

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
L. LLOYD MORGAN)
) FOIA Control No. 2011-121
On Request for Inspection of Records)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2011

Released: September 30, 2011

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we deny an application for review filed by L. Lloyd Morgan (“Morgan”), a Senior Fellow with the Environmental Health Trust.¹ Morgan seeks review of a decision by the Office of General Counsel (“OGC”)² denying in part his Freedom of Information Act (“FOIA”) request for materials related to the Commission’s cellular telephone policy and specific absorption rates (“SAR”).³ We find that OGC correctly applied the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5), to withhold certain of the requested materials because disclosure of the documents would stifle predecisional communications among agency staff, thereby harming the Commission’s decision-making processes.

II. BACKGROUND

2. In his FOIA Request, Morgan requests “any correspondence, memoranda, calendar entries, letters, emails, text messages, or notations” generated or received by officers, employees, or contractors of the FCC pertaining to cellular telephone policy and SAR that “authenticate, reflect, or embody communication between the FCC and CTIA-the Wireless Association employee, lobbyist, or consultant, or any officer thereof, between the dates of June 15, 2010, and January 5, 2010 [sic].”⁴ Morgan’s request further includes “any and all revisions to the FCC website from June 15, 2010 through [January 5, 2011]” and “all correspondence and information as to who requested the changes to the FCC website and the

¹ See Letter from James S. Turner, Counsel for L. Lloyd Morgan, to Office of General Counsel (Apr. 1, 2011) (“AFR”).

² See Letter from Joel Kaufman, Associate General Counsel, to L. Lloyd Morgan (Mar. 3, 2011) (“Decision”).

³ See email from L. Lloyd Morgan to FOIA@fcc.gov (received Jan. 6, 2011) (“FOIA Request”). A SAR is a unit of measurement of the amount of radio frequency energy absorbed by the body when using a particular wireless handset.

⁴ FOIA Request at 1.

dates the changes were requested and the dates the changes were made and who at the FCC made the changes.”⁵

3. In response to the FOIA Request, OGC provided Morgan with copies of prior FOIA responses and documents that overlapped with Morgan’s request.⁶ In addition, OGC released additional documents specifically responsive to Morgan’s request, including emails from CTIA and internal emails.⁷ OGC withheld “draft versions of two fact sheets and internal email correspondence regarding the revisions” pursuant to FOIA Exemption 5, which covers “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”⁸ OGC found that the staff drafts and internal email discussions about those drafts were “predecisional and deliberative, inasmuch as [they] reflect[ed] staff deliberation preliminary to the decision to revise the fact sheet and to the possibility of future action.”⁹

4. In his AFR, Morgan claims that responsive documents were improperly withheld under FOIA Exemption 5 because the documents in questions were purely factual, and thus could not fall within an exemption designed to protect the agency’s deliberative process.¹⁰ Morgan also challenges OGC’s failure to segregate and produce portions of the withheld documents that did not reflect the deliberative process and which thus must be disclosed.¹¹ Finally, Morgan argues that even if the documents properly fell within FOIA Exemption 5, they should be disclosed as a matter of agency discretion.¹²

III. DISCUSSION

5. FOIA Exemption 5 permits an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”¹³ FOIA Exemption 5 incorporates the deliberative process privilege, “which is intended to ‘prevent injury to the quality of agency decisions.’”¹⁴ The deliberative process privilege

⁵ *Id.*

⁶ *See* Decision at 1-2 (citing FOIA requests from Thomas Cluderay, FOIA Nos. 2010-575, 2011-010). Mr. Cluderay had requested documents reflecting communications between CTIA and Commission staff and modification of the Commission’s SAR informational website. *See* Decision at 1.

⁷ *See id.* at 2. OGC noted that “[a]lthough the wording of the FOIA request is not entirely clear on this point, we understand your request to be limited to matters ‘pertaining to cellular telephone policy and SAR.’” *Id.* at 1, n.2 (citing FOIA Request at 1). Morgan does not challenge this interpretation.

⁸ Decision at 2 (citing 5 U.S.C. § 552(b)(5)).

⁹ Decision at 2.

¹⁰ *See* AFR at 2.

¹¹ *Id.* at 2-3.

¹² *Id.*

¹³ 5 U.S.C. § 552(b)(5).

¹⁴ *Ass’n for Maximum Serv. Television, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 11098, 11100 (2010) (quoting *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975)); *see also Cent. Florida Enter., Inc.*, 87 FCC 2d 900 (1981) (applying the deliberative process privilege to “immunize[] from disclosure pre-decisional agency records which are part of deliberations preceding adoption of a final agency decision”).

allows documents to be withheld in order to protect “the full and frank exchange of ideas on legal or policy matters” within the agency.¹⁵ The deliberative process privilege also prevents public confusion that may result from disclosure of predecisional discussions by ensuring that the agency is judged by its final decisions and not by matters considered before making a decision.¹⁶

6. In order to invoke the deliberative process privilege encompassed in FOIA Exemption 5, the Commission must establish that the materials in question are predecisional and deliberative.¹⁷ Documents are considered predecisional if, for example, they are “antecedent to the adoption of agency policy.”¹⁸ Documents are considered deliberative if they reflect the give-and-take of the consultative process and disclosure of the information therein would discourage candid discussion within the agency.¹⁹ Examples of documents commonly withheld pursuant to the deliberative process privilege include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”²⁰

7. We find that OGC properly withheld the documents at issue here pursuant to the deliberative process privilege encompassed within FOIA Exemption 5. As the Decision explains, the documents withheld include “draft versions” of factual information to be placed on the Commission’s website related to the SAR of cell phones, as well as internal emails discussing the various drafts and proposed revisions.²¹ In this situation, revealing the factual material contained in the various drafts of the SAR informational documents would necessarily reveal the thought processes of agency staff as they developed their advice and recommendations regarding the final product. To the extent that facts are included in the draft documents and internal emails, they reflect the subjective judgment of the staff as to what facts are important and how those facts fit together. The evolution of this subjective judgment in the various drafts directly reflects the deliberative decision-making process. Materials reflecting internal staff deliberations about what to include and what not to include in an informational document cannot be disclosed without revealing the deliberative process of the agency.²²

¹⁵ See *Judicial Watch, Inc. v. Dep’t of Energy*, 412 F.3d 125, 129 (D.C. Cir. 2005) (quoting *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997)).

¹⁶ See *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978); *John Dunbar, Associated Press*, Memorandum Opinion and Order, 23 FCC Rcd 9850, 9851 (2008); *Norcom Commc’ns Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 8055, 8057 (1999).

¹⁷ See *Senate of the Commonwealth of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987); see also *Randy R. Herschaft, Associated Press*, Memorandum Opinion and Order, 22 FCC Rcd 5880 (2007).

¹⁸ *Randy R. Herschaft, Associated Press*, 22 FCC Rcd at 5885 (citing *Jordan*, 591 F.2d at 774); Cf. *Rob Evans*, Memorandum Opinion and Order, 17 FCC Rcd 15146, 15146 (2002) (“The predecisional character of records does not hinge on a specific agency final decision; rather, the record must simply have been part of the deliberative process.”).

¹⁹ See *Randy R. Herschaft, Associated Press*, 22 FCC Rcd at 5885.

²⁰ *Id.* (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

²¹ Decision at 2.

²² See, e.g., *Horowitz v. Peace Corps.*, 428 F.3d 271, 277 (D.C. Cir. 2005) (document need not be released where decision makers’ thought processes are woven into the document to such an extent that any attempt at segregation would reveal agency deliberations); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (very act of separating significant from insignificant facts constitutes an act of judgment by agency staff); see also *John* (continued....)

8. OGC also properly determined that the deliberative process material could not be segregated from the purely factual material such that the factual material could be produced. To be sure, FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”²³ However, the Commission has recognized that in certain cases, factual material that either is “inextricably intertwined with deliberative material” or “would reveal the tenor of the agency’s predecisional deliberations” if released is covered by FOIA Exemption 5.²⁴ Because FOIA Exemption 5 is concerned not only with the substantive content of the documents in question, but also with the integrity of the agency’s deliberative process, factual information may be withheld under this exemption where, as here, disclosure would threaten the agency’s decision-making procedures.²⁵

9. We also affirm OGC’s decision to decline to release all or parts of the material withheld as a matter of discretion.²⁶ In certain cases, documents that are properly withheld under FOIA Exemption 5 may be released as a matter of agency discretion.²⁷ In considering whether to exercise our discretion, we look, for example, at whether there is an overriding public interest in releasing records that have been determined to be exempt from disclosure that outweighs any potential harm to the integrity of the Commission’s processes.²⁸ Here, we concur with OGC’s conclusion that “release would damage the integrity of the decisional process.”²⁹ The quality of Commission decisions is dependant upon honest and candid input by staff as they prepare their recommendations, including draft items. Such openness would be discouraged if the process was not subject to some effective confidentiality shield.

10. In particular, the public interest would not be served by discretionary release of the materials in question in this case. The deliberative process privilege is designed in part to protect the public from the confusion that may result from disclosure of the agency’s considerations prior to a final decision.³⁰ In this case, we agree that public disclosure of the predecisional views of staff as reflected in their drafts and internal deliberations might serve to distort, rather than enhance, understanding of the final version of the SAR informational website.

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Dunbar, Associated Press, 23 FCC Rcd at 9851 (“[It] is the Commission’s usual practice to withhold draft decisions that are subject to continued deliberations pursuant to FOIA Exemption 5 to protect the deliberative process of the agency.”).

²³ 5 U.S.C. § 552(b).

²⁴ *Cent. Florida Enter., Inc.*, 87 FCC 2d at 900; *accord Horowitz*, 428 F.3d at 277.

²⁵ *Randy R. Herschaft, Associated Press*, 22 FCC Rcd at 5887.

²⁶ *See* Decision at 2.

²⁷ *See President’s Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed. Reg. 4683 (2009); *Attorney General’s Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act* (Mar. 19, 2009) (available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>).

²⁸ *See, e.g., IBM Corp.*, Memorandum Opinion and Order, 25 FCC Rcd 11085, 11092-93 (2010).

²⁹ *See* Decision at 2.

³⁰ *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *John Dunbar, Associated Press*, 23 FCC Rcd at 9851; *Norcom Commc’ns Corp.*, 14 FCC Rcd at 8057.

11. Finally, we decline to require OGC to produce a detailed index of the documents withheld.³¹ It is well established that such an index is not required at the administrative level.³² The Commission “need only provide ‘a sufficiently detailed description of what it is refusing to produce and why so that the requester and the court can have a fair idea what the agency is refusing to produce and why.’”³³ We find that OGC has provided a sufficient description of the few documents withheld and its justification for doing so.

IV. ORDERING CLAUSES

12. Accordingly, it is ordered that the application for review filed by L. Lloyd Morgan IS DENIED. Morgan may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).³⁴

13. The officials responsible for this action are the following: Chairman Genachowski and Commissioners Copps, McDowell, and Clyburn.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ See AFR at 3 (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)).

³² See *Skybridge Spectrum Found.*, Memorandum Opinion and Order, 25 FCC Rcd 11064, 11071 n.39 (2010) (citing cases); *Schwarz v. U.S. Dep’t of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000).

³³ *Skybridge Spectrum Found.*, 25 FCC Rcd at 11071 n.39 (citing *Wireless Consumer Alliance*, 20 FCC Rcd 3874, 3878 (2005) (internal citation omitted)).

³⁴ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Morgan’s right to pursue litigation. Morgan may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448.