

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

In the Matter of)	
)	
PERCY SQUIRE)	FOIA Control No. 2009-021
)	
On Request for Inspection of Records)	
)	
D.B. ZWIRN SPECIAL OPPORTUNITIES FUND, LLC ET AL.)	
)	
On Request for Confidential Treatment)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 2011

Released: October 21, 2011

By the Commission:

1. By this memorandum opinion and order, we grant in part and deny in part an application for review by D.B. Zwirn Special Opportunities Fund, LLC and Straight Way Radio, LLC (collectively Zwirn).¹ Zwirn seeks review of a decision by the Enforcement Bureau (EB)² that granted in part and denied in part a Freedom of Information Act (FOIA) Request by Percy Squire (Squire).³ Squire sought disclosure of a response⁴ by Zwirn to a letter of inquiry (LOI) that EB sent to Zwirn in Case No. EB-08-IH-0692.⁵ EB ruled that it would disclose a copy of the LOI Response with certain confidential and private information redacted.⁶ We find that EB was correct in declining to withhold the LOI Response in its entirety, but that some additional material should be redacted before the LOI Response is released to Squire.

¹ See Review of Freedom of Information Action, filed June 18, 2009, by D.B. Zwirn Special Opportunities Fund, LLC and Straight Way Radio, LLC (AFR). In some contexts, where doing so would not cause confusion, we will use the term "Zwirn" to include other related entities.

² See Letter from Hilary S. DeNigro, Chief, Investigations and Hearing Division to Percy Squire, Esquire (June 4, 2009) (Decision).

³ See e-mail from Percy Squire to FOIA@fcc.gov (Oct. 16, 2008) (Request or FOIA Request).

⁴ See Letter from David C. Lee, President of D.B. Zwirn & Co., L.P. to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 6, 2008) (LOI Response).

⁵ See Request at 1.

⁶ See Decision at 2-6.

I. BACKGROUND

2. Squire's FOIA Request relates to an investigation conducted by EB into the relationship between Zwirn and Tama Broadcasting, Inc. (Tama), which, along with its affiliates, operates several radio stations. On March 12, 2008, Dr. Glenn W. Cherry (Dr. Cherry), President and CEO of Tama, filed a complaint against Zwirn alleging that Zwirn had violated section 310(d) of the Communications Act by assuming control of Tama's radio stations without Commission authorization.⁷ On August 20, 2008, EB sent an LOI to Zwirn.⁸ Zwirn responded on October 6, 2008, with the LOI Response, including 290 pages of tabbed exhibits (such as various sworn declarations) and 40,000 pages of additional documents.⁹ EB's investigation of Tama concluded on February 17, 2009, with adoption of a consent order executed by EB, Tama, and Zwirn.¹⁰ Dr. Cherry and his brother Charles Cherry, an officer and director of Tama (collectively, the Cherrys), were represented by Squire, the present FOIA requester.

3. Zwirn accompanied the October 6, 2008 LOI Response with a request that the LOI Response be treated as confidential under section 0.459 of the Commission's rules.¹¹ Thus, when EB received Squire's FOIA Request, EB served the request on Zwirn pursuant to 47 C.F.R. § 0.461(d)(3). Zwirn filed Comments on the FOIA Request, reiterating and elaborating upon its earlier claims of confidentiality.¹² Zwirn also asked that the Comments and the requests for confidentiality themselves be treated as confidential.¹³

4. In its Decision responding to the FOIA Request, EB explained that because of the voluminous nature of the additional documents accompanying the LOI Response, EB and Squire had agreed upon a phased approach to responding to the FOIA Request. Pursuant to this agreement, EB would first rule on the confidentiality of the LOI Response and the tabbed exhibits, as well as the Comments and the confidentiality requests, and then confer with Squire in an effort to narrow the request and limit processing fees.¹⁴ EB found that the Comments (with the exception of one piece of financial information) and the confidentiality requests were not entitled to confidential treatment and would be released.¹⁵ EB further found that the LOI Response and most of the tabbed exhibits should be released but that certain portions of these documents should be redacted as exempt pursuant to FOIA Exemptions

⁷ See Letter from Dr. Glenn W. Cherry, President/CEO, Tama Broadcasting, Inc. to Kris Monteith, Esq., Bureau Chief (undated, received Mar. 12, 2008) (Complaint).

⁸ See Letter from Kenneth M. Scheibel, Jr, Assistant Chief, Investigations and Hearing Division to Daniel Zwirn, Managing Partner (Aug. 20, 2008).

⁹ See Decision at 2.

¹⁰ See *Tama Broadcasting, Inc.*, Order, 24 FCC Rcd 1612 (EB 2009).

¹¹ 47 C.F.R. § 0.459; see Letter from Gregory L. Masters to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 6, 2008).

¹² See 30-page Letter from Gregory L. Masters to Mr. William Knowles-Kellett, Attorney, Investigations and Hearings Division (Nov. 21, 2008) (Comments).

¹³ See 3-page Letter from Gregory L. Masters to Mr. William Knowles-Kellett, Attorney, Investigations and Hearings Division (Nov. 21, 2008).

¹⁴ See Decision at 2.

¹⁵ See *id.* at 3-4.

4, 6, and 7(C).¹⁶ Additionally, EB found that a portion of the LOI Response and one exhibit should be withheld under FOIA Exemption 7(A).¹⁷

5. In its AFR, Zwirn asserts that EB failed to address Zwirn's four arguments for withholding the entire LOI Response. Zwirn first argues that Squire's FOIA Request constitutes a misuse of the FOIA, because it circumvents the rules of civil discovery applicable to litigation addressing topics related to the FOIA request.¹⁸ Zwirn next argues that the LOI Response should be withheld because any nonexempt material is inextricably intertwined with material that should be withheld under Exemption 4.¹⁹ Zwirn also argues that the LOI Response should be withheld under Exemption 7(A), because its disclosure would interfere with Commission investigations.²⁰ Finally, Zwirn argues that the LOI Response should be withheld under Exemption 7(B), because it would prejudice Zwirn's rights in civil litigation.²¹ In the event that the entire LOI Response is not withheld, Zwirn asserts that EB erred in not redacting particular portions of the LOI Response and exhibits and failed to address Zwirn's arguments concerning several specific portions of the LOI Response.²²

6. For the reasons that follow, we will modify EB's Decision in certain respects and otherwise deny Zwirn's AFR.

¹⁶ See *id.* at 4-6; 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential"); *id.* § 552(b)(6) ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); *id.* § 552(b)(7)(C) ("records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy").

¹⁷ See Decision at 4-5; *id.* § 552(b)(7)(A) ("records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings").

¹⁸ See AFR at 5-7.

¹⁹ See *id.* at 7-8.

²⁰ See *id.* at 9.

²¹ See *id.* at 9-10; see also 5 U.S.C. § 552(b)(7)(B) ("records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would deprive a person of a right to a fair trial or an impartial adjudication").

²² See AFR at 10-20. In a supplement to its application for review, Zwirn asserts that a then-recently decided case establishes further grounds for withholding the LOI Response. See Letter from Eve Klindera Reed to Marlene H. Dortch (Oct. 13, 2009). According to Zwirn, the decision of the Third Circuit Court of Appeals in *AT&T, Inc. v. FCC*, 582 F.3d 490 (3rd Cir. 2009), establishes that investigatory records concerning corporations are protected from disclosure by FOIA Exemption 7(C), because corporate entities like Zwirn have a "personal privacy" interest within the scope of the exemption. We need not consider this matter at any length, because the Supreme Court has since reversed the Third Circuit's ruling on this point and held that only natural persons (and not corporations) have the requisite personal privacy interest under Exemption 7(C). See *FCC v. AT&T, Inc.*, 131 S.Ct. 1177 (2011).

II. DISCUSSION

A. Alleged Failure To Address Arguments for Withholding the LOI Response in Its Entirety

1. Abuse of civil discovery

7. Zwirn indicates that the Cherrys, represented by Squire, have pursued civil litigation affecting Zwirn.²³ Zwirn contends that grant of Squire's FOIA Request represents an "end run" around the limitations of the civil discovery process, which, it contends, is the proper method for Squire to seek information relevant to such litigation.²⁴ In Zwirn's view, grant of Squire's FOIA request would prejudice its rights in the litigation, because by providing information in response to a FOIA request, the Commission would deprive Zwirn of the opportunity to object to the formal discovery requests that Squire should be required to make in court.²⁵ Zwirn argues that Squire's objective in filing the request is contrary to the "core purpose" of the FOIA, which is to "shed light on the operations and activities of the government," not to gather information about private individuals that could be used for litigation.²⁶

8. We find that the alleged relationship between Squire's FOIA request and the civil litigation involving Zwirn does not warrant withholding the LOI Response. Whether or not Squire intends to use the requested information for purposes of litigation has no bearing on whether his request should be granted. In general, the identity of the requester and the purpose of the request are not taken into account in deciding whether to grant a FOIA request.²⁷ Similarly, it does not matter whether Squire's FOIA request serves the core purpose of the FOIA, to shed light on the operations and activities of the government. The FOIA requires agencies to disclose their records unless the records are subject to one of the enumerated exemptions.²⁸ It is only in determining the applicability of these exemptions that the purpose of the FOIA comes into play.²⁹ In this regard, Zwirn misreads court precedent stating that the FOIA is not a substitute for civil discovery. These cases do not hold, as Zwirn suggests, that a FOIA request should be denied simply because it involves material relevant to civil litigation. They hold, rather, that a connection to civil litigation neither increases nor decreases the requester's rights.³⁰

²³ See AFR at 5; Comments at 4-5.

²⁴ See AFR at 5.

²⁵ See *id.* at 5-6.

²⁶ See *id.* at 6-7; *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989).

²⁷ See *Stonehill v. IRS*, 558 F.3d 534, 538-39 (D.C. Cir. 2009) (identity of the requester is irrelevant to whether disclosure is required under the FOIA; a document disclosed under the FOIA is considered to be public); *Abraham & Rose, P.L.C. v. U.S.*, 138 F.3d 1075, 1078-79 (6th Cir. 1998) (requester's intended use of information is irrelevant in a FOIA action); *Cooper Cameron Corp. v. U.S. Dep't of Labor, Occupational Safety and Health Admin.*, 280 F.3d 539, 547 (5th Cir. 2002) ("specific motives of the party making the FOIA request are irrelevant." and the rights of a potential litigant making a FOIA request are no different than the rights of any other third party).

²⁸ See *Abraham & Rose*, 138 F.3d at 1078 (a federal agency must disclose agency records requested under the FOIA unless they fall within an enumerated exemption).

²⁹ See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989) (Court looks at the rationale underlying exemption in determining whether the Government has properly invoked it). We consider below, at para. 13, *infra*, Zwirn's argument that material should be withheld under Exemption 7(B), which also relates to litigation.

³⁰ See *Stonehill*, 558 F.3d at 538 (that a document is exempt from discovery does not necessarily mean it will be exempt from disclosure under the FOIA); *Cooper Cameron*, 280 F.3d at 548 (possibility that requester seeks statements for use as evidence in a tort suit counts neither in favor or against the FOIA request); *Columbia Meat*

2. Segregability

9. Zwirn submits that EB failed to address its argument that the LOI Response should be withheld in its entirety because exempt confidential material and non-exempt material are inextricably intertwined and thus cannot be segregated.³¹ According to Zwirn, the LOI Response is “replete” with sensitive proprietary information about the highly competitive broadcasting and financial industries.³² Zwirn claims both that disclosure of such information would impair the government’s ability to obtain such information in the future because parties would be reluctant to risk disclosure, and that disclosure would cause substantial competitive harm to Zwirn.³³

10. We reject, as a factual matter, Zwirn’s contention that exempt confidential material in the LOI Response cannot be segregated from non-exempt material. Although Zwirn claims that the LOI Response is “replete” with competitively sensitive material, we are satisfied that it can be identified and redacted without rendering the material to be disclosed meaningless. Accordingly, to the extent that disclosure of such material in the LOI Response would cause Zwirn substantial competitive harm, redaction adequately protects both Zwirn and the government’s ability to obtain information in the future, while complying with the requirements of the FOIA.³⁴ Such partial disclosure is also consistent with the policy set forth by the President and the Department of Justice in their guidance to federal agencies, which is designed to make government operations more transparent.³⁵

3. Exemption 7(A)

11. FOIA Exemption 7(A) allows an agency to withhold records or information compiled for law enforcement purposes to the extent release “could reasonably be expected to interfere with enforcement proceedings.”³⁶ Zwirn argues that failure to withhold the LOI Response in its entirety would interfere with the Commission’s ability to obtain similar information in future investigations, because disclosure in this case would create a disincentive for the subjects of future investigations to cooperate fully with the Commission and risk the disclosure of their sensitive information.³⁷ Zwirn also argues that disclosure would reveal information about the size, scope, nature, and theory of the Commission’s investigation to other actual or potential targets.³⁸

Packing Co., Inc. v. U.S. Dep’t of Agric., 563 F.2d 495, 499 (1st Cir. 1977) (asserted need for documents in connection with litigation will not affect one way or the other a determination of whether disclosure is warranted under the FOIA).

³¹ See AFR at 7 (citing *Mayer, Brown, Rowe & Maw LLP v. IRS*, 537 F. Supp.2d 128, 141 (D.D.C. 2008)); *Michael Ravnitzky*, Memorandum Opinion and Order, 16 FCC Rcd 21745, 21748 (2001).

³² See AFR at 7-8.

³³ See *id.* (citing *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

³⁴ The court in *Mayer Brown*, cited by Zwirn, recognized that portions of documents could be segregated and released. See 537 F. Supp.2d at 141.

³⁵ See *Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed. Reg. 4683 (2009) (President Obama’s memorandum concerning the FOIA); *The Freedom of Information Act (FOIA)*, available at <<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>> (Attorney General Holder’s FOIA Memo).

³⁶ 5 U.S.C. § 552(b)(7)(A).

³⁷ See AFR at 9.

³⁸ See *id.*

12. We find this argument unpersuasive. We recognize that disclosure of an LOI response could interfere with the conduct of a particular investigation by revealing to the parties involved information about the scope, nature, and direction of that investigation. In this instance, however, Squire, counsel for the Cherrys, was served with the LOI³⁹ and thus the Cherrys have already been apprised of the scope of the investigation. EB has not asserted that disclosure of the LOI Response in this case would prejudice future investigations by revealing information to prospective subjects of those investigations, although EB might make such a determination with respect to other LOIs. Although Zwirn asserts that disclosure of its LOI Response will discourage other parties from cooperating with future investigations, this concern is satisfied with respect to competitively sensitive material in future responses by the fact that parties responding to an LOI have the opportunity to seek confidential treatment for such sensitive material in their responses.⁴⁰ To the extent Zwirn suggests that the disclosure of any aspect of an LOI response would chill cooperation, EB has tools available to ensure that regulatees cooperate with staff-conducted investigations, and failure to do so constitutes serious misconduct.⁴¹ EB is generally authorized to conduct investigations on the Commission's behalf,⁴² and we credit its judgment, in this case, that release of the LOI Response, with the exception of two specific items, will not interfere with its efforts to conduct other investigations.⁴³ We trust that in future cases, EB will be able to identify circumstances where a chilling effect may exist. We therefore affirm EB's finding in this regard.⁴⁴

4. Exemption 7(B)

13. FOIA Exemption 7(B) allows an agency to withhold records or information compiled for law enforcement purposes to the extent release "would deprive a person of a right to a fair trial or an impartial adjudication."⁴⁵ As a further reason to withhold the LOI Response in its entirety, Zwirn argues that disclosure would deprive it of its right to a fair trial by prejudicing its position as a party to various state and federal litigations.⁴⁶

14. We find that Zwirn has failed to show that disclosure would deprive it of its right to a fair trial. The pertinent test is (1) whether a trial is imminent and (2) whether it is more likely than not that disclosure would seriously interfere with fairness. We need not decide whether a trial in the litigation between Zwirn and the Cherrys is "imminent" for purposes of the first prong of the test, because Zwirn

³⁹ See Letter from Kenneth M. Scheibel, Jr., to Daniel Zwirn, Managing Partner (Aug. 20, 2008) at 7.

⁴⁰ See 47 C.F.R. § 0.459 (requests for confidential treatment).

⁴¹ See *James A. Kay, Jr.*, 17 FCC Rcd 1834, 1846, para. 40 (2002) (failure to provide information in response to Commission inquiry may violate the Commission's rules or constitute lack of candor), *recon. granted in part and denied in part*, 17 FCC Rcd 8554 (2002), *aff'd*, 396 F.3d 1184 (D.C. Cir.), *cert. denied*, 546 U.S. 871 (2005).

⁴² See 47 C.F.R. § 0.111(a)(16) (EB authorized to conduct investigations, conduct external audits, and collect information, in connection with complaints, on its own initiative, or upon the request of another bureau or office).

⁴³ See Decision at 4-5 (asserting exemption with respect to two items); *McMorgan & Co. v. First California Mortgage Co.*, 931 F. Supp. 703, 710 (N.D. Cal. 1996) (court questions whether private party, as opposed to the government, has "standing" to assert that disclosure of documents would compromise a government investigation).

⁴⁴ This case is therefore readily distinguishable from, e.g., *Patrick Linstruth*, Memorandum Opinion and Order, 16 FCC Rcd 17409, 17410-11 (2001). In *Linstruth*, EB made specific findings that disclosure would interfere with an investigation by revealing the scope, direction, and nature of the investigation and potentially chilling potential witnesses. Here, EB has not found that release of the LOI Response would have such an effect on any pending or future investigation.

⁴⁵ 5 U.S.C. § 552(b)(7)(B).

⁴⁶ See AFR at 9-10; Comments at 12-13.

has failed to satisfy the second prong. To satisfy the second prong, Zwirn must demonstrate, with respect to this litigation, either that disclosure would result in adverse publicity of such a nature and degree that judicial fairness would be compromised or that the document that is subject to disclosure under the FOIA would not be available in discovery and would confer an unfair advantage on other parties.⁴⁷ Zwirn makes no attempt to show that prejudicial publicity would result from disclosure. As to unfair advantage, Zwirn asserts only that “[i]t is questionable whether Mr. Squire could legitimately obtain access to the LOI Response or many of its exhibits through the civil discovery process.”⁴⁸ To assert that it is “questionable” that the LOI Response would be subject to civil discovery falls considerably short of demonstrating that the LOI Response would in fact not be available. Further, Zwirn’s assertion that disclosure of the LOI Response would confer an unfair advantage is lacking in specifics and is unconvincing.⁴⁹ Zwirn’s argument is thus insufficient to warrant applying Exemption 7(B).⁵⁰

B. Alleged Failure To Redact Particular Material⁵¹

1. EB’s alleged failure to address objections with respect to nine specific paragraphs in the LOI Response

15. When EB issued its Decision, it gave Zwirn an opportunity to review the redactions that EB proposed to make.⁵² In its application for review, Zwirn contests the scope of some of the proposed redactions. Zwirn asserts that EB failed to rule on Zwirn’s objections to disclosure of information in nine specific paragraphs of the LOI Response: paragraphs 17, 20, 21-26, and 34.⁵³ Zwirn argues that the

⁴⁷ See *Washington Post Co. v. U.S. Dep’t of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988) (remanding to trial court question of whether disclosure of allegedly incriminating report would result in publicity that would compromise judicial fairness or that the document would be unavailable in discovery and would confer an unfair advantage on one of the parties).

⁴⁸ See Comments at 13.

⁴⁹ See AFR at 10. Zwirn asserts only that disclosure under the FOIA would deprive it of the opportunity to object to disclosure in court and that the opposition would get an “advance look” at Zwirn-specific information without being burdened by its own discovery obligations. See Comments at 13. Neither of these points suggests “serious interference” with fairness.

⁵⁰ We have already considered and rejected Zwirn’s related argument that disclosure of the LOI Response would improperly circumvent the civil discovery process. See para. 6, *supra*. Zwirn’s argument here, under Exemption 7(B), is that disclosure would also deprive Zwirn of its right to a fair trial in the litigation involved.

⁵¹ In the following paragraphs, we preserve the organization of the issues as they are presented in Zwirn’s application for review. We have not, for example, attempted to consolidate the matters discussed in this paragraph with those discussed below beginning with paragraph 21. We believe this approach will make it easier to keep track of the necessary redactions.

⁵² See AFR at 12. Zwirn’s Comments, note 12, *supra*, address specific portions of the LOI Response that Zwirn asserted were subject to an exemption.

⁵³ See AFR at 10-12. The LOI Response does not indicate paragraph numbers. However, Zwirn’s Comments assign numbers to the paragraphs in the LOI Response for purposes of making specific objections, and EB followed that convention in its Decision. See Comments at 18-21; Decision at 4-5. We will also use the numbering conventions specified by Zwirn and EB.

Commission should now address these paragraphs and find that the material in them is competitively sensitive commercial and financial information that is exempt under Exemption 4.⁵⁴

16. Zwirn is correct that EB did not specifically address its objections to the release of the nine paragraphs of the LOI Response. We have therefore examined these paragraphs. We find that, for the most part, these paragraphs describe conduct by Zwirn, Tama, and the Cherrys, including activities undertaken pursuant to a publicly disclosed local marketing agreement (LMA) that does not reveal any competitively sensitive information about Zwirn. However, we find that in certain instances, these paragraphs disclose information about Tama's financial condition and Zwirn's practices in dealing with debtors that could prejudice Zwirn in its future business dealings. We will therefore withhold such information.

17. Our specific rulings with respect to paragraphs 17, 20, 21-26, and 34 are as follows. We withhold all of paragraph 17, which details Tama's financial condition, except for the third sentence, which contains information already made public in a judicial opinion involving an action by Zwirn against Tama.⁵⁵ We will release paragraphs 20 and 21, which describe the parties' actions pursuant to the LMA and are in other respects a matter of public record. We will withhold paragraph 22 and the last sentence of paragraph 23 because they tend to disclose Zwirn's practices in dealing with debtors. We will release paragraphs 24, 25, and 34 in their entirety, because they do not contain sensitive material. We will withhold paragraph 26 because it contains the type of sensitive financial and commercial material described above.

2. EB's alleged failure to redact material in the LOI Response consistently

18. Zwirn points to several instances in which it alleges that EB failed to redact material from some portions of the LOI response even though EB redacted the same material in other portions. Specifically, Zwirn identifies unredacted material in paragraphs 13, 17, 18, and 21, and in Declaration 2 ¶¶ 2, 3, and 18, which, according to Zwirn, is identical to material elsewhere in the LOI Response that EB did redact.⁵⁶ Similarly, Zwirn suggests that, as a result of clerical error, EB failed in some instances to redact confidential financial information or the names of individuals that should be redacted under Exemptions 4, 6 and 7(C).⁵⁷

19. Our examination of the LOI Response confirms that the inconsistencies alleged by Zwirn exist. Accordingly, we will make the redactions necessary to conform the material that EB apparently overlooked to the portions of the LOI Response in which EB made redactions, with the following exception. Some of the information that EB redacted has been made public by the issuance of the *Zwirn Opinion*.⁵⁸ To the extent this has occurred, there is no basis to redact this material either in the portions of the LOI Response that EB did redact or in the conforming redactions that we will make here.

⁵⁴ See *id.* Zwirn also argues generally that disclosure of this material would interfere with enforcement proceedings, disclose investigatory techniques, and deprive Zwirn of its right to an impartial adjudication in related litigation. We find no basis to these claims for the reasons discussed at paras. 7-14, *supra*.

⁵⁵ See *D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broad., Inc.*, 550 F. Supp. 2d 481, 483-84 (S.D.N.Y. 2008) (*Zwirn Opinion*). Information already made public cannot be withheld under the FOIA. See *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (if information requested is already in the public domain, Exemption 4 cannot be applied).

⁵⁶ See AFR at 12-13.

⁵⁷ See *id.* at 13, nn. 49, 50.

⁵⁸ See *Zwirn Opinion*, 550 F. Supp.2d at 482-84.

Our specific rulings consistent with this analysis are as follows: We will release paragraph 6, sentence 2 and paragraph 13 (except for the monetary amount). In paragraph 11 and Declaration 2 ¶¶ 2-3, we will withhold only certain information about the specific use to which some of the loan proceeds would be put. We will withhold Declaration 2, ¶ 6, sentence 1 and paragraph 17 (except for one sentence). We will release Declaration 2, ¶ 9 and the last sentence of paragraph 18. We will also release Declaration 2, ¶ 10 and paragraph 21.

20. We also find, as Zwirn alleges, that in several instances EB appears to have inadvertently failed to redact material that EB found in its analysis to be confidential or private. This includes the names of individuals in notes 23, 24, 26, 53, Response to Inquiry 8 at ¶ 2, and Declaration 3, ¶ 3. Additionally, EB appears to have inadvertently failed to redact monetary amounts at note 9 and Declaration 3, ¶ 6. We will make the appropriate redactions.

3. EB's allegedly unduly narrow interpretation of the scope of Exemption 4

21. Zwirn contends that EB should have redacted additional material under Exemption 4 but did not do so because EB interpreted Exemption 4 too narrowly. In particular, Zwirn notes that in paragraphs 16 and 18, relating to Tama and Zwirn's business and financial dealings, EB redacted monetary figures but did not redact non-numerical information that Zwirn believes is also competitively sensitive.⁵⁹ Zwirn also believes that its responses to LOI Inquiries 3, 4, 5b, 6, 12-13, and 14, Declaration 2, ¶ 6, and Declaration 3, relating to Tama's operations and business dealings with Zwirn and Tama's financial health, should be withheld.⁶⁰ According to Zwirn, the disclosure of this information would benefit the competitors of Zwirn and Tama and potential purchasers of Tama's stations and would impede the Commission's ability to gather such information.⁶¹

22. We find no reason to redact additional information from paragraphs 16 and 18 of the LOI Response. The material referred to by Zwirn has been made public by the *Zwirn Opinion* with the exception of specific monetary amounts. Thus, we affirm EB's decision to release the two paragraphs with the monetary amounts alone redacted.

23. As for the other material referred to by Zwirn, we find that, for the most part, it discloses activities undertaken pursuant to the publicly disclosed LMA that does not reveal any competitively sensitive information about Zwirn. However, in some instances, we find that the material does disclose information about Zwirn's practices in dealing with debtors and other business information that could prejudice Zwirn in its future business dealings, and we will redact that information. Our specific rulings as to this material are as follows.⁶² We will release Zwirn's response to Inquiry 3, which involves certain aspects of day-to-day financial operations, but redact the first two paragraphs of subsection e and all but the first sentence of subsection f, because it discloses Zwirn's treatment of debtors. We will release the first sentence of the response to Inquiry 4.⁶³ We will release the responses to Inquiries 5b, 12, 13, 14 and 19. These paragraphs described aspects of programming, financial operations, and discussion of the

⁵⁹ See AFR at 14.

⁶⁰ See *id.* at 15.

⁶¹ See *id.* at 15-17. Zwirn also contends that Exemptions 7(A) and 7(B) apply because the information was compiled in a law enforcement proceeding. We reject this argument for the same reasons we reject Zwirn's more general arguments concerning Exemption 7, *supra*.

⁶² In any material that we are releasing because we do not find it confidential under Exemption 4, we are nevertheless redacting the names of individuals to protect their privacy pursuant to Exemptions 6 and 7(C).

⁶³ We further discuss the response to Inquiry 4 at paragraph 26, *infra*.

Cherrys' conduct that does not appear to be competitively sensitive. We will withhold the response to Inquiry 6 because it discloses the rationale for one of Zwirn's business decisions. We will also release Declaration 2, ¶ 6, with the exception of the first sentence, because it describes publicly-available information about the LMA. We will withhold Declaration 3, ¶¶ 5-6, because they disclose information about Zwirn's treatment of debtors and ¶ 29 because it discloses the rationale for one of Zwirn's business decisions.

4. EB's alleged failure to withhold the response to LOI Inquiry 8 in its entirety

24. Zwirn faults EB for failing to redact Zwirn's response to Inquiry 8, which sought information about Zwirn's methods and procedures used to prepare the LOI Response. Zwirn contends that information about the means by which Zwirn responds to government inquiries should be withheld under Exemptions 7(A) and 7(B).⁶⁴

25. We disagree with Zwirn. Our examination of Zwirn's response to Inquiry 8 reveals only that Zwirn took various internal administrative measures to locate information responsive to the inquiry of the sort that any entity under investigation might take. We do not discern any information that would tend to interfere with future Commission investigations (Exemption 7(A)) or to deny Zwirn's right to a fair trial in related litigation (Exemption 7(B)).⁶⁵ Accordingly, we will release the response to Inquiry 8.

5. EB's alleged failure to redact personally identifiable information from Zwirn's Response to LOI Inquiry 4

26. Zwirn contends that additional information should be redacted from its response to Inquiry 4,⁶⁶ which sought information about certain personnel actions relating to Tama. EB redacted the names of the affected individuals from the response but did not redact job titles and locations of the various individuals. Zwirn asserts that job titles and locations should also be redacted under Exemptions 6 and 7(C) to protect the privacy of the individuals involved. According to Zwirn, persons knowledgeable about Tama's operations, including Squire, would likely be able to deduce the identity of the individuals from their job titles and locations making the redaction of the individuals' names ineffective.

27. We agree with Zwirn and will redact the job titles and locations as well as the names of the affected employees. Exemptions 6 and 7(C) apply not only to the direct identification of individuals but also where individuals may be identified with the aid of other disclosed information, where there is a substantial probability that an invasion of privacy will occur.⁶⁷ We find, on the facts of this case, that Zwirn has demonstrated a substantial likelihood that disclosure here of the employees' job titles and location will lead to the discovery of their identities and invasion of their privacy.

6. Discretionary release

⁶⁴ See AFR at 17; Comments at 23.

⁶⁵ For a fuller discussion of the principles underlying the applicability of these exemptions, see paras. 11-14, *supra*.

⁶⁶ See AFR at 17-20. Zwirn notes that the information that it asserts should be redacted is also found in Declaration 3, ¶ 26. We agree that the response to Inquiry 4 and Declaration 3, ¶ 26 should be treated the same way.

⁶⁷ See *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 877-78 (D.C. Cir. 1989) (Exemption 6 applies not only where interference with personal privacy results directly from disclosure but also where personal privacy may be compromised as a result of actions by a third party after disclosure).

28. We have examined the records at issue here to determine whether we should as a matter of our discretion release any of the records we have found are exempt from disclosure under the FOIA. While it is true that “[e]ven when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds,”⁶⁸ we decline to exercise our discretion to do so here. We do not discern any overriding public interest in releasing the records that we have determined are exempt from disclosure under FOIA Exemptions 4, 6, and 7(C) given the substantial commercial confidentiality or personal privacy interests attendant to those records.⁶⁹

III. ORDERING CLAUSE

29. IT IS ORDERED that D.B. Zwirn Special Opportunities Fund, LLC and Straight Way Radio, LLC’s application for review IS GRANTED to the extent indicated above and is otherwise DENIED. If Zwirn does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, we direct the Enforcement Bureau to produce the redacted records to Squire, as specified in the Enforcement Bureau’s Decision and as modified above. See 47 C.F.R. § 0.461(i)(4).⁷⁰

30. The Officials responsible for this action are: Chairman Genachowski and Commissioners Copps, McDowell, and Clyburn.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁸ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24818 (1998) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 292-93 (1979)).

⁶⁹ See U.S. Department of Justice, Office of Information Policy, FOIA Post, *President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines Creating a “New Era of Open Government,”* (2009), available at <<http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>> (recognizing that discretionary release of records is less likely when the requirements of Exemption 4 are met for withholding records).

⁷⁰ 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 Zwirn’s right to pursue litigation. Zwirn 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.