

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

In the Matter of)
)
CHARLES BRECKENRIDGE) FOIA Control No. 2009-560
)
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 2011

Released: March 3, 2011

By the Commission:

I. INTRODUCTION

1. The Commission has before it an application for review (AFR) filed by Charles Breckenridge seeking review of a decision of the Wireline Competition Bureau (Bureau or WCB) denying in part his Freedom of Information Act (FOIA) request. As amended, Breckenridge's request sought all reports compiled by the Universal Service Administrative Company (USAC) or the Commission since January 1, 2004, that include or aggregate the data contained in the annual verification forms filed pursuant to 47 C.F.R. § 54.410 (certification and verification of consumer qualifications for Lifeline support). We find that the Bureau correctly applied FOIA Exemption 5 to redact portions of five reports produced by USAC because release of these portions of the reports would reveal deliberative analyses and recommendations by USAC to the Commission. We therefore deny the application for review.

II. BACKGROUND

2. The Lifeline Assistance program utilizes the Universal Service Fund (USF) to provide discounts to income-eligible customers on basic telephone monthly service charges at their primary residence.¹ In states that have their own Lifeline program, an individual must meet the eligibility criteria established by that state to receive federal Lifeline assistance. Under section 54.410 of our rules, in states that do not have their own Lifeline program, eligible telecommunications carriers (ETCs) must conduct an annual verification of a statistically valid sample of Lifeline customers and submit the results of the verification to USAC.² ETCs must also certify that they are reviewing income documentation of Lifeline customers who qualify based on income.³

3. Breckenridge initially filed a FOIA request seeking all Lifeline certifications and verifications filed with USAC pursuant to section 54.410 from January 1, 2004, to the present, and all reports compiled by USAC or the Commission containing or aggregating the data in the annual verification forms.⁴ He later limited his request to seek only reports containing or aggregating the data compiled by USAC or the

¹ See generally FCC Consumer Facts: Lifeline and Link-Up: Affordable Telephone Service for Income-Eligible Consumers, available at <www.fcc.gov/cgb/consumerfacts/lllu.html>.

² See *Lifeline and Link-Up*, 19 FCC Rcd 8302, 8317-19 (2004); 47 C.F.R. § 54.410.

³ *Id.* at 8319-20.

⁴ Letter from Charles Breckenridge, Wiltshire & Grannis LLP, to FOIA Officer (Aug. 4, 2009) (FOIA Request).

Commission during the same time period.⁵ The date for responding to the FOIA request was extended several times at the request of WCB and with Breckenridge's agreement.⁶

4. WCB's FOIA Response provided Breckenridge with five reports consisting of 207 pages responsive to the FOIA request.⁷ The Bureau redacted two sections of each of these reports (a total of less than 15 pages) pursuant to FOIA Exemptions 2 and 5. It relied on FOIA Exemption 2 because the redacted sections "contain[ed] detailed information concerning the verification and certification processes and recommendations for ensuring the integrity of the Lifeline program" which, if disclosed, "could provide a blueprint for those wishing to frustrate such processes."⁸ The Bureau also relied on the deliberative process privilege of FOIA Exemption 5 because the redacted portions of the reports "include[d] USAC's analyses and recommendation to the FCC pertaining to problems encountered with the program requirements and information collection processes."⁹ Breckenridge timely sought review of the Bureau's decision.¹⁰

III. DISCUSSION

5. We have reviewed the arguments presented by Breckenridge and the unredacted records responsive to his FOIA request. We conclude that the Bureau did not err in redacting limited portions of the reports.

6. The Bureau withheld portions of the reports under the deliberative process privilege of FOIA Exemption 5, explaining:

The information we have redacted pursuant to Exemption 5 constitutes internal agency records containing internal evaluative discussions. Specifically, this information includes USAC's analyses and recommendation to the FCC pertaining to problems encountered with the program requirements and information collection processes. The redacted information thus reflects internal deliberative communications pertaining to the reports and is a part of the FCC decision-making process in connection with improving Low-Income programs.¹¹

As Breckenridge correctly notes, the deliberative process privilege embraces "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which

⁵ Telephone call between Breckenridge and WCB Staff (Sept. 14, 2009).

⁶ See Letter from Kirk S. Burgee, Chief of Staff, WCB, to Charles Breckenridge, Wiltshire & Grannis LLP (Dec. 7, 2009) (FOIA Response), at 1 n.1 (detailing extensions of time sought by WCB and agreed to by Breckenridge).

⁷ Overview of Verification Process and Results (covering 2005); Overview of Verification and Certification Process and Results (covering 2006); Summary of 2007 Verification and Certification Processes and Results; Summary of 2008 Verification and Certification Processes and Results; and Summary of Lifeline Verification Process and Results for AT&T, Qwest, and Verizon. See FOIA Response at 1-2.

⁸ FOIA Response at 2, citing 5 U.S.C. § 552(b)(2) (permitting the withholding of records "related solely to the internal personnel rules and practices of an agency").

⁹ FOIA Response at 2-3, citing 5 U.S.C. § 552(b)(5) (permitting the withholding of "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").

¹⁰ Letter from Charles Breckenridge to Office of General Counsel (Jan. 5, 2010) (AFR).

¹¹ FOIA Response at 2-3 (footnotes omitted).

governmental decisions and policies are formulated.”¹² The sections of the documents withheld by the Bureau easily meet this test because they contain USAC’s recommendations to the Commission concerning its administration of the Lifeline certification and verification processes.

7. Breckenridge recognizes that Exemption 5 can be applied to documents exchanged between the Commission and USAC,¹³ but argues that Exemption 5 is *per se* inapplicable to the USAC documents because “USAC may not [m]ake policy” and may not “[a]dvocate policy positions before the FCC or its staff.”¹⁴ However, the very document cited by Breckenridge notes that USAC “advocate[s] positions on administrative issues for managing the USF.”¹⁵ Logically enough, USAC may report to the Commission on problems it encounters in administering the Commission’s universal service programs and make suggestions to the Commission on how to resolve those problems (suggestions that could not be implemented without Commission direction).¹⁶ The reports at issue in this proceeding fall squarely within this role assigned by the Commission to USAC. Further, pursuant to Exemption 5, the Commission has previously withheld USAC documents that contain “suggestions or recommendations as to what agency policy should be.”¹⁷ It does not matter, as Breckenridge asserts, that the records withheld here do not detail “USAC’s approach to requests from specific applicants or its procedures for evaluating them.”¹⁸ The relevant question is whether portions of the records withheld by the Bureau contain USAC’s policy recommendations to the Commission concerning a program USAC administers under Commission direction. Because we answer that question in the affirmative, the portions of the documents were properly redacted pursuant to Exemption 5.

8. The Bureau also relied upon FOIA Exemption 2 to redact portions of the reports. As we have affirmed each of the Bureau’s redactions based on FOIA Exemption 5, we need not reach the applicability of this exemption.¹⁹

¹² AFR at 5, quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal citations omitted).

¹³ AFR at 5.

¹⁴ AFR at 5, quoting Universal Service Administrative Company, USAC’s Role as the Administrator of the USF, available at <www.usac.org/about/usac/usac-role.aspx>.

¹⁵ *Id.* See 47 C.F.R. 54.702(d) (“The Administrator may advocate positions before the Commission and its staff only on administrative matters relating to the universal service support mechanisms.”); *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, 20 FCC Rcd 11308, 11313 (2005) (footnotes omitted) (“the Administrator is prohibited from making policy, interpreting unclear provisions of the statute or the Commission’s rules, or interpreting the intent of Congress, and may only advocate positions before the Commission and its staff on administrative matters.”).

¹⁶ “As part of its duties and subject to Commission rules and oversight, the Administrator . . . submits periodic reports to the Commission (including quarterly reports on the disbursement of universal service support funds), . . . collects information, and provides access to information it collects to the Commission.” *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, 20 FCC Rcd at 11313 (footnotes omitted) (emphasis supplied).

¹⁷ *Inter-Tel Technologies, Inc.*, 19 FCC Rcd 5204, 5207 (2004) (*Inter-Tel*), quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

¹⁸ AFR at 6. See *Sears*, 421 U.S. at 151 n.18 (“Agencies are, and properly should be, engaged in a continuing process of examining their policies” and thus so long as the document is part of a continuing process of examining agency policy Exemption 5 is applicable).

¹⁹ *Cf. United Systems, Inc.*, 24 FCC Rcd 12338, 12345 (2009) (affirming Bureau based on Exemption 7(A) and (E), 5 U.S.C. § 552(b)(7)(A) and (E), and thus declining to determine if the records were exempt under Exemption 2); *MSNBC Interactive News, LLC*, 23 FCC Rcd 14518, 14528 n.82 (2009) (affirming Bureau based on Exemption 4, 5 U.S.C. § 552(b)(4) and therefore not reaching Exemption 2 arguments); *Inter-Tel*, 19 FCC Rcd at 5207 (affirming Bureau based on Exemptions 5 and 7(E) and thus declining to reach Exemption 2 argument).

9. Although Breckenridge does not raise this issue, we note that the Bureau properly segregated and released substantial portions of the reports.²⁰ For the reasons discussed above, we do not believe any of the redacted portions are properly released as a matter of our discretion.

IV. ORDERING CLAUSES

10. IT IS ORDERED that the application for review filed by Charles Breckenridge IS DENIED. Breckenridge may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁰ FOIA Response at 2. See *Memorandum to Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 FR 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).