

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

In the Matter of )
MERCHANT & GOULD, P.C. ) FOIA Control No. 2010-237
On Request for Inspection of Records )
PREMIERE GLOBAL SERVICES, INC. )
AND XPEDITE SYSTEMS, LLC D/B/A )
PREMIERE GLOBAL SERVICES )
On Request for Confidential Treatment )

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 2011

Released: April 29, 2011

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we grant in part and otherwise deny an application for review filed by Premiere Global Services, Inc. and its subsidiary Xpedite Systems, LLC d/b/a Premiere Global Services (collectively PGS). PGS seeks review of a decision of the Enforcement Bureau (EB) that largely granted a Freedom of Information Act (FOIA) request by Merchant & Gould, P.C. (MG), in which MG sought documents relating to an EB investigation of PGS. We find that EB correctly determined that the PGS documents are not exempt from disclosure under FOIA Exemption 4, which covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

II. BACKGROUND

2. PGS provides commercial fax services. On August 29, 2006, EB issued a citation alleging that PGS violated the Telephone Consumer Protection Act of 1991 (TCPA), which prohibits sending an unsolicited advertisement to a fax machine. The Citation warned that any violations that occurred after

1 See Review of Freedom of Information Action, filed April 1, 2010, by PGS (AFR).
2 See Letter from Colleen K. Heitkamp, Chief Telecommunications Consumer Division to Merchant & Gould, P.C. (Mar. 17, 2010) (Decision).
3 See E-mail from Hope Porter – Merchant & Gould to FOIA@fcc.gov (Feb. 17, 2010) (Request).
4 5 U.S.C. § 552(b)(4).
5 See Letter from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumer Division to Premiere Global Services, Inc. (Aug. 29, 2006) (Citation).
6 See 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

the receipt of the Citation might result in the imposition of forfeiture, and provided that PGS could respond to the Citation by personal interview, written statement, or teleconference interview.<sup>7</sup> In response to the Citation, PGS submitted two letters to EB, dated September 22, 2006 and October 30, 2006, including various attachments.<sup>8</sup> On April 6, 2007, EB rescinded the Citation.<sup>9</sup>

3. MG's FOIA request seeks in pertinent part "copies of ANY/ALL responses to the FCC from Premiere Global Services as a result of this citation."<sup>10</sup> Because PGS's September 22 and October 30 Letters contained a request for confidential treatment, EB served MG's FOIA request on PGS, which replied by asserting that both filings should be treated as confidential.<sup>11</sup> EB's decision rejected PGS's claim of confidentiality in most respects. EB held that the October 30 Letter should be released in its entirety and that the September 22 letter should be released with only information identifying PGS's customers redacted.<sup>12</sup>

### III. APPLICATION FOR REVIEW

4. In its application for review, PGS argues that the two documents should be withheld in their entirety under Exemption 4 because they contain sensitive commercial information pertaining to internal business practices and procedures; disclosure of this information would cause PGS competitive harm; and PGS does not generally make this information available to the public.<sup>13</sup> PGS notes that under the case law, different standards govern the applicability of Exemption 4 depending on whether the commercial or financial information in question was submitted on an involuntary or a voluntary basis. Where information has been required to be submitted, the information may be withheld under the FOIA upon a showing that (1) disclosure of the information would likely impair the government's ability to obtain necessary information in the future, or (2) disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.<sup>14</sup> If, however, the submission was voluntary, the exemption applies upon a more lenient showing that the person providing the information does not customarily release the information to the public.<sup>15</sup>

5. In this regard, PGS claims that its submissions of information here should be deemed voluntary because the Citation did not compel or specifically require the information and PGS was voluntarily cooperating with EB's investigation.<sup>16</sup> PGS asserts that it does not customarily release to the public the information about its internal business practices and procedures that was contained in the two

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<sup>7</sup> See Citation at 2. The Citation further indicated that the response should specify the action that PGS is taking to ensure that it does not violate the Act or the rules in the future. See *id.*

<sup>8</sup> See Letters from Michelle W. Cohen to Kurt A. Schroeder (Sept. 22, 2006 and Oct. 30, 2006) (September 22 Letter and October 30 Letter).

<sup>9</sup> See Letter from Kurt A. Schroeder to Premiere Global Services, Inc. (Apr. 6, 2007).

<sup>10</sup> See Request at 1.

<sup>11</sup> See Letter from Colleen K. Heitkamp to Thomson Hine LLP (Feb. 19, 2010); Letter from Michele W. Cohen to Colleen K. Heitkamp (Mar. 8, 2010).

<sup>12</sup> See Decision at 3.

<sup>13</sup> See AFR at 2.

<sup>14</sup> See AFR at 3; *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>15</sup> See AFR at 2-3; *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

<sup>16</sup> See AFR at 3. PGS notes that the Citation stated "You *may* respond to this citation . . . ." See *id.* [Emphasis in the original.]

documents and that the exemption therefore applies.<sup>17</sup> Alternatively, PGS asserts that disclosure of the two documents would cause it competitive harm because knowledge of PGS's internal practices would give competitors (which do not customarily disclose such information) a competitive advantage.<sup>18</sup> PGS further asserts that disclosure would deter others from voluntarily cooperating with investigations, particularly where, as here, the allegations being investigated are without merit (as indicated, PGS asserts, by the withdrawal of EB's Citation).<sup>19</sup> Additionally, PGS asserts that there is no public need for disclosure of such confidential information.<sup>20</sup>

#### IV. DISCUSSION

6. We disagree with PGS's contention that the September 22 Letter and the October 30 Letter should be withheld as confidential under Exemption 4.<sup>21</sup> As an initial matter, we find that the two letters were not submitted on a voluntary basis. PGS submitted the letters in response to a citation that found PGS in apparent violation of law and warned PGS that it faced possible sanctions in the future. PGS found it necessary to submit information to have the Citation rescinded and avoid possible sanctions. While PGS was not absolutely required to submit information, it had to submit information to obtain the beneficial government action it sought (*i.e.*, the rescission of the Citation). This case is therefore similar to cases in which courts have concluded that the submission of information to avoid sanctions or to obtain government benefits is not voluntary.<sup>22</sup> It is distinguishable from *Shell Oil Co. v. U.S. Department of Labor*,<sup>23</sup> relied on by PGS, in which, hours after a chemical plant explosion, Shell provided agency inspectors full access to proprietary information without demanding the issuance of subpoenas or warrants, and allowed its employees to be interviewed and its facilities photographed. We find that the free, spontaneous access noted in *Shell* is readily distinguishable from PGS's response, which was required to obtain rescission of the Citation. Similarly, this case is distinguishable from *Parker v. BLM*,<sup>24</sup> also relied on by PGS,<sup>25</sup> in which certain information was not required to be submitted by applicants for federal right-of-ways but could be submitted to "assist in processing" the application.

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<sup>17</sup> *See id.* at 5.

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> Because we find that the information is not confidential, we need not address MG's offer to receive the information on a confidential basis. *See* Letter from John A. Clifford to Colleen Heitkamp (Mar. 11, 2010).

<sup>22</sup> *See Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp.2d 1, 16-17 (D.D.C. 2000) (submission voluntary where not part of proceeding, investigation, or compliance reporting where the submitter faced any risk of penalties or sanctions). *See also Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp.2d 19, 28 (D.D.C. 2000) (requiring a showing of competitive harm "when the government requires a private party to submit information as a condition for doing business with the government [there applying for export insurance] . . . ."); *Public Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997) (information was required to obtain FDA approval of drug and was therefore not voluntarily submitted).

<sup>23</sup> No. H-96-3113 (S.D. Tex. Mar. 31, 1998) (Slip Op.).

<sup>24</sup> 141 F. Supp.2d 71, 77-78 (D.D.C. 2001).

<sup>25</sup> *See* AFR at 4-5.

7. We find that submission of the September 22 and October 30 Letters was required to obtain rescission of the Citation and thereby avoid the risk of future liability.<sup>26</sup> Consequently, we find that submission of the September 22 and October 30 Letters was not voluntary, and Exemption 4 would apply to the requested material only if it were necessary to avoid impairment of our ability to obtain such information or if we determined that disclosure would cause competitive harm to PGS.<sup>27</sup> Because we anticipate no impairment in our ability to obtain the type of information involved here, we focus on the competitive harm prong of the test. With respect to the September 22 Letter, PGS characterizes as competitively sensitive the information regarding its business relationship with its client customers, including the terms of a customer contract, as well as such information as a standard customer service agreement and details of commercial operations and compliance initiatives.<sup>28</sup>

8. We have examined the contents of the September 22 Letter (including attachments) and the October 30 Letter and find no material that would likely cause competitive harm if disclosed.<sup>29</sup> Contrary to PGS's description, the September 22 and October 30 Letters, including attachments to the September 22 letter, contain only a very general description of the kind of operations that PGS conducts. The September 22 Letter includes a response to the Citation, which contains a description of measures that PGS has taken to comply with the TCPA. These measures appear typical of what any firm in the business might take and do not appear competitively sensitive. Also attached to the responsive pleading is a single-page, incomplete customer service agreement that appears to be a standard form that does not contain any sensitive business or financial information and an attached description of terms and conditions of service similar to the type of material made public on PGS's website.<sup>30</sup> The accompanying pleading attaches letters suspending customers alleged to have violated the prohibition against sending unsolicited advertisements. The October 30 Letter reiterates points made in the September 22 Letter and the attached pleading. Accordingly, we will release the September 22 and October 30 letters and redact only information about specific customers and monetary amounts, which we find would cause competitive harm if made public.

9. We agree with PGS that EB did not completely redact all customer-specific information from the copy of the September 22 Letter supplied to PGS for review. We direct EB to further review the material to be disclosed and to redact any customer-specific information previously overlooked.

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<sup>26</sup> For this reason, we have no reason to believe that failure to treat the September 22 and October 30 Letters as confidential would impair our ability to obtain similar necessary information in the future. Parties failing to submit necessary information would remain exposed to the threat of sanction.

<sup>27</sup> See *Critical Mass Energy Project v. FCC*, 975 F.2d 871, 877-79 (D.C. Cir. 1992) (two prong test applies to information involuntarily disclosed), *cert. denied*, 507 U.S. 984 (1993). See also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (discussing two prong test).

<sup>28</sup> See September 22 Letter at 1.

<sup>29</sup> In particular, we find that the material in question does not contain detailed information that would reveal significant, otherwise unknown aspects of business plans and strategies as was the case in *Timken Co. v. U.S. Customs Service*, 491 F. Supp. 557, 559-60 (D.D.C. 1980); see also *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976) (the disclosure of detailed financial information about national parks concession operators to their competitors would cause substantial competitive harm).

<sup>30</sup> See, e.g., <http://www.pgi.com/us/en/legal-notices/terms-conditions/fax2mail-terms-conditions-isb.php>.

**V. ORDERING CLAUSE**

10. IT IS ORDERED that PGS's application for review IS DENIED except to the extent set forth above. If PGS does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, the redacted records will be produced to Merchant & Gould as specified in the Enforcement Bureau's decision as modified by this memorandum opinion and order. *See* 47 C.F.R. § 0.461(i)(4).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary