

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

In the Matter of)
)
CENTER FOR MEDIA AND DEMOCRACY) FOIA Control No. 2007-488
)
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 2012

Released: September 11, 2012

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we grant in part and deny in part an application for review by the Center for Media and Democracy (CMD) of a decision by the Enforcement Bureau (EB) denying CMD's Freedom of Information Act (FOIA) request. In general, we agree with EB that withholding documents relating to investigations of broadcasters' use of video news releases (VNRs) is warranted under FOIA Exemption 7(A)¹ to avoid interfering with current and future EB investigations.² We have, however, identified a narrow class of records that should be released.

II. BACKGROUND

2. CMD's FOIA request³ involved records regarding EB's investigation into VNR broadcasts by 42 owners of 77 broadcast licensees. Specifically, CMD sought: (1) letters of inquiry sent by EB to the licensees under investigation, (2) the licensees' responses to these letters of inquiry, and (3) records of meetings, correspondence, memoranda, and any other communications between Commission staff and external parties dealing with the VNR investigations.

3. In its response, EB informed CMD that it had located documents responsive to the FOIA Request but that these documents were exempt from disclosure under FOIA Exemption 7(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."⁴ EB explained that release of the documents could

¹ See 5 U.S.C. § 552(b)(7)(A).

² A VNR is a video segment that resembles a news report but is instead created by a public relations firm or other entity and then provided to a broadcaster. The sponsorship identification provisions of the Communications Act and the Commission's rules generally require that the providers of VNRs be identified if the VNRs are broadcast. See, e.g., *Fox Television Stations*, 26 FCC Rcd 9485 (EB 2011). Matters under investigation involve questions raised by the incorporation of VNRs in broadcast television stations' news programming.

³ E-mail from Diane Farsetta to FOIA@fcc.gov (Aug. 29, 2007) (Request).

⁴ See Letter from Hillary S. DeNigro, Chief, Investigations and Hearing Division, Enforcement Bureau to Ms. Diane Farsetta (Jul 20, 2010) (Decision).

reasonably be expected to interfere with pending or prospective investigations, because “(1) disclosure would hinder the agency’s ability to control or shape its investigations; (2) disclosure would enable persons or entities with relevant information to destroy or alter evidence; and (3) disclosure would reveal evidence or strategy in the investigation.”⁵ Further, EB found that it was unable to segregate and release meaningful portions of these documents that were not exempt.⁶ EB also declined to make a discretionary release of the documents.⁷

4. **Application for Review.** CMD’s application for review⁸ asserts that withholding the documents is inconsistent with the Administration’s emphasis on the transparency of government and its policy of not automatically withholding documents just because they fall within an exemption.⁹ CMD asserts that EB relies on precedent that predates and fails to reflect the Administration’s policy.¹⁰ CMD also asserts that EB incorrectly relies on cases in which courts deferred to agency expertise on matters of national security or a requester was seeking information about an investigation of the requester’s own misconduct, neither of which is the situation here.¹¹ CMD maintains that EB did not demonstrate that the specific factors necessary to justify withholding under Exemption 7(A) are present here.¹² Further, CMD speculates that the VNR investigations that are the subject of its FOIA request must by now be closed, so that it is no longer possible to interfere with them.¹³

III. DISCUSSION

5. Exemption 7(A) exempts from disclosure: “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.”¹⁴ Withholding documents under Exemption 7(A) can be justified only if (1) law enforcement proceedings are pending or prospective and (2) release of the information could reasonably be expected to cause some articulable

⁵ See Decision at 1 (footnotes omitted).

⁶ See *id.* at 2.

⁷ See *id.* at 1-2.

⁸ See Letter from Lisa Graves, Executive Director, CMD to Federal Communications Commission (Aug. 17, 2010) (AFR).

⁹ See *id.* at 1-2; see also *Memorandum to 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).

¹⁰ See AFR at 2.

¹¹ See *id.*

¹² See *id.* at 2-3. We discuss the factors that CMD cites *infra* at paragraph 6.

¹³ See AFR at 3. Additionally, CMD contends that, at the very least, EB should have furnished a detailed list of the documents withheld or some redacted documents. See *id.* at 1. It is well-established, however, that a detailed list of documents or “Vaughn index” is not required at the administrative level, and we do not customarily provide one. See *Wireless Consumer Alliance*, 20 FCC Red 3874, 3878 ¶ 11 (2005), citing *Schwarz v. U.S. Dep’t of Treasury*, 131 F. Supp.2d 142, 147 (D.D.C. 2000), *aff’d* No. 00-5453 (D.C. Cir. 2001), reported at 2001 WL 674636; see also *Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999) (an agency 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 of what the agency is refusing to produce and why); *Spannaus v. U.S. Dep’t of Justice*, 813 F.2d 1285, 1288-89 (4th Cir. 1987) (in applying Exemption 7(A), government may justify nondisclosure in a generic fashion).

¹⁴ 5 U.S.C. § 552(b)(7)(A).

harm.¹⁵ Contrary to CMD's contention, we find no indication that this standard has been altered by the Administration's position on government transparency or any recent case law.¹⁶ Moreover, Exemption 7(A) provides Commission investigations into VNRs the same protection it provides investigations involving national security concerns. CMD is correct that in cases such as *Center for National Security Studies v. U.S. Dep't of Justice*,¹⁷ courts have deferred to the government's judgment regarding national security matters in applying Exemption 7(A). But courts also give deference to government showings of articulable harm in law enforcement situations not involving national security concerns.¹⁸

6. In particular, we reject CMD's assertion that Exemption 7(A) applies only upon a showing that disclosure could lead to: "(1) the destruction or alteration of evidence, (2) intimidation or harm of knowledgeable individuals, and (3) fabrication of testimony."¹⁹ While these factors were deemed sufficient for withholding in the particular case CMD quotes, courts have found other factors relevant under Exemption 7(A) and given deference to agency assertions that these factors were present. For example, courts have approved of agencies withholding documents upon showings that disclosure would reveal the nature and scope of the government's investigation and would give the targets of the investigation premature access to information about the investigation and the government's case.²⁰ This would be relevant even if the requester is not itself a target of the investigation, because release would make the information publicly available.²¹ It also may be relevant even in the case of closed investigations, where the information that would be disclosed bears upon additional, ongoing investigations.²²

7. Here, we find with respect to nearly all responsive records that EB has made a sufficient showing to warrant withholding under Exemption 7(A). EB concluded that disclosure of any of the responsive records requested could reasonably be expected to cause articulable harm to its VNR investigations because certain of the VNR investigations referred to in the FOIA request, as well as other

¹⁵ See *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3rd Cir. 1995); *Grey v. U.S. Army Criminal Investigation Command*, 742 F. Supp.2d 68, 72-73 (D.D.C. 2010); *Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp.2d 749, 783 (E.D. Pa. 2008).

¹⁶ See, e.g., *Amnesty Int'l USA v. CIA*, 728 F. Supp.2d 479, 525 (S.D. N.Y. 2010) (recent reiteration of standard).

¹⁷ 331 F.3d 918, 928-29 (D.C. Cir. 2003).

¹⁸ See cases cited *infra* note 20.

¹⁹ See AFR at 2-3, quoting *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 331 (E.D. Va. 1996), *aff'd*, 114 F.3d 1178 (4th Cir. 1997).

²⁰ See *Solar Sources, Inc. v. U.S.*, 142 F.3d 1033, 1039 (7th Cir. 1998) (a suspected violator with advance access could construct defenses that would permit violations to go unremedied); *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996) (records that reveal the focus and scope of the investigation are precisely the sort of information that Exemption 7(A) allows an agency to keep secret); *Kay v. FCC*, 976 F. Supp. 23, 37-38 (D.D.C. 1997) (generally an agency may establish interference by showing that release would reveal the scope, direction, and nature of its investigation), *aff'd*, 172 F.3d 919 (D.C. Cir. 1998); *Int'l Collision Specialists, Inc. v. IRS*, Civ. No. 93-2500 (DRD) (D.N.J. Mar. 4, 1994), reported at 1994 WL 395310 at *2 (finding that release would give the targets of investigation earlier and greater access to information about the investigation than it would otherwise be entitled to).

²¹ See *Solar Sources*, 142 F.3d at 1039 (information disclosed under the FOIA would presumably be available to the public as a whole, including the targets of the investigations).

²² See *id.* at 1040 (applying Exemption 7(A) where the case against the specific individuals named in the FOIA request was closed, but the information was compiled as part of an ongoing investigation); *Wireless Consumer Alliance*, 20 FCC Rcd at 3881 ¶ 21 (Exemption 7(A) may be invoked to withhold records from completed proceedings where the records would be relevant to additional prospective investigations).

investigations involving similar issues, remain ongoing. The materials responsive to CMD's request²³ reveal the developing nature and scope of EB's investigation. EB's approach to the various investigations into individual television stations' use of VNRs has been evolving and fact-specific. As the investigations progress, EB has re-evaluated the significance of the different factors relevant to analyzing the lawfulness of various uses of VNRs. Release of the records requested by CMD would reveal to the targets of ongoing VNR investigations EB's developing focus and thought process with respect to its VNR investigations. This could allow the targets to frustrate EB's enforcement efforts for the reasons cited by EB in its decision and by courts in the precedent noted above. We thus find a reasonable expectation of articulable harm as required by the statute and the case law. In light of this foreseeable harm, we further find that discretionary release of records would not be appropriate.²⁴ Moreover, we find, with the one exception described below, that any non-exempt material is inextricably intertwined with exempt material and that the segregation of non-exempt material would leave material useless to the requester.²⁵

8. Despite the foregoing, we find that there is one narrow class of records that does not raise concerns under Exemption 7(A). In three instances, VNR investigations have closed and resulted in the release of an enforcement order. These are: (1) EB-06-IH-3709 (Fox Television Stations, Inc.),²⁶ (2) EB-06-IH-3723 (Comcast Corporation),²⁷ and (3) EB-06-IH-3725 (Access.1 New Jersey License Company, LLC).²⁸ The enforcement orders in these cases describe the VNRs involved in the investigation. Because this information has already been released to the public, we see no foreseeable harm in releasing the video recordings of these VNRs submitted by the subjects of the investigation, as requested by CMD. We therefore direct EB to release the relevant videos.

IV. ORDERING CLAUSE

9. ACCORDINGLY, IT IS ORDERED, that the application for review by the Center for Media and Democracy IS GRANTED IN PART and DENIED IN PART. CMD may seek judicial review

²³ Records responsive to CMD's request consist of: (1) the letters of inquiry sent to the licensees under investigation, (2) the licensees' responses, including video recordings of VNRs and requests for extensions of time, and (3) internal staff e-mails, memoranda, and charts discussing and analyzing the licensees' responses. The internal material may also fall within the scope of the deliberative process privilege of FOIA Exemption 5. Because we are withholding this material under Exemption 7(A), however, we do not find it necessary to reach this question.

²⁴ See *Peter J. Pratt*, 26 FCC Rcd 13808, 13810 (2011) (a showing that discretionary release would cause harm satisfies administrative policy).

²⁵ See *Electronic Privacy Information Center v. DHS*, 384 F. Supp.2d 100, 109 (D.D.C. 2005) (non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions); *Michael Ravnitzky*, 23 FCC Rcd 4433, 4434 ¶ 6 (2008) (applying inextricably intertwined test).

²⁶ See *Fox Television Stations, Inc.*, Notice of Apparent Liability, 26 FCC Rcd 3964 (EB 2011); *Fox Television Stations, Inc.*, Forfeiture Order, 26 FCC Rcd 9485 (EB 2011).

²⁷ See *Comcast Corp.*, Notice of Apparent Liability, 22 FCC Rcd 17030 (EB 2007).

²⁸ See *Access.1 New Jersey License Co., LLC*, Notice of Apparent Liability, 26 FCC Rcd 3978 (EB 2011).

of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).²⁹ The officials responsible for this action are the following: Chairman Genachowski and Commissioners McDowell, Clyburn, Rosenworcel, and Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁹ 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 CMD's right to pursue litigation. CMD may contact OGIS in any of the following ways:

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