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

In the Matter of	)	
	)	
MICHAEL J. MARCUS	)	FOIA Control No. 2011-530
	)	
On Request for Inspection of Records	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 12, 2012 **Released: September 14, 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 (AFR) filed by Michael J. Marcus (Marcus)[1] seeking partial review of a decision of the Enforcement Bureau (EB)[2] that granted in part and denied in part his Freedom of Information Act (FOIA) request[3] for a copy of a May 30, 2009 letter from Motorola, Inc. (Motorola) to the FCC[4] responding to a April 20, 2009 Letter of Inquiry from EB's Spectrum Enforcement Division to Motorola.[5] In connection with Annexes A and B of the Motorola Letter, we find that EB correctly determined that the redacted material not disclosed was confidential business information that falls within FOIA Exemption 4.[6] With respect to the response to LOI Question 2, we find that a portion of the previously redacted material should be disclosed under the FOIA.

[1] *See* Letter from Marcus to Laurence H. Schecker, Special Counsel, Office of General Counsel, FCC (September 23, 2011) (AFR).

[2] *See* Letter from John D. Poutasse, Acting Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC to Marcus (September 9, 2011) (Decision).

[3] *See* Email from Marcus to FCC FOIA Mailbox (August 11, 2011) (Request).

[4] *See* Letter from Steve B. Sharkey, Senior Director, Regulatory and Spectrum Policy, Motorola to Marlene H. Dortch, Secretary, FCC (May 30, 2009) (Motorola Letter). Motorola also filed a separate request for confidential treatment of the information provided in the Motorola Letter. *See* Letter from Steve B. Sharkey, Senior Director, Regulatory and Spectrum Policy, Motorola to Marlene H. Dortch, Secretary, FCC (May 30, 2009) (Motorola Request Letter).

[5] *See* Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC to Steve B. Sharkey, Senior Director, Regulatory and Spectrum Policy, Motorola (April 20, 2009) (LOI).

[6] 5 U.S.C. § 552(b)(4).

II. BACKGROUND

2. The Request seeks a complete and unredacted copy of the Motorola Letter.[7] In searching their files, FCC officials located the document requested by Marcus. Because Motorola had requested confidential treatment of the Motorola Letter,[8] EB gave Motorola an opportunity to respond prior to making a decision on the Request.[9] In its response to the Bureau letter, Motorola asserted that the Motorola Letter "contains confidential business information regarding Motorola's sales of dozens of U-NII products, including customer information, and associated quality control and regulatory compliance processes."[10] Motorola asserted it would be "irreparably harmed if this information were publicly released and thus made available to the company's competitors."[11] Along with its response, Motorola provided a redacted copy of the Motorola Letter that it claimed protected Motorola's confidential business information "while disclosing other information consistent with the requirements of FOIA."[12] Marcus was furnished a copy of the Redacted Motorola Letter directly from counsel to Motorola.

3. EB determined that disclosure of the redacted portions of the Redacted Motorola Letter would "likely cause substantial competitive harm"[13] and that the redacted information constitutes commercial, financial and other proprietary information that is privileged and confidential."[14] EB also determined that disclosing the redacted information would "provide insight into the company's business practices and procedures, equipment development and internal quality control and compliance processes"[15] and that this information would be valuable to Motorola's competitors. EB determined that the Redacted Motorola Letter properly redacted the confidential information in the Motorola Letter in accordance with FOIA Exemption 4, which protects entities required to submit commercial or financial information to the government by safeguarding them from competitive disadvantages that could result from public disclosure.[16] EB found that of the two DVDs submitted with the Motorola Letter, DVD1 contained sales data, customer information and invoices related to Motorola's U-NII products and withheld it from disclosure pursuant to FOIA Exemption 4.[17] EB noted that there was no request for confidential treatment of DVD2, which contained information related to operator manuals and furnished a copy of DVD2 to Marcus.[18]

[7] Request at 1.

[8] *See* 47 C.F.R. § 0.459.

[9] *See* 47 C.F.R. § 0.461(d)(3); Letter from John D. Poutasse, Acting Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC to David E. Hillard, Wiley Rein, LLP (August 17, 2011).

[10] Letter from David E. Hiller, Wiley Rein LLP to Karen Mercer, Enforcement Bureau, FCC (August 29, 2011) at 1.

[11] *Id.*

[12] *Id.* The redacted letter provided by counsel to Motorola is herein referred to as the "Redacted Motorola Letter."

[13] Decision at 1.

[14] *Id.*

[15] *Id.*

[16] *Id. at 1-2.*

[17] Decision at 2.

[18] *Id.*

III. APPLICATION FOR REVIEW

4. In the AFR, Marcus requests review of three specific redactions (Annex A, Annex B and the response to LOI Question 2)[19] and our review is limited to those redactions. Marcus argues in the AFR that the fact that the Decision upheld every redaction proposed by Motorola and relied on the copy of the Redacted Motorola Letter that Motorola sent to him "gives the distinct appearance of minimal review of this issue by the EB staff and may well constitute arbitrary and capricious action."[20] Marcus also argues that the FOIA exemptions are discretionary, and that the party seeking to prevent the disclosure of information the government intends to release has the burden of justifying the nondisclosure of the information.[21] Marcus also argues that the release of the information is in the public interest as he seeks it in order to study the "root causes of multiple incidents of interference from unlicensed U-NII devices…to safety-of-life radar systems."[22]

5. Motorola filed an Opposition to the AFR asserting that the AFR should be denied in its entirety.[23] In its Opposition, Motorola argued that the EB's review of the Request was adequate,[24] and that the EB correctly found that the redacted information is protected from disclosure under FOIA Exemption 4.[25] In reply to the Opposition, Marcus argues that Motorola did not dispute (1) that exemptions are discretionary, (2) that release of the information sought is in the public interest, and (3) that any reasonably segregable portion of a record must be disclosed.[26] Marcus reiterates in the Reply that release of the information sought is in the public interest because it "involves a very serious interference matter to FAA weather radar that is essential to aviation safety"[27] and that "understanding the causes of these interference incidents is key to assuring public safety."[28] Marcus also submitted a supplement to the Reply noting the under the Open Government Act agencies must, if technically feasible, mark documents to show the FOIA exemption being asserted at the place in the record where the deletion of exempted material occurs.[29]

IV. DISCUSSION

6. Marcus' arguments as set forth in the AFR, the Reply and the Supplement do not warrant a different result than that reached by EB with regard to either Annex A or Annex B. However, as explained below, we consider the redaction of the entire response to LOI Question 2 to be excessive and

[19] *See* AFR at 1.

[20] AFR at 2.

[21] AFR at 2-3.

[22] AFR at 3.

[23] Letter from David E. Hiller, Wiley Rein LLP to Laurence H. Schecker, Special Counsel, Office of General Counsel, FCC (October 3, 2011) (Opposition) at 1.

[24] *See* Opposition at 3.

[25] *See* Opposition at 3-7.

[26] *See* Letter from Marcus to Laurence H. Schecker, Special Counsel, Office of General Counsel, FCC (October 11, 2011) (Reply) at 1.

[27] Reply at 3.

[28] *Id.*

[29] *See* Email from Marcus to Laurence H. Schecker, Special Counsel, Office of General Counsel, FCC (October 12, 2011) (Supplement to Reply) at 1.

grant in part the relief sought in the AFR by limiting the redaction of the response to LOI Question 2 as set forth herein.

7. *Annexes A and B*. Annexes A and B address two potential compliance issues that Motorola states it became aware of during the investigation of issues relating to the LOI, but that are not directly covered by the questions in the LOI.[30] In the Redacted Motorola Letter, all of Annex A is redacted, save for the following section headings – Summary, Background, Root Cause, Scope, and Remediation and other actions taken.[31] Similarly, all of Annex B is redacted save for the following section headings – Background, Remediation, and Scope.[32] As is evident from the Redacted Motorola Letter, Annex A is approximately 1.5 pages in length and Annex B is approximately one page in length.[33] In the Decision, EB found that disclosure of the redacted portions of the Redacted Motorola Letter "would likely cause substantial competitive harm"[34] and that the redacted information "constitutes commercial, financial and other proprietary information that is privileged and confidential."[35]

8. In the AFR, Marcus argues that, because of the total redaction of Annexes A and B in the Redacted Motorola Letter, there is nothing "that gives the slightest hint [as] to what these 'potential compliance issues' are."[36] The AFR asserts "it is difficult to understand how partial revelation of the nature of these problems [would provide] 'insight into the company's business practices and procedures, equipment development and internal quality control and compliance processes….'"[37] The AFR also asserts that the "insight test" it claims is used in the Decision goes beyond the FOIA, which it argues protects information *per se,* rather than "insight that might be gathered from it.[38] In addition to the arguments specific to Annexes A and B, the AFR asserts that FOIA exemptions are discretionary,[39] that the party seeking to prevent disclosure has the burden of justifying the nondisclosure of the information,[40] release of Annexes A and B and the response to LOI Question 2 are in the public interest,[41] the total redaction of Annexes A and B and the response to LOI Question 2 exceeds what is permitted by law because any reasonably segregable portion of a record must be disclosed,[42] and EB's action in upholding every redaction proposed by Motorola "may well constitute arbitrary and capricious action."[43]

9. In addressing Annexes A and B in the Opposition, Motorola reiterated that during its investigation into the issues relating to the LOI it "became aware of two compliance issues involving the company's U-

[30] *See* Motorola Letter at 1.

[31] *See* Redacted Motorola Letter at 24-25.

[32] *Id.* at 26.

[33] *Id.* at 24-26

[34] Decision at 1.

[35] *Id.*

[36] AFR at 5

[37] *Id.*

[38] *Id.*

[39] *Id.* at 2.

[40] *Id.* at 3.

[41] *Id.* at 3-4.

[42] *Id.* at 5.

[43] *Id.* at 2.

NII products which were not directly covered by the questions in the LOI"[44] and provided details on these issues in Annexes A and B. Motorola asserts that Annexes A and B "contain confidential business information regarding quality control and regulatory compliance processes, processes relating to the manufacturing of Motorola products and the sales of U-NII products."[45] Motorola also asserts that "the very reporting of the issues in Annexes A and B is itself commercially sensitive business information."[46] Motorola further asserts that disclosure of this information would "result in substantial and irreparable competitive harm to Motorola"[47] as competitors would use the information "to better understand Motorola's manufacturing processes, compliance programs, and procedures."[48] Motorola also noted that the public interest favored withholding the Annexes A and B under FOIA Exemption 4 because they were provided to the Commission on a voluntary basis.[49] In the Reply, Marcus asserts that the disclosures were voluntary "only in the narrowest sense"[50] because its main business is the sale of equipment regulated under Title III of the Communications Act.[51]

10. Our review of Annexes A and B persuades us that EB was correct in determining that all of the withheld information contained therein was properly withheld under FOIA Exemption 4. Exemption 4 exempts from disclosure under the FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[52] The information set out in Annexes A and B is both commercial and confidential. In construing whether information is financial or commercial for purposes of Exemption 4, the D.C. Circuit has held that these terms should be given their "ordinary meanings" and has rejected the argument that "commercial" in Exemption 4 should be narrowly defined to include only records that reveal basic commercial operations.[53] Since the information in Annexes A and B relates to business or trade, it is "commercial" as that term is used in Exemption 4.[54]

11. Financial and commercial information that is not voluntarily provided to the Government is considered "confidential" for purposes of Exemption 4 if disclosure of the information would either (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.[55] Financial or commercial information voluntarily submitted to the Government is considered "confidential" for purposes of Exemption 4 "if it is a kind that would customarily not be released to the public by the person from whom it was obtained."[56] In determining whether information is voluntarily supplied for Exemption

[44] Opposition at 7.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Reply at 6.

[51] *Id.*

[52] 5 U.S.C. § 552(b)(4).

[53] *See Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319-20 (D.C. Cir. 2006).

[54] *See, e.g. Allnet Commc'n Servs. v. FCC,* 800 F. Supp. 984, 987 (D.D.C. 1992); *Dow Jones Co. v. FERC,* 219 F.R.D. 167, 179 (C.D. Cal 2002).

[55] *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)

[56] *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

4 purposes, the existence of agency authority to require submission of information does not mean the submission is involuntary. Rather, the agency authority must actually be exercised in order for a particular submission to be deemed required than voluntary.[57] We find that the submission of Annexes 1 and 2 in response to the LOI was voluntary and therefore the applicable standard for whether the information therein is confidential is whether "it is a kind that would customarily not be released to the public" by Motorola.[58] Motorola has stated that it does not release the information contained in Annexes 1 and 2 to the public.[59] Marcus does not contest this assertion, and our review of the information in Annexes 1 and 2 convinces us that material of this type would not ordinarily be divulged to the general public. We likewise reject Marcus' argument that Exemption 4 does not extend to information that only provides insight into a company's business practices as opposed to information about the practices themselves. *Critical Mass* makes no such distinction.

12. We have examined Annexes A and B to determine whether any additional portions could be segregated and released, or whether any Annexes A and B should be released in the exercise of our discretion under the FOIA.[60] We can discern no non-exempt material that can be reasonably segregated from the withheld portions of Annexes A and B, beyond the headings released by EB in response to the Request.[61] Marcus also argues that the Commission should release Annexes A and B because he intends to use "this information in order to study the root causes of multiple incidents of interference from unlicensed U-NII devices…to safety-of-life FAA radar systems."[62] The D.C. Circuit has found that such a "consequentialist approach to the public interest in disclosure is inconsistent with the '[balance of] private and public interests' the Congress struck in Exemption 4."[63] Disclosure under FOIA turns not on the identity of the requestor or any collateral benefits of disclosure,[64] thus the use (however laudable) to which Marcus would put the information if it were released is not relevant to our analysis of the applicability of Exemption 4 to the information sought. Finally, it is not arbitrary or capricious to follow a submitter's proposed redactions if the agency determines those redactions are consistent with law, as the Bureau did and now the Commission does here.

13. *Response to LOI Question 2.* Question 2 of the LOI states that FCC field agents in San Juan, Puerto Rico observed a Motorola U-NII device that was labeled with a model number but was not labeled with any FCC ID number. The question also noted that the device was operating on 5460 MHz and was causing interference at the San Juan International Airport. The question then asked (1) whether the

[57] *See Inner City Press/Cmty. On the Move v. Bd. of Governors of the Fed. Reserve Sys.,* 463 F.3d 239, 246-48 and nn. 7-8 *(2d Cir. 2006); Cf. Judicial Watch, Inc. v. DOE,* 310 F. Supp. 2d 271, 308-309 (D.D.C. 2004), *aff'd in part & rev'd in part on other grounds,* 412, F.3d 125 (D.C. Cir. 2005) (Documents were found to be voluntarily submitted based largely on the representations made to the agency by the submitters of the documents.)

[58] *Critical Mass,* 975 F.2d at 879.

[59] *See* Motorola Request Letter at 2 ("At no time is the information in the Motorola Response (with the exception of the manuals being provided to the Commission on DVD2) made available to the public.")

[60] *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).

[61] *See Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

[62] AFR at 3.

[63] *Public Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999), (quoting *Critical Mass,* 975 F. 2d at 872).

[64] *Id.*

device was certified, (2) for the FCC identification number of the device (if the device were certified), and (3) for an explanation "as to why the device was not labeled as required by section 2.925 of the Rules, 47 C.F.R. § 2.925."[65]

14. Marcus argues that the direct answer to the questions on whether the San Juan device was certified, what its FCC ID number was, and why it was not properly labeled "contains no information that might be covered by Exemption 4.[66] In its Opposition, Motorola argues that its response to LOI Question 2 "reveals commercially sensitive information regarding its Canopy U-NII device."[67] It also argues that the response "contains confidential business information about the marketing of Canopy devices outside of the United States, as well as processes for the development and modification of the device."[68]

15. Because the response to LOI Question 2 is commercial or financial information that was not voluntarily provided to the Government,[69] it is considered confidential for Exemption 4 purposes only if disclosure of the information would either (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to Motorola's competitive position.[70] This is a higher threshold for finding information confidential than exists in the voluntary disclosure context where information is considered confidential for Exemption 4 purposes "if it is a kind that would customarily not be released to the public by the person from whom it was obtained."[71]

16. We find that there are portions of Motorola's response to LOI Question 2 that would neither cause substantial harm to Motorola's competitive position if disclosed nor impair the Government's ability to obtain necessary information in the future. Disclosure of substantial portions of Motorola's response to LOI Question 2 (e.g. when and where different Canopy devices were marketed in prior years and under what FCC identification number) would not cause substantial harm to Motorola's competitive position. Motorola's Opposition does not state how release of these portions – which deal with the marketing of devices outside of North America between 2004 and 2007 - would cause substantial harm to Motorola's competitive position on a going forward basis.[72] We are similarly unpersuaded that the Commission's ability to obtain necessary information in the future would be impaired by releasing certain portions of Motorola's response to LOI Question 2.[73] In this regard, we note that Motorola furnished this information in response to an LOI, and our ability to obtain responses to LOIs in the future remains unimpaired by the

[65] Motorola Letter at 10.

[66] AFR at 6.

[67] Opposition at 8.

[68] *Id.*

[69] *See e.g., In Def. of Animals v. HHS,* No. 99-3024, 2001 WL 34871354 at *9 (D.D.C. Sept. 28, 2001) (Information is involuntarily submitted for purposes of Exception 4 where agency sent a letter requesting information that it had the legal authority to compel.)

[70] *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)

[71] *Critical Mass Energy Project*, 975 F.2d at 879.

[72] *See Public Citizen Health Research Grp.*, 704 F.2d at 1291 ("Conclusory and generalized allegations of substantial competitive harm…cannot support an agency's decision to withhold documents.")

[73] To withhold information under the "impairment prong" of Exception 4 an agency must demonstrate that a threatened impairment to its ability to obtain information in the future is "significant" rather, than "minor." *See Washington Post Co. v. HHS,* 690 F.2d 252, 269 (D.C. Cir. 1982). Moreover, only the agency has standing to raise this prong of Exemption 4. *See e.g., Hercules v. Marsh* 839 F.2d 1027, 1030 (4th Cir. 1988); *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force,* 215 F. Supp. 2d 200, 206 (D.D.C. 2002); and *Comdisco, Inc. v. GSA*, 864 F. Supp. 510, 515 (E.D. Va. 1994).

release of certain portions of the response to LOI Question 2. Nor do we believe that withholding of the entirety of the response to LOI Question 2 is necessary to protect other governmental interests, such as compliance and program effectiveness.[74] The withholding of information about when Motorola commenced marketing a certain Canopy device in the United States and the period in which it marketed a similar device without an FCC ID outside the United States is not necessary to enable the Commission to obtain information in the future or protect other governmental interests. Marcus will be furnished a revised redacted version of the Motorola Response that unredacts (1) the first paragraph of Motorola's response to LOI Question 2, and (2) all of the second paragraph of Motorola's response to LOI Question 2 with the exception of a portion of the third sentence of that paragraph. The third paragraph of Motorola's response to LOI Question 2 discloses operational details regarding Motorola's Canopy devices. Because we find that this information would cause substantial competitive harm to Motorola if released, this paragraph will continue to be redacted.

V. ORDERING CLAUSE

17. IT IS ORDERED that Marcus' Application for Review is GRANTED to the extent indicated above and is otherwise DENIED. If Motorola does not seek a judicial stay within ten (10) working days of the date of release of this Memorandum Opinion and Order, we direct EB to produce to Marcus the corrected redacted records as modified above upon payment by Marcus of the FOIA fee he owes. *See* 47 C.F.R. § 0.461(i)(4). Marcus may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).[75]

18. The following officials are responsible for this action: Chairman Genachowski and Commissioners McDowell, Clyburn, Rosenworcel and Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[74] *See National Parks & Conservation Ass'n*, 498 F.2d at 770 n.17.

[75] 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 Marcus' right to pursue litigation. Marcus 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