

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

In the Matter of	)	
	)	
CHERYL B. WILLIAMS	)	FOIA Control No. 2011-423
	)	
On Request for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 6, 2012**

**Released: January 6, 2012**

By the Commission:

**I. INTRODUCTION**

1. By this Memorandum Opinion and Order, we deny an Application for Review (AFR) filed by Cheryl B. Williams (Williams)<sup>1</sup> seeking review of a decision of the Office of Managing Director (OMD)<sup>2</sup> that granted in part and denied in part her Freedom of Information Act (FOIA) request<sup>3</sup> for a “complete and unredacted copy” of a “study of administrative positions” undertaken by Bonita Tingley, Chief Human Capital Officer, and others.<sup>4</sup> We find that OMD correctly determined that the agency records that were not disclosed are deliberative materials that fall within FOIA Exemption 5, and that there are no additional segregable portions of those records that could be released. We further find that OMD correctly observed that the FOIA does not provide an avenue for asking questions of an agency, and, therefore, OMD appropriately declined to answer the list of questions Williams included in the Request.<sup>5</sup>

**II. BACKGROUND**

2. Williams’ Request seeks a complete and unredacted copy of “a study of administrative positions” undertaken by Bonita Tingley and others “during 2010 and/or 2011.”<sup>6</sup> In searching their files,

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<sup>1</sup> See Email from Williams to Austin Schlick, General Counsel, FCC (August 12, 2011) (AFR). Williams subsequently sent a Memorandum to Laurence Schecker, Special Counsel, Office of General Counsel, FCC, dated August 29, 2011 (Memorandum) supplementing the August 12, 2011 email. Because the Memorandum was submitted within the 30 day timeframe for filing an application for review of a FOIA denial, we are treating the Memorandum as part of the Application for Review. See 47 C.F.R. § 0.461(j).

<sup>2</sup> See Letter from Mindy Ginsburg, Deputy Managing Director, FCC to Williams (July 22, 2011) (Decision).

<sup>3</sup> See Letter from Williams to Bonita Tingley, Mary Beth Richards and Edward Lazarus, FCC (June 8, 2011) (Request).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 1-2.

<sup>6</sup> *Id.* at 1.

FCC officials located the document requested by Williams – a report entitled “Assistant Bureau Chief for Management Offices Review – February 2011”<sup>7</sup> (Review).

3. OMD determined that the Review is exempt from disclosure pursuant to the deliberative process privilege of FOIA Exemption 5<sup>8</sup> because “it is an internal agency document that analyzes and makes recommendations concerning administrative positions at the Commission.”<sup>9</sup> As required by the FOIA, OMD reviewed the records subject to Exemption 5 to determine if segregable portions of those records could be released and determined that there were factual portions of the Review that could be released.<sup>10</sup> OMD also reviewed the records subject to Exemption 5 to determine if discretionary release is appropriate and determined that because of the nature of the Review, no additional portions of the Review are appropriate for discretionary release.<sup>11</sup>

### III. APPLICATION FOR REVIEW

4. In her Memorandum, Williams argues that OMD erred in failing to give her an unredacted copy of the Review because the Commission is obligated to make available to the public “statements of general policy . . . formulated and adopted by the Commission.”<sup>12</sup> Williams argues in the Memorandum that the Review “establishes new human resources policies agency-wide that have a direct impact on administrative staff throughout the Commission.”<sup>13</sup> She asserts that the conclusions of the Review may “limit the future career growth of administrative staff” and result, *inter alia*, in the elimination of the Deputy Assistant Bureau Chief for Management positions.<sup>14</sup> Williams concludes in her Memorandum that “all administrative staff in the Commission have a right to know how the study impacts their position and future career advancement.”<sup>15</sup>

### IV. DISCUSSION

5. Williams’ arguments as set forth in her Memorandum do not warrant a different result than that reached by OMD. Specifically, we find that OMD correctly applied Section 552(a)(2)(D), Exemption 5, and other provisions of the FOIA.

6. *The Requirements of Section 552(a)(2)(D)*. As Williams notes, the FOIA requires federal agencies to publish in the Federal Register for the guidance of the public “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.”<sup>16</sup> The FOIA also requires that federal

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<sup>7</sup> See Response at 1.

<sup>8</sup> 5 U.S.C. § 552(b)(5).

<sup>9</sup> Response at 1.

<sup>10</sup> *Id.* The redacted records were provided to Williams.

<sup>11</sup> *Id.* at 2. See *President’s Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed.Reg. 4683 (Jan. 21, 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>).

<sup>12</sup> Memorandum at 1, citing 5 U.S.C. § 552(a)(1)(D).

<sup>13</sup> Memorandum at 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 5 U.S.C. § 552(a)(1)(D).

agencies make certain materials available for public inspection and copying. These include, *inter alia*, “those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register”<sup>17</sup> as well as “administrative staff manuals and instructions to staff that affect a member of the public.”<sup>18</sup> These provisions require proactive disclosure in that they require the agency to publish or make the material available without a FOIA request.

7. None of these provisions is applicable to the Review because it has not been adopted by the agency but instead consists of staff analysis and recommendations. As OMD correctly stated, the Review is “an internal agency document that analyzes and makes recommendations concerning administrative positions at the Commission.”<sup>19</sup> Moreover, contrary to Williams’ assertion, the Review does not establish “new human resources policy agency-wide . . . .”<sup>20</sup> If and when the Commission acts on the recommendations in the Review, it will determine, consistent with the FOIA, whether they rise to the level of policy documents required to be published in the Federal Register or made available for public inspection and copying. In this regard, we note that the FOIA does not require an agency to formulate policy, “but only to publish the policy that it in fact formulates.”<sup>21</sup>

8. *Exemption 5.* OMD was correct in determining that the Review is exempt from disclosure pursuant to the deliberative process privilege of FOIA Exemption 5<sup>22</sup> because “it is an internal agency document that analyzes and makes recommendations concerning administrative positions at the Commission.”<sup>23</sup> Exemption 5 encompasses a deliberative process privilege intended to “prevent injury to the quality of agency decisions.”<sup>24</sup> To fall within the scope of this privilege the agency records must be both predecisional and deliberative.<sup>25</sup> Predecisional records must have been “prepared in order to assist an agency decision maker in arriving at his decision.”<sup>26</sup> Deliberative records must be such that their disclosure “would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.”<sup>27</sup> The Review meets both of these tests. It is predecisional because it contains staff recommendations to be considered by agency decisionmakers, and it is deliberative because it reflects staff discussions and evaluations within the agency, which are at the core of the consultative process.

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<sup>17</sup> *Id.* § 552(a)(2)(B).

<sup>18</sup> *Id.* § 552(a)(2)(C).

<sup>19</sup> Response at 1.

<sup>20</sup> Memorandum at 2.

<sup>21</sup> *Alcaraz v. Block*, 746 F.2d 593, 609-10 (9th Cir. 1984).

<sup>22</sup> 5 U.S.C. § 552(b)(5).

<sup>23</sup> Response at 1.

<sup>24</sup> *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

<sup>25</sup> *Id.* at 151-52.

<sup>26</sup> *Formaldehyde Inst. v. Dep’t of Health and Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (“In deciding whether a document should be protected by the privilege we look to whether the document is . . . generated before the adoption of an agency policy and whether . . . it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents . . . .”).

<sup>27</sup> *Formaldehyde Inst.*, 889 F.2d at 1122, (quoting *Dudman Commc’ns Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

9. As OMD did, we have examined the agency records at issue here to determine whether any additional portions could be segregated and released, or whether any of the records should be released in the exercise of our discretion under the FOIA.<sup>28</sup> We can identify no additional non-exempt material that can be reasonably segregated from the withheld records, beyond the material released by OMD in response to the Request.<sup>29</sup>

10. *Responding to Questions under the FOIA.* OMD also correctly determined that the FOIA provides a means for the public to obtain copies of agency records and is not a mechanism for seeking answers to questions a member of the public desires to pose.<sup>30</sup> OMD thus properly declined to respond to the list of questions Williams submitted as part of her FOIA request.

## V. ORDERING CLAUSE

11. IT IS ORDERED that Williams' Application for Review is DENIED. Williams may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).<sup>31</sup>

12. The following officials are responsible for this action: Chairman Genachowski and Commissioners McDowell and Clyburn.

### FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>28</sup> See *President's Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed.Reg. 4683; *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>).

<sup>29</sup> See *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

<sup>30</sup> See *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1974); *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

<sup>31</sup> 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 Williams' right to pursue litigation. Williams 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](mailto:ogis@nara.gov)  
Telephone: 301-837-1996  
Facsimile: 301-837-0348  
Toll-free: 1-877-684-6448