

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

In the Matter of)
COMPTEL) FOIA Control No. 2007-265
Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: June 18, 2012

Released: June 19, 2012

By the Commission:

1. By this memorandum opinion and order, we grant in part and deny in part an application for review filed by CompTel on November 9, 2011 (AFR). CompTel seeks review of a decision of the Enforcement Bureau (EB) that granted in part and denied in part a Freedom of Information Act (FOIA) request by CompTel. On April 16, 2007, CompTel requested:

[a]ll internal FCC emails, memoranda, and other strictly internal documents from FCC Case file no. EB-04-IH-0342 referenced in the Supplemental Declaration of Judy Lancaster filed in the United States District Court for the District of Columbia in Civil Action 06-1718-HHK on April 13, 2007. COMPTTEL also requests all correspondence with any third party contained in FCC Case file no. EB-04-IH-0342.

2. In responding to CompTel's FOIA request, EB ruled that it would disclose 193 pages of responsive documents, but redact portions that were exempt from disclosure under FOIA Exemptions 4, 5, 6, and 7(C). As discussed below, we find that EB was correct in determining it should disclose non-exempt information in the documents, and in declining to disclose information protected from disclosure in accord with the FOIA. We also find that some material EB withheld should be disclosed as described below. We otherwise deny the application for review.

I. BACKGROUND

3. The procedural posture in this matter is complicated. On December 16, 2004, EB issued a consent decree terminating its investigation into the compliance of SBC Communications, Inc. (SBC), now named AT&T Inc. (AT&T), with section 254 of the Communications Act, as amended (the Act), and

1 See Letter from Judy Lancaster, EB, to Mary C. Albert, CompTel, and Teri Hoskins, AT&T (Nov. 1, 2011) (2011 FOIA Decision).

2 E-FOIA request from Jonathan Lee/COMPTTEL (Apr. 16, 2007).

3 2011 FOIA Decision, citing 5 U.S.C.A. §§ 552(b)(4), (5), (6) and (7)(C).

4 Some of the documents provided to CompTel contained erroneous redactions. Specifically, on certain documents the names of certain FCC staff and certain factual information identifying a related and now dated investigation were to have been disclosed but were not released as a result of a processing error by staff making the redactions. Corrected documents will be provided to CompTel.

the Commission's implementing rules.⁵ CompTel filed a FOIA request on April 4, 2005, seeking "[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342 [*i.e.*, the investigation of SBC]."⁶ In opposing release of the requested documents, SBC for the first time requested confidential treatment of its submissions in that investigation.⁷

4. EB granted in part and denied in part SBC's request for confidential treatment, and, accordingly, granted in part and denied in part CompTel's 2005 FOIA request.⁸ EB determined that certain information in SBC's submissions should be treated as confidential, including "costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers." According to EB, such information, if released, was "likely to substantially harm SBC's competitive position," and was therefore exempt from disclosure under FOIA Exemption 4.⁹ EB also determined that this information was not in the public domain.¹⁰ In addition, EB determined that the names of individuals identified in SBC's submission should be withheld from release to protect personal privacy under FOIA Exemptions 6 and 7(C).¹¹ EB also ruled that SBC itself, as a corporate entity, did not possess personal privacy interests protected under the FOIA.¹² Finally, pursuant to Exemption 5, EB found it should withhold from release drafts of EB pleadings and correspondence, and internal memoranda and e-mails discussing the SBC investigation, which EB determined would disclose the Commission's deliberative process.¹³ Both parties filed applications for review¹⁴ of EB's decisions before any responsive materials were released.¹⁵

5. On October 5, 2006, CompTel filed a civil action in the United States District Court for the District of Columbia, seeking a judicial order compelling production of the records withheld by EB.¹⁶

⁵ *SBC Communications Inc.*, Order, 19 FCC Rcd 24014 (Enf. Bur. 2004).

⁶ E-FOIA request from Mary C. Albert, CompTel/ALTS (Apr. 4, 2005).

⁷ Letter from Jim Lamoureux, SBC Services, Inc. to Judy Lancaster, EB (May 27, 2005). CompTel opposed SBC's request for confidentiality. Letter from Mary C. Albert, CompTel, to Judy Lancaster, EB (Jun. 28, 2005).

⁸ Letter from William H. Davenport, EB to Jim Lamoureux, SBC Services, Inc. and Mary C. Albert, CompTel (Aug. 5, 2005) (*2005 FOIA Decision*).

⁹ *2005 FOIA Decision* at 5. See 5 U.S.C. § 552(b)(4). Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

¹⁰ *2005 FOIA Decision* at 5. Specifically, EB found that 47 C.F.R. § 54.501(d)(3), which states that service providers' records of rates charged and discounts allowed shall be made available for public inspection, did not require the disclosure of all pricing data in SBC's submissions.

¹¹ *2005 FOIA Decision* at 5-6, citing 5 U.S.C. §§ 552(b)(7)(C) ("records compiled for law enforcement purposes but only to the extent . . . [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy") and 552(b)(6) ("personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

¹² *2005 FOIA Decision* at 6.

¹³ *Id.* at 6, citing 5 U.S.C. § 552(b)(5) ("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").

¹⁴ Letter from Mary C. Albert to Samuel Feder (Sept. 6, 2005); Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, [then] Acting General Counsel (Aug. 19, 2005).

¹⁵ See 47 C.F.R. §§ 0.459(g), 0.461(i)(4) & (j).

¹⁶ *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. filed Oct. 5, 2006). The FOIA permits such actions where the agency does not act on a FOIA request or appeal within the statutory time period. See 5 U.S.C. § 552(a)(6)(C)(i) (agency's failure to comply with statutory time period deemed to exhaust administrative remedies).

AT&T intervened in CompTel's action to argue a "reverse FOIA" claim. In the summary judgment pleading cycle, CompTel disputed the government's position that CompTel had agreed with EB to limit the scope of its 2005 FOIA request to exclude certain classes of internal and third party communications. In order to address any argument that it had failed to seek the records at issue, CompTel filed another FOIA request with the Commission in 2007 (which is the FOIA request that is the subject of the AFR we address in this Order).¹⁷ On March 5, 2008, the court stayed the case.¹⁸ The court concluded that it could not address AT&T's "reverse FOIA" claim that certain records at issue should be withheld from disclosure because AT&T's claim could only be reviewed pursuant to the Administrative Procedure Act after final Commission action.¹⁹ The court concluded further that the interests of judicial economy and efficiency would be served by staying CompTel's action until the Commission ruled on AT&T's administrative appeal.

6. On September 9, 2008, the Commission denied the Application for Review that AT&T had filed to oppose release of information that EB had determined to disclose. The Commission rejected AT&T's argument that it should withhold all of the documents SBC had submitted in response to EB's inquiry because AT&T as a corporate entity had a personal privacy interest protected under the FOIA.²⁰ AT&T sought review of the Commission's decision in the United States Court of Appeals for the Third Circuit, which granted AT&T's petition and remanded the matter back to the Commission.²¹ The Commission sought review of the Third Circuit's decision in the Supreme Court, which granted certiorari. On March 1, 2011, the Supreme Court agreed with the Commission that corporations do not have personal privacy interests for purposes of FOIA.²² On June 17, 2011, the District Court lifted its stay of the related proceedings before it at the request of CompTel.²³

7. Because CompTel's 2007 FOIA request implicated the same claims of personal privacy that were being disputed before the full Commission, the Third Circuit, and the Supreme Court, EB responded to that request after the Supreme Court's decision, on November 1, 2011. In its decision, EB ruled that it would disclose to CompTel 193 pages of responsive documents, but redacted portions that were exempt from disclosure under FOIA Exemptions 4 (protecting sensitive commercial information), 5 (protecting deliberative process material), 6 (protecting personal privacy interests), and 7(C) (providing heightened protection for personal privacy interests in law enforcement records).²⁴

8. On November 9, 2011, CompTel filed the instant AFR challenging EB's 2011 FOIA Decision. CompTel argues that EB erred in failing to provide CompTel with a Vaughn Index of information withheld.²⁵ CompTel also argues that all emails and documents exchanged between EB and SBC/AT&T must be produced because they were not kept solely within the Commission and thus cannot be protected by FOIA Exemption 5; that drafts of documents cannot be withheld pursuant to Exemption 5 because EB did not demonstrate to CompTel that such documents were kept within the Commission; that

¹⁷ AFR at 4.

¹⁸ *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. Mar. 5, 2008).

¹⁹ See generally *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (discussing reverse FOIA requests).

²⁰ *SBC Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 13704 (2008).

²¹ *AT&T Inc. v. FCC*, 582 F.3d 490 (3d Cir. 2009), *rev'd*, 131 S.Ct. 1177 (2011).

²² *FCC v. AT&T Inc.*, 131 S.Ct. 1177 (2011).

²³ *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. Jun. 17, 2011).

²⁴ *2011 FOIA Decision*, citing 5 U.S.C.A. §§ 552(b)(4), (5), (6) and (7)(C).

²⁵ AFR at 4.

EB cannot withhold names of FCC or SBC/AT&T staff under Exemption 6 because EB does not explain why it is not also withholding other FCC staff names; that EB cannot withhold the names of FCC or SBC/AT&T staff from disclosure under Exemption 7(C) because the documents were not compiled for law enforcement purposes and because EB did not establish why such disclosure would be an unwarranted invasion of privacy; that EB cannot withhold SBC/AT&T staff names pursuant to Exemption 4 because names do not constitute trade secrets or commercial information; and that EB cannot withhold draft documents and correspondence between SBC/AT&T and EB under Exemption 4 because it would be irrational for EB to conclude that a company would provide sensitive trade secret or confidential commercial information in settlement discussions or consent decrees. CompTel further argues that EB did not demonstrate that it properly could withhold certain information from emails post-dating the consent decree. Finally, CompTel argues that EB erred in withholding draft memoranda discussing possible courses of action in another investigation and that EB must produce any segregable factual information contained in those memoranda. AT&T filed a response to the AFR disagreeing with CompTel's claims but also arguing that the Commission should not rule on the merits of CompTel's appeal until the pending district court litigation regarding CompTel's earlier FOIA request for related material in the same case file is resolved.²⁶

II. DISCUSSION

9. As an initial matter, we do not agree with AT&T that we should wait to address the merits of CompTel's challenge to EB's initial determinations in response to CompTel's 2007 FOIA request until resolution of the litigation regarding CompTel's 2005 FOIA request. To support its position that we should delay ruling on this AFR until the district court has resolved the issues before it, AT&T notes that CompTel has stated that its purposes in filing the FOIA request and the AFR at issue were related to the on-going litigation involving its 2005 FOIA request. As discussed above, the Supreme Court resolved the issue regarding disclosure that affected processing of both the 2005 and the 2007 FOIA requests. Accordingly, EB processed the 2007 request that is the subject of this AFR. The 2007 FOIA request is a properly filed request that is separate from the 2005 request for purposes of agency processing of FOIA requests, even though the requestor is the same and has stated its purposes for filing the 2007 request relate to that district court litigation. The identity and purpose of a FOIA requestor are not relevant considerations in agency determinations to disclose or withhold information pursuant to a properly filed FOIA request.²⁷ Therefore, we will rule on the issues CompTel raises with respect to EB's initial determinations in response to the 2007 FOIA request. Accordingly, we now turn to the merits of CompTel's arguments.

10. Vaughn Index. CompTel is wrong that EB erred by failing to provide CompTel with a "Vaughn Index"²⁸ of information withheld. A Vaughn Index is not required when an agency withholds information in the FOIA context, and we do not customarily prepare one.²⁹ An agency need only provide "a sufficiently detailed description of what it is refusing to produce and why so that the requestor and the court can have a fair idea what the agency is refusing to produce and why."³⁰ This may be accomplished

²⁶ Letter from Geoffrey M. Klineberg, Counsel for AT&T, to Austin Schlick, General Counsel (Nov. 23, 2011).

²⁷ *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989); *Swan v. SEC*, 96 F.3d 498, 499-500 (D.C. Cir. 1996); *Ebling v. Dep't of Justice*, 796 F.Supp.2d 52, 62-63 (D.D.C. 2011).

²⁸ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

²⁹ *Bangoura v. Dep't of the Army*, 607 F.Supp.2d 134, 143-44, n.8 ("Defendant was under no obligation to provide Plaintiff with a Vaughn Index before [the civil action was filed].") (D.D.C. 2009); *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp.2d 142, 147 (D.D.C. 2000).

³⁰ *Wireless Consumer Alliance*, 20 FCC Red at 3878, quoting *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999).

without a detailed index of the records, as was done here. We find no error by EB in not providing CompTel with a Vaughn Index.

11. Exemption 6. FOIA Exemption 6 provides that agencies are to withhold information in “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”³¹ CompTel argues that EB erred in withholding identifying information about certain FCC staff and SBC/AT&T staff under Exemption 6 because EB does not explain why it disclosed certain names and not others and because EB does not explain how such disclosure could be an unwarranted invasion of privacy. Neither of these arguments has merit. First, the FOIA does not require that agencies provide requestors with justifications for decisions to release information in response to their FOIA requests. Nor does the discretionary release of some material create an obligation to release other material even assuming for the sake of argument it is of like nature.³² Moreover, EB was correct in concluding that the redacted information identifying certain individuals falls within the scope of Exemption 6. Files “similar” to personnel and medical files are broadly defined for purposes of Exemption 6,³³ and investigative case files have been considered to be such “similar files” from which names and other personally identifying information should be withheld.³⁴ While Exemption 7(C) provides more explicit protection for personal information in the responsive documents because this FOIA request involves investigative case files, EB is correct that this information is also protected under Exemption 6.³⁵ Here the names and information at issue that have been redacted identify private individuals and government employees. While the personal privacy interest protected by FOIA is clearest when individuals are targets, subjects or witnesses in investigations, disclosure of even innocent association with an investigation into wrongdoing can subject an individual to annoyance, harassment, or embarrassment by association.³⁶ Furthermore, the individual’s protected privacy interest in his or her own personal information exists even when the information “is not of an embarrassing or intimate nature.”³⁷ And though the more severe concerns such as physical harm or “the disclosure of particularly embarrassing private details” that arise from associating individuals with criminal investigations may not

³¹ 5 U.S.C. § 552(b)(6). The personal privacy interests of individuals are protected under FOIA Exemption 6 and Exemption 7 (C). See *FCC v. AT&T Inc.*, 113 S.Ct. at 1184-85. But, as the Supreme Court held in *AT&T*, the reverse FOIA case described above, even though “person” is defined to include corporations, they do not have the “personal” privacy interests of individuals that are protected under FOIA Exemption 7(C). *Id.* at 1185.

³² See, e.g., *Williams & Connelly v. SEC*, 662 F.3d 1240, 1245 (D.C. Cir. 2011); *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982).

³³ *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599-602 (1982) (holding Exemption 6 was not intended to be limited to a “narrow class of files containing only a discrete kind of personal information” but rather was intended to protect personal information in government records when disclosure was sought).

³⁴ See, e.g., *Lahr v. NTSB, et al.*, 569 F.3d 964, 973-979 (9th Cir. 2009) (*Lahr*) (finding redaction of the names of FBI agents and witnesses in investigation files proper under Exemption 6); *Wood v. FBI*, 432 F.3d 78, 85-87 (2nd Cir. 2005) (holding names of government investigators and third parties as well as subjects of administrative investigation may be withheld); *Appleton v. FDA*, 451 F.Supp. 2d 129, 145-46 (D.D.C. 2006) (*Appleton*) (upholding redaction of the names of drug company employees and information identifying interviewees and other individuals in investigation files pursuant to Exemption 6); *Concepcion v. FBI*, 606 F.Supp.2d 14, 35-39 (D.D.C. 2009) (upholding redaction of the names of third parties in investigative files under Exemption 6).

³⁵ Whether the information identifying a regulated company’s personnel and their assignments is commercially sensitive and thus exempt from disclosure under FOIA Exemption 4 is a more difficult question, but because Exemptions 6 and 7(C) clearly apply, it is not one we need to address in this instance.

³⁶ See *Lahr*, 569 F.3d at 975-79 (holding Exemption 6 protected information identifying eyewitnesses and FBI agents in records relating to investigation into airline crash).

³⁷ *Appleton*, 451 F.Supp. 2d at 115.

exist in the regulatory enforcement context, identifying individuals with an EB investigation still can lead to unwanted exposure and contacts from third parties that would constitute clearly unwarranted invasions of privacy.³⁸

12. Exemption 7(C). Exemption 7(C) provides for withholding “records compiled for law enforcement purposes but only to the extent . . . [that disclosure] could reasonably be expected to constitute an unwarranted invasion of personal privacy.”³⁹ CompTel argues incorrectly that the documents in question cannot be withheld under Exemption 7(C) because they were not compiled for law enforcement purposes. CompTel specifically requested material from the case file for an EB investigation into allegations that a company violated the Act and our rules. EB’s investigations can result in enforcement actions by the Commission under the Act, including monetary forfeitures and license revocations, and can be referred to the Commission’s Office of Inspector General and the Department of Justice for other civil or criminal investigation and prosecution. Thus courts have found that the case files of the Commission’s regulatory investigations, such as the one at hand, are compiled for the purposes of law enforcement.⁴⁰

13. Under Exemption 7(C), the Commission will withhold information identifying individuals if disclosure might result in an unwarranted invasion of personal privacy and the public interest in the information does not outweigh that privacy interest.⁴¹ In applying this test, we look at the privacy interests of those individuals who are company personnel and are subjects or witnesses in an investigation or have work assignments relating to representing their company in the investigation. As discussed above, these individuals have protected personal privacy interests under Exemptions 6 and 7(C) that are implicated when they are associated with an EB investigation into corporate wrong-doing. The privacy interests of these individuals are to be weighed against the knowledge about the workings of government that may be gained from disclosure, not knowledge about the workings of a company or its employees.⁴² Even if the privacy interests are more minimal for those who represent a company rather than those who are identified as subjects or witnesses in an investigation, we see nothing in this case to suggest that information identifying company personnel and their work assignments would illuminate anything about the workings of the government. An individual employee of a regulated company has a privacy interest of some degree in not having his or her employment and work assignments made public, especially when that could associate the individual with an investigation into potential wrong-doing. As the U.S. Court of Appeals for the D.C. Circuit has said, “even a modest privacy interest [] outweighs nothing.”⁴³ We therefore agree with EB that information from the case file identifying the company’s employees can be protected under Exemption 7(C).

14. Previously, however, EB publicly identified certain SBC/AT&T employees in the consent decree and in its *2005 FOIA Decision*.⁴⁴ We find that withholding from the responsive documents before us the information identifying the SBC/AT&T employees already publicly disclosed by

³⁸ *Lahr*, 569 F.3d at 975-79.

³⁹ 5 U.S.C. § 552(b)(7)(C).

⁴⁰ See *Kay v. FCC*, 867 F.Supp. 11, 17 (D.D.C. 1994); *Kay v. FCC*, 976 F.Supp. 23, 37 (D.D.C. 1997), *aff’d per curiam*, 172 F. 3d 919 (D.C. Cir. 1998).

⁴¹ *Nat’l Ass’n of Broadcasters*, Memorandum Opinion and Order, 24 FCC Rcd 12320, 12326-27 (2009).

⁴² *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989).

⁴³ *Id.* at 879.

⁴⁴ We note that SBC/AT&T negotiated and signed the consent decree without objecting to the public disclosure of the identifying information; similarly SBC/AT&T responded to the *2005 FOIA Decision* but did not object to or seek remediation of the public disclosure of its employees.

EB will not protect their privacy and direct EB to disclose such information in the responsive documents. The names of other SBC/AT&T employees may be withheld as discussed above.

15. CompTel also argues EB erred in withholding the names of certain FCC staff. EB intentionally withheld the names or other identifying information of staff level Commission employees in the responsive documents under Exemptions 6 and 7(C), but intended to disclose the identifying information for management level FCC staff.⁴⁵ Government employees generally have limited privacy interests in their government employment and their work assignments, but those interests are heightened in law enforcement matters, as here, where Exemption 7(C) is applied. Courts have upheld redaction of government employees' names contained in law enforcement files when those employees are involved in the conduct of the investigation.⁴⁶ EB's position that disclosure of Commission management level employees is less likely to result an unwarranted invasion of privacy than disclosure of staff level employees involved in an investigation is reasonable and accords with the decisions of courts that have addressed the same issue under FOIA.⁴⁷ Management level staff in EB, as elsewhere in the Commission, are publicly identified as such on our website and in other publicly available documents. The connection of any specific staff level employee to any one investigation, however, is not readily apparent. We find that disclosure of such a connection in this case could reasonably be expected to cause an unwarranted intrusion of personal privacy for staff level employees that outweighs the public interest in releasing their names.⁴⁸ We therefore uphold EB's withholding of information identifying staff level employees, as opposed to management level employees, with one exception. As with certain SBC/AT&T employees, EB publicly disclosed the identity of a staff level employee involved in the conduct of the investigation in the consent decree and in the *2005 FOIA Decision*. We therefore find that withholding from the responsive documents before us the name of that FCC staff level employee will not protect his privacy and direct EB to disclose such information in the responsive documents. The names and identifying information of other staff level employees may be withheld as discussed above.⁴⁹

16. Exemption 5. Exemption 5 protects "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."⁵⁰ CompTel objects to the withholding of information from certain documents that post-date the consent decree in the underlying investigation because, it argues, EB "has failed to meet its burden of

⁴⁵ As noted above, there were errors in final conforming redactions in the FOIA response provided to CompTel, including mistaken redaction of some management level employees, which will be corrected.

⁴⁶ See, e.g., *Concepcion v. FBI*, 606 F.Supp.2d at 38-39; *Amusco v. Dep't of Justice*, 600 F.Supp.2d 78, 97, (D.D.C. 2009); *Singh v. FBI*, 574 F.Supp.2d 32, 48-49 (D.D.C. 2008).

⁴⁷ See, e.g., *Families for Freedom v. U.S. Customs & Border Protection*, 2011 WL 6780896 at 10, --- F.Supp.2d --- (S.D.N.Y. 2011) (directing disclosure of the identities of "higher ranking officials such as chief of staff, deputy chief of staff and division chief," but permitting redaction for lower level staff involved in law enforcement activities).

⁴⁸ Commission staff level employees in these situations often act as investigators and as support staff for investigation functions.

⁴⁹ CompTel also identifies as problematic the redactions in Document 30, a one-page email between Commission and USAC staff regarding an analysis of rules. The body of the email was redacted and EB identified Exemptions 5, 6, and 7(C) on the redaction. CompTel correctly argues that an analysis of the rules could not reasonably be expected to cause an unwarranted invasion of privacy. We reviewed the document. The body of the email contained identifying information for the USAC staff member which is protected by Exemptions 6 and 7(C); the remaining text of the email is the work product produced at the direction of the EB attorney in anticipation of litigation and protected by Exemption 5. See, e.g., *Judicial Watch v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (explaining that Exemption 5 incorporates the work product doctrine, which protects material prepared in anticipation of litigation by a party or its attorney or agent).

⁵⁰ 5 U.S.C. § 552(b)(5).

showing that the Exemption [5] does indeed protect” the information in certain documents that post-date the consent decree and were provided in redacted form.⁵¹ Exemption 5 provides that deliberative pre-decisional documents may be withheld from release.⁵² Responsive material that documents or explains a past agency decision is not protected under Exemption 5; responsive material that post-dates a particular decision, however, may be deliberative and pre-decisional as to other matters and thus protected under Exemption 5.⁵³ The documents at issue are emails between Commission staff and between Commission staff and Department of Justice staff discussing issues relating to referral, sharing of documents, and possible courses of action that can be pursued by either agency.⁵⁴ We have reviewed the information withheld. That information does not document or explain past Commission decisions, but instead discusses issues relating to whether matters could be referred to, and associated documents shared with, the Department of Justice; coordination with respect to other investigations and prosecutions involving similar or related issues; possible courses of action that could be pursued; and related deliberative observation and analysis.⁵⁵ The material is deliberative and pre-decisional and thus squarely protected from disclosure under Exemption 5.

17. CompTel also argues that EB erred in withholding the information in certain documents, such as drafts of the consent decree and emails exchanged with SBC/AT&T, because the information was shared with SBC/AT&T and thus is not exempt under Exemption 5.⁵⁶ CompTel states that the Commission cannot justify EB’s redactions and withholding because these are “settlement” documents and “[t]here is no settlement privilege under Exemption 5.”⁵⁷ However, Commission precedent permits the withholding of material relating to settlement discussions pursuant to Exemption 5.⁵⁸ We see nothing in the facts before us that would support reversing our precedent in this matter.

⁵¹ AFR at 9.

⁵² See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)

⁵³ See *id.* at 152-154; *City of Va. Beach v. Dep’t of Commerce*, 995 F.2d 1247, 1254-56 (4th Cir. 1993) (emphasizing the importance of the context of documents for determining whether responsive material is deliberative and pre-decisional even if it relates to and discusses past decisions or actions).

⁵⁴ AFR at 9.

⁵⁵ There is some additional factual information in the emails relating to another investigation that is now dated and can be released. In addition, certain additional management level staff names also will be disclosed by EB’s redaction corrections. The redacted substantive information, however, is deliberative and pre-decisional.

⁵⁶ CompTel also argued that EB did not demonstrate that the documents withheld under Exemption 5 were kept confidential. CompTel provides no evidence that any documents withheld were provided to anyone other than SBC. Moreover, we see no indication that the documents withheld were shared with anyone outside the Commission except for the documents exchanged with SBC in settlement discussions and one document exchanged between SBC and EB under Exemption 5 that was not a “settlement” document. That latter document is a copy of a company response to an EB Letter of Inquiry (LOI) with the handwritten notations of FCC staff. A “clean” copy of the LOI response, without FCC staff annotations, was also in the file and was provided to CompTel in response to its 2005 FOIA request, redacted only for certain discrete commercial information protected under Exemption 4. Because even the placement of redactions on the document could indicate the deliberative analysis of the staff, which is protected under Exemption 5, we agree with EB that the document can be protected under Exemption 5 and the information in it need not be segregated and redacted in order to provide the releasable information twice.

⁵⁷ AFR at 7.

⁵⁸ *Nat’l Ass’n of Broadcasters*, 24 FCC Rcd at 12321-22; *Wireless Consumer Alliance*, 20 FCC Rcd at 3888, n.55 (withholding draft consent decrees exchanged between the parties under both Exemptions 4 and 5 and noting the recognition of a settlement privilege in civil litigation in *Goodyear Tire & Rubber Co. v. Chiles Power Supply Inc.*, 332 F.3d 976 (6th Cir. 2003)).

18. CompTel also objects to EB's withholding copies of EB memoranda "summarizing issues in another E-rate matter and discussing possible courses of action, with handwriting and edits."⁵⁹ CompTel argues, *inter alia*, that a summary of issues is likely to be factual rather than deliberative and that any statements of facts in EB's memoranda or elsewhere must be produced.⁶⁰ We have reviewed the memoranda. They constitute the work product of EB attorneys prepared in anticipation of the administrative litigation that may ensue from enforcement investigations, as well as potential federal court litigation challenging such enforcement actions. As the U.S. Court of Appeals for the D.C. Circuit has found, the inclusion of factual material in attorney work product reflects the work product of selecting relevant facts rendering the whole work product protected under the FOIA.⁶¹ EB was correct in withholding the substantive portions of the memoranda in their entirety.

19. Exemption 4. Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁶² CompTel argues that information in settlement documents and exchanges cannot be withheld under Exemption 4 because it would be irrational for a company to provide sensitive trade secrets or confidential commercial information in settlement discussions of consent decrees.⁶³ The Commission previously has protected confidential commercial information provided in settlement documents under Exemption 4.⁶⁴ Here, EB withheld, pursuant to Exemption 4 as well as Exemption 5, a copy of a draft consent decree with proposed edits by SBC/AT&T and notations by FCC Staff, a draft compliance plan proffered by SBC, and portions of a short related email. The final consent decree and compliance plan agreed to by both parties are publicly available and not at issue here.⁶⁵ The non-public drafts and associated email were submitted voluntarily for the purpose of settling the Commission's enforcement action.⁶⁶ When addressing the coverage of Exemption 4 for voluntarily submitted confidential information, we look at whether the material is of a kind that would not customarily be released to the public.⁶⁷ Material provided and exchanged in settlement negotiations is not customarily released to the public by the provider or other parties. Moreover, commercially sensitive information can be withheld under the FOIA even when it is involuntarily submitted, if disclosure would impair the government's ability to obtain such information in the future or harm the competitive position of the submitting party.⁶⁸ Disclosure of settlement discussion material could harm the commercial interests of submitting parties and is very likely to impair the Commission's ability to carry out settlement negotiations efficiently, contrary to the public interest in conserving scarce government resources and in encouraging settlement negotiations.⁶⁹ Thus, the material

⁵⁹ AFR at 11.

⁶⁰ *Id.*

⁶¹ *Judicial Watch v. Dep't of Justice*, 432 F.3d at 371.

⁶² 5 U.S.C. § 552(b)(4).

⁶³ AFR at 8.

⁶⁴ See, e.g., *Nat'l Ass'n of Broadcasters*, 24 FCC Rcd at 12321-22; *Wireless Consumer Alliance*, 20 FCC Rcd at 3874.

⁶⁵ See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-3893A1.pdf and http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-3893A2.pdf.

⁶⁶ EB noted on the redacted documents that these settlement documents were also protected by Exemption 5.

⁶⁷ See *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992).

⁶⁸ See *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

⁶⁹ *Accord M/A-Com Information Systems v. HHS*, 656 F. Supp 691, 692-92 (D.D.C. 1986) (addressing settlement negotiation information, including proposed compliance measures, and finding "it is in the public interest to (continued ...)

at issue could be withheld even if it were deemed to be involuntarily submitted. We see no reason to set aside EB's determination to withhold these documents.

20. Fee Issue. Finally, we address a related administrative matter. In its FOIA request, CompTel committed to pay \$100 for search, review and duplication costs and the parties did not otherwise address the related fee.⁷⁰ In the *2011 FOIA Decision*, EB determined the FOIA fee in this matter thus would be \$100.⁷¹ On November 12, 2011, the Revenue & Receivables Operations Group of the Commission's Office of Managing Director invoiced CompTel for the fee as determined by EB on November 1, 2011. On December 19, 2011, 48 days after the date of the fee determination, CompTel sent a letter to the Revenue & Receivables Operations Group discussing CompTel's view that EB should have determined the fee to be \$15.81 and enclosing a check in that amount. However, CompTel did not appeal EB's FOIA fee determination in the instant AFR, nor did it file an application for review on the fee determination during the 30-day time period for appeal under Rule 0.461.⁷² Accordingly, any further releases to CompTel pursuant to this order are stayed until CompTel pays the remainder of the \$100 owed.⁷³

III. ORDERING CLAUSES

21. IT IS ORDERED that CompTel's application for review IS GRANTED to the extent indicated above and is otherwise DENIED. If AT&T 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 CompTel the corrected redacted records as modified above upon payment by CompTel of the FOIA fee it owes. See [47 C.F.R. § 0.461\(i\)\(4\)](#).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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encourage settlement negotiation in matters of this kind and it would impair the ability of [the agency] to carry out its governmental duties if disclosure of this kind of material under FOIA were required. Thus, while the commercial interest may be slight, it should be protected under the exemption.”).

⁷⁰ E-FOIA request from Jonathan Lee/COMPTEL (Apr. 16, 2007).

⁷¹ *2011 FOIA Decision* at 2.

⁷² 47 C.F.R. § 0.461(j) (“an application for review of an initial action on a request for inspection of records, a fee determination (see § 0.467 through § 0.470), or a fee reduction or waiver decision (see § 0.470(e)) may be filed only by the person who made the request. The application shall be filed within 30 calendar days after the date of the written ruling by the custodian of records.”).

⁷³ Although we do not rule on the merits of the arguments in CompTel's December 19, 2011 letter to the Revenue & Receivables Operations Group, given the independent procedural reasons for denying the requested relief, we note that the Commission rejected a similar argument for fee discount when it was made by another applicant. See *Warren Havens, Jimmy Stobaugh, et al.*, Memorandum Opinion and Order, 24 FCC Rcd 12308, 12312, n.30 (2009) (explaining the December 31, 2007 FOIA amendment on fees did not apply to fees for requests submitted before the amendment became effective).