

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

In the Matter of)	
)	
Carly Hawkins)	FOIA Control No. 2012-299
)	
On Request for Inspection of Records)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 2013

Released: January 23, 2013

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order denies an application for review (AFR) filed by Carly Hawkins¹ that seeks review of a decision by the International Bureau (IB).² The Decision addresses Ms. Hawkins's Freedom of Information Act (FOIA) request³ for records concerning a January 2012 report by the Organisation for Economic Co-operation and Development regarding the Review of Telecommunication Policy and Regulation in Mexico (OECD Mexico Policy Review). The AFR seeks Commission review of IB's decision to withhold materials responsive to Ms. Hawkins's request pursuant to the FOIA Exemption 5 deliberative process privilege. The AFR generally argues that the Bureau insufficiently describes the responsive materials or inadequately explains its reasons for withholding most of them. We affirm the Bureau's decision to withhold these materials. We also find that the Bureau segregated and released all appropriate factual material. In addition, we affirm the Bureau's decision not to release the materials subject to Exemption 5 as a discretionary matter.

II. BACKGROUND

2. In the Request, Ms. Hawkins sought:

any information held by the Federal Communications Commission regarding the [OECD Mexico Policy Review] ... released in January 2012. This includes but is not limited to draft copies of the report, minutes or other notes from meetings regarding the review, emails or other correspondence regarding the review, questionnaires from Mexican authorities, interviews with communication

¹ See FOIA Appeal-FOIA Control No. 2012-299, Letter from Scott A. Hodes, Attorney at Law, to General Counsel, FCC (filed July 30, 2012) (AFR).

² See Letter from Sarah VanValzah, Associate Bureau Chief for Management, Admin Office, IB (dated July 12, 2012) (Decision).

³ See Freedom of Information Act Request, Letter from Carly Hawkins to Walter Boswell, FCC (dated April 27, 2012) (FOIA No. 2012-299) (Request).

stakeholders, and comments on the report from stakeholders, including corporations and government representatives. The time period in question is January 2007 to the present.⁴

3. The request was assigned to IB, the Bureau generally responsible for cooperation and consultation with international or foreign organizations on international telecommunications matters on behalf of the Commission,⁵ and in particular staff efforts related to the OECD Mexico Policy Review. Responsive to Ms. Hawkins's request, IB located material in the files of the IB's Strategic Analysis and Negotiations Division (SAND), consisting of internal meeting memoranda and reports (including drafts), and e-mail exchanges among FCC staff.⁶ The responsive documents identify and set forth the staff's views and analysis regarding relevant international issues, strategy at various international meetings, and handling the OECD Mexico Policy Review.⁷ IB found that, although responsive, most of the documents were exempt from disclosure under the deliberative process privilege of FOIA Exemption 5 and thus withheld them.⁸ IB released the responsive documents from which it was able to segregate and extract the deliberative material.⁹ Specifically, it provided Ms. Hawkins with redacted copies of two background papers prepared for Chairman Genachowski.¹⁰

III. APPLICATION FOR REVIEW

4. In the AFR, Ms. Hawkins asks the Commission to review IB's withholding of certain materials that it found are responsive to her Request, challenging IB's Decision on a number of grounds. Throughout the AFR, Ms. Hawkins argues that the Bureau insufficiently describes the responsive materials or inadequately explains its reasons for withholding most of them. Ms. Hawkins suggests that the Decision's lack of description and explanation make it difficult for her to evaluate whether IB improperly withheld responsive material that she is entitled to under the FOIA.¹¹ In particular, she raises the following issues:

- (1) whether the withheld materials were shared with private parties or foreign companies and thus fail to meet Exemption 5, which covers only "inter-agency or intra-agency memorandums;"¹²
- (2) whether the withheld materials meet the deliberative process privilege under Exemption 5 and, in particular, whether they qualify as "pre-decisional" as

⁴ *Id.*

⁵ See 47 C.F.R. § 0.51(f), (a)-(b).

⁶ Decision at 1.

⁷ Decision at 1.

⁸ Decision at 1-2.

⁹ Decision at 2.

¹⁰ *Id.*

¹¹ See *infra* ns. 12, 13, 14, and 15.

¹² AFR at 1-2; see 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub.L.No. 110-175, 121 Stat. 2524. Related to this assertion, the AFR complains that "it is not possible to argue [whether] each specific document" was shared, because "no inventory of withheld documents was provided." AFR at 1-2.

required under this privilege;¹³

(3) whether, even if Exemption 5 applies, there may be factual material that could be segregated and disclosed;¹⁴ and

(4) whether the withheld materials should be disclosed as an exercise of the Commission's discretion in the public interest.¹⁵

IV. DISCUSSION

5. We disagree with Ms. Hawkins that IB's Decision should have provided more description of the responsive materials and more explanation of why certain responsive materials were withheld. Consistent with judicial and Commission precedent,¹⁶ the Commission must provide only "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 what the agency is refusing to produce and why."¹⁷

6. In her AFR, Ms. Hawkins seeks additional information about the "internal meeting memoranda and reports (including drafts), and e-mail exchanges between staff"¹⁸ that the Bureau found responsive to the Request. The responsive documents consist of two internal e-mails, draft and final copies of a document assembling selected summaries of foreign telecommunications-related events for internal staff use ("internal digest"), and draft and final copies of two briefing papers, redacted portions of which IB provided to Ms. Hawkins. Except for one of the internal e-mails, only a small portion of each document is responsive to Ms. Hawkins's Request.

¹³ AFR at 2; *see infra* paras. 8-9. To this end, the AFR asserts that the Decision fails to show how the withheld documents are linked to any "continuing process of examining [the Commission's] policies" pursuant to *NLRB v. Sears Roebuck & Co.*, and faults as "too speculative" the Decision's explanation that "[a]lthough [the withheld documents] are not tied to a specific upcoming Commission decision, they are clearly intended to lay the groundwork for future decisions that the Commission, or the Executive Branch in consultation with the Commission, might make." AFR at 2.

¹⁴ This material would include memos, emails, title pages, headers and footers, and introductory or fact based paragraphs. *See* AFR at 2. The AFR complains that the Decision, for lack of description of the materials withheld, does not make clear how it cannot be segregated. *Id.*

¹⁵ The AFR challenges the IB's conclusion that it was inappropriate to do so because of harm to the integrity of the Commission's deliberative process, stating that the Bureau "never cites [an] actual deliberative process" and that "[i]t is not possible to harm the integrity of something that doesn't exist." *See* AFR at 2-3.

¹⁶ Ms. Hawkins incorrectly asserts that "FCC decisions have no precedential value." *See* AFR at 2 n.1. It is a fundamental requirement of administrative law that agencies are bound to follow, or adequately explain departure from, their own prior rulings. *See, e.g., Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (vacating and reversing Commission decision as arbitrary, where Commission failed to articulate reasons for overruling or distinguishing prior relevant decision and thus "effectively ignored its own obvious precedent").

¹⁷ *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999). The Commission is not required to provide any index, or "inventory" as Ms. Hawkins suggests in her AFR, identifying the withheld documents. It is well established that a *Vaughn* index describing the withheld documents is not required at the administrative level. *See id.; Skybridge Spectrum Found., Maritime Communications/Land Mobile LLC, Paging Systems Inc.*, 25 FCC Rcd 11064, 11071 n.39 (2010) (citing *Wireless Consumer Alliance*, 20 FCC Rcd 3874, 3878 (2005)).

¹⁸ Decision at 1.

7. We first address Ms. Hawkins's concern that the documents may have been "shared with private parties or foreign companies" and thus are not "inter-agency or intra-agency memorandums" for purposes of Exemption 5.¹⁹ As the Bureau noted, Exemption 5 applies to "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."²⁰ In response to the AFR, we reviewed the efforts made by IB staff in connection with the original Response. IB staff confirmed that none of the responsive documents has been "shared with private parties or foreign companies,"²¹ or otherwise shared with any party outside the government. Thus, we find that the documents that IB withheld were "inter-agency or intra-agency memorandums" for purposes of Exemption 5.

8. Next, we address Ms. Hawkins's argument that Exemption 5 does not apply to the withheld material because the documents do not qualify as "predecisional" as required to apply the deliberative process privilege under Exemption 5. As found by the Bureau, to fall within the scope of the deliberative process privilege, documents must be predecisional, *i.e.*, "generated before the adoption of an agency policy [*i.e.*, a decision]."²² In particular, the Bureau correctly relied on the principle, established in the Supreme Court's decision in *NLRB v. Sears Roebuck & Co.*,²³ that the existence of the deliberative process privilege does not turn on the ability of the agency to identify a specific decision in connection with which a document was prepared.²⁴ *NLRB* recognized that the privilege also applied to agency documents generated as part of "a continuing process of examining their policies."²⁵

9. The internal emails are predecisional because they concern background preparation for Chairman Genachowski's future meetings with Mexican visitors, and background preparation for future meetings between Commission staff and their Mexican counterparts concerning the U.S. – Mexico relationship as it pertains to telecommunications. The draft and final copies of two briefing papers prepared for Chairman Genachowski similarly concern background preparation for the Chairman's future meetings with Mexican visitors. The draft and final copies of the internal digest are predecisional because they reflect staff's selection and organization of information gleaned from foreign counterparts and other sources about newly-breaking foreign regulatory issues that may form the basis of Commission policy positions.²⁶ Thus, even though IB does not identify a final Commission decision to which any of these documents contributes, we find, in accordance with *NLRB*, that these materials were prepared "as

¹⁹ AFR at 1.

²⁰ Decision at 1 (quoting 5 U.S.C. § 552(b)(5)).

²¹ See AFR at 1-2.

²² See *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). In addition, material within the scope of the privilege must be deliberative, *i.e.*, "[reflecting] the give-and-take of the consultative process." *Id.*

²³ *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975) (*NLRB*).

²⁴ Decision at 2 n.4.

²⁵ *NLRB*, 421 U.S. at 151 n.18.

²⁶ See, e.g., *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974) (summaries of factual material selected by staff from publicly available sources for use by agency officials in decisionmaking were deliberative process material).

part of a continuing process of examining ... policies”²⁷ that may be made by the Commission, or the Executive Branch in consultation with the Commission.²⁸

10. We also affirm the Bureau’s determination that the only segregable material that should be released consists of portions of the final versions of briefing papers prepared for Chairman Genachowski. We have reviewed the responsive materials and agree with IB that there is no additional information that could be segregated and disclosed, because we find that it reflects staff personal opinions and analysis.²⁹ As indicated in the Decision, the deliberative process privilege applies to subjective documents reflecting the personal opinions, analysis, and advice of the staff on the relevant issues and are not established agency policy.³⁰ The privilege does not apply to purely factual material that is severable from the deliberative context.³¹ The responsive information in the internal email chains is clearly deliberative process material, not factual information that could be segregated and disclosed. As to the draft and final copies of the internal digest, material that is arguably factual was properly withheld by IB because the mere fact of its selection from a vast amount of factual material for inclusion in the digest, whether in draft or final form, reveals the thought processes of IB staff as to what international regulatory issues are likely to become important to senior Commission staff and why. Like the other responsive information that was withheld in these documents, it reflects staff opinion on international telecommunications-related issues for which senior Commission officials and staff likely may need to develop a policy position. Thus, all responsive information in the copies of the internal digest was withheld, and no “title pages, headers and footers” or any other factual information is segregable. The draft and final copies of the background papers prepared for Chairman Genachowski’s meetings with Mexican visitors, contain responsive information that arguably is factual as well. The information was not disclosed, however, because its inclusion in the documents reveals the staff’s judgment as to topics these officials might choose to discuss, and the position the Chairman might want to take, during the meetings. Like the other responsive information that was withheld in these documents, it reflects staff input on appropriate use of the information in the Chairman’s meeting with Mexican visitors. Moreover, where the material in these documents was drawn from the OECD Mexico Policy Review and other publicly available sources, its disclosure would chill the process by which Commission staff determines the relevance of factual information to the purpose of the document at issue.

11. In certain cases, documents that are properly withheld under FOIA Exemption 5 may be released as a matter of agency discretion.³² In considering whether to exercise our discretion in this manner, we look, for example, at whether there is an overriding public interest in releasing records that have been determined to be exempt from disclosure that outweighs any

²⁷ *Id.*

²⁸ See Decision at 2.

²⁹ See Decision at 2.

³⁰ See Decision at 2 (citing *EPA v. Mink*, 410 U.S. 73, 87-88 (1973), and *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

³¹ *Id.*

³² 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 www.justice.gov/oip/obama_holder_foia_memo_march2009.pdf website).

potential harm to the integrity of the Commission's processes.³³ After our review of the responsive documents, we concur with IB's conclusion that "release would be inappropriate, in light of the harm this would cause to the integrity of the deliberative process."³⁴ We see no overriding public interest that would be served by releasing this information even though we find that it is privileged.

V. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED that the application for review filed by Carly Hawkins IS DENIED. Ms. Hawkins may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).³⁵

13. The officials responsible for this action are the following: Chairman Julius Genachowski and Commissioners Robert McDowell, Mignon Clyburn, Jessica Rosenworcel, and Ajit Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³³ See, e.g., *IBM Corp.*, Memorandum Opinion and Order, 25 FCC Rcd 11085, 11092-93 (2010).

³⁴ Decision at 2, citing *Warren Havens*, 24 FCC Rcd 12308, 12319 ¶ 22 (2009) (declining to make discretionary release of material exempt under deliberative process privilege).

³⁵ 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 Ms. Hawkins's right to pursue litigation. Ms. Hawkins may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
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E-mail: ogis@nara.gov
Telephone: 301-837-1996
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Toll-free: 1-877-684-6448.