

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

In the Matter of)	
)	
THE CONSUMER LAW GROUP)	FOIA Control No. 2012-300
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 2013

Released: January 18, 2013

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we dismiss as untimely, and separately and independently deny, an application for review (AFR) filed by The Consumer Law Group (CLG).¹ CLG seeks review of a decision² by the Enforcement Bureau (EB) denying in part CLG's Freedom of Information Act (FOIA) request.³ CLG's AFR was not filed within the 30 day period applicable to applications for review. We further find that even if we were to consider the AFR on the merits, we would uphold EB's Decision.

II. BACKGROUND

2. CLG's FOIA Request sought documents relating to a notice of apparent liability (NAL) issued to Touch-Tel USA, LLC (Touch-Tel), in which the Commission assessed a forfeiture of \$5,000,000 based on findings that Touch-Tel had deceptively marketed pre-paid calling cards.⁴ Among the documents requested by CLG was the FCC Form 499-A reporting Touch-Tel's 2010 revenues, which was referenced in the NAL.⁵ Because Touch-Tel had indicated on the Form 499-A that the revenue

¹ See Letter from Alan M. Mansfield to Office of General Counsel (dated Aug. 17, 2012, rec'd Aug. 20, 2012) (AFR). Touch-Tel USA LLC responded to the AFR on November 27, 2012 after being informed by the office of General Counsel that the AFR was pending. See Letter from Michael B. Hazzard and Katherine E. Barker Marshall to Marlene H. Dortch, Secretary (Nov. 27, 2012) (Response).

² See Letter from Richard A. Hindman, Chief, Telecommunications Consumer Division to Alan M. Mansfield (Jul. 18, 2012) (July 18 Decision). In an earlier Decision, EB released some material and made certain preliminary findings. See Letter from Richard A. Hindman, Chief, Telecommunications Consumer Division to Alan M. Mansfield (Jun 22, 2012) (June 22 Decision).

³ See e-mail from Alan M. Mansfield to FOIA@fcc.gov (Apr. 30, 2012) (Request).

⁴ See Touch-Tel USA, LLC, 26 FCC Rcd 12836 (2011) (NAL).

⁵ See Request at 1; NAL, 26 FCC Rcd at 12843 n.43. Telecommunications service providers use FCC Form 499-A to report their annual revenues for the purpose of computing their contributions to the Universal Service Fund.

information was confidential, EB notified Touch-Tel of CLG's FOIA Request, pursuant to 47 C.F.R. § 0.461(d)(3), to give Touch-Tel the opportunity to object to disclosure of the information requested. In so doing, EB told Touch-Tel that, under the rule, if it failed to respond within the time specified, Touch-Tel would be considered to have no objection to disclosure. Touch-Tel did not respond to the notification.⁶

3. In its July 18 Decision, EB released the FCC Form 499-A, but redacted financial information regarding Touch-Tel's revenues as confidential pursuant to FOIA Exemption 4.⁷ EB found that, in prior cases, the Commission had consistently found that revenue information contained in Form 499-A was the kind of competitively sensitive material subject to withholding under Exemption 4.⁸ EB redacted the confidential material from the Form 499-A, despite the fact that Touch-Tel had failed to object to disclosure after being notified of the FOIA request pursuant to section 0.461(d)(3).⁹

4. CLG's AFR contends that EB should not have redacted the revenue information from the Form 499-A pursuant to Exemption 4 in view of the fact that Touch-Tel did not object to release of the information.¹⁰ CLG further contends that Touch-Tel did not object to the NAL's finding that Touch-Tel could afford the \$5,000,000 forfeiture, which CLG interprets as indicating Touch-Tel's consent to release of the information supporting that finding.¹¹ Touch-Tel responds that revenue information should clearly be deemed the type of information that should be withheld under Exemption 4, even in the absence of an objection.¹² Touch-Tel urges that its failure to object to the NAL's finding should not be interpreted as consent to disclosure of any information.¹³

III. DISCUSSION

5. We dismiss CLG's AFR as untimely. Section 0.461(j) of our rules provides that applications for review of FOIA decisions must be filed within 30 days of the date of the written ruling by the custodian of the records (here, EB).¹⁴ The 30 days to be counted in computing the time period began on July 19, the day after the date appearing on EB's Decision.¹⁵ Thus, CLG was required to file its AFR

⁶ See June 22 Decision at 2-3; July 18 Decision at 1.

⁷ See July 18 Decision at 2. See also 5 U.S.C. § 552(b)(4). Exemption 4 protects from disclosure: "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

⁸ See June 22 Decision at 3-4.

⁹ See July 18 Decision at 1.

¹⁰ See AFR at 1.

¹¹ See *id.*

¹² See Response at 1-2.

¹³ See *id.* at 3.

¹⁴ See 47 C.F.R. § 0.461(j). See also July 18 Decision at 2 (noting the 30-day filing requirement).

¹⁵ See 47 C.F.R. § 1.4(c) (the first day to be counted when a period of time begins with the occurrence of an event is the day after the event). See also 47 C.F.R. § 1.4(b)(5) (For documents not published in the Federal Register, released to the public, or referenced in a public notice, Commission action occurs on the date appearing on the document).

by August 17, 2012, the 30th day. CLG's AFR is dated August 17, 2012 but was not received until August 20.¹⁶ Under the Commission's rules, documents are considered to be filed on their receipt.¹⁷ The AFR was therefore untimely, and we dismiss it for that reason.¹⁸

6. As a separate and independent ground for our decision, we find that, even if we were to consider the merits of the AFR, we would deny it. EB correctly noted that past cases have consistently found revenue information to be the type of competitively sensitive material that should be withheld under Exemption 4.¹⁹ In this regard, we note that our rules provide that the Commission may on its own motion determine that materials should be withheld from public inspection,²⁰ so that EB was authorized to redact these materials even in the absence of objection from Touch-Tel. Moreover, notwithstanding its failure to object to disclosure as provided by section 0.461(d)(3), Touch-Tel's Response to the AFR makes clear that Touch-Tel does, in fact, object to disclosure. We also agree with Touch-Tel²¹ that the general statements about its revenues in the NAL do not reveal the confidential financial information that releasing the Form 499-A would. Taking all circumstances into account, we find that EB properly redacted the confidential material. Thus, we would deny the AFR on its merits.

IV. ORDERING CLAUSES

7. ACCORDINGLY, IT IS ORDERED, that the Application for Review filed by The Consumer Law Group IS DISMISSED and, separately and independently, IS DENIED. CLG may seek

¹⁶ See AFR at 1 (date stamp).

¹⁷ See 47 C.F.R. § 1.7.

¹⁸ See *Michael C. Olson*, 13 FCC Rcd 20593 ¶ 1 (1998) (dismissing application for review filed one day late); *Application of Board of Education of the City of Atlanta*, 11 FCC Rcd 7763, 7765-66 ¶ 6 (1996) (same).

¹⁹ See *Skybridge Spectrum Foundation v. FCC*, 842 F. Supp.2d 65, 81-82 (D.D.C. 2012) (upholding FCC's withholding of revenue data on Forms 499-A and 499-Q); *John E. Wall*, 22 FCC Rcd 2561, 2562 ¶ 3 (2007) (withholding Form 499-A data); *The Lakin Law Firm*, 19 FCC Rcd 12727 12729-30 ¶ 6 (2004) (withholding data that would enable competitors to estimate carrier revenues).

²⁰ See 47 C.F.R. § 0.459(f) ("in the unusual instance, [the Commission] may determine on its own motion that the material should be withheld from public inspection"). See also *The Western Union Telegraph Co.*, 2 FCC Rcd 4485, 4486 ¶ 9 (1982) ("In light of the important financial data contained in these submissions, we find that this constitutes such an unusual instance").

²¹ See Response at 3.

judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).²²

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

FEDERAL COMMUNICATIONS COMMISISON

Marlene H. Dortch
Secretary

²² 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 CLG's right to pursue litigation. CLG may contact OGIS in any of the following ways:

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