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

In the Matter of	)	
	)	
JASON SMATHERS	)	FOIA Control No. 2014-177
	)	
On Request for Inspection of Records	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 2014 **Released: May 20, 2014**

By the Commission:

1. This order addresses an application for review (AFR)[1] filed by Jason Smathers in connection with his Freedom of Information Act (FOIA) request seeking "any emails in the Federal Communications Commission FOIA Office that contain the word Smathers."[2] The Office of Managing Director, Performance Evaluation & Records Managements (OMD-PERM) responded to the Request, providing Mr. Smathers with a number of responsive records.[3] Among other redactions, OMD redacted portions of the records pursuant to FOIA Exemption 5[4] because release would reveal the mental processes of decision makers.[5]

2. Mr. Smathers' AFR appeals the redactions made by OMD-PERM under Exemption 5, and requests copies of the responsive documents without redaction.[6] Mr. Smathers asserts that because the responsive records concern his FOIA requests, all of which the agency has acted on, then at least some of the statements redacted have been adopted by the agency as the "official agency position" for the FOIA request at issue and therefore should be disclosed.[7] We deny the AFR.

3. Mr. Smathers' AFR may be read as claiming that once the agency has made a final decision, the documents no longer may qualify as "predecisional" as required to apply the deliberative process privilege under Exemption 5, or that the Commission adopted the reasoning in the emails and therefore Exemption 5 does not apply. Neither argument has merit.

4. FOIA 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."[8]

[1] *See* Review of Freedom of Information Action FOIA Appeal by Jason Smathers (filed March 13, 2014) (AFR).

[2] Email from Jason Smathers to FOIA Officer (filed January 22, 2014) (Request).

[3] Letter from Stephanie D. Kost, FCC FOIA Public Liaison, to Jason Smathers (dated February 27, 2014) (Response).

[4] 5 U.S.C. § 552(b)(5).

[5] Response at 1.

[6] *See* AFR.

[7] *Id.*.

[8] *See* 5 U.S.C. § 552(b)(5).

Exemption 5 encompasses the deliberative process privilege, which is intended to "prevent injury to the quality of agency decisions."[9] To fall within the scope of the deliberative process privilege encompassed by Exemption 5, records must be both pre-decisional, *i.e.,* "generated before the adoption of an agency policy [*i.e.*, a decision]," and deliberative, *i.e.*, "[reflecting] the give-and-take of the consultative process."[10]

5. It is well established that the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision, even if the final document reflects the predecisional material.[11] This is consistent with the privilege's protection not merely of documents, but of the integrity of the agency's decisionmaking process.[12] Moreover, although an agency may waive the protection of the deliberative process privilege by "choos[ing] expressly to adopt or incorporate [protected material] by reference" in the agency's final decision,[13] we see nothing to support a claim that the Commission waived Exemption 5 by adoption in any of the FOIA proceedings involving Mr. Smathers. None of the staff opinions that were redacted are even referenced in the FOIA responses to Mr. Smathers' requests, and thus there is no reasonable basis for suggesting there has been express adoption or incorporation by reference, as required to support a waiver.[14] We therefore reject Mr. Smathers' arguments and uphold OMD-PERM's application of Exemption 5.

6. ACCORDINGLY, IT IS ORDERED that the AFR from Jason Smathers in FOIA Control No. 2014-177 is DENIED, as set forth herein. Mr. Smathers may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).[15]

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[9] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

[10] *See, e.g., Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d. 141, 151 (D.C. Cir. 2006).

[11] *See, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 359-60 (1979); *Electronic Privacy Information Center v. Transportation Sec. Admin*., 928 F.Supp.2d 156, 169 (D.D.C. Mar 07, 2013); *John Dunbar*, 23 FCC Rcd 9850, 9851 (2008).

[12] *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150, *L. Lloyd Morgan*, 26 FCC Rcd 13823, 13825-26 (2011).

[13] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 161.

[14] *See id.*; *Electronic Frontier Foundation v. U.S. Dept. of Justice*, 739 F.3d 1, 10-11 (D.C. Cir. 2014) (it must be evident that agency adopts staff report as agency's reasoning, even when agency's final decision agrees with conclusions of the report); *Everett*, 16 FCC Rcd 4322, 4324 n.17 (2001).

[15] 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 Mr. Smathers' right to pursue litigation. Mr. Smathers 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.

7. The officials responsible for this action are the following: Chairman Wheeler, and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary