

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

In the Matter of )
GENEVIEVE SCHMITT ) FOIA Control No. 2014-029
On Request for Inspection of Records )

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 2014

Released: June 30, 2014

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order denies an application for review filed by Genevieve Schmitt (Schmitt), which seeks review of a determination by the Enforcement Bureau (EB) classifying her as a commercial use requester for purposes of computing fees for her Freedom of Information Act (FOIA) request. We find that EB correctly categorized Schmitt as a commercial use requester and that EB adequately supported its computation of estimated fees.

II. BACKGROUND

2. Schmitt filed her FOIA Request as attorney for a company called Dialing Services, LLC (Dialing Services). Her Request relates to enforcement proceedings initiated by EB against Dialing Services (EB-TCD-12-00001812, EB-07-TC-566) and another (apparently unaffiliated) company called Democratic Dialing (EB-TCD-12-00004943). Both investigations involve allegations that the subject of the investigation violated 47 U.S.C. § 227(b) and 47 C.F.R. § 64.1200. These provisions (1) prohibit making any calls to cell phones using autodialers or artificial or prerecorded messages absent an emergency purpose or prior express consent; and (2) require certain identification information for otherwise permissible prerecorded messages.

3. The Request sought three categories of information:

1 See Letter from Genevieve C. Schmitt to Office of General Counsel (Dec. 13, 2013) (AFR). Ms. Schmitt filed her request in her capacity as an associate with the law firm Roth Doner Jackson, PLC.

2 See AFR, Exhs. B, D, and F (Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, Enforcement Bureau to Ms. Genevieve Schmitt, Esq. (Oct. 29, 2013) (October 29 Letter); Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, Enforcement Bureau to Ms. Genevieve Schmitt, Esq. (Nov. 7, 2013) (November 7 Letter); Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, Enforcement Bureau to Ms. Genevieve Schmitt, Esq. (Nov. 21, 2013) (November 21 Letter)). Schmitt's AFR was timely filed within 30 days of the November 21 Letter.

3 See e-mail from Genevieve Schmitt to FOIA@fcc.gov (Oct. 21, 2013) (Request).

4 See AFR at 1.

5 See Democratic Dialing, Citation and Order, 28 FCC Rcd 1831 (TCD Mar. 15, 2013); Dialing Services, LLC, Citation and Order, 28 FCC Rcd 1840 (TCD Mar. 15, 2013); AFR, Exh. I (Letter from Chris Kolker to Federal Communications Commission (received Apr. 3, 2007)). See also AFR, Exhs. H, J (investigation-related documents). Both Dialing Services and Democratic Dialing provide so-called robocalling services.

- Any response to the letter of investigation submitted to the Commission by or on behalf of Richard Gilmore d/b/a Democratic Dialing pertaining to File No.: EB-TCD-12-00004943, including file attachments, documents, and sound recordings;
- Any response, appeal, request for reconsideration, etc. filed by or on behalf of Richard Gilmore d/b/a Democratic Dialing to the Citation and Order issued by the Commission on March 15, 2013 in File No.: EB-TCD-12-00004943; and
- Any complaints, correspondence or any communication filed or otherwise submitted to the Commission by any individuals, businesses, or entities pertaining to Dialing Services, LLC.<sup>6</sup>

4. On October 29, 2013, EB informed Schmitt that she had been classified as a “commercial use” requester under 47 C.F.R. § 0.466(a)(4).<sup>7</sup> As such, Schmitt would be responsible for all direct costs of searching for, reviewing, and duplicating responsive records<sup>8</sup> and would not be eligible for the reduced fees that are associated with other categories of requesters.<sup>9</sup> EB estimated that these costs would be \$3,226.<sup>10</sup> On November 1, 2013, Schmitt clarified that the purpose of the Request was to seek information that would exculpate Dialing Services in the pending proceedings. She asserted that, in view of this circumstance, she should not be classified as a commercial use requester.<sup>11</sup> EB responded, however, that Schmitt was properly classified as a commercial use requester and reaffirmed the \$3,226 fee estimate.<sup>12</sup>

5. In response, Schmitt amended her Request to drop the third category entirely and add a new category.<sup>13</sup> In separate correspondence, Schmitt indicated that she was willing to pay a maximum of \$50 for processing her Request (as amended).<sup>14</sup> In view of the amended Request, EB submitted a revised fee estimate of \$2,338 and asked Schmitt to provide assurance by December 13, 2013 that she would pay this amount.<sup>15</sup>

6. Schmitt filed an AFR on that date. In the AFR, Schmitt contends that she should not be classified as a commercial use requester, reiterating that the purpose of her Request is to seek documents to support her client’s defense. In support of her contention, she argues that “it defies logic” to label a party subjected without choice to Commission investigation as a commercial requester. She further argues that the Bureau’s interpretation of the term “commercial use” would render a provision in the

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<sup>6</sup> See Request at 1.

<sup>7</sup> See October 29 Letter at 1-2.

<sup>8</sup> See 47 C.F.R. § 0.470(a)(1).

<sup>9</sup> See 47 C.F.R. § 0.470(a)(2) (educational and non-commercial scientific institution requesters and requesters who are representatives of the news media – required only to pay duplicating costs after the first 100 pages but no search or review costs); 47 C.F.R. § 0.470(a)(3) (all other requesters – required to pay only search costs after the first two hours and duplicating costs after the first 100 pages but no review costs). See also *infra* paragraph 10.

<sup>10</sup> See October 29 Letter at 2.

<sup>11</sup> See AFR, Exh. C (e-mail from Genevieve Schmitt to Stacey Weiss and Johnny Drake (Nov. 1, 2013)).

<sup>12</sup> See November 7 Letter at 2-4.

<sup>13</sup> See AFR, Exh. E (e-mail from Genevieve Schmitt to Lisa Williford (Nov. 12, 2013)). Her new category requested: “Any word document, pdf or excel spreadsheet identifying telephone numbers called [that Democratic Dialing] submitted in [Democratic Dialing’s] response(s) to the Letter of Investigation for File No.: EB-TCD-12-00004943. To the extent full telephone numbers may not be publicly disclosed, I request the area code and first four digits of such telephone numbers.”

<sup>14</sup> See e-mail from Genevieve Schmitt to Stacey Weiss (Nov. 14, 2013).

<sup>15</sup> See November 21 Letter at 2-3.

FOIA statute providing for reduced fees to other requesters “useless and pointless.”<sup>16</sup> She also asserts that cases relied on by EB to support its determination are irrelevant because they address the issue of fee waiver not fee category classification.<sup>17</sup> Additionally, Schmitt alleges that there is a possible conflict of interest in that the Chief of the Telecommunications Consumers Division, who is overseeing the enforcement proceedings against Dialing Services, also determines whether Dialing Services has access to potentially exculpatory information.<sup>18</sup> Finally, Schmitt asserts that, in the event she is classified as a commercial use requester, EB has not adequately justified the amount of its fee estimate.<sup>19</sup>

### III. DISCUSSION

7. We find that EB properly classified Schmitt as a commercial use requester and disagree with Schmitt’s assertion that this classification is not appropriate because she is seeking the documents to defend a client subject to a Commission investigation. Under 47 C.F.R. § 0.466(a)(4), we classify as a commercial use a request filed for any use or purpose that furthers the commercial interests of the requester, which would include defending those interests in litigation.

8. Here, Schmitt filed her request on behalf of her client, a business corporation, to obtain information for use in an enforcement proceeding arising from her client’s business activities. We find that a request intended to defend a corporation’s business activities against possible enforcement action serves a commercial interest within the scope of the Commission’s rules. Further, we agree with EB that judicial precedent squarely holds that FOIA requests to obtain information in connection with business-related litigation and enforcement proceedings are commercial use requests.<sup>20</sup> In *Avondale Industries, Inc. v. NLRB*,<sup>21</sup> the court upheld the classification as a commercial use requester a shipbuilding company that sought information for purposes of contesting union election results and/or defending itself in unfair trade practice proceedings. Similarly, in *Rozet v. Dep’t of Housing and Urban Dev’t.*,<sup>22</sup> the court found that the requester, the owner of HUD-assisted low income housing, was a commercial use requester, based on the fact that the request closely followed, and was related to, the initiation of a lawsuit by HUD against the requester and his corporations. In a third court case cited by EB, *Research Air, Inc. v. Kempthorne*,<sup>23</sup> the court denied a fee waiver request by the owner of a low-level commercial flight tracking business, who sought information to expunge reported violations of agency flight rules, holding that the request primarily benefitted the requester’s “commercial interest.”<sup>24</sup>

9. We disagree with Schmitt’s argument that these cases are “fee waiver” cases that are not applicable to the issue of commercial use “fee classification.” First, we would note that the first two cases cited by EB were indeed fee classification cases, not fee waiver issues. Second, while the third case involved a fee waiver rather than a fee classification, it is still relevant to the analysis here. A finding of

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<sup>16</sup> See AFR at 3-4. See also *infra* paragraph 10.

<sup>17</sup> See AFR at 4-5.

<sup>18</sup> See *id.* at 2, 5.

<sup>19</sup> See *id.* at 5.

<sup>20</sup> See November 7 Letter at 3.

<sup>21</sup> No. Civ.A. 96-1227 (E.D. La. Mar. 20, 1998), reported at 1998 WL 34064938 at \*5.

<sup>22</sup> 59 F. Supp.2d 55, 57 (D.D.C. 1999).

<sup>23</sup> 589 F. Supp.2d 1, 10 (D.D.C. 2008).

<sup>24</sup> Commission case law is also consistent with this precedent. In *Skybridge Spectrum Foundation*, 26 FCC Rcd 14864, 14867 ¶ 12 (2011), the Commission classified as a commercial use requester a non-profit entity established to undertake activities on behalf of commercial wireless businesses, including their legal defense.

“commercial interest” is a factor of decisional significance both with respect to a fee waiver determination and the classification of a commercial use requester.<sup>25</sup>

10. We also find unpersuasive Schmitt’s contention that such an interpretation renders provisions of the FOIA -- and, by extension, the Commission’s rules -- “useless and pointless.”<sup>26</sup> The FOIA and Commission’s rules designate three mutually exclusive categories of FOIA requesters for FOIA fee purposes. These are: (1) commercial use requesters, required to pay all direct costs of searching for, reviewing, and duplicating responsive records;<sup>27</sup> (2) educational and non-commercial scientific institution requesters and requesters who are representatives of the news media, required only to pay duplicating costs after the first 100 pages, but no search or review costs;<sup>28</sup> and (3) all other requesters, required to pay only search costs after the first two hours and duplicating costs after the first 100 pages, but no review costs.<sup>29</sup> Schmitt apparently believes she should be classified as an “all other” requester. The fact that we classify her, consistent with law and precedent, as a commercial use requester, does not render the “all other” category “useless and pointless.” The “all other” category includes requesters who are not commercial use requesters under category 1 but who do not meet the specific criteria necessary to qualify for the educational/scientific/news media reduction provided under category 2. For example, an ordinary member of the public seeking information for personal reasons would qualify as an “all other” requester.<sup>30</sup>

11. Finally, we find that EB adequately justified its fee estimate of \$2,338. We have consulted with EB, which indicates that the basis of the fee determination is as follows. EB estimates that there are approximately 4,000 pages of documents responsive to the Request. EB estimates that it will require about one hour to search for these documents and 28 hours to review them and redact exempt material. Search and review will be conducted by GS-15 employees, at \$80.65 per hour, inasmuch as these are the employees who are familiar with the documents and are thus able to locate and review them.<sup>31</sup> We find that EB’s estimates are reasonable, and we accept them.

12. The time for processing Schmitt’s FOIA request has been tolled pending resolution of the fee issue.<sup>32</sup> Schmitt should notify EB within 10 working days of the release date of this memorandum opinion and order of her willingness to pay the estimated fee. If she does not do so, EB should close the file on her FOIA request.

#### IV. ORDERING CLAUSES

13. IT IS ORDERED that the application for review filed by Genevieve Schmitt IS DENIED. Schmitt may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).<sup>33</sup>

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<sup>25</sup> Compare 47 C.F.R. § 0.470(e)(1),(3) (fee waiver standard) with 47 C.F.R. § 0.466(a)(4) (definition of commercial use requester).

<sup>26</sup> See AFR at 4.

<sup>27</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(I); 47 C.F.R. § 0.470(a)(1).

<sup>28</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II); 47 C.F.R. § 0.470(a)(2).

<sup>29</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(III); 47 C.F.R. § 0.470(a)(3).

<sup>30</sup> Because we determine, based on our independent review of EB’s decisions, that Schmitt is a commercial use requester, we need not address Schmitt’s conflict of interest assertion.

<sup>31</sup> See Public Notice, *Modification of Freedom of Information Act Fee Schedule*, DA 10-97 (Jan. 19, 2010); 47 C.F.R. § 0.467(a) and Note to (a)(1).

<sup>32</sup> See 47 C.F.R. § 0.461(e)(2)(i)(B).

<sup>33</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

14. 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

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a non-exclusive alternative to litigation. Using OGIS services does not affect Schmitt’s right to pursue litigation. Schmitt 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](mailto:ogis@nara.gov)  
Telephone: 301-837-1996  
Facsimile: 301-837-0348  
Toll-free: 877-684-6448.