

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

In the Matter of )
WARREN HAVENS ) FOIA Control Nos. 2014-650 and 2014-664
SKYBRIDGE SPECTRUM FOUNDATION ) FOIA Control Nos. 2014-651 and 2014-663
On Request for Inspection of Records )

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 2016

Released: September 8, 2016

By the Commission: Commissioner Pai approving in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. This memorandum opinion and order grants in part and denies in part an application for review by Warren Havens, as an individual and as president of Skybridge Spectrum Foundation ("Havens").1 Havens seeks review of two decisions by the Enforcement Bureau (EB) that denied four Freedom of Information Act (FOIA) requests.2 We find that EB correctly withheld much of the material requested as exempt under FOIA Exemption 7(A) but remand other material to EB for further examination.

2. Havens (both in his individual and corporate capacity) seeks material submitted during the discovery phase of a hearing proceeding, EB Docket No. 11-71 (the Maritime Proceeding). The Commission designated that proceeding to determine whether radio licenses held by a company called Maritime Communications /Land Mobile, LLC (Maritime) should be revoked and related wireless radio applications should be denied.3 Havens, individually, and several related companies are parties to the Maritime Proceeding. The Presiding Administrative Law Judge (ALJ) bifurcated the proceeding and provided that the hearing would initially go forward only with respect to one issue, Issue (g). In connection with discovery related to Issue (g), the ALJ adopted a protective order, which allowed Maritime and other parties to submit information during discovery as confidential or highly confidential.4 The protective order allows counsel for Havens and his companies, but not Havens himself,5 to access confidential documents by signing a non-disclosure agreement, and allows Havens to seek a ruling from the ALJ on whether documents submitted under the protective order should be made public.

1 E-mail from Warren Havens to David S. Senzel, Office of General Counsel (Mar. 20, 2015) (AFR).

2 Letter from Gary Schonman, Special Counsel, Federal Communications Commission, to Warren Havens (Jan. 30, 2015) (650/651 Decision); Letter from Gary Schonman, Special Counsel, Federal Communications Commission, to Warren Havens (Feb. 18, 2015) (663/664 Decision). See also two e-mails from Warren Havens to FOIA@fcc.gov (Sept. 11, 2014) (650 Request and 651 Request); two e-mails from Warren Havens to FOIA@fcc.gov (Sept. 19, 2014) (663 Request and 664 Request).

3 See Maritime Communications/Land Mobile, LLC, 26 FCC Rcd 6520 (2011).

4 See Protective Order, FCC 11M-21 (Jul. 20, 2011).

5 The protective order makes this distinction because Havens and his companies are competitors of Maritime and related entities.

3. In the first set of requests (FOIA Control Nos. 2014-650 and 2014-651), Havens seeks “all documents [EB] holds or controls that were labelled confidential or attorney-eyes-only in proceeding 11-71 (under the protective order or otherwise) that pertain to Maritime Communications/Land Mobile LLC (‘Maritime’) AMTS licenses and stations that are relevant to ‘[I]ssue (g)’ . . . .”<sup>6</sup> Havens indicated that he intended to use the requested material as a party to the hearing.<sup>7</sup> In the second set of requests (FOIA Control Nos. 2014-663 and 2014-664), Havens seeks “the document submitted in FCC proceeding EB Docket No. 11-71, entitled Enforcement Bureau’s Direct Case Exhibits (Public Version), dated 9/16/14, by the Enforcement Bureau (‘the EB Document’), and all documents identified as exhibits in the EB Document (the ‘EB Document and Exhibits’), a copy of the unredacted pages, for each page that has any redaction within the EB Document and Exhibits. . . .”<sup>8</sup>

4. EB denied both sets of requests based on essentially the same reasoning. In the 650/651 Decision, EB found that the material requested, *i.e.*, material designated as confidential under the protective order, was exempt from disclosure under FOIA Exemption 7(A). That exemption protects “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings.”<sup>9</sup> EB found that grant of the FOIA requests would “disrupt the orderly conduct of the proceeding, undermine the protective order and the presiding judge’s authority to supervise the proceeding, and complicate and delay the introduction of evidence.”<sup>10</sup> In the 663/664 Decision, regarding EB’s direct case exhibits, EB made similar findings.<sup>11</sup> In both Decisions, EB relied on *NLRB v. Robbins Tire & Rubber Co.*,<sup>12</sup> in which the Supreme Court upheld the denial of a FOIA request for witness statements that were not subject to disclosure in discovery.<sup>13</sup> EB noted the Court’s holding that granting the FOIA request would disturb the “delicate balance” reflected in NLRB procedure and that the FOIA was not intended to function as a private discovery tool.<sup>14</sup>

5. In his AFR, Havens makes five principal arguments. First, Havens complains that EB’s decisions are untimely, inasmuch as far more than the 20 days specified in the FOIA elapsed before EB issued its Decisions.<sup>15</sup> Second, Havens contends that the documents requested were not compiled for law enforcement purposes (and thus not within the scope of Exemption 7), because they were provided by Maritime and its supporters “and existed outside of any FCC purpose as to all material facts in the records.”<sup>16</sup> Third, Havens asserts that release of the requested documents will not interfere with the Maritime proceeding.<sup>17</sup> In this regard, Havens notes that Maritime, the alleged wrongdoer, already has

<sup>6</sup> 650 Request at 3; 651 Request at 4.

<sup>7</sup> 650 Request at 3; 651 Request at 4.

<sup>8</sup> 663 Request at 1; 664 Request at 1.

<sup>9</sup> 5 U.S.C. § 552(b)(7)(A).

<sup>10</sup> 650/651 Decision at 2.

<sup>11</sup> 663/664 Decision at 2 (“[h]ere granting your FOIA requests would serve only to complicate and delay the introduction of evidence”).

<sup>12</sup> 437 U.S. 214 (1978).

<sup>13</sup> See 650/651 Decision at 2; 663/664 Decision at 2.

<sup>14</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 at 236, 242.

<sup>15</sup> AFR at 3-4. See also 5 U.S.C. § 552(a)(6)(A)(i) (20-day limit). Havens also complains that EB did not follow the usual procedure of soliciting comments from the entities that submitted the confidential information. EB explained, however, that it did not seek comment because it had already received comment in response to earlier FOIA requests for similar material. See 663/664 Decision at 2 n.3.

<sup>16</sup> AFR at 6.

<sup>17</sup> *Id.* at 5, 6, 7.

the information in question and therefore cannot use the information to evade prosecution. Havens believes that it would assist the proceeding to make the information requested public and observes that the hearing on the relevant subject, Issue (g), has already taken place. Fourth, Havens claims that much of the information requested is already public, since the ALJ rejected most claims of confidentiality and other information has otherwise entered the public domain.<sup>18</sup> Finally, Havens argues that it was improper for EB to rule on the FOIA requests, because EB is a party to the Maritime Proceeding and not an impartial decision-maker.<sup>19</sup> Havens accuses EB of taking Maritime's side in the litigation, which means, in Havens' view, that there is no enforcement to be interfered with and that EB has a motive to conceal its own actions and motives.

## II. DISCUSSION

6. We find that EB was justified in denying the 650 and 651 Requests in their entirety under Exemption 7(A). On the other hand, we find that the 663 and 664 Requests present a closer question, and we remand them to EB to give them further consideration.

7. As an initial matter, we find that, although EB's responses to Havens's FOIA requests were clearly untimely, having been issued well beyond the 20-day statutory time period, this does not affect their validity. An agency may "cure" its failure to respond to a FOIA request within the statutory time period by responding before the requester seeks judicial intervention.<sup>20</sup> We therefore turn to the merits of EB's responses.

8. We find, contrary to Havens's assertion, that the documents submitted by Maritime and others during discovery and the documents incorporated into EB's direct case constitute records compiled for law enforcement purposes, bringing them within the scope of Exemption 7. Judicial precedent upholds the application of Exemption 7(A) to Commission enforcement proceedings, such as license revocation hearings.<sup>21</sup> Indeed, the basis for treating the materials at issue here as Commission records subject to a FOIA request is precisely that they are in EB's possession because they were compiled for purposes of litigating Issue (g) in the Maritime Proceeding. We see no basis for Havens's suggestion that the character of the records as having been compiled for law enforcement purposes somehow depends on the position that EB ultimately took on the merits of Issue (g).

9. As to the question of whether EB demonstrated the expectation of interference with an enforcement proceeding, we agree with Havens that Exemption 7(A) requires showing an expectation of "articulable harm" to the proceeding.<sup>22</sup> We also recognize that the harm most often cited in applying Exemption 7(A) has been premature disclosure of the government's case to the targets of an enforcement proceeding.<sup>23</sup> Premature disclosure, however, is not the only type of "articulable harm" relevant to Exemption 7(A). For example, *NLRB v. Robbins Tire & Rubber Co.*, cited by EB, noted several types of

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<sup>18</sup> *Id.* at 4, 6. Havens does not explain why the Commission should consider whether to disclose under the FOIA documents that have already been made publicly available and thus available to him. In any event, he does not specify which documents he is referring to.

<sup>19</sup> *Id.* at 6-7.

<sup>20</sup> See *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 63-64 (D.C. Cir. 1990).

<sup>21</sup> See *Kay v. FCC*, 976 F. Supp. 23, 37 (D.D.C. 1997).

<sup>22</sup> See *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995) (to fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm).

<sup>23</sup> See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 239 (premature disclosure of witness' statements would involve "precisely the kind of 'interference with enforcement proceedings' that Exemption 7(A) was designed to avoid"). But see *Lion Raisins, Inc. v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1084-85 (9th Cir. 2004) (no harm to criminal investigation where target already had copies of the documents sought).

harm in support of its finding that disclosure of prospective witness statements would interfere with unfair labor practice hearings.<sup>24</sup> We find that FOIA requests that have the effect of interfering with the ALJ's control of discovery and the introduction of evidence may cause "articulable harm."

10. We find that this is the case with respect to the 650 and 651 Requests, which seek the wholesale disclosure of thousands of pages of documents submitted during discovery as confidential or highly confidential pursuant to the protective order.<sup>25</sup> The Protective Order represents a calibrated balancing, approved by the ALJ and agreed to by the parties, designed to facilitate the submission of, access to, and use of confidential information in order to permit the parties, including EB, to prepare their cases for the hearing without the distraction of having to litigate *ad hoc* objections to claims of confidentiality. Granting the FOIA requests would bring about a profound alteration of the long-established process for agency ALJs to determine the manner in which parties would have access to discovery materials in enforcement hearings. It potentially undercuts the ALJ's control of the discovery process, discourages the cooperation of the parties, and would occasion time-consuming separate litigation of the FOIA requests that would delay and disrupt the proceeding, thereby interfering with the fair and efficient resolution of the proceeding. While the hearing on Issue (g) has been completed, Issue (g) has not been resolved and grant of the FOIA request might well lead to disruptive attempts to reopen the record. Moreover, regardless of the status of this case, grant of the FOIA request would tend to chill the behavior of parties and the ALJ in future enforcement hearings, because they could not rely on the integrity of protective orders. Entertaining such FOIA requests could force parties to litigate objections to the confidential nature of discovery documents, even by non-parties, and require the wholesale reexamination of all confidential material filed in such proceedings, contrary to the authority of an ALJ to regulate the course of discovery in enforcement hearings.

11. As the Supreme Court did in *Robbins*, we have examined the relationship between these FOIA requests and the purpose of the FOIA. We find that the basic purpose of the FOIA would not be defeated by denial of sweeping requests for documents in enforcement proceedings like the 650 and 651 Requests. Indeed, more recent Supreme Court precedent reinforces this conclusion. In *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*,<sup>26</sup> the Supreme Court further elaborated on how the basic purpose of the FOIA is taken into account in balancing the interests implicated by Exemption 7. The Supreme Court held that in balancing the public's interest in disclosure against the privacy interest underlying Exemption 7(C), it was significant that the purpose of the FOIA to open agency action to the light of public scrutiny is not fostered by the disclosure of information about private citizens accumulated in government files that reveals little or nothing about the agency's own conduct.<sup>27</sup> This is also relevant in the balancing involved in applying Exemption 7(A), inasmuch as the records covered by the Protective Order consist of information that private parties produced about business operations during discovery and not information that illuminates government activities. Thus, our decision to prevent interference with the enforcement proceeding by withholding documents under Exemption 7(A) does not defeat the basic purpose of the FOIA.

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<sup>24</sup> See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 237-42 (including delay, restructuring of adjudication, and chilling sources of information).

<sup>25</sup> Indeed, the Office of General Counsel rejected Havens's previous FOIA request for all documents covered by the Protective Order for the same reason. See Letter from Joel Kaufman, Associate General Counsel to Warren Havens (Dec. 5, 2012), *app. for review dismissed*, 28 FCC Rcd 13539 (2013). See also *Kanter v. IRS*, 433 F. Supp. 812, 818 (N.D. Ill. 1977) (cases "recognize that use of FOIA to expand a litigant's discovery rights inevitably upsets the carefully calibrated balance established by the applicable discovery rules"). The same analysis would apply even if the FOIA requesters were not parties, since the disclosure of information under the FOIA makes the information public and thus indirectly available to the parties and nonparties that are competitors. See *Kanter v. IRS*, 433 F. Supp. at 818 n. 10.

<sup>26</sup> 489 U.S. 749 (1989).

<sup>27</sup> See *id.* at 772-73.

12. On the other hand, it is not as clear that the 663 and 664 Requests have, at this point, the same degree of harmful impact on the Commission's hearing processes as the 650 and 651 Requests. They involve a smaller quantity of specific material that has, by now, already been used at the hearing as redacted and made part of the record. In this regard, these requests are more consistent with the provisions of the Protective Order, which anticipate the review of specific documents. They thus do not have the same effect of wholly nullifying the Protective Order and divesting the ALJ of control over discovery. It may be practicable for EB to review this material and determine which redacted material should continue to be withheld as confidential. We remand these requests to EB to issue a supplemental response addressing these considerations and indicating whether any redacted material should now be disclosed a non-confidential.

13. Finally, we reject Havens's suggestion that EB should not have been the entity to respond to the FOIA requests. Under the Commission's rules, FOIA requests are processed by the appropriate "custodian of the records."<sup>28</sup> Here, Havens specifically seeks records in the custody of EB. It is therefore consistent with Commission regulations for EB to respond to the initial FOIA request. Neither the FOIA statute nor the Commission's regulations require the response to come from an impartial decision maker, and we are unpersuaded by Havens's unsupported arguments to the contrary.

### III. ORDERING CLAUSES

14. IT IS ORDERED that the application for review filed by Warren Havens IS GRANTED in part and DENIED in part. We direct EB to take further action consistent with this memorandum opinion and order. Havens may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).<sup>29</sup>

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>28</sup> See 47 C.F.R. § 0.461(e)(1).

<sup>29</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 a non-exclusive alternative to litigation. Using OGIS services does not affect Havens's right to pursue litigation. Havens 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](mailto:ogis@nara.gov)  
Telephone: 301-837-1996  
Facsimile: 301-837-0348  
Toll-free: 1-877-684-6448.

**STATEMENT OF  
COMMISSIONER AJIT PAI  
APPROVING IN PART AND DISSENTING IN PART**

Re: *Warren Havens*, FOIA Control Nos. 2014-650 and 2014-664; *Skybridge Spectrum Foundation*, FOIA Control Nos. 2014-651 and 2014-663.

The Commission has already sanctioned Warren Havens for abusing the FCC's processes by filing frivolous and repetitive pleadings.<sup>1</sup> And now, in this proceeding, I believe that he is abusing the FCC's FOIA process. He is seeking to obtain through FOIA requests material that he is not allowed to access because of a protective order in an adjudication to which he is a party. That protective order, which was issued by the presiding Administrative Law Judge (ALJ), permits Havens' counsel to access these documents by signing a non-disclosure agreement. However, it does not give Havens himself that same right; he can only ask the ALJ to publicly disclose material submitted under the protective order.

I can certainly understand why Havens would be unhappy with this state of affairs. But in my view, the Enforcement Bureau correctly rejected Havens' attempt to make an end-run around the ALJ's protective order. I therefore agree with the Commission's decision to affirm the Bureau's denial of Havens' two broadest FOIA requests, which "seek the wholesale disclosure of thousands of pages of documents submitted during discovery as confidential or highly confidential pursuant to the protective order."<sup>2</sup> As the *Order* states,

The Protective Order represents a calibrated balancing, approved by the ALJ and agreed to by the parties, designed to facilitate the submission of, access to, and use of confidential information in order to permit the parties, including [the Bureau], to prepare their cases for the hearing without the distraction of having to litigate ad hoc objections to claims of confidentiality. Granting the FOIA requests would bring about a profound alteration of the long-established process for agency ALJs to determine the manner in which parties would have access to discovery material in enforcement hearings. It potentially undercuts the ALJ's control of the discovery process, discourages the cooperation of the parties, and would occasion time-consuming separate litigation of the FOIA requests that would delay and disrupt the proceeding, thereby interfering with the fair and efficient resolution of the proceeding.<sup>3</sup>

For these same reasons, however, I disagree with the Commission's decision to revive Havens' two other FOIA requests, which seek confidential material contained in the Direct Case Exhibits used by the Enforcement Bureau in the adjudication. Were the Bureau to disclose this information to Havens, would it "undercut[] the ALJ's control of the discovery process"? Yes. That's because the Bureau would be providing him access to confidential documents without the ALJ's permission—even though the protective order explicitly requires that Havens ask the ALJ for access to them. Would granting such a FOIA request open the door to "time-consuming separate litigation" of FOIA requests filed by parties to

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<sup>1</sup> See *Warren C. Havens Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in Texas, and Applications to Provide Automated Maritime Telecommunications System Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado*, File Nos. 852997-853009, 853010-853014, Memorandum Opinion and Order, 27 FCC Rcd 2756, 2757, para. 1 (2012); *Warren C. Havens Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in Texas, and Applications to Provide Automated Maritime Telecommunications System Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado*, File Nos. 852997-853009, 853010-853014, Third Order on Reconsideration, 26 FCC Rcd 10888, 10888, para. 1 (2011)).

<sup>2</sup> *Order* at para. 10.

<sup>3</sup> *Id.*

adjudicatory proceedings “that would delay and disrupt the proceeding[s], thereby interfering with the fair and efficient resolution of the proceeding[s]”? Yes. Indeed, given Havens’ long history with the Commission, I think there is a good chance that this *Order* will spawn a new series of more “limited” FOIA requests from Havens seeking information he has attempted to obtain through his broader requests. And were the Enforcement Bureau to release any of the information requested by Havens, would it disturb the protective order’s “calibrated balancing, approved by the ALJ and agreed to by the parties”? Once again, the answer is yes.

In my view, these harms are more than sufficient to justify withholding pursuant to Exemption 7(A) all of the documents requested by Havens. I therefore approve in part and dissent in part.