

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

In the Matter of)	
)	
Matthew Keys)	FOIA Control No. 2014-669
)	
Shawn Musgrave)	FOIA Control No. 2015-000649
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: September 29, 2016

Released: September 30, 2016

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in part and denies in part two applications for review (AFR), one by Matthew Keys (Keys)¹ and the other by Shawn Musgrave (Musgrave).² Keys and Musgrave each seeks review of a decision by the Office of Engineering & Technology (OET)³ that redacted material from a user manual that was disclosed to both Keys and Musgrave in response to their separate requests⁴ under the Freedom of Information Act (FOIA). We do not adopt OET’s finding that the material it redacted from the manual constituted trade secrets, but we do find that there is an alternative basis for redacting most of this material under FOIA Exemption 4. We also find that FOIA Exemptions 7(E) and 3 provide additional bases to withhold this material. We modify OET’s decisions to the extent we find that OET redacted nonexempt material.

II. BACKGROUND

2. In his FOIA request, Keys sought “[a] copy of any and all user manuals for the following items manufactured by the *Harris Corporation*: . . . Device bearing FCC ID NK73092523 (“Stingray”). . . Device bearing FCC ID NK73100176 (“Kingfish”). . . Device bearing FCC ID NK 73166210 (“Stingray II”).”⁵ Keys explained that the manuals had been submitted in connection with Harris Corporation’s (Harris) applications for equipment authorization. Musgrave in turn sought “all manuals submitted for the following cell site simulator products: Stingray, StingRay II, Kingfish, Triggerfish, Loggerhead, Amberjack, and Gossamer.”⁶

¹ Letter from Matthew Keys to Office of General Counsel (Apr. 22, 2015) (Keys AFR).

² E-mail from Shawn Musgrave to FOIA-Appeal@fcc.gov (Sept. 27, 2015) (Musgrave AFR).

³ Letter from Julius P. Knapp, Chief to Matthew Keys (Mar. 23, 2015) (Keys Decision); Letter from Julius P. Knapp, Chief, Office of Engineering & Technology to Shawn Musgrave (Sept. 3, 2015) (Musgrave Decision).

⁴ Letter from Matthew Keys to Custodian of the Records (or FOIA Officer) (Sept. 23, 2014) (Keys Request); Electronic submission via <https://foiaonline.regulations.gov/foia/action/agency/creatRequest> (Jul. 28, 2015) (Musgrave Request).

⁵ Keys Request at 1.

⁶ Musgrave Request.

3. OET responded in each case by producing a single user manual (Manual) that is associated with some of the named devices.⁷ OET indicated that it redacted material from the Manual that was exempt under FOIA Exemption 4, which protects from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”⁸ OET characterized the redacted material as “text, charts, photographs, and drawings that describe the devices and their method of use and could reveal proprietary information about Harris’s technology, manufacturing process, and business strategy and thus provide unwarranted insight into the specifics of Harris’s product or its underlying technology.”⁹ OET found that the redacted material should be protected as trade secrets.

4. Keys filed an AFR seeking review of OET’s decision to redact this material. In his AFR, Keys contends that OET failed to show that the material redacted from the Manual fell within the definition of a trade secret. According to Keys, to constitute a trade secret,¹⁰ the information sought must meet three criteria: (1) it must be related to the manufacturing of the device; (2) it must provide Harris with independent economic value because it is not easily accessible to the public; and (3) it must be subject to reasonable efforts to maintain secrecy.¹¹ Keys concedes that the information in the user manual meets the third criterion, but disputes that it meets the other two. Keys asserts that the information sought contains no information about the manufacturing process or information about a device that is used for the making of trade commodities. Rather, Keys contends, the material is clearly an instructional manual for the operation of a device, and contains no information about the production or manufacturing process.¹²

5. Keys also contends that OET wrongfully withheld material that is already publicly available. This includes: (1) Harris’s telephone and fax number; (2) common words associated with electronic devices, such as “antenna,” and “cable;” (3) the letter headings for sections of a glossary of terms; and (4) product names. Additionally, Keys points to an instance where a specific phrase is redacted in two places in the manual but left unredacted in a third. Finally, although his request only sought information about devices corresponding to three FCC IDs, Keys complains that OET gave no justification for redacting all information about a fourth device also covered by the Manual, which Keys identifies as NK73186795.

6. Musgrave also filed an AFR. He contends that “[w]hile [Exemption 4] certainly applies to certain sections [of the user manual], its invocation to redact an entire chapter of the manual is inappropriate. The FOIA statute and case law requires partial release of documents where possible. I

⁷ See Keys Decision at 1; Musgrave Decision at 1. OET located no records concerning Triggerfish, Loggerhead, Amberjack, or Gossamer.

⁸ See Keys Decision at 1; 5 U.S.C. § 552(b)(4). Harris had sought confidential treatment for the user manual in connection with its applications for equipment authorization. See Letter from Tania W. Hanna, Esq. to Marlene H. Dortch, Secretary (Apr. 28, 2011). Harris reiterated its claim of confidentiality in response to Keys’s FOIA request. See Letter from Tania V. Hanna to Mr. Julius P. Knapp, Chief Officer of Engineering and Technology, Federal Communications Commission (Oct. 20, 2014). See also Letter from Matthew Keys to Julius P. Knapp, Chief Officer of Engineering and Technology, Federal Communications Commission (Oct. 25, 2014) (disputing Harris’s claim of confidentiality).

⁹ Keys Decision at 1; Musgrave Decision at 1.

¹⁰ Keys relies on the definition of trade secret in the Uniform Trade Secrets Act (UTSA): “information, including a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through appropriate means by other persons who might obtain economic value from its disclosure or use; and is subject to efforts that are reasonable under the circumstances to maintain its secrecy.” See Keys AFR at 3.

¹¹ See *id.*

¹² See *id.* at 3-4.

hereby appeal the withholding in whole of Chapter 5 of the manual requested herein, as well as request review of all redactions made throughout the document pursuant to [Exemption 4].”¹³

III. DISCUSSION

7. Because Keys more fully develops the basis for his appeal, we will focus our discussion principally on the Keys AFR. Our analysis, however, applies equally to the Musgrave AFR. Under the FOIA, an agency generally must release a requested record unless the record is protected by one of the nine statutory exemptions.¹⁴ FOIA Exemption 4 covers “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹⁵ The Commission’s rules incorporate Exemption 4.¹⁶ “Trade secrets” and “commercial or financial information obtained from a person and privileged or confidential” represent separate and distinct bases for applying Exemption 4.¹⁷ If documents are trade secrets, they are exempt from disclosure.¹⁸ To justify withholding under Exemption 4 material that does not qualify as a trade secret, an agency must demonstrate confidentiality by showing, with respect to information required to be submitted, that disclosure is likely (1) to impair the government’s ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.¹⁹

8. We agree with Keys that the contents of the Manual do not qualify as trade secrets.²⁰ Under the definition of trade secret adopted by the United States Court of Appeals for the District of Columbia Circuit for purposes of FOIA Exemption 4, a trade secret is:

a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.²¹

The D.C. Circuit subsequently clarified that: “[o]ur Decision in *Public Citizen* narrowly cabins trade secrets to information relating to ‘the productive process’ itself.”²² The Manual here describes the end product of the productive process, not how the devices in question are made, and is therefore excluded from the definition of trade secret by the court’s explicitly narrow interpretation of that term.

¹³ Musgrave AFR at 1. Musgrave’s argument is quoted here in its entirety.

¹⁴ 5 U.S.C. § 552(b)(1)-(9).

¹⁵ See 5 U.S.C. § 552(b)(4).

¹⁶ See 47 C.F.R. § 0.457(d).

¹⁷ See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286 (D.C. Cir. 1983) (if documents are trade secrets, no further inquiry is necessary; otherwise a showing of confidentiality must be made).

¹⁸ See *id.*

¹⁹ See *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) and *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1290-91.

²⁰ We note that in *American Civil Liberties Union of Northern California*, 29 FCC Rcd 9724, 9728 ¶ 11 (2014), we upheld OET’s withholding of certain information regarding these devices as trade secrets. The requester in that case, however, did not challenge the trade secret determination, and we therefore did not review it. In any event, as the analysis below indicates, if we had applied the analysis we adopt here to the earlier case, it would likely not have changed the outcome, inasmuch as there would have been, as here, alternative grounds for withholding the relevant material.

²¹ *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1288.

²² See *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 150-151 (D.C. Cir. 2001) (trade secrets do not encompass information about airbags that relates to the end product, *i.e.*, what features an airbag has and how it performs, rather than to the production process, *i.e.*, how it is made).

9. Although we find that the redacted portions of the Manual do not fall within the definition of a trade secret, we also find that most of this material should be treated as confidential for purposes of Exemption 4 because release of the material is likely to cause substantial harm to the competitive position of Harris. In this regard, we note that the products involved here consist of electronic devices that can be sold only to authorized law enforcement and government agencies, and can be used only by such entities.²³ General dissemination of technical and operational information about these devices could allow parties to evade or counteract their use by law enforcement authorities. By thus reducing the efficacy of the devices, disclosure would make the devices less attractive to their only lawful customers, diminishing their economic value and harming Harris.²⁴

10. We also find that there are additional, independent bases for the redactions. Exemption 7(E) permits withholding of “records or information compiled for law enforcement purposes [the production of which] would disclose techniques and procedures for law enforcement investigations or prosecutions . . . if such disclosure could reasonably be expected to risk a circumvention of the law.”²⁵ As we discussed above in connection with Exemption 4, the devices involved here are used by law enforcement agencies, and widespread dissemination of the detailed specifications of these devices could allow parties to evade or counteract their use in the course of criminal investigations. This factor brings the redaction of such detailed specifications within the scope of Exemption 7(E).

11. We acknowledge, however, that the applicability of Exemption 7(E) also depends on making a threshold determination that the Manual constitutes a record “compiled for law enforcement purposes.” Our possession of the Manual does not directly involve our own law enforcement activities, in the sense of investigating or prosecuting law violations, but rather is part of our role in authorizing the use of electronic equipment, which is not a law enforcement activity *per se*. We find, nevertheless, that the Manual represents a record compiled for law enforcement purposes.

12. Courts have recognized that “[l]aw enforcement entails more than just investigating and prosecuting individuals *after* a violation of the law . . . and . . . includes proactive steps designed to prevent criminal activity and to maintain security.”²⁶ Inasmuch as the FCC’s authorization of these devices is an integral and essential step in their ultimate use by law enforcement authorities, we find that it represents the type of proactive measure that triggers the applicability of Exemption 7.²⁷

13. Moreover, copies of the Manual are in the possession of federal law enforcement authorities as part of their law enforcement functions. If Keys or Musgrave had filed their FOIA requests with a federal law enforcement agency, rather than the Commission, the law enforcement agency would clearly be able to invoke Exemption 7 to redact sensitive material from the Manual. Denying the Commission the ability to invoke Exemption 7 would defeat the purpose of the exemption by allowing a

²³ See Manual at cover page, *citing* 18 U.S.C. § 2512 (governing “electronic communication intercepting devices”). The Manual also indicates that the devices are export controlled under the International Traffic in Arms Regulations (ITAR), 22 C.F.R. Parts 120-30.

²⁴ See *Ruston v. Dep’t of Justice*, 521 F. Supp. 2d 18, 20 (D.D.C. 2007) (holding that Exemption 4 applied to withholding psychological test questions and answers as release of those “can severely compromise the validity of the test, and therefore, its societal usefulness and [its] commercial value as an assessment tool”).

²⁵ 5 U.S.C. § 552(b)(7)(E).

²⁶ See *Electronic Privacy Information Center v. U.S. Dep’t of Homeland Security*, 777 F.3d 518, 522-23 (D.C. Cir. 2015) (protecting protocol for shutting down wireless networks during critical emergencies).

²⁷ Otherwise, to protect materials used in the equipment authorization process, Harris would presumably have to submit them to us through, for example, the FBI, instead of directly. Such an approach would elevate form over substance. See *Abramson v. FBI*, 456 U.S. 615, 631-32 (1982) (“We hold that information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document for a non-law-enforcement purpose.”).

requester to “forum shop” to circumvent the law enforcement agencies with a primary interest in the record.

14. For similar reasons, we find that Exemption 3, which covers matters “specifically exempted from disclosure by statute,” is applicable.²⁸ Among statutes within the scope of Exemption 3 is 50 U.S.C. § 3024(i)(1), which requires the Director of National Intelligence to protect “intelligence sources and methods.”²⁹ To the extent that the devices here are used by federal agencies, Exemption 3 would provide an additional basis to withhold information.³⁰ As noted previously, our possession of information about these devices is ancillary to their use by these other agencies.

15. We have reviewed the redactions made by OET. We affirm OET’s redaction of material that can be described as technical or operational specifications of Harris’s products or as information useful to a person seeking to evade the law, as discussed in the preceding paragraphs. We reject the redactions that cannot be so described. Accordingly, we direct OET to disclose: (1) paragraph and section headings that do not refer to technical or operational matters, (2) information about how required notifications are displayed on the products, (3) the FCC ID numbers of products, and (4) unrevealing section headings from technical specification tables. We have also examined Keys’s assertion that OET wrongly redacted material that is publicly available or inconsistently disclosed. We agree that the following information should not be redacted: (1) Harris’s telephone and fax numbers on page i of the Manual, (2) a phrase disclosed at page B-1 ¶ 5 but redacted from pages i and ix, and (3) the letter headings for sections of the glossary on pages A1-A2. Finally, we find that information relating to the undisclosed fourth FCC ID that was redacted from chapter 5 of the Manual should be disclosed, with exempt material redacted, inasmuch as it relates to the three products specifically mentioned the requests. We direct OET to provide Harris with a copy of the Manual redacted consistent with this paragraph.

IV. ORDERING CLAUSES

16. IT IS ORDERED that the application for review filed by Matthew Keys and the application for review filed by Shawn Musgrave ARE GRANTED in part and DENIED in part. If Harris does not seek a judicial stay within ten (10) working days of the date OET provides it with a copy of the Manual redacted as described above,³¹ a copy of the Manual so redacted will be produced to Keys and Musgrave. See 47 C.F.R. § 0.461(i)(4). Keys and Musgrave may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).³²

²⁸ See 5 U.S.C. § 552(b)(3).

²⁹ See *CIA v. Sims*, 471 U.S. 159, 167 (1985) (holding that the statutory provision is within the scope of Exemption 3).

³⁰ See *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Justice*, Civil Action No. 13-1159 (GK) (D.D.C. Feb. 9, 2016), reported at 2016 WL 541127 (information concerning the FBI’s domestic use of drones may be withheld pursuant to 50 U.S.C. § 3024(i)(1) and Exemption 3, as well as Exemptions 4 and 7(E)).

³¹ We direct OET to inform Keys and Musgrave when this occurs.

³² 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 Keys’s or Musgrave’s right to pursue litigation. Keys and Musgrave 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

(continued....)

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page) _____
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448.