

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

In the Matter of)
RUSSELL CAROLLO) FOIA Control No. 2015-553
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 2016

Released: February 17, 2016

By the Commission:

I. INTRODUCTION

1. By this Order we deny an Application for Review by Russell Carollo seeking review of the Office of General Counsel’s (OGC) decision granting in part and denying in part his Freedom of Information Act (FOIA) request. We conclude OGC acted properly in responding to Mr. Carollo’s FOIA request. We determine, however, that one record will be released in part as a matter of discretion.

II. BACKGROUND

2. The FOIA and Commission regulations give the public the right to request that an agency produce records that are not routinely available for public inspection. Generally, the agency must conduct a reasonable search and produce the responsive records unless the agency determines that one or more of the FOIA’s nine statutory exemptions apply. These exemptions are intended to protect certain sensitive records that are not suitable for release to the public, representing “a balance struck by Congress between the public’s right to know and the government’s legitimate interest in keeping certain information confidential.” If an agency concludes that the requested records fall under a statutory exemption, the agency may deny the FOIA request and withhold those records from release. The FOIA and Commission regulations also provide that the requester may appeal such a denial and argue that the claimed exemption should not apply.

3. On June 3, 2015, Mr. Carollo filed a Freedom of Information Act request for all Commission “records related in any way to . . . [c]ommunications of any kind with and/or about

1 Letter from Russell Carollo to Office of General Counsel, Federal Communications Commission (filed July 20, 2015) (AFR).

2 Letter from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Russell Carollo (rel. July 15, 2015) (OGC Response Letter). Prior to this response, OGC had provided Mr. Carollo with other records in unredacted form. Letter from Elizabeth Lyle, Assistant General Counsel, Federal Communications Commission, to Russell Carollo (rel. June 22, 2015).

3 5 U.S.C. § 552(a)(3); 47 C.F.R. § 0.461.

4 5 U.S.C. § 552(a)(3),(b); 47 C.F.R. §§ 0.457, 0.461(f).

5 Ctr. for Nat’l Sec. Studies v. Dep’t of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003).

6 5 U.S.C. § 552(b); 47 C.F.R. § 0.461(f)(1),(4)-(5).

7 5 U.S.C. § 552(a)(6)(A); 47 C.F.R. § 0.461(j).

Amazon.com, Inc., its employees, management, owners, and/or anyone else conducting business on behalf of Amazon.com, Inc., including, but not limited to, Jeffrey Preston Bezos.”⁸ Mr. Carollo subsequently supplemented his request to include references to Blue Origin.⁹ Commission staff contacted Mr. Carollo in an attempt to clarify and narrow his request because he had not specified which Commission records he would like searched, and it was not feasible to search the records of all approximately 1,700 Commission employees.¹⁰ Mr. Carollo responded by providing a list of 35 named individuals whose records he requested be searched.¹¹ Commission staff then undertook the search for responsive records.

4. Commission staff provided the first set of responsive documents to Mr. Carollo on June 22, 2015, consisting of four unredacted pages of records.¹² A second set of records was released to Mr. Carollo on July 15, 2015.¹³ This second set of released documents consisted of 27 pages of records, including e-mail exchanges mentioning Amazon.com, a list noting that Amazon.com had commented on a particular item, an invitation to an event hosted by Amazon.com, and news articles reporting on Amazon.com activities. One responsive e-mail was redacted and two responsive e-mails were withheld under FOIA Exemption 5, which protects internal agency deliberations.¹⁴ Two responsive e-mails were partially redacted under Exemption 6, which protects against clearly unwarranted invasions of personal privacy.¹⁵ Lastly, one responsive e-mail and its attachment were withheld under Exemption 7(A), which protects against release of documents that could be reasonably expected to interfere with an enforcement proceeding.¹⁶

5. In its response letter, OGC stated that Commission staff had only been able to search the records of 27 of the 35 listed individuals.¹⁷ The remaining individuals no longer worked at the Commission and their records were no longer accessible.¹⁸

6. Mr. Carollo has filed an Application for Review appealing OGC’s decision to redact or withhold some of the requested records.¹⁹ Mr. Carollo asserts that OGC had improperly invoked

⁸ Letter from Russell Carollo to Austin Schlick, Former General Counsel, Federal Communications Commission (filed June 3, 2015).

⁹ Letter from Russell Carollo to Austin Schlick, Former General Counsel, Federal Communications Commission (filed June 4, 2015).

¹⁰ E-mail from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Russell Carollo (rel. June 3, 2015).

¹¹ Letter from Russell Carollo to Ryan Yates, Attorney Advisor, Federal Communications Commission (filed June 5, 2015). The complete list of individuals is: Tom Wheeler, Mignon Clyburn, Jessica Rosenworcel, Ajit Pai, Michael O’Rielly, Jonathan Sallet, Jamillia Ferris, Jon Wilkins, William Davenport, Martha Heller, Paula Blizzard, Evan Parke, Matt DelNero, Renee Gregory, Ruth Milkman, Sagar Doshi, Daniel Alvarez, Stephanie Weiner, Jim Bird, David Turetsky, Sean Conway, Travis Litman, Greg Guice, Julius Genachowski, Zachary Katz, Sherrese Smith, Amy Levine, Michael Steffen, Josh Gottheimer, Gigi Sohn, Philip Verveer, Diane Cornell, Maria Kirby, Deborah Ridley, and Roger Sherman.

¹² Letter from Elizabeth Lyle, Assistant General Counsel, Federal Communications Commission, to Russell Carollo (rel. June 22, 2015).

¹³ OGC Response Letter.

¹⁴ *Id.* at 1-2; 5 U.S.C. § 552(b)(5).

¹⁵ OGC Response Letter at 2; 5 U.S.C. § 552(b)(6).

¹⁶ OGC Response Letter at 2; 5 U.S.C. § 552(b)(7)(A).

¹⁷ OGC Response Letter at 1.

¹⁸ *Id.*

¹⁹ AFR at 1.

Exemption 5, as Exemption 5 “does not cover ‘purely factual information’” and because “[t]he [time for the] deliberative process has very likely passed.”²⁰ Similarly, Mr. Carollo alleges that Exemption 6 was inapplicable because “Amazon.com is the largest Internet-based retailer in the United States” and “[w]hatever small privacy interest the company and its owners claim is clearly outweighed by the public interest.”²¹ He also challenges OGC’s use of Exemption 7(A), stating that “[t]his exemption generally only protects active law enforcement proceedings” and he “question[s] the ‘active’ nature of the investigation.”²² Mr. Carollo also raises two other issues with how OGC searched for and produced the records in question. First, Mr. Carollo states that the fact that some pages of documents were withheld in full shows that OGC did not fulfill its obligation to segregate certain releasable material from those pages.²³ He also takes issue with OGC’s assertion that certain records of former employees are no longer accessible, and claims that any records about the disposition of these employees’ records should have been included in the scope of his initial request.²⁴

7. Pursuant to Commission rules, OGC staff attempted to informally resolve Mr. Carollo’s complaint.²⁵ Staff addressed why each of the claimed exemptions was invoked, provided further details on the withheld documents, and gave an explanation as to why the records of former Commission staff were no longer accessible.²⁶ The letter from OGC noted that, to the extent Mr. Carollo wanted records regarding the disposition of no longer accessible records, he would need to file a new FOIA request.²⁷ In response, Mr. Carollo stated he wished to pursue his appeal with the Commission on the same grounds as originally stated.²⁸ Mr. Carollo also contended that because his original request stated that he desired “all records related in any way to” the requested materials, the scope of his initial request included records regarding the disposition of any related files. To the extent the Commission disagrees with this assertion, Mr. Carollo asked that his appeal be treated as a new request for records related to the disposition of the initially requested records.²⁹

8. OGC subsequently processed Mr. Carollo’s request for records related to the disposition of the requested records.³⁰ Upon speaking with Commission records staff, OGC concluded that the Commission does not create such disposition records, and thus a search was not reasonably likely to uncover the records requested. OGC therefore concluded that Mr. Carollo’s request for disposition records yielded no responsive documents.³¹

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ 47 C.F.R. § 0.461(i)&(j) note.

²⁶ E-mail from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Russell Carollo (rel. Aug. 14, 2015) (Informal Response E-mail).

²⁷ *Id.*

²⁸ Letter from Russell Carollo to Ryan Yates, Attorney Advisor, Federal Communications Commission (filed Aug. 17, 2015).

²⁹ AFR at 2.

³⁰ OGC treated this as a new request and assigned it FOIA Control No. 2016-034.

³¹ Letter from Elizabeth Lyle, Associate General Counsel, Federal Communications Commission, to Russell Carollo (rel. Oct. 16, 2015).

III. DISCUSSION

9. Upon review, we conclude OGC properly granted in part and denied in part Mr. Carollo's FOIA request. We address each of Mr. Carollo's stated grounds in turn.

10. *Exemption 5.* Exemption 5 protects certain inter-agency and intra-agency records that are normally considered privileged in the civil discovery context. Exemption 5 encompasses a deliberative process privilege intended to "prevent injury to the quality of agency decisions."³² To fall within the scope of this privilege the agency records must be both predecisional and deliberative.³³ In its response letter, OGC noted that it had redacted or withheld discussions of staff views on comments filed in a proceeding, as well as discussion of edits to drafts of Commission documents.³⁴

11. In one of the documents produced to Mr. Carollo, a single sentence was redacted. That sentence reflects a Commission staff member's candid opinion about the nature of comments that had been filed in a given proceeding. We determine that this material will be released as a matter of discretion.³⁵

12. Other than that redacted sentence, we find that Exemption 5 was properly used to withhold certain documents in response to Mr. Carollo's FOIA request. OGC withheld in full three e-mails totaling 10 pages, claiming Exemption 5 protection. One e-mail involves a strategy discussion regarding enforcement proceedings. The second is a discussion of draft language to be added to a public-facing website and related legal issues. The third involves discussion of edits to a draft item.

13. Contrary to Mr. Carollo's assertion, this material is not factual in nature, but rather is emblematic of predecisional deliberative discussion and reflects the give-and-take of the consultative process that Exemption 5 is intended to protect.³⁶ Furthermore, courts have clearly stated that drafts of items are protected under Exemption 5.³⁷ Lastly, we reject Mr. Carollo's assertion that the passage of time removes these documents from the scope of the deliberative process privilege.³⁸ The mere passage of time does not itself render the deliberative process privilege inapplicable.³⁹ We conclude that release of these documents could still cause harm to the agency's deliberative process by chilling such candid discussions in the future. Therefore, we conclude that these materials are properly protected under Exemption 5.

14. *Exemption 6.* Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁴⁰ OGC redacted two records based on Exemption 6 – the names of certain Commission staff who were the subjects of a baby shower, and the name of a Commission intern along with a description of that intern's financial holdings.⁴¹ In its response letter, OGC stated that there was limited public interest in this

³² *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

³³ *Id.* at 151-52.

³⁴ OGC Response Letter at 1-2.

³⁵ As we determine that this material will be released as a matter of discretion, we do not reach a conclusion as to whether OGC properly applied Exemption 5 in redacting the material.

³⁶ *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

³⁷ *See e.g., id., Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987).

³⁸ AFR at 1.

³⁹ *See, e.g., Bruscano v. Bureau of Prisons*, No. 94-1955, 1995 WL 444406, at *5 (D.D.C. May 15, 1995) (aff'd in part, rev'd in part on other grounds, and remanded).

⁴⁰ 5 U.S.C. § 552(b)(6).

⁴¹ OGC Response Letter at 2.

information, and weighing that limited public interest against the privacy interest of the staff persons at issue, OGC concluded the information should be redacted under Exemption 6.⁴² We conclude that the records were appropriately redacted under Exemption 6.

15. Exemption 6 requires that we balance the public interest in releasing the information against the private interest in withholding it. The information should be disclosed unless disclosure would result in a clearly unwarranted invasion of personal privacy. We conclude release of this information would constitute such a clearly unwarranted invasion. There is no legitimate public interest in knowing the names of the two staff members who were the subject of a baby shower.⁴³ Such a disclosure would in no way advance the understanding of the operations of government. Weighing that limited public interest against the interest of the two staff members in keeping information about their familial status private, we conclude that Exemption 6 protects those names from release.⁴⁴

16. With regard to the name of the intern and the intern's financial holdings, we conclude that the public does have some interest in knowing about financial conflicts of interest of public servants. How the agency handles conflicts of interest does reflect on the operations and activities of government. However, this interest is already served – the majority of the e-mail is unredacted and contains a description of how the agency responded to the conflict of interest (namely, by prohibiting the intern from working on matters related to those companies). The only remaining public interest would be in knowing the name of the intern and the names of the companies, and we conclude that the intern's interest in personal and financial privacy substantially outweighs this public interest. The public interest in this specific information is minor: the employee was an intern – a junior, temporary staff member not vested with decisionmaking authority.⁴⁵ Furthermore, as a general matter, Congress has determined that employee financial disclosures should be filed confidentially and withheld from public release for all but the most senior of government officials.⁴⁶ Counterbalancing that minor public interest is the intern's interest in not having the intern's financial holdings publicly disclosed. We therefore conclude that disclosing the intern's name and financial holdings would constitute a clearly unwarranted invasion of privacy, and the information should be withheld under Exemption 6.

17. Furthermore, Mr. Carollo objects to the use of Exemption 6, noting that Amazon.com's corporate standing obviates any privacy interest the company might have.⁴⁷ However, as OGC noted in both its original response to the FOIA request and in its informal response to Mr. Carollo's appeal, in this case Exemption 6 has not been invoked to protect Amazon.com's privacy interest – rather, it has been invoked to protect the privacy interest of the Commission staff members mentioned in these records.

18. *Exemption 7(A)*. Exemption 7(A) authorizes the withholding of “records or information compiled for law enforcement purposes [the production of which] could reasonably be expected to interfere with enforcement proceedings.”⁴⁸ OGC withheld records that included a discussion and listing

⁴² *Id.*

⁴³ For purposes of FOIA, the public interest in question is “shed[ding] light on an agency's performance of its statutory duties.” *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989).

⁴⁴ *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

⁴⁵ The public's broader interest in how the agency handles conflicts of interest is preserved, as the remainder of the e-mail, except for the name of the intern and the companies, is disclosed.

⁴⁶ Compare 5 U.S.C. App. 4 §§ 101 & 105 (providing for the public availability of financial disclosures forms for senior government officials) with 5 U.S.C. App. 4 § 107(a) (providing that financial disclosures of less senior government employees “shall be confidential and shall not be disclosed to the public”).

⁴⁷ AFR at 1.

⁴⁸ 5 U.S.C. § 552(b)(7)(A).

of pending Commission investigations, and noted that the release of these records could interfere with the investigations.⁴⁹

19. We determine that these records were properly withheld under Exemption 7(A). Mr. Carollo contends that these records should not have been withheld because he “question[s] the ‘active’ nature of the investigation and whether releasing information that has already been reported in the media could interfere.”⁵⁰ The document in question contains information related to ongoing Enforcement Bureau investigations, noting that certain investigations remain open. Revealing this document could alert the targets of those open investigations, hindering the progress of the Enforcement Bureau’s efforts. OGC properly withheld these records under Exemption 7(A).⁵¹

20. *Withholding of Documents.* In responding to Mr. Carollo’s request, OGC withheld three documents, totaling 10 pages, in their entirety. Mr. Carollo suggests that in withholding these documents in full, OGC has not undertaken its responsibility to segregate out non-exempt material.⁵² We determine that each document was properly withheld in full.

21. The first document withheld is an e-mail chain within the Enforcement Bureau discussing ongoing cases and investigations, including discussion of which cases should be closed and what strategy the Bureau should pursue in the remaining cases. The attachment to the e-mail chain involves a passing reference to Amazon.com.⁵³ As noted above, OGC properly withheld this record under Exemption 7(A). Furthermore, because of the discussion of enforcement strategies and planning of future actions, it would also be proper to withhold this record under the separate and independent grounds of Exemption 5, as the record clearly entails predecisional deliberations, or under Exemption 7(E), as it could reveal investigatory techniques. Given the law enforcement sensitivities of this record and the harm that its release could inflict to the deliberative process, we conclude that withholding this document in its entirety is proper. In reviewing the record, we determine that any non-exempt information is inextricably intertwined with the withholdable portions of the record, and therefore segregation of the non-exempt material is not possible.⁵⁴

22. The second document withheld is an e-mail chain discussing changes to boilerplate language on a public facing website and discussion of the surrounding legal issues. The discussion involves draft language as well as the deliberative give-and-take of the drafting process. This document was withheld by OGC under Exemption 5. We conclude that this record was properly withheld in its entirety. After removing the material protected under Exemption 5, the remaining material would have little to no information value beyond what OGC already provided to the requester,⁵⁵ and thus further segregation is not possible.⁵⁶

23. The last document withheld is an e-mail chain discussing edits to a draft item. This document once again involves draft language and the deliberative give-and-take of the drafting process,

⁴⁹ OGC Response Letter at 2. For the record in question, Amazon.com was not the target of an investigation.

⁵⁰ AFR at 2.

⁵¹ Also, as noted below, even if we disagreed with OGC’s claim that Exemption 7(A) applied, these records could have been withheld under Exemption 5 or Exemption 7(E).

⁵² *Id.*

⁵³ As noted above, while Amazon.com was mentioned in the record at issue, it was not the target of an investigation.

⁵⁴ *Mead Data Cent. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

⁵⁵ In attempting to informally resolve Mr. Carollo’s appeal, OGC provided him with additional information regarding the withheld documents, including the parties to the e-mail, the date of the e-mail, and a brief description of what was discussed in the e-mail. Informal Response E-mail at 1.

⁵⁶ *Mead Data Cent.*, 566 F.2d at 261, n.55.

and is therefore properly withheld under Exemption 5. We similarly conclude that any non-exempt material is inextricably intertwined with exempt material, and therefore the non-exempt material cannot be segregated.⁵⁷

24. *Records No Longer Accessible.* Finally, Mr. Carollo takes issue with the fact that OGC was only able to search records of 27 of the 35 listed persons.⁵⁸ As noted by OGC in its response letter and in its attempt to informally resolve Mr. Carollo's appeal, the remaining eight persons no longer work for the Commission.⁵⁹ We concur with OGC that it would be unreasonably burdensome to search for the records of these individuals. Searching the records of these individuals would require devoting substantial IT resources to attempt to locate and retrieve the records. This is akin to searching backup systems, which courts have previously held is not required as part of a FOIA search.⁶⁰ Furthermore, based on the other responsive records and existing records schedules, we conclude it is unlikely any substantial responsive records would be found even if a search were undertaken.⁶¹ The records produced to Mr. Carollo to date do not suggest there was any Commission proceeding or project focused on Amazon.com during the pertinent search period; rather the records reveal merely incidental references to Amazon.com. Additionally, for the listed individuals, such records are likely no longer in the Commission's possession.⁶² Under the protocol for handling records, any permanent records created by these individuals would be accessioned to the National Archives for permanent storage. Any temporary records of these eight individuals would have been disposed of in accordance with set records disposition schedules.⁶³ Given the difficulty in undertaking a search for these records, combined with the remote likelihood of uncovering responsive records, we find that OGC was justified in determining that a search for these records would be unreasonably burdensome.

25. Mr. Carollo argues that to the extent the records of these eight individuals have been disposed of, OGC erred by not providing records of that disposal.⁶⁴ Mr. Carollo argues that as his original request covered “[a]ll other records *related in any way* to Amazon.com, Inc.” and the scope of that request would have encompassed records referring to the disposal of records that mentioned Amazon.com.⁶⁵ Mr. Carollo asked that, to the extent OGC or the Commission disagreed with his interpretation of the scope, his appeal be treated as a new request for records related to the disposition of the original documents. As noted above, OGC has already processed Mr. Carollo's request for disposition records and has determined that the agency has no responsive records.⁶⁶ Given OGC's response, Mr. Carollo's argument is rendered moot.

⁵⁷ *Id.* at 260.

⁵⁸ AFR at 2.

⁵⁹ OGC Response Letter at 1, Informal Response E-mail at 1.

⁶⁰ See *Ancient Coin Collectors Guild v. Dep't of State*, 866 F. Supp. 28, 33 (D.D.C. 2012) (holding that agency was not required to undertake a search of backup systems where doing so would be “costly and inconvenient” and searching the systems would “be unlikely to result in additional responsive material”).

⁶¹ See *Schrecker v. Dep't of Justice*, 349 F.3d 657, 664 (D.C. Cir. 2003) (“To require the Government to shoulder such a potentially onerous task – with dubious prospects of success – goes well beyond the ‘reasonable effort’ demanded in [the FOIA] context.”)

⁶² During the pertinent period, for example, the e-mail accounts of departing employees were typically deleted 90 days after they left the agency.

⁶³ GRS 23, Item 7.

⁶⁴ AFR at 2.

⁶⁵ *Id.* (emphasis added).

⁶⁶ Letter from Elizabeth Lyle, Associate General Counsel, Federal Communications Commission, to Russell Carollo (rel. Oct. 16, 2015).

IV. ORDERING CLAUSES

26. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Russell Carollo IS DENIED. Mr. Carollo may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).⁶⁷

27. WE DIRECT that the redacted material described above in paragraph 11 be released as a matter of discretion.

28. 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

⁶⁷ 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. Carollo’s right to pursue litigation. Mr. Carollo 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.