

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

In the Matter of)	
)	
MITCHELL F. BRECHER)	FOIA Control No. 2014-338
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 2016

Released: March 29, 2016

By the Commission: Commissioner O’Rielly approving in part, dissenting in part and issuing a statement

I. INTRODUCTION

1. By this memorandum opinion and order, we deny an application for review filed by Mitchell F. Brecher (Brecher)¹ seeking review of a decision of the Wireline Competition Bureau (WCB)² that denied his Freedom of Information Act (FOIA) request.³ We find that WCB properly found that the records responsive to the Request are exempt under FOIA Exemptions 5 and 7.

II. BACKGROUND

2. Brecher, an attorney with the law firm Greenberg Traurig, LLP, seeks information related to Notices of Apparent Liability (NALs) issued to the firm’s client TracFone Wireless, Inc. (TracFone) and to 11 other companies for violations of the rules regarding the Commission’s Lifeline program.⁴ The Lifeline program, a part of the Universal Service Fund, provides reimbursement to Eligible Telecommunications Carriers (ETCs) that supply discounted telephone service to qualifying low-income subscribers.⁵ The Commission found that TracFone and the other 11 ETCs apparently violated the Lifeline rules by obtaining support for duplicate subscribers from the same household. The Commission assessed a forfeiture of \$4,573,376 against TracFone.⁶ The forfeiture was based on reviews of Lifeline enrollment data provided by TracFone. The reviews, referred to as “in-depth data validations” (IDVs), were conducted by the Universal Service Administrative Company (USAC), the administrator of Lifeline for the Commission.⁷

3. Following discussions with WCB staff, Brecher narrowed and clarified his original Request to specify three categories of records:

- Intra-company IDV results for September 2012-present, namely for wireless service

¹ See Application for Review of Freedom of Information Action, filed July 22, 2014, by Mitchell F. Brecher (AFR).

² See Letter from Kirk S. Burgee, Chief of Staff, Wireline Competition Bureau to Mitchell F. Brecher, Esq. (Jul. 3, 2014) (Decision).

³ See Letter from Mitchell F. Brecher to FOIA Liaison (Apr. 2, 2014) (Request).

⁴ See *TracFone Wireless, Inc.*, 28 FCC Rcd 14478 (2013) (NAL); AFR at 3. The NAL cited TracFone for apparently violating 47 C.F.R. §§ 54.407, 54.409, and 54.410.

⁵ See NAL, 28 FCC Rcd at 14478-79 ¶ 2; 47 C.F.R. §§ 54.400-54.422.

⁶ See *id.* at 14483 ¶ 15.

⁷ See *id.* at 14480 ¶ 7.

providers. Specifically, spreadsheets showing the number of subscribers, the number of intra-company duplicates, the number of de-enrollments, and the amount of support disbursed related to the duplicates.

- FCC communications and communications between the FCC and USAC discussing the intra-company IDV results for this timeframe.
- Tolling agreements⁸ related to the Notices of Apparent Liability issued by the Commission's Enforcement Bureau (EB) for intra-company duplicates for the period September 2012 – present.⁹

4. In its Decision, WCB found that all of the responsive documents it located were exempt from disclosure. WCB withheld under FOIA Exemption 5 both internal Commission communications, and communications between the Commission and USAC, discussing the intra-company IDV results. Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”¹⁰ According to WCB, release of these documents would reveal the Commission's deliberative process with respect to the investigation of duplicate claims for Lifeline support.¹¹ WCB found that disclosure would reveal the staff's decision-making and strategies in the enforcement of the Lifeline program requirements and would have the effect of inhibiting the free exchange of ideas.¹²

5. WCB further found that all three categories of records requested were exempt from disclosure under Exemptions 7(A) and 7(E). These exemptions cover “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings. . . [or] (E) would disclose techniques or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecution if such disclosure could reasonably be expected to risk circumvention of the law. . . .”¹³ WCB found that all of these records were compiled for enforcement purposes, *i.e.*, to ensure compliance with the Commission's rules relating to the Lifeline program, and therefore fell within the scope of Exemption 7.¹⁴ WCB concluded that disclosure of the IDV results would reveal investigation thresholds, triggers, and methodologies for determining compliance with applicable laws and rules that could enable a participant in the Lifeline program to avoid triggering reviews or otherwise to predict and avoid the Commission's enforcement efforts.¹⁵ Similarly, WCB concluded that disclosure of communications between and among the Commission and USAC would reveal reasoning and techniques underlying the Commission's selection of targets, knowledge of which could enable participants to avoid enforcement measures.¹⁶ Finally, WCB concluded that disclosure of tolling agreements would reveal terms and conditions reflecting techniques and

⁸ A tolling agreement is an agreement between the EB and the subject of an enforcement proceeding to extend the statute of limitations for taking enforcement action. *See, e.g., Verizon Wireless Usage Charges*, 25 FCC Rcd 15105, 15108 ¶ 4 (Enf. Bur. 2010). A tolling agreement permits further consideration of the evidence and possible negotiation.

⁹ *See* Decision at 1-2.

¹⁰ 5 U.S.C. § 552(b)(5).

¹¹ *See* Decision at 2.

¹² *See id.* at 2-3.

¹³ 5 U.S.C. § 552(b)(7)(A) and (E).

¹⁴ *See* Decision at 3.

¹⁵ *See id.* at 3-4.

¹⁶ *See id.* at 4.

methodologies that would compromise the Commission's ability to effectively negotiate such agreements with other parties in ongoing investigations, such as by allowing targets to gain more favorable terms for their own proceedings.¹⁷

6. Brecher's AFR disputes that the requested material is exempt under the cited exemptions, arguing that Exemption 7 does not apply to IDV data because the data was not compiled for law enforcement purposes as required by the exemption. Rather, according to Brecher, the IDV process was established as part of an effort in which the Commission, USAC, and ETCs participated to identify and prevent duplicative claims, not as an enforcement measure.¹⁸ Brecher contends that, because the rules TracFone allegedly violated were not adopted until after the IDV process was instituted, the IDV data could not have been compiled for the purpose of enforcing those rules. He also argues that USAC has no law enforcement function.¹⁹

7. Specifically with respect to Exemption 7(A), Brecher contends that WCB did not identify any ongoing or anticipated investigation related to the requested IDV data to which Exemption 7(A) would apply. With respect to ETCs not already subject to an NAL, Brecher contends that Exemption 7(A) could not apply, because future enforcement proceedings based on the IDV data are barred by the statute of limitations (absent evidence of a tolling agreement). With respect to ETCs already subject to an NAL, Brecher contends that the investigatory proceedings should be deemed to have terminated with the issuance of the NALs and Exemption 7(A) would thus no longer apply.²⁰

8. With respect to Exemption 7(E), Brecher asserts that neither the IDV data nor the tolling agreements would reveal any techniques, procedures, or guidelines that could be used to circumvent compliance with the law. In his view, the procedures involved in the IDV process are already publicly known.²¹ He further asserts that the NALs combined with publicly available data already disclose the relevant statistics for the companies targeted for enforcement, and thus companies already know the thresholds that might trigger enforcement action.²² Brecher maintains that tolling agreements do not contain information that would interfere with the Commission's ability to negotiate tolling agreements in the future.²³

9. Brecher also challenges the applicability of Exemption 5 to the records of internal Commission communications and to communications between the Commission and USAC. He contends that the communications could not disclose deliberations related to an investigation, because there is no evidence that an investigation, as opposed to the IDV process, has been conducted.²⁴ Brecher also submits that WCB made no showing that the communications were predecisional by showing that they were antecedent to adoption of a Commission policy.²⁵ Brecher also submits that, to the extent the Commission incorporated into its decisions the thresholds and criteria contained in the communications,

¹⁷ *See id.*

¹⁸ *See* AFR at 6-9. *See Lifeline and Linkup Reform and Modernization*, 26 FCC Rcd 9022 (2011) (describing industry proposal to resolve duplicative Lifeline claims in the near term); Letter from Sharon Gillett, Chief, Wireline Competition Bureau to D. Scott Barash, Acting Chief Executive officer, USAC (Jun. 21, 2011) (describing process that should be followed in identifying and resolving duplicative Lifeline claims found through IDVs).

¹⁹ *See* AFR at 8, 9.

²⁰ *See id.* at 11-12.

²¹ *See id.* at 9; *supra* note 17.

²² *See* AFR at 10-11.

²³ *See id.* at 12-13.

²⁴ *See id.* at 14-15.

²⁵ *See id.* at 16.

the communications are not predecisional.²⁶ Brecher asserts that no showing has been made that disclosure of any material would inhibit frank discussion by the staff, and points out that factual material contained in the communications is not protected by Exemption 5.²⁷

III. DISCUSSION

10. **Exemption 7(E).** WCB's Decision cites Exemption 7(A) as well as 7(E) as the basis for withholding the IDV data, communications, and tolling agreements.²⁸ The Decision's analysis, however, appears focused mainly on factors relevant to Exemption 7(E) and does not set out a rationale for applying Exemption 7(A). For this reason, our analysis will also focus on Exemption 7(E), and we will not address Exemption 7(A). We agree with WCB that the IDV data, tolling agreements, and FCC communications should be withheld under Exemption 7(E).

11. **IDV data.** As an initial matter, we disagree with Brecher's contention that the IDV data was not compiled for law enforcement purposes and thus Exemption 7 does not apply. Brecher relies on Commission statements that the IDV process was originally instituted for administrative purposes – specifically, to help identify and eliminate duplicate claims. The original purpose for which the IDV data was compiled, however, does not determine the applicability of Exemption 7 because the data has since been used as the basis for law enforcement actions. Indeed, the stated purpose of Brecher's FOIA request for the data is to better understand the process the Commission used in conducting the enforcement actions that led to the NALs.²⁹ Information originally not compiled for law enforcement purposes may become exempt under Exemption 7 if it is subsequently used for law enforcement purposes prior to the filing of the FOIA request.³⁰ That is the case here.³¹

12. We find that WCB properly relied on Exemption 7(E) to withhold the IDV data. We agree with WCB that disclosure of the IDV data would reveal the standards and methodology used in conducting the Commission's enforcement actions. Indeed, the apparent purpose of Brecher's FOIA Request is to gain precisely such insight.³² An analysis of the IDV data would permit inferences into how our enforcement staff chose which carriers and what time periods for IDV examination and what factors could trigger enforcement action. Brecher's contention that the NALs already disclose the critical information is contradicted by his asserted need for additional information to understand the enforcement process. Knowledge of the Commission's enforcement standards and methods would tend to give carriers insight into the circumstances under which their violations might escape scrutiny or enforcement action.³³

²⁶ See *id.*

²⁷ See *id.* at 17.

²⁸ See Decision at 3-4.

²⁹ See AFR at 5-6.

³⁰ See *John Doe Agency v. John Doe Corporation*, 493 U.S. 146, 154 (1989) (for purposes of Exemption 7, "compiled" does not mean "originally compiled"); *Lion Raisins, Inc. v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004) (information need not be originally compiled for law enforcement purposes so long as it was compiled for law enforcement purposes at the time the FOIA request was made); *KTVY, TV v. U.S.*, 919 F.2d 1465, 1469 (10th Cir. 1990) (the FOIA does not require that records must have been originally compiled for law enforcement purposes).

³¹ As an additional matter, we disagree with Brecher's contention that Exemption 7 does not apply because USAC does not have a law enforcement function in its own right. See AFR at 8-9. USAC administers the Lifeline program on behalf of the Commission and its actions are reviewable by the Commission. Thus, the regulatory authority involved here is ultimately that of the Commission. See *United Systems, Inc.*, 24 FCC Rcd 12338, 12342 ¶ 10 (2009).

³² See AFR at 5-6.

³³ See *United Systems, Inc.*, 24 FCC Rcd 12338, 12345 ¶ 15 (2009) (withholding information about USAC review of school districts under Exemption 7(E)); *Donna Harrington-Lueker*, 16 FCC Rcd 16591, 16592 ¶ 3 (2001) (same).

Such knowledge would thus enable carriers to evade compliance with the law.

13. Tolling Agreements. Similarly, we find that analysis of the tolling agreements signed by EB would give the targets of potential enforcement actions insights that could enable them to evade compliance with the law. Disclosure of tolling agreements related to NALs that have been issued in these ongoing proceedings would disclose techniques and procedures used by EB in its investigations and enforcement actions. The texts of tolling agreements are individually negotiated with the entities that are the targets of investigations, and can be more or less favorable based on unique facts in each case. Examination of the tolling agreements could therefore reveal any favorable terms that a particular target may have been able to obtain, thus strengthening the positions of targets of investigation, and weakening the position of EB, in future negotiations. The basic tolling agreement that EB uses as a starting point for negotiations also changes over time, depending on Bureau priorities and interests, and disclosure could reveal EB's preferred terms at a particular point in time. Such knowledge would provide entities under investigation with additional leverage in negotiations over future tolling agreements and consent decrees. Disclosure of tolling agreements could also provide insight into the Commission's enforcement strategies. Each tolling agreement contains a list of the rule sections at issue in the investigation of the relevant target. That list might vary among targets and during particular time frames, and could indicate the Commission's inclination to pursue certain violations while not pursuing others. Such insights could help other Lifeline providers to shape their behavior so as to evade future enforcement. For these reasons, we agree with WCB's determination that the tolling agreements requested by Brecher should be withheld under Exemption 7(E).

14. Communications. We also find that WCB properly relied on Exemption 7(E) to withhold the internal FCC communications and FCC-USAC communications. The responsive material here consists of e-mails involving the USAC staff and the staff of the Commission's Enforcement Bureau. The subject matter of the e-mails includes the development and interpretation of the IDV data, discussions of the potential violations of the Commission's rules based on the data, the development of an appropriate forfeiture methodology applicable to those violations, and summaries and memoranda discussing proposed enforcement actions based on the IDV data. Disclosure of this material would give carriers insight into the Commission's enforcement methods and standards that would enable them to evade compliance with the law.

15. **Exemption 5**. We agree with WCB that the deliberative process privilege encompassed by Exemption 5 provides an additional, independent reason to withhold the internal FCC communications and FCC-USAC communications.³⁴ The deliberative process privilege permits withholding information about intra-agency and inter-agency communications that is both predecisional and deliberative.³⁵ As discussed above, the responsive material here consists of e-mails involving the USAC staff and the staff of the Commission's Enforcement Bureau. The subject matter of the e-mails includes the development and interpretation of the IDV data, discussions of the potential violations of the Commission's rules based on the data, the development of an appropriate forfeiture methodology applicable to those violations, and summaries and memoranda discussing proposed enforcement actions based on the IDV data.

16. We find that this material is both predecisional and deliberative. It is predecisional, inasmuch as it was compiled to assist staff in arriving at decisions regarding the use of the IDV data in

³⁴ For purposes of Exemption 5, communications between the Commission and USAC are intra-agency. See *IBM Corp.*, 25 FCC Rcd 11085, 11090 ¶ 10 (2010).

³⁵ To fall within the scope of the deliberate process privilege encompassed by Exemption 5, records must be both pre-decisional, *i.e.*, "[they were] generated before the adoption of an agency policy [*i.e.*, a decision]," and deliberative, *i.e.*, "[they reflect] the give-and-take of the consultative process. See *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987).

enforcement proceedings.³⁶ Although some of this material might have contributed to the Commission's ultimate decisions, we find no indication that the material was either adopted or incorporated into the decisions or that it served as the "working law" on which the decisions were based. 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.³⁷ The e-mails are deliberative in character, since they reflect the type of staff discussions and evaluations that are at the core of the consultative process.³⁸ Specifically, they reflect the give and take among the various staff members in the course of weighing the alternatives as to how the various issues regarding use of the IDV data should be resolved.

17. In this regard, we found no reasonably segregable factual material that may be released from the records withheld.³⁹ The staff sometimes made reference to factual matters in the course of their discussions, but we see no way of segregating these passing references in an intelligible manner without disclosing the staff's deliberations.⁴⁰ Further, inasmuch as disclosure of this type of deliberation would tend to chill staff discussion, discouraging staff from expressing their views candidly out of concern that their remarks would be held against them if disclosed, we find no basis to release this material on a discretionary basis.⁴¹

IV. ORDERING CLAUSES

18. IT IS ORDERED that the application for review filed by Mitchell F. Brecher IS DENIED. Brecher may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).⁴²

19. The officials responsible for this action are the following: Chairman Wheeler and

³⁶ See *Cheryl B. Williams*, 27 FCC Rcd 634, 636 ¶ 8 (2012) (records are predecisional if they are "prepared in order to assist an agency decision maker in arriving at his decision").

³⁷ 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. 2013); *American Civil Liberties Union of Northern California*, 29 FCC Rcd 9724, 9729 ¶ 14 (2014).

³⁸ See *Cheryl B. Williams*, *supra* note 36.

³⁹ The FOIA requires the release of reasonably segregable portions of records after appropriate application of FOIA exemptions. No release is required if non-exempt material is so entwined with material being withheld that segregation is impractical. See *Michael Ravnitzky*, 16 FCC Rcd 21745, 21748 ¶ 10 (2001).

⁴⁰ See *American Civil Liberties Union of Northern California*, *supra* note 37 at 9729 ¶ 15.

⁴¹ See *Memorandum to Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed. Reg. 4683 (2009) (President Obama's memorandum concerning the FOIA); *The Freedom of Information Act (FOIA)*, available at <<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>> (Attorney General Holder's FOIA Memo).

⁴² 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 Brecher's right to pursue litigation. Brecher 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.

Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**Statement of Commissioner Michael O’Rielly
Approving in Part and Dissenting in Part**

Re: In the Matter of Mitchell F. Brecher on Request for Inspection of Records, FOIA Control No. 2014-338

While I agree with the Wireline Competition Bureau’s finding that the records at issue are exempt from release under FOIA Exemption 7(E), and therefore reach the same outcome in this matter, I must dissent from the application of Exemption 5 to communications between the FCC and the Universal Service Administrative Company (“USAC”).

USAC is neither a part of the FCC nor a federal agency, but an independent, private nonprofit corporation governed by a 19-member board composed primarily of industry and advocacy group representatives. Its employees work for the corporation, not for any federal government agency. This was the intentional design when the Commission “created” it almost two decades ago, and the independence of USAC is often touted when necessary for purposes of passing the buck or insulating USAC from Commissioners’ input. The Commission cannot redefine this relationship at will to suit its needs.

FCC-USAC communications are clearly neither intra-agency nor inter-agency communications protected by the deliberative process privilege, and should not be treated as such.