

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

In the Matter of
SMS/800 Inc.
On Request for Inspection of Records
FOIA Control No. 2015-044

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2016

Released: March 31, 2016

By the Commission: Commissioner O’Rielly dissenting and issuing a statement.

I. INTRODUCTION

1. This Memorandum Opinion and Order denies an application for review1 filed by SMS/800 Inc. (SMS/800) that seeks review of a Freedom of Information Act (FOIA) decision by the Commission’s Wireline Competition Bureau (WCB). We affirm WCB’s decision to disclose certain revenue information submitted by SMS/800 in support of its FCC Tariff 1, and uphold WCB’s determination that release of the information will not cause competitive harm to either SMS/800 or its vendors.

II. BACKGROUND

2. SMS/800 is the nonprofit membership corporation that is designated by the Commission to administer the toll free Service Management System (SMS). Among other responsibilities, SMS/800 is the sole provider of SMS access services to representatives of toll free subscribers (Responsible Organizations, usually referred to as “RespOrgs,”) under a tariff filed annually with the Commission. RespOrgs access the SMS on their customers’ behalf to query and reserve available toll free numbers and create call routing records to be downloaded to the appropriate regional Service Control Points (SCPs) in the telephone network for each toll free call.2

3. On October 20, 2014, Mark Lewyn of McLean, Virginia (Lewyn) filed a FOIA request seeking the following records:

I am interested in records relating to SMS 800, which operates the 800 number database under FCC Tariff 1. More specifically, I am interested in records relating to SMS 800 Inc., which were submitted to the FCC in support of its tariff.(see link below)

https://apps.fcc.gov/ecfs/public/view a
138040.action;jsessionid=bXSvRbZpy2GGppYTcXxGGH5HgdhVD49TFZL1HdhT2fY
TytLJpxn01-6468203891-1623152729?id=138040

1 Letter from Joel Bernstein, Vice President, Regulatory and Public Policy, SMS/800 Inc. to Jonathan Sallet, General Counsel, FCC (dated February 5, 2015) (AFR).

2 SMS/800 was created by the Bell Operating Companies (BOCs) in 2008. In 2013, the Commission approved SMS/800’s petition to, among other things, (1) expand its governing Board to include RespOrgs and SCPs, (2) take over tariffing responsibilities from the BOCs, and (3) assume the role of neutral SMS administrator. Toll Free Service Access Codes, 28 FCC Rcd 15328 (2013).

According to the letter, some of these documents were marked “confidential” when submitted to the FCC. However, I believe it is in the public interest SMS 800 financials in order to better evaluate whether the public interest is being served through its stewardship of the 800 number database.<sup>3</sup>

In accordance with the Commission’s rules, WCB forwarded Lewyn’s request to SMS/800 and provided it with an opportunity to object.<sup>4</sup> In its December 12, 2014 objection, SMS/800 asserted that the information redacted from the public version of the tariff constitutes “trade secrets or privileged or confidential commercial, financial or technical data” that SMS/800 claims are exempt from routine public inspection under the Commission’s rules.<sup>5</sup> SMS/800 stated in its objection that “[t]he non-public portions of the tariff give greater details as to the company’s costs” and that “[t]he granularity of the information contained therein would essentially expose the terms of contracts between the company and [its] vendors.”<sup>6</sup>

4. In its January 22, 2015 Response, WCB granted Lewyn’s request in part and denied it in part.<sup>7</sup> Relevant here, in partly granting Lewyn’s request, WCB found that one of the supporting tables of Tariff No. 1, Table 2B, showing total RespOrg revenues received by SMS/800, should be disclosed.<sup>8</sup> Table 2B contains two total revenue figures representing the revenues that SMS/800 received from RespOrgs during the 2012 calendar year and the 2012 tariff period.<sup>9</sup> WCB found that SMS/800 did not establish, either in its original request for confidential treatment of portions of Tariff No. 1 or in its objection to Lewyn’s FOIA request, a sufficient basis for finding that the information in Table 2B is confidential under FOIA Exemption 4.<sup>10</sup>

5. WCB also determined that Table 2B “does not appear to implicate SMS/800’s vendors’ interests directly and SMS/800 has not demonstrated how this information could cause competitive harm to it.”<sup>11</sup> On the same day, WCB wrote a letter directly to SMS/800 notifying the entity of WCB’s determination as to Mr. Lewyn’s FOIA request and the deadline for filing an application for review, and forwarding a copy of the records the Bureau had determined to release, including Table 2B.<sup>12</sup>

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<sup>3</sup> Email from Mark Lewyn to [FOIA@fcc.gov](mailto:FOIA@fcc.gov) (filed October 20, 2014) (Request).

<sup>4</sup> 47 C.F.R. § 0.461(d)(3).

<sup>5</sup> Correspondence from Joel Bernstein, Vice President, Regulatory and Public Policy, SMS/800, received December 12, 2014 (SMS/800 Initial Response).

<sup>6</sup> SMS/800 Initial Response.

<sup>7</sup> Letter from Kirk S. Burgee, Chief of Staff, Wireline Competition Bureau, to Mark Lewyn (dated January 22, 2015) (WCB Initial Response).

<sup>8</sup> *Id.* at 3.

<sup>9</sup> Each figure represents primarily actual revenue data, supplemented by projected revenues where actual revenues were not available at the time the tariff was filed. Thus, the RespOrg revenue figure for calendar year 2012 consists of actual data for the months of January 2012 through November 2012, and projected data for December 2012. Similarly, the RespOrg revenue figure for tariff year 2012 consists of actual data for the period of February 15, 2012 through November 2012, and projected data for the period of December 2012 through February 14, 2013. *See* Tariff No. 1, Table 2B.

<sup>10</sup> *See* WCB Initial Response at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *See* Letter from Kirk S. Burgee, Chief of Staff, Wireline Competition Bureau, to Joel Bernstein, SMS/800, Inc. (dated January 22, 2015).

6. On February 5, 2015, SMS/800 filed the AFR. SMS/800 challenges WCB's decision to release Table 2B, arguing that public release of this information could cause the company substantial competitive harm.<sup>13</sup> Specifically, SMS/800 states that Table 2B

“details the entire amount [of] revenue that the company received from Resp Orgs for the previous calendar year and an approximation of the amount for the tariff year (February 15, 2012 to February 14, 2013). The company receives 100% of its Resp Org revenue via [Tariff No. 1] and believes that public release of that information would harm the company's competitive position as the provider of such services under [the] tariff.”<sup>14</sup>

SMS/800 argues that Table 2B “should be accorded the same level of confidentiality that the Commission consistently grants to granular carrier revenue information filed with the Commission [pursuant] to FOIA [E]xemption 4,” relying on prior Commission decisions, including *The Lakin Law Firm, John E. Wall, Jr.*, and *Connect America Fund Fifth Order on Reconsideration*.<sup>15</sup> SMS/800 also states that, “[u]nlike some of the information in [the Tariff No. 1 supporting tables that WCB determined to disclose, over SMS/800's assertion of confidentiality], the revenue figures contained in [Table] 2B are not available elsewhere in the company's tariff.”<sup>16</sup> SMS/800 also alleges that Lewyn fails to make a “persuasive showing” in favor of disclosure under section 0.457(d)(1) of the Commission's rules.

### III. DISCUSSION

7. We deny the AFR and find that the Bureau correctly determined that the Table 2B RespOrg revenue figures are not protected under Exemption 4 and should be released. FOIA Exemption 4 covers “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”<sup>17</sup> To justify withholding material as confidential under Exemption 4, an agency must show, 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.<sup>18</sup> We find that disclosure will not impair the FCC's ability to obtain necessary information in the future, because SMS/800 is required to submit the information needed to support the rates contained in its tariff filings. As explained below, with respect to competitive harm, we find that disclosure of Table 2B is harmless because the revenue data contained in Table 2B is already substantially available to the public.<sup>19</sup> We also find that SMS/800 has failed to show how disclosure of its total revenues could harm its position as sole provider of the services offered under its FCC Tariff 1.

8. Table 2B is not eligible for Exemption 4 protection because, as with other disclosures in the Bureau's initial FOIA response that the AFR now concedes were correct,<sup>20</sup> the Table 2B total RespOrg revenue amounts can be derived, to a high degree of accuracy, from rate and demand data in

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<sup>13</sup> AFR at 1.

<sup>14</sup> AFR at 2.

<sup>15</sup> AFR at 2, citing *The Lakin Law Firm*, 19 FCC Rcd 12727 (2004); *John E. Wall, Jr.*, 22 FCC Rcd 2561 (2007); *USF Fifth Order on Reconsideration*, 27 FCC Rcd 15459 (2012).

<sup>16</sup> AFR at 2.

<sup>17</sup> 5 U.S.C. § 552(b)(4).

<sup>18</sup> *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992).

<sup>19</sup> Information that is in the public domain is not subject to protection as “confidential” under Exemption 4. See, e.g., *CNA Fin'l Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987).

<sup>20</sup> AFR at 1 (SMS/800 does not challenge the Bureau's decision to disclose portions of Tables 2A and 7 over the company's initial objections because “the Bureau correctly determined that ... portions of those tables pertain to information that is substantially available elsewhere in the company's tariff filing”).

other tariff supporting tables that are publicly available.<sup>21</sup> We thus specifically reject the AFR's claim that "the revenue figures contained in [Table] 2B are not available elsewhere in the company's tariff."<sup>22</sup>

9. SMS/800 also has not shown, nor are we able to find, that disclosure of its total RespOrg revenues is likely to result in competitive harm. SMS/800 asserts that disclosure would harm its competitive position as provider of RespOrg services,<sup>23</sup> and that its revenue data should be protected because the Commission has withheld revenue data in other cases. Exemption 4 protection, however, is only available upon a showing of "actual competition" and a "likelihood of substantial competitive injury."<sup>24</sup> SMS/800 fails the first prong of this test because, pursuant to Commission mandate, SMS/800 is not subject to any competition for its services to RespOrgs, and is the designated sole provider of such services.<sup>25</sup> Accordingly, the *Lakin, Wall*, and *Connect America Fifth Order on Reconsideration* decisions that SMS/800 relies upon are inapt.<sup>26</sup> In each of these, the Commission's finding of competitive harm concerned disclosure of information related to the provision of telecommunications services by carriers in markets subject to actual competition, and thus the threshold prong of Exemption 4's competitive injury test was met.

10. Because we uphold the Bureau's decision to disclose Table 2B and find that Exemption 4 protection is not warranted, we need not address whether the public interest favors disclosure of protected information and reject SMS/800's argument that the requester was required to make a "persuasive showing" in favor of disclosure.

11. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by SMS/800 in FOIA Control No. 2015-044 IS DENIED.<sup>27</sup> If SMS/800 does not seek a judicial stay within ten (10) working days of the date of release of this decision, the Tariff No. 1 supporting records that the Bureau determined to release, including Table 2B, will be produced to Lewyn as indicated. See 47 C.F.R. § 0.461(i)(4).

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<sup>21</sup> Table 1, which is publicly available, provides the actual rates for each element of the services offered to RespOrgs by SMS/800. Table 3, which is also publicly available, provides demand amounts for each rate element. Multiplying each rate by its demand gives a total revenue amount for each element; adding up the revenues for all of the elements gives total revenues for RespOrg services. These computations should, and do, produce total revenue figures that are extremely close to the total revenue figures contained in Table 2B.

<sup>22</sup> AFR at 2.

<sup>23</sup> AFR at 2.

<sup>24</sup> *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987).

<sup>25</sup> See *Toll Free Service Access Codes*, 28 FCC Rcd 15328, 15329-30, paras. 4-5, 15342 para. 38 (2013) (describing the service provided under the SMS/800 tariff as "non-competitive").

<sup>26</sup> *The Lakin Law Firm*, 19 FCC Rcd 12727 (2004); *John E. Wall, Jr.*, 22 FCC Rcd 2561 (2007); *USF Fifth Order on Reconsideration*, 27 FCC Rcd 15459 (2012).

<sup>27</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 SMS/800's right to pursue litigation. SMS/800 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.

12. 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

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

*Re: In the Matter of SMS/800 Inc. on Request for Inspection of Records, FOIA Control No. 2014-044*

I find the FOIA Exemption 4 analysis presented here to be unpersuasive. The majority finds that disclosure of Table 2B is unlikely to cause substantial harm to the competitive position of SMS/800 because the revenue data contained in Table 2B can be derived “to a high degree of accuracy” from rate and demand data contained in other publicly available tariff supporting tables, and is therefore itself substantially available to the public. If this were the case, it would seem that WCB would have redirected the requestor to those publicly available data, as is often done in situations where a FOIA request is not necessary to obtain the specified information, and the matter would have been resolved long ago.

If the Table 2B data were truly publicly available, the analysis could have ended there, but perhaps sensing that this is a shaky proposition, the majority goes on to find that disclosure of the revenue data at issue cannot result in competitive harm to SMS/800 because as the designated sole provider of services to RespOrgs, SMS/800 is not subject to any actual competition and is unable to sustain competitive injury. This determination reveals a deep disregard for the realities of operating a business, and I cannot support it. Even a designated sole provider must operate competitively in order to buy services from others on favorable terms, or maintain its contract, and it has just as much interest as any other carrier in maintaining the confidentiality of sensitive of sensitive financial information.