

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

In the Matter of
MediaFreedom.org
On Request for Inspection of Records
FOIA Control No. 2015-734

MEMORANDUM OPINION AND ORDER

Adopted: July 27, 2016

Released: July 28, 2016

By the Commission:

1. By this Order we deny an Application for Review by MediaFreedom.org seeking review of the Office of the Inspector General's (OIG) response to its Freedom of Information Act (FOIA) request. We conclude OIG properly withheld the requested records.

I. 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 produce the requested records unless the agency determines that one or more of the FOIA's nine statutory exemptions apply. These exemptions are intended to protect certain 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 October 2, 2014, MediaFreedom.org, an organization for which Mike Wendy is the director, submitted a request that OIG initiate an investigation of "unusual collaboration" between Commission staff and third parties in the Open Internet Proceeding. On August 27, 2015, Mr. Wendy filed a FOIA request on behalf of MediaFreedom.org seeking reports, e-mails, memoranda, opinions, or white papers related to MediaFreedom.org's October 2 investigation request. OIG ultimately responded that it was able to locate three e-mails, which according to OIG, consisted of staff discussion of

1 Letter from Mike Wendy to Office of General Counsel, Federal Communications Commission (filed November 5, 2015).

2 Letter from David L. Hunt, Inspector General, Federal Communications Commission, to Mike Wendy (Oct. 8, 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).

MediaFreedom.org's allegations and gathering of information related to those allegations.⁸ OIG withheld those three documents in full under applicable FOIA exemptions.⁹ MediaFreedom.org appealed those withholdings, and in the course of its appeal, narrowed its request to "the names of [the Commission staff] who are either conducting/overseeing the investigation, or those who have been brought into the process . . . [and] the dates that those records were created."¹⁰ OIG provided the dates of the three responsive records, but declined to release the names of the persons conducting/overseeing the investigation or the names of the persons who "have been brought into the process."¹¹ OIG withheld these names under Exemption 7(C), which protects law enforcement information that, if disclosed, "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹²

4. MediaFreedom.org now appeals OIG's decision to withhold the names of Commission staff mentioned in these three records. It argues that Exemption 7(C) does not apply to OIG because "[t]he FCC OIG has no law enforcement power . . . [and] the 7(C) exemption for 'law enforcement personnel' fails because OIG has no such personnel."¹³ MediaFreedom.org goes on to claim that, even if OIG records qualified for protection under Exemption 7(C), "disclosure should go forward if it 'confirm[s] or refute[s] compelling evidence that the agency is engaged in illegal activity.'"¹⁴ It also notes that the names of certain OIG personnel are already publicly known, and thus releasing their names in this context would not impinge on any privacy interest.¹⁵ Lastly, as its request also included the name of any "non-investigator Federal employee" that was on the internal correspondence, it argues that these non-law enforcement personnel would not be entitled to any protection under Exemption 7.¹⁶

II. DISCUSSION

5. We conclude that OIG properly withheld the names sought in MediaFreedom.org's narrowed request. Based upon OIG's representations, we find the names of these staff are protected from disclosure under Exemptions 7(C) and 7(E).

6. As an initial matter, we address MediaFreedom.org's contention that OIG does not have law enforcement powers, and thus the Exemption 7 protections do not apply. Courts have recognized that "[a]n Inspector General of a federal government agency engages in law enforcement activities within the meaning of FOIA" and that Exemption 7(C) can apply to such records.¹⁷ According to OIG, the records

⁸ Letter from David L. Hunt, Inspector General, Federal Communications Commission, to Mike Wendy, at 2 (Dec. 21, 2015).

⁹ *Id.* Specifically, Exemption 5, 5 U.S.C. § 552(b)(5), which protects deliberative process materials, and Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), which protects records revealing techniques and procedures for law enforcement investigations.

¹⁰ E-mail from Mike Wendy to Ryan Yates, Attorney Advisor, Federal Communications Commission (filed Jan. 20, 2016).

¹¹ E-mail from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Mike Wendy (Feb. 18, 2016).

¹² 5 U.S.C. § 552(b)(7)(C).

¹³ E-mail from Mike Wendy to Ryan Yates, Attorney Advisor, Federal Communications Commission (filed Mar. 19, 2016) (March 19 E-mail).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Ortiz v. U.S. Dep't of Health and Human Servs.*, 70 F.3d 729, 732-33 (2d Cir. 1995). *See, e.g., Philadelphia Newspapers, Inc. v. Dep't of Health and Human Servs.*, 69 F. Supp. 2d 63 (D.D.C. 1999).

at issue here were compiled for law enforcement purposes (namely, as part of an OIG investigation into MediaFreedom.org's complaint), and thus qualify for protection under Exemption 7.

7. According to OIG, it withheld the names of the persons staffing the investigation under Exemption 7(C). Exemption 7(C) protects law enforcement information that, if disclosed, "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁸ In determining the applicability of Exemption 7(C), we weigh the privacy interest that would be harmed by the release against the public interest in disclosing the records.

8. In support of withholding the names, we must consider the privacy interest of the Commission personnel in doing their day-to-day work. Courts have repeatedly held that the names of law enforcement personnel may properly be withheld under Exemption 7(C).¹⁹ This protection is designed to shield law enforcement personnel, such as the investigators assigned to the MediaFreedom.org case, from "harassment and annoyance in the conduct of their official duties."²⁰

9. In support of releasing the names, MediaFreedom.org states that disclosure is warranted to "help confirm or refute [the organization's] concern about the 'unusual collaboration' between FCC personnel and third-party activists in the run-up to the creation of the Open Internet Order."²¹ MediaFreedom.org also contends that the impact on employee privacy would be limited, as some of the names of the OIG staff are already publicly known.²²

10. In balancing the privacy interests of the OIG staff against MediaFreedom.org's interest, we conclude that the privacy interest prevails and that OIG properly withheld the names under Exemption 7(C). Releasing the names of the investigators would create, at best, a de minimis benefit to the public's interest in knowing how OIG carries out its duties. The identities of the investigators are largely irrelevant to demonstrating the process by which OIG conducts its investigations.²³ Given this, we find little to no public interest in the identities of these staff members. Conversely, we find a very strong privacy interest. Release of those identities could very well result in harassment of the investigators. Furthermore, while the names of some OIG investigators may be known, it is not public knowledge as to what investigators worked on this matter; we reasonably determine that associating certain OIG staff members with this investigation could expose those staff members to harassment. Therefore, we conclude that their names should be withheld under Exemption 7(C), as the release would constitute an unwarranted invasion of personal privacy.

11. MediaFreedom.org further argues that even if the names of investigatory personnel were shielded by Exemption 7(C), the names of any non-investigatory personnel would not be protected under the exemption, as these staff "can serve no legitimate law enforcement role and thus must fall outside of the aforementioned FOIA 'law enforcement personnel' exception."²⁴ MediaFreedom.org misreads the scope of Exemption 7(C). Exemption 7(C)'s coverage is not limited to just law enforcement personnel; its protection extends to any person mentioned in law enforcement records.²⁵ Exemption 7(C) has been

¹⁸ 5 U.S.C. § 552(b)(7)(C).

¹⁹ *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

²⁰ *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978).

²¹ March 19 E-mail at 1.

²² *Id.*

²³ See *New England Apple Council v. Donovan*, 725 F.2d 139, 144 (1st Cir. 1984) (noting that "the public does not care whether an OIG law enforcement official involved in . . . [an investigation] is named John Doe or Jane Roe.").

²⁴ *Id.* at 1.

²⁵ "[T]he D.C. Circuit has consistently held that Exemption 7(C) protects the privacy interests of all persons mentioned in law enforcement records." *Fischer v. Dep't of Justice*, 596 F. Supp. 2d 34, 47 (D.D.C. 2009).

held to protect the names of staff, witnesses, informants, and suspects.²⁶ Thus, even the names of non-OIG staff are properly withheld under Exemption 7(C).

12. In addition to OIG's withholding of the names under Exemption 7(C), we determine that Exemption 7(E) also shields the names of the non-OIG personnel mentioned in the requested records. Exemption 7(E) affords protection to law enforcement information that would disclose techniques or procedures for law enforcement investigations, if such disclosure could reasonably be expected to risk circumvention of the law.²⁷ According to OIG, the release of these names would indicate the steps OIG takes upon initiating an investigation – particularly, who it contacts to gather information pertinent to the investigation. Moreover, according to OIG, the disclosure of this information could bring to light OIG investigatory techniques that are not widely known, which could allow parties to take steps to counter or avoid those techniques, risking a circumvention of the law. We therefore conclude that the names of personnel involved in the MediaFreedom.org investigation may also be withheld under Exemption 7(E).

13. Given the above, we conclude that OIG properly withheld names of Commission personnel mentioned in the records MediaFreedom.org requested.

III. ORDERING CLAUSE

14. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by MediaFreedom.org IS DENIED. MediaFreedom.org may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).²⁸

²⁶ See, e.g., *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995); *Skinner v. Dep't of Justice*, 744 F. Supp. 2d 185, 210-11 (D.D.C. 2010) (recognizing that the names of support staff were properly withheld under Exemption 7(C)).

²⁷ 5 U.S.C. § 552(b)(7)(E).

²⁸ 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 MediaFreedom.org's right to pursue litigation. MediaFreedom.org 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.

15. 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