

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

In the Matter of)
Free Access and Broadcast Telemedia) FOIA Control No. 2015-729
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 2017

Released: May 26, 2017

By the Commission:

1. By this Order we deny an Application for Review by Free Access and Broadcast Telemedia (FAB) seeking review of the Incentive Auction Task Force’s (IATF) response to FAB’s Freedom of Information Act (FOIA) request. We conclude IATF 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. FAB submitted a FOIA request asking for “[t]he ‘[e]xtensive auction simulations’ referred to in” the Incentive Auction Opportunities for Broadcasters report, prepared by Greenhill (Greenhill Report). The records would demonstrate the input and results of simulations run by Commission staff in preparing for the incentive auction. In responding to FAB’s FOIA request, IATF withheld the auction simulations, citing FOIA Exemption 5, which protects internal agency deliberations.

1 FOIAonline Submission 2015-729, Colin Andrews, Attorney for FAB (filed Aug. 21, 2015) (FAB Request).

2 Letter from William Scher, Federal Communications Commission, to Colin Andrews (Sept. 21, 2015) (Response Letter).

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

4 5 U.S.C. § 552(a)(3),(b); 47 CFR §§ 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 CFR § 0.461(f)(1),(4)-(5).

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

8 FAB Request.

9 5 U.S.C. § 552(b)(5).

4. FAB now appeals IATF's decision to withhold the auction simulations.¹⁰ FAB argues that IATF's application of Exemption 5 was overly broad.¹¹ FAB's argument is twofold: first, the auction simulations are factual in nature, rather than deliberative, and therefore not subject to Exemption 5; and second, to the extent Exemption 5 would apply, the Commission waived that exemption by incorporating the auction simulations' results into the Greenhill Report. FAB asks that the Commission overturn IATF's decision and release the auction simulations.¹²

II. DISCUSSION

5. We conclude that IATF properly withheld the auction simulations requested by FAB. We find the auction simulations are protected under Exemption 5.

6. 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."¹³ To fall within the scope of this privilege the agency records must be both predecisional and deliberative.¹⁴ In responding to FAB's FOIA request, IATF justified its use of Exemption 5 by stating, "These simulations reveal core deliberative processes, including with respect to the operation of the incentive auction mechanism, the impact of potential alternative auction scenarios, and decisionmaking regarding auction design. Release of this material would cause harm to the agency's deliberative process, and would hinder the agency's ability to use tools such as simulations in future decisions."¹⁵

7. We find that this is a proper use of Exemption 5. While the auction simulations themselves involve factual data,¹⁶ showing the input and output from the auction model, release of the information would reveal the core deliberations of IATF. In evaluating the applicability of Exemption 5, courts have held that "factual" material may be protected where those facts serve to "reveal the 'evaluative' process by which different members of the decisionmaking chain arrive at their conclusion and what those predecisional conclusions are."¹⁷ Congress granted the Commission broad authority to design and implement the incentive auction. As part of that design and implementation, the Commission staff used auction simulations as a tool to consider, explore, and potentially reject assumptions in the development of the auction. The staff's tentative assessments reflected in the simulations are exactly the kind of core deliberations protected under Exemption 5.¹⁸ Courts have found that disclosure of such "nascent thoughts

¹⁰ Letter from Colin Andrews, Attorney for FAB, to Office of General Counsel, Federal Communications Commission (filed Oct. 21, 2015) (FAB Appeal).

¹¹ *Id.* at 2.

¹² The FAB Appeal also requested review of the scope and sufficiency of the search that was originally performed. *Id.* at 1-2. FAB has since withdrawn this portion of its appeal. E-mail from Colin Andrews, Attorney for FAB, to Ryan Yates, Attorney Advisor, Federal Communications Commission (filed Sept. 2, 2016).

¹³ *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

¹⁴ *Id.* at 151-52.

¹⁵ Response Letter at 3.

¹⁶ The selection of facts can, in itself, be a deliberative act, as the separating of significant facts from insignificant facts constitutes an exercise of judgment. *See Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974).

¹⁷ *Mead Data Cent. v. Dep't of the Air Force*, 575 F.2d 932, 935 (D.C. Cir. 1978).

¹⁸ *Nat'l Wildlife Federation v. U.S. Forest Serv.*, 861 F.2d 1114, 1120 (9th Cir. 1988) ("Subjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent.") *See also Reliant Energy Power Generation v. FERC*, 520 F. Supp. 2d 194, 205-06 (D.D.C. 2007) (withholding spreadsheets and tables analyzing raw data on the grounds that the agency's reliance on the documents in drafting a staff report rendered them part of the deliberative process).

... would discourage intellectual risk-taking so essential to the technical process.”¹⁹ As noted in IATF’s initial response, releasing this information would inflict a direct, concrete harm on the deliberations of the Commission by discouraging the use of simulation tools in the future.²⁰ We, therefore, conclude that IATF properly determined that the auction simulations qualified as documents protected under Exemption 5.

8. We are not persuaded by FAB’s argument that the Commission waived Exemption 5 by incorporating the auction simulations into the Greenhill Report. For waiver to apply, the requester has the burden of demonstrating that the requested information is “as specific as the information previously released” and “match[es] the information previously disclosed.”²¹ FAB has failed to meet this burden. While the Commission did incorporate some of the conclusions derived from the auction simulations into the final version of the Greenhill Report, it did not release the specific simulations themselves. As FAB has failed to demonstrate that the Commission has previously released matching information that is as specific as the records requested, we conclude the Commission has not waived the application of Exemption 5. The records requested may, therefore, be withheld.

9. We also decline to release these records as a matter of discretion. FAB states, “Disclosure of the responsive documents identified in the Request would promote transparency and better inform the public of the possible impact of the FCC’s Incentive Auction.”²² We must, however, weigh this potential public interest against the harm release would cause to the Commission’s deliberative process, and in doing so, we find the harm substantially outweighs the public benefit. As noted in IATF’s response letter,²³ releasing these types of simulations would discourage the use of auction simulations in the future, depriving the agency of a valuable tool in taking a market-based approach to spectrum allocation.

III. ORDERING CLAUSE

10. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Free Access and Broadcast Telemedia IS DENIED. Free Access and Broadcast Telemedia may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).²⁴

¹⁹ *Chem. Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, 600 F. Supp. 114, 118 (D.D.C. 1984).

²⁰ Response Letter at 3.

²¹ *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990).

²² FAB Appeal at 2.

²³ Response Letter at 3.

²⁴ 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 FAB’s right to pursue litigation. FAB 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.

11. The officials responsible for this action are the following: Chairman Pai, and Commissioners Clyburn and O’Rielly.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary