

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

In the Matter of)	
)	
Warren Havens)	FOIA Control No. 2014-664
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 2018

Released: October 31, 2018

By the Commission:

I. INTRODUCTION

1. Warren Havens seeks to use the Freedom of Information Act (FOIA) to get certain information filed in hearing proceeding EB Docket No. 11-71 (the Maritime Proceeding). The last time the Commission reviewed Havens’s request, it directed the Enforcement Bureau to review whether that information should be withheld under FOIA Exemption 4, which protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹ The Bureau released some documents, but not others, finding that information protected by Exemption 4.² Havens has applied for Commission review of the Bureau’s decision to the extent it declined to release certain documents.³ Upon review, we affirm, with a few exceptions, the Bureau’s decision.

II. BACKGROUND

2. The Commission designated the Maritime Proceeding to determine whether radio licenses held by a company called Maritime Communications/Land Mobile, LLC (Maritime) should be revoked and related wireless radio applications should be denied.⁴ Havens, individually, and several companies he owns were parties to the Maritime Proceeding.⁵ The Presiding Administrative Law Judge bifurcated the proceeding and provided that the hearing would initially go forward only with respect to one issue, Issue (g), which concerns the question of whether some of Maritime’s licenses have automatically cancelled. In connection with discovery related to Issue (g), the Administrative Law Judge adopted a protective order, which allowed Maritime and other parties to submit information during discovery as confidential or highly confidential.⁶ The Protective Order allows counsel for Havens and his companies, but not Havens himself,⁷ to access confidential documents by signing a non-disclosure agreement, and allows Havens to seek a ruling from the Administrative Law Judge on whether documents submitted under the Protective

¹ 5 U.S.C. § 552(b)(4).

² Letter from William Knowles-Kellett, Attorney Enforcement Bureau to Warren Havens (Oct. 26, 2016) (*Decision*).

³ Email from Warren Havens to FOIA-Appeals@fcc.gov (Jan. 24, 2017) (Application for Review).

⁴ *Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd 6520 (2011).

⁵ The Presiding Judge later excluded Havens and his companies from participation in the proceeding in response to Havens’s conduct during the hearing. Memorandum Opinion and Order, FCC 15M-14 (Apr. 22, 2015), *appeal pending*.

⁶ See Protective Order, FCC 11M-21 (Jul. 20, 2011).

⁷ The protective order makes this distinction because Havens and his companies are competitors of Maritime and related entities.

Order should be made public.

3. In his FOIA request, Havens seeks “the document submitted in FCC proceeding EB Docket No. 11-71, entitled Enforcement Bureau’s Direct Case Exhibits (Public Version), dated 9/16/14, by the Enforcement Bureau (‘the EB Document’), and all documents identified as exhibits in the EB Document (the ‘EB Document and Exhibits’), a copy of the unredacted pages, for each page that has any redaction within the EB Document and Exhibits. . . .”⁸

4. The Bureau denied this request, in full, finding that the material requested, *i.e.*, text and exhibits redacted from the public version of the direct case because they were designated as confidential pursuant to the Protective Order, was exempt from disclosure under FOIA Exemption 7(A). FOIA Exemption 7(A) protects “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings.”⁹ The Bureau found that the FOIA request would interfere with the Maritime Proceeding in that “granting your FOIA requests would serve only to complicate and delay the introduction of evidence.”¹⁰ That is, the Protective Order provided that any documents subject to the Protective Order could be used in the hearing by parties executing a nondisclosure agreement, whereas the FOIA request (which would have the effect of making the disclosed material public) required a time-consuming individualized determination and litigation of which portions of which documents were confidential.

5. Havens appealed the Bureau’s denial of his FOIA request (2014-664) as well as the Bureau’s earlier denial of Havens’s broader request for all material covered by the Protective Order (2014-650).¹¹

6. The Commission granted in part and denied in part Havens’s first application for review.¹² The Commission upheld the Bureau’s denial of Havens’s broader request (2014-650) for all material covered by the Protective Order, finding that the Bureau had correctly applied Exemption 7(A).¹³ As to Havens’s narrower request (2014-664) for the Bureau’s direct case exhibits, the Commission found that the request did not create the same degree of harmful impact on the hearing proceeding as did the broader request and thus that Exemption 7(A) should not be applied.¹⁴ Consequently, the Commission remanded the narrower request to the Bureau to review the withheld material under FOIA Exemption 4, which protects “trade secrets and commercial or financial information obtained from a person and privileged or

⁸ Email from Warren Havens to FOIA@fcc.gov (Sept. 19, 2014) at 1.

⁹ 5 U.S.C. § 552(b)(7)(A).

¹⁰ Letter from Gary Schonman, Special Counsel, Federal Communications Commission (Feb. 18, 2015) at 2. The Bureau set forth a similar rationale in rejecting Havens’s earlier, broader request (FOIA Control No. 2014-650) seeking all material covered by the Protective Order. Letter from Gary Schonman, Special Counsel, Federal Communications Commission to Warren Havens (Jan. 30, 2015) (finding that the request would “disrupt the orderly conduct of the proceeding, undermine the protective order and the presiding judge’s authority to supervise the proceeding, and complicate and delay the introduction of evidence.”). To avoid confusion, we will refer to the request before us as 2014-664 and the earlier request as 2014-650. Additionally, we note that one of Havens’s companies, Skybridge Spectrum Foundation (Skybridge), filed FOIA requests (FOIA Nos. 2014-651 and 2014-663) identical to Havens’s FOIA Control No. 2014-650 and 2014-664 requests. The Commission considered Skybridge’s requests, along with Havens’s in an earlier order. *Warren Havens*, 31 FCC Rcd 10332 (2016). Skybridge, unlike Havens, did not appeal that order.

¹¹ Email from Warren Havens to David S. Senzel, Office of General Counsel (Mar. 20, 2015).

¹² *Warren Havens*, 31 FCC Rcd 10332.

¹³ *Id.* at 10335, para. 10.

¹⁴ *Id.* at 10336, para. 13.

confidential.”¹⁵ On remand, the Bureau was directed to determine which material should be withheld as confidential and which should be disclosed as not confidential.

7. In the Bureau’s subsequent decision on remand (the *Decision* here under appeal), the Bureau released 13 pages of documents containing redactions and withheld in their entirety 206 pages of documents.¹⁶ The Bureau found that the withheld material consisted of contracts and business plans and descriptions of contracts and business plans that constitute confidential commercial and financial information under Exemption 4.

8. Havens’s Application for Review of this *Decision* is now before us. In his Application for Review, Havens makes three principal arguments. First, Havens asserts that the withheld documents include contracts and business plan documents that have been publicly disclosed in the record of Maritime’s Chapter 11 Bankruptcy proceeding.¹⁷ Havens asserts that such publicly available material cannot be withheld. Second, Havens maintains that the withheld material includes contracts and business plans related to Maritime’s site-based Automated Maritime Telecommunications system licenses.¹⁸ According to Havens, Maritime admitted in the Maritime Proceeding that it had ceased all operations related to these licenses. Havens argues that, in view of this admission, information related to these facilities cannot now be considered competitively sensitive and therefore confidential. Third, Havens contends that he requires the withheld material in order to challenge the positions taken by Maritime and the Bureau in the Maritime Proceeding.¹⁹ Havens acknowledges that the Presiding Judge terminated his party status in the Maritime Proceeding but points out that he is appealing that ruling.

9. Upon reviewing the Application for Review, the Office of General Counsel determined that this case might be suitable for informal resolution.²⁰ The Office of General Counsel anticipated that the parties might be able to clarify the current status of the withheld documents and therefore asked Havens and counsel for Maritime to submit their views as to whether the withheld material continues to be confidential.²¹ The Office of General Counsel asked Maritime whether it continues to claim that the withheld material is confidential and whether any has been publicly disclosed. The Office of General Counsel asked Havens to specify any material he claims is publicly available. Havens withheld his consent to the informal resolution process and declined to make a submission.²² Maritime submitted its views on the confidentiality of the withheld material.²³ Maritime reported that some documents had been publicly disclosed but continued to assert the confidentiality of all other documents.²⁴

¹⁵ 5 U.S.C. § 552(b)(4).

¹⁶ *Decision* at 2. More specifically, the Bureau released in redacted form Exhibits 1A and 1B. The Bureau withheld Exhibits 38, 45, 46, 51, 52, 53, 55, 58, 59, 60, 70, 71, 72, and 91.

¹⁷ Application for Review at 3-4.

¹⁸ *Id.* at 4. Automated Maritime Telecommunications system is a specialized communications system that was formerly licensed on a site-specific basis but is now licensed on a geographic (*i.e.*, area-wide) basis.

¹⁹ *Id.* at 4-5.

²⁰ See 47 CFR § 0.461, Note to paragraphs (i) and (j) (“[t]he General Counsel may review applications for review with the custodian of the records and attempt to informally resolve outstanding issues with the consent of the requester.”).

²¹ Letter from Elizabeth Lyle, Assistant General Counsel, to Warren Havens and Robert J. Keller, counsel for Maritime (May 31, 2017).

²² Email from Warren Havens to David Senzel (June 22, 2017).

²³ Letter from Robert J. Keller, counsel for Maritime, to Elizabeth Lyle, Assistant General Counsel (June 21, 2017) (Keller Letter). Although we sought Havens’s agreement to informal resolution of his appeal, we do not need his agreement to refresh the record regarding the claims of confidentiality. Our rules contemplate that we will consult with the submitters of confidential material. 47 CFR § 0.461(d)(3).

III. DISCUSSION

10. We find that the record before us indicates that most of the withheld contracts and business plans have not been publicly disclosed in court proceedings. In its comments, Maritime states that only two documents, Exhibits 38 and 60, have been publicly disclosed in the Maritime bankruptcy proceeding.²⁵ These exhibits consist of, respectively, Asset Purchase Agreements between Maritime and Duquesne Light Company and between Maritime and Puget Sound Energy, Inc. Maritime also indicates that the financial information in Exhibit 91, a Maritime response to interrogatories, has also been publicly disclosed in litigation.²⁶ Havens provides no evidence to the contrary. Accordingly, we direct the Bureau to disclose Exhibits 38, 60, and 91 to Havens.

11. Otherwise, Maritime asserts that, to the best of its knowledge, none of the exhibits has been publicly disclosed in court proceedings, although some may have been used in litigation subject to protective orders.²⁷

12. We further find that the record before us does not establish that other withheld material has lost its confidential status because Maritime has terminated operation at its site-based Automated Maritime Telecommunications system facilities. We agree with Maritime that information about completed or even unexecuted or abandoned activities may still contain competitively sensitive information concerning business operations and strategies.²⁸ Maritime states that Exhibits 45 and 46 are agreements between Maritime and Evergreen School District involving incumbent facilities still at issue in the Maritime proceeding.²⁹ Likewise, according to Maritime, Exhibits 51, 52, and 53 are agreements between Maritime and Pinnacle Wireless, Inc. involving incumbent facilities still at issue in the Maritime proceeding and also involving a geographic authorization.³⁰ Given the status of these facilities, we find that financial and business information about them remains confidential, especially considering that the information concerns entities other than Maritime.

13. Maritime indicates that Exhibits 55, 58, and 59 contain confidential information provided by Pinnacle Wireless, Inc. and that Exhibits 1A, 1B, 70, and 71 contain confidential information provided by Choctaw Telecommunications, LLC and Choctaw Holdings, LLC, including future business plans.³¹ Maritime states that Exhibit 72 regards a private business transaction between Maritime and Mobex Network Services, LLC, the terms, conditions, and other details of which are private.³² We find that disclosure of these documents would reveal sensitive business and financial information not only about Maritime but about other entities as well.

(Continued from previous page) _____

²⁴ Maritime also argues that documents given to the Bureau as a party in discovery are not agency records subject to a FOIA request. Keller Letter at 3 n.5. In view of our rulings below, we do not reach this question.

²⁵ *Id.* at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1 n.1. Maritime further observes that for this reason non-disclosure agreements typically provide for protection well beyond the completion of the activities involved. *See Ctr. For Auto Safety v. Nat. Highway Traffic Safety Admin.*, 93 F. Supp.2d 1, 16 (D.D.C. 2000) (observing that information does not become stale merely because it is old, where its disclosure would benefit competitors by giving them insight into the party's past and current efforts).

²⁹ The presiding judge issued an order terminating the Maritime Proceeding. *Order of Dismissal*, FCC 17M-35 (Sept. 28, 2017). Havens's appeal of this order is currently pending.

³⁰ *Id.* at 2.

³¹ Keller Letter at 2, 3.

³² *Id.*

14. Finally, we reject Havens's contention that we should grant his request because he needs the withheld material for use as a party to the Maritime proceeding. Havens is not, in fact, a party to the proceeding, having been expelled from the proceeding by the Presiding Judge.³³ Moreover, as Maritime points out, when he was a party, Havens had recourse through the Protective Order for his counsel to access the confidential information he has sought through his FOIA request. In any event, under the FOIA, a requester's intention to use information in litigation is irrelevant to whether a FOIA request should be granted.³⁴

IV. ORDERING CLAUSES

15. IT IS ORDERED that the application for review filed by Warren Havens IS GRANTED in part and DENIED in part. Havens may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).³⁵

16. The officials responsible for this action are: Chairman Pai and Commissioners O'Rielly, Carr, and Rosenworcel.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³³ See Memorandum Opinion and Order, FCC 15M-14 (Apr. 22, 2015), *appeal pending*.

³⁴ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1977) ("The [FOIA] is fundamentally designed to inform the public about agency action and not to benefit private litigants.").

³⁵ 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 Havens's right to pursue litigation. Havens 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.