

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

In the Matter of	)	
	)	FOIA Control No. 96-80
Jeffrey A. Krauss	)	
	)	
On Request for Inspection	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 13, 1996; Released: August 23, 1996**

By the Commission:

1. The Commission has under consideration an application for review filed on April 10, 1996, by Jeffrey A. Krauss (Krauss), seeking review of an April 4, 1996. Freedom of Information Act (FOIA) decision by the Chief, New Technology Development Division, Office of Engineering and Technology (OET). A response to the application for review was filed on April 24, 1996, by Dispatch Interactive Television, Inc. (Dispatch) and Welcome to the Future, Inc. (Welcome). Krauss filed a reply on April 30, 1996. For the reasons discussed below, we grant in part and deny in part the application for review.

**Background**

2. By FOIA request filed on March 6, 1996, Krauss sought "copies of the license, application and all correspondence" associated with the experimental license KA2XAL that was issued to Dispatch. The experimental license authorized Dispatch, the licensee of two Interactive Video and Data Service (IVDS) systems, to test the set-top equipment (RTU), developed by Welcome, in conjunction with Dispatch's IVDS systems. Prior to the filing of the FOIA request, OET had granted a request filed by Dispatch and Welcome asking that material in the application be accorded confidential treatment under section 0.459 of the Commission's rules, 47 C.F.R. § 0.459, and Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). In response to the FOIA request, OET provided Krauss with a copy of the experimental license and OET's response to the confidentiality request.

Pursuant to section 0.461(c) of the Commission's rules, 47 C.F.R. § 0.461(c),<sup>1</sup> OET withheld from disclosure Dispatch's application and a narrative statement appended to the application as Exhibit 1.

3. In his application for review, Krauss contends that OET's failure to release the applications for experimental licenses was contrary to the public interest. In particular, Krauss alleges that the Commission should disclose sufficient information to permit interested parties to detect potential sources of radio interference. In their joint response, Dispatch and Welcome assert that public disclosure of the technical design of the model RTU equipment, which is revealed in their application, likely will cause them substantial competitive harm, particularly given that "great competition currently exists between the various companies who are striving to develop and market the most effective and efficient IVDS technology and equipment."<sup>2</sup> Dispatch and Welcome also maintain that Krauss' application for review has failed to present a persuasive factual showing that justifies the disclosure of the records.<sup>3</sup> In his reply, Krauss continues to assert that only a more complete disclosure will afford the information needed to evaluate potential interference.

### Discussion

4. We have reviewed Dispatch's experimental application and the associated ten page narrative statement (Exhibit 1) and have determined that pages three through ten and portions of page one of the narrative statement, which detail the technical aspects and design of the model RTU equipment, should not be disclosed. We agree that public disclosure of this information would result in substantial competitive harm to Dispatch and Welcome in that it would lessen the value of their technologically innovative product by enabling others to utilize the information to develop similar products. Accordingly, the material is not required to be disclosed under the FOIA because it is within the scope of Exemption 4, which protects from public disclosure matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

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<sup>1</sup> Section 0.461(c) requires that requests for disclosure of confidential materials specify the reasons for disclosure and the facts in support thereof. OET found that Mr. Krauss did not provide reasons for disclosure of the confidential information.

<sup>2</sup> Response at 4.

<sup>3</sup> Response at 3.

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See National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770-71(D.C. Cir. 1974)(where disclosure of commercial information likely will cause substantial competitive harm, it is confidential information protected from disclosure under Exemption 4). In light of our determination that this information is "confidential" within the meaning of Exemption 4, we need not decide whether the information is also exempt as a "trade secret" under the Exemption. See Public Citizen Health Research Group v. Food and Drug Administration, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

5. Krauss' concern regarding potential interference does not justify disclosure of the confidential information. The experimental authorizations issued to Dispatch and Welcome were for the limited purpose of enabling them to operate and test their RTU equipment in conjunction with Dispatch's licensed IVDS systems. In conducting their tests, Dispatch and Welcome must comply in all respects with the applicable IVDS rules regarding permissible frequencies, antenna heights, and maximum power output limits.<sup>4</sup> Moreover, the Commission's IVDS licensing rules explicitly require licensees to resolve and correct any interference problems caused by their operations.<sup>5</sup> Additionally, under the Commission's experimental authorization rules, applicants are required to refrain from causing harmful interference and to cease operations in the event that such interference occurs.<sup>6</sup> Finally, in the event harmful interference does occur, any interested party may file a complaint with the Commission, and the Commission will determine the source of the interference. Accordingly, because disclosure of the information is not required in order to protect interested parties from potential harmful interference, we find no public interest basis to release it.

6. We have confirmed, however, that the three page application itself (exclusive of Exhibit 1) was not within the scope of the applicant's original request for confidentiality and that the applicant has no objection to its disclosure. Accordingly, the three page application form will be released. In addition, portions of pages one and two of the narrative statement contain information that is virtually identical to the information provided in Dispatch's and Welcome's publicly filed response to the application for review. Therefore, because this information is not confidential, we will also disclose paragraphs one and two of page one and all of page two of the narrative statement.<sup>7</sup>

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<sup>4</sup> See 47 C.F.R. §§ 95.815(b), 95.851(a), 95.853, 95.855, 95.857, 95.859.

<sup>5</sup> See 47 C.F.R. § 95.861.

<sup>6</sup> See 47 C.F.R. § 5.151.

<sup>7</sup> See Church of Scientology International v. U.S. Department of Justice, 30 F.3d 224, 228 (1st Cir. 1994)(Government is required to disclose all reasonably segregable, non-exempt portions of the record).

Dispatch and Welcome have also indicated that they do not seek confidential treatment for this information.

**Conclusion**

7. Accordingly, the application for review IS GRANTED to the extent indicated herein and IS DENIED to the extent indicated herein. Krauss may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

8. The officials responsible for this action are the following Commissioners: Reed E. Hundt, Chairman; James H. Quello, Susan Ness and Rachelle B. Chong.

**FEDERAL COMMUNICATIONS COMMISSION**

William F. Caton  
Acting Secretary