

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)	
)	
Freedom of Information Act Request)	Control No. 2003-023
)	
Rules and Regulations Implementing)	
The Telephone Consumer Protection)	CG Docket No. 02-278
Act of 1991)	

MOTION FOR EXPEDITED REVIEW

The American Teleservices Association (“ATA”), by counsel and pursuant to 47 C.F.R. § 1.41, hereby respectfully requests that the Commission expedite its consideration of ATA’s Application for Review of Freedom of Information Act (“FOIA”) Action, filed December 6, 2002. 1/ Expedited treatment of the Application for Review is necessary to ensure that ATA and other parties participating in the above-captioned proceeding are afforded timely access to critical documents central to the issues raised by the Notice of Proposed Rulemaking in this docket. 2/

As explained in greater detail in the Application for Review, ATA filed a FOIA request to obtain certain TCPA-related documents received by the Commission and relied upon in the NPRM. ATA filed the FOIA request after the Consumer and Governmental Affairs Bureau (“Bureau”) declined to make the documents available for inspection absent a FOIA request, even though the Commission cited the documents as

1/ Application for Review of FOIA Action, Control No. 2003-023, CG Docket No. 02-278 (Dec. 6, 2002) (“Application for Review”) (attached Tab 1 (attachments omitted)).

2/ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd 17459 (2002) (“NPRM”) (considering potential changes to FCC rules implementing Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”)).

a key factor in its decision to revisit the TCPA rules. ^{3/} The Application for Review challenges this determination, as well as the Bureau's assessment of upwards of \$25,000 in fees to process ATA's FOIA request.

This Motion for Expedited Review is submitted in response to a recent letter from the Bureau, which informed ATA that the Bureau will not continue to process ATA's FOIA request, unless ATA expresses its willingness to pay the disputed fees while the Commission considers the Application for Review. ^{4/} This presents ATA with a Hobson's choice: ATA must agree in advance to pay fees it believes are illegitimate under the Commission's rules. Unless the Commission expedites its review as requested here, ATA will be forced to pay the disputed fee in order to review even a small fraction of the documents during the comment period of this rulemaking proceeding. Thus far, barely 4 percent of the requested documents have been produced, yet ATA and the other parties to this proceeding face a January 8, 2003, deadline to reply to the comments on the NPRM's inquiry into potentially far-reaching revisions to the Commission's TCPA rules.

It is critical that the Commission act upon ATA's Application for Review as soon as practicably possible to allow ATA and other commenters the opportunity to

^{3/} The Bureau stated that it could not fulfill ATA's FOIA request within the period mandated by FOIA and the Commission's rules, but rather would require "a number of months" to provide the requested information. See Letter of K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission, to Ronnie London, Counsel for ATA, filed in Control No. 2003-023 (Nov. 29, 2002) (Tab 2). The Bureau estimated that responding to the request would cost ATA approximately \$6,800 just to copy the requested materials (at \$0.17 per page) and between \$16,480 and \$19,468 for "search and review costs." *Id.*

^{4/} Letter of K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission, to Robert Corn-Revere, Counsel for ATA, filed in Control No. 2003-023 (Dec. 13, 2002) (See Tab 3).

review the requested documents in time to file reply comments (the comment period has already passed). Expedited treatment of the Application for Review is necessary in that ATA requested the materials cited in the NPRM to meaningfully participate in the TCPA rulemaking. As ATA noted in its Application for Review, "information is often useful only if it is timely." Application for Review at 14, quoting *Gilmore v. Dept. of Energy*, 33 F. Supp.2d 1184, 1187 (N.D. Cal. Sept. 14, 1998). ATA filed the Application for Review to speed the process of obtaining documents the Commission relies upon in the NPRM so that ATA can comment accordingly. The only solution – short of forcing ATA to pay what it believes is an exorbitant amount for documents that should be available as part of the rulemaking process – is for the Commission to expedite its resolution of ATA's Application for Review of the Bureau's FOIA determination.

For the foregoing reasons, ATA herein respectfully requests that the Commission grant ATA's Motion for Expedited Review.

Respectfully submitted,

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December 17, 2002

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WASHINGTON, D.C.

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OFFICE OF THE SECRETARY

In the Matter of)
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Freedom of Information Act Request)
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Rules and Regulations Implementing)
The Telephone Consumer Protection)
Act of 1991)

Control No. 2003-023

CG Docket No. 02-278

REVIEW OF FREEDOM OF INFORMATION ACTION

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Summary

This application for review raises a very straightforward question: Can the Commission delay the release of documents that it has cited as a principal basis for a rulemaking proceeding and charge interested commenters approximately \$25,000 in order to obtain the documents? The American Teleservices Association (“ATA”) maintains that it cannot.

In September, the Commission initiated a proceeding to review and possibly adopt far-reaching revisions to its rules implementing the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA”). In doing so, it cited “the increasing number and variety of inquiries and complaints involving our rules on telemarketing and unsolicited fax advertisements.” In order to meaningfully participate in the proceeding, ATA sought access to the complaints upon which the Commission relied.

The staff responded to ATA’s request for the documents by requiring it to file a request under the Freedom of Information Act (“FOIA”) and the FCC’s FOIA rules. However, there was no legal basis to require proceeding under FOIA rather than simply making the documents publicly available. Documents upon which the Commission relies in a rulemaking proceeding must be available for public inspection during the notice and comment period so a complete record can be established.

Additionally, as informal complaints, the requested documents are generally classified as “routinely available” under the Commission’s current rules. Parties seeking to withhold such documents from public inspection must avail themselves of the request process set forth in Section 0.459(a) of the rules. While the staff seeks to subject these documents to a redaction process and thereby delay their release until months after the NPRM comment period has closed, it cannot do so

legitimately. There is only a *de minimis* privacy interest supporting redaction of the complainants' names under the Commission's rules governing informal complaints and its standard practice in the TCPA rulemaking proceeding of personally identifying the thousands of individual commenters makes the assertion of a privacy interest all the more questionable here. It is critical to note that ATA is not seeking access to the names of the complainants, and ATA would not publicly disclose such information in any case. In this circumstance, there is no basis for the staff's asserted need to delay the release of the complaints in the name of privacy.

The Bureau's response not only violates 47 C.F.R. § 0.461(g) of the Commission's rules by not providing the requested documents within 30 working days of the FOIA request, but the estimated time for compliance – “a number of months” – seriously damages ATA's and other commenters' ability to meaningfully participate in the underlying rulemaking. In fact, since the Commission had already counted, collected and reviewed all of the documents that ATA requested (otherwise it could not have cited them in the NPRM) there should be no search and review time involved in fulfilling the request. In addition, the estimated costs associated with processing ATA's FOIA request and the associated costs to ATA are excessive and should be greatly reduced or waived entirely in the public interest pursuant to 47 C.F.R. § 0.470(e).

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REVIEW OF FREEDOM OF INFORMATION ACTION

The American Teleservices Association ("ATA"), by counsel and pursuant to 47 C.F.R. §§ 0.461(j) and 1.115, herein respectfully requests that the full Commission review the above-captioned Freedom of Information Act ("FOIA") action, in which the Consumer and Governmental Affairs Bureau ("CGB") claimed (i) it could not fulfill ATA's FOIA request within the period mandated by FOIA and the Commission's rules, but rather would require "a number of months" to provide the requested information, and (ii) estimated that implementing the request would cost ATA approximately \$6,800 just to copy the requested materials (at \$0.17 per page) and between \$16,480 and \$19,468 for "search and review costs." 1/

This application for review arises out of ATA's effort to obtain and analyze informal complaints relied upon by the Commission in initiating a proceeding to review and possibly adopt far-reaching revisions to its rules implementing the Telephone

1/ Letter of K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission, to Ronnie London, Counsel for ATA, filed in Control No. 2003-023 (Nov. 29, 2002) (See Tab 1).

Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA").^{2/} ATA believes that the staff response, which would delay release of the requested documents until several months after the comment period in the underlying proceeding has closed, and which would effectively impose a surcharge of \$25,000 for the privilege of commenting intelligibly in the proceeding, is clearly erroneous.

First, the staff's claim that such informal complaints are not routinely available, and that a FOIA request had to be filed, is incorrect. Second, not only has the staff violated 47 C.F.R. § 0.461(g) of the Commission's rules by not processing ATA's FOIA request within 30 days, but the estimated time for compliance greatly prejudices ATA's ability to meaningfully participate in the underlying rulemaking. Third, even if such a FOIA request was required, the resources necessary to process the request, and the resultant costs to ATA, are excessive and should be greatly reduced or waived entirely.

I. BACKGROUND

On September 18, 2002, the Commission issued the *TCPA NPRM*. The notice stated that the proceeding was "prompted, in part, by the increasing number and variety of inquiries and complaints involving our rules on telemarketing and unsolicited fax advertisements." *Id.* ¶ 8. The Commission observed that it received over 11,000 complaints about telemarketing practices from January 2000 through December 2001, *id.* ¶ 8, and over 1,500 inquiries about predictive dialing between June 2000 and

^{2/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Docket No. 02-278, FCC 02-250 (rel. Sept. 18, 2002) ("*TCPA NPRM*").

December 2001. *Id.* ¶ 26. As a result, the Commission sought comment on whether it is necessary for it to adopt new rules regulating the provision of teleservices.

As the trade association of the teleservices industry representing teleservice providers and users in the United States, ATA is participating in the proceeding. Because the Commission's reliance on the complaints is a significant factor underlying its issuance of the *TCPA NPRM*, ATA requested access to the complaints and inquiries. In response to an informal inquiry, counsel for ATA was instructed by the CGB staff that the only means of reviewing the documents would be filing a request under FOIA and the FCC's FOIA rules. ^{3/}

On October 16, 2002, Counsel for ATA submitted a FOIA request to the Commission as directed by the CGB staff. ^{4/} During follow-up conversations regarding the request, ATA was told that it would take the Commission six to eight months to provide the requested documents. The CGB indicated that, during this time, a staff member at the GS-13 or GS-14 level would have to redact the personally identifiable information from the complaints before ATA could receive them. On November 6, 2002, Counsel for ATA and ATA's Director of Government Affairs met with K. Dane Snowden, Chief of CGB, and several other members of the CGB staff, along with a representative from the Commission's Office of General Counsel. ^{5/} The meeting confirmed the original time and expense estimate for responding to ATA's FOIA request, and the CGB

^{3/} See 5 U.S.C. § 552(b); 47 C.F.R. § 0.441 *et seq.*

^{4/} FOIA Control No. 2003-023 (Oct. 16, 2002) (*see* Tab 2).

^{5/} See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Ronald G. London, Counsel for ATA, filed in CG Docket No. 02-278 (Nov. 7, 2002) (*see* Tab 3).

offered several options that fell well short of complying with the request. These included providing a sample of a few hundred of the 11,000 complaints, or allowing ATA to specify two months during the two-year period in which the complaints were received for which the Commission would provide documents responsive to the FOIA request.

On November 7, 2002, Counsel for ATA submitted two letters following the meeting with the CGB staff (see Tabs 4 & 5). The first letter memorialized the meeting and scope of the FOIA request as clarified through discussion at the meeting. It also memorialized the understanding that a written response to the FOIA request was due November 14, 2002, and that the staff anticipated exercising the ten-day extension provided under rules for situations when "it is not possible to locate the records and determine whether they should be made available for inspection." 47 C.F.R. § 0.461(g). The second letter, while confirming ATA's continued interest in receiving all the documents sought by its FOIA request, agreed as an interim measure to receipt of a two-month sampling of responsive documents while the rest of the documents responsive to the request are compiled. ^{6/}

On November 14, 2002, CGB issued a letter exercising the 10-day extension, thereby moving back the time for substantive response to the FOIA request until November 29, 2002, the Friday after Thanksgiving (see Tab 6). At the same time, the letter acknowledged ATA's continued interest in receiving all the documents sought by its FOIA request, and it provided as an interim measure a sample of complaints

^{6/} The letter (i) consented to receipt of "complaints received about telemarketing practices" referenced at ¶ 8 of the *TCPA NPRM* for the months August 2001 and March 2002, (ii) requested the documents be provided no later than November 14, 2002, and (iii) further requested provision of the remaining documents responsive to the FOIA request on a rolling basis as they become available for release.

received in the two months specified by ATA, August 2001 and March 2002 (125 for each month). *Id.*

On November 29, 2002, the Commission staff issued its final written response to the FOIA request, stating “that it would take a number of months and considerable staff resources in order to provide” the documents requested by ATA. The staff indicated that, according to its “tentative estimates,” copying costs would amount to \$6,800 (\$0.17 per page) and the fee for “search and review costs” would total at least \$16,480 (GS-13 level staff billed at \$41.20 per hour for 400 hours) to \$19,468 (GS-14 level staff billed at \$48.67 per hour for 400 hours) (see Tab 1). The Bureau further indicated that such review and search costs were only for “complaints that are available electronically” and that such costs would increase for any non-electronic complaints. The staff provided an additional 188 redacted TCPA-related complaints along with its letter.

II. REQUESTED RELIEF

ATA respectfully requests that the Commission overturn the staff’s classification of the telemarketing complaints and predictive dialing inquiries as “not routinely available” documents and immediately release those documents for public consideration during the notice and comment period for the *TCPA NPRM*. In the alternative, ATA requests that the Commission require the staff to significantly accelerate its release of the redacted documents in time for consideration of them in the notice and comment period, and to substantially reduce or waive the charge associated with producing the requested documents.

III. THE STAFF ERRED IN WITHHOLDING THE REQUESTED DOCUMENTS AND IN CLASSIFYING THEM AS “NOT ROUTINELY AVAILABLE”

The Bureau incorrectly classified the telemarketing complaints and predictive dialing inquiries as documents that are “not routinely available” and therefore available only through a FOIA request. In the *TCPA NPRM*, the Commission relied upon the complaints and inquiries as a principal basis for the rulemaking. The Commission cannot now reasonably limit public access to the documents that it has identified as relevant to possible changes in its TCPA rules. Such documents are precisely the types of materials that are “routinely available” for public inspection and comment.

A. The Commission Should Make the Requested Documents Available to All Commenters

Federal case law and Commission precedent require Commission disclosure of the complaints and inquiries in time for consideration in the comment period. Requiring disclosure of such files in agency proceedings ensures “that interested parties have a meaningful opportunity to participate . . . and that the Court has an adequate record from which to determine whether the agency properly performed its functions.” ⁷¹ The Commission has observed the “significant impact” that non-disclosure of documents in a rulemaking can have on whether commenters have

⁷¹ *Abbott Laboratories v. Young*, 691 F. Supp. 462, 467 (D.D.C. 1988), *remanded on other grounds*, 920 F.2d 984 (D.C. Cir. 1990), *cert. denied sub. nom.*, *Abbott Laboratories v. Kessler*, 502 U.S. 819 (1991).

had meaningful notice and opportunity to comment. ^{8/} It has noted that one purpose for disclosure "is to ensure that interested parties have full opportunity to participate in the proceeding by providing a different perspective on materials that may be relied upon by the agency." ^{9/}

Since the Commission expressly relied upon the telemarketing complaints and predictive dialer inquiries in initiating the *TCPA NPRM*, it must not only make them publicly available, but must do so in time for the interested parties to comment upon them. The Commission recently applied this principle in its broadcast ownership proceeding, making its internal data available to commenters. ^{10/} In doing so, it acknowledged that by placing documents over which it has complete control at issue in a rulemaking proceeding, it is obligated to provide sufficient time for the parties to analyze the information before filing comments.

Because of the difficulty in gaining access to the complaints, ATA filed a motion for extension of time to file comments and a supplemental motion to permit the Commission time to process the FOIA request, disclose the requested documents, and allow interested parties to review and comment upon those materials. ^{11/} The Bureau

^{8/} *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24844 (¶ 44) (1998).

^{9/} *Id.*

^{10/} See *FCC's Media Bureau Adopts Procedures for Public Access to Data Underlying Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review Of Commission's Media Ownership Rules*, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, Public Notice, DA 02-2980 (Nov. 5, 2002).

^{11/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, ATA Motion for Extension of Time (filed Nov. 13, 2002); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,

granted ATA's motion in part, extending the comment deadline by 17 days (from November 22, 2002 to December 9, 2002) and the reply comment deadline to 30 days after the new comment deadline (from December 9, 2002 to January 8, 2003). ^{12/} Unfortunately, even with the new comment period, the vast majority of the requested documents will not be available in time for ATA and others to meaningfully provide comment on them. ATA requests that the Commission address this issue by requiring the Bureau to immediately disclose the requested documents in time for interested parties to reasonably review and comment upon them within the established comment period. In the alternative, the Commission should extend the reply comment period to permit adequate analysis of the documents once they are released.

B. The TCPA Informal Complaints Should Be "Routinely Available" Pursuant to 47 C.F.R. § 0.453

The requested documents should be considered "routinely available" pursuant to § 0.453 of the Commission's rules. The Commission's FOIA rules contemplate two types of documents, those which are "routinely available" for public inspection (see §§ 0.453 and 0.455) and those which are "not routinely available" (see § 0.457). Routinely available documents include a broad range of materials, including, among other things, all formal and informal complaints filed against common carriers pursuant to 47 C.F.R. §§ 1.711 through 1.735 (§ 0.453(a)(2)(ii)(F)); documents related to enforcement proceedings, public hearings and related matters (§ 0.453(a)(2)(ii)(H));

CG Docket No. 02-278, ATA Supplemental Motion for Extension of Time (filed Nov. 15, 2002).

^{12/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, CG Docket No. 02-278, DA 02-3210 (rel. Nov. 20, 2002).

and all complaints regarding cable programming rates (§ 0.453(a)(2)(v)(A)). Such documents are generally available for public inspection free of charge (except for duplication costs or requests made pursuant to § 0.460(e)) at Commission locations upon request (upon written request for large or complex searches) (see § 0.460).

Conversely, materials that are “not routinely available” constitute a much narrower class of documents, such as those protected pursuant to Executive Order for national security purposes; internal Commission personnel rules and practices; statutorily protected documents; trade secrets and other confidential commercial, financial, and/or technical information; interagency and intra-agency memoranda; “personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy;” and certain investigatory records compiled for law enforcement purposes (see § 0.457). Individuals wishing to obtain documents not routinely available must submit a written FOIA request to the Commission (§ 0.461). The Commission then has 20 working days to act upon the request (plus an additional 10 working days in “unusual circumstances”). Parties requesting not routinely available documents must pay both copying and search/review fees in most cases.

The Commission is in the process of reviewing its rules governing the filing of informal complaints against entities regulated by the Commission. ^{13/} As part of that proceeding, the Commission has proposed changing the current designation of informal complaints as records that are available for public inspection. ^{14/} Specifically,

^{13/} *Establishment of Rules Governing Procedures to be Followed When Informal Complaints Are Filed By Consumers Against Entities Regulated by the Commission*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 17 FCC Rcd 3919 (2002) (“*Informal Complaint NPRM*”).

^{14/} *Id.* at 3927.

the Commission has stated that "[b]ecause informal complaint records include personal information relating to consumers such as their names, addresses, and phone numbers, *we propose to no longer make them routinely available for public inspection.*" ^{15/} In other words, under the Commission's current rules, informal complaints are classified as routinely available documents, and as such, are not subject to FOIA as enumerated in the rules governing documents that are "not routinely available." The proposed change in the rules has not yet been adopted and cannot control the Commission's response to ATA's request in this case.

It bears noting that the telemarketing complaints and predictive dialer inquiries also should be classified as "routinely available" documents under § 0.453(a)(2)(ii)(H) of the rules as records associated with "enforcement hearings, public inquiries and related materials." Moreover, Section 0.459(a) of the Commission's rules affords individuals filing information with the Commission the opportunity to request that such information not be made available for public inspection. To the extent that the individuals submitting the telemarketing complaints and predictive dialing inquiries did not avail themselves of the request process set forth in Section 0.459(a), the Commission has no basis to withhold the documents for the redaction of personal identifying information. ^{16/}

For these reasons, the Commission should overturn the Bureau's decision to classify the telemarketing complaints and predictive dialing inquiries as "not routinely available" and should immediately produce the materials for public inspection. In this

^{15/} *Id.* (emphasis added).

^{16/} ATA is not requesting access to documents in any instances where the complainant has requested confidentiality.

regard, it is also important to note that ATA is not seeking the identities of the complainants, nor will it publicly disclose any names. Accordingly, the Commission cannot rely on FOIA Exemption 6 as the basis for impeding access to the complaints during the comment period. 17/ The problem in this case is of the FCC's making; ATA does not care whether the complainants' names are redacted, but is adamant that the time the Commission takes for doing so should not penalize those who wish to submit comments in the rulemaking proceeding. The core issue is that the Commission has no basis to withhold or delay access to the complaints that it put at issue in an active rulemaking proceeding, and it certainly has no support for passing the cost of such redaction through to ATA. 18/

17/ Exemption 6 of FOIA does not support the Commission's position here because ATA is not seeking and will not disclose the complainants' names or any identifying information. This information raises only a *de minimis* privacy interest in the first instance given the Commission's rules governing informal complaints and its practice in the TCPA rulemaking proceeding of personally identifying individual commenters. See, e.g., *Baltimore Sun v. United States Marshals Serv.*, 131 F. Supp.2d 725, 729 (D. Md. 2001) (allowing release of records with identifying information because there was "little to fear in the way of harassment, annoyance, or embarrassment."); *Alliance for the Wild Rockies v. Dept. of the Interior*, 53 F. Supp. 32, 36-37 (D.D.C. 1999) (holding that commenters to proposed rulemaking had little expectation of privacy as complete record of proceeding would be publicly available); *Oregon Natural Desert Ass'n v. Dept. of the Interior*, 24 F. Supp.2d 1088, 1093 (D. Or. 1998) (finding release of names of violators of federal grazing law provided public with understanding of how government enforced land management laws); *Urbigkit v. Dept. of the Interior*, No. 93-CV-0232-J, slip op. at 13 (D. Wyo. 1994) (finding release of list of individuals reporting wolf sightings shows how agency meets obligations imposed upon it by Endangered Species Act).

18/ Neither can the documents be withheld based upon the Privacy Act of 1974 (5 U.S.C. § 552a). Section 552a(b)(2) of the Privacy Act "represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access." *Greentree v. United States Custom Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982).

IV. THE COMMISSION SHOULD GREATLY ACCELERATE PRODUCTION OF THE REQUESTED DOCUMENTS

The staff has violated 47 C.F.R. § 0.461(g) of the Commission's rules by not providing the requested documents within 30 days of ATA's FOIA request. Section 0.461(g) requires that the Commission act upon a FOIA request within 20 business days of the date of the request. "If it is not possible to locate the records and determine whether they should be made available for inspection" the Commission can extend the time for action by another 10 days under certain circumstances. (47 C.F.R. § 0.461(g)).

The extension provision does not apply to ATA's FOIA request for documents relied upon in the *TCPA NPRM*. The extension period is to be taken only in "unusual circumstances," ^{19/} which for the Commission are delineated in §§ 0.461(g)(1), (2) and (3) of the Commission's rules. However, it is clear that the staff did not need to gather the documents from field offices (§ 0.461(g)(1)), search for the records (§ 0.461(g)(2)), or obtain the cooperation of other federal bodies having a substantial interest in the determination of the request (§ 0.461(g)(3)). The Commission had already collected, counted, and reviewed the documents, or it could not have cited to them in the *TCPA NPRM*. Thus, no "search" time should be required. Nor is it necessary to conduct "research." Even assuming that the staff is correct that a FOIA request is required here, all it need do is go through the documents, redact the personal identifying information, and copy them. Accordingly, there was no basis for the staff to claim the need for an extension.

^{19/} See *Ogelsby v. U.S. Dept. of the Army*, 920 F.2d 57, 62 n.2 (D.C. Cir. Oct. 22, 1990) (citing legislative history of the FOIA).

Moreover, the staff did not meet the 30-day requirement under the rules for acting upon the FOIA request in any event. The 30 days have passed, and little more than 3.9 percent of the documents ATA requested have been produced. The unavailability of these documents greatly diminishes the value of the comment period and completeness of the record in the rulemaking, as documents on which the *TCPA NPRM* rests will not be reviewed in full by any party to the proceeding.

As a basis of comparison, the Federal Trade Commission has demonstrated that the FOIA response process can be more simple and swift. On November 1, 2002, Counsel for ATA requested access to telemarketing complaints submitted to the FTC over the past 5 years (see Tab 5). On November 12, 2002 – only seven business days after the initial request – the FTC responded in partial fulfillment of ATA's request, providing a clearly delineated response and cost breakdown in addition to the redacted documents themselves (see Tab 6). The FTC has been providing the rest of the requested documents on a rolling basis since that time with separate and clearly defined invoices for work performed.

In contrast, the Commission provided “randomly selected and redacted” documents 20 days after ATA's initial request and then reserved to itself another 10 days to comply with the request. Now, the Bureau states that processing the entire request will take several months more, at a cost of at least \$25,000. This delay and the projected costs are difficult to understand in light of the FTC's response. They are even more difficult to justify in light of commenters' need for the documents to effectively participate in this ongoing proceeding.

Accordingly, the Commission should require the staff to greatly expedite processing of ATA's FOIA request. Currently, the Bureau is processing an average of 14.6 documents per day (438 documents divided by 30 days) yielding only 3.9 percent of the documents requested in one month's time. "[I]nformation is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial." 20/ The current response is inconsistent with both the spirit and the letter of FOIA, greatly hampering ATA's ability to meaningfully participate in the comment period established by the *TCPA NPRM*.

V. THE STAFF'S CHARGES FOR PROCESSING THE FOIA REQUEST ARE EXCESSIVE AND SHOULD BE REDUCED OR WAIVED PURSUANT TO 47 C.F.R. § 0.470

The staff asserts that redaction of the personal identifying information from the telemarketing complaints and predictive dialing inquiries combined with copying fees will take several months and cost at least \$25,000. Even assuming that the Bureau did not erroneously classify the documents as "not routinely available," the estimated fees for processing ATA's FOIA request are excessive. 21/ If the Commission determines the materials at issue are protected, it should at least greatly reduce or waive the fees

20/ *Gilmore v. U.S. Dept. of Energy*, 33 F. Supp.2d 1184, 1187 (N.D. Cal. Sept. 14, 1998) (quoting legislative history of FOIA).

21/ As a basis for comparison, a random sampling of other FOIA-related cases show great differences between the Commission and other federal agencies in the cost of processing FOIA requests. See, e.g., *Comsat Corp. v. National Science Found.*, 190 F.3d 269, 272 n.4 (4th Cir. 1999) (cost of processing 40 linear feet of files approximately \$20,000); *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 34 F. Supp. 28, 31 (D.D.C. 1998) (cost of processing request for 28,000 pages of documents approximately \$13,000); *Summers v. U.S. Dept. of Justice*, 925 F.2d 450, 451 (D.C. Cir. 1991) (cost of processing request for 17,100 pages of material approximately \$1,710).

for processing the FOIA request and provide a clear estimate, invoice and receipt for the required staff work.

As already indicated herein, the Commission has based a rulemaking in substantial part upon the requested documents. As such, the documents should have been made part of the record in that proceeding and made available to interested parties at no charge. Moreover, the documents normally would be routinely available under the Commission's current rules. Thus, the Commission has no legal basis to charge ATA for "review and search costs" related to redaction and production of the materials. At most, ATA only should be required to pay reasonable duplication fees pursuant to § 0.465 of the Commission's rules.

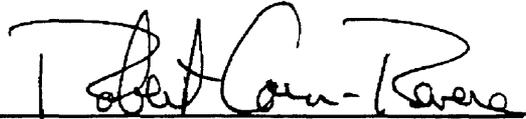
In addition, to the extent any fees, including copying fees, are applicable to ATA for production of the requested documents, ATA hereby requests a waiver or reduction of all such fees pursuant to 47 C.F.R. § 0.470(e). Section 0.470(e) states that "[c]opying, search and review charges shall be waived or reduced. . .when 'disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding or the operations or activities of the government and is not primarily in the commercial interest of the requester'" (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Ensuring meaningful and fair public participation in the Commission's rulemaking process is essential to preserve the integrity of the TCPA proceeding. Accordingly, the Commission should waive the fees entirely, since facilitating public comment serves the public interest.

VI. CONCLUSION

For the foregoing reasons, ATA herein respectfully requests that the Commission grant ATA's requested relief.

Respectfully submitted,

AMERICAN TELESERVICES ASSOCIATION

By: 

Robert Corn-Revere
Ronald G. London
C. Jeffrey Tibbels

HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Telephone: (202) 637-5600
Facsimile: (202) 637-5910

Its Attorneys

December 6, 2002

Attachments Omitted



**Federal Communications Commission
Consumer & Governmental Affairs Bureau
Office of The Bureau Chief**

CGB

November 29, 2002

Mr. Ronnie London
Hogan & Hartson, L.L.P.
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109

FOIA Control No. 2003-023

Dear Mr. London:

This is in reference to our meeting of November 6, 2002, to discuss your pending request under the Freedom of Information Act (FOIA) for access to consumer complaints related to the Telephone Consumer Protection Act (TCPA), and your subsequent correspondence. Among other things discussed at the meeting, we stated that it would take a number of months and considerable staff resources in order to provide the over 11,000 documents encompassed by your request. You asked for an estimate of costs involved to process your FOIA request. Pursuant to the FOIA, 5 U.S.C. § 552(a)(6)(B), the response is currently due by the close of business on November 29, 2002.

We have done a preliminary and tentative assessment of the costs involved. They are as follows.

- (i) Duplication costs @ .17 cents a page = \$6800.00. This tentative assessment is based on duplication of an estimated 20,000 records responsive to your request, each record tentatively consisting of 2 pages. This estimate would vary if the actual number of records involved, and/or the number of pages of the records involved, are different from the estimated numbers.
- (ii) Search and Review is normally conducted by staff members who are at grade levels GS-13 or GS-14. Search and review conducted by a GS-13 staffer would be @ \$41.20 per hour and search and review conducted by a GS-14 staffer would be @ \$48.67 per hour. Tentatively, we estimate that the search and review costs associated with 20,000 records would be \$16,480.00 if performed by GS-13 staff @ \$41.20 per hour, and \$19,468.00 if performed by a GS-14 staff @ \$48.67 per hour. For the purpose of this assessment we are assuming that it would take bureau staff approximately 20 hours to search and review 1,000 records and, therefore, 400 hours to search and review 20,000 records. We base this estimate on the fact that it took 2 GS-13 and 1 GS-14 staff members approximately 5 hours to search, review, and redact the 250 complaints that were provided to you on November 14. Please note, however, that the 250 complaints that you received were available electronically. Not all complaints are available electronically. If a complaint is not available electronically, then it involves more search time. We are unable to estimate

the number of complaints that are available electronically, at this time.

Please note that the estimated number of records and number of pages are tentative estimates which may change significantly upon more detailed review by the staff. The estimations provided in this letter are for informational purposes only and should not be construed as any offer to process your FOIA request for the estimated costs set forth above. We look forward to hearing from you as to whether you are agreeable to the estimated costs.

On November 14, 2002, pursuant to the November 6, 2002 meeting and your subsequent correspondence dated November 7, 2002, we provided 250 randomly selected and redacted TCPA-related complaints received in August 2001 and March 2002, in partial fulfillment of your FOIA request. With this letter we are also providing an additional 188 redacted TCPA-related complaints received in August 2001 and March 2002. As noted in the November 14 letter, the enclosed complaints are not lieu of our ongoing efforts to provide a complete response to your FOIA request. Again, we have to reiterate that it will take a number of months and considerable staff resources in order to provide all the records you have requested.

If you consider this letter to be a denial of your FOIA request, you may file an application for review with the Office of the General Counsel within 30 days of the date of this letter in accordance with Section 0.461(j) of the Commission's rules, 47 C.F.R. Section 0.461(j).

Sincerely,



Mr. K. Dane Snowden
Chief

Consumer & Governmental Affairs Bureau

Encls.



**Federal Communications Commission
Consumer & Governmental Affairs Bureau
Office of The Bureau Chief**

CGB

December 13, 2002

Robert Corn-Revere, Esq
Ronald G. London, Esq.
C. Jeffrey Tibbels, Esq.
Hogan & Hartson, L.L.P.
555 - 13th Street, N.W.
Washington, DC 20004

Re: FOIA Control No. 2003-023

Gentlemen:

We are writing to you to seek your guidance on how to proceed with your Freedom of Information Act (FOIA) request of October 16, 2002, assigned FOIA Control No. 2003-023.

In your FOIA request, you represented that there was "no limit" to the FOIA fees you would pay for processing your request. See electronic mail from Ronnie London to FOIA@fcc.gov (Oct. 16, 2002). You also stated that you were not entitled to a restricted fee assessment. *Id.* Subsequently, you asked for an enumeration of the costs that would result from processing your request. The Consumer & Governmental Affairs Bureau (the "Bureau") estimated that search and review time would result in fees of between \$16,480 and \$19,468, and duplication costs would be approximately \$6800. See letter from Bureau Chief Dane Snowden to Ronnie London, Hogan & Hartson (Nov. 29, 2002).

We note that you have now filed an Application for Review. Your application for review seeks "to substantially reduce or waive the charge associated with producing the requested documents." Application for Review, at 5. You ask that the requester be charged only for "reasonable duplication fees." *Id.* Alternatively, you seek a waiver of all fees associated with processing this FOIA request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 47 C.F.R. § 0.470(e) because "[e]nsuring meaningful and fair participation in the Commission's rulemaking process is essential to preserve the integrity of the TCPA proceeding." Application for Review, at 15.

The Commission will act on the matters raised in your Application for Review. In the mean time, we seek your guidance on how to proceed in this matter. As noted above, you indicated your client's willingness to pay FOIA fees without limit. You also indicated that you wished to receive the records "on a rolling basis as soon as they became available for release," letter from Ronnie London to Sumita Mukhoty (Nov. 7, 2002), and the Bureau has indicated that it intended to process your FOIA request on a rolling basis. See letter from Bureau Chief Snowden (Nov. 29, 2002), at 2 (noting the Bureau's "ongoing efforts to provide a complete

Messrs Corn-Revere, London and Tibbels

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December 13, 2002

response to your FOIA request"); letter from Bureau Chief Snowden (Nov. 14, 2002) (noting the Bureau's "effort to continue to diligently work to provide a complete response to fulfill your FOIA request"). Now, however, it is unclear whether you have withdrawn your assurance that you will pay the FOIA fees associated with processing this request. Please let us know as soon as possible how to proceed, as the Bureau cannot expend resources processing your request without assurance that the fees incurred will be paid. *See* 47 C.F.R. §§ 0.461(b)(2); 0.467(e); and 0.469.

The Bureau remains willing, ready, and able to continue to process your request on a rolling basis upon receipt of your representation that the requester will pay the search, review, and copying fees in full, unless and until such fees may be reduced or waived by the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Dane Snowden", with a long horizontal line extending to the right.

K. Dane Snowden

Chief

Consumer & Governmental Affairs Bureau

CERTIFICATE OF SERVICE

I, Ronald G. London, hereby certify that on this 17th day of December, 2002, copies of the foregoing **MOTION FOR EXPEDITED REVIEW** were hand-delivered or mailed, first-class, postage prepaid, to the following:

Chairman Michael K. Powell*
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Kathleen Q. Abernathy*
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Jonathan S. Adelstein*
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Michael J. Copps*
Federal Communications Commission
445 12th Street, N.W.
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Commissioner Kevin J. Martin*
Federal Communications Commission
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K. Dane Snowden, Chief*
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, N.W.
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Office of General Counsel*
Federal Communications Commission
445 12th Street, N.W.
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Ronald G. London

* HAND DELIVERED