

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)	
)	
MARITIME COMMUNICATIONS/LAND MOBILE, LLC)	EB Docket No. 11-71
)	File No. EB-09-01-1751
Participation in Auction No. 61 and Licensee Of Various)	FRN: 001358779
Authorizations in the Wireless Radio Services)	
)	
Applicant for Modification of Various)	App. FNs 0004030479,
Authorizations in the Wireless Radio Services)	0004144435, 0004193028,
Applicant with ENCANA OIL AND GAS, <i>Et al.</i>)	0004193328, 0004354053, etc.

To: Marlene Dortch, Secretary
Attn: Responsible FOIA Officer
Attn: Mr. Schonman, Enforcement Bureau

Re: FOIA Control Nos. 2014-085 and 2014-138: Reply to Maritime Communications/
Land Mobile LLC, Debtor-in-Possession's and Choctaw Holdings, LLC's and Choctaw
Telecommunications, LLC's Responses - [Errata copy](#)^[*]

Skybridge Spectrum Foundation ("SSF" or "Requestor") hereby replies ("SSF Reply") to the responses filed by Maritime Communications/ Land Mobile LLC,¹ ("Maritime") and Choctaw Holdings, LLC and Choctaw Telecommunications, LLC (together, "Choctaw")² regarding FOIA Control Nos. 2014-085 and 2014-138 (the "SSF Requests") (Maritime and Choctaw together: "Maritime-Choctaw" or "MC") (the Maritime and Choctaw responses together: "MC Responses" or "Oppositions").³ The records and information in the records sought in the SSF Requests are herein called the "Records."

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^[*] Additions in blue, deletions in strikeout, and a few spacing changes are made.

¹ Including Maritime as debtor in possession, and including the owners and controllers of Maritime including, *inter alia*, John Reardon and Donald and Sandra Depriest.

² Including but not limited to these "Choctaw" entities' position under the Chapter 11 Plan of Maritime, which provides to Choctaw an effective transfer of control over Maritime's alleged valid FCC licenses and related documents and information, including the Records under the SSF Requests. In addition, "Choctaw" herein includes the owners and controllers of the Choctaw entities that backed Maritime financially before and during its bankruptcy proceeding.

³ "MC" further means both Maritime and Choctaw, or either one, shown by the context of each use of the term below and the underlying facts already in the record. "MC Oppositions," likewise mean either or both the Maritime and the Choctaw Responses"

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		party in the docket (unless it obtains representative legal counsel, which it need not obtain), and since MCLM-Choctaw asserted with the Enforcement Bureau that Havens is barred from any access to any document submitted under the Protective Order.
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1. Introduction and Summary

The description section titles provided in the Contents above provide a full summary.

The SSF FOIA 2014-085 (“85”) request requested: copies of all records that contain any communications between and among” various Maritime Communications entities and their representative or agents, various Choctaw entities and their representatives or agents, and FCC Enforcement Bureau staff regarding “any potential settlement, consent decree, or other compromise regarding what is known as ‘Issue (g)’ in FCC Order, FCC 1164. The SSF FOIA 2014-138 (“138”) request requested: Copies... of all “requests for confidentiality” that are reflected in Exhibit 1 hereto, in the sentence: “At least some of the requested documents were submitted by Maritime and Choctaw and are the subject of request for confidentiality.”

Exhibits 1 and 2 hereto relate to these two SSF requests, and certain arguments below.

For reasons indicated herein, SSF asserts that the FCC personnel handling the SSF Requests have already violated FOIA law and show prejudice, and this causes damages. SSF, a nonprofit foundation, has rights to pursue damages, including but not limited to relief under the Equal Access to Justice Act.

The FCC is late in decision upon the SSF Requests and thus cannot charge any fees.

2. Warren Havens request for the same Records (“Havens Request”)

Warren Havens, the undersigned, ~~will~~ ~~has~~ submit ~~ted~~ tomorrow before the FCC a FOIA

request ~~that is~~ with the same content as the subject SSF Requests (the “Havens Request”). If the Havens Request is denied by the FCC, and Havens disagrees with the denial for good cause, and the denial is suitably ripe for appeal to a US District Court, then Havens intends to file an appeal with the court, possibly with a request to consolidate it with the recently filed action by Havens seeking various injunctive, declaratory and economic relief against the FCC, pending now before the US District Court, Northern District of California, Case C-14 0404 MEJ. Upon discussion with the FCC FOIA officer(s) handling the Havens Request, Havens may agree but does **not** herein commit to agree that it may be consolidated **for** processing and decision **with** ~~upon~~ the SSF Request. As with all FOIA requests, time is of the essence, and it is also set in the FOIA as to initial decisions, and decisions on appeal within the agency.

3. Reason for use of formal pleading format, and service on all parties

This SSF Reply uses formal pleading style and is served on all parties in the captioned proceeding, 11-71, based on FCC rule §0.461(d)(3): “...The requester may submit a reply within ten days... Note to paragraph (d)(3): Under the ex parte rules... a pleading in a FOIA proceeding may also constitute a presentation in another proceeding if it addresses the merits of that proceeding.” Under ex parte rules, the subject FOIA Request proceeding, including the MC Oppositions and this SSF Reply, are “presentations” and are not exempt communications (for example, solely seeking status and procedure information) as to the proceeding under docket 11-71. Thus, this SSF Reply uses formal pleading format and is served on all parties to proceeding 11-71, since any “presentation” in this proceeding must use formal pleading style and be served on all parties. SSF does not believe that the FCC staff that, to date, have handled the SSF Request have authority to waive, or have waived, the above cited rule.

4. Procedural Defects

The MC Responses fail to use formal pleading style and were not served on the parties in

docket 11-71 and are thus defective for reasons given in section 3 above. MC argued in their response and opposition to FCC releases under the SSF and Havens (same in content) FOIA requests “FOIA Control No. 2013-021” (“O21”) and “FOIA Control No. 2013-022”⁴ (“O22”) when the initial denials were appealed to the Office of General Counsel, that formal pleading requirements were required and failure to comply was fatal, and the FCC accepted the arguments ~~in~~ (even though the factual assertions, and particular legal arguments were spurious, as was the FCC acceptance: that is now before the US District Court, in the case noted above). MC now fail, in the MC Responses, under their own [past](#) assertions, and the FCC must follow its own precedent in denying the [Oppositions](#), unless it rescinds that precedent: the *Memorandum and Opinion and Order* FCC 13-120, released September 17, 2013. Due to these defects, Maritime and Choctaw fail to oppose grant of SSF Requests, and the FCC has no basis to apply any exemption based on any response by Maritime or Choctaw. The time for their responses has long past, and neither asked for any waiver to fail to follow the above noted rule requirements, and said precedent they [asked](#) for and obtained as to the above named related FOIA requests.

5. Choctaw and Maritime waivers of the Opposition assertions

Maritime and Choctaw, in the Havens, Skybridge v Mobex, Maritime antitrust case, in US District Court, New Jersey, effectively waived [s](#) any assertion of confidentiality, trade secrets, and the like (as meant under FOIA exemption 4) and as to any disclosure bar as to information in a “law enforcement” proceeding (as meant under FOIA exemption 7(A), in this court actions discovery phase including in the deposition testimony of David Predmore that was designated as the Rule 30(b)(6) expert of Mobex by the Mobex legal counsel that was directed (per the statement of said counsel) by John Readon, then the CEO of Maritime by his own

⁴ These requested records of documents submitted in docket 11-71 under the Protective Order, or at least all segregable portions that were not exempt under any valid FOIA exemption. These requests are thus related to the instant SSF Requests.

repeated assertion. This testimony is attached hereto as Exhibit 3 (Ex. 7 in the USDC case). It shows repeated disclosure by Mr. Predmore of the same class of records as in the SSF Requests: information as to the Mobex-Maritime “issue (g)” licenses and stations. Once a party has waived assertions of protection, and information is disclosed to a third party, including in public litigation, the party that effected the waiver cannot later assert the protections as to the same or materially same information. SSF thus asserts herein that MC have waived the assertions in their MC Responses.

6. The FCC denied the SSF Requests and Skybridge has a right to, and intends to, submit the matter in an appeal: the Oppositions are at least substantially moot.

The FCC has failed to respond to the SSF Requests in the time period permitted under FOIA and the FCC’s implementing rule §0.461, including since:

(1) See Exhibit 1 hereto re the 85 Request: The FCC gave itself a 10 day extension where it had no basis to do so under the applicable rule subsection. SSF references and incorporates in full the facts and arguments in Exhibit 1 for the purpose of this section 6. In addition, the requested information cannot be fully subject to any FOIA exemption, yet the FCC did not, as requested, immediately release the portions that cannot possible be subject to any exemption. Thus, the FCC failed to process the request within the permitted time period.

(2) See Exhibit hereto, re the 138 request. The FCC failed to release the requested records in the permitted period. A request for confidentiality cannot be, in itself, confidential (even if, inappropriately, the party submitting the reject introduced some allegedly confidential information in an attempt to spuriously argue that then entire request is confidential). SSF references and incorporates in full the facts and arguments in Exhibit 2 for the purpose of this section 6. Thus, the FCC failed to process this e request, also, within the permitted time period.

When an agency fails to respond to a FOIA request within the permitted period, it s is an

effective denial, and the agency cannot charge fees, and the effective denials can be appealed.

7. The sole FCC exemption applied in the previous, related, like FOIA matter is 7(A) (the “Precedent”) and assertion of that in the Oppositions fails. In addition, it is now before the US District Court in San Francisco. Havens may amend the Complaint to add any other FCC FOIA denials of like kind, including the Havens Request. SSF may join in his court action.

The FCC rejected ~~the~~ MC arguments as to why the FCC should not release records requested in 021 and 022 (see above) but adopted an alleged exemption under FOIA exemption 7(A) (the “Precedent”). This exemption fails for reasons SSF and Havens argued in their agency appeal as to 021 and 022: this is provided in ~~Exhibit 4 hereto. We continue this section 7~~ in the appendix below, since it is substantial and better set out in a separate appendix, rather than in the main body of this pleading with otherwise fairly short subsections.

8. The ~~exemption 4~~ assertion in the Oppositions of Exemption 4 fails as contrary to said FCC Precedent and other law.

MC Responses attempt the same argument that the FCC rejected in the Precedent. Thus, it appears that the MC Responses fail, under the Precedent, in their assertion of Exemption 4.

In addition, the information sought under the SSF Requests was voluntarily submitted by MC to the FCC, and not for any purposes that the FCC requested, indeed, it is directly contrary to the full Commission tentative findings and order to show cause in FCC 11-64, and contrary to the decision of ALJ~~H~~ Sippel in rejecting the Maritime motion for summary decision in year 2013 (which was on the merits- a footnote as to Havens being a pro se party, was an additional footnoted comment, but was not the reason that the ALJ denied the motion). Thus, under the well known Critical Mass precedent (Critical Mass Energy Project v. NRC, 975 F.2d 871), the MC Responses fail, in that the government has no purposes for getting this information, and for trying to get any more of the same by ~~allegedly valid~~ confidentiality.

9. The assertion of exemption 4, exemption 7(A), or any other exemption fails since the

subject requested Records are for in relation to a proposed settlement or compromise with the subject federal agency, and case law does not support any such exemption.

Grounds for maintaining the confidentiality of information exchanged during the settlement negotiation process before a federal agency is not recognized under the FOIA by the courts. Courts to consider the issue to date have rejected the position that the information exchanged during settlement negotiations is entitled to distinct protection under the FOIA. In *County of Madison v. Department of Justice*, 641 F. 2d 1036, 1040-41 (1st Cir. 1981), it was held that settlement proposals submitted to an agency by "past and potential adversaries" must be disclosed for lack of satisfying the "inter-agency or intra-agency" threshold requirement of Exemption 5, 5 U.S.C. § 552(b)(5). See also *Norwood v. FAA*, 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984) (following *County of Madison*) (on motion for clarification and reconsideration).

In two other cases, district court judges have refused to accord settlement documents protection because of their additional conclusion that there exists no distinct "settlement negotiations" privilege. In *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739, 749 (D.D.C. 1983), it was found that such a privilege had not been established by the courts in the civil discovery context, nor could one be implied directly from the special federal rule of evidence (Rule 408) prohibiting the admissibility at trial of settlement negotiation details. This conclusion was followed in *NAACP Legal Defense & Educational Fund v. Department of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985).

Accordingly, the FCC has no basis to grant any FOIA exemption asserted by Maritime and Choctaw.

10. MCLM is a sham entity, and Choctaw is part of the sham, including by it and its members backing MCLM in its sham from the start, through the bankruptcy, and through proceeding 11-71 including spurious and specious assertions of protection under FOIA exemptions. The sham is effectively stated in the HDO FCC 11-64, and further shown by MCLM offering to give up 90 % of its licenses under issue (g) which is barred if it were not a sham entity under bankruptcy law, the Plan, and the Plan Order. Actions

in pursuance of an illegal purpose are void as to public policy, including action to assert governmental protections under FOIA exemptions.

This Section 10 caption presents this allegation.

11. MCLM and Choctaw counsel lack attorney-client privilege protections by (i) their supporting illegal action of MCLM-Choctaw to submit false statements under oath to the FCC and destroy and spoil evidence to unlawfully obtain and keep government licenses and related property, and this bars them from asserting government FOIA exemptions.

This Section 11 caption presents this allegation. SSF and Havens have presented this in filings in docket 11-71. They will pursue this on appeal of the SSF Requests, if denied. This is also reflected in Exhibits 3 4 hereto and in the Havens v FCC USDC Complaint recently filed, noted above and the exhibits thereto.

12. MCLM and Choctaw assert frivolous arguments, subject of section 1.52 sanctions, that any person's FOIA request is barred by the Protective Order in docket 11-71.

This Section 12 caption presents this allegation. The frivolous arguments include that SSF is barred from submitting the subject FOIA SSF Requests since SSF was, at one time, a party in the 11-71 hearing. Anyone could have submitted the same requests. This is a blatantly frivolous argument that imposes on FOIA a condition clearly not in the law and at direct odds with its purpose:

[T]he case law makes it abundantly clear that the policy underlying in all respects favors disclosure. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling hands." *Environmental Protection Agency v. Mink*, supra at 80, of 410 U.S., at 832 of 93 S. Ct. See e.g. *Getman v. N.L.R.B.*, 146 U.S. App. D.C. 209, 450 F.2d 670, 672 (1971); *Bristol-Myers v. F.T.C.*, supra. As Chief Judge Bazelon has counseled:

"The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interest. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly." *Soucie v. David*, supra at 1080, of 448 F.2d. 4/

----- Footnotes -----

4/ The Court there held that, save exceptional circumstances, the reviewing court is precluded from denying access based upon general equitable considerations. The government can meet its burden only by establishing that a statutorily created exemption is applicable. Deference to administrative findings is rejected by the Act's mandate for a de novo trial at the District Court level. "It could not be more clear, therefore, that Congress sought to make certain that the ordinary principle of judicial deference to agency *discretion was discarded under this Act.*" *Environmental Protection Agency v. Mink*, concurring opinion of Justice Brennan, 410 U.S. at 104, 93 S. Ct. at 844.

Stern v. Richardson (Attorney General), 367 F.Supp. 1316 (DC Circuit, 1973).

13. MCLM and Choctaw assert frivolous arguments, subject of section 1.52 sanctions, that the SSF FOIA request is barred by the Protective Order in docket 11-71, including since, at MCLM's lobbying, SSF has been barred as a party in the docket (unless it obtains representative legal counsel, which it need not obtain), and since MCLM-Choctaw asserted with the Enforcement Bureau that Havens is barred from any access to any document submitted under the Protective Order.

This is presented (i) in section 13's caption above and (ii) under Section 12 above.

14. Other

The MC alleged confidential and protected information in the Records under the SSF Requests was already, in substantial part, made public in the motion for summary decision which was actually by its language and terms a proposal for a settlement, submitted in docket 11-71 on December 2, 2013. Therein, MC made public which stations it would turn in for cancellation and which it sought to retain. That is the essence of the settlement that MC negotiated with the Enforcement Bureau and that MC repeatedly represented to Havens, the undersigned, was confidential and would not be shared with Havens (for Havens and SSF and all the SkyTel entities) unless he signed a confidentiality agreement, which the Enforcement Bureau said (i) it would not sign, and (ii) it would not engage in confidential settlement communication with Havens under the 11-71 Protective Order since said Protective Order did not allow him as a non attorney to receive any information submitted under the Order. MC are now † barred from

asserting that all information under the settlement communications with the Enforcement Bureau or anyone else at the FCC is protected, since it released substantially this information publicly, and since their alleged confidential nature of the settlement was a misrepresentation.

15. Conclusion

The [SSF Requests](#) should be fulfilled in full. SSF does not, however, waive any right to proceed at this time to appeal or take other appropriate action regarding the effective denial explained above.

Respectfully submitted,

/s/

Warren Havens

[President, SSF](#)

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January ~~28~~ [30](#), 2014

Appended matters below continue some sections above, for reasons given above.

In the treatise “Litigation Under the Federal Open Government LAWS (2008),”⁵ discuss

Exemption 7(a) is discussed including:

Where the FOIA request is made by a third party seeking information to which the target of the investigation already has access, the government will be required to make a ... particularized showing of harm or interference to law enforcement proceedings. *Campbell v. Dep’t of Health & Human Servs.*, 682 F. 2d 256 (D.D. Cir. 1982). *See also Goldschmidt v. Dep’t of Agric.*, 557 F. Supp. 274 (D.D.C. 1983) (Documents sought were already in the possession of the targets of the investigation and agency failed to demonstrate that the disclosure would interfere with law enforcement proceedings; assertion that publicity [via FOIA release, which allows publicity] would interfere with law enforcement by making a company less willing to negotiate an informal settlement is insufficient);.... Other courts have [also] held that there is no harm to enforcement proceedings where potential defendants have access to the requested information. *See, e.g., Coastal ... v. Dep’t of Energy*, 617 F.2d 854, 870 (D.D.C. 1980).

The above applies in this case: (i) **Maritime (or MCLM)**, the defendant in the 11-71 Hearing (“Hearing”) already has access to the subject information of the subject requests (the “Information” or “Records”) and, as an independent reason, (ii) the MC Responses fail to show particularized harm or interference to law enforcement proceedings.

The MC Oppositions do not show that there was any determination that any of the Records or parts of any Record document was not already in the public domain or lacking any basis for confidentiality or privilege rights as to the party sources of the Records. Indeed, MC waived any such assertion (see text above). Exemption 7(A) is not a means for the government to evade a determination under a FOIA request to determine if the requested records are not already in the public domain, or lacking of said source-party rights. Obviously, there is no basis to assert problems that Exception 7(A) is meant to protect against, if the information sought under the subject FOIA request is already public or lacks any basis for it to not become public. The federal agency has an obligation, when reviewing FOIA requested information under

⁵ Epic Publications, Washington DC.

Exemption 7(A) to look at the character and contents and make the threshold determinations discussed in this paragraph, and not apply this Exemption 7(A) to any of the requested information if the information is of the public or non-protected nature described above.

In addition to the above, SSF ~~do not believe~~ asserts that the subject Hearing under docket 11-71 is **not** a law enforcement proceeding of the sort that may be subject to Exemption 7(A), including since **if** it were, then (i) the formal-hearing rule we (SSF and Havens) cited in our pleadings in this proceeding that allows use of FOIA in a formal hearing of this sort (before a FCC ALJ, with the FCC Enforcement Bureau prosecuting the case for the FCC) would not be valid (but **it** is valid and in lawful affect), and (ii) the Protective Order (“PO”) (that all parties signed including MCLM, Pinnacle, and Puget Sound) would not have language at its start noting that the PO does not have an effect upon a FOIA request for items submitted under the PO being processed under FOIA criteria, and (iii) the FCC would have, in denying SSF’s past FOIA requests for materials redacted in FCC 11-64 (and materials submitted confidentially in the investigation leading to FCC 11-64) cited Exemption 7(A), but it did not, and that precedent stands.

Further (iv) if the mere enforcement of administrative rules is “law enforcement” for purposes of Exemption 7(A) (as opposed to enforcement of criminal code violations, for example) then a large portion of all FCC and other Federal regulatory agencies proceedings would be subject to Exemption 7(A), but case law does not support that, and if it did, it would gut FOIA, and allow said agencies to use Exemption 7(A) to render ineffective FOIA while said proceeding were pending, or possibly even expected.

In addition, the first subpart of Exemption 7, Exemption 7(A), authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to

interfere with enforcement proceedings."⁽¹⁾ [*] There is nothing to interfere with here. The “cat is fully out of the bag,” so to speak.

Indeed, the subject of the alleged law enforcement proceeding are the sources of the requested Records, and fully know about their prosecution, as does SSF, and further, MC have stipulated with the FCC Enforcement Bureau to give up approximately 90% of all of the subject issue (g) licenses and stations, which MC could not do unless there is no information to protect: Licenses and stations that are given up in a bankruptcy can have no validity and value, and in that case, there is nothing to protect, but illegal activity (warehousing bogus stations for decades, in violation of FCC and US Antitrust law) and actions in pursue of illegal activity are void and cannot obtain any government relief.

Determining the applicability of this Exemption 7 subsection requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm.⁽⁴⁾ The courts have held that the mere pendency of enforcement proceedings is an inadequate basis for the invocation of Exemption 7(A); the government must also establish that some distinct harm could reasonably be expected to result if the record or information requested were disclosed.⁽⁵⁾ For example, the Court of Appeals for the District of Columbia Circuit has held that the fact that a judge in a criminal trial specifically delayed disclosure of certain documents until the end of the trial is alone insufficient to establish interference with that ongoing proceeding.⁽⁶⁾

In regards to the above ¶¶ 1 and 2, the Denial failed to meet the criteria. This is further shown below.

It is beyond question that Exemption 7(A) is temporal in nature and is not intended to "endlessly protect material simply because it [is] in an investigatory file."⁽⁷⁾ Thus, as a general

^[*] The EFCS filed copy has hyperlinks to authorities underneath the blue numbers in parentheses.

rule, Exemption 7(A) may be invoked so long as the law enforcement proceeding involved remains pending,⁽⁸⁾ or so long as an enforcement proceeding is fairly regarded as prospective⁽⁹⁾ or as preventative.⁽¹⁰⁾

In this regard, in the subject MCLM Hearing, it has already been effectively admitted by MCLM that about ~~half~~ 90% of the site-based licensed stations were not ~~longer~~ valid or viable, and they were stipulated ~~turned in~~ for cancellation. The Hearing is effectively over as to those licenses and stations, and there is thus no basis for application of Exemption 7(A) as to the requested Records Documents and Information that apply to those licenses and stations.

It is well established that in order to satisfy the "law enforcement proceedings" requirement of Exemption 7(A), an agency must be able to point to a specific pending or contemplated law enforcement proceeding that could be harmed by disclosure.⁽³⁰⁾ By comparison, while some courts have extended the attorney work-product privilege of Exemption 5 to instances of "foreseeable litigation, even if no specific claim is contemplated,"⁽³¹⁾ courts have not likewise extended the protection of Exemption 7(A).⁽³²⁾ As one court has observed, "[i]f an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, the FOIA would be meaningless."⁽³³⁾ Rather, it is the existence of a pending or prospective law enforcement proceeding against other investigative targets that permits the continued use of Exemption 7(A) when law enforcement proceedings against the first target are "closed."⁽³⁴⁾ Thus, information cannot properly be protected just because a law enforcement agency asserts, without a firm basis, that release would interfere with future actions.⁽³⁵⁾

Courts have accepted affidavits in Exemption 7(A) cases that specify the distinct, generic categories of documents at issue and the harm that would result from their release, rather than requiring extensive, detailed itemizations of each document.⁽⁴⁷⁾

However, it is important to note that the D.C. Circuit in Bevis v. Department of State, held that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs."⁽⁵⁵⁾ Indeed, when an agency elects to use the "generic" approach, the court stated, the agency "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings."⁽⁵⁶⁾ (~~For a further discussion, see Litigation Considerations, "Vaughn Index," below.~~)

The D.C. Circuit has held that the mere fact that defendants in related ongoing criminal proceedings might obtain documents through the FOIA that were ruled unavailable "through discovery, or at least before [they] could obtain them through discovery," does not itself "constitute interference with a law enforcement proceeding."⁽⁶⁸⁾ Furthermore, Exemption 7(A) ordinarily will not afford protection when the target of the investigation has possession of or submitted the information in question.⁽⁶⁹⁾

The D.C. Circuit in Maydak v. United States Department of Justice further ruled that the nature of the burden of proof under Exemption 7(A) does not relieve an agency from having to prove its case with respect to other, underlying exemptions.

The MC Responses fail at to exemption 7(A) under the above criteria and authorities.

///

Certificate of Service

I, Warren Havens, certify that I have, on this 30th day of January 2014, caused to be served, by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing filing to the following:⁶

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The Honorable Richard L. Sippel
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