



Federal Communications Commission
Washington, D.C. 20554

November 6, 2013

Mr. Al Inga
ajdmm@optonline.net

Re: FOIA Control No. 2013-508

Dear Mr. Inga:

This responds to your Freedom of Information Act (FOIA) request dated August 22, 2013 (*Request*).¹ You request copies of any e-mail correspondence from you² to the following Commission staff that was forwarded to Commission staff without your being copied on it: Mignon Clyburn, Jessica Rosenworcel, Ajit Pai, Julius Genachowski, Meredith Attwell Baker, Michael Copps, Deena Shetler, Pamela Arluk, Maria Gaglio, Matthew Berry, Patrick Carney, Julie Veach, Sharon Gillett, Jane Halprin, Sharon Kelley, Kay Richman, and Russ Genachowski.³ You request copies of such “e-mail communication regarding petitioners’ case against AT&T Case ID 06-210”⁴ in which there were “comments regarding when the case was to be resolved or why wasn’t it being resolved.”⁵ You also request copies of such e-mail communications “contain[ing] the words Washington Post or Associated Press.”⁶ You have agreed to pay \$2,000.00 for the search.⁷ At your suggestion, we agreed to extend the time for responding to your request to November 8, 2013.⁸

We have searched our records and found six documents responsive to your request. We have determined, however, that these documents are exempt under FOIA Exemption 5, which applies to “inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]”⁹ Exemption 5 encompasses the deliberative process privilege, which is intended to “prevent injury to the quality of agency decisions.”¹⁰ To fall within the scope of the deliberative process privilege encompassed by Exemption 5, records must be both pre-decisional and deliberative, “[reflecting] the give-and-take of the consultative process.”¹¹

¹ See e-mail from Al Inga to FOIA@FCC.gov (Aug. 22, 2103).

² See *Request* at 1 (identifying your e-mail addresses as: ajdmm@optonline.net, freerecdeptsrvc@optonline.net, and prosoftwarepack@yahoo.com).

³ *Id.* at 1-2 (“I am not looking for my own emails that I sent to them [that were] sent back to me. If they sent my email to other FCC staff without sending the email to me then I am interested in that email.”).

⁴ See *Request for Declaratory Rulings*, WCB Docket No. 06-210, Internal File No. CCB/CPD 96-20 (filed Sept. 27, 2006) (*Request for Declaratory Rulings*); see also *Request* at 1 (“correspondence that includes FCC staff’s comments on the merits of the tariff [at issue in the *Request for Declaratory Rulings*] . . . can be redacted”).

⁵ See *Request* at 1 (stating that you “are focused upon any correspondence between FCC Staff as to the allocation of FCC resources to get the case resolved”).

⁶ *Id.*

⁷ *Id.*

⁸ See e-mail from Al Inga to Joanne Wall (Oct. 17, 2013).

⁹ 5 U.S.C. § 552(b)(5).

¹⁰ *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

¹¹ *Senate of the Commonwealth of Puerto Rico v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987).

The material withheld here under Exemption 5 consists of internal discussions concerning the timing and substance of a pending decision addressing the *Request for Declaratory Rulings*. Disclosure of this material would chill the deliberative process and inhibit the frank and open discussions between government employees that are necessary for agency decision-making.¹² The opinions and recommendations of Commission staff regarding the *Request for Declaratory Rulings* “are themselves the essence of the deliberative process” because they represent “the mental processes of the agency in considering alternative courses of action prior to settling on a final plan.”¹³ Release of those materials would discourage candid discussion within the agency regarding issues that factor into the decision-making calculus.¹⁴

We also reviewed the withheld records to determine if discretionary release of any of the portions being withheld is appropriate.¹⁵ While it is true that “[e]ven when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds,”¹⁶ we decline to exercise our discretion to do so here. We do not discern any overriding public interest in releasing the records that we have determined are exempt from disclosure under FOIA Exemption 5 given the harm to the integrity of the Commission's processes that would result from release of those records.¹⁷

These determinations do not end our analysis. The FOIA requires that records be reviewed to determine if any segregable portions can be released.¹⁸ We have reviewed the withheld records and determined that no additional portions may be segregated and released on this basis, as any remaining releasable portions are inextricably intertwined with the deliberative or otherwise privileged portions of the documents.¹⁹

You have been categorized as an “all others” FOIA requester, responsible for all direct costs of search and review, billed at the published hourly rate for the Federal employee(s) performing the search and review, except that you are entitled to receive two free hours of search and review time, and 100 pages without charge.²⁰ We have determined that the applicable fee is \$686.16 (*i.e.*, \$767.56 for search and review minus \$81.40 (*i.e.*, two free hours of search and review time)). The charge includes search and review by nine GS-15 employees at \$80.65 per hour (\$463.73), two GS-14 employees at \$68.56 per hour (\$205.68), one GS-13 employee at \$58.02 per hour (\$29.01), two GS-12 employees at \$48.79 per hour (\$48.79), and one GS-11 at

¹² See *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (*Coastal States v. Dep't of Energy*); *L. Lloyd Morgan*, 26 FCC Rcd 13823, 13826 (2011) (*L. Lloyd Morgan*); *Rob Evans*, 17 FCC Rcd 15146, 15147 (2002).

¹³ *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1121-22 (9th Cir.1988).

¹⁴ *Id.*; *United States v. Nixon*, 418 U.S. 683 (1974).

¹⁵ See *Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 FR 4683 (2009) (President Obama's memorandum concerning the FOIA); *The Freedom of Information Act (FOIA)*, available at <<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>> (Attorney General Holder's FOIA Memo).

¹⁶ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24818 (1998), citing *Chrysler Corp.*, 441 U.S. 281, 292-94 (1979).

¹⁷ See *Warren Havens*, 24 FCC Rcd 12308, 12319 ¶ 22 (2009) (declining to make discretionary release of material exempt under deliberative process privilege); see also *L. Lloyd Morgan*, 26 FCC Rcd at 13826.

¹⁸ See 5 U.S.C. § 552(b) (sentence immediately following exemptions).

¹⁹ See, e.g., *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981).

²⁰ See 47 C.F.R. §§ 0.466(a)(8); 47 C.F.R. § 0.467(a); 0.470(a)(3).

Mr. Al Inga
Page 3

\$40.70 per hour (\$20.35) (totaling \$767.56). You will shortly receive a bill in the amount of \$686.16 from the Financial Operations Division of the Office of the Managing Director for these fees.

If you consider this to be a denial of your FOIA request, you may seek review by filing an application for review with the Office of General Counsel within 30 days of the date of this letter.²¹ If you have any questions, please contact me.

Sincerely,



Joel Kaufman
Associate General Counsel and
Chief, Administrative Law Division

cc: FOIA Officer

²¹ See 47 C.F.R. § 0.461(j).