



Federal Communications Commission
Washington, D.C. 20554

April 28, 2015

Dr. Michael J. Marcus
8026 Cypress Grove Lane
Cabin John, MD 20818

Re: FOIA Control No. 2015-358

Dr. Marcus:

This letter responds to your Freedom of Information Act (FOIA) request, as amended, for "All outside studies commissioned by FCC in the past 2 years that deal with FCC's spectrum enforcement activities and possible changes to them...[and] [a]ny related study by Ocean East Associates." Your request has been assigned FOIA Control No. 2015-358. On April 14, 2015, you agreed to a 10-business day extension of the due date for this response, thereby extending the date for responding to your request till today.

Your email of April 12, 2014, stated that non-governmental sources have provided you with a March 31, 2015 document from Oceaneast Associates, Inc. (Oceaneast) and Censeo Consulting Group (Censeo) entitled "Consultant's Report," but you still seek "any other documents that meet the terms of the request." In your email of April 13, 2015, you further stated that you "understand[] ... that there is a 300 page report in addition to the" March 31, 2015 Consultant's Report.

Without conceding whether this document is responsive to your request, we have located a document entitled "FCC Field Modernization: Field Modernization Draft Report" dated January 16, 2015 and prepared by Oceaneast and Censeo (the Oceaneast Draft Report). We have determined that this document and its supporting materials are exempt under FOIA and are withholding them in full. FOIA Exemption 5, 5 U.S.C. § 552(b)(5), and Section 0.457(e) of the Commission's rules, 47 C.F.R. § 0.457(e), permit nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 incorporates the deliberative process privilege which "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions,' by protecting open and frank discussion among those who make them within the Government."¹

The Oceaneast Draft Report and its supporting materials are quintessentially the kinds of documents protected from public release by FOIA Exemption 5. The Court made clear in *Klamath*, 532 U.S. at 10-11, Exemption 5 applies to communications between government agencies and outside consultants hired by them. The Court explained, "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as

¹ *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001) (citations omitted).

documents prepared by agency personnel might have done.”² The consultant’s “only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.”³ The document is a draft report by a consultant hired by the Commission to study and make recommendations concerning FCC Field Modernization. As Judge Friendly observed in *Lead Indus. Ass’n v. OSHA*, 610 F.2d 70, 80 (2d Cir. 1979), “It is necessary in assessing a FOIA claim to understand ‘the function of the documents in issue in the context of the administrative process which generated them.’” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). . . . Whether a particular document is exempt under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process. See *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C.Cir. 1974); *Mead Data Central, Inc. v. United States Department of Air Force*, 566 F.2d 242, 256-57 (D.C.Cir.1977).”

Oceaneast and Censeo were hired by the Commission to assess the Enforcement Bureau’s field operations and make recommendations for modernizing the field structure. The Draft Report was a recommendation to FCC management, which is responsible for recommending any field restructuring to the Commission -- precisely the kind of document that is properly withheld under FOIA Exemption 5. This point is further strengthened by the fact that the document in question (as well as the documents described below) are draft materials, reflecting preliminary analysis and recommendations between the consultants and Commission staff.⁴

We have reviewed the Oceaneast Draft Report and its supporting materials to determine if there were any factual portions of the otherwise exempt documents that must be released.⁵ Factual portions of an otherwise exempt document fall within FOIA Exemption 5 if such materials are “‘inextricably intertwined’ with policy making recommendations so that their disclosure would ‘compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5.’”⁶ Here, “disclosure of factual portions of the report may reveal the deliberative process of selection.”⁷ Consistent with the courts’ guidance concerning Exemption 5, we are withholding the Draft Report and its supporting materials in its entirety.

In addition, we have located two additional draft documents that may be responsive to your request. These draft reports (dated February 17, 2014 and September 22, 2014) were prepared by a consultant, Dale N. Hatfield, hired by the Commission to assist in developing strategies to address adapting the Commission’s enforcement resources for interference and enforcement in the digital age and to recommend enforcement modernization ideas. We are withholding these draft reports for the reasons set forth above.

² *Id.* at 10.

³ *Id.* at 11.

⁴ See e.g., *Peter J. Pratt*, 26 FCC Rcd 13808, 13810-11 (2011).

⁵ *EPA v. Mink*, 410 U.S. 73, 91 (1973) (disclosure of “purely factual material” in otherwise exempt documents may be ordered only if the material “is severable without compromising the private remainder of the documents.”).

⁶ *Lead Industries*, 610 F.2d at 85, quoting *Mink*, 410 U.S. at 92.

⁷ See *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974); *Lead Industries*, 610 F.2d at 83; see also *id.* at 84 quoting *Mead Data Central*, 575 F.2d at 935 (distinguishing “raw facts with informational value in their own right” from facts which “serve primarily to reveal the ‘evaluative’ process by which different members of the decision-making chain arrived at their conclusions.”).

We are required by both the FOIA and the Commission's own rules to charge requesters certain fees associated with the costs of searching for, reviewing, and duplicating the sought after information.⁸ To calculate the appropriate fee, requesters are classified as: (1) commercial use requesters; (2) educational requesters, non-commercial scientific organizations, or representatives of the news media; or (3) all other requesters.⁹ Pursuant to Section 0.466(a)(8) of the Commission's rules, you have been classified for fee purposes as category (3), "all other requesters."¹⁰ As an "all other requester," the Commission assesses charges to recover the full, reasonable direct cost of searching for and reproducing records that are responsive to the request; however, you are entitled to be furnished with the first 100 pages of reproduction and the first two hours of search time without charge under section 0.470(a)(3)(i) of the Commission's rules.¹¹ The search took less than two hours and did not involve more than 100 pages of duplication. Therefore, you will not be charged any 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. An application for review must be *received* by the Commission within 30 calendar days of the date of this letter.¹² You may file an application for review by mailing the application to Federal Communications Commission, Office of General Counsel, 445 12th St SW, Washington, DC 20554, or you may file your application for review electronically by e-mailing it to FOIA-Appeal@fcc.gov. Please caption the envelope (or subject line, if via e-mail) and the application itself as "Review of Freedom of Information Action."

Sincerely,



William Davenport
Deputy Chief
Enforcement Bureau

cc: FCC FOIA Office

⁸ See 5 U.S.C. § 552(a)(4)(A), 47 C.F.R. § 0.470.

⁹ 47 C.F.R. § 0.470.

¹⁰ 47 C.F.R. § 0.466(a)(8).

¹¹ 47 C.F.R. § 0.470(a)(3)(i).

¹² 47 C.F.R. §§ 0.461(j), 1.115; 47 C.F.R. § 1.7 (documents are considered filed with the Commission upon their receipt at the location designated by the Commission).