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September 23, 2011

Mr. Laurence H. Schecker
Office of General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: FOIA Control No. 2011-530
Review of Freedom of Information Action

Dear Mr. Schecker,

On August 11, 2011, I submitted a FOIA request with the above control number for Motorola's response to an Enforcement Bureau Letter of Inquiry ("LOI") in EB-09-SE-064. In a letter dated September 9, 2011 ("EB letter") John D. Poutasse, Acting Chief, Spectrum Enforcement Division, Enforcement Bureau responded to that request and effectively ratified the redactions made by Motorola's successor, Motorola Solutions ("Motorola") in a copy mailed to me earlier. The instant letter is an appeal of this decision pursuant to 47 C.F.R. §0.461(i)(1).

I agree that much of the redacted information might be inappropriate to be disclosed under FOIA, but request review of 3 specific redactions where the whole text on a subject was *completely* redacted. These involve Annex A (p. 24-25), Annex B (p. 26), and the response to LOI Question No. 2 (p. 10).

Background. The EB letter stated,

> We have determined that disclosure of the redacted portions of Motorola's LOI response would likely cause substantial competitive harm. The redacted information constitutes commercial, financial and other proprietary information that is privileged and confidential. We agree with Motorola's argument that in a highly competitive industry that includes Wireless Local Area Network systems, wireless broadband systems and other telecommunications technology, disclosing the redacted information in the LOI response would provide insight into the company's business practices and procedures, equipment development and internal quality control and compliance processes. This information would be valuable to other companies in the industry seeking to gain a competitive advantage over Motorola. We find that Motorola has properly redacted the confidential business information in its LOI response in accordance with FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Exemption 4 protects from disclosure trade secrets and commercial or financial information obtained from a person that is privileged or confidential.

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Adequacy of EB review of Motorola redaction request. The fact that the EB letter upholds *every single redaction* proposed by Motorola and EB did not even bother to send the requested document, rather relying on the copy of the proposed redactions that Motorola sent me directly, gives the distinct appearance of minimal review of this issue by the EB staff and may well constitute arbitrary and capricious action. The Supreme Court has held that the Administrative Procedure Act's predominant scope and standard of judicial review -- review on the administrative record according to an arbitrary and capricious standard -- should "ordinarily" apply to requests like the one here from Motorola to withhold information.[1]

Exemptions are discretionary not mandatory. An agency has the authority to construe the exemptions as discretionary rather than mandatory when no harm would result from disclosure of the requested information. The Supreme Court has held that jurisdiction for a reverse FOIA action cannot be based on the FOIA itself because "Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin agency disclosure."[2]

Moreover, the Supreme Court held that jurisdiction cannot be based on the Trade Secrets Act[3] (a broadly worded criminal statute prohibiting the unauthorized disclosure of "practically any commercial or financial data collected by any federal employee from any source"[4] because it is a criminal statute that does not afford a "private right of action. Consequently, even if a requested document falls within one of the nine exemptions, the agency can release it anyway as an exercise of its discretionary powers. Moreover, "[t]hese exemptions are specifically made exclusive . . . and must be narrowly construed".[5]

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[1] 441 U.S. 281, 318 (1979); accord Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1184 (8th Cir. 2000); Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991); Gen. Dynamics Corp. v. U.S. Dep't of the Air Force, 822 F. Supp. 804, 806 (D.D.C. 1992), vacated as moot, No. 92-5186 (D.C. Cir. Sept. 23, 1993); Davis Corp. v. United States, No. 87-3365, 1988 U.S. Dist. LEXIS 17611, at *5-6 (D.D.C. Jan. 19, 1988); see also McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 6 (D.D.C. Jan. 24, 1992) (bench order) (recognizing that court has "very limited scope of review"), remanded, No. 92-5342 (D.C. Cir. Feb. 14, 1994).

[2] Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979).

[3] 18 U.S.C. § 1905 (2006)

[4] CNA, 830 F.2d at 1140

[5] Dept. of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

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The party seeking to prevent the disclosure of information the government intends to release assumes the burden of justifying the nondisclosure of the information.[6] A submitter's challenge to an agency's disclosure decision should be reviewed in light of the "basic policy" of the FOIA to "'open agency action to the light of public scrutiny'" and in accordance with the "narrow construction" afforded to the FOIA's exemptions.[7]

Release of this information is in the public interest. I seek this information in order to study the root causes of multiple incidents of interference from unlicensed U-NII devices regulated by §15.407, such as the Motorola Canopy devices in this enforcement case, to safety-of-life FAA radar systems.[8] The importance of this issue is highlighted by the fact

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[6] See Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997); accord Frazee v. U.S. Forest Serv., 97 F.3d 367, 371 (9th Cir. 1996) (declaring that the "party seeking to withhold information under Exemption 4 has the burden of proving that the information is protected from disclosure"); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (explaining that the "statutory policy favoring disclosure requires that the opponent of disclosure" bear the burden of persuasion); TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1097 (E.D. Mo. 1998) (same); see also McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1195 (D.C. Cir. 2004) (Garland, J., dissenting), reh'g en banc denied, No. 02-5342 (D.C. Cir. Dec. 16, 2004); cf. Kan. Gas & Elec. Co. v. NRC, No. 87-2748, lip op. at 4 (D.D.C. July 2, 1993)

[7] Martin Marietta, 974 F. Supp. at 40 (quoting U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976)); see, e.g., TRIFID, 10 F. Supp. 2d at 1097 (reviewing submitter's claims in light of FOIA principle that "[i]nformation in the government's possession is presumptively disclosable unless it is clearly exempt"); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, 1997 WL 578960, at *1 (W.D. Ark. Feb. 5, 1997) (examining submitter's claims in light of "the policy of the United States government to release records to the public except in the narrowest of exceptions," and observing that "[o]penness is a cherished aspect of our system of government"), aff'd, 133 F.3d 1081 (8th Cir. 1998)

[8] The interference victim in these cases was the FAA's Terminal Doppler Radar System. Here is a description of TDWR's vital role and its impact on aviation safety:

> A microburst is an intense localized downdraft that is sometimes generated by a thunderstorm. If an aircraft inadvertently encounters a microburst while flying at low altitude, it may lose altitude rapidly and not be able to recover in time to avoid a crash. In fact, a series of commercial aviation accidents in the 1970s and 80s led the FAA to commission a sensor capable of remotely detecting low-altitude wind shear phenomena such as the microburst. The resulting product was the Terminal Doppler Weather Radar (TDWR), which is now deployed at 45 major airports around the country … (T)he TDWR has been a great success as no commercial airline accidents caused by wind shear have occurred at airports protected by it.
> (http://www.ll.mit.edu/mission/aviation/faawxsystems/tdwr.html)

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that NTIA has already released two detailed technical reports on the issue.[9] The fact that these NTIA reports do not mention the information contained even in the present redacted version of the Motorola response to the LOI indicates that the root causes of at least some of the safety related interference problems has been obscured or even "covered up".

The present public record leaves serious unanswered questions as to the cause of these interference incidents. Without knowing the real causes it is impossible to develop rules and policies that prevent such problems in a cost-effective way. In addition, the mystery of these interference cases raises policy question as to all other cognitive radio rules adopted by the Commission and their adequacy to prevent interference. Finally, I suspect that the Commission's software defined radio rules adopted in Docket 00-47 and 03-108 have loopholes that enabled these interference problems. Thus the disclosure in whole or in part of the requested sections would further the public interest and falls within the Commission's discretionary FOIA authority.

Exemption 4. Generally, Congress intended the FOIA exemptions of 5 U.S.C. § 552(b)(1)-(9) to protect against disclosure of information which would *substantially* harm national defense or foreign policy, individual privacy interests, business proprietary interests, and the efficient operation of governmental functions. Motorola claims that the redactions in question are consistent with Exemption 4, documents which would reveal "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential."[10]

Exemption 4 protects from public disclosure two types of information: (1) trade secrets; and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. Congress intended this exemption to protect the interests of both the government and submitters of information. Its existence encourages submitters to voluntarily furnish useful commercial or financial information to the government and it correspondingly provides the government with an assurance that such information will be reliable.

A trade secret is a commercially valuable plan, formula, process, or device. This is a narrow and relatively easily recognized category of information. It is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be

[9] NTIA Report 11-473: Case Study: Investigation of Interference into 5 GHz Weather Radars from Unlicensed National Information Infrastructure Devices, Part I ,November 2010 (http://www.its.bldrdoc.gov/pub/ntia-rpt/11-473/11-473.pdf); NTIA Technical Report TR-11-479, Case Study: Investigation of Interference into 5 GHz Weather Radars from Unlicensed National Information Infrastructure Devices, Part II, July 2011 (http://www.its.bldrdoc.gov/pub/ntia-rpt/11-479/11-479.pdf)

[10] 5 U.S.C. § 552(b)(4).

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the end product of either innovation or substantial effort. [11]An example of a trade secret might be the formula of a gasoline additive. The second form of protected data is "commercial or financial information obtained from a person and privileged or confidential." Courts have held that data qualifies for withholding if disclosure by the government would be likely to harm the competitive position of the person who submitted the information. Detailed information on a company's marketing plans, profits, or costs can qualify as confidential business information.

Redactions and the statute. The information involved in this appeal does not meet these standards to be withheld and even if it did in part the total redaction of the 3 sections exceeds what is permitted by law. The Act expressly mandates that any "reasonably segregable portion" of a record must be disclosed to a requester after the redaction (the deletion of part of a document to prevent disclosure of material covered by an exemption) of the parts which are exempt.[12] This is a very important aspect of FOIA because it prohibits an agency from withholding an entire document merely because one line, one page or one picture are exempt.

Annexes A & B. With respect to Annex A and Annex B, Motorola states on p. 1 of its response,

> "During its investigation into the issues involved in the LOI, Motorola became aware of two potential compliance issues involving the company's U-NII products, which are not covered by the questions in the LOI. These issues are summarized below and described in detail in two annexes to the response"

Motorola then redacts the total content of both the summary of the compliance issues and the more detailed information in two annexes. *Perhaps* there was some information here might be covered by Exemption 4, which is discretionary for the Commission. But there is nothing in the redacted version that gives the slightest hint to what these "potential compliance issues" are. Furthermore it is difficult to understand how partial revelation of the nature of these problems "insight into the company's business practices and procedures, equipment development and internal quality control and compliance processes." Finally, the "insight" test used in the EB letter seems to go beyond the statute, which protects information *per se*, not " insight" that might be gathered from some interpretation of it.

Question No. 2. This question from EB asks whether the Motorola Canopy device found in San Juan was FCC certified, what is ID number was, and why it was not properly labeled. It would appear at the very least that the direct answer to these questions at least

[11] Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[12] 5 U.S.C. § 552(b).

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contains no information that might be covered by Exemption 4.[13] The question to FCC certification is simply a yes or no answer. The ID number is simply one of a list of numbers that are publicly available. Finally the question as to why it wasn't properly labeled does not appear to be a valid trade secret covered by 5 U.S.C. §552(b)(4) and the *Public Citizen Health Research Group* standard. Perhaps the response to this question contains *some* valid trade secrets but the total redaction of all content appears inconsistent with the letter of the statute. [14]

Possible alternative resolutions of this matter. I have indicated to Motorola that I am willing to be flexible in this matter and I do not need public disclosure of the requested information. If Motorola is willing to release the information to me subject to a nondisclosure agreement (NDA) allowing me to discuss the matter with FCC and NTIA staff then I am willing to withdraw this appeal.

I am willing to explore alternative arrangements with Motorola if they so wish. I am also willing to consider Alternative Dispute Resolution.[15]

Sincerely,

Michael J. Marcus, Sc.D., F-IEEE

cc: David Hilliard, Esq., Counsel for Motorola

[13] The absence of even these direct responses in the redacted version raises serious questions about the review standard contained in the EB letter.

[14] 5 U.S.C. § 552(b).

[15] 47 C.F.R. §1.18.