



Federal Communications Commission
Washington, D.C. 20554

August 18, 2010

Ms. Marcia Hofmann
Senior Staff Attorney
Electronic Frontier Foundation
545 Shotwell Street
San Francisco, CA 94110

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Re: FOIA Control No. 2010-485

Dear Ms. Hoffman:

Your above-numbered Freedom of Information Act (FOIA) request on behalf of the Electronic Frontier Foundation (EFF) seeks "all records from June 17, 2010 to the present . . . reflecting discussion between FCC officials [including but not limited to Edward Lazarus, Paul de Sa, Zachary Katz, and their staff members] and representatives of telecommunications, cable, and Internet companies and organizations [including but not limited to AT&T, Verizon, the National Cable & Telecommunications Association, Google and Skype] concerning (1) potential legislation on broadband Internet regulations . . . ; (2) potential FCC reclassification of broadband Internet connectivity services as 'telecommunications services' subject to either partial or full regulation under Title II of the Communications Act; and (3) the application of ex parte rules to any meetings between FCC officials and representatives of telecommunications, cable and Internet companies and organizations." By letter dated July 20, 2010, your request for expedited processing (5 U.S.C. § 552(a)(6)(E)(1); 47 C.F.R. § 0.461(h)) was denied,¹ EFF was classified as a representative of the news media (5 U.S.C. § 552(a)(4)(A)(ii); 47 C.F.R. § 0.466(a)(7)), and EFF's request for a fee waiver (5 U.S.C. § 552(a)(4)(A)(iii); 47 C.F.R. § 0.470(e)) was granted. Letter from Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, to Marcia Hoffman, EFF (July 20, 2010). The date for responding to your FOIA request was extended to August 18, 2010, pursuant to 5 U.S.C. § 552(a)(6)(B)(iii)(I) and 47 C.F.R. § 0.461(g)(1)(i). By this letter, we grant in part and deny in part your FOIA request.

We have searched the files of the FCC officials involved in the discussions referenced in your FOIA request. In doing so, we have searched for records dated from June 17, 2010 to July 7, 2010, the date your FOIA request was received and the date we commenced the search for responsive records. See 47 C.F.R. § 0.461(f)(6). We have located the following categories of materials potentially responsive to your request: (1) handwritten personal notes of FCC staff; (2) emails and letters between FCC staff, on the one hand, and persons outside of the FCC, on the other; (3) emails among FCC staff; and (4) various draft documents. Below, we discuss these categories.

Handwritten Personal Notes. We located several pages of handwritten notes of FCC staff related to the discussions that are the subject of your FOIA request. The notes are handwritten notes intended solely for the personal use of the staff members who created them. The notes were not distributed to other staff, and maybe disposed of at the creator's discretion. Therefore, the notes are not "agency records" subject to the FOIA. See *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995),

¹ We are in receipt of your application for review (AFR) filed July 26, 2010 of the denial of your request for expedited processing. If this response to your FOIA request renders the AFR moot, please let us know to allow us to close the file on that matter.

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aff'd, 76 F.3d 1232 (D.C. Cir. 1996); *Sybille v. Federal Reserve Board of New York*, 770 F. Supp. 134, 136-39 (S.D.N.Y. 1991).

Emails and letters between FCC staff and persons outside of the agency. We located a number of emails and *ex parte* letters sent either to FCC staff from persons outside of the agency, or from FCC staff to persons outside of the agency. Copies of these emails and the *ex parte* letters are attached. Pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6) (protecting materials the release of which “would constitute a clearly unwarranted invasion of personal privacy”), we have redacted from these records personal email addresses and telephone numbers. Some of the email chains contain portions that are internal emails between FCC staff. These portions are addressed in the next section.

Emails among FCC staff. Our search of agency records located a number of emails among FCC staff, or portions of email chains that were communications among FCC staff. We are withholding these internal emails pursuant to the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5). FOIA Exemption 5 permits agencies to withhold “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 is intended to “prevent injury to the quality of agency decisions.” *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975). The deliberative process privilege applies to predecisional materials that reflect the “give-and-take” of the agency’s consultative process. See *Public Citizen v. OMB*, 569 F.3d 434 442-43 (D.C. Cir. 2009), citing *Judicial Watch v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). The internal emails among FCC staff concern the discussions that are the subject of your FOIA request. Many involve Internet-related issues currently pending before the Commission. As such, the emails are within the scope of FOIA Exemption 5.

This determination does not end our analysis, however. The FOIA requires that records be reviewed to determine if any segregable portions can be released. 5 U.S.C. § 552(b) (sentence immediately following exemptions). We also must review the records to ensure that we withhold only those parts of records that would result in foreseeable harm to an interest protected by FOIA Exemption 5. See *Memorandum to 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). We have determined that a number of the emails or portions thereof may be released as a matter of our discretion as no interests protected by FOIA Exemption 5 would be harmed by their release. The remainder of the records contain no portions that may be segregated and released on this basis, as any otherwise-releasable portions are inextricably intertwined with the deliberative portions of the documents, see, e.g., *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981), the release of which at this time would diminish the quality of the deliberative process and “inhibit candor in the decision-making process.” *Media Access Project, Consumers Union and Consumers Federation of America*, 16 FCC Rcd 6727, 6729-30 (2001) (*MAP*).

Various draft documents. Finally, we located a number of draft documents concerning the subjects of your FOIA request. We are withholding these documents pursuant to FOIA Exemption 5 (discussed above). Release of these drafts would represent an unwarranted intrusion into the deliberative process because it would tend to reveal thinking as to the importance or unimportance, or merit or lack of merit, of certain facts or positions. See *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993) (“Given the need for deliberation to inform discretion and for confidentiality to protect deliberation, we have felt bound to shelter factual summaries that were written to assist the making of a discretionary decision”). Nor do we believe any portions of these drafts can be segregated under section 552(b) or released as a matter of discretion under the President’s and Attorney General’s FOIA Memoranda. The materials withheld under FOIA Exemption 5 contain staff analysis concerning sensitive matters raised at

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the *ex parte* meetings in question. The staff's ability to provide candid opinions and analysis is of the utmost importance in such matters. Moreover, relevant proceedings are still ongoing before the Commission. See *MAP*, 16 FCC Rcd at 6729-30.

Fees. As noted above, your request for a FOIA fee waiver has been granted. Therefore, no fees will be assessed for processing your FOIA request.

Appeal rights. You may seek review of this decision granting in part and denying in part your FOIA request by filing an application for review with the Office of General Counsel within thirty (30) days of the date of this letter. See 47 C.F.R. § 0.461(j).

Sincerely,

A handwritten signature in black ink that reads "Ann E. Bushmiller". The signature is written in a cursive style with a long horizontal stroke at the end.

Ann E. Bushmiller
Deputy Associate General Counsel

enclosures

cc: FOIA Officer