

THE CENTER FOR PUBLIC INTEGRITY

October 19, 2006

By Certified Mail, Return Receipt Requested

General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Review of Freedom of Information Action
FOIA Control No. 2006-493

Dear Sir or Madam:

This letter serves as a formal Freedom of Information Act appeal under 5 U.S.C. § 552(a)(6)(A) and an application for review under 47 C.F.R. § 0.461(j) of the written decision dated September 26, 2006, by Kirk S. Burgee, Associate Bureau Chief, Wireline Competition Bureau, on the Freedom of Information Act (FOIA) request (FOIA Control No. 2006-493) submitted by Drew Clark on behalf of the Center for Public Integrity. A copy of the determination letter is attached. The Center for Public Integrity's objections to the determination by Mr. Burgee to withhold the records sought are noted and addressed in turn in the paragraphs below.

The Center's FOIA request is the subject of a lawsuit, *Center for Public Integrity v. Federal Communications Commission*, Civil Action No. 06-1644 (RMC) (D.D.C.), filed September 25, 2006. We believe this suit was properly filed pursuant to 5 U.S.C. § 552(a)(6)(C)(i) but nevertheless ask that you consider this application for review.

1) FOIA Exemption 4. The decision to deny the Center's request under FOIA Exemption 4 depends on findings that the requested data is confidential (5 U.S.C. § 552(b)(4)), meaning in this case, likely to cause substantial competitive harm to the filer if released (*National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)).

In analyzing the application of FOIA Exemption 4 to the Center's request, the determination letter is cursory, vague, conclusory and contradicts the factual record. For instance, the letter asserts (at p. 3) that "[f]ilers customarily guard this [requested] data from their competitors." In fact, filers may choose to designate whether they consider some submitted data to be "privileged and confidential." (Form 477, Cover Page, Question 8; *see also* FCC, "Frequently Asked Questions About FCC Form 477," http://www.fcc.gov/broadband/broadband_data_faq.html, at ¶ 24. The determination letter does not address what proportion of the data has been submitted under claim of confidentiality. We request that any data not claimed as confidential be released to us.

In addition, when the Commission adopted the Form 477 data collection program, it stated that “it is our understanding that some providers release considerable data about the nature of their operations, while others more closely safeguard such data” and that “[a]t this time, we do not have sufficient evidence in the record to make a universally applicable decision about the competitive sensitivity of all of the Part I Broadband information for all providers.” Local Telecommunications Competition and Broadband Deployment, Report and Order, Docket No. 99-301, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-00-114A1.pdf (“2000 Data Gathering Order”), at ¶¶ 89 and 91. Even so, the determination letter asserts that the Center’s FOIA request seeks “data derived from filings that the Commission *has already determined in prior orders* should not be made available to the public” (emphasis added), apparently referring to the 2000 Data Gathering Order but not citing any order in particular. We ask that you reconsider the probability, extent and scope of any likely competitive harm, in light of the doubts expressed by the Commission in the 2000 Data Gathering Order.

2) Segregability. FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). The determination letter does not even attempt to justify the withholding of all portions of the data, other than to assert (at 3 n.12) that the Commission has published some portions of the data in publicly available reports. The letter does not indicate whether further segregable portions can be released. We ask that you make such a determination.

The Center’s FOIA request stated, “If it is not possible to produce all the fields in the database, we are willing to negotiate to narrow the scope of this request.” We remain willing to do so. We ask that you consider whether most or some fields can be released without causing competitive harm if certain other fields are withheld as exempt.

In instances where you determine that data must be withheld to prevent competitive harm, we ask that you consider whether particular numbers can be redacted by indicating a range that the number falls within (e.g., 0, 1-100, 101-1000, etc.) or, at a minimum, by indicating whether the number is zero or greater than zero.

3) Documentation. The second part of the Center’s FOIA request (at 1) sought “[a]ll documentation associated with [the requested] database.” The next paragraph repeated that the Center was requesting “any and all documentation related to these records, including but not limited to data dictionaries, database documentation, record layouts, data entry instructions and similar printed or electronic documentation materials.”

The Center intended to use the term “documentation” in the sense it normally has in computer science: “the organized collection of records that describe the structure, purpose, operation, maintenance, and data requirements for a computer program, operating system, or hardware device.” (“documentation,” *The American Heritage Dictionary of the English Language* (4th ed. 2000), <http://www.thefreedictionary.com/documentation>)

We ask that you reconsider the denial of this part of the Center’s request in light of this clarification. The Center is seeking documentation associated with the structure of the database,

not with its contents. This should obviate the competitive-harm concerns the determination letter expresses with regard to this part of the Center's request.

For the reasons noted above, we ask that you reconsider and reverse the determination made on the Center's request.

Sincerely,

Peter Newbatt Smith
Research Editor and counsel in this matter
Center for Public Integrity
910 17th Street, N.W., 7th Floor
Washington, DC, 20006-2606
202-481-1239
psmith@publicintegrity.org

copy to: Wyneva Johnson, Assistant United States Attorney