



Federal Communications Commission
Washington, D.C. 20554

July 19, 2017

Dell Cameron
Gizmodo Media Group
2 West 17th St, 2nd Floor
New York, NY 10011
Via e-mail to foiaquery@gmail.com

Re: FOIA Control No. 2017-655

Mr. Cameron:

This letter responds to your Freedom of Information Act (FOIA). Your request has been assigned FOIA Control No. 2017-655. Specifically, your request seeks:

1. All communications between employees in the offices of Chairman Ajit Pai and Commissioner Michael O’Rielly concerning the following topics:
 - a. “distributed denial-of-service attack” or “DDoS”
 - b. Public comments to the FCC’s comment system regarding net neutrality.
 - c. “astroturfing”
 - d. “spam” sent to the FCC comment system.
 - e. Dr. David Bray’s May 8, 2017, statement regarding the alleged DDoS attack.
 - f. Questions from representatives of the news media regarding the alleged DDoS attack and/or the integrity of the FCC’s comment system.
2. All calendar entries, visitor logs, or meeting minutes referring or relating to any and all meetings between employees in the offices of Chairman Ajit Pai and Commissioner Michael O’Rielly regarding the FCC’s public comment system and/or the alleged DDoS attack.
3. Any and all documents in the offices of Chairman Ajit Pai and Commissioner Michael O’Rielly discussing, referring, or relating to the FCC’s comment system and/or the alleged DDoS attack, including all draft or final versions of orders, memoranda, or written views concerning the approach the FCC should take with respect to perceived issues with the comment system.
4. All records referencing a letter by Senators Ron Wyden and Brian Schatz sent to FCC on May 9 concerning the alleged DDoS attack.
5. All documents and communications in the offices of Chairman Ajit Pait and Commissioner Michael O’Rielly relating to the recommendations or views of FCC personnel about how to respond to the alleged DDoS attack and/or questions about the integrity of the FCC’s comment system.
6. A copy of any records related to the FCC “analysis” (cited in Dr. Bray’s statement) that concluded a DDoS attack had taken place.

Pursuant to section 0.461(g)(1)(i) of the Commission’s rules, the date for responding to your request has been extended July 6, 2017, due to a need to search records from multiple offices of the Commission. The deadline was subsequently extended to July 19, 2017.

The Office of the Chairman, the Office of Commissioner O’Rielly, the Office of Legislative Affairs, and the Office of the Managing Director – Information Technology searched for responsive records.

We located approximately 225 pages of records responsive to your request. Of the approximately 225 pages of responsive records located, 16 pages are produced here. The remaining pages are withheld in full due to the reasons discussed below. Additionally, some material on the pages produced has been redacted due to the reasons discussed below.

Records responsive to your request were withheld under FOIA Exemption 4.¹ Exemption 4 protects matters that are “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” These documents consist of trade press articles and other subscription publications that are subject to copyright. We have determined that disclosure is prohibited by law under the Trade Secrets Act, 18 U.S.C. § 1905, or that release would otherwise harm the commercial interests of the companies involved.

Records responsive to your request were withheld or redacted under FOIA Exemption 5.² Exemption 5 protects certain inter-agency and intra-agency records that are normally considered privileged in the civil discovery context. Exemption 5 encompasses a deliberative process privilege intended to “prevent injury to the quality of agency decisions.”³ To fall within the scope of this privilege the agency records must be both predecisional and deliberative.⁴ Predecisional records must have been “prepared in order to assist an agency decision maker in arriving at his decision.”⁵ Deliberative records must be such that their disclosure “would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.”⁶

These documents include staffing decisions made by Commission supervisors, draft talking points, staff summaries of congressional letters, and policy suggestions from staff. We have determined that it is reasonably foreseeable that disclosure would harm the Commission’s deliberative processes, which Exemption 5 is intended to protect. Release of this information would chill deliberations within the Commission and impede the candid exchange of ideas.

¹ 5 U.S.C. § 552(b)(4).

² 5 U.S.C. § 552(b)(5).

³ *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

⁴ *Id.* at 151-52.

⁵ *Formaldehyde Inst. v. Dep’t of Health and Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (“In deciding whether a document should be protected by the privilege we look to whether the document is . . . generated before the adoption of an agency policy and whether . . . it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents. . .”).

⁶ *Formaldehyde Inst.*, 889 F.2d at 1122 (quoting *Dudman Commc’ns Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

Records responsive to your request were withheld or redacted under FOIA Exemption 6.⁷ Exemption 6 protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Balancing the public’s right to disclosure against the individual’s right to privacy, we have determined that release of this information would constitute a clearly unwarranted invasion of personal privacy. These redactions consist of non-public contact information. We have determined that the public interest in this information is de minimis, while there is a substantial privacy interest for the affected individuals.

We have determined that it is reasonably foreseeable that disclosure would harm the privacy interest of the persons mentioned in these records, which Exemption 6 is intended to protect.

Records responsive to your request were withheld under Exemption 7(E), which protects “records or information compiled for law enforcement purposes [the production of which] would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk a circumvention of the law.”⁸ These documents consisted of discussion of the Commission’s IT infrastructure and countermeasures. It is reasonably foreseeable that this information, if released, would allow adversaries to circumvent the FCC’s protection measures.

We have determined that it is reasonably foreseeable that disclosure would harm the Commission or the Federal government’s law enforcement activities, which Exemption 7 is intended to protect.

Part 6 of your request seeks “A copy of any records related to the FCC ‘analysis’ (cited in Dr. Bray’s statement) that concluded a DDoS attack had taken place.” IT staff have confirmed there are no records responsive to this portion of the request. The analysis referred to stemmed from real time observation and feedback by Commission IT staff and did not result in written documentation.

The FOIA requires that “any reasonably segregable portion of a record” must be released after appropriate application of the Act’s exemptions.⁹ The statutory standard requires the release of any portion of a record that is nonexempt and that is “reasonably segregable” from the exempt portion. However, when nonexempt information is “inextricably intertwined” with exempt information, reasonable segregation is not possible.¹⁰ The redactions and/or withholdings made are consistent with our responsibility to determine if any segregable portions can be released. To the extent non-exempt material is not released, it is inextricably intertwined with exempt material.

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.¹¹ To calculate the appropriate fee, requesters are classified as: (1)

⁷ 5 U.S.C. § 552(b)(6).

⁸ 5 U.S.C. § 552(b)(7)(E).

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

¹⁰ *Mead Data Cent. Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

¹¹ *See* 5 U.S.C. § 552(a)(4)(A), 47 C.F.R. § 0.470.

commercial use requesters; (2) educational requesters, non-commercial scientific organizations, or representatives of the news media; or (3) all other requesters.¹²

Pursuant to section 0.466(a)(5)-(7) of the Commission's rules, you have been classified as category (2), "educational requesters, non-commercial scientific organizations, or representatives of the news media."¹³ As an "educational requester, non-commercial scientific organization, or representative of the news media," the Commission assesses charges to recover the cost of reproducing the records requested, excluding the cost of reproducing the first 100 pages. The production in response to your request did not involve more than 100 pages of duplication. Therefore, you will not be charged any fees.

You have requested a fee waiver pursuant to section 0.470(e) of the Commission's rules.¹⁴ As you are not required to pay any fees in relation to your FOIA request, the Office of the General Counsel, which reviews such requests, does not make a determination on your request for a fee waiver.¹⁵

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 90 calendar days of the date of this letter.¹⁶ 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."

If you would like to discuss this response before filing an application for review to attempt to resolve your dispute without going through the appeals process, you may contact the Commission's FOIA Public Liaison for assistance at:

FOIA Public Liaison
Federal Communications Commission, Office of the Managing Director,
Performance Evaluation and Records Management
445 12th St SW, Washington, DC 20554
202-418-0440
FOIA-Public-Liaison@fcc.gov

If you are unable to resolve your FOIA dispute through the Commission's FOIA Public Liaison, the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies.¹⁷ The contact information for OGIS is:

¹² 47 C.F.R. § 0.470.

¹³ 47 C.F.R. § 0.466(a)(5)-(7).

¹⁴ 47 C.F.R. § 0.470(e).

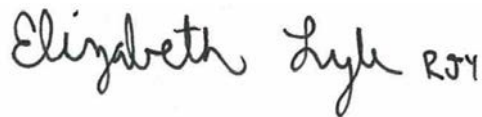
¹⁵ 47 C.F.R. § 0.470(e)(5).

¹⁶ 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).

¹⁷ Please note that attempts to resolve your dispute through the FOIA Public Liaison or OGIS do not toll the time for filing an application for review unless an extension is granted by the Office of General Counsel.

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740-6001
202-741-5770
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ogis.archives.gov

Sincerely,

A handwritten signature in black ink that reads "Elizabeth Lyle ROY". The signature is written in a cursive style with a distinct "ROY" at the end.

Elizabeth Lyle
Assistant General Counsel

Enclosures
cc: FCC FOIA Office



National Security Archive,
Suite 701, Gelman Library, The George Washington University,
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Phone: 202/994-7000, Fax: 202/994-7005, nsarchiv@gwu.edu