

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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No. 08-4024

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AT&T INC.,  
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,  
*Respondents.*

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On Petition for Review of an Order of the  
Federal Communications Commission

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**APPENDIX  
Volume II (A 15-67)**

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December 19, 2008

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08-4024

**CERTIFIED LIST OF ITEMS IN THE RECORD**

***AT&T v. FCC & USA, 3rd Cir. 08-4024***

**Administrative Records Pertaining to  
Intervenor Respondent Comptel's FOIA Request**

- 09/12/08 Memorandum Opinion and Order, *SBC Communications Inc. On Request for Confidential Treatment*, FCC 08-207 (rel. Sept. 12, 2008).
- 09/06/05 SBC Communications, Inc. ("SBC") Opposition to Comptel's Application for Review (Letter from Jim Lamourex, Senior Counsel, SBC, to Samuel Feder, Acting General Counsel, Office of General Counsel, Federal Communications Commission ("FCC")).
- 09/06/05 Comptel's Application for Review of the FCC Enforcement Bureau's administrative Freedom of Information Act ("FOIA") decision (Letter from Mary C. Albert, Vice President Regulatory Policy, Comptel, to Samuel Feder, Acting General Counsel, Office of General Counsel, FCC).
- 09/01/05 Comptel's Opposition to SBC's 08/19/08 Application for Review (Letter from Mary C. Albert, Vice President Regulatory Policy, Comptel, to Samuel Feder, Acting General Counsel, Office of General Counsel, FCC).
- 08/19/05 SBC's Application for Review of the FCC Enforcement Bureau's administrative FOIA decision (Letter from Jim Lamourex, Senior Counsel, SBC, to Samuel Feder, Acting General Counsel, Office of General Counsel, FCC).
- 08/05/05 FCC Enforcement Bureau's administrative FOIA decision (Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC, to Jim Lamourex, Senior Counsel, SBC, and Mary C. Albert, Vice President Regulatory Policy, Comptel).
- 06/28/05 Comptel's Opposition to SBC's Request for Confidential Treatment (Letter from Mary C. Albert, Vice President,

Regulatory Policy, CompTel, to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, FCC).

- 05/27/05 SBC's Opposition to CompTel's FOIA request/Request for Confidential Treatment (Letter from Jim Lamoureux, Senior Counsel, SBC, to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, FCC).
- 04/04/05 CompTel's FOIA request (e-mail from Mary C. Albert, Vice President, Regulatory Policy, CompTel to FCC's FOIA Control Office).

**Records Contained in File No. EB-04-IH-0342**

- 01/10/05-01/11/05 Two-page e-mail chain between FCC employees, dated January 10, 2005 through January 11, 2005, subject "FW: SBC Documents," discussing whether documents associated with the FCC's E-rate investigation of SBC may be provided to the U.S. Department of Justice ("DOJ").
- 01/10/05-01/11/05 Three-page e-mail chain between FCC employees, dated January 10, 2005 through January 11, 2005, subject "RE: SBC Documents," discussing whether documents associated with the FCC's E-rate investigation of SBC may be provided to DOJ, with handwritten notes.
- 01/10/05-01/11/05 Two-page e-mail chain between FCC employees, dated January 10, 2005 through January 11, 2005, subject "RE: SBC Documents," discussing whether documents associated with the FCC's E-rate investigation of SBC may be provided to DOJ, with handwritten notes.
- 01/10/05 Three-page handwritten notes of FCC staff, dated January 10, 2005, discussing coordination and possible courses of action that FCC and/or DOJ can pursue in E-rate investigations in light of proceedings in FCC's E-rate investigation of SBC.
- 01/06/05-01/11/05 Seven-page e-mail chain between FCC employees, dated January 6, 2005 through January 11, 2005, subject "RE: SBC Documents," discussing the FCC's investigation of SBC for

violations of the FCC's rules in connection with the FCC's E-rate investigation and possible referral to DOJ.

- 12/20/04-  
01/06/05 Five-page e-mail chain between FCC staff and DOJ officials, dated December 20, 2004 through January 6, 2005, subject "SBC e-rate consent decree," discussing whether documents associated with the FCC's E-rate investigation of SBC may be provided to DOJ and containing DOJ opinions regarding that investigation vis-à-vis similar investigations in other cases, with attached one-page chart identifying SBC New London E-rate projects.
- 12/20/04-  
01/06/05 Three-page e-mail chain between FCC staff, dated December 20, 2004 through January 6, 2005, subject "FW: SBC e-rate consent decree," discussing whether documents associated with the FCC's E-rate investigation of SBC may be provided to DOJ and containing DOJ opinions regarding that investigation vis-à-vis similar investigations in other cases.
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- 12/20/04-  
01/06/05 Three-page e-mail chain between FCC staff and DOJ officials, dated December 20, 2004 through January 6, 2005, subject "FW: SBC e-rate consent decree," discussing whether documents associated with the FCC's E-rate investigation of SBC may be provided to DOJ and containing DOJ opinions regarding that investigation vis-à-vis similar investigations in other cases.
- 12/06/04 One-page e-mail between FCC staff, dated December 6, 2004, subject "Tolling Agreement Extension.doc," discussing edits to draft Tolling Agreement Extension between the FCC and SBC.

- 11/30/04 One-page e-mail between FCC staff, dated November 30, 2004, subject "SBC Erate," discussing edits to draft Compliance Plan.
- 11/09/04 One-page e-mail between FCC staff, dated November 9, 2004, subject "RE: SBC E Rate – New London," discussing edits to draft Consent Decree and strategies for presenting FCC counter-offer to SBC.
- 11/09/04 One-page handwritten note of FCC staff, dated November 9, 2004, containing SBC employee's contact information.
- 10/22/04-10/24/04 Three-page e-mail chain between FCC staff and SBC officials, dated October 22, 2004 through October 29, 2004, subject heading may not be disclosed because it would reveal protected information, discussing edits to draft Consent Decree and draft Compliance Plan.
- 10/22/04-10/29/04 Two-page e-mail chain between FCC staff and SBC officials, dated October 22, 2004 through October 29, 2004, subject heading may not be disclosed because it would reveal protected information, discussing edits to draft Consent Decree and draft Compliance Plan.
- 10/29/04 One-page handwritten notes of FCC staff, dated October 29, 2004, discussing meeting between FCC and SBC officials regarding possible points to be included in Consent Decree and Compliance Plan.
- 10/21/04 Two-page e-mail between FCC staff, dated October 21, 2004, subject "RE: SBC E Rate," discussing edits to draft Consent Decree.
- 10/21/04 One-page e-mail between FCC staff, dated October 21, 2004, subject "SBC E Rate," discussing edits to draft Consent Decree, with handwritten notes, and attached five-page draft Consent Decree with edits.
- 10/12/04 One-page e-mail from FCC official to SBC officials, dated October 12, 2004, subject "Tolling Agreement, EB-04-IH-0342," stating that Tolling Agreement was signed.

- 10/08/04 One-page e-mail between FCC staff, dated October 8, 2004, subject "FW: SBC erate New London," discussing FCC and SBC settlement offers and FCC strategies in settlement discussions.
- 10/07/04 One-page handwritten notes of FCC staff, dated October 7, 2004, discussing potential settlement terms in FCC's E-rate investigation of SBC.
- 10/07/04 One-page e-mail between FCC staff, dated October 7, 2004, subject "SBC E Rate New London," discussing settlement negotiations between FCC and SBC regarding FCC's E-rate investigation, with attached one-page summary of matters at issue prepared for settlement negotiations.
- 10/07/04 One-page e-mail between FCC staff, dated October 7, 2004, subject "RE: SBC E Rate - New London," discussing potential FCC settlement counter-offers in FCC's E-rate investigation of SBC.
- 10/05/04 Two-page e-mail between FCC staff, dated October 5 through 7, 2004, subject "RE: SBC New London," discussing invoices at issue in FCC's E-rate investigation of SBC and how invoices may relate to investigation.
- 10/05/04-  
10/07/04 One-page e-mail between FCC staff, dated October 5 through 7, 2004, subject "RE: SBC E Rate – Invoices," discussing FCC's interpretation of SBC invoices regarding FCC's E-rate investigation and FCC investigatory practices regarding such invoices.
- 10/05/04 Four-page memorandum between FCC staff, dated October 5, 2004, preparing for settlement negotiations and discussing matters at issue in FCC E-rate investigation of SBC and the parties' settlement negotiations.
- 09/30/04 One-page FCC staff typewritten notes, dated September 30, 2004, discussing SBC settlement offer and possible FCC counter-offers.

- 09/28/04-09/30/08 Two-page e-mail between FCC staff, dated September 28 through September 30, 2004, subject "RE: SBC New London," discussing settlement discussions between FCC and SBC and potential FCC strategies and counter-offers.
- 09/28/04 Two-page e-mail between FCC staff, dated September 28 through September 30, 2004, subject "RE: SBC New London," discussing settlement discussions between FCC and SBC and potential FCC strategies and counter-offers.
- 09/23/04 One-page e-mail between FCC staff and USAC official, dated September 23, 2004, subject "Requirement that funds be used at sites specified on the," discussing analysis of FCC rules at issue in FCC's E-rate investigation of SBC and how rules might apply to that investigation.
- 09/23/04 Two-page handwritten notes of FCC staff, dated September 23, 2004, discussing meeting with SBC and SBC settlement proposals for resolving FCC's E-rate investigation of SBC.
- 09/07/04-09/22/07 Three-page e-mail chain between FCC officials, dated September 7, 2004 through September 22, 2004, subject "SBC E Rate," discussing FCC staff opinions regarding possible courses of action for FCC to pursue in its E-rate investigation of SBC and possible violations.
- 09/20/04-09/21/04 Three-page e-mail chain between FCC officials, dated September 20, 2004 through September 21, 2004, subject "FW: SBC E Rate," discussing staff opinions regarding possible courses of action for FCC to pursue in its E-rate investigation of SBC; discussions with SBC officials; and issues regarding settlement.
- 09/13/04 SBC's response to the FCC's Letter of Inquiry, with attachments.
- 08/25/04-09/14/04 One-page of handwritten notes of FCC staff, with attached three-page e-mail chain between FCC officials, dated August 25, 2004 through September 14, 2004, subject "RE: SBC E-

rate,” discussing FCC staff opinions regarding possible courses of action for FCC to pursue in its E-rate investigation of SBC.

08/25/04- Two-page e-mail between FCC staff, dated August 25, 2004  
09/14/04 and September 14, 2004, subject “RE: SBC e-rate,” discussing FCC staff opinions regarding possible courses of action for the FCC to pursue in its E-rate investigation of SBC.

08/25/04- Two-page e-mail between FCC staff, dated August 25, 2004  
09/07/04 through September 7, 2004, subject “RE: SBC E-rate,” discussing FCC staff opinions regarding possible courses of action for the FCC to pursue in its E-rate investigation of SBC, with handwritten notes on first page.

08/25/04- Two-page e-mail between FCC staff, dated August 25, 2004  
09/07/04 through September 7, 2004, subject “RE: SBC E-rate,” discussing FCC staff opinions regarding possible FCC rules at issue in FCC’s E-rate investigation of SBC and how these rules might relate to that investigation.

08/25/04 One-page e-mail between FCC staff, dated August 25, 2004, subject “SBC E-rate,” discussing issues that FCC should review in connection with its E-rate investigation of SBC.

08/24/04 Letter of Inquiry from the FCC to SBC.

08/18/04 One-page e-mail between FCC staff, dated August 18, 2004, subject “SBC erate,” discussing suggested edits to draft FCC LOI to SBC, with handwritten notes.

08/06/04 One-page e-mail between FCC staff, dated August 6, 2004, subject “SBC e-rate,” discussing telephone conversation with SBC officials regarding SBC’s internal E-rate investigation and the FCC’s possible courses of action.

08/06/04 Two-page e-mail between FCC staff and SBC officials, dated August 6, 2004 through August 9, 2004, subject heading may not be disclosed because it would reveal protected information, discussing SBC’s August 6, 2004 letter notifying the FCC that SBC had discovered “certain irregularities” during an internal

audit that constituted an “apparent violation of the E-rate rules” and possible FCC courses of action.

- 08/06/04-  
08/09/04 Two-page e-mail chain between FCC staff and SBC officials, dated August 6, 2004 through August 9, 2004, subject heading may not be disclosed because it would reveal protected information, discussing SBC’s August 6, 2004 letter to the FCC described in paragraph 46 above and possible FCC courses of action, with attached 15-page SBC August 6, 2004 letter (with attachments) containing handwritten notes of FCC staff.
- 08/--/04 Six-page draft FCC Letter of Inquiry to SBC, dated “August \_\_, 2004,” with handwritten edits.
- 08/--/04 Nine-page draft FCC Letter of Inquiry to SBC, dated “August \_\_, 2004.”
- 08/06/04 SBC’s August 6, 2004 letter (with attachments) notifying the FCC that SBC had discovered “certain irregularities” during an internal audit that constituted an “apparent violation of the E-rate rules” (15 pages).
- 06/04/04 Cover letter with attached Plea Agreement in *United States v. NEC-Business Network Solutions, Inc.* (43 pages, with personally identifiable information redacted from cover letter)
- 05/28/04 Cover letter with attached Settlement Agreement in *U.S. ex rel. San Francisco Unified School District v. Nippon Electric Co. Business Network Solutions, et al.*, No. C02-2398 CRB; *U.S. v. NEC-Business Network Solutions, Inc.*, CR 04-184 CRB (13 pages)
- 04/14/04 One-page e-mail between FCC staff and USAC officials, dated April 14, 2004, subject “FW: Surveillance Cameras,” discussing whether E-rate pays for certain equipment.
- 02/06/04 Two-page e-mail between FCC staff, dated February 6, 2004, subject “2/6 TR Daily story on Sprint & E-Rate program,” containing FCC staff opinion on news article.

- 02/--/04 Six-page draft memorandum from FCC staff to other FCC staff, dated "February \_\_, 2004," subject heading may not be disclosed because it would reveal protected information, summarizing issues in another E-rate matter and discussing possible courses of action for the FCC to pursue in that matter, with handwriting and edits.
- 01/06/04 One-page handwritten notes of FCC staff discussing certain "DOJ issues" relating to subject matter that is unclear, dated January 6, 2004.
- /--/-- Two-page handwritten notes of FCC staff, undated, discussing FCC rules associated with possible SBC violations of E-rate program and possible SBC E-rate violations.
- /--/-- Two-page draft Tolling Agreement Extension between FCC and SBC, undated, with handwritten edits.
- /--/-- Two-page draft Tolling Agreement Extension between FCC and SBC, undated.
- /--/-- One-page handwritten notes of FCC staff, undated, discussing timeline of events in connection with FCC's E-rate investigation of SBC and FCC rules related thereto.
- /--/-- Three-page typed notes of FCC staff, undated, subject "SBC E Rate Investigation New London, CT," summarizing and discussing possible violations and courses of action for the FCC to pursue in its E-rate investigation of SBC, with handwritten notes and edits.
- /--/-- One-page handwritten notes of FCC staff, undated, discussing tasks that FCC may perform in connection with FCC's E-rate investigation of SBC.
- /--/-- Three-page handwritten notes of FCC staff, undated, summarizing and discussing possible violations and courses of action for the FCC to pursue in its E-rate investigation of SBC, with handwritten notes and edits.

- /--/-- One-page handwritten notes of FCC staff, undated, discussing possible SBC violations in connection with FCC's E-rate investigation of SBC.
- /--/-- One-page handwritten notes of FCC staff, undated, subject "Invoices SBC E Rate," discussing information in connection with FCC's E-rate investigation of SBC.
- /--/-- One-page handwritten notes of FCC staff, undated, discussing information in connection with FCC's E-rate investigation of SBC.
- /--/-- Four-page draft Consent Decree between FCC and SBC, undated, with handwritten notes and typed edits.
- /--/-- Six-page draft Consent Decree between FCC and SBC, undated, with typed edits and handwritten notes.
- /--/-- Four-page draft Consent Decree between FCC and SBC, undated, with typed edits and handwritten notes, with attached one-page e-mail between FCC and SBC officials (dated October 28, 2004) discussing edits, and three-page memo discussing SBC E-Rate Compliance Program, with FCC staff handwritten notes.
- /--/-- Four-page executed Tolling Agreement between FCC and SBC, with one-page fax transmission cover sheet and one-page confirmation page, and one-page EB cover sheet.
- 02/27/01 FCC Order *In the Matter of Request for Review of a Decision of the Universal Service Administrative Company by Naperville Community Unit School District 203 Naperville, Illinois, et al.*, released February 27, 2001 (8 pages, with the handwriting of FCC staff redacted).

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

AT&T, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 08-4024
	)	
FEDERAL COMMUNICATIONS COMMISSION	)	
and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	

CERTIFICATE OF MARLENE H. DORTCH, SECRETARY  
FEDERAL COMMUNICATIONS COMMISSION

I, Marlene H. Dortch, Secretary, Federal Communications Commission, hereby certify that the preceding list is a true and correct Certified List of Items in the Record comprising a record of the proceedings before the Federal Communications Commission considered pertinent to the above-captioned case.

Witness my hand and Seal of the Federal Communications Commission this 7<sup>th</sup> day of November, 2008.

Federal Communications Commission

*For* *William F. Caton*  
Marlene H. Dortch  
Secretary

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**AT&T, Inc., Petitioner,**

v.

**Federal Communications Commission and the United States of America, Respondents.**

**Certificate Of Service**

I, Koy Miller, hereby certify that the foregoing "Certified List of Items in the Record" was served this 10th day of November, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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\_\_\_\_\_  
**Koy Miller**

From: Mary C. Albert [malbert@comptelascent.org]  
Sent: Monday, April 04, 2005 10:52 AM  
To: FOIA  
Subject: Electronic FOIA (E-FOIA) Request Form

Mary C. Albert  
CompTel/ALTS, 1900 M Street N.W.  
800  
Washington, DC  
20036

Phone Number: (202)296-6650  
Fax Number: (202)296-7585  
Email Address: malbert@comptelascent.org

Date of Request: 04/04/2005

Mary C. Albert Requests:  
All pleadings and correspondence contained in File No. EB-04-IH-0342.

-----  
Subject: Enforcement Bureau investigation into SBC Communications, Inc. compliance with  
47 USC Section 254 and 47 CFR Part 54.

Maximum Fee: \$50.00

Listed In CFR 47:  
If Yes Give Reasons for Inspection:

Is the requester entitled to a restricted fee assessment? No  
If Yes Give Reasons for Inspection:

Any Additional Information and/or Comments:

Server protocol: HTTP/1.1  
Remote host: 208.178.77.162  
Remote IP address: 208.178.77.162

CONTROL 2005-333  
2005 APR -4 P 1:00  
FOIA CONTROL STAFF



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Phone 202 326-8895  
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May 27, 2005

**BY ELECTRONIC AND U.S. MAIL**

Judy Lancaster  
Enforcement Bureau  
Investigations and Hearings Division  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington DC 20554

**Re: Freedom of Information Act Request, Control No. 2005-333  
(CompTel/ALTS, April 4, 2005)**

Dear Ms. Lancaster:

SBC Communications Inc. ("SBC"), on behalf of itself and its affiliates, opposes release of the records sought by CompTel/ALTS in the above-referenced Freedom of Information Act ("FOIA") request. In its request, CompTel/ALTS seeks release of "[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342." Included within the scope of the CompTel/ALTS request are records that SBC submitted to the Commission in response to a Letter of Inquiry issued by the Enforcement Bureau, as well as the Letter of Inquiry itself.<sup>1</sup> All of the records responsive to the CompTel/ALTS request were issued and obtained by the Commission as part of an Enforcement Bureau investigation, and thus, pursuant to 47 C.F.R. § 0.457, are not routinely available for public inspection.<sup>2</sup> Moreover, all responsive documents plainly fall within the "law enforcement-privacy" and "confidential commercial information" exemptions to the FOIA's disclosure requirements. *See* 5 U.S.C. § 552(b)(7)(C) and 5 U.S.C. § 552(b)(4). Accordingly, pursuant to the FOIA and Commission Rule 0.459, all of the requested records should be maintained by the Commission as confidential and should not be made available for public inspection or disclosure.

All of the records requested by CompTel/ALTS fall within 5 U.S.C. 552(b)(7)(C), which exempts from public disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." All of the records responsive to the CompTel/ALTS request were clearly "compiled for law enforcement

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<sup>1</sup> If the Commission determines that other records are responsive to the CompTel/ALTS request, SBC reserves the right to object to disclosure of any such additional records.

<sup>2</sup> Contrary to FCC Rule 0.461(c) pertaining to material not routinely available for public inspection, the CompTel/ALTS request does not "contain a statement of the reasons for inspection and the facts in support thereof."

purposes.” The Letter of Inquiry itself was issued as part of an Enforcement Bureau investigation, and the documents provided to the Enforcement Bureau by SBC were all in response to the Letter of Inquiry. The stated purpose of the Enforcement Bureau’s Letter of Inquiry, as well as the overall purpose of the Enforcement Bureau’s investigation was to determine whether SBC had violated Commission rules. It is thus plain that the records in question were compiled by the Enforcement Bureau for law enforcement purposes. The courts have made clear that all agency enforcement proceedings, including civil enforcement proceedings generally, and FCC Enforcement Bureau investigations in particular, fall within the ambit of Exemption 7. *See, e.g., Aspin v. Dept. of Defense*, 348 F. Supp. 1081 (D.D.C.), *aff’d* 491 F.2d 24 (D.C. Cir. 1972); *Windels, Marx, Davies & Ives v. Dept. of Commerce*, 576 F. Supp. 405 (D.D.C. 1983); *Kay v. FCC*, 867 F. Supp. 11 (D.D.C. 1994). There is thus no doubt that all of the records responsive to the CompTel/ALTS request were compiled for law enforcement purposes under Exemption 7 of the FOIA.

Moreover, disclosure of the records requested by CompTel/ALTS would cause an unwarranted invasion of personal privacy, and thus, pursuant to Exemption 7(C), should not be disclosed. The purpose of Exemption 7(C) is to protect third parties from embarrassment, reprisal or harassment, and other invasions of privacy associated with the stigma of law enforcement investigations. *See Voinche v. F.B.I.*, 940 F. Supp. 323 (D.D.C. 1996); *Foster v. U.S. Dept. of Justice*, 933 F. Supp. 687 (E.D. Mi 1996). Moreover, because of the intense privacy interests in information compiled by law enforcement agencies, Exemption 7(C) “affords broad[] privacy rights to suspects, witnesses, and investigators.” *Bast v. Dep’t of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). The question of whether disclosure of such information is warranted turns on whether “the privacy interest at stake outweighs the public interest in disclosure.” *Nation Magazine, Washington Bureau v. U.S. Customs Svc.*, 71 F.3d 885, 893 (D.C. Cir. 1995). In this instance, there is no public interest in disclosure that could possibly offset the invasion of privacy that would result from disclosure.

The Supreme Court has made clear that, for purposes of Exemption 7(C), “whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made.” *United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989). Rather, “whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny rather than on the particular purpose for which the document is being requested.” *Id.* (*Internal quotation marks and citations omitted.*)<sup>3</sup> In *Reporters Committee*, several journalists sought disclosure under the FOIA of the FBI “rap sheet” of a reputed mob boss. In holding that disclosure was prohibited by Exemption 7(C), the Court held that the core purpose of the FOIA,

. . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about

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<sup>3</sup> *See also Wichlacz v. U.S. Dept. of Interior*, 938 F. Supp. 325 (E.D. Va. 1996)(only possible public interest to weigh against privacy interest is extent to which disclosure would shed light on agency’s performance of its statutory duties or otherwise let citizens know what their government is up to).

an agency's own conduct. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed light on the conduct of any Government agency or official.

*Reporters Committee*, 489 U.S. at 773. More specifically, with respect to documents compiled by agencies during the course of law enforcement investigations, the Court further held that,

. . . although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.

*Id.* at 774.<sup>4</sup> The Court thus concluded that the public interest in disclosure of the rap sheet sought by the journalists “is not the type of interest protected by the FOIA.” *Id.* at 775. As a general proposition, moreover, the Court held,

. . . as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and [] when the request seeks no “official information” about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is “unwarranted.”

*Id.* at 780.<sup>5</sup> (Emphasis added.) The Court's holding in *Reporters Committee*, as well as the D.C. Circuit's holding in *SafeCard Services* apply with equal force in this instance.

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<sup>4</sup> See also *SafeCard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (“the type of information sought is simply not very probative of an agency's behavior or performance.”); *Nation Magazine*, 71 F.3d at 895 (“In some, perhaps many, instances where a third party asks if an agency has information regarding a named individual in its law enforcement files, the cognizable public interest in that information will be negligible; the requester will be seeking records about a private citizen, not agency conduct.”); *Alexander & Alexander Svcs., Inc. v. Securities and Exchange Commission*, Civ.A. No. 92-1112 (JHG), 1993 WL 439799 (D.D.C. Oct. 19, 1993) (“when a private citizen seeks information regarding another private citizen or corporation, the requester is not seeking information regarding the conduct of the agency in possession of the information.”).

<sup>5</sup> See also *SafeCard*, 926 F.2d at 1205-1206 (“Indeed, unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant.”); see also *id.* at 1205 (“The public interest in disclosure is not just less substantial, it is insubstantial.”)

The only records responsive to the CompTel/ALTS request are internal documents of a private party that were submitted to and compiled by the Commission pursuant to investigative demands issued by the Enforcement Bureau. None of the records in question contain “official information” about the Commission; nor do any of the records pertain to the conduct of the Commission or any Commission official. The only ostensible interest on the part of CompTel/ALTS in disclosure of the requested documents is to try to embarrass SBC with the information compiled by the Enforcement Bureau. There is thus no public policy interest in disclosure of the requested documents. Conversely, there are substantial privacy interests in such documents. As with information compiled by the FBI in rap sheets, the requested records are no more than documents that “happen to be in the warehouse” of the Commission because they were gathered during the course of a law enforcement investigation. Indeed, the privacy interest in the particular information at issue here is stronger than that in *Reporters Committee*. The discrete informational components of rap sheets are frequently publicly available through various court records; it was thus the compilation of such information in which the Court found a cognizable privacy interest. See *Reporters Committee*, 489 U.S. at 763-764.<sup>6</sup> Here, in contrast, none of the information is generally publicly available. Indeed, but for the investigative demand of the Enforcement Bureau, the information would remain in SBC’s possession. Moreover, the information would remain in SBC’s possession as discrete documents and information scattered throughout SBC’s offices and files. But for the Enforcement Bureau’s investigative demand, there would be no compilation of those records as there is now in the Enforcement Bureau’s files. Accordingly, given the strong privacy interest in the records at issue here, and the complete lack of any public interest in disclosure of those records, *Reporters Committee* and *SafeCard Services* make clear the Exemption 7(C) compels the Commission not to publicly disclose any of the records responsive to the CompTel/ALTS request.

Exemption 4 also requires that the Commission not publicly disclose any of the records responsive to the CompTel/ALTS request. 5 U.S.C. § 552(b)(4). Exemption 4 applies to “trade secrets and commercial or financial information obtained from a person and privileged and confidential.” *Id.* The phrase “commercial or financial information” has a broad meaning under the FOIA, and includes anything pertaining to or relating to commerce. *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 2d Cir. 1978); see also *Public Citizen Health research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)(documents are commercial if a submitter has a commercial interest in them). The records at issue here clearly pertain to SBC’s business dealings with one of its customers and are thus undoubtedly commercial information under the FOIA.

Those records, moreover, are confidential under Exemption 4. Two lines of cases have evolved for determining whether agency records fall within this component of Exemption 4. Under *Critical Mass*, commercial information that is voluntarily submitted to the Commission must be

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<sup>6</sup> *Reporters Committee* thus disposes of any notion that SBC has no privacy interest in the records in question merely because the investigation is a matter of public record as a result of the Order issued by the Commission approving the Consent Decree between SBC and the Enforcement Bureau. See, e.g., *Reporters Committee*, 489 U.S. at 1480 (“In sum, the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information.” (Internal quotation marks and citations omitted.))

withheld from public disclosure if such information is not customarily disclosed to the public by the submitter. *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992). All of the information at issue here is maintained on a confidential basis within SBC and would not ordinarily be disclosed to parties outside the company. Company practices instruct employees not to disclose such information outside the company and restrict access to this information on a need-to-know basis. In short, none of the information at issue here is customarily disclosed to the public, and should, therefore, be withheld under Exemption 4.

For materials not subject to *Critical Mass*, *National Parks* establishes a two part test for determining if information qualifies for withholding under Exemption 4. *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765 D.C. Cir. (1974). The first prong asks whether disclosing the information would impair the government's ability to obtain necessary information in the future. The second prong asks whether the competitive position of the person from whom the information was obtained would be impaired or substantially harmed. If the information meets the requirements of either prong, it is exempted from disclosure under Exemption 4. Here, the first prong of *National Prongs* compels the Commission not to publicly disclose the records requested by CompTel/ALTS. The subject matter of the investigation at issue here was voluntarily brought to the Enforcement Bureau's attention by SBC as a result of an ongoing internal review conducted by SBC. SBC, moreover, voluntarily refunded all amounts that might have been at issue, and it entered into a consent decree to make a voluntary contribution to the United States Treasury. Compelled public disclosure of the records compiled by the Enforcement Bureau in this instance would plainly impair the Enforcement Bureau's ability to obtain similar information in the future. It would chill industry incentives to conduct internal investigations and to bring the results of those investigations to the attention of the Commission. It would thus hamper the general ability of the Commission to conduct investigations and enforcement proceedings and to rely on the cooperation of parties involved in those proceedings, which would necessarily impair the Commission's ability to obtain documents and information in investigations and enforcement proceedings. It would, in short, undermine the agency's "effective execution of its statutory responsibilities." *9 to 5 Org. for Women Office Workers v. Board of Governors*, 721 F.2d 1, 11 (1<sup>st</sup> Cir. 1983). *See also Africa Fund v. Mosbacher*, No. 92-289, 1993 WL 183736 at \*7 (S.D.N.Y. May 26, 1993)(disclosure would impinge upon agency's receipt of substantial information that potential exporters voluntarily submit when seeking export licenses and that the agency finds invaluable in making policy and maintaining effective export controls.) Accordingly, in addition to Exemption 7(C), Exemption 4 also compels the Commission not to publicly disclose any of the records responsive to the CompTel/ALTS request.

If the Commission determines that Exemptions 7(C) and 4 do not compel it to withhold all of the requested records from public disclosure, at a minimum, specific records and information responsive to the CompTel/ALTS requests fall within the scope of Exemptions 7(C) and 4 and should be withheld from public disclosure. First, the requested records contain information identifying SBC employee names, titles and job functions, phone numbers, email addresses, and physical addresses, which are highly sensitive not only in terms of SBC confidential commercial information, but also from a personal privacy perspective. Indeed, the DC Circuit holds "categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure."

*SafeCard*, 926 F.2d at 1206. Accordingly, the Commission should withhold from disclosure all such information pertaining to individuals identified in the records responsive to the CompTel/ALTS request.

In addition, the documents in question contain competitively sensitive information which should not be made available for public disclosure. Telecommunications is a highly competitive industry. The presence of such competition and the likelihood of competitive injury threatened by release of the information provided to the Commission by SBC should compel the Commission to withhold the information from public disclosure. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Frazer v. U.S. Forest Service*, 97 F.3d 367, 371 (9<sup>th</sup> Cir. 1996); *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979).<sup>7</sup>

The requested records contain information pertaining to SBC's systems, processes, and operations, and thus represent confidential commercial information that should not be released under the FOIA. The records also contain cost, pricing information that clearly falls within the scope of Exemption 4. Attachment A identifies the records that contain such information. Competitors could use such confidential information to assist in targeting their service offerings and enhancing their competitive positions, to the detriment of SBC's competitive position. *See, e.g., GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9<sup>th</sup> Cir. 1994). Commission precedent has clearly found this type of information to be competitively sensitive and withholdable under Exemption 4.<sup>8</sup> The Commission has recognized that competitive harm can result from the disclosure of confidential business information that gives competitors insight into a company's costs, pricing plans, market strategies, and customer identities. *See In re Pan American Satellite Corporation*, FOIA Control Nos. 85-219, 86-38, 86-41, (May 2, 1986).<sup>9</sup> Accordingly, the Commission should withhold all of the records identified in Attachment A.

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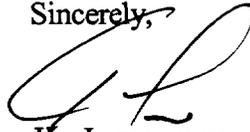
<sup>7</sup> It is worth noting that the request in question comes from a trade association representing many of SBC's competitors in the marketplace.

<sup>8</sup> *See e.g. In Matter of Pacific Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-23, DA 00-2618, November 20, 2000 (supporting confidentiality for collocation data); *Local Exchange Carrier's Rates, Terms and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport; Southwestern Bell Telephone Company*, 13 FCC Rcd 13615 (1998)(keeping administrative operating expenses confidential because it would provide insight into business strategies); *AT&T/McCaw Merger Applications* 9 FCC Rcd 2610 (1994)(keeping confidential accounting records showing account balance information); *NAACP Legal Defense Fund on Request for Inspection of Records* 45 RR 2d 1705 (1979)(keeping confidential records that contained employee salary information); *Mercury PCS II, LLC (Request for Inspection of Records) Omnipoint Corporation (Request for Confidential Treatment of Documents)*, FCC 00-241 (July 17, 2000)(keeping confidential marketing plans and strategy information).

<sup>9</sup> Further, the Commission has ruled that not only should such information be protected, but also that information must be protected through which the competitively sensitive information can be determined. *Allnet Communications Services, Inc. Freedom of Information Act Request*, FOIA Control No. 92-149, Memorandum Opinion and Order (released August 17, 1993) at p. 3. The

For the above reasons, SBC opposes the CompTel/ALTS request for the records described in its April 4, 2005, email. If you have any questions, please do not hesitate to contact me at (202) 326-8895.

Sincerely,



Jim Lamoureux  
Senior Counsel  
SBC Services, Inc.

cc: William Davenport

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Commission's decision was upheld in a memorandum opinion of the U.S. Court of Appeals for the D.C. Circuit, which affirmed a U.S. District Court decision protecting the information. *Allnet Communications Services, Inc. v. FCC*, Case No. 92-5351 (memorandum opinion issued May 27, 1994, D.C. Cir.).

## ATTACHMENT A

### LOI

Document Reference

Information that is confidential commercial

Pages 4-8	Identification of SBC's customers, contracts, projects, and invoice amounts
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### SBC Response to LOI

Document Reference

Information that is confidential commercial

SBC's Responses to the Enforcement Bureau's interrogatories (pages 1-15)	Identification of SBC's customers, contracts, projects, invoice amounts and subcontractors
Attachment A, Job Responsibilities (pages 1-9)	Identification of SBC job functions, responsibilities and priorities
SBCNL000022-27	Identification of SBC vendors and subcontractors, cost and pricing detail, and general customer bid strategies and operational processes
SBCNL000029	Identification of SBC cost and pricing detail
SBCNL000042-55	Identification of SBC cost and pricing detail
SBCNL000056-59	Identification of SBC vendors and subcontractors, and general customer bid strategies and operational processes
SBCNL000060	Identification of SBC cost and pricing detail and vendor and subcontractor information
SBCNL000061	Identification of SBC cost and pricing detail
SBCNL000062-65	Identification of SBC cost and pricing detail and general customer bid strategies and operational processes
SBCNL000067	Identification of SBC cost and pricing detail and vendor and subcontractor information
SBCNL000068-72	Identification of SBC vendors and subcontractors, cost and pricing detail, and general customer bid strategies and operational processes
SBCNL000074-80	Identification of SBC general customer bid strategies and operational processes
SBCNL000081-100	Identification of SBC operational processes, vendor and subcontractor information, cost and pricing detail and billing information
SBCNL000101-102	Identification of SBC billing information
SBCNL000103 - 142	Identification of SBC cost and pricing detail and billing information
SBCNL00143-152	Identification of SBC cost and pricing detail
SBCNL00163 - 166	Identification of SBC cost and pricing detail and billing information
SBCNL00167	Identification of SBC vendor and subcontract information
SBCNL000169	Identification of SBC billing information
SBCNL000170 - 174	Identification of SBC vendor and subcontract information
SBCNL000175 - 178	Identification of SBC cost and pricing detail and billing information

**Letter to Judy Lancaster**

**Re: Freedom of Information Act Request, Control No. 2005-333**

**May 27, 2005**

**Attachment A**

**Page 2 of 2**

SBCNL000179 – 182	Identification of SBC cost and pricing detail and billing information and vendor and subcontract information
SBCNL000183	Identification of SBC cost and pricing detail and billing information
SBCNL000184 – 185	Identification of SBC cost and pricing detail and billing information
SBCNL000186-190	Identification of SBC billing information and operational processes
SBCNL000196-218	Identification of SBC internal documentation and operational processes

June 28, 2005

Ms. Judy Lancaster  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington, D.C. 20554

Re: Freedom of Information Act Request, Control No. 2005-333

Dear Ms. Lancaster:

CompTel/ALTS hereby responds to SBC Communications, Inc.'s ("SBC") objection to the release of documents to CompTel/ALTS pursuant to the above-captioned Freedom of Information Act ("FOIA") request.

On April 4, 2005, CompTel/ALTS submitted an FOIA request to the Commission for documents contained in File No. EB-04-IH-0342. These documents relate to the Enforcement Bureau's investigation of SBC for violations of the Commission's rules in connection with the receipt of universal service support for the New London Connecticut Public Schools. The Commission terminated the investigation upon issuing an Order adopting a Consent Decree. *In the Matter of SBC Communications, Inc.*, File No. EB-04-IH-0342, Order, DA 04-3893 (released December 16, 2004).

By letter dated May 27, 2005, SBC objected to disclosure of the documents requested on the grounds that they were exempt from disclosure pursuant to FOIA Exemptions 7(C) and 4.<sup>1</sup> 5 U.S.C. §§ 552(b)(7)(C), 552(b)(4). SBC is wrong on both counts. As demonstrated below, neither Exemption is applicable and the Commission is obligated to grant CompTel/ALTS' request without further delay.<sup>2</sup>

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<sup>1</sup> See Letter from Jim Lamoureux, SBC, to Judy Lancaster dated May 27, 2005. SBC's letter was provided to CompTel/ALTS on June 23, 2005.

<sup>2</sup> CompTel/ALTS notes for the record that the Commission has not met the statutory deadline for notifying CompTel/ALTS whether it will comply with the request for documents nor provided written notice to extend the deadline. See 5 U.S.C. §552(a)(6).

Ms. Judy Lancaster  
June 28, 2005  
Page 2

The FOIA embodies a policy authorizing liberal disclosure of government documents and records. Government documents must be produced upon request unless they are specifically exempted from disclosure by statute. FOIA Exemption 7 authorizes disclosure of law enforcement<sup>3</sup> records unless the government can demonstrate one of six specific harms. Although SBC correctly notes that pursuant to Exemption 7(C), the Commission has the discretion to exempt from disclosure investigatory records compiled for law enforcement purposes only to the extent that the production of such records “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” it has failed to demonstrate that the documents requested are covered by that Exemption.

SBC asserts that disclosure of the records requested by CompTel/ALTS would cause an unwarranted invasion of its personal privacy. (SBC Objection at 2) SBC is mistaken. As a large, publicly traded corporation, it is well settled that SBC possesses no protectable “personal privacy” interest as that term is used in the FOIA. *The Washington Post Company v. United States Department of Agriculture*, 943 F.Supp. 31, 35 n. 4 (D.D.C. 1996); *Ivanhoe Citrus Association v. Handley*, 612 F. Supp. 1560, 1567 (D.D.C. 1985); *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976). *See also, The Washington Post Company v. United States Department of Justice*, 863 F. 2d 96, 100 (D.C. Cir. 1988) (investigation and assessment of business decisions of corporate employees during the development and marketing of a commercial product do not qualify for exemption from disclosure under Exemption 7(C)). Thus, the Commission cannot withhold the documents under Exemption 7(C) on the grounds that their release may invade SBC’s “personal privacy.”

To the extent that any of the responsive documents contain the names, telephone numbers, email addresses and physical addresses of SBC employees, CompTel/ALTS has no objection to the redaction of such information before the documents are released. *See Safecard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197 (D.C. Cir. 1991) (upholding SEC’s deletion of names and addresses of third parties mentioned in investigatory file).

SBC’s reliance on Exemption 4 is similarly unavailing. Exemption 4 gives the Commission discretion to withhold privileged and confidential “commercial or financial information.” SBC asserts that all records responsive to the CompTel/ALTS request meet the test of confidentiality under Exemption 4 and must be withheld. (SBC Objection at 4). The test for determining whether information is confidential within the meaning of Exemption 4 differs depending on whether the information was provided to the government voluntarily or under compulsion. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F. 2d 871 (D.C. Cir. 1992). Financial or commercial information voluntarily provided to the government is exempt from disclosure if it is of a kind that would not customarily be released to the public. *Id.* In contrast, information that is provided to the government under compulsion will be treated

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<sup>3</sup> CompTel/ALTS also notes for the record that it does not concede SBC’s characterization of the records requested as being compiled for law enforcement purposes.

as confidential where its disclosure would (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom information was obtained. *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

SBC's argument that all responsive documents are confidential is entitled to little weight given the conflicting positions it takes with respect to whether the information was provided voluntarily or under compulsion. SBC first asserts that the responsive documents were produced under compulsion. "The only records responsive to CompTel/ALTS request are internal documents of a private party that were submitted to and compiled by the Commission pursuant to investigative demands issued by the Enforcement Bureau"; "but for the investigative demand of the Enforcement Bureau, the information would remain in SBC's possession"; "[b]ut for the Enforcement Bureau's investigative demand, there would be no compilation of those records as there is now in the Enforcement Bureau's files"; "the documents provided to the Enforcement Bureau by SBC were all in response to the Letter of Inquiry." (SBC Objection at 2, 4) If the Enforcement Bureau compelled SBC to submit the documents to the Commission, the first prong of the *National Parks* test cannot be satisfied. In *National Parks*, the Court held that where entities are required to submit commercial information to the government, there is no danger that public disclosure of the information will impair the ability of the government to obtain such information in the future. 547 F. 2d at 678. *See also, CNA Financial Corporation v. Donovan*, 830 F. 2d 1132, 1153 (D.C. Cir. 1987) (where government requires submission of information, first prong of *National Parks* test is not implicated).

Nor has SBC satisfied the second prong of the *National Parks* test which requires a showing that disclosure of the information will cause substantial harm to SBC's competitive position. *Id.* at 677. SBC merely asserts that the requested records "contain information pertaining to SBC's systems, processes and operations" and also "contain cost, pricing information" that could be used by competitors "to assist in targeting their service offerings and enhancing their competitive positions, to the detriment of SBC's competitive position." (SBC Objection at 6) Such conclusory and generalized allegations are insufficient to demonstrate the likelihood of substantial competitive injury necessary to sustain the burden of nondisclosure under Exemption 4. *Id.* at 680. In any event, Exemption 4 cannot be used to justify withholding any of the cost and pricing information contained in the responsive documents identified on SBC's Attachment A because such data is already in the public domain. Section 54.501(d)(3) of the Commission's rules clearly requires that e-rate service providers, such as SBC, make records of rates charged and discounts allowed to participating schools available for public inspection. That rule reads as follows:

Service providers shall keep and retain records of rates charged to and discounts allowed for eligible schools and libraries – on their own or as part of a consortium. **Such records shall be made available for public inspection.**

47 C.F.R. §54.501(d)(3) (emphasis added). Records that are required to be made available for public inspection are not confidential within the meaning of Exemption 4. *See CNA Financial Corporation v. Donovan*, 830 F. 2d 1132, 1154 (D.C. Cir. 1987) (a claim of confidentiality cannot be made for any data in the public domain).

Ms. Judy Lancaster  
June 28, 2005  
Page 4

In the alternative, SBC argues that the responsive documents were voluntarily provided to the Commission and are protected from disclosure because they are of a kind that SBC would not ordinarily disclose to parties outside the company. (SBC Objection at 5) SBC has failed, however, to identify any financial or commercial information that was voluntarily provided to the Commission. On the contrary, SBC concedes that only “the subject matter of the investigation at issue” was “voluntarily brought to the enforcement Bureau’s attention by SBC.” (SBC Objection at 5) The “subject matter” of the investigation is not entitled to exemption from disclosure under Exemption 4 because the Commission has already made the “subject matter” of the investigation a matter of public record by virtue of its release of the Order and Consent Decree. SBC’s voluntary act of notifying the Commission of possible rule violations cannot shield the subsequent investigatory record nor any documents SBC provided to the Commission under regulatory compulsion from disclosure.

SBC has failed to demonstrate that the information requested is protected from disclosure under either Exemption 7(C) or Exemption 4 of the FOIA. As a result, the FOIA mandates release of the requested files to CompTel/ALTS immediately.

Respectfully submitted,

Mary C. Albert  
Vice President, Regulatory Policy

cc: William Davenport  
Jim Lamoureux, SBC



**FEDERAL COMMUNICATIONS COMMISSION**  
Enforcement Bureau, Investigations and Hearings Division  
445 12<sup>th</sup> Street, S.W., Room 4-C320  
Washington, D.C. 20554

August 5, 2005

**Via Certified Mail, Return Receipt Requested,**  
**Facsimile and E-Mail**

Mr. Jim Lamoureux  
SBC Services, Inc.  
1401 I Street N.W., Suite 400  
Washington, D.C. 20005

Ms. Mary C. Albert  
Vice President, Regulatory Policy  
CompTel / ALTS  
1900 M Street, N.W.  
Washington, D.C. 20036

Re: Freedom of Information Act Request  
FOIA Control No. 2005-333

Dear Mr. Lamoureux and Ms. Albert:

**I. INTRODUCTION**

This letter concerns a Freedom of Information Act ("FOIA") request from Comptel/ALTS ("Comptel") for information submitted by SBC Communications, Inc. ("SBC") in response to a Letter of Inquiry ("LOI") from the Enforcement Bureau. SBC has requested confidential treatment of its submissions. As explained below, we grant SBC's request in part and deny it in part. Therefore, we will release to Comptel SBC's responses as described herein unless we receive an application for review from SBC within ten working days from the date of this letter. If Comptel believes that any portion of this decision is in error, it may file an application for review of this action with the Commission's Office of General Counsel within 30 days of the date of this letter.

**II. BACKGROUND**

On August 24, 2004, the Investigations and Hearings Division of the Enforcement Bureau (the "Bureau") sent SBC an LOI notifying the company that the Bureau was investigating whether it violated Part 54, Subpart F, of the Commission's rules, 47 C.F.R. §§ 54.500-54.521, and the Commission's orders regarding universal service funding.<sup>1</sup> SBC responded to this LOI on September 13, 2004.<sup>2</sup>

<sup>1</sup> Letter to Michelle A. Thomas, Executive Director, Federal Regulatory, SBC Communications, Inc., and Christopher Heimann, General Attorney, SBC Telecommunications Inc. from Hillary S. DeNigro, Deputy Chief.

Mr. Jim Lamoureux  
Ms. Mary C. Albert  
August 5, 2005  
Page 2

On December 16, 2004, the Bureau terminated its investigation by adopting a Consent Decree in which SBC agreed to make a voluntary contribution to the United States Treasury in the amount of \$500,000 and to institute a compliance plan, as specified therein, "to ensure SBC's wholly-owned subsidiaries' future compliance with the Commission's rules governing the E-Rate program."<sup>3</sup> The Consent Decree specifies that "it does not constitute an admission, denial, adjudication on the merits, or a factual or legal determination regarding any compliance or noncompliance with the requirements of section 254 of the Act or Part 54 of the Commission's rules."<sup>4</sup>

On April 4, 2005, the Bureau received Comptel's FOIA request for copies of "all pleadings and correspondence contained in file number EB-04-IH-0342,"<sup>5</sup> the investigative file for the investigation referenced in the December 16, 2004, Consent Decree. On May 27, 2005, SBC filed its response to the FOIA request, opposing release of the requested documents and seeking confidentiality for the materials.<sup>6</sup> SBC argues in its Opposition that the requested documents were "compiled for law enforcement purposes," and, thus, are exempt from disclosure under FOIA Exemption 7. Specifically SBC argues that disclosure is prohibited by FOIA Exemption 7(C) because it would cause an unwarranted invasion of personal privacy. SBC also contends that FOIA Exemption 4 prohibits release of the requested documents because the documents "clearly pertain to SBC's business dealings with one of its customers" and because many of the documents contain information pertaining to SBC's systems, processes and operations, and include cost, pricing and other "commercially sensitive" information.<sup>7</sup>

By letter dated June 28, 2005, Comptel replied to SBC's Opposition.<sup>8</sup> Comptel challenges SBC's claims that FOIA Exemptions 7(C) and 4 prohibit disclosure of the requested

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Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated August 24, 2004 ("LOI").

<sup>2</sup> Letter to David Janas, Special Counsel, Investigations and Hearings Division, Enforcement Bureau from Christopher Heimann, General Attorney, SBC Telecommunications Inc., dated September 13, 2004 ("LOI Response").

<sup>3</sup> *SBC Communications Inc.*, Order and Consent Decree, 19 FCC Rcd 24014 (Enf. Bur. 2004).

<sup>4</sup> *Id* at 24019, ¶13.

<sup>5</sup> See Electronic FOIA (E-FOIA) request form from Mary C. Albert ("Requester"), Comptel / ALTS, dated April 4, 2005 ("FOIA 2005-333"). In a telephone conversation with IHD staff on April 12, 2005, the Requester modified and clarified her FOIA request to seek only pleadings filed by SBC and correspondence between SBC and the Commission.

<sup>6</sup> See Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc., to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, dated May 27, 2005 ("Opposition").

<sup>7</sup> Opposition at 6.

<sup>8</sup> Letter from Mary C. Albert, Vice President Regulatory Policy, CompTel/Ascent/ALTS to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 28, 2005 ("Reply")

documents. Although Comptel does not object to redaction from the requested documents of the names, telephone numbers, and home and email addresses of SBC employees, it argues that Exemption 7(C) is inapplicable to SBC because it is "a large, publicly traded corporation . . . that . . . possesses no protectable personal privacy interest."<sup>9</sup> Comptel also asserts that SBC's "conflicting positions" regarding whether its submissions were provided to the Bureau voluntarily or under compulsion do not support SBC's reliance upon Exemption 4 to prohibit disclosure of the requested documents, that SBC's "conclusory and generalized" characterizations of the records as confidential commercial information are "insufficient to demonstrate the likelihood of substantial competitive injury" as required by Exemption 4, and that the cost and pricing information that SBC wishes to withhold from disclosure is already in the public domain because E-Rate service providers are required under section 54.501(d)(3) of the Commission's rules<sup>10</sup> to make those records available for public inspection.<sup>11</sup>

### III. DISCUSSION

#### A. SBC's Requests To Keep Its Responses Confidential In Their Entirety Are Deficient

Section 0.459 of the Commission's rules establishes a procedure by which parties may request that information or materials that they have submitted to the Commission not be made routinely available for public inspection. *See* 47 C.F.R. § 0.459. This rule requires that a party seeking confidentiality provide a statement of the reasons for withholding the materials in question from public inspection and set forth specific categories of materials for which such treatment is appropriate. A request for confidentiality "shall include," *inter alia*, an "explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;"<sup>12</sup> an "[e]xplanation of how disclosure of the information could result in substantial competitive harm;"<sup>13</sup> and "[i]dentification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties."<sup>14</sup>

We find that SBC's requests for confidential treatment of its submissions substantially fail to comply with the standards set forth in section 0.459(b) of the Commission's rules. The rules clearly state that casual requests for confidentiality that do not comply with the requirements set forth in sections 0.459(a) and (b) will not be considered.<sup>15</sup> Further, the LOI

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<sup>9</sup> *Id* at 2.

<sup>10</sup> 47 C.F.R. § 54.501(d)(3).

<sup>11</sup> Reply at 3.

<sup>12</sup> *See* 47 C.F.R. § 0.459(b)(3).

<sup>13</sup> *See* 47 C.F.R. § 0.459(b)(5).

<sup>14</sup> *See* 47 C.F.R. § 0.459(b)(7).

<sup>15</sup> *See* 47 C.F.R. § 0.459(c).

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issued to SBC by the Bureau explicitly warns SBC that requests for confidential treatment must comply with the requirements specifically mandated by section 0.459(b), and that the Bureau will not consider confidentiality requests that do not so comply.

Nevertheless, SBC has failed to provide a statement of specific reasons for withholding its responses in their entirety. While generally categorizing the information contained in its submissions, SBC does not, as required by section 0.459(b)(3), explain the degree to which specific information is commercial or financial or contains a trade secret. Nor does it explain, as required by section 0.459(b)(5), how disclosure of such information could result in substantial competitive harm. SBC also fails to state whether any of the information for which it seeks protection is already available to the public.<sup>16</sup>

We find SBC's request for the confidential treatment of all its submissions to be overly broad. Portions of the documents submitted by SBC appear to contain commercial or financial information, the disclosure of which could result in substantial competitive harm to SBC. But most of those pages also contain information that is not confidential, such as FRN numbers, lists of equipment, and references to ordinary administrative matters. Some of that information is already within the public domain.<sup>17</sup> Release of such information appears unlikely to result in competitive harm to SBC and SBC offers no justification for withholding such information as commercial, financial or trade secret information. Consequently, that information will be disclosed.

Accordingly, we conclude that SBC has failed to demonstrate by a preponderance of the evidence a case for nondisclosure of all of its submissions. We therefore deny SBC's requests that we grant confidential treatment of the entirety of its submissions.

**B. Portions of SBC's Submissions Are Subject To Protection From Disclosure As "Commercially Sensitive Information"**

We base confidentiality determinations under section 0.459 of the Commission's rules relating to commercial or financial materials on Exemption 4 of the FOIA which permits us to withhold "trade secrets and commercial or financial information obtained from a person and [that is] privileged or confidential."<sup>18</sup> Exemption 4 protects "any financial or commercial information provided to the Government on a *voluntary* basis if it is of a kind that the provider would not customarily release to the public." (emphasis added)<sup>19</sup> However, under Exemption 4 commercial or financial materials that are part of *required* submissions are held to be confidential only when

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<sup>16</sup> See 47 C.F.R. § 0.459 (b)(7).

<sup>17</sup> Federal Registration Numbers ("FRN"s), including those of SBC, are available to the public on the Commission Registration System ("CORES") database which is located on the Commission's internet web page. See also 47 C.F.R. 54.501(d)(3).

<sup>18</sup> 5 U.S.C. § 552(b)(4).

<sup>19</sup> See *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992) ("*Critical Mass*").

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disclosure would either impair the government's ability to obtain necessary information in the future or would be likely to substantially harm the competitive position of the submitter.<sup>20</sup>

SBC's LOI responses were *required* submissions for the purposes of our FOIA analysis.<sup>21</sup> An LOI is an administrative order that compels the production of information. Failure to respond properly to an LOI may subject an entity to forfeiture action.<sup>22</sup> Because we directed SBC to submit its written responses to the Bureau's LOI, its responses were required.

We find that certain information in SBC's submissions constitutes commercial or financial information, the disclosure of which could result in substantial competitive harm to SBC. Such commercially sensitive information includes, but is not limited to, SBC's costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers. Accordingly, such information is exempt from disclosure under FOIA Exemption 4.<sup>23</sup>

Although section 54.501(d)(3) of the Commission's rules requires telecommunications service providers such as SBC to allow public inspections of the rates it charges and the discounts it allows to schools and libraries eligible for universal service support,<sup>24</sup> SBC can comply with the rule's requirements by maintaining a "public inspection file" containing the required rate information. The rule does not mandate disclosure here of all of the pricing data contained in SBC's submissions. In this instance, disclosure of SBC's invoice and discount amounts could disclose the total value of its contract, information that would not otherwise be publicly available. That information is not in the public domain and its release is not required by the rule. Because release of SBC pricing information in this case is likely to substantially harm SBC's competitive position, such information is exempt from disclosure under FOIA Exemption 4.

### **C. Names of SBC Employees And Customers Are Protected From Disclosure Due To Personal Privacy Concerns**

The FOIA statute, 47 U.S.C. § 552(b)(7)(C), provides that records or information compiled for law enforcement purposes are exempt from disclosure to the extent that the

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<sup>20</sup> *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("*National Parks*"); *Critical Mass*, 795 F.2d at 878 (citing *National Parks*).

<sup>21</sup> See *Critical Mass* (establishing separate tests for confidential treatment of voluntary submissions and required submissions). See also

<sup>22</sup> See *SBC Communications, Inc.*, Order of Forfeiture, 17 FCC Rcd 7589 (2002) (forfeiture paid); *Globcom Inc.*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, n. 36 (2003), *response pending*.

<sup>23</sup> See, e.g., *In Re The Lakin Law Firm, P.C.*, Memorandum Opinion and Order, 19 FCC Rcd 12727 (2004).

<sup>24</sup> 47 C.F.R. § 54.501(d)(3) provides that "[Telecommunications] Service providers shall keep and retain records of rates charged to and discounts allowed for eligible schools and libraries – on their own or as part of a consortium. Such records shall be available for public inspection."

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production of such records could reasonably be expected to "constitute an unwarranted invasion of personal privacy" are exempt from disclosure.<sup>25</sup> Generally, businesses do not possess "personal privacy" interests as required for application of FOIA Exemption 7(C).<sup>26</sup> However, the individuals identified in SBC's submissions do have such privacy rights and, pursuant to this provision, portions of SBC's submissions will be redacted to withhold the names and identifying information of those individuals to prevent unwarranted invasions of their personal privacy.

**D. Documents Which Disclose an Agency's Deliberative Process Are Protected From Disclosure**

Exemption 5 of the FOIA protects "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."<sup>27</sup> Pursuant to this exemption we will withhold from public disclosure drafts of Bureau pleadings and correspondence, and memoranda and emails, distributed among Commission staff, which discuss the issues and investigation related to this matter.

**IV. CONCLUSION**

For the reasons stated above, we grant in part and deny in part SBC's request for confidentiality. If SBC believes that this decision is in error, it must file an application for review of this action with the Commission's Office of General Counsel within ten working days of the date of this letter. See 47 C.F.R. § 0.461(i). We will produce the documents requested as noted above if no such application for review is filed. We will assess copying charges, if any, at that time. If Comptel believes that this decision is in error, it may file an application for review of this action with the Commission's Office of General Counsel within 30 days of the date of this letter. See 47 C.F.R. § 0.461(j).

We are providing SBC's counsel with a copy of the documents as redacted pursuant to this decision.

Sincerely,



William H. Davenport  
Chief, Investigations and Hearings Division  
Enforcement Bureau

<sup>25</sup> 5 U.S.C. § 552(b)(7)(C). See also 5 U.S.C. § 552(b)(6); *In re William McConnell, Broadcasting and Cable*, Order, 18 FCC Rcd 26371 (2003).

<sup>26</sup> See, e.g., *Chadmore Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 23943 (1998)

<sup>27</sup> 5 U.S.C. § 552(b)(5).



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August 19, 2005

**VIA FACSIMILE, HAND DELIVERY AND U.S. MAIL**

Samuel Feder  
Acting General Counsel  
Office of General Counsel  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington DC 20554

**Re: Application for Review of Freedom of Information Action;  
FOIA Control No. 2005-333**

Dear Mr. Feder:

Pursuant to 47 C.F.R. § 0.461(i), SBC Communications Inc. ("SBC") hereby files an application for review of the Enforcement Bureau's August 5, 2005, determination to deny in part confidential treatment of records responsive to a Freedom of Information Act ("FOIA") request submitted by CompTel/ALTS. SBC does not object to the specific redactions proposed by the Enforcement Bureau under FOIA Exemptions 4 and 7(C) or its determination to withhold documents under Exemption 5. However, SBC seeks review of the Bureau's rejection of SBC's assertion of the application of Exemption 7(C), *in toto*, to the responsive records.

**Background**

In its FOIA request, CompTel/ALTS sought release of "[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342." Included within the scope of the CompTel/ALTS request are records that SBC submitted to the Commission in response to a Letter of Inquiry issued by the Enforcement Bureau, as well as the Letter of Inquiry itself. All such records responsive to the CompTel/ALTS request were obtained by the Commission as part of an Enforcement Bureau investigation. Accordingly, SBC asserted that all such responsive documents fell within the "law enforcement-privacy" exemption to the FOIA's disclosure requirements. *See* 5 U.S.C. § 552(b)(7)(C).<sup>1</sup> Pursuant to the FOIA and Commission Rule 0.459, SBC requested that all of the requested records should be maintained by the Commission as confidential and should not be made available for public inspection or disclosure.

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<sup>1</sup> *See* Letter from Jim Lamoureux, Senior Counsel, SBC Services Inc. to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (May 27, 2005)("Lamoureux Letter").

On August 5, 2005, the Enforcement Bureau denied SBC's request that the documents be withheld from disclosure under FOIA Exemption 7(C).<sup>2</sup> Although the Enforcement Bureau agreed to redact the names of individuals contained in the responsive records, the Enforcement Bureau otherwise denied SBC's claim that the records should be withheld pursuant to Exemption 7(C).<sup>3</sup> Its rationale for doing so was contained in a single sentence: "Generally businesses do not possess 'personal privacy' interests as required for application of FOIA Exemption 7(C)." In effect, with a single sweeping statement, the Enforcement Bureau held, as a categorical matter, that corporations have no rights under FOIA Exemption 7(C). Thus, according to the Enforcement Bureau, a corporation's basis for requesting non-disclosure of records compiled for law enforcement purposes is limited to an assertion that the records fall within some other specific FOIA exemption, such as Exemption 4 pertaining to confidential commercial information. That holding is inconsistent with and contrary to the purpose underlying Exemption 7(C), cases addressing the scope of Exemption 7(C), and the actual language of Exemption 7(C). Accordingly, SBC respectfully requests that the Enforcement Bureau's rejection of SBC's request for confidentiality be reversed, and that the documents requested by CompTel/ALTS be withheld from disclosure.

#### Exemption 7(C) Compels Withholding of the Responsive Documents

Exemption 7(C) applies to all "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The purpose of Exemption 7(C) is to protect parties who had been the subject of law enforcement proceedings from embarrassment, reprisal or harassment, and other invasions of privacy associated with the stigma of law enforcement investigations. *See Voinche v. F.B.I.*, 940 F. Supp. 323 (D.D.C. 1996); *Foster v. U.S. Dept. of Justice*, 933 F. Supp. 687 (E.D. Mi 1996). Because of the intense privacy interests in information compiled by law enforcement agencies, Exemption 7(C) "affords broad[] privacy rights to suspects, witnesses, and investigators." *Bast v. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). With respect to the records at issue here, there is no question, and the Enforcement Bureau does not challenge, that the records were "compiled for law enforcement purposes."<sup>4</sup> Thus, the only question is

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<sup>2</sup> See Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Jim Lamoureux, SBC Services Inc. at 5-6 (August 5, 2005)("Davenport Letter").

<sup>3</sup> The Enforcement Bureau also agreed to redact specific information in the responsive records pursuant to Exemption 4, and it withheld certain records pursuant to Exemption 5. SBC does not seek review of those determinations.

<sup>4</sup> The Letter of Inquiry was issued as part of an Enforcement Bureau investigation, and the documents provided to the Enforcement Bureau by SBC were all in response to the Letter of Inquiry. The stated purpose of the Enforcement Bureau's Letter of Inquiry, as well as the overall purpose of the Enforcement Bureau's investigation was to determine whether SBC had violated Commission rules. It is thus plain that the records in question were compiled by the Enforcement Bureau for law enforcement purposes. The courts have made clear that all agency enforcement proceedings, including civil enforcement

whether disclosure of such documents would constitute an unwarranted invasion of SBC's personal privacy.

The question of whether disclosure of records compiled for law enforcement purposes is warranted turns on whether "the privacy interest at stake outweighs the public interest in disclosure." *Nation Magazine, Washington Bureau v. U.S. Customs Svc.*, 71 F.3d 885, 893 (D.C. Cir. 1995). In this instance, there is no public interest in disclosure that could possibly offset the invasion of privacy that would result from disclosure. The Supreme Court has made clear that, for purposes of Exemption 7(C), "whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made." *United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989). Rather, "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny rather than on the particular purpose for which the document is being requested." *Id.* (Internal quotation marks and citations omitted).<sup>5</sup> The Supreme Court's *Reporters Committee* decision is dispositive in this instance.

In *Reporters Committee*, several journalists sought disclosure under the FOIA of the FBI "rap sheet" of a reputed mob boss. In holding that disclosure was prohibited by Exemption 7(C), the Court held that the core purpose of the FOIA,

. . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed light on the conduct of any Government agency or official.

*Reporters Committee*, 489 U.S. at 773. More specifically, with respect to documents compiled by agencies during the course of law enforcement investigations, the Court further held that,

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proceedings generally, and FCC Enforcement Bureau investigations in particular, fall within the ambit of Exemption 7. See, e.g., *Aspin v. Dept. of Defense*, 348 F. Supp. 1081 (D.D.C.), *aff'd* 491 F.2d 24 (D.C. Cir. 1972); *Windels, Marx, Davies & Ives. v. Dept. of Commerce*, 576 F. Supp. 405 (D.D.C. 1983); *Kay v. FCC*, 867 F. Supp. 11 (D.D.C. 1994).

<sup>5</sup> See also *United States Dep't of Defense v. Federal Labor Relations Bd.*, 114 S.Ct. 1006, 1012 (1994) ("the only relevant 'public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'") (quoting *Reporters Committee*); *Wichlacz v. U.S. Dept. of Interior*, 938 F. Supp. 325 (E.D. Va. 1996) (only possible public interest to weigh against privacy interest is extent to which disclosure would shed light on agency's performance of its statutory duties or otherwise let citizens know what their government is up to).

. . . although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.

*Id.* at 774.<sup>6</sup> The Court thus concluded that the public interest in disclosure of the rap sheet sought by the journalists "is not the type of interest protected by the FOIA." *Id.* at 775. As a general proposition, moreover, the Court held,

. . . as a *categorical matter* that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and [] when the request seeks no "official information" about a Government agency, but merely *records that the Government happens to be storing*, the invasion of privacy is "unwarranted."

*Id.* at 780 (emphasis added).<sup>7</sup> (Emphasis added.) notably, nowhere in its decision did the Court limit its holding to the disclosure of documents pertaining to *individuals*. The Court's holding in *Reporters Committee*, as well as the D.C. Circuit's subsequent application of that holding in *SafeCard Services* and *Nation Magazine* thus apply with equal force in this instance.

The only records responsive to the CompTel/ALTS request are internal documents of a private corporate citizen that were submitted to and compiled by the Commission pursuant to investigative demands issued by the Enforcement Bureau. None of the records in question contain "official information" about the Commission; nor do any of the records pertain to the conduct of the Commission or any Commission official. The only ostensible interest on the part of CompTel/ALTS in disclosure of the requested documents is to try to embarrass SBC with the information compiled

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<sup>6</sup> See also *SafeCard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1205 (D.C. Cir. 1991)("the type of information sought is simply not very probative of an agency's behavior or performance."); *Nation Magazine*, 71 F.3d at 895 ("In some, perhaps many, instances where a third party asks if an agency has information regarding a named individual in its law enforcement files, the cognizable public interest in that information will be negligible; the requester will be seeking records about a private citizen, not agency conduct."); *Alexander & Alexander Svcs., Inc. v. Securities and Exchange Commission*, Civ.A. No. 92-1112 (JHG), 1993 WL 439799 (D.D.C. Oct. 19, 1993)("when a private citizen seeks information regarding another private citizen or corporation, the requester is not seeking information regarding the conduct of the agency in possession of the information.").

<sup>7</sup> See also *SafeCard*, 926 F.2d at 1205-1206 ("Indeed, unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant."); see also *id.* at 1205 ("The public interest in disclosure is not just less substantial, it is insubstantial.")

by the Enforcement Bureau. There is thus no public policy interest in disclosure of the requested documents.

Conversely, there are substantial privacy interests in such documents. As with information compiled by the FBI in rap sheets, the requested records are no more than documents that “happen to be in the warehouse” of the Commission because they were gathered during the course of a law enforcement investigation. Indeed, the privacy interest in the particular information at issue here is stronger than that in *Reporters Committee*. The discrete informational components of rap sheets are frequently publicly available through various court records; it was thus the compilation of such information in which the Court found a cognizable privacy interest. *See Reporters Committee*, 489 U.S. at 763-764.<sup>8</sup> Here, in contrast, the records are SBC’s private possessions; none of the information in those records is generally publicly available. Indeed, but for the investigative demand of the Enforcement Bureau, the records would remain in SBC’s possession. Moreover, the information would remain in SBC’s possession as discrete documents and information scattered throughout SBC’s offices and files. But for the Enforcement Bureau’s investigative demand, there would be no compilation of those records as there is now in the Enforcement Bureau’s files. Accordingly, given the strong privacy interest in the records at issue here, and the complete lack of any public interest in disclosure of those records, *Reporters Committee* is clear that Exemption 7(C) compels the Commission not to publicly disclose the records responsive to the CompTel/ALTS request.

The Enforcement Bureau’s sole response to this argument is that “Generally, businesses do not possess ‘personal privacy’ interests as required for application of FOIA Exemption 7(C).”<sup>9</sup> That statement is inaccurate as a general proposition as well as in the application of Exemption 7(C) to compilations of records contained in law enforcement files.

First, there is no support for any general proposition that corporations do not have privacy rights in their documents. In an analogous setting in which a corporation sought to keep sealed documents that had been produced in discovery in civil litigation, the D.C. Circuit held that “a corporation possesses legitimate constitutional expectations of confidentiality in internal commercial information.” *Tavoulares v. Washington Post Company*, 724 F.2d 1010, 1022 (D.C. Cir. 1983), *rev’d en banc on other grounds*, 737 F.2d 1170 (1984). The only qualification of a corporation’s right to nondisclosure is to allow “adequate policing of corporate conduct.” *Id.*<sup>10</sup>

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<sup>8</sup> *Reporters Committee* thus disposes of any notion that SBC has no privacy interest in the records in question merely because the investigation is a matter of public record as a result of the Order issued by the Commission approving the Consent Decree between SBC and the Enforcement Bureau. *See, e.g., Reporters Committee*, 489 U.S. at 1480 (“In sum, the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information.”)(*internal quotation marks and citations omitted*).

<sup>9</sup> *Davenport Letter* at 6.

<sup>10</sup> Which, of course, goes to the authority and power of the Commission to obtain documents from SBC in the first instance, not to subsequent disclosure of those documents to the public.

Similarly, and even closer to the situation at hand, in a case in which a corporation sought to keep sealed documents that had been gathered by law enforcement officials during searches of a corporation, the D.C. Circuit held that “The public attributes of corporations may reduce pro tanto the reasonability of their expectation of privacy, but the nature and purpose of the corporate entity and the nature of the interest sought to be protected will determine the question whether under given facts the corporation per se has a protectible interest.” *U.S. v. Hubbard*, 650 F.2d 293, 306 (D.C. Cir. 1980). There is thus no question that corporations generally have privacy interests in their own documents.

There also is no merit to the argument that the protections of Exemption 7(C) do not apply to corporations. On its face, Exemption 7(C) is not limited to protecting the personal privacy of individuals. Nor has SBC been able to discover any legislative history that would suggest that Exemption 7(C)’s protections are limited to individuals. Indeed, there is no reason that corporations should not be protected from the embarrassment, reprisal or harassment, and other invasions of privacy associated with the stigma of law enforcement investigations that Exemption 7(C) was designed to prevent.

The Enforcement Bureau’s holding effectively conflates the protections afforded by Exemptions 6 and 7(C). Both Exemption 6 and Exemption 7(C) involve personal privacy concerns, but the specific language of Exemption 6 is fundamentally different than the language of Exemption 7(C). Specifically, Exemption 6 only protects from disclosure “personnel and medical files and similar files.” 47 U.S.C. § 552(B)(6). Thus, by its own terms, Exemption 6 protects information that could only pertain to an individual and which might reveal personal private information pertaining to that individual. A personnel file is something that is compiled only with respect to an individual as an employee, and a medical file is something that is compiled only with respect to an individual’s medical health. Corporations, in their own capacity, do not have personnel or medical files. It thus makes plain sense to conclude that Exemption 6 implicates only individual privacy concerns and does not apply to corporations. In contrast, there are no restrictive adjectives with respect to the files subject to Exemption 7(C). Rather, Exemption 7(C)’s protections against invasions of privacy applies to all records or information compiled for law enforcement purposes.

The Commission’s holding also flies in the face of the language in Exemption 7(B), which immediately precedes Exemption 7(C). Exemption 7(B) applies to documents that would deprive “a person”—not an individual—of a right to a fair trial or an impartial adjudication. 47 U.S.C. § 552(b)(7)(B). Corporations are generally presumed “persons” for purposes of statutory construction. *See, e.g., Cook County, Illinois v. U.S.*, 123 S.Ct. 1239, 1244 (2003) (“There is no doubt that the term [person] [extends] to corporations, the Court in 1826 having expressly recognized the presumption that the statutory term ‘person’ extends as well to persons politic and incorporate, as to natural persons whatsoever.”)(*internal quotation marks and citations omitted*). It is thus reasonable to attach the same presumption to Exemption 7(C)’s use of the term “personal,” which is merely the adjectival form of the noun “person” used in Exemption 7(B). The language and structure of Exemptions 6, 7(B) and 7(C) thus compel rejection of the Commission’s holding that Exemption 7(C) does not apply to corporations.

Nor is there case support for the Enforcement Bureau's holding. The Enforcement Bureau's sweeping pronouncement that corporations have no rights to non-disclosure under Exemption 7(C) was supported by a citation to a single prior Commission decision: Chadmore Communications, Inc. *Memorandum Opinion and Order*, 13 FCC Rcd. 23943 (1998). That decision rejected a non-disclosure claim on the ground that the information in question pertained to the interests of individuals "in their status as holders of commercial radio licenses, a capacity in which they have neither a personal privacy interest nor an expectation of privacy." *Id.* ¶ 7. As support for its holding in *Chadmore*, the Commission relied upon three cases, all of which involved application of Exemption 6, and none of which involved application of Exemption 7(C). *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980); *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); *Ivanhoe Citrus Ass'n v. Handley*, 612 F. Supp. 1560 (D.D.C. 1985).<sup>11</sup> None of the cases relied upon by the Commission thus actually stand for the proposition that Exemption 7(C) does not apply to corporations.<sup>12</sup>

Moreover, all three cases pre-date the Supreme Court's decision in *Reporters Committee*. That decision fundamentally altered the calculus of balancing public and private interests in determining whether to disclose documents in response to FOIA requests. Thus, all of the cases relied on by the Commission in *Chadmore*, and, by extension in this instance, to restrict the scope of Exemption 7(C) are supplanted by the Court's pronouncement in *Reporters Committee* that the core purpose of the FOIA is not served by disclosure of information that merely resides in agency files but reveals nothing about the agency's own conduct, and its *categorical* pronouncement that a third party request that seeks no "official information" about an agency,

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<sup>11</sup> The *Chadmore* decision apparently understood the tenuousness of its conclusion, because it went on to find, "Even assuming these commercial licensees have a privacy interest, it is at most de minimis and is far outweighed by the public interest in publicly disclosing information about commercial licensees who have been granted rule waivers in Commission proceedings." *Chadmore* ¶ 7. In this instance, *Reporters Committee* firmly and categorically establishes that there is *no* public interest in granting disclosure to a third party of law enforcement records that happen to be stored in agency files. Accordingly, any slight privacy interest is sufficient to compel nondisclosure.

<sup>12</sup> One D.C. Circuit decision, *Washington Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) ("Information relating to business judgments does not qualify for exemption."), and one decision from the United States District Court for D.C., *Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) ("The privacy exemption does not apply to information regarding professional or business activities.") contain language suggesting that Exemption 7(C) protects only individual privacy interests. However, as with the Commission's decision in *Chadmore*, both *Washington Post* and *Cohen* support their statements as to the applicability of Exemption 7(C) with citations to prior cases that involved only the application of Exemption 6. Thus, the *Cohen* decision relies on *Rural Housing alliance v. Untied States Dep't of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974) and *Kurzon v. Dep't Of Health and Human Svcs.*, 649 F.2d 65 (1<sup>st</sup> Cir. 1981), both of which involved only the application of Exemption 6, and the *Washington Post* decision relies on *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980), which also involved only the application of Exemption 6. Thus, as with the Commission's *Chadmore* decision, neither *Washington Post* or *Cohen* are supported by prior decisions concerning the scope of Exemption 7(C). Moreover, as with the cases relied on by the Commission in *Chadmore*, both *Washington Post* and *Cohen* pre-date the Supreme Court's *Reporters Committee* decision.

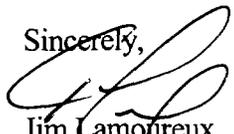
but merely seeks files accumulated and stored by the agency is an invasion of privacy. The holding in *Reporters Committee* is not limited to privacy interests of individuals. Rather, the comparison of the core purpose of the FOIA—shedding light on agency conduct—and the potential invasion of privacy occasioned by disclosure of law enforcement records an agency happens to be storing, applies with equal force to individuals and corporations. Indeed, the United States District Court for D.C. has indicated its understanding that the Court's holding in *Reporters Committee* applies “when a private citizen seeks information regarding another private citizen or corporation.” *Alexander & Alexander* at \*10 (emphasis added). In that case, the district court rejected the SEC's proposed disclosure of information dealing only with individuals in their professional capacities. *Id.* It held that under *Reporters Committee*

personal information is exempt from disclosure to a FOIA requester in the absence of compelling evidence that the agency was involved in illegal activity. The fact that the information may or may not injure these individuals' reputations is irrelevant to the inquiry whether the information sheds any light on what the SEC “was up to.” *Id.*

That application of the balancing required under *Reporters Committee* is directly on point here. None of the documents requested by CompTel/ALTS reveal anything about the official conduct of the Commission. They are all SBC's personal business documents. Accordingly, given the complete lack of any public interest that would be served by disclosure, the documents should be withheld.<sup>13</sup>

The Enforcement Bureau's sweeping pronouncement that Exemption 7(C) does not apply to corporations is thus belied by the purpose of Exemption 7(C), cases addressing the scope of Exemption 7(C), and the actual language of Exemption 7(C). Accordingly, SBC respectfully requests that the Enforcement Bureau's rejection of SBC's request for confidentiality be reversed, and that the documents requested by CompTel/ALTS be withheld from disclosure.

If you have any questions, please do not hesitate to contact me at (202) 326-8895.

Sincerely,  
  
Jim Lamoureux  
Senior Counsel  
SBC Services, Inc.

cc: Judy Lancaster  
Mary C. Albert

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<sup>13</sup> See *United States Dep't of Defense v. Federal Labor Relations Authority*, 114 S.Ct. 1006, (1994) (“Because a very slight privacy interest would suffice to outweigh the relevant public interest, we need not be exact in our quantification of the privacy interest. It is enough for present purposes to observe that the employees' interest in nondisclosure is not insubstantial.”)



September 6, 2005

**By Facsimile, U.S. Mail and E-Mail**

Samuel Feder, Esq.  
Acting General Counsel  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington, D.C. 20554

Re: CompTel's Application for Review of Freedom of  
Information Act Action, FOIA Control No. 2005-333

Dear Mr. Feder:

Pursuant to Section 0.461(j) of the Commission's rules, 47 C.F.R. §0.461(j), CompTel hereby submits its Application for Review of the Enforcement Bureau's August 5, 2005<sup>1</sup> letter denying in part CompTel's Freedom of Information Act Request ("FOIA") on the grounds that FOIA Exemptions 4 and 5 protect certain documents from disclosure.

**Background**

On April 4, 2005, CompTel filed with the Commission an FOIA request for documents contained in File No. EB-04-IH-0342. These documents relate to the Enforcement Bureau's investigation of SBC for violations of the Commission's rules in connection with the receipt of universal service support for the New London, Connecticut Public Schools. The Commission terminated the investigation in December 2004 upon issuing an Order adopting a Consent Decree. *SBC Communications, Inc.* Order and Consent Decree, 19 FCC Rcd 24014 (released December 16, 2004).

Apparently SBC did not seek confidential treatment for its documents at the time it provided them to the Commission in connection with the investigation. Upon being

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<sup>1</sup> August 5, 2005 Letter from William Davenport to Jim Lamoureux and Mary C. Albert.

notified of CompTel's FOIA request, however, SBC objected to the disclosure of the documents requested, claiming that they were exempt from disclosure pursuant to FOIA Exemptions 7(C) and 4, 5 U.S.C. §§552(b)(7)(C) and 552(b)(4).<sup>2</sup> CompTel responded to SBC's objections and the Bureau issued its decision on August 5, 2005.<sup>3</sup> The Bureau rejected SBC's Exemption 7(C) claims, but stated that it would withhold certain documents pursuant to Exemption 4 and certain other documents pursuant to Exemption 5 of the FOIA. CompTel is at an extreme disadvantage in making a case for review of the Enforcement Bureau's decision because the Bureau has not provided CompTel with a Vaughn index<sup>4</sup> identifying the documents it proposes to withhold and the particular Exemption(s) that applies to each document. Nonetheless, out of an abundance of caution and in order to protect its rights on appeal, CompTel requests that the Commission review the Bureau's determinations to withhold documents pursuant to Exemptions 5 and 4 for the following reasons.

**The Bureau Has Not Identified With Particularity The Documents Withheld Under Exemption 5 Or Demonstrated That The Exemption Applies**

Exemption 5 of the FOIA, 47 U.S.C. §552(b)(5), permits the Commission to withhold inter-agency or intra-agency memorandums that would not be available to a private party in litigation with the agency through discovery. In invoking this exemption, the Bureau has stated that it "will withhold from public disclosure drafts of pleadings and correspondence, and memoranda and emails, distributed among Commission staff which discuss the issues and investigation related to this matter."<sup>5</sup> The burden is on the Bureau to prove that Exemption 5 protects all of these materials. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The conclusory and generalized allegation that Exemption 5 applies to all of the withheld material is insufficient to meet the Bureau's burden. In order to carry its burden, the Bureau must describe both the contents of each of the withheld documents and enough about their context to establish that Exemption 5 applies. *SafeCard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1204 (D.C. Cir. 1991); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (withheld documents must be described and indexed). Because the materials the Bureau intends to withhold are not otherwise identified or indexed, it is impossible for CompTel to challenge with any specificity the Bureau's decision to withhold any or all of the documents. Based on the information that is available to CompTel, however, there are at least two aspects of the Bureau's Exemption 5 determination that warrant review.

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<sup>2</sup> May 27, 2005 Letter from Jim Lamoureux to Judy Lancaster.

<sup>3</sup> August 5, 2005 Letter from William Davenport to Jim Lamoureux and Mary C. Albert.

<sup>4</sup> See e.g., *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (withheld documents must be described and indexed).

<sup>5</sup> August 5, 2005 Letter from William Davenport to Jim Lamoureux and Mary C. Albert at 6.

First, intra-agency memoranda that explain decisions not to file a complaint are final opinions made in the adjudication of a case that fall outside the scope of Exemption 5. *National Labor Relations Board v. Sear Roebuck & Co.*, 421 U.S. 132 (1975); *SafeCard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1204 (D.C. Cir. 1991) (agency's decision not to file injunctive action against a particular entity is final agency action in the adjudication of a case). The Bureau's investigation into SBC's violations of the Commission's universal service rules was terminated upon the adoption of a Consent Decree. *SBC Communications, Inc.* Order and Consent Decree, 19 FCC Rcd 24014. A complaint was never filed. To the extent that any of the documents withheld pursuant to Exemption 5 reflect an explanation of the Bureau's or the Commission's decision not to pursue a complaint against SBC, they must be produced.

Secondly, Exemption 5 does not protect any purely factual material appearing in the intra-agency documents in a form that is severable without compromising the deliberative or policy making material contained therein. *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973) (agency must demonstrate by surrounding circumstances that particular documents are purely advisory or deliberative and contain no separate factual information); *Sterling Drug v. Federal Trade Commission*, 450 F.2d 698 (D.C. Cir. 1971) (while communications of thoughts and opinions are to be protected, statements of fact are subject to disclosure). To the extent that any of the documents withheld contain statements of fact, those documents, or the portions thereof that contain the statements of fact, must be produced.

**Exemption 4 Does Not Protect From Disclosure All of  
The Financial Information The Bureau Intends To Withhold**

The Bureau warned SBC in the Letter of Inquiry ("LOI") pursuant to which SBC submitted the documents requested by CompTel that requests for confidential treatment must comply with the requirements specifically mandated by Section 0.459(b), and that the Bureau would not consider confidentiality requests that did not so comply.<sup>6</sup> SBC apparently did not heed the warning or request confidential treatment at the time it submitted the documents. Indeed, it did not request confidential treatment until 8 months after the documents were originally produced to the Commission, 5 months after the investigation was terminated and then only in response to CompTel's FOIA request.<sup>7</sup>

The Bureau correctly found that SBC's belated request for confidential treatment was woefully inadequate:

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<sup>6</sup> August 5, 2005 Letter from William Davenport to Jim Lamoureux and Mary C. Albert at 3-4.

<sup>7</sup> May 27, 2005 Letter from Jim Lamoureux to Judy Lancaster.

We find that SBC's requests for confidential treatment of its submissions substantially fail to comply with the standards set forth in section 0.459(b) of the Commission's rules.<sup>8</sup>

SBC has failed to provide a statement of specific reasons for withholding its responses in their entirety. While generally categorizing the information contained in its submissions, SBC does not, as required by section 0.459(b)(3) explain the degree to which specific information is commercial or financial or contains a trade secret. Nor does it explain, as required by section 0.459(b)(5), how disclosure of such information could result in substantial competitive harm. SBC also fails to state whether any of the information for which it seeks protection is already available to the public.<sup>9</sup>

Despite these findings, the Bureau determined on its own that disclosure of certain information "could result in competitive harm to SBC." As a result, the Bureau stated its intent to withhold certain documents, including, but not limited to, SBC's costs and pricing data, invoice and discount amounts, and its billing and payment dates<sup>10</sup> pursuant to Exemption 4 of FOIA, 5 U.S.C. §552(b)(4).

Exemption 4 gives the Commission discretion to withhold from disclosure confidential commercial and financial information. In order to prevail on a claim under Exemption 4, a party must demonstrate that disclosure of the requested information is likely to cause substantial harm to the competitive position of the entity from whom the information was obtained. *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 677-678 (D.C. Cir. 1976). The Bureau determined that SBC had failed to show how disclosure of any of the information could result in substantial competitive harm. The Bureau's own conclusory and generalized allegation of substantial competitive harm is unacceptable and cannot support its decision to withhold the requested documents. *Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). It is difficult to imagine, for example, how the disclosure of billing and payment dates could cause substantial harm to SBC's competitive position. Moreover, the fact that SBC was unable to demonstrate substantial harm to its competitive position from disclosure of the documents should weigh heavily against withholding any of the documents.

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<sup>8</sup> August 5, 2005 Letter from William Davenport to Jim Lamoureux and Mary C. Albert at 1.

<sup>9</sup> *Id.* at 4. SBC did not challenge these findings in its Application for Review of the Bureau's decision.

<sup>10</sup> *Id.* at 5.

The Bureau's determination that Exemption 4 protects from disclosure SBC's invoice and discount amounts is similarly wanting. Exemption 4 does not protect from disclosure the rates SBC charged or the discounts it provided to any participating schools and libraries because that information already is (or should be) in the public domain. Section 54.501(d)(3) of the Commission's rules requires e-rate service providers, such as SBC, to make records of rates charged and discounts allowed to participating schools available for public inspection.<sup>11</sup>

While acknowledging the applicability of the rule, the Bureau stated that SBC can comply with its requirements "by maintaining a 'public inspection' file containing the required rate information" and that the rule does not mandate disclosure of the SBC invoice and discount information pursuant to CompTel's FOIA request because disclosure of such amounts "could disclose the total value of [SBC's] contract, information that would not otherwise be publicly available."<sup>12</sup> There are at least two flaws in the Bureau's reasoning. First, a claim to confidentiality cannot be sustained under Exemption 4 for any data that is already in the public domain. *CNA Financial Corporation v. Donovan*, 830 F. 2d 1132,1154 (D.C. Cir. 1987). To the extent that any of the requested documents show the rates SBC charged or the discounts it allowed – i.e., the information required to be maintained in its "public inspection" file -- the documents must be produced. Secondly, the inquiry that must be made in determining whether Exemption 4 applies is not whether or not the information would otherwise be publicly available, but whether disclosure would cause substantial competitive harm to SBC. *CNA Financial Corporation v. Donovan*, 830 F. 2d at 1153 (rejecting appellant's invitation to adopt an Exemption 4 test that "focuses solely on whether the material is 'customarily kept confidential' by the submitter"). The Bureau did not explain exactly how disclosure of the total value of SBC's contract to provide publicly funded e-rate services to the New London, Connecticut schools could cause SBC competitive harm. Moreover, although the Bureau found that SBC had failed "to state whether any of the information for which it seeks protection is already available to the public,"<sup>13</sup> the Bureau determined apparently on its own that the total value of SBC's contract "is not in the public domain" without revealing the factual basis for that determination.

The exemptions in the Freedom of Information Act must be construed narrowly in such a way as to provide maximum access to the material requested. The Commission cannot sustain the Bureau's determination to withhold materials pursuant to Exemptions 5 and 4 withhold further explanation and justification.

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<sup>11</sup> Section 54.501(d)(3) requires service providers to "keep and retain records of rates charged to and discounts allowed for eligible schools and libraries – on their own or as part of a consortium. Such records shall be made available for public inspection."

<sup>12</sup> August 5, 2005 Letter from William Davenport to Jim Lamoureux and Mary C. Albert at 5.

<sup>13</sup> *Id.* at 4.

Samuel Feder, Esq.  
September 6, 2005  
Page 6

For the foregoing reasons, CompTel respectfully requests that the Commission grant this Application for Review and at the very least direct the Enforcement Bureau to provide a *Vaughn* index of the documents it proposes to withhold.

Respectfully submitted,

/s/

Mary C. Albert

cc: William Davenport  
Jim Lamoureux

**DECLARATION OF LESLIE A. BOWMAN**

1. My name is Leslie A. Bowman. My business address is 6 Devine St., North Haven, CT, 06473. I hold the title of Area Sales Director – Government and Education in the Southern New England Telephone Company (“SNET”), a subsidiary of AT&T Inc. (“AT&T”). In this position, I am responsible for managing a team of sales professionals who meet the needs of government and education accounts throughout Connecticut.

2. The purpose of my declaration is two-fold. First, I describe the documents provided by AT&T to the Federal Communications Commission (“FCC”) in connection with the FCC’s investigation of certain invoices that AT&T submitted to the universal service fund administrator related to projects that AT&T performed for the New London, Connecticut school district (“New London Public Schools”) (FCC File No. EB-04-IH-0342). Second, I describe the irreparable harm that would result from disclosure of those documents, both in terms of harassment, embarrassment, and stigmatization, and with respect to AT&T’s ability to compete in the marketplace.

**Background**

3. In 2004, AT&T (then known as SBC Communications Inc.) informed the FCC that AT&T had discovered concerns regarding certain invoices related to the FCC’s “Education Rate,” or “E-Rate,” universal service program. AT&T explained that SNET had submitted arguably improper invoices to the universal service fund administrator relating to services performed for New London Public Schools.

4. The FCC subsequently issued a Letter of Inquiry ordering AT&T to produce a wide range of documents as a part of its investigation into possible violations of FCC rules, 47 C.F.R. §§ 54.500-54.521 (2003), and FCC orders pertaining to universal service. The Letter of Inquiry

sought detailed information relating to various projects in Connecticut. For each such project, the FCC asked for, among other things, dates on which AT&T invoiced the universal service fund administrator, dates on which AT&T refunded the universal service fund administrator, the names of all AT&T personnel involved in deciding how to bill under the E-Rate program, and the names of all AT&T personnel aware of decisions regarding billing under the E-Rate program. The Letter of Inquiry also instructed AT&T to provide its Code of Business Conduct and to state which sections of the Code, if any, were violated by the billing in question.

5. AT&T responded to the Letter of Inquiry with a declaration, answers to interrogatories, and documents. The documents include, among other things, internal AT&T email communications; AT&T job descriptions; completed universal service invoice forms; funding committee reports provided by the universal service fund administrator; AT&T billing invoices (many of which include handwritten notes by AT&T personnel) containing product, project, and pricing information; confidential AT&T engagement forms; quotation forms; vendor information sheets; and AT&T's Code of Business Conduct.

6. More specifically, the document set, which includes more than 150 documents comprising more than 250 pages, includes, among other things:

- A one-page cover letter from AT&T to the FCC describing its response to the Letter of Inquiry.
- A one-page declaration of an AT&T employee describing generally AT&T's discovery of the arguably improper billing.
- A 15-page written response to interrogatories by the FCC. This document provides detailed information regarding when AT&T invoiced the universal service fund administrator for each New London Public School project at issue, the dates on which the universal service fund administrator paid the invoices, the dates on which AT&T refunded the universal service fund administrator, amounts that AT&T billed for each project in various years of the E-Rate program, and the names and job titles of employees who decided whether and when AT&T could bill the universal service fund administrator

for the projects at issue. This response also contains written descriptions of how AT&T employees arrived at their arguably incorrect understanding of FCC rules, and it identifies provisions of AT&T's Code of Business Conduct that the named employees arguably violated.

- Nine pages of job descriptions of AT&T personnel involved in the arguably improper billing of the universal service fund administrator for work performed for New London Public Schools.
- Eighteen pages of completed universal service fund administrator invoice forms completed by AT&T. These include, among other things, AT&T's service provider identification number, the amounts that AT&T invoiced to the universal service fund administrator, contact information for AT&T, the dates on which AT&T submitted the service provider invoices, and the dates on which AT&T billed its customers.
- Three pages of universal service funding committee reports containing, among other information, names of customers receiving the services provided by AT&T, the dates on which contracts were awarded, and the dates of funding decisions by the funding committee.
- More than 75 pages of internal AT&T emails (including documents attached to emails). These describe, among other things, cost and pricing information in connection with services provided to New London Public Schools, details of AT&T's discussions with representatives of New London Public Schools, descriptions of AT&T's billing and invoice procedures, work sheets detailing pricing information used for billing the universal service fund administrator, an original bill of materials (including list price and unit price) for equipment installed in connection with projects for New London Public Schools, discussions of proper billing under the E-Rate program, discussions of invoice procedures with respect to the universal service fund administrator, confidential engagement forms for New London Public Schools, E-Rate billing information for a particular year, and charts summarizing services and universal service fund decisions for New London Public Schools.
- More than 30 pages of AT&T billing invoices and maintenance orders describing charges for work performed by AT&T for New London Public School customers. These invoices include, among other things, descriptions of the services provided and work performed, pricing information, AT&T's customers' names, dates on which the billing occurred, and handwritten notations by AT&T employees, including payment calculations.
- Twelve pages of commitment adjustment letters (some with handwritten notations by AT&T employees) from the universal service fund administrator to AT&T and New London Public Schools, including funding commitment reports in connection with applications for universal service funding.

- More than 10 pages of billing invoices provided by vendors to AT&T, including price and billing information, as well as descriptions of the work performed.
- Eighteen pages of AT&T price quotations to New London Public Schools, which include unit price and extended price information, as well as descriptions of the services to be performed.
- Handwritten notes describing price and cost information for materials and labor in connection with New London Public School projects.
- Accounts payable authorization forms relating to AT&T's refund to the universal service fund administrator.
- A five-page description of hardware sold to New London Public Schools provided by an AT&T vendor.
- AT&T's 23-page Code of Business Conduct.

#### **Irreparable Harm Resulting from Disclosure**

7. The documents that AT&T provided in response to the FCC's Letter of Inquiry include information that, if released, could be used to attempt to embarrass, harass, and stigmatize AT&T as a corporation, as well as individual AT&T employees.

8. These documents are confidential internal documents of AT&T and are responsive to the FCC's request for information relating to possible violations of FCC rules. The documents contain the names, and other identifying information, of individuals involved in the arguable violations of FCC rules. Such information could be used to attempt to embarrass, harass, or stigmatize AT&T as a corporation or those employees as individuals by making public that those individuals were identified as involved in arguable violations of FCC rules.

9. Aside from the names and other identifying information of individual AT&T employees, the requested documents contain facts and descriptions that reveal the what, when, where, why, and how of AT&T's alleged violations of FCC rules. These documents, taken

together, show the decisionmaking processes that led to the alleged violations of the FCC rules, the period of time over which the arguable billing errors occurred, and AT&T's internal responses to the arguable misconduct. With those details of supposed corporate wrongdoing in hand, CompTel and others could piece together basic time lines and theories of how and why the arguable violations of FCC rules came about. Such information could then be used by competitors or others to attempt to embarrass, harass, and stigmatize AT&T publicly by, for example, citing such information in press releases, advertisements, or news reports. Such information also could be used by competitors in regulatory proceedings, in an attempt to prejudice decisionmakers against AT&T's interests. Disclosure would, as a result, harm AT&T's reputation and goodwill.

10. The requested documents also contain internal information about AT&T's operational and billing processes and practices, AT&T's standards of corporate conduct, and other confidential information. Because these documents were collected pursuant to the FCC's investigation – and are compiled in an investigatory file – their disclosure in this context would enable competitors and others, among other things, to attempt to disparage the reliability of AT&T's operational and billing processes and practices, criticize publicly the effectiveness of AT&T's standards of corporate conduct, and otherwise target AT&T by making public currently private commercial facts pertaining to alleged violations of FCC rules, thus harming AT&T's reputation and goodwill.

11. The redactions made by the FCC, pursuant to FOIA Exemption 4, do not materially diminish the likelihood that the disclosure of the documents would result in the embarrassment, harassment, and stigmatization of AT&T. The FCC redacted from the requested documents (i) cost and pricing data in connection with services and hardware used in connection with the

New London Public School projects; (ii) amounts for which AT&T invoiced the universal service fund administrator; (iii) dates on which AT&T invoiced the universal service fund administrator; the universal service fund administrator paid the invoice, and AT&T refunded the payment; and (iv) names and identifying information of AT&T's staff, contractors, and representatives of its contractors and customers.

12. For the reasons stated above, the redacted documents still reveal important confidential facts, including important details about how AT&T employees arrived at an arguably incorrect understanding of FCC rules, the level of corporate decisionmaking involved in the billing decisions, AT&T's internal response to those arguable billing violations, as well as AT&T's own assessment of whether and the extent to which its employees violated the company's code of conduct.

13. This concludes my declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

September 20, 2008

  
Leslie A. Bowman

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Volume II of the Appendix was filed electronically in compliance with Third Circuit LAR 30.1 on this 19th day of December 2008. In addition, four copies of the foregoing were sent via overnight mail to the Office of the Clerk.

I further certify that, on this date, one copy of the foregoing appendix was served on each of the parties listed below by first-class mail, postage prepaid.

/s/ Kelly P. Dunbar  
Kelly P. Dunbar

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