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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 12th 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.¹ 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.² 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

¹ 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.

² 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."

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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." *Basl 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).³ 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

³ 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).

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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 774.⁴ 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 780.⁵ (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.

⁴ 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.")

⁵ 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.")

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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 763-764.⁶ 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

⁶ *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.))

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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 Parks* 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 (1st 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."

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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 (9th Cir. 1996); *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979).⁷

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 (9th Cir. 1994). Commission precedent has clearly found this type of information to be competitively sensitive and withholdable under Exemption 4.⁸ 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).⁹ Accordingly, the Commission should withhold all of the records identified in Attachment A.

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

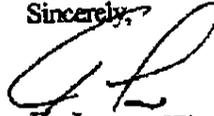
⁸ See e.g. *In Matter of Pacific Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-23, DA 00-2618, November 20, 2000 (supporting confidentiality for collocation data); *Local Exchange Carrier's Rates, Terms and Conditions for 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).

⁹ 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

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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

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

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Attachment A

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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

ATTACHMENT C