

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
SBC COMMUNICATIONS INC.
On Request for Confidential Treatment

MEMORANDUM OPINION AND ORDER

Adopted: September 9, 2008

Released: September 12, 2008

By the Commission:

1. The Commission has before it an application for review filed by SBC Communications, Inc. (SBC), seeking review of a decision of the Enforcement Bureau (EB or Bureau), which rules on a Freedom of Information Act (FOIA) request by CompTel. SBC appeals that portion of EB's decision that denied in part SBC's request for confidential treatment of records responsive to CompTel's FOIA request. For the reasons set forth below, we deny SBC's application for review.

I. BACKGROUND

2. On December 16, 2004, EB issued a consent decree terminating its investigation into SBC's compliance with section 254 of the Communications Act, as amended, and Part 54 of the FCC's regulations. CompTel, on April 4, 2005, filed a FOIA request seeking "[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342 [i.e., the investigation of SBC]." In opposing

1 SBC adopted the name AT&T, Inc. (AT&T) following its acquisition of the company by that name. See http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21850 (company press release). Because, however, the pleadings and rulings before us refer to "SBC," we will generally use the name "SBC" in this memorandum opinion and order to avoid confusion. We will use the name "AT&T" only where the context makes it more appropriate.

2 The procedural history of this case is somewhat complex. For reasons explained in greater detail below, CompTel's own application for review of EB's decision is not before us. We will discuss CompTel's FOIA request and application for review only to the extent necessary to clarify the matters under consideration.

3 SBC Communications Inc., 19 FCC Rcd 24014 (Enf. Bur. 2004). The consent decree addressed alleged irregularities in invoices submitted by SBC Connecticut to the Schools and Libraries Division of the Universal Service Administrative Company (USAC) for services provided to certain schools and other entities subsidized under the Universal Service Fund "E-Rate" program.

4 See 47 U.S.C. § 254; 47 C.F.R. Part 54.

5 E-FOIA request from Mary C. Albert, CompTel/ALTS (Apr. 4, 2005).

release of the requested documents, SBC, on May 27, 2005, for the first time requested confidential treatment of its submissions in that investigation.⁶

3. The Bureau granted in part and denied in part SBC's request for confidential treatment, and, accordingly, granted in part and denied in part CompTel's FOIA request.⁷ The Bureau found that SBC had not complied with the procedures for seeking confidential treatment specified by section 0.459 of the Commission's rules.⁸ EB held that SBC "failed to provide a statement of specific reasons for withholding its responses in their entirety," especially because it failed to meet the requirements of section 0.459 that it explain "how disclosure of the information could result in substantial competitive harm" and "whether any of the information for which it seeks protection is already available to the public."⁹ The Bureau, however, examined SBC's submissions and determined that certain information in SBC's submissions should be treated as confidential, including "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." According to EB, such information, if released, was "likely to substantially harm SBC's competitive position," and was therefore exempt from disclosure under FOIA Exemption 4.¹⁰ EB also determined that this information was not in the public domain.¹¹ In addition, the Bureau determined that the names of individuals identified in SBC's submission should be withheld from release to protect personal privacy under FOIA Exemptions 6 and 7(C).¹² EB ruled, however, that SBC itself, as opposed to the individuals mentioned in SBC's submissions, did not possess personal privacy interests protected by Exemptions 6 and 7(C).¹³ Finally, the Bureau withheld from release pursuant to FOIA Exemption 5¹⁴ drafts of EB pleadings and correspondence, and internal memoranda and e-mails discussing the SBC investigation,¹⁵ which EB determined would disclose the Commission's deliberative process.

⁶ Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc. to Judy Lancaster, Enforcement Bureau (May 27, 2005). SBC's request for confidentiality specifically applied to financial documents that it submitted to EB in response to a letter of inquiry issued during the investigation. CompTel opposed SBC's request for confidentiality. Letter from Mary C. Albert, Vice President, Regulatory Policy to Judy Lancaster, Enforcement Bureau (Jun. 28, 2005).

⁷ Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau to Jim Lamoureux, SBC Services, Inc. and Mary C. Albert, Vice President Regulatory Policy, CompTel/ALTS (Aug. 5, 2005) (*FOIA Decision*).

⁸ 47 C.F.R. § 0.459.

⁹ *FOIA Decision* at 4, citing 47 C.F.R. § 0.459(b)(5) and (7).

¹⁰ *FOIA Decision* at 5. See 5 U.S.C. § 552(b)(4). Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

¹¹ *FOIA Decision* at 5. Specifically, EB found that 47 C.F.R. § 54.501(d)(3), which states that service providers' records of rates charged and discounts allowed shall be made available for public inspection, did not require the disclosure of all pricing data in SBC's submissions.

¹² *FOIA Decision* at 5-6, citing 5 U.S.C. §§ 552(b)(7)(C) (records compiled for law enforcement purposes . . . [that] could reasonably be expected to "constitute an unwarranted invasion of personal privacy") and 552(b)(6) (. . . files the disclosure of which would "constitute a clearly unwarranted invasion of personal privacy").

¹³ *FOIA Decision* at 6.

¹⁴ 5 U.S.C. § 552(b)(5) (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).

¹⁵ *FOIA Decision* at 6.

4. Both CompTel and SBC filed applications for review of EB's decision.¹⁶ While these pleadings were pending before the Commission, CompTel filed a civil action, pursuant to 5 U.S.C. § 552(a)(4)(B), in the United States District Court for the District of Columbia, seeking a judicial order compelling disclosure of the records withheld by EB.¹⁷ AT&T¹⁸ (as successor to SBC) intervened in CompTel's action as a defendant, and, on March 5, 2008, the court stayed the case.¹⁹ The court concluded that it could not address AT&T's "reverse FOIA" claim that certain records at issue should be withheld from disclosure because AT&T's claim could only be reviewed pursuant to the Administrative Procedure Act after final Commission action.²⁰ The court concluded further that the interests of judicial economy and efficiency would be served by staying CompTel's action until the Commission ruled on AT&T's administrative appeal. Accordingly, SBC's application for review is now before us.

5. SBC seeks review of the Bureau's denial in part of its request for confidential treatment. SBC challenges the Bureau's conclusion that FOIA Exemption 7(C) does not apply to corporations, contending that corporations are persons that have a privacy interest within the meaning of Exemption 7(C), and that this proposition is consistent with precedent.²¹ Accordingly, SBC argues that its internal documents should be withheld pursuant to Exemption 7(C), because disclosure would embarrass SBC without serving any public policy interest.²² CompTel responds that there is no precedent supporting the proposition that corporations have a personal privacy interest for purposes of Exemption 7(C).²³

II. DISCUSSION

A. Procedural Matter

6. As an initial matter, we find that SBC's application for review does not conform with the Commission's Rules. In general, an application for review of an initial action on a request for inspection may be filed only by the person making the FOIA request (here CompTel).²⁴ There is an exception to this limitation where a request for inspection of records submitted to the Commission in confidence under section 0.457(d) or section 0.459 is granted or partially granted, in which case the person who submitted the records or the third party owner of the records may file an application for review.²⁵ However, despite

¹⁶ Letter from Mary C. Albert to Samuel Feder (Sept. 6, 2005) (*CompTel Application for Review*); Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, [then] Acting General Counsel (Aug. 19, 2005) (*SBC Application for Review*).

¹⁷ *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. filed Oct. 5, 2006). The FOIA permits such actions where the agency does not act on a FOIA request or appeal within the statutory time period. See 5 U.S.C. § 552(a)(6)(C)(i) (agency's failure to comply with statutory time period deemed to exhaust administrative remedies). Because the CompTel's judicial action is still pending, we will not address the merits of its application for review here.

¹⁸ See note 1, *supra*.

¹⁹ *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. memorandum opinion and order Mar. 5, 2008).

²⁰ See generally *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (discussing reverse FOIA requests).

²¹ SBC Application for Review at 2-8.

²² *Id.* at 4-5.

²³ Letter from Mary C. Albert, Vice President, Regulatory Policy to Samuel Feder, Esq., [then] Acting General Counsel (Sept. 1, 2005) (*CompTel Opposition*) at 3-6.

²⁴ 47 C.F.R. § 0.461(j).

²⁵ 47 C.F.R. § 0.461(i)(1) and (2), *citing* 47 C.F.R. §§ 0.457(d) and 0.459.

notice from EB of its right to do so,²⁶ SBC did not seek confidential treatment of its submissions in accordance with section 0.459(a) by filing a timely request for confidentiality when it submitted the material, and thus does not qualify to file an application for review pursuant to the terms of section 0.461(i).²⁷ This failure to comply with our rules would alone justify the denial of SBC's request for confidential treatment. Although we admonish SBC that it should have complied with section 0.459, we are mindful of the provisions of FOIA Exemption 4 and the Trade Secrets Act²⁸ to prevent disclosure of confidential information and to consider the views of the submitter when making disclosure determinations. Therefore, we have considered the information and arguments subsequently submitted by SBC on our own motion.

B. Exemption 7(C)

7. We disagree with SBC's contention that we should withhold all of the documents that it submitted in response to EB's letter of inquiry under Exemption 7(C).²⁹ SBC argues that disclosure of these records, all indisputably "compiled for law enforcement purposes," could reasonably be expected to "constitute an unwarranted invasion of personal privacy."³⁰ In this regard, SBC characterizes itself as a "private corporate citizen" with personal privacy rights that should be protected from disclosure that would "embarrass" it.³¹ However, SBC's position that a corporation has "personal privacy" interests within the meaning of Exemption 7(C) is at odds with established Commission and judicial precedent. In *Chadmoore Communications, Inc.*,³² the Commission held that information regarding an individual acting in the capacity of a commercial licensee, that is, in a business capacity, did not implicate a privacy interest for purposes of Exemption 7(C). The clear implication of *Chadmoore* is that information regarding a corporation would not be exempt either.³³ Our holding is consistent with judicial decisions in

²⁶ EB's letter of inquiry specifically advised SBC: "If the Company [SBC] requests that any information or Documents, as defined herein, responsive to this letter be treated in a confidential manner, it shall submit, along with responsive information and Documents, a statement in accordance with section 0.459 of the Commission's rules." Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearing Division, EB to Michelle A. Thomas and Christopher Heimann [SBC] (Aug. 24, 2004) at 1-2.

²⁷ SBC's response to CompTel's FOIA request states: "All of the records responsive to the CompTel/ALTS [FOIA] request were issued and obtained by the Commission as part of an Enforcement Bureau investigation, and thus, pursuant to 0.457, are not routinely available for public inspection." Letter from Jim Lamoureux to Judy Lancaster (May 27, 2005). SBC thus implies that it was not required to comply with section 0.459. We disagree. Because the material submitted by SBC was not specifically listed as confidential commercial and financial information under section 0.457(d)(1), section 0.457(d)(2) required SBC to submit a request for confidentiality under section 0.459. Section 0.461(i) does not permit a party submitting confidential documents to the Commission to wait to claim confidentiality, as SBC did, until a FOIA request is filed.

²⁸ 18 U.S.C. § 1905.

²⁹ FOIA Exemption 7(C) applies to "records or information compiled for law enforcement purposes . . . to the extent that production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."

³⁰ See 5 U.S.C. § 552(b)(7)(C).

³¹ *SBC Application for Review* at 4.

³² 13 FCC Rcd 23943, 23946-47 ¶ 7 (1998).

³³ *Chadmoore* references a line of cases holding that corporations do not have a "personal privacy" interest for purposes of Exemption 6. See 13 FCC Rcd at 23946-47 ¶ 7 and *Electronic Privacy Information Center v. Dep't of Homeland Security*, 384 F.Supp.2d 100, 118 n.29 (D.D.C. 2005); *Hill v. Dep't of Agriculture*, 77 F.Supp.2d 6, 7 (D.D.C. 1999); *Ivanhoe Citrus Ass'n v. Handley*, 612 F.Supp. 1560, 1567 (D.D.C. 1985). "While it has been established that Exemption 7(C) and Exemption 6 are not completely congruent, the difference lies in the standard of review and not the relevant privacy interest covered by the exemption." *Cohen v. EPA*, 575 F.Supp. 425, 429 n. 6 (D.D.C. 1983), citing *FBI v. Abramson*, 456 U.S. 615, 630 n. 13 (1982) (Exemption 6 protects against the disclosure

(continued....)

*Washington Post Co. v. U.S. Dep't of Justice*³⁴ and *Cohen v. EPA*.³⁵ In *Washington Post*, the United States Court of Appeals for the District of Columbia Circuit stated that the disclosures with which Exemption 7(C) is concerned are those of “an intimate personal nature” such as “marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation.”³⁶ In *Cohen*, the United States District Court for the District of Columbia cited the same examples.³⁷ These cases hold that Exemption 7(C) does not cover information relating to business judgments and relationships, even if disclosure might tarnish someone’s professional reputation.³⁸ Thus, in *Washington Post*, the D.C. Circuit held that Exemption 7(C) did not cover the report of an internal corporate investigation that mentioned individual employees by name but did not identify them as being personally the target of the investigation.³⁹ In *Cohen*, the district court held that Exemption 7(C) did not cover the names of individuals, such as corporate officials, mentioned in EPA hazardous waste notices, since they were identified only in their “public role” of being the users of hazardous waste disposal sites and would no more be subject to harassment than if the name of the corporation were disclosed.⁴⁰ Like *Chadmoore*, these cases imply that Exemption 7(C) does not cover a corporation’s “privacy interest,” since a corporation’s interests are of necessity business interests. SBC points to no Exemption 7(C) cases that are to the contrary.

8. SBC urges us to depart from this precedent on several grounds, none of which are persuasive. Unlike SBC, we do not believe that protecting a corporation from “embarrassment” falls within the purposes of Exemption 7(C), as interpreted by the courts.⁴¹ Judicial discussion of the purposes of Exemption 7(C) focus on the kinds of tangible personal impact that disclosure of information of an intimate personal nature might have on the targets of investigations, witnesses, and participating law enforcement officials, such as damage to their personal reputation, embarrassment, and the possibility of

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of information that would constitute a “clearly unwarranted” invasion of personal privacy, whereas Exemption 7 (C) does not require the harm to privacy to be “clearly unwarranted”); see also *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 (1989) (noting the same distinction and that Exemption 6 uses the word “would” while Exemption 7(C) uses “could reasonably”).

³⁴ 863 F.2d 96, 100-01 (D.C. Cir. 1988).

³⁵ 575 F.Supp. 425, 429-30 (D.D.C. 1983).

³⁶ 863 F.2d at 100.

³⁷ 575 F. Supp. at 429.

³⁸ 863 F.2d at 100 (“Information relating to business judgments and relationships does not qualify for exemption [7(C)]”); 575 F.2d at 429 (“The privacy exemption [in Exemption 7(C)] does not apply to information regarding professional or business activities”).

³⁹ The D.C. Circuit, in *McCutcheon v. U.S. Dep't of Health and Human Services*, 30 F.3d 183, 187 (D.C. Cir. 1994), clarified that, although the exemption does not generally cover business judgments and relationships, information that accused individual employees of having committed a crime in connection with their employment would implicate “the privacy interest of personal honor” and that “the protection accorded reputation under Exemption 7(C) would generally shield material” that “would show that an individual was the target of a law enforcement investigation.” As noted, however, the internal corporate report in *Washington Post* did not identify any individual employees as being the targets of investigation and no such information is at issue in the present case.

⁴⁰ To the extent that the notices identified individuals as being potentially responsible for hazardous waste violations, the court held that the public interest outweighed the individuals’ privacy interests.

⁴¹ We have previously held that public embarrassment to a corporation did not warrant withholding material under Exemption 4. *Liberty Cable Co., Inc.*, 11 FCC Rcd 2475, 2476 ¶ 7 (1996), *aff'd sub nom. Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997), *citing CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) and *General Electric Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

harassment.⁴² We read the courts' discussion in these cases to refer to the literal embarrassment and danger that an individual might suffer from disclosure of information of a personal nature and not to the more abstract impact that disclosure might have on a legal entity like a corporation.

9. SBC also argues that in *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*,⁴³ the United States Supreme Court did not limit the applicability of Exemption 7(C) to individuals.⁴⁴ This argument is inapposite because *Reporters Committee* involved a rap sheet unique to a particular individual and the Court had no reason to address the applicability of its holding to corporations. Nonetheless, to the extent that *Reporters Committee* is at all relevant, it is fully consistent with EB's determination that Exemption 7(C) applies only to individuals' privacy interests. In analyzing the intent of Congress with respect to Exemption 7(C), *Reporters Committee* relies on both the Privacy Act⁴⁵ and FOIA Exemption 6, both of which apply only to individuals,⁴⁶ suggesting that the privacy interest involved in all three provisions is similar and applicable only to individuals.

10. SBC's remaining arguments amount to the assertion that because a corporation may be treated as a "person"⁴⁷ and have "privacy interests" for some purposes, it has personal privacy interests for purposes of Exemption 7(C). Such reasoning cuts too broadly. The privacy interests relevant to Exemption 7(C) are those discussed in paragraphs 8 and 9, *supra*. The interests underlying other forms of "privacy" that might be relevant in other contexts are not controlling for purposes of Exemption 7(C).⁴⁸

⁴² See, e.g., *Washington Post*, 863 F.2d at 100-01; *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 894 (D.C. Cir. 1995) ("... individuals have an obvious privacy interest . . . in keeping secret the fact that they were subjects of a law enforcement investigation," as do witnesses and informants); *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 333 (E.D. Va. 1996) ("Law enforcement officers, interviewees, suspects, witnesses, and other individuals named in investigatory files all have substantial privacy interests" because revelation could result in "embarrassment or harassment"). SBC notes that in *Alexander & Alexander Services, Inc. v. SEC*, 1993 WL 439799 (D.D.C. 1993) at *10, the district court held that Exemption 7(C) applies when "a private citizen seeks information regarding another private citizen or corporation. . . ." SBC Application for Review at 8. [Emphasis added.] However, that case, like *Washington Post*, concerned the personal privacy of individuals named in corporate documents, not the privacy of the corporation itself.

⁴³ 489 U.S. 749 (1989).

⁴⁴ *SBC Application for Review* at 4.

⁴⁵ 5 U.S.C. § 552a.

⁴⁶ See *Reporters Committee for Freedom of the Press*, 489 U.S. at 766-68. SBC admits that Exemption 6 applies only to individuals. *SBC Application for Review* at 6. The Privacy Act provides on its face that it applies only to individuals. See 5 U.S.C. § 552a (titled "Records maintained on individuals"). *Reporters Committee* effectively rebuts SBC's argument that EB erred in equating the protection afforded by Exemptions 6 and 7(C). *SBC Application for Review* at 6. See also note 36, *supra*.

⁴⁷ A corporation is defined as a "person" under the Administrative Procedure Act (APA), of which the FOIA is a part. See 5 U.S.C. § 551(2). Thus, a corporation falls within the scope of FOIA Exemption 4, which speaks of commercial and financial records obtained from a person. See *Lakin Law Firm, P.C.*, 19 FCC Rcd 12727, 12729 n.24 (2004), citing *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). The APA does not, however, define "personal" or "personal privacy." It is therefore irrelevant, for example, whether FOIA Exemption 7(B), which applies to records or information that "would deprive a person of a right to a fair trial or an impartial adjudication," applies to corporations, as SBC contends. *SBC Application for Review* at 6. A corporation's right to a fair trial is not based on any personal privacy interest.

⁴⁸ See *Reporters Committee*, 489 U.S. at 762 n. 13 ("The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution."), citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (Constitution prohibits State from penalizing publication of name of deceased rape victim obtained from public records).

Thus, for example, it is not relevant that a corporation may have a constitutionally protected privacy interest against unreasonable search and seizure of its property under the Fourth Amendment, as found in *U.S. v. Hubbard*,⁴⁹ cited by SBC. SBC has not demonstrated that the holding in *Hubbard* compels or even supports a finding that a corporation has any personal privacy interest that justifies withholding of documents under the FOIA.⁵⁰ Likewise, the privacy interests found in *Tavoulaareas v. Washington Post Co.*,⁵¹ and cited by SBC, involved the “constitutionally protected privacy interest in avoiding the public disclosure of sensitive commercial information [obtained in civil discovery and not used at a trial between private parties].”⁵² It had nothing to do with FOIA Exemption 7.⁵³ The constitutional privacy analysis applied by the panel in *Tavoulaareas* was, in any case, vacated on rehearing by the court *en banc*.⁵⁴

11. For all of the reasons discussed above, we find that Exemption 7(C) has no applicability to corporations such as SBC. Accordingly, we deny SBC’s application for review.

III. ORDERING CLAUSE

12. ACCORDINGLY, IT IS ORDERED that SBC Communications Inc.’s application for review IS DENIED. If SBC does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, the redacted records will be produced to CompTel, as specified in the Enforcement Bureau’s decision. *See* 47 C.F.R. § 0.461(i)(4).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁹ 650 F.2d 293, 306 (D.C. Cir. 1980), *cited in SBC Application for Review* at 6.

⁵⁰ In *Hubbard*, the government seized documents from non-public areas of the premises of the Church of Scientology. Subsequently, the Church proffered the documents in support of a motion asserting that the seizure was unconstitutional. The appellate court reversed the trial judge’s order unsealing the documents. It held that the “single most important element” in its decision to protect the documents was that they had been put in the record solely to support a motion to demonstrate the unlawfulness of the seizure and that it would undermine the Fourth Amendment for the documents to be disclosed under those circumstances. The fact that a corporation may have an interest in protecting itself from the unlawful seizure of its property does not imply that it has the distinctly different “personal privacy” interest relevant to Exemption 7(C).

⁵¹ 724 F.2d 1010, 1018 (D.C. Cir. 1984), *reh. granted en banc and vacated*, 737 F.2d 1170 (D.C. Cir. 1984), *cited in SBC Application for Review* at 5. The court *en banc* directed the District Court to apply a discretionary “good cause” analysis under Rule 26(c) of the Federal Rules of Civil Procedure, which relates to protective orders.

⁵² 724 F.2d at 1023.

⁵³ The privacy interest protected in *Tavoulaareas* seems somewhat similar to the interest protected by FOIA Exemption 4, which applies to corporations as well as individuals. 5 U.S.C. § 552(b)(4) (“trade secrets and commercial or financial information obtained from a person and privileged or confidential”).

⁵⁴ *See supra* note 51.