

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

In the Matter of )
)
GULF COAST WIRELESS LIMITED ) FOIA Control No. 2006-406
PARTNERSHIP )
)
On Request for Inspection of Records )

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 2008

Released: March 7, 2008

By the Commission:

I. INTRODUCTION

1. The Commission has before it an application for review1 filed by Gulf Coast Wireless Limited Partnership (GCW) of the decision of the Managing Director denying in part its Freedom of Information Act (FOIA) request.2 We dismiss part of the AFR as moot, and otherwise deny the AFR.

II. BACKGROUND

2. GCW filed a FOIA request for records related to refunds it alleges were due Meretel Communications Limited Partnership (Meretel), claiming to be the successor in interest to Meretel.3 The Managing Director granted in part and denied in part GCW's FOIA request, withholding records pursuant to FOIA Exemption 4 because it was unclear that GCW was the successor-in-interest to Meretel, the company whose confidential commercial information was at issue, and Exemption 5 with respect to six pages of internal Commission deliberative process materials.4 GCW filed this AFR. Subsequent to the filing of the AFR, GCW was acquired by Sprint Nextel.5 After discussions with Office of General Counsel (OGC) staff, Sprint Nextel filed a new FOIA request for the records withheld from GCW.6 The request also presented evidence that Sprint Nextel is the successor-in-interest to Meretel.7 The Managing Director granted in part and denied in part Sprint Nextel's FOIA request, providing it with the records

1 Application for Review of Freedom of Information Action, FOIA Control No. 2006-406 (Nov. 13, 2006) (AFR).

2 Letter from Anthony J. Dale, Managing Director, to Russell D. Lukas, Lukas, Nace, Gutierrez & Sachs (Oct. 13, 2006) (MD Decision).

3 Letters from Russell D. Lukas and David L. Nace, Lukas, Nace, Gutierrez & Sachs (Counsel for GCW) to Managing Director (June 19, 2006 amended June 20, 2006) (FOIA Control No. 2006-406). GCW's FOIA followed our decision in Russell D. Lukas, 21 FCC Rcd 6680 (2006), declining to release deliberative process records pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), and also declining to release Meretel's confidential commercial information to a requester other than Meretel or its demonstrated successor-in-interest pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4).

4 MD Decision at 2-3.

5 See Letter from Laura Holloway Carter, Vice-President, Government Affairs, Federal Regulatory, Sprint Nextel, to FOIA Officer (June 4, 2007) (FOIA Control No. 2007-393), at 1.

6 Id.

7 Id. at 1 and Exhs. A-C (attaching documentation of Meretel's change of name to GCW, and of Sprint's acquisition of GCW).

withheld from GCW as confidential commercial information, but withholding Commission deliberative records.<sup>8</sup> Sprint did not seek review of this decision.<sup>9</sup>

### III. DISCUSSION

3. We conclude that, in these circumstances, the AFR filed by GCW is moot with respect to the materials previously withheld under Exemption 4 because the documents have been provided to Sprint Nextel. Sprint Nextel demonstrated that it is the legal successor-in-interest to both Meretel and GCW.<sup>10</sup> Accordingly, the Managing Director provided to Sprint Nextel all of the documents located and withheld from GCW as confidential commercial records. GCW's legal successor-in-interest therefore has been provided with all of Meretel's confidential commercial records. There is thus nothing left to provide to GCW or its successor-in-interest, Sprint Nextel.

4. The AFR filed by GCW also deals with the six pages of material withheld under Exemption 5, arguing that even if the materials fall within Exemption 5, policy considerations favoring non-disclosure are outweighed by factors favoring disclosure.<sup>11</sup> We have already discussed why these six pages constitute deliberative process materials properly withheld under FOIA Exemption 5 and reaffirm that decision here.<sup>12</sup> In addition, we have already released a segregable factual portion of these pages (an embedded e-mail transmitting a letter from a third party to the Commission) and concluded that no other portions could be released.<sup>13</sup> While it is not mandatory for the Commission to withhold internal deliberative materials under FOIA Exemption 5,<sup>14</sup> we do not believe that a discretionary release of these six pages is warranted. GCW argues discretionary disclosure is warranted because of "the public's right to know what happened to [the refund it alleges was due to Meretel]."<sup>15</sup> Our review of these six pages

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<sup>8</sup> Letter from Anthony J. Dale, Managing Director, to Laura Holloway Carter (July 18, 2007). In his letter, the Managing Director inquired whether Mr. Lukas was the proper person to contact regarding the still-pending GCW AFR. *Id.* at 2.

<sup>9</sup> If Sprint Nextel intended to file an AFR, it was required to do so by August 19, 2007. *See* 47 C.F.R. § 0.461(j). It did not.

<sup>10</sup> *See* note 7, *supra*.

<sup>11</sup> AFR at 8-9.

<sup>12</sup> *Lukas*, 21 FCC Rcd at 6682 ("The six pages withheld here under Exemption 5 consist of staff analyses of GCW's correspondence with the Managing Director regarding refund claims of Meretel."), *citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

<sup>13</sup> *Id.*, 21 FCC Rcd at 6683 ("Disclosure of even portions of these documents would result in an unwarranted intrusion into the Commission's deliberative processes.").

<sup>14</sup> *See, e.g., Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997).

<sup>15</sup> AFR at 9. The cases cited by GCW (AFR at 8-9) are to no avail. To be sure, *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375, 385 (1980), notes, as GCW points out, that Congress enacted FOIA "to counteract 'the efforts of official to prevent the release of information in order to hide mistakes or irregularities committed by the agency.'" *GTE* goes on, however, to observe that "Congress was largely concerned with the unjustified suppression of agency information by officials." *Id.* And, in any case, notwithstanding its general concerns, Congress created an exemption allowing agencies to withhold deliberative process materials. Further, here, for the second time, we have examined the documents sought by GCW and its successor-in-interest, Sprint Nextel. There is certainly no evidence here of any attempt to hide "mistakes or irregularities" where staff has so diligently searched for any records regarding the refunds. GCW also cites to *Dobronski v. FCC*, 17 F.3d 275 (9th Cir. 1994), a very different proceeding involving an employee's sick leave records ordered to be released over the Commission's objections that such a release would violate the employee's personal privacy, *see* 5 U.S.C. § 552(b)(6) (personal privacy exemption in FOIA). The continued vitality of the holding in *Dobronski* is questionable in light of the Supreme Court's decision in *NARA v. Favish*, 541 U.S. 154 (2004). *See Supreme Court Rules for "Survivor Privacy" in Favish* (Dep't Of Justice, FOIA Post 2004), *available at* <<http://www.usdoj.gov/oip/foiapost/>> (continued....)

once again indicates that they contain no information that would shed any light on GCW's assertion concerning refunds allegedly due to Meretel. We therefore decline to exercise our discretion and release the six pages.<sup>16</sup>

#### IV. ORDERING CLAUSES

5. IT IS ORDERED that the application for review by Gulf Coast Wireless Limited Partnership is DISMISSED IN PART AS MOOT and is otherwise DENIED. Gulf Coast Wireless Limited Partnership may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

6. The officials responsible for this action are the following Commissioners: Chairman Martin, Commissioners Copps, Adelstein, Tate and McDowell.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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2004foiapist12.htm> (“Indeed, the Supreme Court's total repudiation of the Ninth Circuit's disclosure rationales in *Favish* necessarily sweeps broadly enough to discredit (or effectively overrule) that circuit court's . . . aberrational Exemption 6 decision . . . [in ] *Dobronski*”). In any case, the court in *Dobronski* concluded that the privacy interest at stake was “minimal.” 17 F.3d at 275. The same cannot be said of the agency's interest in preserving the confidentiality of the deliberations by which governmental decisions are formulated. *See Sears, Roebuck*, 421 U.S. at 150.

<sup>16</sup> GCW's only other argument (AFR at 12) is that the Commission should provide a Vaughn Index, *see Vaughn v. Rosen*, 484 F.2d 280 (D.C. Cir. 1973). It is well established that a Vaughn Index is not required at the administrative level. *See Dateline NBC*, 21 FCC Rcd 6675, 6677 n.14 (2006) (“A listing and description of individual withheld documents, or ‘Vaughn Index,’ is not required at the administrative level.”); *see also Schwarz v. U.S. Dep't of Treasury*, 131 F.Supp.2d 142, 147 (D.D.C. 2000), *aff'd*, No. 00-5453 (D.C. Cir. 2001). GCW's reference to *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1180-81 (D.C. Cir. 1996), is inapposite, as the court in that case addressed the inadequacy of a Vaughn Index filed in court, not at the administrative level.