

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

In the Matter of)	
)	
JOHAN KARLSEN)	FOIA Control No. 2008-465
)	
On Request for Inspection of Records)	
)	
RALLY CAPITAL, LLC)	
)	
On Request for Confidential Treatment)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2009

Released: September 30, 2009

By the Commission:

1. By this memorandum opinion and order, we grant in part and deny in part an application for review filed by Rally Capital, LLC (Rally)¹ seeking review of a decision of the Enforcement Bureau (EB)² granting in part and denying in part a Freedom of Information Act (FOIA) request by Johan Karlsen (Karlsen).³

I. BACKGROUND

2. Karlsen’s FOIA request sought “[a]ll documents related to the matter of Rally Capital, LLC, File No. EB-07-IH-4089, NAL Acct. No. 200732080038, FRN No. 0015577208, DA 07-4017.”⁴ EB was investigating whether there was a transfer of control of Telesphere

¹ Letter from Harris, Wiltshire & Grannis, LLP, Counsel for Rally Capital, LLC, to Matthew Berry, General Counsel, Federal Communications Commission (Dec. 1, 2008) (AFR).

² Letter from Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau to Johan Karlsen (Nov. 14, 2008) (Decision).

³ Letter from Johan Karlsen to FOIA Public Liaison (May 7, 2008) (FOIA Request). Karlsen neither appealed the Decision nor opposed the AFR.

⁴ *Id.* at 2.

Networks Ltd. to Rally without the Commission's prior authorization.⁵

3. In response to Karlsen's FOIA Request, EB stated that it had located 197 pages of responsive documents consisting of a seven-page EB Letter of Inquiry (LOI), dated June 15, 2007, to Rally; Rally's 183 page response to the EB LOI (LOI Response), dated June 29, 2007; and a seven-page Notice of Apparent Liability for Forfeiture, released September 24, 2007.⁶

4. In its LOI Response, Rally requested confidential treatment⁷ of a total of 103 pages pursuant to FOIA Exemption 4.⁸ In its FOIA Decision, EB granted in part and denied in part Rally's request for confidentiality. EB agreed with Rally's contention that certain attachments to the LOI Response⁹ should be withheld under FOIA Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." EB found, however, that two documents, the 14-page LOI Response letter and a two-page Exhibit 5 consisting of an organizational chart reflecting the company's ownership structure, did not contain any commercially sensitive information. It therefore denied Rally's request for confidentiality regarding those documents.¹⁰

5. Rally filed an application for review under 47 C.F.R. § 0.461(i) in which it maintains that the 14-page letter and Exhibit 5 contain confidential and commercially sensitive information protected by FOIA Exemption 4.¹¹ Rally contends that disclosure of the details contained in these documents could be exploited by competitors to inflict substantial competitive harm.¹²

II. DISCUSSION

6. For the reasons discussed below, we grant in part and deny in part Rally's AFR.

A. Procedural Issue

7. Rally argues that Karlsen's FOIA Request was insufficient and should be denied because the requester "failed even to provide 'a statement of the reasons for inspection and the

⁵ Letter from Trent B. Harkrader, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau to Dennis Weibling, Rally Capital, LLC (June 15, 2007) (LOI). *See generally* 47 U.S.C. § 214(a) and 47 C.F.R. §§ 63.03 and 63.24 (transfer of control requires Commission authorization).

⁶ *See* Decision at 1. The LOI (7 pages), the Notice of Apparent Liability for Forfeiture (7 pages), and certain Appendices to the LOI Response (80 pages) were released to the requester because Rally did not claim confidential treatment for these documents.

⁷ *See* 47 C.F.R. § 0.457(d). Effective April 29, 2009, the Commission amended its FOIA rules at 47 C.F.R. Part 0. *74 Fed. Reg.* 14073 (Mar. 30, 2009). To the extent this matter refers to any sections of FOIA rules that changed, we are using the rules in effect when the FOIA request was filed.

⁸ *See* 5 U.S.C. § 552(b)(4).

⁹ EB determined that it should withhold 87 pages of Exhibits consisting of commercially sensitive information such as Rally's revenue data and tax returns. Decision at 2.

¹⁰ *Id.* at 2. Pursuant to the Commission's rules, those documents continue to be withheld pending the resolution of the AFR. *See* 47 C.F.R. § 0.461(i).

¹¹ *See* AFR.

¹² *Id.*

facts in support thereof...as required by the Commission's rules."¹³ The Commission has previously found that non-compliance with the rule by the requester does not bar the consideration and grant of a FOIA request.¹⁴ Thus, we reject Rally's argument that Karlson was required to supply a statement of reasons for seeking inspection of the records.

B. Exemption 4

8. Under FOIA Exemption 4, agencies may withhold documents obtained from a person that contain trade secrets and commercial and financial information that are privileged or confidential.¹⁵ The exemption affords protection to submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.¹⁶

9. Rally asserts that the documents contain proprietary information concerning Rally's acquisition history and financing; detail non-public business decisions undertaken with respect to Telesphere; and include sensitive ownership information about which the FCC does not otherwise require disclosure. Rally further contends that the documents contain confidential information regarding investments of Rally and its owners and financing decisions of a privately-held company that would not customarily be released to the public; have not been publicly released in any published financial report or other public document; and provide greater detail than would be voluntarily disclosed.¹⁷ Rally asserts that "[r]evealing details of [its] acquisition history, financing history, and strengths and weaknesses of the company could be used by competitors to compete with Rally Capital or its subsidiaries for customers and capital or to call the company's financial viability into question with investors or potential customers."¹⁸

10. Competitive harm under FOIA Exemption 4 includes the harm caused by release of detailed financial information such as a company's assets, liabilities and investments.¹⁹ Thus, EB granted confidentiality for the exhibits containing Rally's detailed financial information, such as revenue data and tax returns.²⁰

11. The Commission finds that the details of Rally's acquisition and financing history, business decisions, ownership information, and investment and financing decisions are not confidential. First, Rally has not shown that release of the 14-page letter would cause substantial competitive harm to it. Conclusory and generalized allegations of substantial competitive harm are insufficient and cannot support a decision to withhold requested

¹³ AFR at 2, citing 47 C.F.R. § 0.461(c).

¹⁴ See, e.g., *Bob Davis*, 2 FCC Rcd 6715, 6717 (1987).

¹⁵ See 5 U.S.C. § 552(b)(4) (authorizing the withholding of "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential").

¹⁶ Decision at 1, citing *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); see also *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

¹⁷ AFR at 2.

¹⁸ *Id.*

¹⁹ See, e.g., *Inner City Press/Cnty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, No. 98 CIV. 4608, 1998 WL 690371, at *5 (S.D.N.Y. Sept. 30, 1998) (upholding the redactions of financial information), *aff'd*, 182 F.3d 900 (2d Cir. 1999).

²⁰ Decision at 2.

documents.²¹ Rally contends that the documents contain greater detail than would be voluntarily disclosed. Our review of Rally's LOI Response indicates that it consists of a general summary of the Exhibits that is devoid of details that would be of value to competitors.²²

12. Further, Rally claims that the entire text of the letter should be afforded protection, without specifying which parts of the letter are confidential. Based on our review of the letter, clearly the entire document should not be subject to confidential treatment. Much of the information contained in this material does not appear to be substantially different from information already in the public domain.²³ In particular, Rally's claims that the documents contain non-public investment, financing, and business decisions regarding Telesphere are not persuasive because information regarding the transfer of control of Telesphere to Rally is publicly available.²⁴ Moreover, parts of the letter summarize information contained in non-confidential exhibits to the LOI Response that EB already disclosed without objection from Rally. Another portion of the letter summarizes confidential exhibits by indicating that Rally is providing copies of tax returns and financial statements which the LOI requested. Those documents were withheld

²¹ *Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). See also 47 C.F.R. § 0.459(c).

²² *Cf. CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1155 (D.C. Cir. 1987), *cert denied*, 485 U.S. 977 (1988) (finding that information claimed to be confidential and competitively sensitive pursuant to Exemption 4 would "not be of any particular help to competitors").

²³ For example, information about Rally Capital's direct and indirect owners and subsidiaries is publicly available. See <http://www.edgar-online.com> (Form SC 13G ICO Global Communications (Holdings) Ltd (filed February 14, 2007) includes shares held by Mente, LLC, Teledesic LLC, and William H. Gates, III; Form DEF 14A ICO Global Communications (Holdings) Ltd (for period ending June 15, 2007) lists amount and nature of shares of Mente, LLC, that William H. Gates III is sole owner, and stocks held by Teledesic); <http://www.sec.gov> (SEC Form D Notice of Sale of Securities (signed May 8, 2002) of Teledesic Corporation Common Stock Option, includes Dennis Weibling, Dennis James, Mente, LLC, and William H. Gates III; SEC Form D Notice of Sale of Securities (filed June 5, 2008) of Telesphere Networks, Ltd. Series B Preferred Stock and Underlying Common Stock, lists Dennis Weibling, Dennis James, Todd Miszner, Rally Capital, LLC); and <http://www.fcc.gov> (Notice of Apparent Liability for Forfeiture (September 24, 2007) and Application for Transfer of Control of Telesphere Networks Ltd. to Rally Capital, LLC (October 12, 2006); <http://www.muckety.com> (lists relationships between: William H. Gates III and other entities, including Mente, LLC; Dennis M. Weibling and Rally Capital, LLC; Rally Capital, LLC and Teledesic and Dennis M. Weibling; and Teledesic LLC); <http://www.secinfo.com> (William H. Gates III, group member of Mente, LLC); <http://tek-info.blogspot.com> (lists Teledesic investors, including William H. Gates); <http://gsec.abudhabi.ae/Sites/GSEC/Navigation/EN/Executive> Council (member profile of H.H. Sheikh Saeed Been Zayed Al Nehayan, leader of Abu Dhabi, as owner of Teledesic Holdings, Ltd.); <http://investing.businessweek.com> (Dennis James, Chief Operating Office; Todd Miszner, Vice President of Finance; and Dennis Weibling, Board of Directors, Telesphere, primary company is Rally Capital, LLC); Dennis M. Weibling, Managing Director to Rally Capital, LLC and other affiliations to Teledesic; <http://web2westlaw.com> (executive information on Dennis Weibling, Chairman and Dennis James as registered agent, Telesphere Networks Ltd; <http://people.forbes.com> (Dennis M. Weibling profile, includes Managing Director of Rally Capital, LLC a "private equity fund that is wholly-owned subsidiary of Teledesic Corporation, of which he is a director" and also serves in other companies in which Rally Capital has invested, including Telesphere Networks Ltd.); <http://www.manta.com> (profiles of Dennis M. Weibling and Rally Capital).

²⁴ See Notice of Apparent Liability for Forfeiture (September 24, 2007) at n.23 citing Telesphere Networks Ltd., Transferor and Licensee and Rally Capital, LLC, Transferee, Application for Consent to Transfer Control of a Telecommunications Carrier Authorized to provide Global-Facilities-Based and Global Resale International Telecommunications Services and to Transfer Control of Domestic Common Carrier Transmission Lines (filed October 24, 2006).

by EB, but their mere existence is not a confidential commercial matter. Another part of the letter consists of Rally's argument in favor of confidential treatment. We do not see, and Rally does not explain, how disclosure of this information would enable its competitors to gain a competitive edge. Without greater specificity, we are unable to determine that any portions of the letter would result in competitive harm if disclosed. Since Rally failed to demonstrate that any specific portion of the letter is entitled to confidential treatment, we agree with the Bureau's decision to release the letter in its entirety.²⁵

13. Rally claims that Exhibit 5 contains "sensitive ownership information."²⁶ According to the LOI Response, the organizational chart was prepared by Rally's legal advisor and details the direct and indirect owners and subsidiaries. The direct and indirect owners and subsidiaries of Rally, however, are publicly identified in financial reports filed with the SEC and other websites.²⁷ To the extent information is in the public domain, Rally cannot claim the information is confidential.²⁸ Consequently, much of the ownership information in the chart is not protected by FOIA Exemption 4. However, the chart also lists the numbers of shares, types/class of shares, and percentages of ownership among Rally Capital and related entities – information that does not appear to be publicly available and is of the type customarily withheld under Exemption 4.²⁹ Accordingly, we conclude that the numbers of shares, types/class of shares, and percentages of ownership should be withheld pursuant to Exemption 4, and thus will be redacted from the Exhibit 5 organizational chart.³⁰

14. Rally also contends that the information at issue in this AFR appears to be sought by a competitor for use in a private dispute and not to serve the public interest, to learn about the actions of the Commission, or to participate in or monitor the enforcement or other ongoing proceeding before the Commission.³¹ A FOIA requester's reasons for seeking documents is, however, irrelevant to determining whether documents may be withheld under Exemption 4.³² Moreover, the LOI Response was referenced in the Commission's Notice of Apparent Liability for Forfeiture finding that Rally apparently willfully or repeated violated the Commission's rules by consummating unauthorized transfers of control.³³ The documents thus do shed light on the actions of the Commission. Accordingly, for the reasons set forth above, and with the exception of a portion of the chart, Rally has not shown that the documents should be withheld under

²⁵ Rally cites *Department of the Air Force v. Rose*, 425 U.S. 352, 380-81 (1976), for the proposition that the "information could not be redacted under Exemption 4 because of the possibility that other parties might be able to identify confidential information even if part of the information was redacted." AFR at 3. The cited portions of *Rose* dealt with Exemption 6 (personal privacy of cadet's disciplinary information), not Exemption 4. In any event, Rally does not demonstrate that *any* portions of the letter legitimately constitute sensitive information.

²⁶ AFR at 2.

²⁷ See n.23 *supra*.

²⁸ See *Mercury PCS II, LLC*, 15 FCC Rcd 14559, 14572 (2000), citing *CNA Financial Corp. v. Donovan*, 830 F.2d at 1154.

²⁹ See ¶ 10 above.

³⁰ See 5 U.S.C. § 552(b); 47 C.F.R. § 0.461(f)(5).

³¹ AFR at 2.

³² *Daniel A. Edelman, Esq.*, 19 FCC Rcd 12741 (2004), citing *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992).

³³ See Notice of Apparent Liability for Forfeiture at 2-5 nn.13-20, 22, 24, 29, 40-41, and 44.

Exemption 4.

III. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED that RALLY CAPITAL LLC's application for review IS GRANTED IN PART AND DENIED IN PART. If Rally does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, the records will be produced to Karlsen, as specified in the Enforcement Bureau's decision, and with redactions to Exhibit 5 as discussed herein. *See* 47 C.F.R. § 0.461(i)(4).

16. The following officials are responsible for this action: Chairman Genachowski, Commissioners Copps, McDowell, Clyburn and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary