

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

In the matter of )
JUDICIAL WATCH, INC. ) FOIA Control No. 2003-497
On Request for Inspection of Records )

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 2004

Released: May 28, 2004

By the Commission:

1. The Commission has before it an application for review filed by Judicial Watch, Inc., of a decision of the International Bureau (the Bureau) granting in part and denying in part its Freedom of Information Act (FOIA) request for records involving Global Crossing. For the reasons stated below, we grant in part and deny in part the application for review.

I. BACKGROUND

2. Judicial Watch filed a FOIA request for records concerning (1) the representation of Global Crossing by Anne K. Bingaman; (2) meetings and telephone or conference calls between Anne Bingaman and any official or representative of the Commission; (3) Senator Jeff Bingaman and Global Crossing; and (4) "the decision of the FCC to delay a license to the AT&T led consortium of Global Crossing rivals." The Bureau initially informed Judicial Watch that there were many records concerning the AT&T Corp. cable landing license application that were publicly available. The Bureau then, in a further response, granted in part and denied in part the FOIA request. Specifically, the Bureau located and provided to Judicial Watch the calendar of Bureau Chief Donald Abelson, redacted to eliminate personal information pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), and to eliminate predecisional informational references pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5). The Bureau also located the calendar of Bureau Chief Economist Douglas Webbink, but explained that his calendars were not agency records subject to the FOIA. Also identified in response to the request were internal e-mails, staff memorandums, briefing papers, and outlines related to submarine cable licensing issues, all of which

2 Letter from Christopher J. Farrell, Judicial Watch, Inc., to Shoko B. Hair, FOIA Officer (July 2003) (received July 29, 2003) (FOIA Request).

3 Letter from James L. Ball, Chief, Policy Division, International Bureau, to Christopher J. Farrell, Judicial Watch, Inc. (Sept. 25, 2003) (First FOIA Response).

4 Letter from James L. Ball, Chief, Policy Division, International Bureau, to Christopher J. Farrell, Judicial Watch, Inc. (Sept. 25, 2003) (Second FOIA Response).

5 Id. at 1-2.

6 Id. at 2, citing Bureau of National Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1494 (D.C. Cir. 1984) (BNA).

the Bureau withheld under FOIA Exemption 5.<sup>7</sup> Judicial Watch filed an application for review of the Second FOIA Response.<sup>8</sup>

## II. DISCUSSION

3. For the reasons discussed below, we grant in part and deny in part the application for review.

### Bureau Chief Calendars

4. Judicial Watch first seeks review of the redaction of material from the calendars of Bureau Chief Abelson, arguing that “[t]here is a compelling public interest in the full release of documents and information withheld under Exemption 5 of the FOIA.”<sup>9</sup> Bureau Chief Abelson’s calendars record his appointments and meetings with a brief parenthetical description of the subject of the appointment or meeting. We have reviewed these materials and note that nothing redacted by the Bureau falls within the subject of this FOIA request. Any appointments and meetings on Bureau Chief Abelson’s calendars that did not involve the subject of this FOIA request are simply not responsive to the request and therefore properly were redacted from the records released to Judicial Watch.<sup>10</sup> Indeed, Judicial Watch states that it does not seek information in the calendars that is not responsive to its FOIA request.<sup>11</sup> Accordingly, we need not decide whether the materials might also have been withheld under Exemption 5.

### Bureau Chief Economist Calendars

5. The Bureau determined that Chief Economist Webbink’s calendars containing entries within the scope of the FOIA request were in fact not agency records subject to disclosure under the FOIA.<sup>12</sup> Judicial Watch seeks review of this determination, arguing that there is a “compelling public interest” for the release of the calendars of Mr. Webbink, referred to by Judicial Watch as “a senior FCC official.”<sup>13</sup> It notes that Mr. Webbink’s calendars “have an impact on policy at the FCC which characterizes them as ‘official’ to the work of the Commission.”<sup>14</sup>

6. To determine whether these records are “agency records” within the meaning of the FOIA,<sup>15</sup> “it is necessary to look at the circumstances surrounding the creation, maintenance, and use of the documents within the agency.”<sup>16</sup> The factors to be weighed include how the calendar is maintained, who has access to the calendar, whether it is distributed to staff, and how it is handled under relevant records

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<sup>7</sup> Id. at 2.

<sup>8</sup> Letter from Christopher J. Farrell, Judicial Watch, Inc. to Office of General Counsel (Oct. 27, 2003) (Application for Review).

<sup>9</sup> Id. at 1. Judicial Watch does not seek review of the redaction under FOIA Exemption 6 of the personal entries on Bureau Chief Abelson’s calendars.

<sup>10</sup> See Michael Ravnitzky, 16 FCC Rcd 21745, 21747 & n.21 (2001), citing Public Employees for Environmental Responsibility, Rocky Mountain Chapter v. United States Environmental Protection Agency, 978 F. Supp. 955, 965 (D. Colo. 1997) (records not responsive to FOIA request need not be disclosed).

<sup>11</sup> Application for Review at 2.

<sup>12</sup> Second FOIA Response at 2, citing BNA, supra.

<sup>13</sup> Application for Review at 2.

<sup>14</sup> Id.

<sup>15</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>16</sup> BNA, 742 F.2d at 1494.

retention statutes.<sup>17</sup> The Bureau explained that Mr. Webbink's calendar is not made publicly available and are not circulated to other members of the Bureau staff.<sup>18</sup> In addition, the calendar is solely controlled by Mr. Webbink.<sup>19</sup> He creates the calendar for his own convenience, and he may dispose of it at will. The calendars are maintained by Mr. Webbink and not integrated into the FCC's files. Contrary to Judicial Watch's contention, Mr. Webbink's status as a senior agency official does not render the calendar an agency record subject to FOIA.<sup>20</sup> Moreover, our review of the circumstances of the creation and use of Mr. Webbink's calendar indicates that the calendar is used for Mr. Webbink's personal convenience only, and does not have an impact on FCC policy. Thus, the Bureau properly concluded that Mr. Webbink's calendars are not agency records subject to disclosure under the FOIA

#### Internal Commission Records

7. The Bureau withheld pursuant to FOIA Exemption 5 approximately 70 internal Commission e-mails, staff memorandums, briefing papers and outlines.<sup>21</sup> In its application for review, Judicial Watch maintains that "beyond any claim of exemption by the agency," there is a compelling public interest in the disclosure of these materials because "the American public deserves full disclosure of all information held by the FCC regarding representatives of [Global Crossing] to lobby or persuade the Commission to grant government contracts and/or favors to [Global Crossing] at the expense of the taxpayer."<sup>22</sup>

8. We conclude that discretionary release of these materials is not appropriate here. Disclosure of the information in question would harm the Commission's interest underlying the deliberative process privilege embodied in FOIA Exemption 5, which is intended to "prevent injury to the quality of agency decisions."<sup>23</sup> The records at issue here include recitations of staff opinions that, if released, "would actually inhibit candor in the decision-making process."<sup>24</sup> We note further that the Commission's ex parte rules provide for public disclosure of any communications concerning the merits of Commission proceedings.<sup>25</sup> We therefore decline to exercise our discretion to release these internal records.

9. Our review of the records withheld by the Bureau, however, located two records submitted to the Bureau from outside of the Commission that should have been made available to Judicial Watch.<sup>26</sup> We will release these two documents, after redacting personal telephone numbers and handwritten staff

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<sup>17</sup> Id., citing Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 157 (1980) (the four factors to be considered are whether the documents are in the agency's control, are generated within the agency, are placed in the agency's files, and are used by the agency for any purpose).

<sup>18</sup> Second FOIA Response at 1.

<sup>19</sup> Id. at 2 (the calendars are considered Mr. Webbink's "personal records").

<sup>20</sup> See Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 479-80 (2d Cir. 1999).

<sup>21</sup> Second FOIA Response at 2.

<sup>22</sup> Application for Review at 2.

<sup>23</sup> Ravnitzky, 16 FCC Rcd at 21748, quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). See also Rob Evans, 17 FCC Rcd 15146, 15147 (2002).

<sup>24</sup> Ravnitzky, 16 FCC Rcd at 21748.

<sup>25</sup> See 47 C.F.R. § 1.1206.

<sup>26</sup> We note that one of the documents was also submitted in the public record of a Commission proceeding. The other document, containing biographical and other background information, was accompanied by an apparent request for confidentiality that was subsequently rescinded by the submitter.

notes pursuant to FOIA Exemption 5 and FOIA Exemption 6.<sup>27</sup> We also release a newspaper article that was among the records located by the Bureau in response to this FOIA request.

### III. ORDERING PARAGRAPHS

10. Accordingly, IT IS ORDERED that Judicial Watch, Inc.'s Application for Review IS GRANTED IN PART AND DENIED IN PART. Judicial review of this action may be sought pursuant to 5 U.S.C. § 552(a)(4)(b).

11. The officials responsible for this action are the following Commissioners: Chairman Powell, Commissioners Abernathy, Copps, Martin and Adelstein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>27</sup> 5 U.S.C. §§ 552(b)(5) and 552(b)(6).