ENVIRONMENTAL HEALTH TRUST

Freedom of Information Act Appeal

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Appeal RE: FOIA Control Nos. 2023-000281 and 2023-000325

This letter constitutes an appeal of the Federal Communications Commission ("FCC") determination granting in part and denying in part Theodora Scarato's request under the Freedom of Information Act ("FOIA") on behalf of the Environmental Health Trust (FOIA Control Nos. 2023-000281 and 2023-000325). The Environmental Health Trust ("EHT") appeals all aspects of the FCC's denial, including the withholding of all or part of the requested records.

BACKGROUND

On January 3, 2023 and February 8, 2003, Theodora Scarato of the Environmental Health Trust initially requested records related to cell phone radiation tests performed by the FCC from January 2017 through April 2020. On September 29, 2023, she received 11 of 18 documents in response, along with a letter signed by Ronald T. Repasi Chief, Office of Engineering & Technology at the FCC.

In regards to the seven documents the FCC withheld from the FOIA response, the FCC stated, "The records withheld under Exemption 5, constituting internal documents and emails, contain pre-decisional internal deliberations among Commission staff. These records include staff summaries, pre-decisional discussion of the merits of information provided by third parties, preliminary thoughts of agency staff regarding policy, and general discussion of internal staff questions and viewpoints. Particularly, the withheld records implicate sensitive matters that require particular candor in the advice given to decision makers, which would be discouraged by the public release of the advice. We have determined that it is reasonably foreseeable that disclosure would harm the

Commission's deliberative processes, which Exemption 5 is intended to protect. Release of this information would chill deliberations within the Commission and impede the candid exchange of ideas."

The 11 records released on September 29, 2023 revealed that FCC had tested several popular cell phones (Apple, Samsung, Motorola, Blu models) for cell phone radiofrequency (RF) radiation SAR levels in positions mimicking the phone in the pocket, specifically at 2 mm distance between the phone and the body phantom. The FCC's findings showed RF radiation SAR level measurements that violated FCC limits when tested in this position. This is the first known public release of these records.

These records further state: "We observed that at a 2 mm separation distance, the FCC radiofrequency (RF) exposure limits were exceeded". The FOIA records released by the FCC document cell phone radiation SAR levels as high as 5.2 W/kg --more than 3 times the current SAR limit of 1.6 W/kg.

The FCC's tests were conducted in response to an August 21, 2019, Chicago Tribune investigation that reported that phones tested in close body contact (at 2 mm) exceeded FCC's SAR radiation limits several-fold. The Tribune chose the 2 mm distance to mimic real world cell phone use with a phone in a tight pants pocket.

Soon after the report made headlines, the FCC issued a December 19, 2019 report stating that they had tested the same phone models and that the phones met FCC limits. However, this report only included the FCC's cell phone radiation SAR test findings done with the phone distanced from the body at 5 mm to 15 mm. The December 19, 2019 report did not include findings from the FCC tests done at 2 mm from the body that found cell phone radiation SAR levels over 300% of the FCC limit.

At the time, the agency also had an open rule-making followed by a court challenge (*EHT v. FCC*) regarding its 1996 limits and regulations for human exposure to cell phone radiation. A central issue involved the FCC's premarket cell phone compliance tests that do not require phones to be tested in body contact positions. The FCC withheld this data from the Inquiry and it was not included in any court filings. Further, the Inquiry addressed the adequacy of the FCC's human exposure limits as the limits were designed to only protect for short term exposure, not long-term exposure.

The materials provided in response to the EHT FOIA noted that the FCC cell phone radiation SAR radiation testing commenced August 30, 2019 and concluded on

September 23, 2019. Yet on December 4, 2019, the FCC issued a decision in its 7 year inquiry that omitted both (i) public opportunity to comment on and (ii) possibly full FCC personnel access to the FCC's 2 mm cell phone tests data. The FCC stated that "Even though some parties claim that the RF exposure evaluation procedures for phones should require testing with a "zero" spacing – against the body – this is unnecessary."

DISCUSSION

The FCC Should Not Withhold Documents Based on Exemption 5

The FCC withheld certain documents from EHT based on the FOIA exemption in 5 U.S.C. § 552(b)(5) (shielding certain inter-agency or intra-agency documents from disclosure). To begin with, EHT challenges the application of 5 U.S.C. § 552(b)(5) to the records requested. However, because the FCC has not provided any sufficient description of any of the records withheld (apart from what can be gleaned from the claimed exemption), the EHT lacks the ability to make any document-by-document arguments at this time.

Exemption 5, the deliberative process privilege, has been interpreted for the general purpose to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 151 (1975). Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See, e.g., Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc); *Heggestad v. United States Dep't of Justice*, 182 F. Supp. 2d 1, 12 (D.D.C. 2000). Despite the breadth of the goal of protecting such information from disclosure, this exemption is not a cover-all that applies merely because it is invoked.

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked. See *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing Petroleum Info.

Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992))). First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." *Jordan*, 591 F.2d at 774. Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). The burden is upon the agency to show that the information in question satisfies both requirements. *See Coastal States*, 617 F.2d at 866. Finally, even if a document is clearly protected from disclosure by the deliberative process privilege, it may lose this protection if a final decisionmaker "chooses expressly to adopt or incorporate [it] by reference." *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 973 (7th Cir. 1977); *Bhd. of Locomotive Eng'rs v. Surface Transp. Bd.*, No. 96-1153, 1997 WL 446261, at **4-5 (D.D.C. July 31, 1997) (finding that staff recommendation was adopted in both written decision and commission vote); *Burkins v. United States*, 865 F. Supp. 1480, 1501 (D. Colo. 1994) (holding that final report's statement that findings are same as those of underlying memorandum constituted adoption of that document); *Atkin v. EEOC*, No. 91-2508, slip op. at 23-24 (D.N.J. July 14, 1993) (holding recommendation to close file not protectible where it was contained in agency's actual decision to close file).

In an effort to obtain sufficient information to make this document-by-document assessment, on October 7, 2023, Theodora Scarato sent an email to the David Duarte, FCC Spectrum Allocations Analyst, OET/ Policy & Rules Division requesting the Vaugh list for the redacted documents from the FCC including the date of document; originator; originating component, the author, and the recipient; subject/title of document; total number of pages reviewed; number of pages of reasonably segregable information released; number of pages denied; exemption(s) claimed; justification for withholding. In response, Scarato received an email on October 16, 2023 from Duarte stating that, “We are happy, to the extent we are able, to answer any specific questions you may have regarding the material that may have been withheld in our response to your two requests. That said, however, agencies are not required to provide FOIA requesters with a Vaughn Index to complement an administrative FOIA response and we will not do so in this instance which is consistent with agency practice.” On October 16, 2023, Theodora Scarato emailed David Duarte requesting the: date of document, author and recipient; Subject/title of document; total number of pages for each document and exemption(s) claimed for each document. On November 8, 2023, David Duarte emailed Theodora Scarato that, “This request is the equivalent of a Vaughn’s Index. As stated before, we are not required to provide one with an administrative FOIA response and

will not be providing one for these FOIA requests. Please let us know if you have any furthers questions regarding your requests."

The FCC Must Still Provide Documents that Contain Non-Exempt Materials

Even assuming that 5 U.S.C. § 552(b)(5) applies, the FCC is obligated to provide segregable, non-exempt portions of such records. For example, even when an agency document embodies pre-litigation deliberations that would normally be exempt under (b)(5), the factual content underlying those deliberations must still be produced. *See Ryan v. DOJ*, 617 F.2d 781, 790-91 (D.C. Cir. 1980); *Mead Data Cent., Inc., v. Department of the Air Force*, 566 F.2d, 242, 260 (D.C. Cir. 1977); *EPA v. Mink*, 410 U.S. 73, 91 (1973) (refusing to extend deliberative process privilege protection to "factual material otherwise available on discovery merely [on the basis that] it was placed in a memorandum with matters of law, policy, or opinion"); Coastal States, 617 F.2d at 867 (citing *Mink*, 410 U.S. at 93); *Bilbrey v. United States Dep't of the Air Force*, No. 00-0539, slip op. at 10-11 (W.D. Mo. Jan. 30, 2001) (holding privilege inapplicable to factual statements underlying predecisional recommendations), aff'd, No. 01-1789, 2001 WL 1222471, at *1 (8th Cir. Oct. 16, 2001) (unpublished table decision*); Sw. Ctr. for Biological Diversity*, 170 F. Supp. 2d at 941 (concluding that release of "raw research data" would not expose agency's deliberative process, on grounds that such data were not recommendations, not subject to alteration upon further agency review, and not "selective" in character).

The FCC failed to provide segregable portions of documents that it claims are exempt under 5 U.S.C. § 552(b)(5). Even if the exemption does apply, portions of those documents should be disclosed to the EHT.

The FCC Should Provide the Documents Based on the Extreme Interest to Public Health

Finally, we request that you release the withheld documents notwithstanding their purported exempt status based on the critical nature of the information and the heightened public interest. The public interest in their release outweighs the public interest in withholding them because most of the American public uses cell phones with the phone pressed to their body. If there is a balance to be weighed between protecting deliberative privilege and the notification of the public of harmful interference the balance should be on side of transparency and public health.

Real world use of phones often occurs with phones 2mm from the body or even in direct skin contact (0 mm). If phones are exceeding the regulatory limit in positions of real-world use, the public has a right to be informed. Nearly every child and adult in the United States uses a cell phone in direct body contact, i.e phones in the pocket, held up to the chest or on lap. Parents use phones pressed against the body of their infants unaware that the phones even emit radiation. The public is not aware that phones exceed radiation limits when the phone is used in body contact as the FCC's 2 mm tests reveal. There is no clear consumer information informing users to distance their body from the phone despite the FCC stating that no additional consumer information is necessary.

The public health implications of continuing the withhold this information are far reaching. Scientific research has found adverse effects from cell phone radiation exposure at levels well below FCC limits with study findings that include cancer, the induction of oxidative stress, epigenetic effects, impacts to neurotransmitters, memory, brain development and damage to the immune, endocrine, hematological and reproductive system (Alkayyali et al 2021, Panagopoulos et al. 2021, Lai 2021, Smith-Roe et al. 2020, Cantu et al 2023, Davis et al 2023, ICBE-EMF 2022, Gautam et al 2023, Lai and Levitt 2022, Hardell and Carlberg 2017, Miller et al. 2018, Belpomme et al 2018, Directorate-General for Parliamentary Research Services European Parliament 2021).

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