

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

In the Matter of)	
)	
INTER-TEL TECHNOLOGIES, INC.)	FOIA Control No. 2003-214
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 2004

Released: March 17, 2004

By the Commission:

1. The Commission has before it an application for review filed by Inter-Tel Technologies, Inc. (Inter-Tel) of the decisions of the Wireline Competition Bureau (WCB or the Bureau) granting in part and denying in part its request under the Freedom of Information Act (FOIA) for records concerning Inter-Tel. For the reasons stated below, we deny the application for review.

I. BACKGROUND

2. Inter-Tel, a service provider to schools and libraries participating in the E-Rate program managed by the Schools and Libraries Division (SLD) of the Universal Services Administrative Company (USAC), filed a broad FOIA request¹ that it later narrowed to records related to its applications for discounts from the Schools and Libraries Program.² The Bureau identified a large volume of responsive records in the possession of USAC.³ Inter-Tel agreed to the production of the records on a rolling basis.⁴

3. WCB responded to the FOIA request in a series of 11 letters.⁵ The last letter, dated October 10, 2003, summarized the Bureau's efforts to respond to the FOIA request. It indicated that approximately 5,000 pages of paper and 50 CDs representing 7,000 pages, representing 75 percent of the records responsive to the FOIA request, were released to Inter-Tel.⁶ The Bureau withheld pursuant to FOIA Exemption 5,⁷ pre-decisional deliberative process materials including "emails and memos sent

¹ Electronic mail (e-mail) from Stephen H. Wong to FOIA@fcc.gov (rec'd Mar. 3, 2003) (FOIA Request).

² See e-mail from Stephen H. Wong to Ruth Yodaiken, WCB (Mar. 11, 2003); e-mail from Ruth Yodaiken to Stephen H. Wong (Mar. 13, 2003). Inter-Tel excluded from its request copies of checks, remittance statements, FCC Forms 486 and 498, receipt acknowledgement letters, and letters that only re-directed applicants to file any appeals with the Commission.

³ Under our procedures, FOIA requests for materials in the possession of USAC are referred to WCB for processing.

⁴ See e-mail from Stephen H. Wong to Ruth Yodaiken (Mar. 13, 2003); e-mail from Stephen H. Wong to Mark Nadel, WCB (Mar. 12, 2003).

⁵ Letters from Joseph T. Hall, Assistant Bureau Chief for Management, WCB, to Stephen H. Wong (Apr. 21; May 5; May 19; June 2; June 16; June 30; June 16; July 30; Aug. 11; Aug. 27; and Oct. 10, 2003) (FOIA Decision). The Oct. 10 FOIA Decision provides a full explanation of the Bureau's actions. Our decision here refers primarily to that decision.

⁶ Oct. 10 FOIA Decision at 1-2.

⁷ 5 U.S.C. § 552(b)(5).

among the [SLD] staff members at USAC” that “demonstrate[] how SLD determines whether to reduce a funding request or to deny it in its entirety.”⁸ The Bureau also withheld similar materials under FOIA Exemption 7(E),⁹ explaining that “Applicants aware of the benchmarks used here could supplement their legitimate requests with questionable requests that were not sufficient to trigger the benchmark levels set for denials,” enabling applicants “to seek funding for illegitimate expenses without any risk of losing their access to support for their legitimate expenses.”¹⁰ The Bureau noted that more than one half of the withheld materials sought by Inter-Tel were collected or generated as part of SLD’s “selective review” process, and public release of the records would enable the public to identify those recipients that have been targeted for selective review and what triggers review, and therefore enable companies “to avoid triggering selective review even where their practices would otherwise have justified them.”¹¹ WCB also relied on FOIA Exemption 2,¹² to withhold some records in whole or in part because the release of these materials “would supply detailed information concerning the review process and provide a blueprint for those wishing to frustrate or defeat such reviews.”¹³ Finally, the Bureau withheld “any documents in the possession of the Office of the Inspector General [OIG] of the Commission” pursuant to FOIA Exemptions 7(A) and 7(E).¹⁴

4. Inter-Tel filed an application for review of the Oct. 10 FOIA Decision.¹⁵ For the reasons discussed below, we deny the application for review.

II. DISCUSSION

Selective Review Records

5. More than half of the material withheld by the Bureau consisted of records collected or generated as part of SLD’s selective review process. We agree with the Bureau that these materials were properly withheld pursuant to FOIA Exemption 7(E).¹⁶ This FOIA exemption affords protection to all law enforcement information that “would disclose techniques and procedures for law enforcement investigations or prosecutions.”¹⁷ The Bureau explained, “[u]nder this process, applications with attributes that suggest violations are particularly likely (based on past experience) to be scrutinized more

⁸ Oct. 10 FOIA Decision at 2.

⁹ 5 U.S.C. § 552(b)(7)(E).

¹⁰ Oct. 10 FOIA Decision at 2-3.

¹¹ Id. at 3-4, citing Donna Harrington-Lueker Requests for Inspection of Records, 16 FCC Rcd 16591 (2001) (Harrington-Lueker).

¹² 5 U.S.C. § 552(b)(2).

¹³ Oct. 10 FOIA Decision at 3.

¹⁴ Id. at 4, citing 5 U.S.C. §§ 552(b)(7)(A) and 552(b)(7)(E).

¹⁵ Letter from Stephen H. Wong, Esq., Wilson Sonsini Goodrich & Rosati, to Office of General Counsel (Nov. 7, 2003) (Application for Review). Inter-Tel originally filed an application for review on September 10, 2003. Inter-Tel Technologies, Inc.’s Application for Review for the Wireline Competition Bureau’s Decision Granting in Part and Denying in Part Inter-Tel Technologies, Inc.’s FOIA Request (Sept. 8, 2003), amended by letter from Stephen H. Wong, Esq., Wilson Sonsini Goodrich & Rosati to Secretary, FCC (Sept. 9, 2003). When Inter-Tel was informed that the Bureau would issue one additional decision disposing of the remainder of the FOIA request, Inter-Tel agreed to hold its application for review in abeyance and, if it was still dissatisfied with the Bureau’s response, to refile an application for review after it reviewed the last Bureau letter.

¹⁶ Application for Review at 3-4.

¹⁷ E.g., Edmonds v. FBI, 272 F. Supp.2d 35, 53-54 (D.D.C. 2003) (Edmonds); Coleman v. FBI, 13 F. Supp. 2d 75, 83 (D.D.C. 1998).

closely. In particular, these applicants are asked to submit documentation for many of the claims they have made.”¹⁸ As such, SLD’s selective review process is a more comprehensive and detailed examination than the more limited reviews such as the Program Integrity Assurance (PIA) reviews.¹⁹ The Bureau withheld materials from the selective review process because release of the records “would signal which applications are being subject to selective reviews” and permit the public to “ascertain the attributes that triggered such reviews,” thus enabling applications “to avoid triggering selective review, even where their practices would otherwise have justified them.”²⁰ We agree. The Bureau’s determination was consistent with our previous examination of this question in Harrington-Lueker. There, a FOIA requester sought records concerning SLD Item 25 PIA reviews. We concluded that such SLD investigatory records are properly withheld under Exemption 7(E) because release of these documents would reveal techniques and guidelines for conducting such reviews.²¹ We explained that if the PIA review documents sought by the requester were made public, they would “give detailed information concerning the review process and provide a blueprint for those wishing to frustrate or defeat such reviews.”²² Inter-Tel provides no reason for us to depart from these conclusions.

6. Inter-Tel asserts that the Bureau’s invocation of Exemption 7(E) was inadequate here because the Bureau did not allege that all records withheld under this exemption, if released, would allow circumvention of selective review processes.²³ The Bureau explained, however, that it was withholding “reviewers’ notes and internal e-mails discussing the review” that, if released, “would reveal USAC’s techniques and guidelines for conducting investigations of program funds and thus undermine USAC’s . . . investigatory process.”²⁴ Clearly, the Bureau concluded, and we agree, that the records withheld under this exemption must be withheld in their entirety, and that there were no segregable portions that could be released.

7. The Bureau also relied upon FOIA Exemption 2 to withhold the selective review records, asserting disclosure of the records “might compromise audit guidelines.”²⁵ Inter-Tel maintains that

¹⁸ See Oct. 10 FOIA Decision at 3; E-Rate Selective Review Information Request – FY 2003, <www.sl.universalservice.org/data/pdf/MegaFax.pdf> (describing the submissions required in a selective review).

¹⁹ “The PIA review process examines applicants’ FCC Forms 471 and other documentation to ensure that the discounts recipients obtain are for eligible services, provided to eligible entities, for eligible uses. See SLD web site, <<http://www.sl.universalservice.org/reference/6pia.asp>>.” Request for Review of the Decision of the Universal Service Administrator by Gary Community School Corporation, Gary, Indiana, 17 FCC Rcd 5993, 5998 n.31 (2002); see also Request for Review of the Decision of the Universal Service Administrator by Kerman Unified School District, Kerman, California, 16 FCC Rcd 8408, 8410 n.7 (2001). See also Oct. 10 FOIA Decision at 3-4 & n.12. A PIA review might be an Item 25 review as described in Harrington-Lueker, 16 FCC Rcd at 16591 & n.3; Request for Review of the Decision of the Universal Service Administrator by Children’s Village Academy, Kingston, North Carolina, 16 FCC Rcd 7174, 7175-76 (2001), recon. dismissed, 16 FCC Rcd 20393 (2001), and Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy, Brooklyn, New York, 15 FCC Rcd 423, 425 (2000).

²⁰ Oct. 10 FOIA Decision at 3.

²¹ Harrington-Lueker, 16 FCC Rcd at 16592 (PIA reviews).

²² Id.

²³ Application for Review at 3-4.

²⁴ Oct. 10 FOIA Decision at 3-4.

²⁵ Id. at 3.

Exemption 2 is inapplicable here.²⁶ As we conclude that the materials are properly withheld under FOIA Exemption 7(E), we need not decide whether they could also be withheld under FOIA Exemption 2.²⁷

8. Finally, relying on Coastal States v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980) (Coastal), Inter-Tel argues that e-mails and memos between SLD staff may not properly be withheld under Exemption 5 if they are used as guidance in conducting audits.²⁸ The Bureau relied on Exemption 5 to withhold these records.²⁹ We have reviewed the e-mails and memos at issue here, and conclude that they are in the nature of advice-giving exchanges between staff that easily fall within the ambit of Exemption 5. As such, they are not like the "resource opinions" found in Coastal not to qualify for protection under FOIA Exemption 5.³⁰ Indeed, in Coastal the court acknowledged that "suggestions or recommendations as to what agency policy should be," memoranda that are "advice to a superior" or are "suggested dispositions of a case," or records that are "one step of an established adjudicatory process, which would result in a formal opinion," or that contain "subjective or personal" views of the authors, may be withheld under FOIA Exemption 5.³¹ These descriptions more precisely fit the records withheld by the Bureau here.³² These predecisional materials are part of the deliberative process leading to formal decisions on funding that are provided to applicants and supply SLD's rationale for the reduction or denial of a funding request. Thus, we believe these records could also be properly withheld under FOIA Exemption 5.

Inspector General Records

9. The Bureau also withheld all records in the possession of the FCC's Inspector General, citing FOIA Exemptions 7(A) and 7(E). Inter-Tel argues that the Bureau erred by failing to provide any explanation of why these exemptions are applicable, other than the fact that the records were in the possession of the OIG in connection with an investigation of Inter-Tel.³³ We agree with Inter-Tel that by simply stating that "any documents in the possession" of the OIG would be withheld,³⁴ Inter-Tel could not

determine the nature of the records and how release of those records would interfere with law

²⁶ Application for Review at 2-3, citing Hawkes v. IRS, 507 F.2d 481, 484 (6th Cir. 1974) (Hawkes).

²⁷ See Edmonds, 272 F. Supp. 2d at 50 (not reaching Exemption 2 argument where agency sustained under Exemption 7(E)). We note that in Hawkes, cited by Inter-Tel, the court concluded that the IRS manual had to be released under FOIA Exemption 2 and 5 U.S.C. § 552(a)(2)(C) (agencies must make routinely available "administrative staff manuals and instructions to the staff that affect a member of the public"). However, subsequent amendments to the FOIA make it clear that "disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation" are properly withheld under Exemption 7(E). Tax Analysts, Inc. v. IRS, 294 F.3d 71, 78 (D.C. Cir. 2002) citing PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 250-51 (D.C. Cir. 1993).

²⁸ Application for Review at 4.

²⁹ Oct. 10 FOIA Decision at 2.

³⁰ Id.

³¹ Coastal, 617 F.2d at 867.

³² Oct. 10 FOIA Decision at 2.

³³ Application for Review at 2, citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978) (Robbins Tire) and Crooker v. BATE, 789 F.2d 64, 67 (D.C. Cir. 1986) (Crooker II).

³⁴ Oct. 10 FOIA Decision at 4.

enforcement proceedings.³⁵

10. We have reviewed the records responsive to Inter-Tel's request that are in the possession of OIG. When invoking Exemption 7(A), we may utilize generic descriptions of records to avoid interference with the law enforcement proceedings at issue.³⁶ The OIG records fall into three categories: correspondence with law enforcement authorities, analyses prepared by the OIG for law enforcement authorities, and program documents concerning Inter-Tel provided to the OIG. We conclude that all of these materials were compiled for law enforcement purposes. Furthermore, according to the OIG, release of these records would interfere with enforcement proceedings by revealing the nature and scope of the investigation and investigative activities. The OIG-held records were thus properly withheld from Inter-Tel pursuant to FOIA Exemption 7(A).³⁷ The first two categories of records also are properly withheld from Inter-Tel pursuant to FOIA Exemption 5. Under that exemption, we may withhold inter-agency memorandums under the privileges available to an agency in civil litigation, including the deliberative process privilege.³⁸ Here, the OIG records include inter-agency consultative correspondence and analyses prepared by OIG for other law enforcement agencies. These are quintessentially the types of records that are properly withheld under FOIA Exemption 5.

11. Finally, for the reasons discussed in paragraphs 5-6 above, the OIG materials also are exempt from disclosure under FOIA Exemption 7(E). The inter-law enforcement communications, the analyses prepared by the OIG, and the materials gathered by the OIG, if released, could reveal the OIG's investigative techniques that would impair the future effectiveness of those techniques.³⁹

III. ORDERING CLAUSES

12. IT IS ORDERED that Inter-Tel Technologies, Inc.'s application for review of the denial in part of its Freedom of Information Act request IS DENIED. Judicial review of this action may be sought pursuant to 5 U.S.C. § 552(a)(4)(b).

13. 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

³⁵ See Crooker II at 65.

³⁶ See, e.g., Robbins Tire, 437 U.S. at 236; Solar Sources, Inc. v. United States, 142 F.3d 1033, 1038 (7th Cir. 1998); In re Dep't of Justice, 999 F.2d 1302, 1308-09 (8th Cir. 1993) (en banc), cert. denied sub nom. Crancer v. Dep't of Justice, 510 U.S. 1163 (1994); Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987); Edmonds, 272 F. Supp.2d at 53-54; see also James A. Kay, Jr., 11 FCC Rcd 12452, 12454 & n.12 (1996).

³⁷ See Edmonds, 272 F. Supp.2d at 54.

³⁸ See id. at 51.

³⁹ See id. at 56.