May 12, 2020

Via Electronic Delivery

Connie Craley, Director
Executive Secretary Division
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301
caseinfo@psc.state.wv.us

Re: Case No. 18-0291-T-P
Frontier West Virginia Inc. and
Citizens Telecommunications Company of West Virginia
Focused Management Audit

Dear Ms. Craley:

Enclosed for filing in the above-referenced matter is the Memorandum of Law Supporting Protective Treatment of Audit Information Exposed to the Public Without Authorization filed on behalf of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia dba Frontier Communications of West Virginia in response to the Commission’s April 27, 2020 Order.

Please file this letter and enclosure and distribute the filing to the appropriate parties at the Commission. As always, we appreciate your assistance in this matter.

Sincerely,

Christopher L. Callas

Enclosure

cc: Joseph J. Starsick, Esq.
    Vincent Trivelli, Esq.
    Linda S. Bouvette, Esq.
    Christopher Howard, Esq.

Tom White, Esq.
Dennis Schumaker
MEMORANDUM OF LAW SUPPORTING PROTECTIVE TREATMENT OF AUDIT INFORMATION EXPOSED TO THE PUBLIC WITHOUT AUTHORIZATION

Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia dba Frontier Communications of West Virginia (individually and collectively, “Frontier”) submit this Memorandum of Law pursuant to the Commission’s April 27, 2020 Order. As explained in this brief, a third-party bad actor’s public exposure of the means to obtain certain confidential information from the redacted non-public version of the Focused Service Quality Management Audit Report (“Audit Report”), and the subsequent unauthorized public disclosure of a very small portion of the Audit Report, does not deprive Frontier of protective treatment for the redacted information.

Where public disclosures of confidential information are manifestly unauthorized, or even only inadvertent, courts have found no waiver of the protection provided against public disclosure under applicable Freedom of Information Act (“FOIA”) exemptions. In this case, it is beyond dispute that: (i) the Audit Report was filed under seal; (ii) Frontier redacted the protected material; (iii) Frontier was without knowledge that the redactions could be removed through technological manipulation; and (iv) the disclosure of the redacted material was unauthorized. Under the legal authority
discussed below, the Commission should find that the unauthorized disclosure of Frontier’s redacted material does not preclude continued confidential treatment of that material under FOIA. Moreover, only a very small portion of material was actually disclosed publicly. Not only does this small portion remain protected due to its unauthorized acquisition for public disclosure, but the remainder of the material—which never was publicly disclosed—certainly remains protected.

I. Background

The Audit Report at issue was filed under seal on March 18, 2020. On March 25, 2020, Frontier filed a redacted version accompanied by a Motion for Protective Order seeking protective treatment of certain information constituting trade secrets protected from disclosure under West Virginia law. On April 8, 2020, the Commission entered an Order stating that it had received a FOIA request on April 3, 2020 seeking an unredacted version of the Audit Report and directing the parties to file briefs addressing Frontier’s Motion for Protective Order. Subsequently, the bad actor, an Internet technology media outlet, determined that the Audit Report on the Commission’s web docket could be manipulated to reveal the redacted information and posted an article on April 9, 2020 explaining how to view the redacted material—but without actually posting an unredacted version.

Upon learning of the article, the Commission immediately removed the original Audit Report from its web docket, and the very next day Frontier submitted a replacement version that corrected the redaction issues. On April 27, 2020, the Commission entered an order (1) directing the parties to submit a memorandum of law addressing the impact of this series of events on the Commission’s ability to accord
protective treatment to the Audit Report under FOIA and (2) directing Frontier to describe the extent to which the redacted text, charts, and graphs, of the Audit Report were made accessible.

II. Legal Authority

Legal authority governing the impact of inadvertent and unauthorized disclosures on FOIA obligations falls squarely in favor of Frontier. As explained below, where a disclosure of trade secret or other information eligible for an exemption from FOIA disclosure was unauthorized (or even merely inadvertent), courts have repeatedly determined that the disclosure does not defeat the governmental body’s obligation to protect the information from further disclosure—in other words, the right to protection is not waived under those circumstances.

Generally, a party cannot rely on an otherwise valid FOIA exemption to justify withholding information that has already been released into the public domain. See, e.g., Davis v. U.S. Dep’t of Justice, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (noting that “a showing of public availability renders the FOIA exemptions inapplicable”); Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999) (“materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed”); and Afshar v. U.S. Dep’t of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (concluding that a party may waive FOIA protection if the requester carries his “burden of pointing to specific information in the public domain that appears to duplicate that being withheld”).

Frontier does not dispute the general rule that information in the public domain is normally ineligible for FOIA protection. But, like most general rules, the “public domain doctrine” has important exceptions. Those exceptions are critical in the analysis of the
present situation. Several courts, including the United States District Court for the District of Columbia and the United States Circuit Court of Appeals for the District of Columbia—which routinely hear FOIA disputes—have ruled that public exposure does not necessarily result in a waiver of a party’s right to invoke a FOIA exemption. Information meant to remain confidential sometimes unintentionally enters the public domain through either (1) an unauthorized disclosure or (2) even a merely inadvertent disclosure. In both instances, the information is still entitled to FOIA protection.

A. Unauthorized Disclosure

On several occasions, courts have held that a party does not waive its ability to pursue FOIA protection if the information enters the public domain through an unauthorized disclosure. Courts have found “no waiver” under a variety of circumstances. For example, in Safeway Stores, Inc. v. FTC, a supermarket chain filed a FOIA request seeking a Federal Trade Commission report, claiming that FOIA protection had been “compromised” after portions of the report were leaked to the Washington Post, which later published a full article on it. 428 F. Supp. 346, 347-348 (D.D.C. 1977). The Court found that the “[p]ublication by the Washington Post was unauthorized” and held that “an unauthorized ‘leak’ does not constitute waiver of the [FOIA] exemption.” Id. at 347. See also, Medina-Hincapie v. Department of State, 700 F.2d 737, 741 n.20 (D.C. Cir. 1983) (holding that “[a]n unauthorized disclosure of documents does not . . . constitute a waiver of the applicable FOIA exemption”).

In Simmons v. DOJ, the Fourth Circuit explained that courts are hesitant to strip FOIA protection from information released to the public without permission: “[W]here there has been less than full disclosure from an official source, courts have been reluctant
to release the requested information” because a release from an authorized source “confirms the accuracy of the previously leaked information.” 796 F.2d 709, 710 (4th Cir. 1986). The plaintiff in Simmons argued that the documents he sought from the Department of Justice were no longer protected by FOIA exemptions because an FBI agent had previously disclosed them, allowing them into the public domain. Id. In concluding that the documents did not lose FOIA protection, the Court found that if the FBI agent had in fact disclosed the documents, he did not do so “in an official” capacity. Id. In other words, any disclosure was unauthorized and, therefore, unable to form a basis for a FOIA waiver.

Courts finding no waiver often rely on the “two wrongs don’t make a right” adage. In LaRouche v. DOJ, a plaintiff seeking grand jury documents under FOIA produced several news articles indicating that the documents had been leaked to the press. No. CIV. A. 90-2753(HHG), 1993 WL 388601 (D.D.C. June 25, 1993). He argued that because the material was now in the public domain, it was no longer entitled to FOIA protection. Id. at *6. The Court found that the unauthorized disclosure of the material to the press, a violation of the federal grand jury secrecy rule, “does not justify a subsequent court-sanctioned violation.” Id. The Court concluded that the “fact that aspects of the grand jury proceedings have been leaked to the public has no bearing on this FOIA litigation.” Id. at 7. See also Murphy v. FBI, 490 F. Supp. 1138, 1142 (D.D.C. 1989) (explaining that finding waiver after an unauthorized disclosure would only lead to “exacerbation of the harm created by the leaks” and that it “cannot condone leaks of an unauthorized nature”).
B. Inadvertent Disclosure

Courts have also routinely held that an inadvertent public disclosure does not strip a party of its right to invoke a FOIA exemption, often focusing on a party's intent to maintain confidentiality. For example, in Hersh & Hersh v. HHS, the plaintiff sought to obtain trade secret documents that had been inadvertently produced in separate litigation and made publicly available on an electronic docketing system. No. C 06-4234 PJH, 2008 WL 901539 (N.D. Cal. Mar. 31, 2008). The District Court for the Northern District of California found no waiver, holding that the "documents made publicly available on the docketing system were inadvertently produced by defendants, must be returned to them, and cannot form the basis for a waiver argument." Id. at *7. Similarly, in Astley v. Lawson, the D.C. District Court ruled that a government agency did not waive a FOIA exemption after mistakenly attaching a confidential memorandum to a motion that was placed into a publicly accessible record. No. CIV. A. 89-2806(CRR), 1991 WL 7162 (D.D.C. Jan. 11, 1991). The Court pointed to the agency's motion to remove the documents from the public document after realizing the mistake as evidence "demonstra[ing] that the disclosure was indeed inadvertent, and not inconsistent with the [agency's] intent to maintain the confidentiality of the memoranda." Id. at *8.

In another trade secret case, a witness inadvertently revealed confidential company valuation figures at trial, and a reporter argued that the information was not entitled to FOIA's trade secret exemption because the testimony was made in open court with "no constraints on public access." In re Tr. for Gore, No. CIVA1165-VCN, 2011 WL 13175994, at *1 (Del. Ch. Jan. 6, 2011). The Delaware Chancery Court rejected that argument, "explaining that the better policy is to mitigate the consequences of an
inadvertent disclosure, at least where the public’s interest in access is outweighed by the confidentiality interests of the parties involved.” Id. at *3. See also Parker v. Bureau of Land Management, 141 F. Supp.2d 71 (D.D.C. 2001) (concluding that inadvertent disclosure of information sought to be withheld under FOIA’s trade secrets exemption does not render the information “publicly available” for purposes of future FOIA requests).

Courts have similarly decided cases specifically involving inadequately redacted documents. In a case before the Tenth Circuit, the plaintiff filed a FOIA request with the Department of the Army seeking documents associated with an employment-related investigation. Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998). The Court rejected the plaintiff’s claim that the Army’s inadvertent release of certain employee names through inadequate redactions constituted waiver of FOIA’s personal privacy exemption. Id. at *3. See also Canning v. U.S. Dep’t of Justice, 567 F.Supp.2d 85, 95 (D.D.C.2008) (concluding that waiver of FOIA protection did not occur where agency inadvertently failed to redact law enforcement official’s name from a document, noting that waiver would be “contrary to the spirit of FOIA”).

III. The Present Case

In the present case, the disclosure of Frontier’s confidential information was patently unauthorized. Frontier did not give permission for the disclosure. In addition, Frontier actively took steps to protect the information from disclosure. Nonetheless, a third-party Internet technology media outlet maliciously extracted Frontier’s confidential trade secrets from a redacted Audit Report and illicitly exposed them to public disclosure without any prior authorization from Frontier—knowing full well that it was Frontier’s
explicit intent that the redacted materials be kept confidential, and that they were subject
to a motion for protective order pending before the Commission. Thereafter, another
media outlet—which had initially made the FOIA request to the Commission—used this
illicit means of unauthorized exposure to publicly disclose a small portion of Frontier’s
confidential information. Accordingly, under the authority cited above, Frontier’s
confidential information remains protected from further disclosure.

As the Fourth Circuit explained in Simmons, the Commission should not strip
protective treatment from a party whose information falls victim to unauthorized public
exposure by a bad actor. 796 F.2d 709, 710 (4th Cir. 1986). Doing so would set an unfair
precedent and would effectively result in a second, Commission-sanctioned, wrongful
disclosure without any legitimate justification. Further, if parties with questionable
intentions know they can deprive others of protective treatment by misappropriating
confidential material and publishing it online, the Commission runs the risk of
encouraging such behavior. As the Murphy Court explained, finding waiver of FOIA
protection would only lead to “exacerbation of the harm” created by the unauthorized

Even assuming for the sake of argument that Frontier somehow was totally
responsible for the Audit Report disclosure, which it certainly is not, Frontier still would
not have waived its ability to invoke the FOIA trade secrets exemption. Courts have
found that parties who inadvertently disclose information have not necessarily waived
FOIA protection. Just like the defendants in Hersh & Hersh, Frontier’s trade secret
information was unknowingly exposed to possible public disclosure after it was uploaded
to an online docketing system. No. C 06-4234 PJH, 2008 WL 901539, at *7 (N.D. Cal.
Mar. 31, 2008). Frontier did not know that a third party could undo the redactions in the Audit Report and certainly did not intend the underlying information to be available for public viewing. Like the defendant in Astley, Frontier acted immediately to maintain the information’s confidentiality to the fullest extent possible by providing a replacement Audit Report that was not susceptible to manipulation of the redacted portions. See No. CIV. A. 89-2806(CRR), 1991 WL 7162, at *8 (D.D.C. Jan. 11, 1991). The Commission itself commendably acted to remove the susceptible information from the Commission’s electronic docket. The unknowing and unintentional susceptibility of the redactions to unauthorized removal simply cannot form the basis for depriving Frontier protection under FOIA. As the Gore Court explained, the agency should mitigate the consequences by finding no waiver of FOIA protection and upholding the FOIA exemption from disclosure. The Commission should take the same action.

In applying these legal principles, the Commission should keep two additional factors in mind. First, the Commission should be mindful of how it would have acted had the Internet technology media outlet properly requested public disclosure of the redacted information, either as a participant in the case or as a non-party. Had the bad actor requested the information as an intervenor, the Internet technology media outlet would have had access to the information only after executing an interim protective agreement, under which it would be bound to maintain the confidentiality of the information unless and until the Commission determined that the information was not entitled to that treatment. Had the Internet technology media outlet requested the information under FOIA as a third party, the Commission would have required it to await the completion of the full FOIA process before disclosing any of the redacted information.
Second, the Commission should be aware that the Internet technology media outlet did not actually disclose the protected information. It merely disclosed the means to obtain it. The sponsor of the actual FOIA request obtained access to the redacted information only by following the steps suggested in the Internet technology media outlet’s post. The actual FOIA-requesting party then published an article that included only a very small portion of the redacted information. To Frontier’s knowledge, there have been no additional disclosures of its redacted confidential information by the FOIA requestor or anyone else. Further disclosure of Frontier’s confidential information through the Commission’s website does not serve a public purpose.

IV. Scope of Redacted Information Revealed

The redacted information in the Audit Report was presented in the form of text, charts, and graphs. The chart and graph portions of the report appeared as numbered exhibits. Although it appears that all the non-exhibit redacted text can be revealed by means of the directions and link on the bad actor’s website, the vast majority of the redacted information presented in the exhibits is not susceptible to conversion to an unredacted form. Based on Frontier’s review, only ten of the 89 redacted exhibits in the Audit Report have substantive content that can be accessed by following the Internet technology media outlet’s instructions. Of those ten exhibits, only eight can be read in their entirety and two can be partially read.\(^1\)

\(^1\) The ten exhibits are Exhibits III-3 (partial only), IV-33 (partial only), VI-5, IX-5, X-1, X-2, X-3, X-4, X-5, and X-6.
V. Conclusion

The public domain doctrine does not apply to the unauthorized disclosure underlying this case. Depriving protective treatment from parties encountering unfortunate situations like the one faced by Frontier only exacerbates the harm of an unauthorized exposure and, worse still, encourages bad actors to flout this Commission’s authority. Accordingly, the Commission should find that Frontier has not waived its ability to invoke FOIA’s trade secret exemption.

Respectfully submitted this 12th day of May, 2020.

FRONTIER WEST VIRGINIA INC. AND CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA DBA FRONTIER COMMUNICATIONS OF WEST VIRGINIA

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CERTIFICATE OF SERVICE

I certify service of the foregoing Memorandum of Law on May 12, 2020, by electronic mail, as addressed:

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