



Federal Communications Commission
Washington, D.C. 20554

May 8, 2009

Ms. Tegan Millspaw
Judicial Watch, Inc.
501 School Street, SW
Suite 500
Washington, DC 20024

Re: FOIA Control No. 2009-232

Dear Ms. Millspaw:

This responds to your Freedom of Information Act (FOIA) request filed February 13, 2009, on behalf of Judicial Watch, Inc. (Judicial Watch) for (1) "any records concerning the decision to delay the transition to digital television until June 12, 2009;" and (2) "any and all records of communication between the Federal Communication Committee [sic] and the White House concerning the delays in the transition to digital television." You also requested a fee waiver, which was granted by our letter dated February 25, 2009.

The first part of your FOIA request sought records concerning the decision to delay the transition to DTV until June 12, 2009. The decision to delay the DTV transition was made by Congress and the President, not the FCC, in the DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009). Accordingly, we do not interpret this part of your request to seek materials related to the FCC's implementation of the DTV Delay Act. We located records discussing Congress' consideration of the delay of the transition to DTV until June 12, 2009.

We have reviewed the records in light of the FOIA guidance issued by the Attorney General implementing the President's FOIA Memorandum. See <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> (*Holder FOIA Memo*), and http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/ (*President's FOIA Memo*). We located and are releasing records that largely were progress reports to FCC employees concerning the DTV Delay Act as it made its way through Congress and to the White House for the President's signature. See *Holder FOIA Memo* at 1. Some of the records, however, cannot be released in their entirety because portions contain deliberative materials that are properly withheld under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), and have been reviewed to determine if any segregable materials can be released. See *id.* We will be releasing some of these records, redacting portions pursuant to FOIA Exemption 5 and also redacting personal non-governmental e-mail addresses or telephone numbers pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6). Finally, we located some draft memos concerning the DTV Delay Act that we are withholding in their entirety under FOIA Exemption 5. See *John Dunbar, The Associated Press*, 23 FCC Rcd 9850, 9850-51 (2008) (explaining that drafts are properly withheld under FOIA Exemption 5 because they do not represent the final views of an agency).

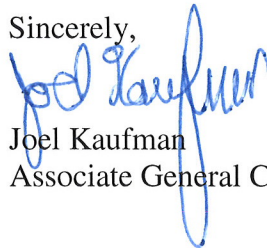
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Because of the volume of records located in response to part (1) of your request, and the need to redact portions of those records before we release them to you, we are unable to provide you with the records along with this letter. We anticipate that the records will be ready for release to you shortly. We will call you to arrange delivery.

The records you seek in part (2) of your request (some of which overlap to the scope of part (1) of your request) involve communications between the FCC and White House or the Executive Office of the President (EOP) staff concerning delays in the transition to DTV. Pursuant to instructions from the Department of Justice, we are required to consult with the White House to determine what, if any, privileges should be asserted regarding the handling of these records. *See* U.S. Dep't of Justice, FOIA Update: FOIA Memo on White House Records, Vol. XIV, No. 3 (1993), *available at* http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page4.htm, *cited with approval in* *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 532 F.2d 860, 866 (D.C. Cir. 2008). Because of these requirements, we are unable to respond to this part of your FOIA request until we receive instructions from the White House. We will issue a supplemental response to your FOIA request at that time.

If you consider this to be a denial in part of your request, you may seek review by filing an application for review with the Office of General Counsel within 30 days of the date of this letter. *See* 47 C.F.R. § 0.461(j).

Sincerely,



Joel Kaufman
Associate General Counsel

cc: FOIA Officer