

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Review of Freedom of Information Action) FOIA Control No. 2007-235 – XM Records
) FOIA Control No. 2007-235 – Sirius Records
)

**OPPOSITION OF THE NATIONAL ASSOCIATION OF BROADCASTERS TO
APPLICATIONS FOR REVIEW**

The National Association of Broadcasters (“NAB”), by its attorneys and pursuant to 47 C.F.R. § 0.461(i)(2), hereby opposes the applications for review filed by XM Radio, Inc. (“XM”), Sirius Satellite Radio, Inc. (“Sirius”), and some of their current or former employees.¹ The applications for review oppose the above-captioned rulings by the Enforcement Bureau (the “Bureau”) to release under the Freedom of Information Act (“FOIA”) certain details about the nature and scope of various violations by XM and Sirius.² There is a compelling public interest

¹ *Review of Freedom of Information Action*, FOIA Control No. 2007-235 – XM Records, Application for Review of XM Radio Inc. (filed July 2, 2007) (“XM Application for Review”); Application for Review of Four Employees of XM Radio Inc. (filed July 2, 2007) (“Four XM Employees Application for Review”); Application for Review of Three Employees of XM Radio Inc. (filed July 2, 2007) (“Three XM Employees Application for Review”). *Review of Freedom of Information Action*, FOIA Control No. 2007-235 – Sirius Records, Application for Review of Sirius Satellite Radio Inc. (filed July 2, 2007) (“Sirius Application for Review”); Application for Review of John Does 1 and 2, Present or Former Corporate Officers of Sirius Satellite Radio Inc. (filed July 2, 2007) (“John Does Application for Review”).

² See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, to David H. Solomon, Counsel for NAB; FOIA Control No. 2007-235 – XM Records (June 18, 2007) (“*XM Ruling*”); Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, to David H. Solomon, Counsel for NAB; FOIA Control No. 2007-235 – Sirius Records (June 18, 2007) (“*Sirius Ruling*”) (collectively referred to as “*Bureau Rulings*”).

in release of this information so that it can be properly considered and evaluated in the context of the proposed XM/Sirius merger.³

I. FACTUAL BACKGROUND

The Enforcement Bureau is investigating a history of serious violations of the Commission's Part 15 rules by XM and Sirius relating to their use of FM modulators/transmitters, as well as a history of widespread violations by XM of Commission rules and authorizations regarding its terrestrial repeater network. It is a matter of record that the violations were apparently intentional on Sirius's part,⁴ and that, with respect to both companies, the "employees who were involved . . . or were aware of potential non-compliance" were "executive and senior-level employees."⁵

The information at issue here is inextricably linked to the pending application of XM and Sirius to merge and become the nation's only satellite Digital Audio Radio Service ("satellite DARS") provider. In that proceeding, NAB and others have argued that any conditions that might be proposed cannot adequately counter the anti-competitive and other public interest

³ See *Applications of XM Satellite Radio Holdings, Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, Consolidated Applications for Authority to Transfer Control of XM Radio and Sirius Satellite Radio Inc.*, MB Docket No. 07-57 (March 20, 2007).

⁴ Sirius Satellite Radio Inc., Quarterly Report (Form 10-Q), at 35 (Nov. 8, 2006) ("certain SIRIUS personnel requested manufacturers to produce SIRIUS radios that were not consistent with these rules."). See also Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, to Patrick L. Donnelly, Executive Vice President and General Counsel, Sirius, File No. EB-06-SE-250 at 3 (Aug. 7, 2006) ("In its response to our June 20, 2006 LOI, Sirius stated that 'a number of Sirius' product management and engineering managers decided in July 2004 to increase emissions levels to be competitive with XM and other products transmitting to car radios, and requested that manufacturers make necessary changes.'") (A copy of this letter was provided to NAB in connection with the *Sirius Ruling*.)

⁵ *XM Ruling* at 4-5, 7; *Sirius Ruling* at 4.

harms of the proposed merger because, in light of their history of serious violations, XM and Sirius cannot be relied on to comply with their promises and any such proposed conditions.⁶

NAB filed the FOIA Request that is the subject of this proceeding in order to ensure that the Commission has before it in the merger proceeding the relevant facts with respect to these violations.⁷ This will permit the Commission, after appropriate input from the public, to make a considered determination whether XM and Sirius can, in fact, be relied on to comply with their promises and any proposed merger conditions.

The *Bureau Rulings* granted in part and denied in part NAB's FOIA Request. The Bureau concluded that approximately 446 pages of more than 2700 pages of relevant XM material and approximately 212 pages of more than 3,700 pages of relevant Sirius material were not subject to an applicable FOIA exemption and should be released (some with redactions).⁸ The documents that XM and Sirius (and some of their employees and former employees) seek to keep out of the merger proceeding relate, at their core, to "when [the companies] became aware of compliance problems with [their] FM modulators and terrestrial repeaters, the reasons for those compliance problems, and the names of . . . employees identified as being responsible for or aware of the compliance problems."⁹

⁶ See MB Docket No. 07-57, Petition to Deny of the National Association of Broadcasters at 50-58 (July 9, 2007); Comments of Entravision Holdings, LLC at 19-21 (July 9, 2007); Petition to Deny of the National Association of Black Owned Broadcasters, Inc. at 13-14 (July 9, 2007).

⁷ See Letter from David H. Solomon, Counsel to NAB, to Anthony J. Dale, Managing Director (March 22, 2007) ("FOIA Request"); Letter from David H. Solomon, Counsel to NAB, to Kathryn S. Berthot, Chief, Spectrum Enforcement Division (May 23, 2007) (response to XM and Sirius oppositions to NAB's FOIA Request).

⁸ See *XM Ruling* at 9; *Sirius Ruling* at 2, 4-5.

⁹ See XM Application for Review at 2-3; see also *id.* at 3 (the documents at issue are "about the events in question and the company's knowledge of a response to those events," and "the names of both current and former employees at various levels of the company who may have known about the subjects of the inquiries."); Sirius Application for Review at 2-3.

II. DISCUSSION

It is important to emphasize that the FOIA is, first and foremost, a disclosure statute with a “strong presumption in favor of disclosure.”¹⁰ To that end, those seeking confidential treatment bear the burden of proof to show by a preponderance of the evidence that the material they seek to withhold from public inspection is exempt from disclosure under the FOIA.¹¹ Application of this legal standard should lead to prompt denial of the applications for review. The Bureau supported its rulings that the records in question were not subject to a FOIA exemption with well-reasoned and detailed analysis of the relevant law and facts. None of the applications for review present arguments that are sufficient to overcome the statutory presumption favoring disclosure or to counter the Bureau’s reasoning in this regard.¹²

¹⁰ “FOIA mandates a ‘strong presumption in favor of disclosure’ . . . and . . . the statutory exemptions, which are exclusive, are to be ‘narrowly construed.’” *National Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002), quoting *United States Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) and *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (observing that “disclosure, not secrecy, is the dominant objective of” FOIA).

¹¹ 47 C.F.R. § 0.459(d)(2).

¹² The applications for review do raise some arguments not previously raised by XM and Sirius and thus not previously addressed by the Bureau. The argument that the Privacy Act prevents release of the names of the relevant individuals, Four XM Employees Application for Review at 11, is wholly without merit and must be disregarded. The Privacy Act is irrelevant here. The Privacy Act applies to “records” that are contained within a “system of records” maintained by an agency. 5 U.S.C. § 552a(b). A system of records is defined as “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.” *Id.* § 552a(a)(5) (emphasis added). The Commission’s files concerning XM’s potential misconduct are not organized or retrieved by the name or other identifying particular of any XM employee and, therefore, the Privacy Act has no application here. *See, e.g., Fisher v. National Institutes of Health*, 934 F.Supp. 464, 472-73 (D.D.C. 1996), *aff’d without decision*, 107 F.3d 922 (D.C. Cir. 1996) (holding that scientific misconduct investigatory files did not constitute a “system of records” under the Privacy Act, because the files were not retrieved by the physician’s name at the time of disclosure).

The argument that exemption 7(C) prevents release, XM Application for Review at 14, Sirius Application for Review at 7; Four XM Employees Application for Review at 6-9; Three XM Employees Application for Review at 9; John Does Application for Review at 5-10, fails because the public interest in disclosure here outweighs the minimal privacy interests in question. *See XM Ruling* at 5 (the executives and high level employees of a publicly traded corporation at issue here “have no reasonable expectation of privacy as to their business decisions concerning potential violations of the FCC’s rules.”). Disclosure will allow the information to become part of the record of the merger proceeding, enabling the public to know and

Even if the Commission were to conclude that the relevant information does fall within an exemption to the FOIA, the Commission should exercise its discretion to permit disclosure of the records because the policy considerations here favoring disclosure outweigh those supporting non-disclosure.¹³ In this regard, in the closely analogous context of the proposed EchoStar/DirecTV merger, the Commission stated that “[r]ealization of these claimed merger benefits, as well as the effective operation of the proffered ‘national pricing remedy,’ depends in large part on the likelihood that EchoStar has correctly predicted how New EchoStar will implement certain business strategies.”¹⁴ After noting that EchoStar’s compliance record “suggests a resistance to taking steps to serve the public interest that do not serve the company’s view of its own private economic interest[,]” the Commission indicated that EchoStar’s “history of past conduct will be taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives.”¹⁵

NAB and others are raising precisely the same questions with regard to the XM and Sirius merger; specifically, whether the companies’ history of past misconduct “suggests a resistance to taking steps to serve the public interest that do not serve the company’s view of its

understand the facts upon which the Commission bases its decision with regard to the merger and providing a record for judicial review of such decision. As such, disclosure will serve the “‘core purpose of the FOIA’ which is ‘contributing significant to public understanding of the operations or activities of the government.’” See Four XM Employees Application for Review at 9, citing *United States Dep’t of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

¹³ “Even when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds.” *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24818 ¶ 2 (1998) (subsequent history omitted), citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 292-94 (1979).

¹⁴ *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)*, 17 FCC Rcd 20559, 20579 ¶ 35 (2002).

¹⁵ *Id.*

own private economic interest.”¹⁶ The information to be released by the Bureau has a direct bearing on this issue. As XM put it, the information in question relates to “when XM became aware of compliance problems with its FM modulators and terrestrial repeaters, the reasons for those compliance problems, and the names of XM employees identified as being responsible for or aware of the compliance problems.”¹⁷ This information obviously will shed light on the scope, nature, and degree of the companies’ history of various rule violations, all of which bears directly on whether the merged entity can be relied upon to comply with its promises and any proposed merger conditions.¹⁸

¹⁶ *Id.*

¹⁷ XM Application for Review at 2-3.

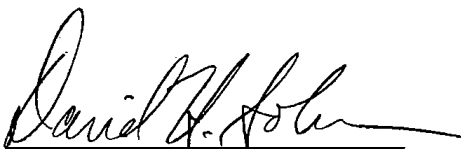
¹⁸ In an analogous situation, the D.C. Circuit upheld the Commission’s discretionary release of information regarding an applicant’s misconduct against similar claims of confidentiality, noting the Commission’s conclusion that “the public has a compelling interest in the information at issue as it bears directly on [the applicant’s] fitness as a licensee.” *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997).

III. CONCLUSION

For the foregoing reasons, the Commission should deny all five applications for review and uphold the release of documents ordered in the *Bureau Rulings*.

Respectfully submitted,

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July 17, 2007

CERTIFICATE OF SERVICE

I, Sarah D. Gutschow, hereby certify that, on this 17th day of July, 2007, copies of the forgoing Opposition of the National Association of Broadcasters to Applications for Review were served via U.S. Mail, postage prepaid, upon the following:

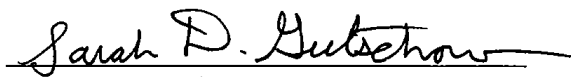
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