



August 25, 2010

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Request for Confidential Treatment, PS Docket No. 06-229

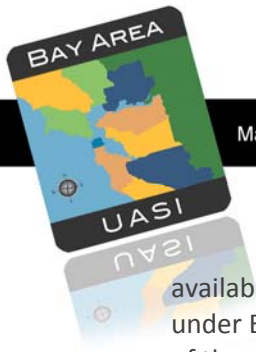
Dear Ms. Dortch:

In response to a letter from Jennifer Manner, Deputy Chief of the Public Safety and Homeland Security Bureau, dated August 17, 2010, the San Francisco Bay Area Urban Area was asked to provide a copy of Motorola's "Standards and Guidelines for Communications Sites." The San Francisco Bay Area Urban Area requests confidential treatment of this manual, which is protected by copyright and is available for commercial purchase. Copies of the manual are being delivered to Ms. Manner.

Pursuant to Section 0.459 of the Commission's rules, materials can be deemed confidential and withheld from public inspection if they meet any of the criteria of Section 0.457. In this case, the manual falls within Exemption 4 of the Freedom of Information Act ("FOIA") and thus satisfies the requirements of Section 0.457(d) because it contains commercial information the public disclosure of which would cause harm to Motorola.

A copyrighted document can be withheld as exempt under Exemption 4, which permits parties to withhold from public inspection "trade secrets and commercial or financial information obtained from a person and privileged or confidential," because of the "commercial value" of the work and the effect that FOIA disclosure would likely have on the copyright holder's potential market. Indeed, the term "commercial" in the context of Exemption 4 has been interpreted to include all information "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978). Commercially valuable copyrighted works plainly pertain to commerce and thus logically satisfy this requirement of Exemption 4.

The competitive harm requirement of Exemption 4 -- part of the two-prong standard of *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) -- is met when the copyright holder's market for his or her work would likely be adversely affected by FOIA disclosure. Such is the case with Motorola's "Standards and Guidelines for Communications Sites" manual. The fact that the manual can be purchased from Motorola does not render it "nonconfidential" under Exemption 4. Indeed, in *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981), the D.C. Circuit held that when requested information is



available elsewhere through some means other than the FOIA, the inquiry as to confidentiality under Exemption 4 must "be expanded to include two considerations: (1) the *commercial value* of the requested information, and (2) the *cost of acquiring* the information through other means." 662 F.2d at 51 (emphasis in original). According to the D.C. Circuit, when a commercially valuable document can be acquired elsewhere "only at considerable cost," agency disclosure at the duplication costs permitted under FOIA would competitively harm the submitter. *Id.* In enacting FOIA, Congress certainly did not intend to provide requesters with such "bargains," at the expense of a copyright holder. *Cf. id.*

Accordingly, the San Francisco Bay Area Urban Area respectfully requests that Motorola's "Standards and Guidelines for Communications Sites" manual be kept confidential and withheld from public inspection at all times. The San Francisco Bay Area Urban Area requests that the Commission return the manual without consideration if this request is denied pursuant to Section 0.459(e).

Sincerely,

Executive Director, Bay Area UASI

Cc: Jennifer Manner