Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of REVIEW OF FREEDOM OF INFORMATION ACTION	)))))))	FOIA Control No. 2008-190

To: Office of General Counsel

APPLICATION FOR REVIEW

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APPLICATION FOR REVIEW

Pursuant to Sections 0.461 and 1.115 of the Federal Communications Commission's ("Commission") rules, XM Radio Inc. ("XM") hereby seeks Commission review of a March 21, 2008 ruling by the Enforcement Bureau regarding disclosure of information for which XM sought confidential treatment.[1] The Bureau's Ruling addressed a Freedom of Information Act ("FOIA") request by U.S. Electronics, Inc. ("USE") for copies of documents supplied to the Commission by "applicants, respondents, or other non-Commission employees" on the following five topics: (1) the petition filed July 5, 2007 in MB Docket No. 07-57; (2) the certifications required of Satellite Digital Audio Radio Service operators that the systems include a receiver that permits users to access licensed systems that are operational or under construction; (3) Interoperable Technologies, LLC; (4) the compliance of Sirius Radio, Inc. ("Sirius") and XM with the equipment authorization rules including the matters considered in EB-

[1] Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, to Charles H. Helein, Helein & Marashlian, LLC, Counsel for U.S. Electronics, Inc., FOIA Control No. 2008-190 – XM Records (March 21, 2008) ("Bureau Ruling").

06-SE-250; and (5) XM's and Sirius' compliance with their authorizations for terrestrial repeaters.[2]

After conducting a review for responsive documents, the Bureau determined that the overwhelming majority of the documents responsive to USE's FOIA request were also responsive to a prior FOIA request, FOIA Control No. 2007-235.[3] The common documents include substantially all correspondence between XM and the Commission in connection with pending enforcement proceedings that involve XM. The only additional document at issue in USE's FOIA request is a three-page document comprised of an email and a two-page letter regarding the same enforcement proceedings.[4] In this proceeding, as the Bureau did in FOIA Control No. 2007-235, it granted USE's request in part and denied it in part. In so doing, the Bureau also said:

> it will not furnish any materials whose release is being contested [in FOIA Control No. 2007-235] until after a final ruling. Similarly, to the extent USE is seeking any materials found to be exempt from disclosure in our June 18, 2007 ruling, we will not release such materials in the absence of a final ruling requiring their release. Accordingly, the determinations and analysis [in this letter] closely follow the determinations and analysis in our June 18, 2007 ruling.[5]

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[2] *See* Letter from Charles H. Helein, Helein & Marashlian, LLC, Counsel for U.S. Electronics, Inc. to FOIA Public Liaison Officer (January 25, 2008); Bureau Ruling at 1.

[3] Bureau Ruling at 2, citing Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to Robert L. Pettit, Esq., Wiley Rein LLP (June 18, 2007) (the "June 18, 2007 ruling").

[4] This document was not at issue in FOIA Control No. 2007-235 because the document was authored on February 5, 2009 – after the FOIA request at issue in that case. The document is a supplemental response to the Enforcement Bureau's February 15, 2007 Letter of Inquiry. The Letter of Inquiry required XM to provide "additional responsive information" that "becomes known" any time within a year after issuance of the Letter of Inquiry.

[5] Bureau Ruling at 2-3.

SUMMARY

The Bureau correctly determined that certain XM confidential information was exempt from disclosure under FOIA and protected the sensitive commercial and proprietary information. The Bureau, however, erred in failing to provide confidential treatment for, and proposing to disclose, five documents (totaling approximately 48 pages). These five documents contain XM's responses to Commission Letters of Inquiry ("LOIs") regarding 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.[6]

In order to answer and supplement the LOIs as candidly and completely as possible, XM did not merely supply the Enforcement Bureau with information from XM's files. Rather, XM conducted its own internal investigation and included the fruits of that investigation in its response. As a result, XM's LOI responses disclose information about XM's internal decision-making processes, as well as about the events in question and the company's knowledge of and response to those events. Moreover, because witnesses' recollections sometimes conflict, the responses include those

[6] The five documents are: the August 21, 2006 letter from Joseph M. Titlebaum to Neal McNeil regarding File No. EB-06-SE-148 (five-page letter plus five one-page declarations); the September 6, 2006 letter from Terry G. Mahn to Neal McNeil regarding File No. EB-06-SE-148 (four-page letter plus one page of names and titles and a one-page declaration); the March 12, 2007 letter from James S. Blitz to Kathryn S. Berthot regarding File No. EB-06-SE-356 (seven-page letter plus a one-page declaration, an exhibit divider, and two eight-page spreadsheets); the March 27, 2007 letter from Scott Blake Harris to Kathryn S. Berthot regarding File No. EB-06-SE-356 (two-page letter plus a two-page spreadsheet); and the February 5, 2008 letter from Scott Blake Harris to Kathryn S. Berthot regarding File No. EB-06-SE-356 (cover email and two-page letter).

conflicting recollections 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. XM's responses identify persons whose actual involvement with, or knowledge of, the matters under investigation may have been only tangential, depending on the accuracy of individual recollections.

The Bureau did not adequately consider the adverse consequences that disclosing the information provided by XM would have on future internal inquiries intended to collect the composite "knowledge" of an organization. Complete candor in such situations requires encouraging full cooperation in interviews and collecting factual material that may not all fit neatly together. Disclosing this information may unfairly tarnish the reputations of individuals, unfairly subject companies like XM and individual employees to opportunistic attacks, and undermine the public interest in facilitating internal investigations in response to government inquiries. For these reasons, the five documents should be protected from disclosure under FOIA Exemptions 4 and 6.

The Commission should also withhold disclosure based on FOIA Exemptions 7(A) and 7(C). The Commission should take this opportunity to limit the scope of one of its own prior rulings involving FOIA Exemption 7(A), so as to make clear that this exemption also covers the information at issue here, consistent with Supreme Court precedent. While the Bureau may have felt bound by the broad language in this prior Commission ruling, the Commission can and should bring its prior ruling in line with court rulings.

<u>**ARGUMENT**</u>

I. The LOI Responses Are Exempt from Disclosure Under FOIA Exemption 4.

Exemption 4 to FOIA, 5 U.S.C. §552(b)(4), exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." XM's LOI responses were obviously "information obtained from a person," that is, not generated by the Commission itself. In addition, the broad reading the courts have given to the phrase "commercial or financial" makes clear that virtually all of the information in XM's LOI responses falls into this category.[7] *See, e.g.*, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871, 874 (D.C. Cir. 1992) (*en banc*) (treating safety reports by a non-profit corporation as "commercial"); *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978) (treating the number of authorization cards submitted in support of union's certification petition as "commercial"). Thus, the only real question is whether the information in XM's LOI responses qualifies as "confidential."

Under FOIA, "confidential" has a specialized meaning derived from the purposes of the statute. Because XM was required to respond to the Commission's LOIs, the

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[7] The Bureau's Ruling states at one point that "information about when XM became aware of potential non-compliance and what modifications XM made to its radios after they were authorized by the Commission is *not commercial information entitled to confidential treatment*." Bureau Ruling at 6 (emphasis added). To the extent the italicized phrase was intended as a finding that the LOI responses failed the "commercial" prong of the applicable test (and not just the "confidential" prong), the Bureau clearly erred. *See Public Citizen Health Research Group v. FDA,* 704 F.2d 1280, 1290 (D.C. Cir. 1983) (reports about product safety are "commercial" because they will be instrumental in the manufacturer's attempts to market the products). Facts developed in the Commission's FM modulator and terrestrial repeater inquiries have already significantly affected XM's commercial operations, and XM is well aware that additional commercial consequences are likely to follow. Under *Public Citizen,* XM therefore has the requisite commercial interest in all factual information requested by the Commission.

information is considered "confidential" if disclosure is likely *either* to: (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to XM's competitive position. *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In this case, both prongs are satisfied.

As an initial matter, the purpose of the USE FOIA Request is to fish for information that USE might use both in its ongoing private contractual dispute with Sirius and against XM and Sirius in the pending XM/Sirius merger application – not to find out anything about *government* activity. USE has inundated the Commission with petitions, motions, letters, and other filings in the merger docket that in essence invite the Commission to insert itself into a private contractual dispute;[8] the instant FOIA request is only another step in USE's efforts to use the Commission's processes to benefit its interests, rather than the public. In other words, this request is designed to cause substantial harm to XM and if granted, will do so; thus the documents are "confidential" under settled law.

As importantly, the documents are "confidential" because disclosing them will impair the Commission's ability to obtain necessary information in future investigations. As the D.C. Circuit has stated, "when dealing with a FOIA request for information the provider is required to supply, the governmental impact inquiry will focus on the possible

[8] *See, e.g.*, Letter from Kathleen Wallman to Chairman Kevin J. Martin, FCC, MB Docket No. 07-57 (filed Feb. 11, 2008); Letter from Charles Heilein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (filed Dec. 19, 2007); Petition of U.S. Electronics, Inc. To Designate Application for Hearing, MB Docket No. 07-57 (filed Nov. 9, 2007); Comments on Notice of Proposed Rulemakings Submitted by U.S. Electronics, Inc., MB Docket No. 07-57 (filed Aug. 10, 2007); Letter from Charles Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (filed Sept. 4, 2007); Letter from Charles Helein to Chairman Martin, FCC, MB Docket No. 07-57 (filed Oct. 9, 2007).

effect of disclosure on its *quality*." *Critical Mass,* 975 F.2d at 878 (emphasis added); *Washington Post Co. v. Dep't of Health and Human Servs.,* 690 F.2d 252, 268-69 (D.C. Cir. 1982) (quality of information submitted to government may be impaired where the nature of the inquiry leaves substantial room for interpretation by the submitting party).

There are at least two reasons why disclosure of XM's LOI responses would adversely affect the quality of future responses in Commission enforcement proceedings. *First*, even though a business organization may be obligated to respond to Commission LOIs, as XM was required to reply to the LOIs here, Bureau Ruling at 6, 8, individual employees – as well as *former* employees – may not be obligated to cooperate with efforts to provide that response. In this case, many of the events about which the Commission inquired happened more than five years ago, and there has been significant employee turnover at XM during that time. XM was able to respond as completely as it did only because both former and current employees at all levels of the company were willing to be interviewed at length by counsel so that their recollections, some of which were of events more than five years past, could be taken into account. Disclosing the identities and recollections of these individuals may subject them improperly to reputational harm and adverse consequences in their chosen professions.

As a result, disclosing the identities of the individuals who provided information to XM, along with the information they provided, will surely deter cooperation by individuals in connection with future Commission investigations. It would be short-sighted for the Commission to adopt a disclosure policy in this case that would make it less likely that potential witnesses in comparable situations will voluntarily and fully cooperate in future investigations. Indeed, similar considerations recently prompted the

Department of Justice ("DOJ") to change its policy regarding companies' refusal to waive the attorney-client privilege. Under the so-called "Thompson Memorandum," DOJ policy held that a corporation's refusal to waive attorney-client privilege during a criminal investigation could be considered a relevant indicator of non-cooperation in determining whether to indict the corporation. *See, e.g.*, *United States v. Stein*, 440 F. Supp. 2d 315, 319 (S.D.N.Y. 2006). But in December 2006, DOJ changed its position in response to concerns that its policy would deter cooperation with internal corporate investigations. The "McNulty Memorandum" concluded that a corporation's refusal to waive privilege over attorney-client communications could not be held "against the corporation in making a charging decision."[9] DOJ reversed course because it recognized that the privilege "'encourage[s] full and frank communication between attorneys and their client and thereby promote[s] broader public interests in the observance of law and administration of justice'" (quoting *Upjohn v. United States*, 449 U.S. 383, 389 (1976)).[10] In other words, the promise of confidentiality – whether between attorney and client or regulator and corporation – actually promotes, rather than restricts, openness and honesty in a given proceeding. Without that promise, as DOJ rightly recognized, an individual's instinct to protect himself or herself inevitably replaces "full and frank communication."

In addition, the "knowledge" of any business organization is necessarily a composite of what its employees know. If the employees claim to "know" different things that are to some extent irreconcilable, there may be no simple answer to the question of what the organization as a whole knew or when it knew it. Under these

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[9] Memorandum of Deputy Attorney General Paul McNulty, *available at* http://news.findlaw.com/hdocs/docs/doj/121206mcnultymemo.html.

[10] *Id*.

circumstances, a Commission policy of protecting detailed elements of LOI responses from disclosure will encourage respondents to bring all relevant, even if sometimes conflicting, information to the Commission's attention. Or to put the matter negatively, compelling disclosure here may cause future respondents to Commission inquiries to answer in generalities or harmonize differing recollections. As noted above, XM conducted its investigation not only by reviewing materials in its files, but also by conducting interviews of current employees, former employees, and even outside advisors. XM gave the Commission the recollections of those XM believed might have been involved in these matters – even where those recollections were not identical and where it was not clear whether or to what extent the individual was actually involved. This is precisely the kind of disclosure the Commission should encourage. However, by making public the details of who had what recollections, the Commission necessarily deters candid communications in response to internal corporate inquiries. This result will hamper future internal inquiries and ultimately, Commission enforcement efforts.

Disclosing XM's LOI responses will also cause substantial harm to XM's competitive position. *Nat'l Parks*, 498 F.2d at 770. XM responded candidly to the LOIs and supplemented its responses to the LOIs in detail. Its responses provide insights into XM's organizational processes, how it became aware of the potential non-compliance, how it reacted, and how the potential non-compliance affected its business processes and strategy. XM's supplemental LOI response includes detailed information not only about

XM's organization processes, but about the actual location and specifications of a specific repeater.[11]

Accordingly, disclosing these responses would reveal not just the "name[s] and titles" of XM's employees as the Bureau suggested, but also details about XM's internal workings that go far beyond any public disclosure XM has made to date on these subjects. As XM has explained "[a]ny disclosure of this information would provide a peek into XM's 'play book,' giving a significant advantage" to third parties.[12]

II. The LOI Responses Are Exempt from Disclosure Under FOIA Exemption 6.

FOIA Exemption 6 protects against disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). According to the Supreme Court, "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *United States Dep't of State v. Washington Post Co.,* 456 U.S. 595, 599 (1982).

The statutory reference to "personnel files and medical files and similar files" has misled some agencies and courts into taking a narrow view of Exemption 6. But the Supreme Court has forcefully rejected a narrow view of this exemption, finding the protection of individual privacy "was not intended to turn upon the label of the file which contains the damaging information." *Id.* at 601-02. Rather, "[w]hen disclosure of information which applies to a particular individual is sought from Government records,

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[11] *See* Letter from Scott Blake Harris to Kathryn S. Berthot (February 5, 2008) regarding File No. EB-06-SE-356 at 2-3.

[12] Letter from Scott Blake Harris to Kathryn S. Berthot (April 20, 2007); *see also* Letter from Scott Blake Harris to Kathryn S. Berthot (February 29, 2008).

courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy."

The Bureau focused its analysis of Exemption 6 solely and erroneously on names and titles. *See* Bureau Ruling at 7. Framing XM's Exemption 6 argument solely as a request for "confidential treatment of the names and titles of XM employees," the Bureau said it was willing to "assum[e] that the names and titles of these XM employees could be characterized as personnel or similar files," *id*. at 6-7, but it would "not redact the names and titles." *Id.* (The Bureau had already claimed that the "names and titles" of XM's executive and senior-level employees "are publicly known." Bureau Ruling at 6.) This treatment of Exemption 6 cannot be reconciled with the applicable law.

First, the Bureau's finding that the considerable harm such disclosure might cause to individuals does not outweigh "the public's interest in understanding the agency's enforcement proceedings" (Bureau Ruling at 7) is directly contrary to the facts: USE is seeking this information in order to damage both Sirius and XM in a separate proceeding and not to better understand any Commission proceedings. In fact, any suggestion of a public interest in disclosure is contradicted by the Bureau Ruling itself, which concluded – correctly – that USE seeks the information for use in the pending XM/Sirius merger application. Bureau Ruling at 10 (emphasis added). It was on this basis that the Bureau explained – again, correctly – "we disagree that there is a compelling public interest in disclosing information regarding XM's potential rule violations." *Id.*

Having found no public interest reason to disclose in disclosing information about potential rule violations by XM, and that USE's interest in the enforcement documents was to make collateral use of them, the Bureau's conclusion that the privacy interests of

the individuals mentioned in XM's LOI responses were outweighed is inexplicable. The Supreme Court said it quite succinctly: "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 765 (1989).

Second, to the extent that there is any doubt whether "personnel files or medical files or similar files" were involved here, that question is decisively settled in XM's favor. As the D.C. Circuit has held, "[a]ll information which 'applies to a particular individual' is covered by Exemption 6, regardless of the type of file in which it is contained." *Washington Post Co.,* 690 F.2d at 260 (quoting *United States Dep't of State,* 456 U.S. at 599). Under this ruling, information about an individual's involvement – or *possible* involvement – in matters that are the subject of regulatory enforcement activity clearly qualifies under the exemption, and not just to the extent of "names and titles." Such information is precisely what the Bureau Ruling would release to USE.

Third, it is irrelevant – as a matter of law – whether certain information in XM's LOI responses (such as names and titles) is also available from other public sources. In *Reporters Committee for Freedom of the Press, supra*, the Supreme Court held that a computerized FBI "rap sheet" was protected from disclosure under Exemption 7(C) even though *everything* on the rap sheet was a matter of public record. 489 U.S. at 749. And in *New York Times Co. v. NASA,* 920 F.2d 1002, 1008-10 (D.C. Cir. 1990), the D.C. Circuit held that an audio recording of the voices of the *Challenger* astronauts in the moments before the fatal explosion was protected under Exemption 6 even though NASA had already made a transcript of the recording public. Thus, the fact that "names and

titles" of XM's employees may be publicly available, or that XM has disclosed its *receipt* of the LOIs in securities filings, is irrelevant to the analysis under Exemption 6.

Finally, the Bureau's application of the legally required balancing test seriously understated the potential harm to the individuals disclosed in XM's response, by repeatedly discussing "names and titles" as if that were the only issue here. The real and serious invasion of personal privacy here is not the disclosure that a particular person held a particular position at XM, but the linkage of individuals, by name, to recollections about – and perhaps even each individual's alleged role in – the underlying activities and alleged non-compliance that are the subject of the Enforcement Bureau's investigations. That linkage is as patent an invasion of privacy as disclosing a medical condition or reprimand in a personnel file.

III. The LOI Responses Are Exempt from Disclosure Under FOIA Exemption 7.

Exemption 7 of FOIA protects from mandatory disclosure any records or information "compiled for law enforcement purposes," if disclosure "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. §552(b)(7)(A), or "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7) (C); *FBI v. Abramson*, 456 U.S. 615, 633 (1982). Records compiled by agencies having both law enforcement and administrative functions, like the Commission, qualify as investigatory files compiled for law enforcement purposes under Exemption 7. *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

A. Exemption 7(A).

Although the Commission's investigation has progressed, the matters that are the subject of the LOIs are not yet closed. Disclosure of the documents at issue could compromise the current investigation and establish a precedent that would compromise unrelated Commission enforcement proceedings. As explained above in the discussion of Exemption 4, publicizing the names of voluntary witnesses at this time would make both those witnesses and other potential witnesses less likely to voluntarily and fully cooperate in the future. Such reticence would inevitably lead to more limited and less useful responses. That is exactly the kind of harm that Exemption 7(A) was intended to avert.

Exemption 7(A) focuses not on individual privacy but on the integrity of the investigation itself. The Commission has routinely denied FOIA requests for information submitted to the Commission during an ongoing investigation. In *Kay v. FCC*, the Commission received a FOIA request for "all complaints, letters, reports, and memoranda, or notes submitted to the Commission by any person" with respect to an ongoing investigation. 867 F. Supp. 11, 15 (D.D.C. 1994). The District Court held that the Commission properly withheld the requested documents because the documents were protected under FOIA exemption 7. *Id.* at 16-20; *see also Rocky Mountain Record*, 21 FCC Rcd 12362 (October 27, 2006) (denying access to documents in an enforcement proceeding because protection would interfere with an ongoing investigation including deterring potential witnesses, and exposing witnesses to potential harassment.) Indeed,

the Commission recently relied on Exemption 7 to reject a FOIA request submitted by a reporter for many of the same records sought by USE.[13]

By contrast, the Commission said in *Wireless Consumer Alliance*, 20 FCC Rcd 3874, 3881 (2005), that LOI responses such as those at issue here do not qualify for Exemption 7(A) because "[a]s a general proposition, release of information already known to the target of the investigation would not be expected to result in interference." The Commission should take this opportunity to limit the scope of that ruling, which sweeps much too broadly. In this case, for example, XM has provided the Commission with summaries of witness recollections that do not agree on all points. Each witness knows what he or she has told XM's counsel, but not necessarily what other witnesses have said. Public disclosure of the LOI responses, therefore, could actually taint further testimony at the Commission or elsewhere by compromising the independence of the witnesses' recollections. Moreover, the Commission should approach the matter "categorically," as the Supreme Court has instructed, *Reporters Committee for Freedom of the Press,* 489 U.S. at 773-75, and consider the long-term effect of permitting disclosure of unevaluated investigatory materials.

B. <u>Exemption 7(C).</u>

Exemption 7(C) is similar to Exemption 6 (as discussed above), but broader; thus, courts require a lesser degree of intrusion on personal privacy in order to invoke Exemption 7(C). *See Reporters Committee,* 489 U.S. at 756. This reflects the common-sense view that disclosure of information about an individual is inherently more troubling when it connects a person with possible non-compliance. Indeed, the D.C. Circuit has

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[13] Letter to Christopher Stern, Bloomberg News, from the Enforcement Bureau dated 26 September 2006, FOIA Control Number 2006-486.

recognized that "a primary purpose of Exemption 7(C)" is ensuring that individuals are not "associated unwarrantedly with alleged criminal activity." *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984). Publishing the names of people who were merely involved in an investigation – but were never actually accused of any wrongdoing – could "make those persons the subjects of rumor and innuendo, possibly resulting in serious damage to their reputations." *Id.* That kind of disclosure should be permitted "only if the public interest in the information outweighs the significant privacy interests implicated." *Id.*

In *Stern*, the court held that the privacy interests of two FBI agents outweighed the public interest in knowing the names of everyone who was involved in potentially wrongful activity. The primary public interest was in knowing that a government investigation of wrongdoing was thorough and that any wrongdoers were held accountable. *Id.* That interest "would not be satiated in any way by the release" of the agents' names. *Id.* The same considerations apply here. The XM employees who would be harmed by the release of their names never had the chance to even review – much less respond to – any allegations that might have been leveled against them during the investigation. Subjecting the XM employees involved in the investigation to the "embarrassment or stigma wrought by negative disclosures," *id.* at 91, would contravene a core purpose of Exemption 7.

For these reasons, the Commission should make clear that Exemptions 7(A) and 7(C) are fully applicable to ongoing investigations and apply those exemptions to USE's FOIA request.

CONCLUSION

It is perhaps telling that USE's FOIA request can be summed up so aptly using the Supreme Court's own characterization of an equally meritless request almost twenty years ago. As the Supreme Court said in *Reporters Committee,* the purpose of FOIA

> is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case – and presumably in the typical case in which one private citizen is seeking information about another – the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

Reporters Committee, 489 U.S. at 773. The same is true here. The Commission should exempt from disclosure XM's five documents and deny USE's request in its entirety.

Respectfully Submitted,

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April 4, 2008

Certificate of Service

I hereby certify that on April 4, 2008, I served copies of XM Radio, Inc.'s Application for Review via electronic mail on the following:

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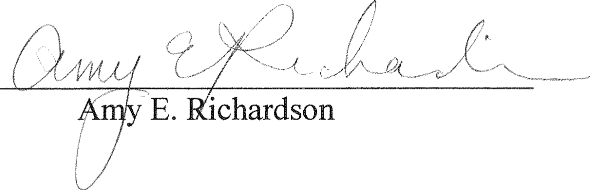

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