COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 09-9 February 9, 2010

TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers

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HEARING OFFICER RULING ON MOTION FOR PROTECTIVE TREATMENT BY TRACFONE WIRELESS, INC. REGARDING ANNUAL AUDIT OF SAFELINK WIRELESS LIFELINE CUSTOMERS

I. INTRODUCTION

On November 18, 2009, TracFone Wireless, Inc. ("TracFone") filed an Annual Audit Report of a statistically valid sample of its SafeLink Wireless Lifeline subscribers with the Massachusetts Department of Telecommunications and Cable ("Department") for the purpose of verifying the eligibility of its subscribers. Notice of Filing, Annual Audit Report. On January 5, 2010, the Department issued a Notice of Public Hearing and an Order of Notice. TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers, Notice of Public Hearing, D.T.C. 09-9 (Jan. 5, 2010); TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers, *Order of Notice*, D.T.C. 09-9 (Jan. 5, 2010). The Department conducted a public hearing and procedural conference in this matter on February 3, 2010. TracFone filed a Motion for Protective Order with the Audit Report, seeking to prevent public disclosure of all of the information it files in this proceeding, as well as all information filed with its Notice of Filing. Motion for Protective Order at 2 ("Motion").

The Department denies TracFone's Motion as TracFone fails to meet its burden under the applicable standard set forth in G. L. c. 25C, § 5. Specifically, TracFone fails to demonstrate that the relevant information constitutes trade secrets, confidential, competitively sensitive or other proprietary information, and likewise failed to demonstrate the need for protection of that information. G. L. c. 25C, §. 5. However, as certain information contained within the audit materials consists of the personal data of subscribers, implicating privacy concerns, such information must be redacted prior to disclosure. G. L. c. 66A, §§ 1, 2(c); G. L. c. 4, § 7(26)(c).

II. ANALYSIS AND FINDINGS

All documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review under a general statutory mandate. *See* G. L. c. 66, § 10; G. L. c. 4, § 7(26). "Public records" include "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose unless such materials or data fall within [certain enumerated] exemptions." G. L. c. 4, § 7(26). Materials that are "specifically or by necessary implication exempted from disclosure by statute" are excluded from the definition of "public records." G. L. c. 4, § 7(26)(a).

G. L. c. 25C, § 5 permits the Department to "protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter." In applying this exception, there is a presumption that "the information for which such protection is sought is public information and

the burden shall be upon the proponent of such protection to prove the need for such protection." G. L. c. 25C, § 5.

Under this provision, the Department applies a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information." *Id.* Second, the party seeking protection must overcome the statutory presumption that all such information is public information by "proving" the need for its non-disclosure. *Id.* Third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. *See id.*

A. TracFone Fails to Satisfy the Standard for Confidential Treatment under G. L. c. 25C, § 5.

The Department has not and will not automatically grant requests for protective treatment. The Department has stated that "[c]laims of competitive harm resulting from public disclosure, without further explanation, have never satisfied the Department's statutory requirement of proof of harm." *See Investigation by the Dept. of Telecomms. and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a/ Verizon Massachusetts' intrastate retail telecomms. servs. in Mass., Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment*, D.T.E. 01-31 Phase I, at 7 (Aug. 29, 2001) ("*Interlocutory Order*, D.T.E. 01-31"). The proponent of confidential treatment must fully support the basis for the request in its motion. *See, e.g., Boston Edison Co., Hearing Officer Ruling*, D.P.U. 94-1A-1 (Apr. 12, 1994). *Cambridge Elec. Light Co./Commonwealth Elec. Co., Letter Order*, D.P.U. 95-

95, 3-4 (Dec. 15, 1995) (finding that where companies seeking protective treatment did not explain how Department precedent and policies regarding confidential treatment applied to their request, and failed to fully support their claim of competitive disadvantage as a result of disclosure, the companies did not overcome the statutory presumption in favor of public disclosure). The Department has previously noted that "many requests for confidential treatment received by the Department fail to address the [statutory] requirements[], and parties would be well advised to limit submission of requests for confidential treatment to documents and data that truly fall within the statutory requirements for nondisclosure protection, and to support those requests fully." *Petitions of MediaOne Telecomms. of Mass., Inc. and New England Tel. and Tel. Co. d/b/a Bell Atlantic-Mass. for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement, Order on Motions of Bell Atlantic-Mass. for Reconsideration and Clarification, Motion of Bell Atlantic-Mass. for Stay, Motion of MediaOne Telecomms. of Mass., Inc. for Extension of Time to File its Interconnection Agreement, Motion of Greater Media Tel., Inc. for Clarification or Reconsideration, and Motions of Bell Atlantic for Confidential Treatment*, D.T.E. 99-42/43, 99-52 at 52 fn.31 (Mar. 24, 2000) ("*Order*, D.T.E. 99-42/43, 99-52"). In another case, the Department upheld the Hearing Officer's finding that the company had failed to explain how the information at issue could be used by competitors to disadvantage the company if disclosed. *Investigation by the Dep't of Telecomms. and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecoms. servs. in Mass.*, D.T.E. 01-31-Phase I, 13-14 (May 8, 2002) ("*Order*, D.T.E. 01-31").

In its Motion, TracFone seeks a protective order to prevent public disclosure of asserted "confidential, competitively sensitive, and proprietary information provided to the Department in this matter." Motion at 1. According to TracFone, the documents submitted consist of the results of the audit, information about the auditing procedures used, as well as samples of the documents TracFone uses to certify initial eligibility and verify continued eligibility of its subscribers. *Id.* at 1-2. TracFone states that its "internal policies and procedures for complying with its Lifeline certification and verification obligations" are included among these, and that TracFone considers these documents to be "highly confidential and commercially sensitive information." *Id.* at 2. TracFone asserts that "information about how TracFone operates and complies with its legal obligations is confidential and competitively-sensitive information from which its competitors may derive economic value." *Id.* at 2.

TracFone fails to overcome the statutory presumption of public disclosure for several reasons. First, TracFone fails to specify which, if any, documents within its submission are confidential, competitively sensitive, or proprietary. *See* G. L. c. 25C, § 5; *Interlocutory Order*, D.T.E. 01-31 at 7; Motion. Further, while TracFone asserts that the submitted documents include "information from which competitors may derive economic value," it fails to specify neither what information competitors might use to disadvantage TracFone, nor how competitors may use it to do so. *Order*, D.T.E. 01-31 at 13-14; Motion at 2. Finally, the third part of the standard applied under G. L. c. 25C, § 5 requires that only so much protection be afforded as necessary to meet the proven need. Here, TracFone's Motion, which can only be described as a blanket assertion, requesting confidential treatment for everything submitted in this matter, is impermissibly broad. *See id.*; *Order*, D.T.E. 99-42/43, 99-52.

B. Privacy Concerns Mandate Redaction of Subscriber Information.

The Department recognizes that under G. L. c. 66A, § 2(c), state agencies maintaining personal data bear responsibility for protecting such data and may "not allow any other agency or individual…to have access to personal data." Under this chapter, personal data is "any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual; provided, however, that such information is not contained in a public record." G. L. c. 66A, § 1. Accordingly, relevant here is the exemption to the public records statute for "materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G. L. c. 4, § 7(26)(c). In evaluating the applicability of that exception, "[t]he State agency seeking to justify the disclosure has the burden of showing that an invasion of privacy is warranted." *Torres v. Attorney Gen.*, 391 Mass. 1, 9 (1984).

Evaluation of the personal privacy exemption "requires a balancing between the seriousness of any invasion of privacy and the public right to know." *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 156 (1979) (citing *Hastings & Sons Pub. Co. v. City Treasurer of Lynn*, 374 Mass. 812 (1978)). "Massachusetts courts have generally concluded that names and home addresses are not inherently private or personal in nature." *Georgiou v. Comm'r of the Dep't of Indus. Accidents*, 67 Mass. App. Ct. 428, 433 (2006) (citing *Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587, 595 (2005)); *Attorney Gen. v. Collector of Lynn*, 377 Mass. at 157-58). However, "the same information about a person, such as his name and address, might be protected from disclosure as an unwarranted invasion of privacy in one context and not in another." *Torres*, 391 Mass. at 10. Specifically, "[d]isclosure of information provided to DSS [Department of Social Services] in connection with obtaining government services or benefits

would normally be regarded as an invasion of privacy." *Id.* at 8. Here, SafeLink subscribers provide information such as their name, address, social security number, and whether they participate in certain assistance programs in order to obtain Lifeline service. *See, e.g.*, Annual Audit of SafeLink Wireless Lifeline Customers, TracFone Wireless, Inc., Attachment 4. As such, the Department finds that disclosure of this information would constitute an invasion of privacy, and that the subscriber information constitutes personal data which must be protected. *See* G. L. c. 66A, § 2(c); *Torres*, 391 Mass. at 8. Accordingly, the Department directs TracFone to redact all personal identifying information regarding its subscribers from its audit including, but not limited to name, address, telephone number, date of birth, email address, and social security number, and submit the redacted version (in electronic format and hard copy) to the Department within seven (7) days of this Ruling.

III. RULING

TracFone's Motion is DENIED as set forth above. Furthermore, the Department directs TracFone to redact all personal identifying information regarding its subscribers from its audit including, but not limited to name, address, telephone number, date of birth, email address, and social security number, and submit the redacted version (in electronic format and hard copy) to the Department within seven (7) days of this Ruling.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Department by filing a written appeal with supporting documentation within five (5) days of this Ruling. A written response to any appeal must be filed within two (2) days of the appeal.

/s/
Betsy S. Whittey, Hearing Officer