

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) EB-03-IH-0053
)
ENTERCOM PORTLAND LICENSE, LLC)
)
Licensee of Station KNRK(FM),) Facility ID # 51213
Camas, Washington)

ORDER

Adopted: August 8, 2003

Released: August 11, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Order*, issued pursuant to sections 0.111, 0.311 and 0.459(c) and (d)(2) of the Commission's rules,¹ we deny the July 11, 2003, request of Entercom Portland License, LLC ("Entercom"), licensee of Station KNRK(FM), Camas, Washington, for confidential treatment of material that it submitted in response to an inquiry by the Enforcement Bureau.²

II. BACKGROUND

2. The Enforcement Bureau received a complaint that alleged that Entercom had broadcast material over Station KNRK(FM) on February 6, 2003, at approximately 3:30 p.m., in violation of the Commission's rules restricting indecency.³ Upon review of the complaint, the Bureau staff determined that the complainant provided sufficient information to warrant an investigation. In order to investigate the matter, on May 28, 2003, we sent Entercom a letter directing it to provide information concerning the broadcast, including recordings of the material identified in the complaint or otherwise broadcast over Station KNRK(FM) between 3:00 and 4:00 p.m. on February 6, 2003.⁴

¹ 47 C.F.R. §§ 0.111, 0.311, 0.459(c) and (d)(2).

² See Memorandum from Brian M. Madden, Esq., Leventhal Senter & Lerman PLLC, to Investigations and Hearings Division, Enforcement Bureau, dated July 11, 2003 ("Confidentiality Request").

³ See 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

⁴ Letter from Maureen F. Del Duca, Investigations and Hearings Division, Enforcement Bureau, to Entercom Portland License, LLC (DE), dated May 28, 2003, ("letter") at 4.

3. Entercom timely filed a response to our letter that included a compact disc recording of the material that the station had so broadcast.⁵ The response also included the Confidentiality Request at issue here, which asks that the compact disc be “held confidential and not made available for public inspection” pursuant to section 0.459 of the Commission’s rules.⁶ In support of its request, Entercom objects to the scope of our inquiry⁷ and states that “[t]he programming included on the compact disc has not been available to the public since February 6, 2003 and has not since been disclosed to any third parties, except those parties that are working on behalf of KNRK, Entercom or its affiliated stations.”⁸

III. DISCUSSION

4. The Freedom of Information Act (“FOIA”)⁹ requires the Commission to disclose agency records that are reasonably described and requested by the public unless the records contain information that fits within one or more of the specifically listed categories of material that are not routinely available for public inspection under one of the relevant FOIA exemptions.¹⁰ If information or materials submitted to the Commission do not fit within any of those categories, the entity submitting them may request, on an *ad hoc* basis, that the information be kept confidential and not made routinely available for public inspection pursuant to section 0.459 of the Commission’s rules.¹¹

5. The appropriate bureau chief will act on and grant a confidentiality request upon a finding that the request demonstrates by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the FOIA.¹² In this regard, the request must demonstrate that, although the information does not fall within one of the specific categories listed in the FOIA, it nonetheless qualifies for non-disclosure under one of the general FOIA exemptions.

6. In its Confidentiality Request, Entercom does not specify the FOIA exemption under which it seeks confidential treatment.¹³ Instead, it claims that the Bureau’s directive that it

⁵ See *Letter from Brian M. Madden, Esq., Dennis P. Corbett, Esq. and Jean W. Benz, Esq., Leventhal Senter & Lerman PLLC, to Investigations and Hearings Division, Enforcement Bureau*, dated July 11, 2003.

⁶ See Confidentiality Request.

⁷ *Id.* at 1.

⁸ *Id.* at 2.

⁹ 5 U.S.C. § 552.

¹⁰ See 47 C.F.R. 0.457; *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order in GC Docket No. 96-55, 13 FCC Rcd 24816 (1998), *recon. denied*, 14 FCC Rcd 20128 (1999)(“*Confidential Treatment Order*”).

¹¹ 47 C.F.R. § 0.459(a). See *Confidential Treatment Order*, 13 FCC Rcd at 24821.

¹² 47 C.F.R. § 0.459(d). See *Confidential Treatment Order*, 13 FCC Rcd at 24822, *citing Sandab Communications Ltd. Partnership II*, 11 FCC Rcd 11790, 11791 (1996); *TR Cable of Ramapo*, 11 FCC Rcd 3538 (1996); *GE American Communications, Inc.*, 11 FCC Rcd 11497, 11498 n.3 (Internat’l Bur. 1996)..

¹³ See 47 C.F.R. § 0.459(b).

submit the recording of the hour of its station’s programming that contained the material that is the subject of the complaint exceeds our authority because the Bureau sought a recording of more programming than that complained of in the complaint. Setting aside the merits of this argument,¹⁴ Entercom cites no authority to support its bare contention that its taking issue with the propriety of the scope of the Bureau’s request justifies confidential treatment of the recording.

7. Entercom’s claim that the programming contained on the CD has not been available to the public since February 6 and has not since been disclosed to any third parties is also insufficient to justify its request for confidential treatment of the recording. Entercom does not dispute that, on February 6, 2003, it broadcast to the public the material that is the subject of its Confidentiality Request.¹⁵ Thus, Entercom itself placed the material in question in the public domain, and the Bureau’s inquiry does not alter this fact. Indeed, the courts and the Commission have consistently held that no claim of confidentiality may be made if material is already in the public domain.¹⁶

8. In view of the foregoing, we conclude that Entercom has failed to demonstrate by a preponderance of the evidence a case for non-disclosure of the recording of its prior broadcast over Station KNRK(FM), as required by section 0.459 of the Commission’s rules. We therefore deny Entercom’s July 11, 2003, Confidentiality Request.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to sections 0.111, 0.311, and 0.459(c) and 0.459(d)(2) of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, and 0.459(c) and (d)(2), that the Confidentiality Request filed on July 11, 2003, by Entercom Portland License, LLC is hereby DENIED.

10. IT IS FURTHER ORDERED, pursuant to section 0.459(g) of the Commission’s rules, 47 C.F.R. § 0.459(g), that Entercom Portland License, LLC, may file an application for review of this denial with the Commission within five (5) working days from the date of this *Order*.

¹⁴ The Bureau requested a recording that contained not only the complained-of material, but also 30 minutes broadcast before and after the allegedly indecent material was aired, to allow it to determine the context within which the material had been broadcast. Consideration of this context is a significant factor in the Commission’s analysis to determine whether particular broadcast material is indecent. *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8002 ¶ 9 (2001)(“In determining whether material is patently offensive, the *full context* in which the material appeared is critically important. It is not sufficient to know, for example, that explicit sexual terms or descriptions were used, just as it is not sufficient to know only that no such terms or descriptions were used.”)(emphasis in original).

¹⁵ The Communications Act of 1934, as amended, defines “broadcasting” as “the dissemination of radio signals intended to be received by the public or by the intermediary of relay stations.” 47 U.S.C. § 153(6). See *National Association for Better Broadcasting v. Federal Communications Commission*, 849 F.2d 665, 671 (D.C. Cir. 1988).

¹⁶ See *Niagra Mohawk Power Corp. v. United States Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1998)(Exemption 4 cannot be used to protect information already in the public domain); *Anderson v. HHS*, 907 F.2d 936, 952 (10th Cir. 1990); *Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, 17 FCC Rcd 17012, 17012, n.81 (2002).

11. IT IS FURTHER ORDERED that a copy of this *Order* shall be sent by facsimile and by Certified Mail Return Receipt Requested to counsel for Entercom Portland License, Brian M. Madden, Esquire, Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809 and by Certified Mail Return Receipt Requested to Entercom Portland License, LLC, 410 City Avenue, Suite 409, Bala Cynwyd, Pennsylvania 19004.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau