

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

In the matter of)
)
PATRICK A. LINSTRUTH)
) FOIA Control No. 21-067
On Request for Inspection of)
Documents)

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 2001

Released: September 24, 2001

By the Commission:

1. The Commission has before it an application for review¹ filed by Patrick A. Linstruth seeking review of a decision of the Enforcement Bureau (the Bureau) denying his Freedom of Information Act (FOIA) request for records regarding reports received from the public between January 1-18, 2001, of unlicensed radio station operations on 102.1 MHz in Palmdale, California.² For the reasons stated below, we deny Mr. Linstruth’s application for review.

2. The Bureau withheld records located in response to Mr. Linstruth’s FOIA request for two reasons. It determined that release of the material would interfere with an ongoing investigation, citing FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), and the Commission’s implementing rule, 47 C.F.R. § 0.457(g)(1).³ The Bureau also withheld the records pursuant to FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), and the Commission’s implementing regulation, 47 C.F.R. § 0.457(g)(4), authorizing the withholding of records that could disclose the identity of a confidential source.⁴ In his application for review, Mr. Linstruth asserts that the Bureau erred by failing to provide justification that disclosure of the information could reasonably be expected to interfere with enforcement proceedings as required by Exemption 7(A), contending that an investigation of possible violations is not an “enforcement proceeding.”⁵ He also disputes the Bureau’s invocation of Exemption 7(D) for what he claims is an “anonymous source.”⁶

3. Upon review, we affirm the decision of the Bureau to withhold the records. Exemption 7(D) permits the Commission to withhold the name and identifying data which could reasonably be expected to lead to the disclosure of a confidential source when there was an expressed or implied

¹ Letter from Patrick A. Linstruth to Office of General Counsel (rec’d Apr. 30, 2001) (App. for Rev.).

² Letter from Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau, to Patrick A. Linstruth (Apr. 5, 2001) (Bureau Decision).

³ Id.

⁴ Id.

⁵ App. for Rev. at 1.

⁶ Id.

assurance of confidentiality.⁷ The records of complaints concerning unlicensed radio station operations on 102.1 MHz in Palmdale, California reveal that the source requested anonymity, and that the Bureau assured the source it would be treated confidentially. Thus, the documents are properly withheld under Exemption 7(D). Mr. Linstruth maintains that the source was anonymous, citing a Bureau letter responding to a congressional inquiry,⁸ and therefore cannot be considered a confidential source.⁹ We note that even anonymous sources can be protected under Exemption 7(D).¹⁰ However, in this case, our review of the documents reveals that the source in question is named in the documents and requested anonymity. Therefore, the Bureau properly invoked Exemption 7(D) to protect the confidential source.

4. Mr. Linstruth also argues that if a confidential source is named in the record, all information with the exception of the source's identity should be disclosed. Release of these records with the name of the source redacted would still provide Mr. Linstruth with sufficient information to identify the source.¹¹ Finally, this requestor fails to make any showing that the public interest benefits of disclosure would outweigh its potential harmful effects.¹² We therefore decline to exercise our discretionary authority to release the information. 47 C.F.R. § 0.461(f)(4).

5. Mr. Linstruth also argues that there is no enforcement proceeding pending and therefore Exemption 7(A) is inapplicable.¹³ To qualify for protection under FOIA Exemption 7(A), the requested documents must relate to either an ongoing investigation or a pending enforcement proceeding.¹⁴ Mr. Linstruth is well aware that there was an ongoing investigation pending.¹⁵ The Bureau specifically noted that release of these documents "would interfere with the ongoing investigation."¹⁶ Moreover, as the Bureau pointed out,¹⁷ release of the documents could reasonably be expected to interfere with the ongoing investigation by revealing the scope, direction and nature of the investigation.¹⁸ Release of the documents could chill a potential witness in a future enforcement proceeding.¹⁹ Therefore, it was appropriate for the Bureau to withhold the requested documents pursuant to Exemption 7(A). Finally, we note that some of the documents were internal Commission communications containing staff opinions and recommendations concerning the investigation. As such, they are properly withheld under FOIA

⁷ See WXGI AM 950 Richmond, Virginia, 14 FCC Rcd 3720 (1999) (citing United States Department of Justice v. Landano, 508 U.S. 165, 171-72 (1993)); Barry A. Stevenson, 8 FCC Rcd 5151 (1993); Jimmy Shillington, 7 FCC Rcd 903 (1992); Duane Delorey, 4 FCC Rcd 5412 (1989); William Rondini, 3 FCC Rcd 2590 (1988).

⁸ Letter from David A. Solomon, Chief, Enforcement Bureau, to Representative Howard "Buck" McKeon (Mar. 23, 2001).

⁹ App. for Rev. at 1.

¹⁰ See Ortiz v. United States Dep't of Health and Human Svcs., 70 F.3d 729, 734 (2d Cir. 1995).

¹¹ See, e.g., Ortiz, 70 F.3d at 735; Pollard v. FBI, 705 F.2d 1151, 1155 (9th Cir. 1983); WXGI, *supra*.

¹² App. for Rev. at 2.

¹³ Id. at 1.

¹⁴ See, e.g., Kay v. FCC, 976 F. Supp. 23, 38 (D.D.C. 1997), *aff'd*, 173 F.2d 919 (D.C. Cir. 1998) (table) (citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978) (Exemption 7(A) protects "pending investigations or actual enforcement proceedings"))).

¹⁵ See letter from J.R. Zoulek, District Director, Los Angeles Field Office, FCC to Patrick Linstruth (Jan. 19, 2001); letter from Patrick Linstruth to J.R. Zoulek (Jan. 24, 2001).

¹⁶ Bureau Decision.

¹⁷ Id.

¹⁸ Kay, 936 F. Supp. at 39.

¹⁹ Id. (citing Robbins Tire, 437 U.S. at 239-41).

Exemption 5, 5 U.S.C. § 552(b)(5), which permits us to withhold records that are part of the deliberative process.

6. IT IS ORDERED that Patrick A. Linstruth's application for review is DENIED. Mr. Linstruth may seek judicial review of the denial in part of his FOIA request pursuant to 5 U.S.C. § 552(a)(4)(B).

7. The officials responsible for this action are the following Commissioners: Chairman Powell, Commissioners Abernathy, Copps, and Martin.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary