

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

In the Matter of)
)
BILL McCONNELL)
) FOIA Control No. 21-118
on Request for Inspection of)
Records)

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 Bill McConnell, Assistant Editor of Broadcasting & Cable magazine, of a decision of the Mass Media Bureau (the Bureau) granting in part and denying in part his Freedom of Information Act (FOIA) request2 for documents related to the Public Notice postponing the auction of FM broadcast construction permits for reasons of administrative convenience.3 For the reasons stated below, we deny the application for review.

2. In response to the FOIA request, the Bureau located and withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), two drafts of the Public Notice prepared by a staff attorney and forwarded to the Chief of the Bureau for his consideration.4 The Bureau Decision explained that these drafts are "predecisional and deliberative in nature" and were being withheld to "ensure that the Bureau's action is judged on the basis of reasons set forth in the Public Notice actually promulgated."5 Mr. McConnell seeks review of this decision, asserting that the reasons for delaying the auction "may differ from the vague 'for reasons of administrative convenience' stated as the rationale in the public notice."6

3. Upon review, we affirm the decision of the Bureau to withhold the drafts of the Public Notice. It is well established that draft decisions may properly be withheld under FOIA Exemption 5.7 It

1 Letter from Bill McConnell, Assistant Editor, Broadcasting & Cable to Jane Mago, General Counsel (May 22, 2001) (App. for Rev.)

2 Electronic mail (e-mail) from Bill McConnell, Broadcasting & Cable to <FOIA@FCC.GOV> (Apr. 16, 2001) (FOIA Control No. 21-118).

3 "Auction for FM Broadcast Construction Permits Postponed Until December 5, 2001; Broadcast Auction 37 FM Rescheduled from May 9, 2001; Freeze on FM Minor Change Applications Lifted," Public Notice, DA 01-619 (Mar. 7, 2001) (Public Notice).

4 Letter from James J. Brown for Roy J. Stewart, Chief, Mass Media Bureau to Bill McConnell, Assistant Editor, Broadcasting & Cable (May 16, 2001) (Bureau Decision). The Bureau also located and provided to the requester various e-mail messages.

5 Id.

6 App. for Rev. citing e-mail from Audio Services Division (ASD) Chief Linda Blair to ASD staff (Mar. 7, 2001) (produced by the Bureau in response to this FOIA).

7 See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (Coastal States).

is our practice not to release draft decisions.⁸ This is to prevent public confusion that might be caused by disclosure of reasons and rationales that were not ultimately the grounds for the agency's action.⁹ The Commission expresses the basis for its actions in its published decisions. Here, the requester is specifically seeking to uncover a rationale for the decision different from that stated in the Public Notice.¹⁰ FOIA Exemption 5 protects the agency deliberative process from precisely this type of probing.¹¹

4. Mr. McConnell suggests that Exemption 5 does not apply because the drafts were written after the decision was made to delay the auction,¹² but in the same sentence admits that there were still ongoing deliberations concerning the explanation for the decision.¹³ So long as the documents are part of a continuing process of agency decisionmaking, Exemption 5 may be properly invoked to withhold draft decisions.¹⁴ The Bureau therefore properly withheld the drafts of the Public Notice.

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

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁸ E.g., Norcom Communications Corp., 14 FCC Rcd 8055 (1999) (recent example of our refusal to release draft decision pursuant to FOIA Exemption 5).

⁹ See, e.g., Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (Russell); Jordan v. Department of Justice, 591 F.2d 753, 772- 73 (D.C. Cir. 1978) (en banc).

¹⁰ See App. for Rev.

¹¹ E.g., National Wildlife Federation v. United States Forest Serv., 861 F.2d 1114, 1122 (9th Cir. 1988) ("To the extent that [the requestor] seeks through its FOIA request to uncover any discrepancies between the findings, projections, and recommendations between the draft prepared by lower-level personnel and those actually adopted, . . . it is attempting to probe the editorial and policy judgments of the decisionmakers").

¹² See App. for Rev. citing Blair e-mail, supra n. 6.

¹³ See App. for Rev.

¹⁴ E.g., Coastal States, 617 F.2d at 868 (Exemption 5 is applicable to a document that is a part of the course of the deliberative process).