

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

In the Matter of)
JOSEPH A. EVERETT) FOIA Control No. 20-098
on Request for Inspection)
of Records)

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2001 Released: February 12, 2001

By the Commission:

1. The Commission has before it an application for review filed by Joseph A. Everett (Everett) of a decision of the Mass Media Bureau (MMB or Bureau) granting in part and denying in part his Freedom of Information Act (FOIA) request for inspection of records related to CBS Television Network's broadcast of four "Heavyweight Championship of Tennis" matches between February 1975 and March 1977. For the reasons stated below, we dismiss the application for review in part and otherwise deny it.

2. Mr. Everett's FOIA request sought seven specific documents: five internal Commission documents, an appendix to a filing by CBS, Inc., and transcripts of hearing before the United States House of Representatives concerning the broadcasts. This is not the first time Mr. Everett has sought these documents. In 1997, acting on a FOIA request by Mr. Everett, MMB located and released various records related to the Commission's consideration of the broadcasts. The Bureau withheld portions of five internal documents pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5); withheld Appendix D to CBS's response pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4) and a previous Commission decision denying access to that document, John Weisman, 81 F.C.C.2d 584 (1980); and informed Mr. Everett that the

1 See CBS, Inc., 67 F.C.C.2d 969 (1978) (letter of admonition to network concerning broadcasted tennis matches); see also CBS, Inc., Applications for Renewal of Licenses for Stations KNXT-TV and WCBS-TV, 69 F.C.C.2d 1082 (1978) (short-term renewal of network station license following investigation into broadcasted tennis matches).

2 Letter from Joseph A. Everett to Patricia T. Quartey (Mar. 31, 2000) (FOIA Request) at 1, 3.

Commission did not have in its records a transcript of the congressional hearings concerning the broadcasts.³

3. The Bureau denied Mr. Everett's latest FOIA request.⁴ It noted that the congressional hearing transcripts were not among the materials located during a search for records responsive to his request.⁵ The Bureau reviewed the five internal documents and determined that they contained staff analysis and recommendation that were properly withheld under the deliberative process privilege embodied in FOIA Exemption 5.⁶ MMB also declined to exercise its discretion and release the previously withheld portions of the five internal documents.⁷ Finally, the Bureau determined that it would not in its discretion release the CBS Appendix D, a three-page analysis of expenses of CBS Sports employees involved in the Heavyweight Championship of Tennis broadcasts, indicating disclosure would impair the agency's ability to obtain information in the future.⁸ Mr. Everett sought review of the Bureau Decision.⁹

4. After Mr. Everett filed his application for review, CBS indicated that the Appendix could be released to Mr. Everett, and the Bureau did so.¹⁰ Mr. Everett's application for review concerning the CBS Appendix is therefore moot.

5. We have reviewed the record and documents in this proceeding and deny the application for review. The Bureau properly withheld the portions of the five internal documents

³ Letter from Roy J. Stewart, Chief, MMB, to Joseph A. Everett (April 4, 1997) (1997 Bureau Decision). Mr. Everett did not seek review of the Bureau's 1997 decision.

⁴ Letter from Roy J. Stewart, Chief, MMB, to Joseph A. Everett (June 8, 2000) (Bureau Decision).

⁵ Id. at 2.

⁶ Id.

⁷ Id.

⁸ Id. citing John Weisman, 81 F.C.C.2d at 588.

⁹ Letter from Joseph A. Everett to Christopher J. Wright, General Counsel (June 28, 2000) (FOIA A/R). Mr. Everett makes no reference to the congressional hearing transcripts, and we will not address those documents further.

¹⁰ Electronic mail message from Howard F. Jaeckel, Vice President, Associate General Counsel, CBS Broadcasting, Inc., to Laurence H. Schecker, Attorney-Advisor, Office of General Counsel (Dec. 20, 2000) (consenting to release of Appendix D); letter from Roy J. Stewart, Chief, Mass Media Bureau, to Joseph A. Everett (Dec. 22, 2000) (releasing Appendix D).

(previously withheld in 1997) that contain staff recommendations and analysis. We agree that this material falls squarely within the deliberative process privilege of FOIA Exemption 5. Mr. Everett makes four arguments attacking the Bureau's decision. He erroneously asserts the portions withheld are final opinions of the Commission.¹¹ Rather, the withheld materials are portions of internal staff memoranda and draft decisions. The final opinion of the agency in the matter was the letter in CBS, Inc., supra n.1. He also suggests that the withheld portions of the documents cannot be withheld because Exemption 5 does not protect "secret law."¹² The withheld portions of the five documents are not secret law.¹³ Rather, the material contains staff analysis and recommendations to the Commission that fall within the ambit of the deliberative process privilege. Next, Mr. Everett suggests that the Bureau failed to segregate factual materials in the five documents,¹⁴ but a review of the documents clearly reveals that the Bureau carefully segregated the factual portions of the documents and released them to Mr. Everett in 1997.¹⁵ Finally, Mr. Everett "surmises" that the "predecisional documents were adopted or incorporated by reference or actually made part of the final decisions, thus losing their protection under Exemption 5."¹⁶ However, the portions of the internal documents withheld from Mr. Everett were neither expressly adopted nor incorporated into the final Commission decisions, and thus the withheld portions did not lose the protection of Exemption 5.¹⁷

6. Accordingly, IT IS ORDERED that the Application for Review IS DISMISSED IN PART AS MOOT as indicated in paragraph 4 and otherwise IS DENIED. Judicial review of this action may be sought pursuant to 5 U.S.C. § 552(a)(4)(B).

¹¹ FOIA A/R at 1-2.

¹² Id. at 2.

¹³ "Secret law" refers to "orders and interpretations which [the agency] actually applies to cases before it," Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971), and which are "routinely used by agency staff as guidance." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 869 (D.C. Cir. 1980).

¹⁴ FOIA A/R at 2.

¹⁵ 1997 Bureau Decision at 2.

¹⁶ FOIA A/R at 3.

¹⁷ See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975) (documents protected by the deliberative process privilege lose this protection only if the final decisionmaker "chooses expressly to adopt or incorporate [it] by reference").

7. The officials responsible for this action are the following Commissioners: Chairman Powell, Commissioners Ness, Furchtgott-Roth and Tristani.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary