

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

In the matter of)
)
WILLIAM McCONNELL,)
BROADCASTING & CABLE) FOIA Control No. 2003-031
)
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 2003

Released: December 18, 2003

By the Commission:

1. The Commission has before it an application for review by Infinity Broadcasting Operations, Inc. (Infinity) of the decision of the Enforcement Bureau (the Bureau) granting in part and denying in part a Freedom of Information Act (FOIA) request by William McConnell, Assistant Editor of Broadcasting & Cable. McConnell’s FOIA request sought disclosure of the response filed by Infinity to the Bureau’s August 22, 2002, letter of inquiry concerning a broadcast by station WNEW(FM).¹ Infinity had filed a request for confidential treatment of part of its response to the letter. For the reasons stated below, we grant in part and deny in part Infinity’s application for review.

2. The Bureau’s August 22, 2002, letter stemmed from an August 15, 2002, broadcast on WNEW(FM) of the “Opie & Anthony Show.”² On September 20, 2002, Infinity filed a transcript of the broadcast with the Bureau. Infinity did not seek confidential treatment of this part of its response. On October 11, 2002, Infinity filed a narrative statement, supporting documents, and a computer disc of several pre-broadcast versions of the broadcast at issue. Infinity sought confidential treatment of this entire filing.³

3. McConnell’s October 22, 2002, FOIA Request sought the transcript of the broadcast and Infinity’s entire October 11, 2002, response to the Bureau’s letter.⁴ Infinity was invited to respond to the

1 At the time the FOIA request was filed, the Bureau was investigating the broadcast. We have now issued a Notice of Apparent Liability for Forfeiture, concluding that Infinity is apparently liable for a monetary forfeiture of \$357,500.00 for broadcasting indecent material in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. See Infinity Broadcasting Operations, Inc., Licensee of Stations WNEW(FM), New York, New York, WYSP(FM), Philadelphia, Pennsylvania, KYCY(AM), San Francisco, California, Notice of Apparent Liability for Forfeiture, EB-02-IH-0685 (Oct. 2, 2003) (NAL).

2 See letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to Infinity Broadcasting Operations, Inc. (Aug. 22, 2002).

3 See letter from Stephen A. Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc. to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC (Oct. 11, 2002).

4 See FOIA request by William McConnell, Assistant Editor, Broadcasting & Cable (Oct. 22, 2002).

FOIA request,⁵ and did so, again asserting that the entire response (except for the transcript) was confidential and not subject to disclosure under the FOIA.⁶

4. The Bureau granted in part and denied in part Infinity's request for confidential treatment of its October 11, 2002, response, and granted in part and denied in part Mr. McConnell's FOIA request.⁷ The Bureau agreed that certain portions of the response contained confidential commercially sensitive information that, if released, could cause Infinity substantial competitive harm.⁸ The Bureau also determined that portions of the response (specifically, names, non-public e-mail addresses, copies of driver's licenses, and telephone numbers) contained personal information that, if released, could reasonably be expected to "constitute an unwarranted invasion of personal privacy."⁹ A version of the proposed redactions was provided to Infinity so it could determine exactly what the Bureau proposed to release to Mr. McConnell. Infinity filed an application for review asserting that the entire response should be kept confidential.¹⁰ Infinity also filed a separate response to the proposed redactions, suggesting additional redactions that should be made consistent with the Bureau's decision.¹¹

5. On consideration of the application for review and the supplemental response proposing additional redactions, we conclude that the Bureau properly denied Infinity's request for confidentiality of the entire response. Infinity asserts¹² that documents it previously identified as meriting confidential treatment "were merely examples of the proprietary and commercially sensitive information pervasive throughout the materials." Under our rules, 47 C.F.R. § 0.459(d), parties seeking confidential treatment of records must do so with specificity. Lacking that specificity either identifying the records or explaining in any detail why such records should be withheld, we cannot agree with Infinity's general assertions that "internal idea generation and strategy" references or "pre-broadcast" material should be redacted.

6. Infinity contends that even with the redaction of the names, e-mail addresses and similar personal identifying information, some of the documents "were generated with a reasonable expectation that they would remain private" and "taken together would provide enough information to identify the individual in question."¹³ We have gone to great lengths to ensure that all personal information is redacted from the materials to be released under this FOIA request to protect the identities of the

⁵ See 47 C.F.R. § 0.461(d)(3) (when a FOIA request is filed for records subject to a request for confidential treatment, the submitter of the records is notified of the FOIA request and given an opportunity to respond).

⁶ See letter from Stephen A. Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc. to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC (Nov. 4, 2002).

⁷ See letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to William McConnell, Assistant Editor, Broadcasting & Cable and to Stephen A. Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc. (Nov. 20, 2002). The transcript of the broadcast was provided to McConnell on December 18, 2002.

⁸ *Id.* at 2, citing 5 U.S.C. § 552(b)(4) and National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

⁹ *Id.* at 2-3, citing 5 U.S.C. §§ 552(b)(7)(C) and 552(b)(6).

¹⁰ See letter from Steven A. Lerman, Esq., et al., to Jane E. Mago, General Counsel (Dec. 5, 2002) (Application for Review).

¹¹ See letter from Steven A. Lerman, Esq., et al. to Laurence H. Schecker, Office of General Counsel (Dec. 23, 2002).

¹² Application for Review at 1.

¹³ *Id.* at 2.

individuals to the extent they have any expectation of privacy. We do not, however, redact all first names of persons mentioned in the records, but we agree with Infinity that some additional personal references should be redacted for consistency.¹⁴

7. The Bureau had previously indicated it would withhold details of Infinity's contracts with sponsors of the broadcast. On review Infinity seeks to have us withhold every reference to the names of the sponsors. These names are already publicly well-known,¹⁵ and are not the type of commercially sensitive material that is properly withheld under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Therefore, these names will be disclosed.

8. Infinity will be provided with a copy of the response with the additional redactions ordered herein. If Infinity does not seek a judicial stay within 10 working days of the date of release of this decision, the redacted version of the response will be released to McConnell. 47 C.F.R. § 0.461(i)(4).

9. We regret the delay in processing this FOIA application for review and will endeavor to process such requests more expeditiously in the future.

10. Accordingly, IT IS ORDERED that the application for review by Infinity Broadcasting Operations, Inc. IS GRANTED IN PART AND DENIED IN PART. Judicial review may be sought pursuant to 5 U.S.C. § 552(a)(4)(B).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene R. Dortch
Secretary

¹⁴ We note that Infinity, not the individuals, is asserting this expectation of privacy, suggesting that it, not the individuals, would be embarrassed or humiliated. Exemption 6, 5 U.S.C. § 552(b)(6), and our implementing regulation, 47 C.F.R. § 0.457(g)(3), are designed to protect individuals' personal privacy. Release of individuals' first names, in the context of this matter, does not constitute an unwarranted invasion of personal privacy.

¹⁵ See NAL at 3 ¶ 2 (naming the Sam Adams Brewery).