

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

In the Matter of)
)
ROBERT J. ROBBINS,) FOIA Control No. 2005-249
CALL COMMUNICATIONS GROUP, INC.)
)
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2006

Released: May 26, 2006

By the Commission:

1. The Commission has before it an application for review filed by Robert J. Robbins, President of Call Communications Group, Inc., of the decision of the Deputy Associate General Counsel denying his request for a waiver of the fees for processing his Freedom of Information Act (FOIA) request. For the reasons stated below, we deny the application for review.

2. The FOIA Request sought records pertaining to unlicensed radio stations operating on the FM radio band in Miami-Dade and Broward Counties, Florida, and the outcome of FCC or Department of Justice enforcement actions regarding such unlicensed radio operations, and a waiver of fees for processing the request. In support of his request for a fee waiver, Robbins indicated that "the requested information will contribute significantly to the public understanding of the [FCC] enforcement efforts." By letter dated February 18, 2005, the Deputy Associate General Counsel denied the waiver request on three grounds. First, the Deputy Associate General Counsel explained that he could discern no reason why a waiver of FOIA fees is in the public interest because Robbins had failed to "identify with 'reasonable specificity' the public interest to be served by waiving FOIA fees associated with the request," especially in light of the availability of information about pirate radio enforcement operations

1 Letter from Robert J. Robbins, President and General Manager, The Call 97.1 (WMKL) to FOIA Officer (Feb. 2, 2005) (FOIA Request); Letter from Robert J. Robbins, President, Call Communications Group, Inc. to Deputy Associate General Counsel Joel Kaufman (Feb. 28, 2005) (Application for Review).

2 Robbins has subsequently narrowed his FOIA request to information related to unlicensed broadcasts on 91.7 and 91.9 MHz in the Miami Dade/Broward County Florida areas. For station 91.7, Robbins seeks records going back two years; for station 91.9, he seeks records for the past five years. See E-mail from Diane Law-Hsu, Regional Counsel, South Central Region, FCC, to Robert Robbins (Nov. 9, 2005) (summarizing telephone conversation with Robbins).

3 We note that Robbins may want to seek records of DOJ enforcement actions concerning unlicensed radio operations directly from DOJ. See 47 C.F.R. § 0.461(f)(6) ("only those records within the Commission's possession and control as of the date of the request shall be considered").

4 FOIA Request at 1. Robbins asserted that the requested information "would enable the public to ascertain whether of [sic] not there has been a dereliction of duty on the FCC's part of an overwhelming amount of unlicensed broadcasting activity that surpasses the FCC's resources and ability to enforce the law."

5 Letter from Deputy Associate General Counsel Joel Kaufman to Robert J. Robbins, 97.1 The CALL (WMKL) (Feb. 18, 2005) (Fee Waiver Decision).

6 Id. citing McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987) (MESS).

on the FCC's Internet website.⁷ Second, the fee waiver was denied because Robbins did not indicate that he would disseminate the documents to the public at large, a requirement of obtaining a FOIA fee waiver.⁸ Finally, Robbins's fee waiver request was denied because he failed to certify that the information sought was not primarily in his commercial interest.⁹ Robbins then filed an application for review of the Deputy Associate General Counsel's decision.¹⁰

3. The FOIA requires Federal agencies to charge fees for processing FOIA requests.¹¹ However, a FOIA fee waiver may be obtained under 5 U.S.C. § 552(a)(4)(A)(iii), which provides that FOIA fee should be waived or reduced "if disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."¹² The focus in determining whether to waive FOIA fees is the benefit to be derived by the public; personal benefit to be derived by the requester is not relevant to the determination.¹³

4. We agree with Robbins' argument on review that records concerning enforcement activities regarding pirate radio operations could further inform the public about the FCC's efforts in this regard, even though, as the Deputy General Counsel noted, the EB website provides much information about such activities already.¹⁴ However, Robbins fails to demonstrate that he would disseminate the records in a manner likely to contribute significantly to the public's understanding of the operations or activities of the government, as required by the FOIA as a prerequisite to granting a fee waiver.¹⁵ We note in this regard that Robbins indicates that he will disseminate the FOIA-obtained records by giving them to an unspecified local public library.¹⁶ The placement of records in a library is, at best, a passive method of distribution that does not establish entitlement to a fee waiver.¹⁷ Thus, Robbins fails to demonstrate that

⁷ *Fee Waiver Decision* at 1, citing <<http://www.fcc.gov/eb/reports/Jan2005.html>> ("Enforcement Bureau recently reported that it shut down 250 pirate radio stations during 2004") and <<http://www.fcc.gov/eb/FieldNotices/>> (notices of action on complaints, including complaints about unlicensed operations are available at this link).

⁸ *Fee Waiver Decision* at 1, citing *MESS*, 835 F.2d at 1286 and *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988).

⁹ *Fee Waiver Decision* at 1, citing 47 C.F.R. §§ 0.470(c) and (e), and 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ Application for Review, *supra*.

¹¹ 5 U.S.C. § 552(a)(4)(A)(i)-(ii); *Carney v. United States Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994).

¹² See also 47 C.F.R. § 0.470(e) (incorporating statutory standard); *D.C. Technical Assistance Org., Inc. v. United States Dep't of Housing and Urban Dev.*, 85 F.Supp.2d 46, 47-48 (D.D.C. 2000) (*D.C. Technical*) (applying a four-factor test for evaluating whether a FOIA fee waiver will contribute to a greater public understanding of government activities -- whether the subject matter of the requested documents specifically relates to "operations or activities of the government; whether the requested documents will be "likely to contribute" to an understanding of specific government activities or operations; whether the disclosure will contribute to a greater understanding on the part of the public at large, and whether disclosure of the requested documents will contribute "significantly" to the public's understanding of government activities or operations).

¹³ *McClain v. United States Dep't of Justice*, 13 F.3d 220, 220-21 (7th Cir. 1993) (*McClain*).

¹⁴ See footnote 7, *supra* (citing FCC website information). See also, e.g., *FCC Closes Down 15 Unlicensed Radio Stations In Miami Area*, Public Notice (Aug. 18, 1998), reprinted at <http://ftp.fcc.gov/Bureaus/Compliance/News_Releases/1998/nrci8017.html>.

¹⁵ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁶ Application for Review at 1.

¹⁷ See FOIA Update, Vol. VIII, No. 1, at 8 (Winter/Spring 1987), reprinted at <www.usdoj.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm> (dissemination requirement "not satisfied simply because a fee waiver request is made by . . . a requester who intends merely to disseminate information to" a library); *Freedom of*

(continued...)

the records once obtained would be disseminated in a manner likely to contribute significantly to the public understanding of the operations or activities of the government.

5. The next step in our statutory fee waiver analysis focuses on whether there is primarily a commercial interest on the part of the requester because fee waivers must benefit the public. Robbins's application for review for the first time certifies that his request "is **not** [sic] being sought 'to further the commercial interests of the requester because the requester is making this request on behalf of a 501(c)(3) nonprofit, charitable organization, which is licensee of non-commercial radio station WMKL'" and because WMKL received complaints of interference with its signal from the general public.¹⁸ The Deputy Associate General Counsel correctly found that Robbins made no such representation in his initial request for fee waiver, as required by our rules.¹⁹ As a separate and independent ground, we also reject Robbins's assertion in his application for review that his interest is not primarily commercial in nature. It is well established that a requester's status as a non-profit organization does not automatically qualify the requester for a FOIA fee waiver.²⁰ Robbins states that his FOIA request was prompted because listeners of his radio station had complained to him about interference with his station's signal.²¹ Indeed, Robbins has complained to Congress and this agency about interference to WMKL's signal.²² This demonstrates Robbins's concern with interference with his station's interests. Based on this record, Robbins's commercial interest in disclosure outweighs the contribution disclosure would make to a significant public understanding of pirate enforcement operations.

6. For the above reasons, we conclude that Robbins's request for a FOIA fee waiver fails the statutory test, and accordingly is denied.

7. As the Deputy Associate General Counsel indicated, Robbins FOIA request was held in abeyance pending resolution of the fee issues.²³ Robbins subsequently clarified his FOIA request,

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Information Act Guide & Privacy Act Overview, Office of Information and Privacy, U.S. Dep't of Justice (May 2004 ed.) at 131 n.153, citing two unpublished decisions, *Van Fripp v. Parks*, No. 97-0159, slip op. at 12 (D.D.C. Mar. 16, 2000); and *Klamath Water Users Protective Ass'n v. United States Dep't of the Interior*, No. 96-3077, slip op. at 47 (D. Or. June 19, 1997) (magistrate's recommendation, available at <www.usdoj.gov/osg/briefs/1999/2pet/7pet/99-1871.pet.aa.pdf>, App. A at 105) (finding placement in a library is insufficient in itself to establish entitlement to a fee waiver), *recommendation adopted* (D. Or. Oct. 16, 1997), *rev'd on other grounds*, 189 F.3d 1034 (9th Cir. 1999), *aff'd on other grounds sub nom. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001).

¹⁸ Application for Review at 2.

¹⁹ *Fee Waiver Decision* at 1, citing 47 C.F.R. § 0.470(c).

²⁰ *McClain*, 13 F.3d at 221 ("Even a request from a newspaper or nonprofit would not lead to an automatic waiver of fees."); *VoteHemp v. DEA*, 237 F. Supp. 2d 55, 59, 64-66 (D.D.C. 2002) ("Plaintiff's status as a nonprofit organization does not relieve it of its obligation to satisfy the statutory requirements for a fee waiver."), citing *D.C. Technical*, 85 F. Supp. 2d at 48. See also *Security Archive v. Department of Defense*, 880 F.2d 1381, 1384 (D.C.Cir. 1989) (noting elimination from FOIA bill of preference for fee waivers for non-profit organizations).

²¹ Application for Review at 1.

²² See letter from Robert J. Robbins, President, Call FM 91.7 to United States Senator Bill Nelson (Jan. 6, 2003) (identifying broadcasts that "cause direct interference to WMKL's signal"); letters from Rob Robbins, President, Call FM 97.1 to Congressman Peter Deutsch (Jan. 8, 2001 and Mar. 21, 2001); letter from Rob Robbins, President, Call FM 97.1 to Senator Bob Graham (May 10, 2001) (stating that "our radio station is being damaged by this illegal activity"); Rob Robbins Complaint, Case No. EB-00-MA-118 (Dec. 8, 2000); Rob Robbins Complaint, Case No. EB-03-MA-006 (Feb. 5, 2003); Robert Robbins Complaint, Case No. EB-03-MA-008 (Feb. 5, 2003); Rob Robbins Complaint, Case No. EB-03-MA-062 (Sept. 24, 2003).

²³ *Fee Waiver Decision* at 2, citing 47 C.F.R. § 0.469(a)(3).

restricting its scope.²⁴ Even as modified, EB estimates that it would take a several days to search for the records sought by Robbins, and possibly result in 1500 pages of records, resulting in fees of well in excess of \$250. If Robbins does not provide “satisfactory assurance” of “full payment” of the estimated costs of processing this FOIA request, as required by our rules, *see* 47 C.F.R. § 0.469(a)(1), or further limit his request within 10 working days of the release of this decision, the file will be closed on his request without further action.

8. IT IS ORDERED that Robert J. Robbins’s application for review is DENIED. Robbins may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

9. The officials responsible for this action are the following Commissioners: Chairman Martin, Commissioners Copps, Adelstein, and Tate.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁴ *See* footnote 2, *supra*.