

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

In the Matter of)	
)	
TED HUDACKO)	FOIA Control No. 2012-071
)	
On Request for Inspection of Records)	
)	
In the Matter of)	
)	
THE UNIVERSITY OF SAN FRANCISCO)	
and CLASSICAL PUBLIC RADIO)	
NETWORKS, LLC)	
)	
On Request for Confidential Treatment)	

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 2012

Released: December 21, 2012

By the Commission:

I. INTRODUCTION

1. This Order affirms the Media Bureau's (Bureau's) decision on a Freedom of Information Act (FOIA) request filed by Ted Hudacko.¹ Specifically, the University of San Francisco (University) has filed an Application for Review challenging the Bureau's decision to release a "privilege log" submitted by the University in response to a Letter of Inquiry (*LOI*) from the Bureau.² We find that the privilege log is an agency record subject to the FOIA, and that the University did not demonstrate that the log is a confidential attorney-client communication that can be withheld under FOIA Exemption 4. We therefore affirm the Bureau's decision.

II. BACKGROUND

2. On November 19, 2011, Hudacko filed a FOIA request seeking unredacted versions of documents submitted by the University and CPRN (Classical Public Radio Networks, LLC) in response to an *LOI* issued by the Bureau. The *LOI* concerned the University's and CPRN's application for consent to assign the license for noncommercial educational (NCE) FM

¹ See letter from Michael S. Perko, Chief, Office of Communications and Industry Information, Media Bureau, FCC, to Ted Hudacko (Feb. 9, 2012) (*Bureau Decision*).

² See Application for Review of Mr. Ted Hudacko Freedom of Information Act Action, by the University of San Francisco (Feb. 24, 2012) (*AFR*).

station KUSF(FM), San Francisco, California (the Station)³ from the University to CPRN (*Assignment Application*).⁴ Among other documents, Hudacko sought access to the privilege log that the University submitted with a request for confidentiality as part of its response to the *LOI*.⁵

3. On February 9, 2012, the Bureau granted in part and denied in part Hudacko's FOIA request. The Bureau found, *inter alia*, that the University's privilege log, which identified and described documents that the University withheld pursuant to the attorney-client privilege from its *LOI* response, should be released.⁶ The Bureau found that the "privilege log itself does not contain confidential information"⁷ but, instead, "is merely a summary of facts submitted in lieu of the materials that [the University] has retained based on its claim of privilege."⁸ Stating that "[d]ocuments like this are not normally shielded from disclosure[.]"⁹ the Bureau compared a privilege log to the *Vaughn* index in the FOIA context.¹⁰

³ The Bureau issued the *LOI* and initiated an investigation into the proposed transaction in response to petitions to deny the assignment filed by Hudacko and Friends of KUSF and an untimely petition to deny filed by Loren Dobson, which the Bureau treated as an informal objection under Section 73.3587 of the Commission's rules, 47 C.F.R. § 73.3587. The *LOI* requested the parties' responses regarding: (1) monthly payments for program time in apparent violation of Section 73.503(c) of the Commission's rules, 47 C.F.R. § 73.503(c) (which forbids such payments to NCE radio stations unless they are limited to reimbursement of operating expenses); and (2) the parties' apparently false certifications that the transaction complied with the Commission's rules and policies.

⁴ On June 7, 2012, the Bureau granted the *Assignment Application* and denied all the petitions to deny and informal objections opposing the grant of that application, including Hudacko's petition to deny. See *University of San Francisco (Assignor) and Classical Public Radio Network LLC (Assignee) for Consent to Assignment of License Station KUSF(FM)*, San Francisco, CA, File No. BALED-20 1101 25ACE; see also letter to Alan Korn, Esq., *et al.*, from Peter H. Doyle, Chief, Audio Division, Media Bureau, FCC, at 1-2 (Media Bur. June 7, 2012) (available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=34273). At the same time, the Bureau approved a Consent Decree entered into by the Bureau, the University, and CPRN regarding the alleged violations discussed in footnote 5 above. See *University of San Francisco (Assignor) and Classical Public Radio Network LLC (Assignee) for Consent to Assignment of License-Station KUSF(FM)*, San Francisco, CA, Order, 27 FCC Rcd 5674 (Media Bur. June 7, 2012) (*Consent Decree*). Hudacko has sought review of these two actions. See Hudacko Application for Review, File No. BALED-20 1101 25ACE (July 2, 2012).

⁵ *Hudacko FOIA Request* at 2-3. Hudacko also requested salary information for the University and CPRN employees, and the University's and CPRN's donor and underwriting documentation. See *id.*

⁶ *Bureau Decision* at 5. The Bureau also found that the employee salary information and donor and underwriting documentation, see *supra* n.7, for the most part fell within FOIA Exemptions 4 and 6 and should not be released. See *Bureau Decision* at 3-4. In addition, the Bureau found that other materials sought by Hudacko were not within the agency's possession and control and thus were not subject to production under the FOIA. See *id.* at 2. These decisions are not at issue here.

⁷ *Id.* at 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ See *id.* (citing *Amnesty International USA v. CIA*, 728 F. Supp 2d 479, 519 (S.D.N.Y. 2010) (comparing the requirements of the privilege log to the requirements of a *Vaughn* index); *Sharkey v. FDA*, 250 Fed. Appx. 284, 286 n.2 (11th Cir. 2007) (comparing function of *Vaughn* index in FOIA context to function of privilege log in civil discovery)). Under *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), agencies are required to prepare an itemized index correlating each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.

III. APPLICATION FOR REVIEW

4. The University filed an Application for Review challenging the Bureau's decision to release the privilege log and Hudacko filed a reply.¹¹ First, the University contends that "its privilege log is more akin to a private record than the 'agency records' to which FOIA applies."¹² It cites the Commission's 2010 *Skybridge Spectrum Foundation* decision for the proposition that "[t]he core purpose of FOIA is to illuminate the operations and activities of the government and not that of private entities, whose records happen to be in government custody."¹³ The University also asserts that the Bureau's suggestion that a privilege log was analogous to a *Vaughn* index was misplaced, because a *Vaughn* index "details agency records, which are presumptively subject to disclosure under FOIA,"¹⁴ while the instant privilege log "describes private records which are not."¹⁵

5. Second, the University alleges that the privilege log is protected by the attorney-client privilege. The University maintains that producing its "privilege log would grant Hudacko information about [the University's] correspondence with its attorneys . . . [where t]he underlying documents are not subject to FOIA[.]"¹⁶ It states that Hudacko is "simply not legally entitled [to information about privileged correspondence]."¹⁷

6. Third, the University argues that because "a *Vaughn* index is a tool for judicial review"¹⁸ and is "not typically provided at the administrative level[.]"¹⁹ the University should not have to produce its privilege log at the administrative level.²⁰ Rather, it maintains that "there are no grounds for disclosing the University's listing of its privileged and confidential communications . . . until the proceeding to which that listing pertains is before a reviewing court."²¹

IV. DISCUSSION

7. We agree with the Bureau's decision that the privilege log should be released in its entirety to Hudacko. We do not find any of the University's arguments to be persuasive.

8. First, we find that the privilege log is an agency record. Under the FOIA, the Commission must disclose reasonably described agency records requested by any person, unless the records contain information that fits within one of the nine exemptions from disclosure provided in the Act.²² Agency records are documents which are (1) either created or obtained by

¹¹ See letter from Ted Hudacko to Marlene H. Dortch, Secretary, FCC (Mar. 1, 2011).

¹² *AFR* at 2.

¹³ *Id.* (quoting *Skybridge Spectrum Foundation*, 25 FCC Rcd 11064, 11069 (2010) (*Skybridge Spectrum Foundation*)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ *Id.* at 4 (quoting *Almira Capital Corp.*, 11 FCC Rcd 6710, n.4 (1996)).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See 5 U.S.C. § 552(b).

an agency, and (2) are under agency control at the time of the FOIA request.²³ More specifically, courts have found that documents submitted to an agency at an agency's request are agency records under FOIA.²⁴ Because the privilege log, which was submitted by the University to the Bureau in response to the *LOI*, was in the control of the Commission at the time Hudacko filed his FOIA request, the privilege log is clearly an agency record within the meaning of the FOIA. Accordingly, we disagree with the University's assertion that the privilege log is a private document not subject to the FOIA.²⁵ We would also note that differences cited by the University between the documents described in a *Vaughn* index and a privilege log are not relevant to the analysis of whether the privilege log is an agency record subject to the FOIA given that the privilege log was submitted by the University to the Bureau in response to the *LOI* and was in the Commission's possession at the time of Hudacko's FOIA request.

9. Second, we find that the privilege log is not protected by the attorney-client privilege. Exemption 4 of the FOIA protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential"²⁶ and has been construed to protect from disclosure confidential communications between an attorney and client obtaining legal advice.²⁷ Under our rules, those seeking to withhold information from public inspection must explain why the information is privileged.²⁸ Here, the University provides no explanation as to how disclosure of the privilege log might breach the attorney-client privilege. The University does not explain how a summary of facts provided to the Bureau retained any

²³ See *Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

²⁴ See *RCA Global Communications, Inc. v. FCC*, 524 F. Supp. 579, 583 (D.Del. 1981) (finding documents produced by regulated communications company in response to an FCC investigatory subpoena were agency records for purposes of the FOIA) and *Teich v. Food and Drug Administration*, 751 F.Supp. 243, 247-49 (D.D.C. 1990) (finding summary of consumer complaints which was submitted to the Food and Drug Administration (FDA) upon request became an agency record within the meaning of the FOIA once it was filed with the FDA where the complaint summary was drafted at the specific request of the agency in the legitimate conduct of its official duties); cf. *FCC v. AT&T*, 131 S.Ct. 1177 (2011) (upholding FCC Order granting competitors' FOIA requests for documents FCC obtained from petitioner during course of an FCC investigation).

²⁵ We note that the University's reliance on the *Skybridge Spectrum Foundation* decision, see *supra* para. 4, is misplaced. In *Skybridge Spectrum Foundation*, the Commission rejected Skybridge Spectrum Foundation's argument that FOIA Exemption 4, which applies trade secrets and confidential commercial or financial information, see 5 U.S.C. § 552(b)(4), does not protect allegedly fraudulent information. See *Skybridge Spectrum Foundation* at 11069. In finding that the submitting party's interest in protecting confidential information outweighed the public interest in disclosure, the Commission noted that "the core purpose of the FOIA is to illuminate the operations and activities of the government and not that of private entities, whose records happen to be in government custody." *Id.* Significantly, the issue in *Skybridge* was not whether the documents were agency records, but whether Exemption 4 applied. Here, as discussed above, the documents at issue are clearly agency records subject to FOIA, and no FOIA exemption is applicable.

²⁶ 5 U.S.C. § 552(b)(4).

²⁷ See *Miller, Anderson, Nash, Yerke & Wiener v. DOE*, 499 F. Supp. 767, 771 (D. Or. 1980). (legal advice memorandum prepared for a utility company by its attorney qualified for protection under Exemption 4 as subject to the attorney-client privilege and could be withheld as "confidential.")

²⁸ See 47 C.F.R. § 0.459(b)(3) (requests that information be withheld from public inspection as privileged shall include an "[e]xplanation of the degree to which the information . . . is privileged") and 47 C.F.R. § 0.459(c) ("[c]asual requests" that information be withheld from public inspection "that do not comply with the requirements of paragraph[] . . . (b) of this section will not be considered").

privilege that might have existed between the University and its attorneys.²⁹ Indeed, the very purpose of the privilege log, which was produced to the Bureau in *lieu* of documents that might have compromised the attorney-client privilege, was to avoid producing material subject to the attorney-client privilege. Nor does it appear that the University prepared the privilege log for the purpose of securing legal advice; rather, the University compiled and submitted the privilege log to the Bureau instead of providing the documents described in the log itself. As such, the privilege log does not constitute legal advice protectable under the attorney-client privilege that would be exempt from disclosure under FOIA Exemption 4.

10. Finally, we reject the University's argument that if the privilege log is like a *Vaughn* index, it can only be released upon an order of a court, as *Vaughn* indices are prepared and released by court order. The fact that an agency need not provide a *Vaughn* index until it is ordered to do so by a court has no bearing on the issue of whether the privilege log here should be released. As noted above, the pertinent issues are whether the privilege log is an agency record and whether the University can withhold the log as a confidential attorney-client communication under Exemption 4.

11. Because the privilege log is an agency record and because the University has not demonstrated that the log is a confidential attorney-client communication subject to FOIA Exemption 4, we affirm the Bureau's decision that the privilege log should be released in its entirety to Hudacko. We therefore deny the University's Application for Review.

V. ORDERING CLAUSES

12. IT IS ORDERED that University of San Francisco's and Classical Public Radio Networks, LLC's request for confidential treatment is DENIED.

13. IT IS FURTHER ORDERED that the Application for Review filed by University of San Francisco IS DENIED. University of San Francisco may seek judicial review of this action pursuant to 5 U.S.C. §552(a)(4)(B).³⁰ If University of San Francisco does not seek a

²⁹ See *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981) (the protection of the attorney-client privilege extends only to communications and not the underlying facts).

³⁰ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Hudacko's right to pursue litigation. Hudacko may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448

judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, we direct the Media Bureau to produce the privilege log to Mr. Hudacko.³¹

14. The following officials are responsible for this action: Chairman Genachowski and Commissioners McDowell, Clyburn, Rosenworcel, and Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ See 47 C.F.R. § 0.461(i)(4).