

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

In the Matter of)
JOHN ANDERSON) FOIA Control No. 2014-295
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: October 26, 2016

Released: October 27, 2016

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order denies an application for review filed by John Anderson, Assistant Professor and Director of Broadcast Journalism, Brooklyn College (Prof. Anderson), seeking review of a Freedom of Information Act (FOIA) decision by the Commission’s Enforcement Bureau (EB). As explained below, we uphold EB’s decision and deny the AFR.

II. BACKGROUND

2. Prof. Anderson’s FOIA request sought the following records:

“the entire contents of Enforcement Bureau File Number EB-09-IH-0574 (In the Matter of Radio License Holding XI, LLC). Refers to sponsorship identification violation of WLS-AM in Chicago, involving program material from Workers Independent News. I seek all relevant documents, starting with the [initial] complaint dated March 19, 2009, and all subsequent correspondence between the offending Licensee and the Commission, as well as all internal Commission correspondence on this case, culminating in the release of a Forfeiture Notice on February 10, 2014.”

EB’s response to Prof. Anderson provided 88 pages of records and an audio file that were responsive to his request. In partly denying the request, the Bureau redacted portions of the disclosed documents, and withheld additional documents in their entirety, pursuant to the deliberative process privilege of FOIA Exemption 5. The Bureau also redacted information to protect individuals’ personal privacy under FOIA Exemption 6. The Bureau’s review of the responsive material determined both that no additional portions

1 Letter from John Anderson, Assistant Professor and Director of Broadcast Journalism, Brooklyn College to Office of General Counsel, Federal Communications Commission (dated December 11, 2015) (AFR).

2 Letter from William Knowles-Kellett, FCC to John Anderson (November 17, 2015) (Response).

3 Email from John Anderson to FOIA@fcc.gov (filed March 14, 2014).

4 Response. The records disclosed were drawn from the following responsive records: the complaint, correspondence with the licensee, a Notice of Apparent Liability for Forfeiture, a Forfeiture Order, a Tolling Agreement, approximately 4,200 pages of internal agency e-mail communications and internal memoranda, and approximately 1,500 pages of draft Commission decisions. Id. at 1.

5 Response at 1-2; 5 U.S.C. § 552(b)(5).

6 Response at 2, citing 5 U.S.C. § 552(b)(6).

could be segregated and released, and that there was no overriding public interest in disclosing any of the exempt material as a matter of its discretion.⁷

3. On December 11, 2015, Prof. Anderson filed the AFR, seeking review of EB's Response and requesting the identities of the complainant and FCC staff associated with file number EB-09-IH-0574 and deliberative material relevant to the Commission's characterization of the WIN programming at issue as paid programming rather than news.⁸ Prof. Anderson alleges that the Commission "actively libeled" Workers Independent News (WIN) in its enforcement action against WLS-AM and has liability for infringement on WIN's legitimacy and character as a news organization. Prof. Anderson claims that he filed the FOIA to support an infringement action against the Commission that he or WIN may bring in the future. Thus, he argues that his need for the names of the complainant and staff working on the WLS-AM enforcement action outweighs the individual privacy interests that are protected by Exemption 6. He also argues that the deliberative process privilege of Exemption 5 "does not extend to the protection of libelous speech" or protect agency deliberations "when the policy determinations that result actively place the Commission into a compromised position regarding an apparently new and unconstitutional incursion into broadcast content regulation."⁹

III. DISCUSSION

4. Prof. Anderson's AFR centers on two issues – EB's withholding of the identities of the complainant and lower level Commission staff, and EB's withholding of deliberative process materials. We find no reason to disturb EB's decision and therefore deny the AFR.

A. Identities of Individuals

5. Prof. Anderson requests disclosure of the identities of the complainant and FCC staff associated with file number EB-09-IH-0574, notwithstanding the individuals' privacy interests. He states that he or WIN needs the information to "move forward on any action" on his assertion that "the Commission has actively libeled Workers Independent News and thus has liability for this infringement on WIN's legitimacy and character as a news organization."¹⁰ The individual identities at issue here consist of the identity of the complainant and a few names of non-management-level staff contained in the records that EB withheld in full.¹¹ As we explain below, this information is protected under not only Exemption 6 but also Exemption 7(C).

6. We reject Prof. Anderson's argument that EB improperly redacted information identifying the complainant involved in the WIN investigation. While EB relied on FOIA Exemption 6, we find that FOIA Exemption 7(C)¹² is more on point when considering the identity of the complainant. Exemption 7(C) permits agencies to withhold identifying information in law enforcement investigative files when releasing that information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹³ In determining whether disclosure would meet this test, we consider "the nature of the requested document and its relationship to 'the basic purpose of the [FOIA] to open agency action to

⁷ Response at 2-3.

⁸ AFR at 4.

⁹ AFR at 4.

¹⁰ AFR at 4.

¹¹ AFR at 4.

¹² 5 U.S.C. § 552(b)(7)(C).

¹³ *Id.*

the light of public scrutiny,’ . . . rather than . . . the particular purpose for which the document is being requested.”¹⁴

7. As we have previously found, agency administrative records, including records that EB gathers in the course of investigating potential rule violations, constitute “law enforcement records” for purposes of Exemption 7(C).¹⁵ Exemption 7(C) also requires that an agency identify the privacy interests it aims to protect by withholding the requested information.¹⁶ We find that the individual who filed a complaint with the Commission about the WLS-AM broadcasts of WIN material has a substantial privacy interest in their name, address, phone number, and email address.¹⁷

8. The Supreme Court has held that, as a categorical matter, “a request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy, and that when the request seeks no ‘official information’ about a government agency, but merely records that the government happens to be storing, the invasion of privacy is ‘unwarranted.’”¹⁸ In this context, the concept of public interest is limited to the “core purpose” for which FOIA was enacted: to “shed light on an agency’s performance of its statutory duties.”¹⁹ Here, Prof. Anderson seeks no official information about the Commission. His asserted need for the information is to support an action against the Commission for libel or defamation that he or WIN may bring.²⁰ This is a private use of the information about the complainant having nothing to do with “shed[ding] light on an agency’s performance of its statutory duties.”²¹ We rejected precisely this argument previously, and find no reason to depart from that precedent.²² We therefore find that this information is properly withheld under FOIA Exemption 7(C).

9. We also agree with EB that Exemption 6 protects this information. FOIA Exemption 6 protects information about individuals in “personnel and medical files and similar files”²³ when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.”²⁴ Exemption 6 requires identification and balancing of the relevant privacy and public interests. The privacy interest of the individual who filed a complaint with the Commission about the WLS-AM broadcasts of WIN material is well established, and there is no indication of a public interest in the

¹⁴ *Dep’t of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976)).

¹⁵ See, e.g., *CompTel*, 27 FCC Rcd 7705, 7710 para. 12 (citing *Kay v. FCC*, 867 F.Supp. 11, 17 (D.D.C. 1994); *Kay v. FCC*, 976 F.Supp. 23, 37 (D.D.C. 1997), *aff’d per curiam*, 172 F.3d 919 (D.C. Cir. 1998)).

¹⁶ See *Associated Press v. DOD*, 554 F.3d 274, 284 (2d Cir. 2009).

¹⁷ See *Mark Hubeny*, 24 FCC Rcd 12290, 12291 (2009); *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122, 1124 (7th Cir. 2003), *cert. denied*, 524 U.S. 904 (2004); *CBS Corp.*, 22 FCC Rcd 11341, 11342-43 (2007).

¹⁸ *U.S. Dep’t of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 780 (1989) (quoting 5 U.S.C. § 552(b)(7)(C)).

¹⁹ *Id.* at 773 (1989); see *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

²⁰ AFR at 3-4.

²¹ *Reporters Committee*, 489 U.S. at 773.

²² *Mark Hubeny*, 24 FCC Rcd at 12291.

²³ The term “similar files” is interpreted broadly to include all information that applies to a particular individual. *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 601-02 (1982); see *Judicial Watch v. Food & Drug Administration*, 449 F.3d 141, 148 (D.C. Cir. 2006), *Carter, Fullerton & Hayes LLC v. Federal Trade Comm’n*, 520 F.Supp.2d 134, 144-45 (D.D.C. 2007).

²⁴ 5 U.S.C. § 552(b)(6). The protective scope of Exemption 6 is narrower than that of Exemption 7(C). The former provision bars any disclosure that “would constitute” an invasion of privacy that is “clearly unwarranted,” while the latter applies to any disclosure that “could reasonably be expected to constitute” an invasion of privacy that is “unwarranted.” See, e.g., *Joel Harding*, 23 FCC Rcd 4214, 4215 n.13 (2008).

complainant's identity.²⁵ We therefore agree with EB's decision to redact this information in the documents that were released.²⁶

10. We also find that the names of non-management level FCC staff are properly withheld under both Exemption 7(C) and Exemption 6. Although government employees generally have limited privacy interests in their government employment and work assignments, courts have upheld redaction of government employees' names contained in law enforcement files when those employees are involved in the conduct of the investigation.²⁷ Previously, we have upheld EB's decision to redact the names of FCC staff, as opposed to management level staff, where disclosure of their involvement in a particular investigation could reasonably be expected to cause an unwarranted intrusion of personal privacy that outweighs the public interest in releasing their names.²⁸

B. Deliberative Process Material

11. Prof. Anderson also requests release of deliberative material relevant to the Commission's characterization of the WIN programming at issue as paid programming rather than news.²⁹ We reject Prof. Anderson's argument that the deliberative process privilege under FOIA Exemption 5 is unavailable in this case because it is outweighed by his asserted need for the information (to support an action against the Commission for libel or defamation that he or WIN may bring).³⁰ Exemption 5 protects certain inter-agency and intra-agency records that are normally considered privileged in the civil discovery context.³¹ In civil discovery, however, application of the deliberative process privilege may be overcome by a showing of relevance or need by an opposing party, while under FOIA, a showing of relevance or need for the requested information has no bearing on the applicability of the privilege.³² Prof. Anderson's asserted need for the information, therefore, provides no basis for any additional disclosure of the deliberative information that was withheld by EB in response to his FOIA.³³

12. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by John Anderson in FOIA Control No. 2014-295 IS DENIED.³⁴ Prof. Anderson may seek judicial review of the denial in part of his FOIA request pursuant to 5 U.S.C. § 552(a)(4)(B).

²⁵ See *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) ("something, even a modest privacy interest, outweighs nothing every time"); see also *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174-75 (finding that requester had not shown existence of public interest "to put the balance into play").

²⁶ See *supra* para. 7.

²⁷ See *CompTel*, 27 FCC Rcd 7705, 7711 para. 15 (2012), *aff'd CompTel v. FCC*, 910 F.Supp.2d 100, 122-27 (D.D.C. 2012).

²⁸ *Id.*

²⁹ AFR at 4.

³⁰ AFR at 3-4.

³¹ See *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984).

³² See *FTC v. Grolier*, 462 U.S. 19, 28 (1983); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 ("[T]he needs of a particular plaintiff are not relevant to the exemption's applicability"); *Swisher v. Dep't of the Air Force*, 660 F.2d 369, 371 (8th Cir. 1981) (observing that applicability of Exemption 5 is in no way diminished by fact that privilege may be overcome by showing of need in civil discovery context).

³³ Prof. Anderson's assertions that WIN was libeled in the enforcement action are beyond the scope of this appeal of EB's Response to Prof. Anderson's FOIA request and we do not address them.

³⁴ 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 Prof. Anderson's right to pursue litigation. Prof. Anderson may contact OGIS in any of the following ways:

(continued...)

13. The officials responsible for this action are the following: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page) _____
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