

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

In the matter of
PAUL D. COLFORD,
THE DAILY NEWS
On Request for Inspection of Records
FOIA Control No. 21-132

MEMORANDUM OPINION AND ORDER

Adopted: January 28, 2002

Released: January 30, 2002

By the Commission:

1. The Commission has before it an application for review filed by Paul D. Colford of The Daily News seeking review of the decision of the Mass Media Bureau (the Bureau) granting in part and denying in part his Freedom of Information Act (FOIA) request for documents filed in connection with the proceeding in which Fox Television Stations (FTS) sought to acquire ten television broadcast station licenses held by Chris-Craft Industries. For the reasons stated below, we deny the application for review.

Background

2. FTS sought to acquire ten television broadcast station licenses, including the license for station WWOR-TV, Secaucus, New Jersey. The acquisition of WWOR-TV implicated the Commission's television/newspaper cross-ownership rule because FTS's parent, News Corporation Limited (News Corp.), also owns collocated station WNYW-TV and The New York Post newspaper in New York City. News Corp. submitted certain financial data regarding The New York Post along with a request for confidential treatment pursuant to section 0.459 of our rules, 47 C.F.R. § 0.459, and a declaration from The New York Post that the financial data was not publicly available. The Bureau adopted a Protective Order to allow parties to the FTS/Chris-Craft proceeding to have access to the financial materials for purposes of that proceeding.

3. Subsequently, the Bureau's Video Services Division sought additional information from FTS concerning the financial condition of The New York Post. In response, News Corp. provided a declaration of two of its senior executives and additional financial statements of The New York Post.

1 See Applications of UTV of San Francisco, Inc., KCOP Television, Inc., UTV of San Antonio, Inc., Oregon Television, Inc., UTV of Baltimore, Inc., WWOR-TV, Inc., and UTV of Orlando, Inc. and United Television, Inc. (Assignors) and Fox Television Stations, Inc. (Assignee) For Consent to the Assignment of Licenses for Stations KBHK-TV, San Francisco, CA; KCOP-TV, Los Angeles, CA; KMOL-TV, San Antonio, TX; KPTV-TV, Portland, OR; WUTB-TV, Baltimore, MD; WWOR-TV, Secaucus, NJ; WRBW-TV, Orlando, FL; KMSP-TV, Minneapolis, MN; KTVX-TV, Salt Lake City, UT; KTUP-TV, Phoenix, AZ, 16 FCC Rcd 14975 (2001) (FTS/Chris-Craft).

2 Order Adopting Protective Order, DA 01-528, 16 FCC Rcd 4807 (MMB 2001); Supplemental Protective Order, DA 01-579, 16 FCC Rcd 5259 (MMB 2001).

3 Declaration of Arthur M. Siskind, Senior Executive Vice President, News Corp., attaching a description of capital improvement costs statement; Declaration of David F. DeVoe, Senior Executive Vice President and Chief Financial Officer, News Corp., attaching "Unaudited Statement of Operations," New York Post, Fiscal Years ended June 30, 1999 and 2000, and forecasts for Fiscal Year ending June 30, 2001.

New Corp. requested that these additional filings be made subject to the Protective Order. The Bureau did so.⁴

4. *The Daily News* filed a FOIA request for the two submissions made by News Corp. described above.⁵ Pursuant to section 0.461(d)(3) of our rules, 47 C.F.R. § 0.461(d)(3), News Corp. was provided with a copy of the FOIA request, and filed a response in opposition to the request.⁶ News Corp. opposed release of the documents because they contained “highly confidential and competitively sensitive” information that should not be released to *The Daily News*, a “direct competitor” of *The New York Post*. *The Daily News* replied, asserting that because News Corp. had raised *The New York Post*’s financial condition in the FTS/Chris-Craft proceeding, its financial information should be disclosed.⁷

5. The Bureau granted in part and denied in part *The Daily News*’ FOIA request pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4).⁸ The Bureau noted that the documents sought by *The Daily News* “could conceivably assist a competitor in ascertaining *The New York Post*’s financial position and its past and planned capital expenditures, and might be used against *The New York Post* in the market.”⁹ It also observed, “The fact that FTS and News Corp. may have placed *The New York Post*’s financial condition in issue [in the FTS/Chris-Craft proceeding] is not dispositive of whether disclosure of the financial information is appropriate.”¹⁰ The Bureau determined that it would release to *The Daily News* portions of the submissions that were not subject to a confidentiality claim by FTS and News Corp., and the segregable factual portions of the records.¹¹

6. *The Daily News* then sought review of the Bureau Decision.¹² The newspaper again asserted that because *The New York Post*’s financial condition was placed in issue in the FTS/Chris-Craft proceeding, the financial data should be made generally available to the public.¹³ It also challenged FTS’s claim of the competitive harm that would result from disclosure of *The New York Post*’s financial information.¹⁴ News Corp. also filed an application for review of the Bureau’s decision to release the segregable factual information,¹⁵ but, upon its review of the proposed partial release of information to *The Daily News*, withdrew its application for review.¹⁶

⁴ Further Supplemental Protective Order, DA 01-976 (MMB Apr. 19, 2001).

⁵ Electronic mail from Paul D. Colford, *The Daily News*, to FOIA@FCC.GOV (Apr. 27, 2001) (FOIA Request).

⁶ Letter from William S. Reyner, Jr., Hogan & Hartson (attorney for News Corp. and FTS) to James J. Brown, Deputy Chief, Video Services Division, MMB (May 22, 2001) (News Corp. Response).

⁷ Letter from Paul D. Colford, *The Daily News*, to James J. Brown, Deputy Chief, Video Services Division, MMB (May 29, 2001) (*Daily News Reply*).

⁸ Letter from Roy J. Stewart, Chief, MMB, to Paul D. Colford, *The Daily News* (June 38, 2001) (Bureau Decision).

⁹ Id. at 3.

¹⁰ Id. citing Leesburg Communications and Answering Service, Inc., 89 F.C.C.2d 119 (1982) and Knoxville Broadcasting Corp., 87 F.C.C.2d 1103, 1110 (1981).

¹¹ Id. at 4.

¹² Letter from Paul D. Colford, *The Daily News*, to [Laurence H.] Schecker, [Office of] General Counsel, FCC (July 5, 2001) (App. for Rev.).

¹³ Id. at 1-2.

¹⁴ Id. at 3.

¹⁵ Application for Review of Freedom of Information Action (July 13, 2001).

¹⁶ Electronic mail from William S. Reyner, Jr., Hogan & Hartson, to Laurence Schecker, Office of General Counsel (Sept. 24, 2001).

Discussion

7. Upon review, we affirm the decision of the Bureau to withhold portions of the records sought by *The Daily News*. Exemption 4 permits us to withhold competitively sensitive commercial or financial information where release would cause substantial harm to the competitive position of the submitter of the information.¹⁷ We do not agree with *The Daily News* that News Corp. has not met its burden of showing why the information should be kept confidential.¹⁸ News Corp. explained that competition in the New York market is “increasingly fierce” and release of financial information about *The New York Post* would harm that newspaper competitively by giving the public access to information not customarily made available to the public.¹⁹

8. *The Daily News* also argues that the Bureau erred in not releasing information submitted to the Commission by News Corp. in support of its FTS/Chris-Craft application.²⁰ In addressing our general policies concerning confidential information submitted to the Commission, see Confidential Information, 13 FCC Rcd 24816, 24838-39 (1998), we explored the parameters of our general policy that information submitted in broadcast licensing proceedings should be made available for public inspection. We explained that while such applications are routinely available to the public,²¹ we would entertain requests for confidentiality because “a party should not necessarily be required to forego confidential information as a condition of obtaining a license.”²² We also noted that in order to give access to such information “to individuals and entities who file a petition for deny,” we would utilize protective orders to ensure limited use of the confidential materials. This is precisely the course taken in the FTS/Chris-Craft proceeding.²³ *The Daily News* was not a party to the FTS/Chris-Craft proceeding, and thus not entitled to the same access as parties and petitioners to deny. The Confidential Information order did not envision that any time confidential information was submitted in a broadcast or other Title III licensing proceeding, it would automatically be made available to the public at large. Rather, the Commission sought to balance the needs of applicants and petitioners to deny through the appropriate use of protective orders. As we observed in Confidential Information, 13 FCC Rcd at 24823-24 (footnotes omitted), “In recent years the Commission has increasingly relied on special remedies such as . . . protective orders to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials.”

9. The requestor also argues that the Bureau wrongly relied on our decisions in Knoxville and Leesburg.²⁴ In Knoxville, released in 1981, the Commission departed from its previous policy of authorizing public inspection of annual financial reports when licensees alluded to their financial condition in pleadings.²⁵ Leesburg, issued in 1982, followed the policy adopted in Knoxville and denied

¹⁷ E.g., National Parks and Conservation Ass’n v. Morton, 547 F.2d 673 (D.C. Cir. 1976); Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, 13 FCC Rcd 24816, 24818-20 (1998) (Confidential Information).

¹⁸ App. for Rev. at 2, 3.

¹⁹ See News Corp. Response, at 2, citing letters from Arthur M. Siskind, Senior Executive Vice President, News Corp. to Magalie Roman Salas, Secretary, FCC (January 22, 2001 and April 9, 2001).

²⁰ App. for Rev. at 2.

²¹ See 47 C.F.R. §§ 0.453(a)(2)(i)(G) (current reference).

²² Confidential Information, 13 FCC Rcd at 24838.

²³ See nn. 2 and 4, *supra*.

²⁴ Id.

²⁵ Knoxville Broadcasting Co., 87 F.C.C.2d 1103, 1110 (1982).

access to financial information submitted in a licensing proceeding.²⁶ More importantly and more relevant to the decision here, our recent statements in this regard in Confidential Information, discussed above, reflect our current policy of allowing limited access to petitioners to deny through the use of protective orders. Furthermore, in these circumstances, we do not agree with *The Daily News* that the public interest outweighs any competitive harm to News Corp., and therefore the Bureau did not err in refusing to authorize discretionary disclosure of the information.²⁷ We therefore conclude that the Bureau properly applied Exemption 4 in denying in part *The Daily News*'s FOIA request for financial information submitted by News Corp.²⁸

10. IT IS ORDERED that *The Daily News*'s application for review is DENIED. *The Daily News* may seek judicial review of the denial in part of his FOIA request pursuant to 5 U.S.C. § 552(a)(4)(B).²⁹

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

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

²⁶ Leesburg Communications and Answering Service, Inc., 89 F.C.C.2d 119, 121 (1982).

²⁷ See 47 C.F.R. § 0.457(d)(1).

²⁸ The Bureau cited Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982), because the Bureau was concerned that release of the information before the Commission issued its decision in FTS/Chris-Craft could result in confusion as to the basis for that decision. We agree that the Bureau's reliance in Russell was misplaced. Russell applies to internal agency documents, not to documents submitted by parties to our proceedings.

²⁹ Because News Corp. has withdrawn its application for review, the redacted versions of the documents sought by *The Daily News* may be released upon issuance of this order.