

August 20, 2007

Mark Messmer
795 East Scherle Lane
Jasper, Indiana 47546

Re: Formal Complaint 07-FC-214; Alleged Violation of the Access to Public Records Act by the Vincennes University Foundation, Licensee of WFML-FM

Dear Mr. Messmer:

This is in response to your formal complaint alleging the Vincennes University Foundation (“Foundation”) violated the Access to Public Records Act (“APRA”) (Ind. Code §5-14-3) by redacting information from a record it provided to you in response to your request. A copy of the Foundations’s response to your complaint is enclosed. I find that the Vincennes University Foundation may redact confidential or proprietary information only when it can provide the statutory authority citing what specific information is confidential or propriety.

BACKGROUND

In your complaint you allege that you requested from the Foundation on April 1 a copy of the five-year lease Vincennes University had signed with DLC Media to operate the University radio stations. You received a copy of the document on July 18 with certain financial payment information redacted. You called the Foundation on July 19 and requested the redacted information. You were denied access to the information. You filed your complaint on July 19.

The Foundation responded to your complaint on July 20, indicating it had given to you what is required by the Federal Communications Commission. The Foundation indicates FCC regulations allow redaction of monetary information. The Foundation provided further information on August 10 in the form of a communication from the Foundation’s attorney, Lauren Lynch-Flick. In her correspondence, Ms. Lynch-Flick indicates “the rule actually says that confidential and proprietary information can be redacted where appropriate. There is no real definition that I have found so far that defines what is confidential or proprietary or when redacting is appropriate. However, given the nature of these types of agreements, it must refer to financial matters, and perhaps matters of the format that the station will broadcast or whether the broker will take on certain employees at the station . . .” The rule Ms. Lynch-Flick cites is 47 C.F.R. § 73.3526(e)(14) (2005).

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. §5-14-3-1. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

Records required to be kept confidential by federal law may not be disclosed by a public agency. I.C. §5-14-3-4(a)(3). The burden of proof is on the agency in denying access to a public record. I.C. §5-14-3-9.

Here, the Foundation cites a federal regulation which indicates that for commercial radio stations the public file shall contain a copy of every agreement or contract involving time brokerage of the licensee's station or of another station by the licensee, with confidential or proprietary information redacted where appropriate. 47 C.F.R. § 73.3526(e)(14). This regulation does not indicate what information is required to be kept confidential, if any. The APRA is clear in requiring information declared confidential by federal statute to be withheld from disclosure. But here I see no regulation or statute requiring the information redacted from the contract to be kept confidential. Rather, I read the federal regulation in much the same way I believe the similar provisions of the APRA are intended – a public agency shall redact information *required* to be kept confidential. But an agency may not use its discretion in deciding what it wants to keep confidential absent a governing statute allowing it to do so.

If the Foundation relies on a federal statute requiring the financial terms of the contract to be withheld from disclosure, the Foundation bears the burden of providing the requester with the statutory authority declaring the information confidential. A guess or suggestion that this particular payment information might be what is contemplated by the federal regulation is not enough to withhold disclosure.

CONCLUSION

For the foregoing reasons, I find that the Vincennes University Foundation may redact confidential or proprietary information only when it can provide the statutory authority citing what specific information is confidential or proprietary.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Phillip Smith, Manager, WFML