

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

In the Matter of	)	
	)	
CBS CORPORATION	)	FOIA Control Nos. 2006-313 and 2006-428
	)	
On Requests for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** June 12, 2007

**Released:** June 15, 2007

By the Commission:

1. The Commission has before it two applications for review filed by CBS Corporation (CBS) of two decisions of the Enforcement Bureau (the Bureau) granting in part and denying in part its Freedom of Information Act (FOIA) requests. The FOIA requests sought copies of indecency complaints that the Commission received concerning an episode of “Without a Trace” broadcast on eight named CBS stations.<sup>1</sup> For the reasons described below, we deny the applications for review.

2. In FOIA Control No. 2006-313, CBS sought sample copies of complaints alleging that eight CBS stations violated FCC indecency rules by broadcasting an episode of “Without a Trace,” which depicted numerous teenagers engaged in various sexual activities.<sup>2</sup> The Bureau provided eight sample complaints, redacting the names and street addresses pursuant to FOIA Exemption 6<sup>3</sup> which protects personal privacy.<sup>4</sup> The Bureau did not redact the city, state and zip code of the complaining parties. CBS then filed an application for review of the Bureau’s decision.<sup>5</sup> CBS also filed a new FOIA request seeking all complaints filed against the same eight stations for broadcasting the “Without a Trace” episode.<sup>6</sup> In response, the Bureau provided 2063 pages of complaints, again redacting the complainants’ names and street addresses pursuant to FOIA Exemption 6, but releasing the city, state and zip code of the complainants.<sup>7</sup> CBS again filed an application for review.<sup>8</sup>

<sup>1</sup> The two applications for review are consolidated for disposition in this single Memorandum Opinion and Order, as requested by CBS. See Letter from Robert Corn-Revere, Esq., David, Wright Tremaine LLP, to Samuel Feder, General Counsel (Oct. 2, 2006) (2006-428 AFR) at 3.

<sup>2</sup> See Letter from Robert Corn-Revere, Esq. to Managing Director, FCC (Apr. 14, 2006) (FOIA Control No. 2006-313). On March 15, 2006, the Commission released a Notice of Apparent Liability (NAL) finding that the “Without a Trace” episode in question was apparently indecent and proposing a forfeiture of \$32,500 against each station that was the subject of a complaint and had broadcast the episode prior to 10 p.m. *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,”* 21 FCC Rcd 2732 (2006), corrected, 21 FCC Rcd 3110 (Enf. Bur. 2006) (*Without a Trace NAL*).

<sup>3</sup> 5 U.S.C. § 552(b)(6).

<sup>4</sup> See Letter from William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Robert Corn-Revere, Esq. (May 31, 2006).

<sup>5</sup> Review of Freedom of Information Action, FOIA Control No. 2006-313 (June 30, 2006) (2006-313 AFR).

<sup>6</sup> See Letter from Robert Corn-Revere, Esq. to Managing Director, FCC (June 30, 2006) (FOIA Control No. 2006-428).

<sup>7</sup> See Letter from William Davenport to Robert Corn-Revere, Esq. (Aug. 31, 2006).

<sup>8</sup> 2006-428 AFR.

3. We affirm the Bureau's two FOIA decisions. FOIA Exemption 6 permits the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>9</sup> In applying this exemption, we must weigh the privacy interest of the individual against the public interest in disclosure.

4. Contrary to CBS's contention,<sup>10</sup> the individuals who complained to the Commission about the "Without a Trace" broadcast have a substantial privacy interest in their names and street addresses. In *Lakin Law Firm, P.C. v. FTC*,<sup>11</sup> the United States Court of Appeals for the Seventh Circuit addressed precisely this issue in the context of a FOIA request for consumer complaints. The Seventh Circuit held that "personal identifying information [in consumer complaints to the government] is regularly exempt from disclosure. And that is as it should be, for the core purpose of the FOIA is to expose what the government is doing, not what its private citizens are up to."<sup>12</sup> Further, the Supreme Court has recognized that "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."<sup>13</sup> We believe that an individual's television programming preferences are the type of personal information protected by Exemption 6.<sup>14</sup>

5. In an attempt to demonstrate that there is no privacy interest in the names and street addresses of the complaining parties, CBS offers three unpersuasive arguments. First, CBS asserts the complaining parties' failure to seek confidential treatment of their names and addresses indicates they had little expectation of privacy.<sup>15</sup> However, this argument is specious, as the Commission rule cited by CBS

---

<sup>9</sup> 5 U.S.C. § 552(b)(6).

<sup>10</sup> See 2006-313 AFR at 6.

<sup>11</sup> 352 F.2d 1122, 1124 (7th Cir. 2003) (*Lakin Law Firm*), cert. denied, 524 U.S. 904 (2004).

<sup>12</sup> *Lakin Law Firm*, 352 F.3d at 1124. See also *Kidd v. Dep't of Justice*, 362 F. Supp.2d 291, 297 (D.D.C. 2005) ("Providing personal identifying information commonly found in constituent letters does not advance the purposes of FOIA and, as such, may be withheld from FOIA requests."), citing *Voinche v. FBI*, 940 F. Supp. 323, 330 (D.D.C. 1996) ("There is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the identities of . . . private citizens who wrote to government officials . . ."), *aff'd*, No. 96-5304 (D.C. Cir. 1997), cert. den., 522 U.S. 950 (1997). The cases cited by CBS (2006-313 AFR at 6) for the proposition that "the release of names and addresses is not inherently and always a significant threat to privacy" are distinguishable because none involved complaints by individuals filed with the Federal government. Further, in two of the three cases, the court upheld an agency decision to withhold the documents on privacy grounds. See *Painting and Drywall Work Preservation Fund, Inc. v. Dep't of Housing and Urban Dev.*, 936 F.2d 1300, 1302-03 (D.C. Cir. 1991) (names and addresses from payroll records may be withheld); *Hertzberg v. Veneman*, 273 F. Supp.2d 67, 85-90 (D.C. Cir. 2003) (names of individuals giving witness statements or evacuated during threat of wildfires may be withheld). In the third case, the court held that the information should be released because it carried no opprobrium and was hardly even a private matter. *Southern Utah Wilderness Alliance, Inc. v. Hodel*, 680 F. Supp. 37, 39 (D.D.C. 1988) (names of individuals who have visited national parks must be disclosed).

<sup>13</sup> *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

<sup>14</sup> Cf. 47 U.S.C. § 551(c)(2)(C)(ii)(I) (a cable operator may not disclose "personally identifiable information" about a cable subscriber that would "reveal, directly or indirectly, the extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator"); 18 U.S.C. § 2710(b)(2)(D)(ii) (a video tape service provider may not disclose personally identifiable information of a video renter if it would "identify the title, description, or subject matter of any video tapes or other audio visual material"); Mart, *Protecting the Lady From Toledo: Post USA-Patriot Act Electronic Surveillance at the Library*, 96 L.Lib.J. 449, 454 n.36 (2004) ("Forty-eight states and the District of Columbia have express laws protecting the privacy of library records; the remaining two states (Kentucky and Hawai'i) have opinions from their attorneys general that library records are confidential.")

<sup>15</sup> *Id.* at 6-7, citing, e.g., 47 C.F.R. § 0.459(a).

is directed at confidential commercial information, not personal privacy rights.<sup>16</sup> Further, the personal information concerning complaining parties is part of a system of records under the Privacy Act.<sup>17</sup> The system of records specifically assured complainants that their names and addresses would be withheld from the public.<sup>18</sup> In fact, the system of records specifically indicates that the complaints “are available for public inspection *after redaction of information that could identify the complainant or correspondent, i.e., name, address and/or telephone number.*”<sup>19</sup> Thus, CBS errs when it claims that there was a “failure and/or absence of agency assurance of confidentiality,”<sup>20</sup> and we conclude that there was an expectation of privacy by individuals filing indecency complaints. Second, CBS points out that the names of parties complaining about certain other allegedly indecent broadcasts were provided by the Commission in a certified list of the items in the record in the litigation of orders involving those broadcasts.<sup>21</sup> CBS’s observation, while accurate, does not provide support for releasing the names and addresses of the complainants here. This is because the relevant system of records expressly permits the Commission to reveal personal information to courts in litigation,<sup>22</sup> and the limited release of personal information as authorized by the system of records is far different than a public release of information under the FOIA.<sup>23</sup> Third, CBS wrongly argues that the complaints are routinely available records because they are not

---

<sup>16</sup> See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24825-26 (1998) (amending section 0.459 for confidentiality request for competitively sensitive information), *recon. den.*, 14 FCC Rcd 20128 (1999). A case cited by CBS (2006-313 AFR at 6-7 n.11), *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 377 (1980), illustrates this point. That case involved reports filed by television manufacturers concerning television-related accidents. Some were filed with requests for confidential treatment; others were not. FOIA requesters were granted access to those reports filed without a claim of confidentiality. That case did not involve personal information, but rather involved claims of confidential commercial information. Likewise, CBS’s citation to *United States Dep’t of Agriculture v. FLRA*, 836 F.2d 1139, 1144 (8th Cir. 1988) is inapposite. That case involved a decision of the Federal Labor Relations Authority (FLRA) determining that labor unions were entitled to disclosure of employees’ home addresses. While holding the employees had a privacy interest in their home addresses, *see id.* at 1143, the court also concluded that the union was entitled to disclosure unless the employee had requested confidentiality for his or her home address, *see id.* at 1143-44. The court based this conclusion on an “accommodat[ion] to the fullest extent possible of both the privacy interests of employees and the need of the union to communicate effectively in carrying out its statutory duty of representation.” *id.* at 1144. In the case under consideration here, as we describe, the privacy interests of complaining parties is clear, but there is no substantial countervailing interest in the release of this private information. CBS also fails to note the subsequent history of the *Department of Agriculture* case on which it relies. The decision was vacated and remanded to the Eighth Circuit in *FLRA v. United States Dep’t of Agriculture*, 488 U.S. 1025 (1989). in light of a regulation adopted by the Department that allowed for release to the unions of the home addresses of employees, and on remand the Eighth Circuit dismissed the case as moot. *United States Dep’t of Agriculture v. FLRA*, 876 F.2d 50 (8th Cir. 1989).

<sup>17</sup> 5 U.S.C. § 552a.

<sup>18</sup> See *Privacy Act System of Records*, 66 FR 51955, 51956 (2001) (FCC/CIB-1, *Informal Complaints and Inquiries*) (“Records in this system are available for public inspection *after redaction of information that could identify the complainant or correspondent, i.e., name, address and/or telephone number.*”) (emphasis supplied).

<sup>19</sup> 66 FR at 51956 (emphasis added).

<sup>20</sup> 2006-313 AFR at 6 & n.11.

<sup>21</sup> *See id.* at 7.

<sup>22</sup> See FCC/CIB-1, 66 FR at 51956 (Routine Use 4 providing that “[a] record on an individual in this system of records may be disclosed, where pertinent, in any legal proceeding to which the Commission is a party before a court or administrative body”).

<sup>23</sup> See *Lakin Law Firm*, 352 F.2d at 1124 (holding that a limited release of information to law enforcement officials does not alter the individual consumer’s privacy interests in keeping their identities and home addresses free from general public disclosure under the FOIA).

specifically listed among the “records not routinely available for public inspection.”<sup>24</sup> This argument fails, however, because under 47 C.F.R. § 0.461, “[a]ny person desiring to inspect Commission records which are not listed in § 0.453 or § 0.455 [the rules listing records routinely available for public inspection] shall file a [FOIA] request for inspection meeting the requirements of this section.” Complaints against broadcasters are not among the records listed in those rules as routinely available.<sup>25</sup> Thus, a FOIA request under section 0.461 is required to inspect those complaints, and in considering such a request, the Commission or its staff must determine whether any FOIA exemption applies.<sup>26</sup>

6. A FOIA requester bears the burden of demonstrating the public interest that would be served by release of records where individuals have a privacy interest.<sup>27</sup> CBS fails to meet its burden here with respect to complainants’ names and street addresses. The concept of public interest under the FOIA is limited to the “core purpose” for which FOIA was enacted: to “shed[] light on an agency’s performance of its statutory duties.”<sup>28</sup> Here, public release of the names and street addresses of the individual complainants would do little to shed light on the Commission’s activities concerning the indecency statutes and regulations. CBS argues that the information would reveal whether “the FCC is properly implementing the indecency provisions of the [Communications] Act and the rules, and correctly administering associated agency policies.”<sup>29</sup> CBS, however, misapprehends the role of a complaint alleging a violation of the indecency rules. Once a complaint alleging an indecent broadcast is filed with the Commission, the complainant has no ongoing role (or in rare instances only a very limited ongoing role) in the process.<sup>30</sup> The Commission independently resolves the issue of whether the subject broadcast has violated the indecency statutes and regulations. This is particularly true where, as in this case,<sup>31</sup> the Commission has a tape of the episode in question, because in such instances the Commission has a generally undisputed record of what was broadcast.<sup>32</sup> CBS argues that the information is needed to confirm that the Commission is relying on legitimate viewer complaints to justify an inquiry to sanction.<sup>33</sup> To be sure, we have indicated that “it is appropriate that we sanction only the licensee of the station

---

<sup>24</sup> 2006-313 AFR at 7 n.13, citing 47 C.F.R. §§ 0.457 and 0.461 and *Establishment of Rules Governing Procedures to be Followed When Informal Complaints are Filed by Consumers against Entities Regulated by the Commission*, 17 FCC Rcd 3919, 3927 (2002) (discussing current informal complaint rules against common carriers and proposing to modify and extend them to all regulated entities so that they would be available for routine inspection).

<sup>25</sup> In contrast, the Commission’s rules do indicate that complaints against common carriers (47 C.F.R. § 0.453(a)(ii)(F)) and complaints against cable programming rates (47 C.F.R. §§ 0.453(a)(v)(A) and 0.453(m)(1)) are routinely available.

<sup>26</sup> See 47 C.F.R. § 0.461(f)(1) and (4).

<sup>27</sup> See, e.g., *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (*Favish*); *Lakin Law Firm*, 352 F.3d at 1125; *ACLU v. FBI*, 429 F. Supp.2d 179, 192 (D.D.C. 2006).

<sup>28</sup> *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). See also *Favish*, 541 U.S. at 171-72 (stating the *Reporters Committee* balancing test).

<sup>29</sup> 2006-313 AFR at 7-10.

<sup>30</sup> Thus, for example, complainants lack a private right of action with respect to indecency enforcement decisions. See *Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993) (petitioner lacked standing to challenge the FCC’s refusal to take action against a radio station for unlawfully broadcasting indecent language), *cert. den.*, 511 U.S. 1052 (1994).

<sup>31</sup> See *Without a Trace NAL*, *supra*.

<sup>32</sup> See *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8015 (2001) (describing the supporting evidence necessary to enable the Commission to evaluate an indecency complaint).

<sup>33</sup> 2006-313 AFR at 8.

whose viewers complained about the program.”<sup>34</sup> However, by providing redacted complaints containing the city, state and zip code of the complainant, the Commission has provided sufficient information to establish that it is following its policy of considering complaints from within station’s viewing area.<sup>35</sup> CBS also asserts that the addresses are required because a broadcast is considered indecent only if it is patently offensive as measured by contemporary community standards.<sup>36</sup> However, the Commission has held that the relevant standard is not a local one, and in any case, the zip code is sufficient to identify the community at issue.<sup>37</sup> Finally, CBS says that the names and addresses might reveal if multiple complaints came from a single household or small area. This too is irrelevant. In determining whether material is patently offensive, the Commission does not rely on the number of complaints it receives or the geographic distribution of complaints within a particular local market.

7. CBS cites *Bartholdi Cable Co. v. FCC*<sup>38</sup> for the proposition that “the mere fact that information might be protectible under the exemption does not foster expectations the FCC will withhold it.”<sup>39</sup> *Bartholdi* actually stated that “[t]he fact that information falls within one of the FOIA exemptions does not necessarily mean that the agency cannot disclose the material. FOIA’s exemptions simply permit, but do not require, an agency to withhold exempted information from the public.”<sup>40</sup> In other words, an agency may in its discretion release records that otherwise may be withheld under a FOIA exemption. Here, we conclude that Exemption 6 protects the names and street addresses of complaining individuals, and, as we have explained, there is no reason to exercise our discretion to override the FOIA exemption and release this information. In short, as the Seventh Circuit observed in *Lakin Law Firm*, “When people feel so strongly that they actually complain about it to a federal agency, they probably think their names and addresses will not be released to a firm of private lawyers”<sup>41</sup> or, as in the present circumstances, to the public at large.<sup>42</sup> The individuals who complained to us about the “Without a Trace” broadcast are entitled to their privacy.

8. IT IS ORDERED that the applications for review by CBS Corporation ARE DENIED. CBS Corporation may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

---

<sup>34</sup> *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2687 (2006) (*Omnibus Order*), remanded and partially stayed (2d Cir. Sept. 7, 2006), on remand, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299 (2006) (*Order on Remand*), vacated on other grounds sub nom. *Fox Television Stations, Inc. v. FCC*, \_\_\_ F.3d \_\_\_, 2007 WL 1599032 (2d Cir. decided June 4, 2007). See also *Order on Remand*, at 13329 (“In addition to demonstrating appropriate restraint in light of First Amendment values, this enforcement policy preserves limited Commission resources, while still vindicating the interests of local residents who are directly affected by a station’s airing of indecent and profane material.”).

<sup>35</sup> Cf. *Order on Remand*, at 13328-29; *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVII Halftime Show, Forfeiture Order*, 21 FCC Rcd 6653, 6665 (2006) (on reconsideration of 21 FCC Rcd 2760 (2006)), *pet. for rev. pending sub nom. CBS Corp. v. FCC*, No. 06-3575 (3d Cir. filed July 28, 2006).

<sup>36</sup> 2006-313 AFR at 9.

<sup>37</sup> See *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, 1841 (2004) (“The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area.”).

<sup>38</sup> 114 F.3d 274, 283 (D.C. Cir. 1997).

<sup>39</sup> 2006-313 AFR at 6-7.

<sup>40</sup> 114 F.3d at 282.

<sup>41</sup> 352 F.2d at 1122.

<sup>42</sup> See *Favish*, 541 U.S. at 174 (“It must be remembered that once there is disclosure, the information belongs to the general public.”).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary