

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

In the Matter of
JOEL HARDING
On Request for Inspection of Records
FOIA Control No. 2007-065

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2007

Released: May 30, 2007

By the Commission:

1. By this memorandum opinion and order, we deny an application for review1 filed January 17, 2007, by Joel Harding (Harding), a prisoner at the Alger Maximum Correctional Facility in Munsing, Michigan, seeking review of a letter ruling2 denying his request for a waiver of fees relating to his Freedom of Information Act (FOIA) request.3

I. BACKGROUND

2. In his FOIA request, Harding sought 15 categories of records.4 Additionally, Harding requested a waiver of the fees for processing his FOIA request, explaining.5

1 Letter from Joel Harding to Federal Communications Commission, Office of General Counsel (Jan. 17, 2007) (Application for Review).

2 Letter from Joel Kaufman, Associate General Counsel to Mr. Joel Harding (Dec. 27, 2006) (Response).

3 Letter from Joel Harding to Federal Communications Commission (Nov. 30, 2006) (Request).

4 See Request at 1-3. These categories are:

- (1) All amateur radio and radio station applications for all class licenses including those of the amateur radio bands.
(2) A list and fee schedule for all licenses including those specified in Request #1.
(3) All [sic] list of all call-signs of all volunteer exam [sic] coordinators (VEC's) in Michigan and their addresses from you [sic] call sign or other databases. . . .
(4) A printout from the database in request #3 of Amateur operator N8XNN.
(5) A copy (list) of all rules regarding each type of application and transmission/reception station including space/shuttle stations.
(6) A copy/list of all radio amateur radio satellites and all telecommunications satellites, their names/call signs and the frequencies uplink/downlink they operate on.
(7) A copy (list) of all radio repeaters/amateur radio repeaters and their call signs and operation frequency specifics.
(8) A copy/list of all Q codes/signs and any other radio code communications format that is usable by the public to [sic] which you maintain as a record, even those that are old.
(9) A copy of Part 97 regarding amateur radio/other operations. (radio/television.)
(10) A copy of all cell phone/telephone calling areas including the first 3 digit calling areas for transmission/reception cites [sic] with identifying info.

This is an indigent person[']s request and release of the documents is in the public interest at no cost to the requester because the information is being sought in connection with safety and welfare needs specifically related to the requester, as the requester requires the information for self protection reasons and disclosure of information of records on individuals whom [sic] may assist him with this protection.

3. The Associate General Counsel, Administrative Law Division (OGC) denied Harding's request for a fee waiver.⁶ Applying relevant precedent, OGC noted that indigency alone is not a sufficient basis for granting a waiver.⁷ Further, the fee waiver was denied because, while Harding alleged that the request would serve "safety and welfare needs," he failed to explain with reasonable specificity how disclosure would contribute to public understanding of the operations of the government⁸ and, in particular, how he would disseminate the requested information to the public.⁹ As an additional matter, Harding was advised that some of the materials he requested may be available in the Department of Corrections' Law Library.¹⁰

II. DISCUSSION

4. We deny Harding's application for review. As explained below, we reject Harding's contention that, because he is an indigent prisoner, it would be

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- (11) The state identification list for all call-signs you provide in the lists foregoing.
 - (12) All rules regard transmission of radio signals on amateur bands for Antennas for the said stations requested.
 - (13) A copy of the application which was sent in my name (I did not send it; It is # Ref 0002431215, and all related papers/records.
 - (14) A copy/list of any call sign area maps (with call prefixes) including any world call zone maps and ITU region maps.
 - (*) I would also like your complaint forms for unlawful transmission on any frequency and would like to know the procedure.

⁵ Request at 1. Absent a waiver, Harding would be categorized as an "all other requester" and would be charged with the search and duplication costs associated with his request, except for the first two hours of search time and the first 100 pages of duplication. See Response at 2; 47 C.F.R. § 0.470(a)(3).

⁶ See Response at 2.

⁷ See Response at 1, citing *Ely v. USPS*, 753 F.2d 163, 165 (D.C. Cir. 1985) (rejecting contention that indigency alone is justification for granting fee waiver requested by federal prisoner), *cert. denied*, 471 U.S. 1106 (1985), and *Durham v. U.S. Dep't of Justice*, 829 F. Supp. 428, 435 n.10 (D.D.C. 1993) (indigency alone does not constitute adequate grounds for a fee waiver).

⁸ See Response at 1, citing *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (*MESS*) (requester must demonstrate with reasonable specificity how disclosure will contribute to public understanding).

⁹ See Response at 1, citing *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (absence of specific information regarding ability to disseminate requested information is grounds for denying a fee waiver) and *MESS*, 835 F.2d at 1285 (requiring an explanation with "reasonable specificity how disclosure will contribute to public understanding").

¹⁰ See Response at 2.

unconstitutional to deny his fee waiver request. Further, we find that Harding has not shown that his FOIA request is likely to contribute significantly to public understanding of the operations or activities of the government, as required by the fee waiver provision of the statute.

5. Constitutionality of Fee Waiver Denial. In *Ely v. USPS*, the United States Court of Appeals for the District of Columbia Circuit squarely rejected the argument that indigency alone constitutes a sufficient justification for waiving FOIA fees.¹¹ Nevertheless, Harding, in his application for review, argues that denying a FOIA fee waiver to an indigent prisoner is unconstitutional.¹² There is no merit to Harding's argument that the Constitution requires granting fee waivers to indigents because they would otherwise be denied access to information through FOIA.¹³ The Supreme Court has upheld the application of government fees to indigents. In *United States v. Kras*,¹⁴ for example, the Court held that the imposition of filing fees as a condition for obtaining discharge in bankruptcy had a rational basis and did not deny indigents equal protection of the laws, although it tended to deny them access to bankruptcy relief.¹⁵ The Court noted that bankruptcy is not a fundamental right such as free speech or marriage and therefore a compelling governmental interest was not required to regulate it.¹⁶ The Court further noted that indigency is not a suspect category, such as race, nationality, or alienage.¹⁷ Accordingly, it reasoned the law imposing fees was valid, although it tended to have a greater effect on the indigent, because it was a rational exercise of Congress' power to regulate bankruptcy proceedings.¹⁸ Similarly, in this case, no fundamental right or suspect category is involved, and, accordingly, fee waiver standards need only have a rational basis. And here, limiting FOIA fee waivers to cases where the disclosure of information would contribute significantly to public understanding of the operations or activities of the government represents a rational basis for granting waivers since it furthers the basic purpose of the FOIA, which is to open agency action to the light of public scrutiny while protecting the public fisc.¹⁹

¹¹ See *Ely*, 753 F.2d at 165.

¹² See Application for Review at 2-3.

¹³ See *Price v. United States*, 2005 WL 3207402 (D. Ariz. 2005) (giving FOIA fees as example in finding that government fees are generally not constitutionally required to be waived for indigents).

¹⁴ 409 U.S. 434, 446-47 (1973).

¹⁵ See *id.*

¹⁶ See *id.* at 446.

¹⁷ See *id.*

¹⁸ In this regard, Harding errs (Application for Review at 2) in suggesting that a higher "strict scrutiny" standard should apply.

¹⁹ See *Ely*, 753 F.2d at 165 (D.C. Cir. 1985) ("The fee waiver provision in the Freedom of Information Act was enacted to ensure that the public would benefit from any expenditure of public funds for the disclosure of public records. Congress rejected a fee waiver provision for indigents."); see also *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 153-54 (1980) (recognizing congressional intent that persons making FOIA requests must generally pay for the costs of document search and duplication). See generally *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772 (1989) (basic purpose of the FOIA is to open agency action to the light of public scrutiny), quoting *Dep't of Air Force v. Rose*, 425 U.S. at 372.

6. In support of his argument, Harding relies on two cases, *Turner v. Safley*²⁰ and *Romer v. Evans*²¹, both of which are inapposite. In the first place, neither case involves indigency or the imposition of fees. Moreover, *Turner* involved a prisoner-specific restriction on the fundamental right of marriage. Here, by contrast, the same waiver standard for FOIA fees applies to all applicants, whether or not they are incarcerated or indigent, and Harding's request for a fee waiver does not implicate any fundamental rights. Furthermore, in *Romer*, the Supreme Court found that a state constitutional amendment was unconstitutional because it singled out a particular disfavored group (homosexuals) and lacked a rational basis. In this case, however, the FOIA fee waiver provision applies equally to all applicants and, as explained above, the FOIA waiver standards have a rational basis. Accordingly, the cases cited by Harding do not call into question the constitutionality of the FOIA fee waiver standards.

7. Absence of Significant Contribution to Public Understanding of Government. Harding next argues that he has satisfied the requirement for showing that his request is in the public interest because his request involves a matter of personal safety. Harding states:

I have been and continue to be subjected to an unlawful terrorist weapon which . . . is being used on me to intercept . . . and transmit for the purpose of murdering me and defrauding the public, all of my thoughts, speech, and activities. The device is a bioelectric, Radio frequency transmitter/receiver which monitors and tracks my location, and my biophysical information, and transmits it to others over radio and television air space throughout the state of Michigan and the United States. . . . They use it to intercept and thwart legal claims/prosecutions. . . . The device is frying my body and brain, literally. . . . This is a serious and outlawed death penalty offense. I am suffering for more than 2 years non-stop and am dying from it. . . . They are all conspiring together and use the device to spy on law enforcement. They though[t] I was a Federal agent. The crimes are intended not only against me, but also against the state and federal government, and if you don't stop this Treason²² I will die.²³

Harding also alleges that his children were kidnapped, that he is being blackmailed and misrepresented to the public and that "more than 5000 and possibl[y] millions of persons [are] involved."²⁴ He further claims that a fraudulent FCC license application was filed in his name. He then indicates that "[t]he information requested will benefit the public because I will use it to prove the unlawful threat against them, supra, and state how I used it to do so, through amateur Radio communications."²⁵

²⁰ 482 U.S. 78, 97-98 (1987) (finding unconstitutional prison regulation that prohibits inmate marriages unless prison superintendent determines that there are compelling reasons for the marriage).

²¹ 517 U.S. 620, 632-33 (1996) (state constitutional amendment that bars laws designed to protect homosexuals from discrimination is unconstitutional).

²² Harding cites to 18 U.S.C. § 2382, which criminalizes the misprision of treason.

²³ Application for Review at 4-6 (emphasis in the original).

²⁴ Application for Review at 7.

²⁵ *Id.*

8. A fee waiver will be granted only upon a showing that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”²⁶ For purposes of the fee waiver statute, the public interest is narrowly defined to mean a likelihood of contributing significantly to the public understanding of the operations or activity of government.²⁷ Further, personal benefit to be derived by the requester is not relevant to the determination.²⁸ A requester seeking a fee waiver bears the initial burden of identifying the public interest to be served.²⁹ The public interest must be identified with “reasonable specificity;” a waiver is not justified if any benefit to the public from waiver and disclosure would be “at best, indirect and speculative.”³⁰ In this case, we cannot discern any specific basis to believe that disclosure of the information requested by Harding will serve to illuminate his allegations of government misconduct or otherwise contribute significantly to the public understanding of the operations of government as the statute requires in order to grant a fee waiver. In fact, despite his attempt to more broadly characterize his request, it appears that it is primarily motivated by his desire to protect his personal safety and that the information he requests would not make a significant contribution to public understanding of federal government operations.³¹ At best, any benefit to the public would be indirect and, in light of the somewhat bizarre nature of Harding’s allegations, highly speculative. Harding has therefore failed to meet his burden of showing that the requested information would benefit the public by contributing significantly to the public understanding of the operations of government.³² Moreover, Harding has failed to identify how he intends to disseminate the information to the public, further undermining his assertion that release of the information would benefit the public by contributing significantly to the public understanding of the operations of government.³³ Indeed, this failure alone is sufficient to deny a fee waiver request.³⁴

²⁶ See 5 U.S.C. § 552(a)(4)(A)(iii); 47 C.F.R. § 0.470(e). See also *Robert J. Robbins*, 21 FCC Rcd 6685, 6686 ¶ 3 (2006) (The focus on determining whether to waive FOIA fees is the benefit to be derived by the public; personal benefit to be derived by the requester is not relevant to the determination). Contrary to Harding’s contention (Application for Review at 1), OGC correctly cited the relevant statutory provision, which does not mention indigence. Furthermore, notwithstanding Harding’s contrary view, it is irrelevant whether Harding would be exempt from fees under the Michigan Freedom of Information Act, MCL §§ 15.231-246, since it is the federal FOIA, not the state statute, that is at issue here. See Application for Review at 2.

²⁷ See 5 U.S.C. § 552(a)(4)(A)(iii); 47 C.F.R. § 0.470(e).

²⁸ *Robbins*, 21 FCC Rcd at 6686, citing *McClain v. U.S. Dep’t of Justice*, 13 F.3d 220, 221 (7th Cir. 1993).

²⁹ *NTEU v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987); see also *MESS*, 835 F.2d at 1285 (explaining requester’s burden).

³⁰ *NTEU v. Griffin*, 811 F.2d at 647.

³¹ See *McClain v. U.S. Dep’t of Justice*, at 221 (a former inmate’s request for information concerning federal investigation and prosecution of him primarily served to facilitate a challenge to his conviction and therefore did not qualify as contributing significantly to the public understanding of government operations).

³² See *supra* note 31.

³³ See *supra* note 9.

III. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED, that the application for review, filed January 17, 2007, by Joel Harding IS DENIED. Harding may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ *See Larson*, 843 F.2d at 1483 (failure to identify means of disseminating information is a sufficient basis for denying fee waiver request). Citing various civil rights laws, such as 18 U.S.C. § 242, Harding (Application for Review at 5, 7) also asks the Commission to initiate prosecution in the state and federal courts. Requests of this nature, however, are beyond the scope of a FOIA appeal.