Friends of Yellowstone Public Radio
Emergency Board Meeting
KEMC Studios, Billings, MT 59101/Conference Call

June 4, 2020

Board Members in attendance (via phone):
Melissa Boehm
David Craig
JoAnn Eder
Susan Foster
Malcom Goodrich
Mary McNally
Marilynn Miller
Scott Mitchell
Anita Pagliaro
Amber Parish
Barbara Sample
Barb Shafer
Curt Starr
Ashley Warren

Absent:
Doxey Hatch
Chuck Hingle

Staff:
Ken Siebert
Nicky Ouellet

The board meeting was called to order at 1:00pm.

The following issue was discussed by the Executive Committee with Ken Siebert and Nicky Ouellette. It was decided through these discussions that this issue needed to be brought before the full board.
On Tuesday May 12, the Billings Gazette published an article about the Public Service Commission (PSC) naming Yellowstone Public Radio, as well as the Billings Gazette and the Great Falls Tribune, in a lawsuit due to a public records request. The purpose of the lawsuit is to require the court to make a declaration as to whether the PSC is required to release the records named in the lawsuit.

The records in question are PSC emails that had been leaked to a right-wing website. The Billings Gazette first requested the information contained in the emails. YPR’s request came after, meaning we were requesting information that had already been requested.

Because the University holds the license for YPR, the lawsuit was submitted to the University. The Executive Committee, along with Ken Siebert and Nicky Ouellet, discussed the lawsuit with the University’s lawyer, Kellie Petersen on Wednesday, May 13.

Ms. Petersen conveyed that the situation is a positional conflict of interest for the University. The University has argued previously to keep individual records private and therefore couldn’t argue the opposite in this case. Ms. Petersen presented three options for YPR:

1. Withdraw the records request and ask to be removed from the lawsuit
2. Remain as defendants in the lawsuit but not take a position either way
3. Move forward with our own legal representation (the University would not provide any) with the understanding that any legal representation would have to report to University counsel.

In a subsequent meeting the Executive Committee discussed the Operating Agreement, noting the document contains declarations of independence. Ms. Petersen responded that there is the possibility for the Friends of Yellowstone Public Radio to represent the station in the lawsuit with the blessing of the Chancellor and the President of the University.

In terms of legal representation, The Billings Gazette and Great Falls Tribune have hired Martha Sheehy and YPR was invited to share representation. Unfortunately, Ms. Sheehy has a conflict of interest as she is on the Board of Regents for the Montana University system. Additionally, lawyer Mike Molloy has argued on behalf of the University’s position, which would create a positional conflict for him as well.

Mr. Goodrich and Mr. Mitchell offered their thoughts on the situation. Mr. Goodrich first made it very clear that neither he nor Mr. Mitchell were legally representing the board. He went on to explain that YPR is not a legal entity which means the lawsuit can’t be enforced as it is currently written. It was also noted that the University President oversees the Chancellor, and if the Chancellor were to go against the University’s wishes by supporting YPR’s position, it could make other situations more difficult to navigate, such as negotiating salaries. Mr. Goodrich recommended that in whatever way the board chooses to move forward, he advised that YPR/Friends would need its own legal counsel, especially in consideration of the integrity of our news service.

Mr. Mitchell provided further clarity as to the University’s positional conflict. Montana State University on one hand is an educational institution, apparently with a policy that resists public
record requests. This is the position they would like to stay consistent with. At the same time, however, Montana State University holds the license for a radio station (YPR), and that entity has the interest to state public records. These lawsuits usually come about when the records requests are affirmatively denied, the requesting entity sues for the rights to the records. Here, we have a reversed situation. The PSC has taken the offensive making Montana State University a defendant as one of the parties who had requested records.

This conflict will have to be addressed in terms of how and if it can be resolved. If the client is the University, they could make a decision that YPR/Friends doesn’t agree with. Another question raised by this situation is how to navigate this conflict without jeopardizing our relationship with the Chancellor, the President, and Montana State University. Mr. Mitchell noted that he doesn’t have a recommendation, but that these are his observations and concerns.

Ms. Ouellet expressed her concern that whatever we do moving forward sets precedent for demanding transparency from state agencies. She also expressed discomfort with how the University is framing the issue.

Ms. Foster inquired further as to the University's reasoning for not responding to public records requests. Mr. Siebert explained that the similar issue presented by University was the John Krakauer case. The similarities involve individual email requests. One of the things Ms. Petersen said was when you specifically request an individual’s email, it becomes a privacy issue. It’s not so much that they’re reluctant to release public records, it’s that they’re reluctant to cavalierly release personal email. This may not be comparable because the Krakauer case dealt with student information and this case deals with public employees’ information. Ms. Petersen also mentioned that there may be alternative ways of requesting information. Overall, this appears to be less about what’s best for the radio station and more about what’s best from the University, which reflects the position of the University counsel.

Ms. Foster asked about the nature of the records request. Ms. Ouellet explained YPR was requesting internal emails that they believed would expose serious infighting at the PSC. It’s newsworthy because we pay commissioners for their time and right now their time is being taken up with accusing each other of potential acts of violence and other petty complaints. Specifically, we were requesting emails that had been leaked to a right-wing political blog that had then been spoken about on the blog’s podcast. YPR’s intent was to see how the emails would have been treated if they had been released correctly, and what would have been redacted. We were also requesting internal memorandums discussing personnel issues. We received some of what we asked for. We were also trying to figure out who had access to which email accounts as it is believed that staff could have sent emails on behalf of the commissioners without their knowledge. We did name a staff person in the request. Regardless of how we worded the requests, we likely would have been swept up in legal actions.

Ms. Miller asked if the emails were sent via state email addresses or personal email addresses. Ms. Ouellet confirmed the request was only for state email addresses. Everything that was requested is subject to the state records request laws.
Mr. Starr commented that he has served on two governmental boards and served as an unpaid consultant to another. In each case, he was told that any email, to or from a government entity, becomes part of the public record and can be requested by anyone. In his opinion, Mr. Starr believes the PSC has no hope of winning the lawsuit.

Ms. McNally confirmed Mr. Starr’s comments about government emails. Ms. McNally asked about the nature of the relationship between YPR and the University. Is there a way this situation could be used to clarify the relationship moving forward?

Mr. Goodrich acknowledged that Ms. Miller and Ms. McNally pointed out two critical issues: 1) this shouldn’t be a problem because these are state emails and our news department properly made the request and 2) the problem is the person who is supposed to make the request and therefore appear in a lawsuit is MSU and they’ve said they’re not going to do that aggressively.

It is Mr. Goodrich and Mr. Mitchell’s recommendation that the Friends, for the benefit of the station, should consider engaging a separate lawyer to interact with the University’s lawyer. That person might be able to aggressively engage them in this issue, and that this isn’t a public record request they should be concerned about. Specifically, point out to them that the Krakauer case is not comparable. This might be a way to convince the University to take a position in the lawsuit. Mr. Goodrich does not feel the three options presented are feasible and suggested that moving forward, this begs the question of whether YPR should be considered independent. For now, it’s recommended to engage a lawyer to parse things out with the University.

Mr. Siebert noted that when he spoke to Maureen Brakke and the Chancellor about this situation on May 12 that neither one of them was aware of the lawsuit. Throughout, Ms. Brakke and the Chancellor have not taken a position, though they have encouraged the Board to deliberate. There has been no pressure yet from the University to make any decisions.

Ms. Foster asked if there was any way to engage the Corporation of Public Broadcasting for assistance with the Freedom of Information Act. Mr. Seibert confirmed the affiliation but noted that it’s very clear that the owner of the license is the University and owners listed on the official FCC documentation is the Board of Regents.

Ms. Miller believes it’s right a proper for this information to be requested. However, she expressed her reluctance to see the Friends become involved in a legal battle on behalf of YPR, primarily because of the potential for future vulnerability in lawsuits. Ms. Miller said she would be comfortable with a private lawyer to negotiate with the University on behalf of YPR, however, she is uncomfortable with the idea of YPR and the Friends hiring a lawyer to represent them in the public lawsuit. This could make the station a target for other lawsuits that may involve settlements in the future. Mr. Seibert agreed and acknowledged it could create confusion for the public in terms of the nature of the relationship between YPR and the Friends as the Friends is an Advisory Board, not a Governing Board.

Mr. Mitchell followed up on Mr. Goodrich’s recommendation to have a lawyer engage with the University counsel. There are few approaches they could take. 1) If our Operating Agreement says YPR has editorial independence, then that contractual term must mean something/have
credence. 2) There could educate the University counsel about the nature of the relationship between YPR and the University. Mr. Siebert clarified that Ms. Petersen was aware of the ownership relationship between the University and YPR, though not the existence of the Operating Agreement until after the meeting with the Executive Committee.

Ms. Miller asked about the nature of the editorial independence identified in the Operating Agreement. Mr. Seibert shared the following from the Agreement:

   The University and the Friends agree to encourage and maintain the programming (including news, information, public affairs, cultural, entertainment, and educational on-air programming and related online and social media content) and operational independence and integrity of the Station as appropriate for its mission as a public radio station affiliated with National Public Radio.

   …The Friends may not make any decisions or issue an directives about the Station’s operations and programming, all of which shall be subject to the independence of the station’s management and staff (“Station Management”), in accordance with generally accepted journalistic and public broadcasting standards.

Upon motion and seconded it was unanimously **RESOLVED** that the board potentially engage an independent lawyer for the benefit of the station to work on behalf of the station to interact with the counsel from Montana State University to determine whether there is a satisfactory method for the interest of the station as an independent news gathering organization, to proceed forward with the pending document request. The lawyer would then be reimbursed to the extent that they charge a fee by the Friends of Yellowstone Public Radio with oversight on expenditures by the finance committee.

Mr. Siebert added that the station already employs outside counsel for FCC work.

Mr. Goodrich will follow-up with Mark Parker to see if he’s willing to act as counsel. If he’s not a possibility, the Executive Committee will investigate other options for legal counsel.

**New Business**

Ms. Sample noted that we’re in the process of securing new board members and in the process have tried to outline the mission statement and the goals and objectives from the past. There was a previous strategic plan, but it is missing. We’re hoping to put together a strategic plan from the statement, goals and objectives that are currently being put together.

**Old Business**

None

**Meeting Schedule**

July 28, 2020

October 27, 2020

Meeting adjourned at 1:55pm.