



Federal Communications Commission
Washington, D.C. 20554

DA 11-1811

October 28, 2011

Gigi B. Sohn
President
Public Knowledge
1818 N Street, N.W.
Washington, D.C. 20036

Re: Public Release of Staff Recusal Notices

Dear Ms. Sohn:

This responds to your letter of May 19, 2011, to Chairman Genachowski, in which you urge “a requirement that anyone negotiating employment with an organization doing business with the Commission [must] file a letter, available for public viewing, with the recusal information.”¹ You assert that the Commission formerly had such a policy, and that readopting it would promote transparency and alleviate “agency capture.” As you note, there is no current requirement that a Commission staff member submit a written recusal statement (also referred to as a “statement of disqualification”).

In response to your letter, the Office of General Counsel (OGC) reviewed the Commission’s policy both with respect to whether Commission staff should be required to submit written recusal statements and whether any such statements should be made available to the public. As explained below, this review has led us to conclude that recusal statements voluntarily submitted by current Commission staff are, and should be, confidential and exempt from release under the Freedom of Information Act (FOIA). Because recusal statements are now voluntary under government-wide ethics rules, release of such statements could deter their submission—a negative effect that generally would outweigh the benefits of disclosure. In the case of requests for access to recusal statements covering entities with which a former FCC employee actually accepted employment, however, the balance tips in favor of disclosure and access will be granted.

The Former Requirement To File a Written Recusal Statement

In 1979, the Commission amended its rules to add 47 C.F.R. § 19.735-204(e), which required Commission employees engaged in negotiations with a prospective employer to file a statement of disqualification and non-participation with respect to any matters that could affect the interests of the prospective employer.² In 1991, however, the Office of Government Ethics

¹ See Letter from Gigi B. Sohn to Julius Genachowski, Chairman (May 19, 2011).

² See *Conduct of Commission Employees*, 46 RR 2d 33 (1979).

(OGE) adopted government-wide ethics rules applicable to Commission employees.³ Under the relevant OGE rule, 5 C.F.R. § 2635.604(b), an employee is not required to file a written disqualification statement when negotiating employment, but may elect to create a written record. OGE specifically found that “a possible regulatory requirement for notice and written disqualification statements was rejected as unnecessarily burdensome.”⁴

In 1996, the Commission repealed its Rule 19.735-204(e).⁵ The Commission determined that it was not appropriate to maintain a recusal policy contrary to the government-wide policy established by OGE.⁶

Past Practice Concerning Confidentiality of Recusal Statements

After it adopted 47 C.F.R. § 19.735-204(e) and required statements of disqualification, the Commission held in *Citizens Communications Center*⁷ that these statements were exempt from disclosure under FOIA Exemption 6. Exemption 6 applies to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁸ The Commission reasoned that employees have a strong interest in protecting the privacy of their job search and that the public did not have a strong interest in disclosure.⁹ The Commission gave great weight to employees’ privacy interests because disclosure of the job-search information might create difficulties with coworkers, interfere with negotiations with prospective employers, and give rise to embarrassing speculation as to why an employee might be considering new employment or ultimately did not leave the Commission.¹⁰

It nevertheless appears that even after *Citizens*, Commission staff maintained a file of employee recusal statements that was available to the public for in-person inspection. Furthermore, after the Commission eliminated the requirement of preparing recusal statements in 1996, OGC released under the FOIA an e-mail by a former Commission legal advisor who indicated that she had been offered, but would not accept, outside employment with a particular regulated communications company.¹¹ OGC also recently released recusal information relating to former Commissioner Baker’s acceptance of an offer of employment with a regulated

³ See *Standards of Ethical Conduct for Employees of the Executive Branch*, 56 Fed. Reg. 3378 (1991).

⁴ See *id.* at 33784-85.

⁵ See *Adoption of Supplemental Standards of Ethical Conduct for Employees of the Federal Communications Commission and Revision of the Commission’s Employee Responsibilities and Conduct Regulations*, 11 FCC Rcd 15438, 15441 ¶ 12 (1996).

⁶ See *id.* (indicating that repealed provisions were superseded by executive branch-wide provisions).

⁷ 85 FCC 2d 191 (1981).

⁸ 5 U.S.C. § 552(b)(6).

⁹ See 85 FCC 2d at 193-94 ¶¶ 5-6.

¹⁰ *Id.* at 193-94 ¶ 5.

¹¹ See Letter from Joel Kaufman to Mr. Robert Herring, FOIA No. 2011-383 (June 28, 2011).

communications company, after Commissioner Baker had herself made public the fact of her recusal.¹²

Clarification of Policy

Commission policy in this area, as reflected in the *Citizens* decision, is based on the principles embodied in FOIA Exemption 6, which balance the strength of individual privacy interests in nondisclosure of the requested information against the public's interest in disclosure. In *Citizens*, the Commission held that there was only a slight public interest in disclosure of individual recusal statements, because the interests of the public were adequately served by the FCC's consideration of the recusal statements as an internal administrative matter.¹³ In *Washington Post Co. v. U.S. Dep't of Health and Human Services*,¹⁴ however, the D.C. Circuit subsequently considered whether financial disclosure forms for agency consultants were protected by Exemption 6. The court held that the FOIA was intended to give the public the ability to decide for itself whether conflicts of interest exist.¹⁵

Taking both *Citizens* and *Washington Post* into account, we conclude that the public interest in disclosing the recusal statements of current employees does not warrant their release. Here, the public interest in disclosure is relatively low because the employee has stated that he or she will not participate in the particular matter. The public may have a substantial interest in whether employees who *do* participate in a matter have a potential conflict of interest, but there is a lesser public interest in knowing whether employees who *do not* participate in a matter have a potential conflict of interest. The employee's own declaration of non-participation (which in general we will assume is implemented through actual non-participation) distinguishes recusal statements from the financial disclosure forms that *Washington Post* required to be disclosed.

As noted in *Citizens*, disclosure of the recusal statements of current FCC employees would likely complicate negotiations with potential employers and raise questions about why employees did not leave the Commission. Further, in light of OGE's rejection of mandatory recusal statements, releasing the recusal statements of FCC employees would likely discourage Commission staff from voluntarily creating a record of recusal, a result that ought to be avoided.

At the same time, the rationale of *Citizens*, particularly when viewed in light of subsequent judicial precedent, suggests that its reliance on Exemption 6 should apply differently to recusal statements of former Commission employees. Once an employee leaves the FCC to

¹² See Letter from Joel Kaufman to Mr. Jonathan Make, FOIA No. 2011-362 (June 27, 2011).

¹³ See 85 FCC 2d at 194 ¶ 6.

¹⁴ 690 F.2d 252 (D.C. Cir. 1982), *rev'd on other grounds*, 795 F.2d 205 (D.C. Cir. 1986). That case held that Exemption 6 did not apply to financial disclosure forms for consultants hired by NIH. The court found that the consultants had a relatively weak privacy interest in the limited information contained in the financial disclosure forms: their past employment history and a listing of their financial interests (without dollar amounts). *Id.* at 261-62.

¹⁵ *Id.* at 264-65.

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take a new job with a particular employer, the new employment becomes known and the employee no longer has a strong privacy interest in the fact that he or she was exploring employment with that particular entity. In the case of actual subsequent employment, there also may be a heightened public interest in knowing when the former employee began considering the new job. In the event an employee submitted multiple recusal statements concerning negotiations with multiple prospective employers, this reasoning would apply only to the recusal statement covering the entity with which the employee actually accepted employment. Other recusal statements would be withheld consistent with *Citizens*.

I hope you find this responsive to your concerns.

Sincerely,

Austin C. Schlick
General Counsel