

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

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| In the Matter of |) | |
| |) | |
| GREENBERG TRAURIG, LLP |) | FOIA Control No. 2013-025 |
| |) | |
| On Request for Inspection of Records |) | |

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2014

Released: October 8, 2014

By the Commission: Commissioner Pai dissenting and issuing a statement; Commissioner O'Reilly dissenting.

I. INTRODUCTION

1. This Memorandum Opinion and Order denies an application for review¹ filed by Greenberg Traurig, LLP, counsel to OpenBand, that seeks review of a Freedom of Information Act (FOIA) decision by the Commission's Office of General Counsel (OGC). We affirm OGC's decision to withhold certain responsive documents and portions thereof and uphold OGC's finding that the documents at issue were protected from disclosure under the joint defense privilege of Exemption 5.

II. BACKGROUND

2. In August 2011, the Lansdowne HOA, located in Loudoun County, Virginia, filed suit in the U.S. District Court for the Eastern District of Virginia against OpenBand, a cable operator providing telephone, Internet, and other services.² Among other things, the lawsuit alleged that the contractual arrangement regarding video programming and other utilities for the Lansdowne community that was put in place by the defendants constituted an exclusive right to provide video programming services in violation of the FCC's *Exclusivity Order*.³ Following the District Court's decision in June 2012 that the contractual arrangement at issue did violate the FCC's *Exclusivity Order*,⁴ OpenBand filed an appeal with

¹ Letter from Sanford M. Saunders, Jr., Counsel to OpenBand, Greenberg Traurig, LLP to Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, FCC (dated January 11, 2013) (AFR). Wiltshire & Grannis LLP, counsel to Lansdowne Home Owners Association (Lansdowne HOA or Lansdowne), filed a Reply opposing the AFR. Letter from John Nakahata and Steven A. Fredley, Counsel to Lansdowne Home Owners Association, Wiltshire & Grannis LLP (dated January 28, 2013). For simplicity, in this order we refer to Mr. Saunders, Greenberg Traurig, and the OpenBand companies, individually or collectively, as "OpenBand," even though Mr. Saunders made the FOIA request and filed the AFR. See 47 C.F.R. § 0.461(j) (AFR may be filed only by person making the initial FOIA request); see also *Russell D. Lukas*, 21 FCC Rcd 6680, 6681 & nn. 17, 19 (2006).

² See *OpenBand at Lansdowne, LLC v. Lansdowne on the Potomac Homeowners Association Inc.*, No. 12-1925, Amicus Brief for the FCC in Support of Appellee, Statement of Facts at 11. The suit was also brought against OpenBand's parent and affiliate companies, and the Lansdowne developer. *Id.*

³ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007) (*Exclusivity Order*).

⁴ *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, Not Reported in F.Supp.2d, 2012 WL 2462301 (E.D.Va. 2012).

the U.S. Court of Appeals for the Fourth Circuit in July 2012. In August 2012, Commission staff met with the Lansdowne HOA about the litigation⁵ and on October 10, 2012 the Commission filed an *amicus* brief urging the Fourth Circuit to affirm the District Court's finding.⁶

3. On October 12, 2012, OpenBand filed a FOIA request relating to the pending litigation. Among other things, OpenBand requested “[a]ll communications between the FCC, on the one hand, and the Lansdowne on the Potomac Homeowners Association, Inc., or any of its members, officers, directors, employees, agents, attorneys (including but not limited to the law firm of Wiltshire & Grannis, LLP) or consultants, on the other hand.”⁷

4. In its December 14, 2012 Response, OGC stated that it was redacting and withholding documents containing communications between Wiltshire & Grannis and the Commission regarding *OpenBand v. Lansdowne* after the decision by the FCC to intervene, on the grounds that they were protected from disclosure under the joint defense privilege.⁸ OGC's response also noted that it covered only responsive documents from OGC and the Media Bureau (MB), but that in the course of collecting records, OGC determined that there may be responsive records in the Enforcement Bureau (EB).⁹ Thus, OGC stated it would provide a supplemental response when the search of EB's records was completed.¹⁰

5. On January 11, 2013, OpenBand filed the AFR. OpenBand argues, as a threshold matter, that the delay in receiving the additional documents from EB could be prejudicial in its (then) pending appeal before the Fourth Circuit.¹¹ Second, OpenBand argues that the FCC could not assert the joint defense privilege because the communications were not “inter-agency or intra-agency” documents subject to Exemption 5 and, even if they were, there was a “presumed conflict” between Lansdowne and the FCC that contravenes assertion of any privileged relationship.¹² Finally, OpenBand argues that there is an overwhelming public interest supporting a discretionary release of the documents, suggesting that the communications between one of the Wiltshire & Grannis attorneys and the FCC may have violated the Ethics in Government Act.¹³

6. On January 31, 2013, OGC sent OpenBand a supplemental response containing EB's responsive documents.¹⁴ On April 5, 2013, the Fourth Circuit held in favor of Lansdowne, affirming the

⁵ See E-mail from Christopher Wright to Sean Lev (sent August 20, 2012 at 3:02 pm) (referring to “the Fourth Circuit cases we discussed a couple of weeks ago”).

⁶ See *OpenBand at Lansdowne, LLC v. Lansdowne on the Potomac Homeowners Association Inc.*, No. 12-1925, Amicus Brief for the FCC in Support of Appellee, Statement of Interest at 2; *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187 (4th Cir. 2013).

⁷ Letter from Sanford M. Saunders, Jr., Esq. to Walter Boswell, Federal Communications Commission at 1 (filed Oct. 12, 2012) (Request).

⁸ See Letter from Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, FCC to Sanford M. Saunders, Jr. at 2 (dated December 14, 2012) (December 14, 2012 Response). The released documents indicate that the decision to intervene was made sometime after mid-September 2012.

⁹ See *id.*

¹⁰ See *id.*

¹¹ AFR at 1.

¹² *Id.* at 2-3.

¹³ AFR at 3-4.

¹⁴ Letter from Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division to Sanford M. Saunders, Jr. (dated Jan. 31, 2013) (January 31, 2013 Supplemental Response).

District Court's judgment voiding the OpenBand contract provisions at issue.¹⁵

III. DISCUSSION

7. As a preliminary matter, we reject OpenBand's assertions of prejudice because of the timing of OGC's January 31, 2013 Supplemental Response. Even assuming OpenBand had shown prejudice, that would have no bearing on the merits of its FOIA request. In particular, OpenBand was entitled to no special treatment of its FOIA request because of its pending argument before the Fourth Circuit,¹⁶ which was held on January 29, 2013.¹⁷ In addition, OGC reasonably carried out its duties under the FOIA in acting on OpenBand's request. In this case, OGC initially searched its own records and records of MB because these two offices were directly involved in the *Exclusivity Order* proceedings. OGC only became aware that the search should be extended to EB when, as indicated in the December 14, 2012 Initial Response and January 31, 2013 Supplemental Response, some of the records collected in searching OGC and MB referenced enforcement proceedings involving OpenBand, thus indicating to staff that there may be additional responsive documents in EB's files.¹⁸ In any event, it does not appear that the timing of the Supplemental Response caused any actual prejudice, given that the documents provided did not concern OpenBand's dispute with Lansdowne.¹⁹

8. We also disagree with OpenBand's assertion that the FCC improperly asserted the joint defense privilege under Exemption 5. FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."²⁰ A document must meet a two-prong statutory test to receive protection under Exemption 5: 1) its source must be a government agency, and 2) it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds the document.²¹

9. We first find that the documents are "intra-agency memorandums or letters" and thus meet the first prong. As the Supreme Court has found, "in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra-agency' memorandum under Exemption 5."²² In *Hunton & Williams v. U.S. Dep't of Justice*,²³ the Fourth Circuit found that one of these circumstances is where the common interest doctrine applies.²⁴ The common interest doctrine permits parties whose legal interests coincide to share privileged materials with one another in order to more

¹⁵ See *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 195 (4th Cir. 2013).

¹⁶ See AFR at 1.

¹⁷ See, e.g., *In the Matter of Percy Squire*, 26 FCC Rcd 14930, 14933 (2011) ("a connection to civil litigation neither increases nor decreases the requester's rights" under FOIA); *Cooper Cameron Corp. v. U.S. Dep't of Labor, Occupational Safety and Health Admin.*, 280 F.3d 539, 547 (5th Cir. 2002) (the "specific motives of the party making the FOIA request are irrelevant" and the rights of a potential litigant making a FOIA request are no different than the rights of any other third party).

¹⁸ See December 14, 2012 Response at 1, January 31, 2013 Supplemental Response at 1.

¹⁹ Indeed, after receiving the documents, OpenBand did not file an AFR or make any other attempt to demonstrate to the Commission how the timing of the January 31, 2013 Supplemental Response caused OpenBand any actual harm or prejudice.

²⁰ 5 U.S.C. § 552(b)(5).

²¹ See *id.*, *Dept. of Interior v. Klamath Water Users*, 532 U.S. 1, 8 (2001).

²² See *id.*, *Hunton & Williams v. U.S. Dept. of Justice*, 590 F.3d 272, 276 (4th Cir. 2010).

²³ *Hunton & Williams v. U.S. Dept. of Justice*, 590 F.3d 272, 276 (4th Cir. 2010).

²⁴ *Id.*

effectively prosecute or defend their claims.²⁵ For the common interest doctrine to apply in the context of Exemption 5, “an agency must show that it had agreed to help another party prevail on its legal claims at the time of the communications at issue because doing so was in the public interest.”²⁶ While a written agreement is not necessary, there must be an agreement or a meeting of the minds.²⁷

10. Here, the communications between the Commission and Lansdowne counsel meet these tests. As indicated in the Initial Decision, the redacted portions contain communications between Lansdowne counsel and the Commission regarding *OpenBand v. Lansdowne* after the Commission’s decision that it was in the public interest to intervene that case.²⁸ Contrary to OpenBand’s assertions, none of the withheld or redacted documents was “aimed at attempting to convince the FCC either [to] file an amicus brief or [to] intervene.”²⁹ Rather, all of the withheld or redacted communications between the Commission staff and Lansdowne occurred after the Commission and Lansdowne formed a common interest in the case, *i.e.*, persuading the court that the Commission’s rule prohibiting exclusive arrangements for cable and Open Video Systems (OVS) operators in multiple dwelling units was applicable to the arrangement at issue.³⁰

11. Accordingly, OpenBand’s reliance on the Supreme Court’s decision in *Dept. of Interior v. Klamath Water Users* to support its assertion that the documents at issue here do not meet the first prong is misplaced. In *Klamath*, the Court found that records submitted to the Department of Interior by several Indian tribes did not qualify as “intra-agency” documents because the parties were “self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.”³¹ As the court found in the *Hunton* case discussed above, however, *Klamath* did not address the common interest doctrine at all.³² Rather, the *Hunton* court explained that “*Klamath* addressed the case of self-interested parties attempting to persuade the government to adopt a particular policy, but those concerns are no longer in play once the government is actually persuaded that the policy is in the public interest.”³³ Because all of the documents at issue are communications made after the Commission decided to intervene, the common interest doctrine is applicable, and the documents are “intra-agency” for purposes of Exemption 5.

12. In addition, we find the documents meet the second prong of the test set forth above, since the joint defense privilege asserted by OGC “falls within the ambit of a privilege” normally covered by Exemption 5.³⁴ The joint defense privilege is an extension of the attorney-client privilege of Exemption 5 and thus applies to communications between parties sharing litigative interests, such as those between the FCC and Lansdowne at issue here.³⁵ We disagree with OpenBand’s assertion that the

²⁵ See *id.* at 277.

²⁶ See *id.* at 274.

²⁷ See *id.* at 285; see also *American Management Services, LLC, v. Dept. of the Army*, 703 F.3d 724, 733-34 (4th Cir. 2013).

²⁸ December 14, 2012 Response at 2.

²⁹ AFR at 2.

³⁰ See January 31, 2013 Supplemental Response.

³¹ *Klamath*, 532 U.S. 1, 12.

³² See *Hunton*, 590 F.3d 272, 279.

³³ *Id.*

³⁴ See *Klamath*, 532 U.S. at 8.

³⁵ See, e.g., *Hanson v. AID*, 372 F.3d 286, 292 (4th Cir. 2004) (applying Exemption 5 to report submitted by private consultant to USAID based on finding that attorney-client relationship existed between the two), *Cavallaro v. U.S.*, 284 F.3d 236, 249-50 (1st Cir. 2002) (recognizing an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party, whether that exception is termed “common interest,” “joint defense,” or otherwise), *Fox News Network, LLC, v. U.S. Dept. of the Treasury*, 739 F.Supp.2d 515,

(continued...)

privileged relationship was contravened because “[Lansdowne] has asserted that OpenBand has a Tucker Act claim against the FCC.”³⁶ First, Lansdowne has made no such assertion. In the underlying litigation, Lansdowne argued that the 2007 *Exclusivity Order* prohibited arrangements like the one at issue, even if partially embodied in purported easements, but Lansdowne took no position on the separate legal issue of whether such a prohibition would give rise to a valid Tucker Act claim.³⁷ The FCC and Lansdowne were therefore aligned in arguing that the *Order* reached these arrangements, but there was no conflict on the issue of any Tucker Act claim because Lansdowne took no position on the matter. Moreover, even if Lansdowne had made this argument in the underlying proceeding, this would not preclude the FCC from asserting the joint defense privilege with regard to the communications at issue. Lansdowne and the FCC need not agree on every issue related to the litigation in order to protect their communications under the common interest doctrine. Rather, the FCC must show that “it had agreed to help [Lansdowne] prevail on its legal claims *at the time of the communications at issue* because doing so was in the public interest.”³⁸ Here, any assertion that OpenBand could assert a valid Tucker Act claim would not be relevant to the meeting of the minds between the FCC and Lansdowne concerning their mutual goal of persuading the court that the Commission’s rule prohibiting exclusive arrangements is applicable to the arrangement at issue.

13. Finally, we disagree with OpenBand’s argument that there was an overwhelming public interest in a discretionary release of the documents at issue. According to OpenBand, such a public interest exists because the communications between one of the Lansdowne attorneys and the FCC may have violated the Ethics in Government Act.³⁹ Upon review of the facts and applicable law, we find absolutely no support for OpenBand’s argument that the criminal conflict of interest prohibition against a former employee representing a party in a matter in which the former employee participated while serving the government,⁴⁰ was applicable to and violated by the former FCC General Counsel in the *OpenBand* litigation before the Fourth Circuit. The 2007 *Exclusivity Order* proceeding that promulgated the bar on exclusive arrangements at issue in the *OpenBand* litigation was conducted long after the former FCC General Counsel’s departure from the agency in 2001, and is not a continuation of the 1997 rulemaking on similar policy issues, or any other FCC proceeding, that took place during his employment. We therefore agree with the December 14, 2012 Decision against discretionary disclosure “given the harm to the integrity of the Commission’s processes, the attorney work product, and the attorney-client relationship that would result from release of those records.”⁴¹

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563 (S.D.N.Y. 2010) (attorney-client privilege between New York Federal Reserve Bank, a non-agency, and private law firm, not waived where third party, a Treasury attorney, is copied on privileged communications, because of common legal interests between NYFRB and Treasury). In addition, the attorney work product privilege is also applicable to the FCC-Lansdowne communications at issue, *see Strang v. Collyer*, 710 F.Supp. 9, 12-13 (D.D.C. 1989) (attorney work product privilege of Exemption 5 applies to materials generated in preparation of an *amicus* brief), *aff’d sub nom. Strang v. DeSio*, 899 F.2d 1268 (D.C. Cir. 1990).

³⁶ AFR at 2-3.

³⁷ *Lansdowne on the Potomac Homeowners Ass’n, Inc. v. OpenBand at Lansdowne, LLC*, Not Reported in F.Supp.2d, 2012 WL 2462301 at 6 (E.D.Va. 2012). The district court held that the issue of whether the *Exclusivity Order* could result in a regulatory taking (thus giving rise to a Tucker Act claim), was irrelevant to the claims before the court and beyond the court’s jurisdiction to consider. Following the Fourth Circuit’s ruling in favor of Lansdowne on appeal, *see para. 6 supra*, Open Band sought a meeting with Commission staff and indicated, among other things, that it would not pursue a Tucker Act claim. *See* Letter from Sanford M. Saunders, Jr. to Joel Kaufman, Deputy General Counsel, Federal Communications Commission (dated May 24, 2013).

³⁸ *Hunton*, 590 F.3d at 274 (italics added); *see also id.* at 283 n.1 (“A fair interpretation of a common interest agreement ... must leave room for the parties to debate the means by which they will secure their common end”).

³⁹ AFR at 3; *see* Ethics in Government Act of 1978, as amended, 5 U.S.C. App. § 101 *et seq.*

⁴⁰ *See* 18 U.S.C. § 207(a).

⁴¹ December 14, 2012 Response at 3.

14. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by OpenBand in FOIA Control No. 2013-025 IS DENIED.

15. The officials responsible for this action are the following: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Greenberg Traurig, LLP, On Request for Inspection of Records*, FOIA Control No. 2013-25.

This item raises a simple question: Is a private law firm representing a private client part of the Federal Communications Commission? My answer is no, but the Commission disagrees. In order to shield documents from public disclosure, today's FCC order brings the attorneys of Wiltshire Grannis into the Commission's ranks. Because that conclusion is inconsistent with the text and purpose of the Freedom of Information Act (FOIA), defies common sense, and does not reflect a commitment to transparency, I must respectfully dissent.

This dispute involves a FOIA request for communications between attorneys at Wiltshire Grannis⁴² and those at the FCC. And in this item, the Commission refuses to produce those communications on the ground that they are protected from public disclosure by FOIA Exemption 5. Looking to the text of the statute, the Commission specifically claims that these documents constitute "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁴³

But are these documents really intra-agency memorandums? Getting to the basics, "intra" means "within" or "in the interior"⁴⁴ so intra-agency means within an agency.⁴⁵ Thus, for communications between Wiltshire Grannis and the FCC to be intra-agency memorandums, the Commission must conclude that Wiltshire Grannis was functioning as part of the FCC.

For me, that is a bridge too far. To state the obvious, Wiltshire Grannis is not a Commission Bureau or Office. Its attorneys certainly are not compensated pursuant to the GS scale. And when they come to lobby the Commission, its attorneys must comply with our *ex parte* rules.

Notwithstanding these facts, the Commission suggests that Wiltshire Grannis became part of the FCC for purposes of this dispute when the FCC decided to file an *amicus* brief supporting one of the firm's clients in the U.S. Court of Appeals for the Fourth Circuit.

Had the Commission hired Wiltshire Grannis to represent us in court or to function as consultants, I could see the argument that the firm should be treated as a part of the FCC for FOIA purposes. As the U.S. Supreme Court has noted in a seminal case expounding Exemption 5, "the fact about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, *or the interest of any other client*, when it advises the agency that hires it. Its *only* obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do."⁴⁶ In such cases, the Court has indicated that "consultants may be enough like the agency's own personnel to justify calling their communications 'inter-agency.'"⁴⁷

That is not the case here. Wiltshire Grannis was not hired to represent or provide advice to the FCC. Rather, in communicating with the FCC, it was representing a private client, the Lansdowne on the

⁴² Following the events relevant to this item, Wiltshire & Grannis LLP (Wiltshire Grannis) changed its name to Harris, Wiltshire & Grannis LLP.

⁴³ *Memorandum Opinion and Order* at para. 8 (quoting 5 U.S.C. § 552(b)(5)) (emphasis added).

⁴⁴ See Webster's New International Dictionary 1302 (2d ed. 1958).

⁴⁵ See, e.g., *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70 (2d Cir. 2002) ("[I]ntra-agency' documents are those that remain inside a single agency.").

⁴⁶ *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10–11 (2001) (emphasis added) (*Klamath*).

⁴⁷ *Id.* at 12.

Potomac Home Owners Association, Inc. In each communication, Wiltshire Grannis had an ethical responsibility to represent its client's interest, *not* the federal government's.⁴⁸

The Supreme Court's *Klamath* decision is squarely on point. There, the Court rejected the argument that a Tribe's communications with the Bureau of Reclamation were "intra-agency" memorandums protected by Exemption 5. Critically, the Court said that the Tribe "would be pressing its own view of its own interest in its communications with the Bureau."⁴⁹ So too here. In its communications with the Commission, Wiltshire Grannis was pressing its client's interest, not the government's. Therefore, those communications cannot reasonably be described as "intra-agency" memorandums.⁵⁰

* * *

President Obama has stated that the Freedom of Information Act "should be administered with a clear presumption: In the face of doubt, openness prevails."⁵¹ Today, the Commission falls woefully short of meeting that standard.

In the meantime, all that is left to say is "welcome" to our new FCC colleagues, the attorneys of Wiltshire Grannis.

⁴⁸ While the Commission maintains that those interests were one and the same once the FCC decided to file an *amicus* brief supporting the firm's client's litigation position in the Fourth Circuit, that argument ignores the realities of litigation. A private party and the FCC as an *amicus* might share a similar objective in the litigation, but their strategic interests often diverge. A private party is generally more interested in winning a particular dispute while the FCC is generally more concerned with the development of a particular body of law. This, among other things, can lead parties ostensibly on the same side to make and/or emphasize different arguments. Moreover, even on mundane issues, interests are distinct. For example, a party and an *amicus* will often discuss how to divide time at oral argument. And having worked in the Office of General Counsel, I can assure you that both sides to such conversations are not pursuing a common interest. The FCC often wants more time than the private party's counsel is willing to cede.

⁴⁹ *Klamath*, 532 U.S. at 13.

⁵⁰ To the extent that the Fourth Circuit's decision in *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272 (2010), points in the other direction, I find Judge Michael's dissenting opinion in that case to be more persuasive. *See id.* at 290–91 ("The majority argues that when an outsider and the government have a unitary interest that fits within the common interest doctrine, communications between the outsider and the agency can be understood as 'intra-agency' under exemption 5. The common interest doctrine, however, only relates to the second condition of the exemption, that is, the communications 'must fall within the ambit of a privilege against discovery.' Satisfaction of the second condition cannot serve as automatic satisfaction of the first condition. As the Supreme Court emphasized in *Klamath*, there is 'no textual justification of draining the first [intra-agency] condition of independent vitality,' and 'the first condition of Exemption 5 is no less important than the second.' Failure to satisfy the first (intra-agency) condition 'rules out any application of Exemption 5' to a communication that would otherwise be privileged against discovery." (internal citations omitted)).

⁵¹ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies (Jan. 21, 2009).