

**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 Grannis¹ 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."²

But are these documents really intra-agency memorandums? Getting to the basics, "intra" means "within" or "in the interior"³ so intra-agency means within an agency.⁴ 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."⁵ 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.'"⁶

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

¹ Following the events relevant to this item, Wiltshire & Grannis LLP (Wiltshire Grannis) changed its name to Harris, Wiltshire & Grannis LLP.

² *Memorandum Opinion and Order* at para. 8 (quoting 5 U.S.C. § 552(b)(5)) (emphasis added).

³ See Webster's New International Dictionary 1302 (2d ed. 1958).

⁴ 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.>").

⁵ *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10–11 (2001) (emphasis added) (*Klamath*).

⁶ *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.⁷

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."⁸ 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.⁹

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President Obama has stated that the Freedom of Information Act "should be administered with a clear presumption: In the face of doubt, openness prevails."¹⁰ 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.

⁷ 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.

⁸ *Klamath*, 532 U.S. at 13.

⁹ 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)).

¹⁰ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies (Jan. 21, 2009).