

**STATEMENT OF  
CHAIRMAN AJIT PAI**

**Re: *Nicholas Confessore On Request for Inspection of Records, FOIA Control No. 2017-764, Jeremy Singer-Vine On Request for Inspection of Records, FOIA Control No. 2018-204, Memorandum Opinion and Order***

For many years as a Commissioner, I called on the FCC’s leadership to publish FCC meeting items before the FCC held a vote.<sup>1</sup> I argued that this was basic good government—that an agency that regulates one-sixth of the economy should be transparent and “show its work” in advance to the American people. My dissenting colleague said—nothing.

In 2014, the FCC withheld documents created by a private law firm on behalf of a private client from disclosure under the Freedom of Information Act (FOIA) exemption for “intra-agency” documents (that is, solely within this agency).<sup>2</sup> I dissented, arguing that it was absurd to suggest that a document generated outside this agency by an outside law firm doing work for an outside client could be considered an “intra-agency” document. My dissenting colleague said—nothing.

In 2015, before the FCC rammed through utility-style Internet regulation under White House pressure, I called on the agency to publish the draft order so that the American people could see all 300-plus pages of it before the decision was actually made.<sup>3</sup> My dissenting colleague said—nothing.

In 2016, the FCC considered major reforms to the Universal Service Fund’s program for small, rural carriers. Commissioner O’Rielly, who played a leading role in drafting these reforms, and I requested the reforms be published ahead of a vote, and the head of a major rural broadband association explicitly said “It is absolutely essential to see the written words on the page and review the specific terms of the order to understand the actual effectiveness of the reforms.” Our request was denied. My dissenting colleague said—nothing.

In the nearly half-decade preceding this Administration, there arose many, many chances to join what should have been a bipartisan effort to promote openness and transparency at the FCC. And yet, my dissenting colleague said—nothing.<sup>4</sup>

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<sup>1</sup> See, e.g., Hearing before House Energy and Commerce Committee, Subcommittee on Communications and Technology, Witness Statement of Commissioner Pai at 3 (Mar. 22, 2016), *available at* <https://docs.house.gov/meetings/IF/IF16/20160322/104714/HHRG-114-IF16-Wstate-PaiA-20160322.pdf> (“Take this simple proposition: The public should be able to see what we’re voting on before we vote on it. That’s how Congress works, as you know. Anyone can look up any pending bill right now by going to [congress.gov](http://congress.gov). And that’s how many state commissions work too. But not the FCC.”).

<sup>2</sup> *Greenberg Traurig, LLP, on Request for Inspection of Records*, FOIA Control No. 2013-025, Memorandum Opinion and Order, 29 FCC Rcd 12045 (2014).

<sup>3</sup> See, e.g., <https://twitter.com/ajitpaifcc/status/563724099906568193>.

<sup>4</sup> See, e.g., Hearing before House Energy and Commerce Committee, Subcommittee on Communications and Technology, Preliminary Transcript at 91-92 (Mar. 22, 2016), *available at* <https://docs.house.gov/meetings/IF/IF16/20160322/104714/HHRG-114-IF16-Transcript-20160322.pdf>:

“Mr. Pai. Whoever is leading the agency, Republican or Democrat, I would hope that they would embrace the same spirit of transparency that the Congress has, in terms of making things public before they are voted upon.

Mr. Lance. Commissioner Rosenworcel, your comments on the discussion I have had with your colleagues?

Ms. Rosenworcel. Well, thank you. I have not found that our existing policies get in the way of me having substantive conversations with stakeholders of every stripe.

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But that was then. Today, we see newfound advocacy of transparency arising in this FOIA decision. In making this decision, the FCC relies on clear judicial precedent and careful analysis of the facts to uphold the career staff's determination that disclosure of certain server logs is inappropriate under FOIA Exemptions 6 and 7(E). Among many other things, the agency painstakingly explains U.S. Supreme Court precedent discussing Exemption 6 and analyzes why that exemption applies here. The agency also relies on a very recent decision by an Obama appointee to the U.S. District Court for the District of Columbia involving *these very server logs*, holding that the agency's justification for applying the 7(E) exemption "more than suffices" for purposes of FOIA.<sup>5</sup>

My dissenting colleague says—a lot. But nothing about the U.S. Supreme Court precedent. Nothing about the on-point district court decision. Nothing about why our career information technology staff's determination that releasing these server logs could undermine our agency's efforts to defend against cyberattacks is wrong. Indeed, nothing whatsoever about any of the actual analysis the FCC or its career staff have proffered.

Instead, one finds the now-standard overheated rhetoric about "net neutrality" (omitting, as usual, the fact that the half-million comments submitted from Russian e-mail addresses and the nearly eight million comments filed by e-mail addresses from e-mail domains associated with FakeMailGenerator.com supported her position on the issue!).

What has changed between then and now? Literally nothing, other than the political affiliation of the FCC's leadership (and a lot more transparency now than the agency ever had then). What is required in this matter, as in any other, is sober analysis of the facts and the law—not partisan gamesmanship. Fortunately, the Commission majority embraces that ethos in this item.

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Mr. Lance. In your opinion, do you and I have a right to go back and forth in the document that Commissioner Pai has at his desk?

Ms. Rosenworcel. I believe we have the right to go back and forth and discuss any matter that is before the agency.

Mr. Lance. I don't know what is contained in that document. Are you able to release to me what is contained in that document?

Ms. Rosenworcel. I don't believe we are.

Mr. Lance. And why is that, Commissioner?

Ms. Rosenworcel. I believe that is under our Commission's rules right now.

Mr. Lance. . . . Do you agree with the rules?

Ms. Rosenworcel. I think that we can do more so that our discussions are transparent but I also think it is essential that we preserve the right to have deliberations among the five of us and actually review the text and discuss the text among all of us. So, I think we should strive to be more transparent but I think we have to preserve some space for honest deliberation."

<sup>5</sup> *Prechtel v. FCC*, Case No. 17-cv-01835 (CRC), slip op. at 22 (Sept. 13, 2018).