

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

In the Matter of	)	
	)	
William J. Kirsch	)	FOIA Control Nos. 2011-552, 2012-176,
	)	and 2012-241
On Requests for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 25, 2012**

**Released: October 26, 2012**

By the Commission:

**I. INTRODUCTION**

1. This Memorandum Opinion and Order denies three applications for review (AFRs) filed by William J. Kirsch.<sup>1</sup> Mr. Kirsch seeks review of decisions by the Office of Managing Director (OMD) and the International Bureau (IB)<sup>2</sup> responding to his Freedom of Information Act (FOIA) requests<sup>3</sup> for records, asserting that the searches performed by Commission staff in each of these three cases should have yielded particular documents or types of documents that he expressly identifies. In Decision 1, OMD provided Mr. Kirsch, a former Commission employee assigned to IB, documents responsive to his Request 1 for information related to his 1998 employment transfer to the International Telecommunication Union (ITU),<sup>4</sup> and in Decisions 2 and 3, IB informed Mr. Kirsch that the searches performed in response to his Requests 2 and 3, each of which related to his work experiences at the ITU subsequent to his transfer, did not locate any responsive documents. As explained below, we find that the searches performed in response to Mr. Kirsch's Requests 1-3 were reasonable under the FOIA and we deny his AFRs.

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<sup>1</sup> See Review of Freedom of Information Action & Freedom of Information Act Request, filed November 16, 2011, by William J. Kirsch (AFR 1); Review of Freedom of Information Action and Privacy Act Correction Request, filed March 13, 2012, by William J. Kirsch (AFR 2); Freedom of Information Act (FOIA) and Privacy Act Appeal, filed May 4, 2012, by William J. Kirsch (AFR 3).

<sup>2</sup> See Letter from Bonita Tingley, Chief Human Capital Officer, OMD to William J. Kirsch (October 24, 2011) (Decision 1); Letter from Sarah Van Valzah, Associate Bureau Chief for Management, Admin Office, IB (March 8, 2012) (Decision 2); Letter from Narda Jones, Division Chief, SAND, IB (April 13, 2012) (Decision 3).

<sup>3</sup> See Freedom of Information Act Request, filed September 1, 2011, by William J. Kirsch (FOIA No. 2011-552) (Request 1); Freedom of Information Act and Privacy Act Request, filed February 9, 2012, by William J. Kirsch (FOIA No. 2012-176) (Request 2); Freedom of Information Act and Privacy Act Request, filed March 29, 2012, by William J. Kirsch (FOIA No. 2012-241) (Request 3).

<sup>4</sup> The ITU is the United Nations specialized agency for information and communication technologies. Among other things, the ITU allocates global radio spectrum and satellite orbits and develops the technical standards that ensure networks and technologies seamlessly interconnect. See <http://www.itu.int/en/about/Pages/overview.aspx> (retrieved July 30, 2012). The FCC serves as a technical advisor to the Department of State for ITU meetings and conferences.

## II. BACKGROUND

2. **FOIA No. 2011-552.** In Request 1, Mr. Kirsch sought “any and all documents or correspondence associated with [his] transfer to the International Telecommunication Union.”<sup>5</sup> The request was assigned to the OMD, the Office responsible for personnel and position management. OMD conducted a search of its files for responsive materials. In addition, OMD coordinated with IB, where Mr Kirsch worked prior to his transfer to the ITU and where Bureau staff searched their files for responsive materials, and with the Office of General Counsel (OGC).<sup>6</sup>

3. In response to Request 1, OMD located and provided Mr. Kirsch with two pages of information drawn from its electronic records database, showing that Mr. Kirsch transferred from the FCC to the State Department on June 13, 1998.<sup>7</sup> Under FOIA Exemption 6, OMD redacted personal identifying information, including Mr. Kirsch’s social security number, date of birth, veteran’s preference and leave, because disclosure of that information to the public would constitute a clearly unwarranted invasion of personal privacy.<sup>8</sup>

4. **FOIA No. 2012-176.** Mr. Kirsch’s Request 2 sought “any and all information concerning [his] successful work as Secretary of the Credentials Committee and Secretary of the Editorial Committee at the ITU Plenipotentiary Conference (Minneapolis 1998).”<sup>9</sup> The request was assigned to IB, the Bureau responsible, among other things, for development and articulation of international telecommunications policies, and for representing the Commission on international telecommunications matters at both domestic and international conferences and meetings.<sup>10</sup> IB, coordinating with OGC, conducted a search of its files and Mr. Kirsch’s personnel folder for responsive materials and informed Mr. Kirsch that the search did not locate any documents responsive to his request.<sup>11</sup>

5. **FOIA No. 2012-241.** Mr. Kirsch’s Request 3 sought “any information concerning Article 2 of the Convention of the [ITU],” the provision on eligibility for re-election, and “the role of the elected officials on the internal ITU administrative coordinating committee.”<sup>12</sup> The request also sought “any information concerning nonfeasance, malfeasance or misfeasance by any ITU elected official” and “any FCC information concerning the migration of international

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<sup>5</sup> See Request 1.

<sup>6</sup> OMD staff sent Mr. Kirsch a letter asking for clarification of his request and providing contact information, and received no response. See Letter from Lois D. Jones, Human Resource Specialist, OMD to William J. Kirsch (dated October 12, 2011). OMD staff also attempted to contact Mr. Kirsch by telephone, but was unable to reach him. OMD therefore responded to Mr. Kirsch based on its best understanding of the information sought in his FOIA request.

<sup>7</sup> See Decision 1.

<sup>8</sup> *Id.*; see 5 U.S.C. § 552(b)(6). OMD further advised that, if Mr. Kirsch wished to have an unredacted version of these records, he should file a request under the Privacy Act and the Commission’s implementing regulations. See 47 C.F.R. §§ 0.554 – 0.556 (procedures for an individual to obtain their own records).

<sup>9</sup> See Request 2.

<sup>10</sup> See 47 C.F.R. § 0.51.

<sup>11</sup> See Decision 2.

<sup>12</sup> See Request 3.

telecommunications-related activities to other international forums in light of the failed World Summit on the Information Society.”<sup>13</sup> This request also was assigned to IB. IB, coordinating with OGC, conducted a search of Commission records and informed Mr. Kirsch that the search did not locate any documents responsive to his request.<sup>14</sup>

### III. APPLICATIONS FOR REVIEW

6. Mr. Kirsch’s AFRs ask the Commission to review the decisions in all three of his FOIA requests. In each case Mr. Kirsch identifies a specific document, or type of document, that he claims was not provided in response to his FOIA requests. His statements to this effect thus amount to a claim that the search for records was inadequate. In AFR 1, Mr. Kirsch states that Decision 1 “does not provide a copy of then Chairman Kennard’s September 1998 letter authorizing [Mr. Kirsch’s] ‘transfer,’” or “any reference to [his] request(s) to Chairman Genachowski for reemployment or payment of annual leave.”<sup>15</sup> In AFR 2, Mr. Kirsch indicates that Decision 2 does not include “the ‘Constitution and Convention of the International Telecommunication Union (Geneva 1992) as amended by the ... Plenipotentiary Conference (Minneapolis 1998) ...’ referenced in Senate Executive Report 110-28 (September 23, 2008).”<sup>16</sup> He states that Decision 2 should have included “[his] successful work as Secretary of the Editorial Committee responsible for the Final Acts (Minneapolis 1998)” and that “FCC representatives participated at the ITU Plenipotentiary Conference (Minneapolis 1998) and should have retained copies of the various documents, including cables, associated with credentials for a number of member states, including for the Former Yugoslav Republic of Macedonia, and elections, including for Secretary-General and ITU Council.”<sup>17</sup> Mr. Kirsch further requests in AFR 2, “[u]nder the recent FOIA law ... that any classified cables be declassified and provided to [him].”<sup>18</sup> Mr. Kirsch’s AFR 2 also states that Decision 1 “fails to include, inter alia, career tenure, reemployment rights or accrued annual and sick leave.”<sup>19</sup> In AFR 3, Mr. Kirsch states that Decision 3 “d[oes] not include In Re Kirsch, ILO Administrative Judgment 2022 in which the [ITU] failed to comply with its own Staff Regulations and Staff Rules” or “other examples of harassment, intimidation and abuse or ‘mobbing’ by ITU elected and other officials, including the ILO Administrative Judgments concerning the former Dutch Chief of Personnel.”<sup>20</sup>

7. In addition, Mr. Kirsch states in AFR 1 that Decision 1 contained “unwarranted disclosure of personal information, including [his] personal salary history,”<sup>21</sup> and thus “violates the Privacy Act and relevant case law.”<sup>22</sup> Mr. Kirsch also states his “concern that [Decision 1]

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<sup>13</sup> *Id.*

<sup>14</sup> *See* Decision 3. IB indicated that Mr. Kirsch may find it more helpful to contact the ITU. *Id.*

<sup>15</sup> *See* AFR 1.

<sup>16</sup> *Id.*

<sup>17</sup> *See* AFR 2.

<sup>18</sup> *Id.*

<sup>19</sup> *See* AFR 2.

<sup>20</sup> *See* AFR 3.

<sup>21</sup> *See* AFR 1.

<sup>22</sup> *Id.*

and the referral to the Chief Human Capital Officer may represent retaliation by the Commission for my opposition to the fundamentally flawed World Trade Organization Basic Telecommunications Services Agreement for which [he] was relieved of primary FCC staff responsibility,” such that Decision 1 may be a “bad faith response” to his Request 1.<sup>23</sup> In AFR 2 and AFR 3, Mr. Kirsch also requests that his personnel records be corrected to reflect: a) that he transferred from the Commission to the ITU and not, as indicated in the records provided to him in Decision 1, the State Department;<sup>24</sup> and b) his “‘separation’ from July 27, 2011.”<sup>25</sup>

#### IV. DISCUSSION

8. We deny Mr. Kirsch’s AFRs. Mr. Kirsch’s AFRs essentially claim that the searches conducted in response to his initial FOIA Requests were inadequate because they did not yield particular documents or types of documents that he identifies or describes in his AFRs. Under the FOIA, an agency must conduct a search that is “reasonably calculated to uncover all relevant documents.”<sup>26</sup> The reasonableness of an agency’s search depends upon the facts of each case.<sup>27</sup> Specifically, the adequacy of a search under the FOIA is determined by a test of reasonableness,<sup>28</sup> which depends, in part, on the requester’s description of the records sought<sup>29</sup> and how the search was conducted in light of the scope of the request.<sup>30</sup> The mere inability to locate requested documents does not render a search inadequate.<sup>31</sup> Moreover, the adequacy of a FOIA search is generally not determined by the fruits of the search, but rather by the appropriateness of the methods used to carry out the search.<sup>32</sup>

9. We are satisfied that the documents provided to Mr. Kirsch represent all of the responsive records that were located in response to Requests 1-3, pursuant to searches of Commission files conducted by OMD and IB that were reasonably calculated to uncover all

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<sup>23</sup> *Id.*

<sup>24</sup> *See* AFR 2.

<sup>25</sup> *See* AFR 3. Although Mr. Kirsch’s AFR 3 contains no further explanation of what he means by his “‘separation’ from July 27, 2011,” a copy of a memo from him to H. Toure (presumably Dr. Hamadoun Touré, Secretary-General of the ITU since January 2007) and attached to AFR 3, indicates that he may be referring to the date of his resignation from employment. *See* AFR 3 at Attachment (Memo from W. Kirsch to H. Toure (dated May 21, 2011) (“Please amend my July 1999 resignation offer to take effect July 27, 2011”). In a memorandum to FCC staff on September 12, 2012, among other things, Mr. Kirsch requests correction of his personnel records in accordance with his previous correspondence with the FCC, including Requests 1 and 3. Memorandum from William J. Kirsch to Leslie Smith, FCC (dated September 12, 2012).

<sup>26</sup> *See Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Campbell v. U. S. Dep’t of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998) (noting that an agency must search “using methods which can be reasonably expected to produce the information requested”) (quoting *Oglesby v. U. S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

<sup>27</sup> *See Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

<sup>28</sup> *See Weisberg*, 705 F.2d at 1351.

<sup>29</sup> *See* 5 U.S.C. § 552(a)(3)(A) (requiring that a FOIA request “reasonably describe[] . . . records [sought]”).

<sup>30</sup> *See, e.g., Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) (“[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.”).

<sup>31</sup> *See Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

<sup>32</sup> *Id.*

relevant documents. The record indicates that OMD and IB conducted diligent searches for relevant records in their offices. OMD searched its files for personnel records for Mr. Kirsch, and located his official personnel folder (OPF). IB searched for records related to the 1998 Minneapolis ITU Plenipotentiary Conference. In addition, both offices talked to staff knowledgeable about personnel records and the ITU, or who knew Mr. Kirsch, to determine whether any responsive records existed and if so where they could be found. These searches were “reasonably calculated to uncover all relevant documents,”<sup>33</sup> and thus were adequate to satisfy the agency’s obligation under the FOIA. In response to Mr. Kirsch’s AFRs, IB staff again searched their files and did not locate any of the documents, or types of documents, that he identifies.<sup>34</sup> Moreover, in response to Mr. Kirsch’s reference in AFR 1 to “a copy of then Chairman Kennard’s September 1998 letter authorizing [his] ‘transfer’” from FCC employment, OMD staff extended their search to the former Chairman’s files, and were unable to locate any document meeting Mr. Kirsch’s description. In sum, the methods used by the Commission to carry out the search were clearly appropriate. We find that the documents referenced in Mr. Kirsch’s AFRs regarding Request 1, other than the 1998 Kennard letter discussed above, are outside the scope of his initial Request 1, which sought “any and all documents or correspondence associated with [his] transfer to the International Telecommunication Union.”<sup>35</sup> Mr. Kirsch’s “request(s) to Chairman Genachowski for reemployment or payment of annual leave” referenced in AFR 1,<sup>36</sup> and personnel information referenced in AFR 2, “inter alia, career tenure, reemployment rights or accrued annual and sick leave,” are neither expressly contained or referenced in his Request 1, nor evidently related to his employment transfer.<sup>37</sup> Because an AFR may not raise issues on which staff was not afforded an opportunity to pass, we therefore reject these particular references by Mr. Kirsch as any basis for seeking review of Decision 1.<sup>38</sup>

10. We also reject Mr. Kirsch’s reference to Decision 1 personnel-related information in AFR 2 on a separate and independent ground that it is untimely insofar as it requests review of

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<sup>33</sup> See *Weisberg*, 705 F.2d at 1351.

<sup>34</sup> A number of the documents referenced in Mr. Kirsch’s AFRs are publicly available. The ITU Constitution as currently amended, including the 1998 Minneapolis amendments referenced in AFR 2, is available online at <http://www.itu.int/council/groups/stakeholders/Background-Documents/final-acts.doc> (retrieved July 25, 2012). Senate Executive Report 110-228, referenced in AFR 2, is available online at <http://www.gpo.gov/fdsys/pkg/CRPT-110erpt28/html/CRPT-110erpt28.htm> (retrieved July 25, 2012). Neither of these documents mentions Mr. Kirsch or any activities that can be directly attributed to him, based on the information presented in Request 2. We also note that the ILO decision referenced in AFR 3 is available at [http://www.ilo.org/dyn/triblex/triblexmain.fullText?p\\_lang=fr&p\\_judgment\\_no=2022&p\\_language\\_code=EN](http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=fr&p_judgment_no=2022&p_language_code=EN) (retrieved July 24, 2012).

<sup>35</sup> See Request 1. As noted previously, OMD sought to clarify the scope of this request and received no response. See *supra* n.6.

<sup>36</sup> As Mr. Kirsch requests, we will treat his reference to these requests to Chairman Genachowski as a new FOIA request. See AFR 1. Mr. Kirsch’s request for fee waiver will be addressed by appropriate staff in the context of this new FOIA request.

<sup>37</sup> See AFR 2. The two pages of information drawn from OMD’s database that OMD provided to Mr. Kirsch in response to Request 1 were responsive because they showed that Mr. Kirsch transferred from the FCC to the State Department on June 13, 1998. See *para. 3 supra*. The personal identifying information that OMD redacted from this document, including Mr. Kirsch’s leave information, was not itself responsive to the request.

<sup>38</sup> See 47 C.F.R. § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass”).

Decision 1.<sup>39</sup> Moreover, to the extent that Mr. Kirsch's statement in AFR 2 that Decision 1 did not provide "accrued annual and sick leave" can be read to complain that OMD improperly redacted this information in its response to Request 1,<sup>40</sup> we disagree. Had OMD released this personal information pursuant to Mr. Kirsch's FOIA request, it would have been in the public domain. The redactions were made to protect Mr. Kirsch's personal privacy. If he wishes to obtain an unredacted copy of his OPF that would not be publicly available with his personal information, he may do so pursuant to the Privacy Act and the Commission's implementing regulations.<sup>41</sup> Mr. Kirsch's requests to amend his personnel records will be addressed separately, in accordance with our Privacy Act implementing regulations.<sup>42</sup> A FOIA proceeding is not the appropriate avenue for seeking correction of personnel records.

11. We also reject Mr. Kirsch's claim that Decision 1 contains "unwarranted disclosure of personal information, including [his] personal salary history" and thus "violates the Privacy Act and relevant case law."<sup>43</sup> The information contained in Decision 1, including information pertaining to Mr. Kirsch's salary at the time of his transfer to the State Department, was disclosed fully in accordance with the FOIA and the Privacy Act, government-wide personnel regulations, and the Commission's implementing regulations. As OMD stated in Decision 1, personal-identifying information was redacted from the responsive documents provided to Mr. Kirsch pursuant to FOIA Exemption 6.<sup>44</sup> Mr. Kirsch's salary at the time of his transfer, however, was not redacted.<sup>45</sup> This information, as well as his salary history throughout his Federal employment, is among the information in his personnel records that is publicly available.<sup>46</sup> Thus, disclosure of this information does not violate the Privacy Act.<sup>47</sup>

12. In addition, we find nothing indicating that Decision 1 constitutes "retaliation" against Mr. Kirsch for any reason or is a "bad faith" response to his Request 1.<sup>48</sup> As indicated above, Decision 1 reflects that an adequate search was performed by Commission staff and responsive documents were located and provided to Mr. Kirsch, fully in accordance with the FOIA and the Commission's rules. Mr. Kirsch's claims of "retaliation" and "bad faith" are

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<sup>39</sup> See 47 C.F.R. § 1.115(d) (establishing 30-day time limit from date of public notice for filing application for review of action taken on delegated authority).

<sup>40</sup> As noted in para. 3 *supra*, OMD provided Mr. Kirsch two pages of information drawn from its electronic database, showing that Mr. Kirsch transferred from the FCC to the State Department on June 13, 1998. OMD redacted all personal identifying information from this document, including Mr. Kirsch's leave information. *See id.*

<sup>41</sup> See 5 U.S.C. § 552a; 47 C.F.R. §§ 0.554 – 0.556. To obtain a copy of his OPF, Mr. Kirsch should contact the Associate Managing Director—Human Resources Management, 445 12<sup>th</sup> Street, SW., Washington, D.C. 20554.

<sup>42</sup> See 47 C.F.R. §§ 0.556, 0.557.

<sup>43</sup> AFR 1.

<sup>44</sup> 5 U.S.C. § 552(b)(6).

<sup>45</sup> Decision 1, Attachment.

<sup>46</sup> See 5 C.F.R. § 293.311(a)(4) ("Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials)" among information in personnel records for most Federal employees that is available to the public).

<sup>47</sup> Further, even if the Commission had inadvertently released Privacy Act protected information about Mr. Kirsch to Mr. Kirsch, there would be no cognizable harm to Mr. Kirsch.

<sup>48</sup> See AFR 1.

unsupported, and we therefore reject them as speculative, conclusory, and without merit.

13. We find that the documents referenced in Mr. Kirsch's AFR 2 regarding Request 2 are outside the scope of his initial Request in that they do not clearly refer to Mr. Kirsch or what he terms his "successful work" as Secretary of the Credentials Committee and Secretary of the Editorial Committee at the ITU Plenipotentiary Conference.<sup>49</sup> For the same reason discussed above in the context of AFR 1, *i.e.*, because an AFR may not raise issues on which staff was not afforded an opportunity to pass, we deny this aspect of AFR 2. Finally, AFR 3 faults the Commission for not locating "In Re Kirsch, ILO Administrative Judgment 2022 in which the [ITU] purportedly failed to comply with its own Staff Regulations and Staff Rules" or "other examples of harassment, intimidation and abuse or 'mobbing' by ITU elected and other officials, including the ILO Administrative Judgments concerning the former Dutch Chief of Personnel." Mr. Kirsch provides no reason why the Commission should have copies of these documents pertaining to outside entities. It was not surprising that the International Bureau failed to find them after conducting a reasonable search. We accordingly deny AFR 3.

## V. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that the applications for review filed by William J. Kirsch ARE DENIED. Mr. Kirsch may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).<sup>50</sup>

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<sup>49</sup> A number of the documents referenced in Mr. Kirsch's AFRs 2 and 3 are publicly available. The ITU Constitution as currently amended, including the 1998 Minneapolis amendments referenced in AFR 2, is available online at <http://www.itu.int/council/groups/stakeholders/Background-Documents/final-acts.doc> (retrieved July 25, 2012). Senate Executive Report 110-228, referenced in AFR 2, is available online at <http://www.gpo.gov/fdsys/pkg/CRPT-110erpt28/html/CRPT-110erpt28.htm> (retrieved July 25, 2012). We also note that the ILO decision referenced in AFR 3 is available at [http://www.ilo.org/dyn/triblex/triblexmain.fullText?plang=fr&p\\_judgment\\_no=2022&p\\_language\\_code=EN](http://www.ilo.org/dyn/triblex/triblexmain.fullText?plang=fr&p_judgment_no=2022&p_language_code=EN) (retrieved July 24, 2012).

<sup>50</sup> We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Mr. Kirsch's right to pursue litigation. Mr. Kirsch may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
Room 2510  
8601 Adelphi Road  
College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 301-837-1996  
Facsimile: 301-837-0348  
Toll-free: 1-877-684-6448.

15. The officials responsible for this action are the following: Chairman Julius Genachowski and Commissioners Robert McDowell, Mignon Clyburn, Jessica Rosenworcel, and Ajit Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary