



U.S. Department of Energy
Office of Inspector General
Office of Audits and Inspections

MANAGEMENT ALERT

Review of Allegations of Improper Disclosure
of Confidential, Nonpublic Federal Energy
Regulatory Commission Information

DOE/IG-0939

June 2015



Department of Energy
Washington, DC 20585

June 4, 2015

MEMORANDUM FOR THE CHAIRMAN, FEDERAL ENERGY REGULATORY
COMMISSION

FROM: 
Gregory H. Friedman
Inspector General

SUBJECT: INFORMATION: Management Alert: Review of Allegations of
Improper Disclosure of Confidential, Nonpublic Federal Energy
Regulatory Commission Information

BACKGROUND

The Federal Energy Regulatory Commission (Commission or FERC), an independent regulatory agency officially organized as part of the Department of Energy, is composed of five Commissioners (including a Chairman). The Commission is responsible for, among other things, regulating the interstate transmission of the Nation's electricity, natural gas, and oil. The Commission's Office of Enforcement (OE) seeks to encourage compliance with energy-related statutes, rules, and orders. The Chairman and Commissioners are kept apprised of all OE investigative cases and must provide their approval prior to key enforcement actions being implemented. According to Commission regulation, virtually all of the information gathered during the course of an investigation is nonpublic.

On March 9, 2015, Mr. Jon Wellinghoff, who served as Commission Chairman from 2009 to 2013, moderated a panel discussion at a public conference at which he shared a video excerpt of a nonpublic deposition taken during a major OE investigation. At the time of the investigation, which was resolved through a July 2013 agreement, Mr. Wellinghoff was FERC's chair. Subsequent to the of March 9 event, a Commission employee and an attorney for the energy trading firm which was the subject of the OE investigation expressed concerns to the Commission that the disclosure may have been unauthorized and in violation of Federal law and regulation. Because of the potential for harm associated with the unauthorized disclosure, on March 24, 2015, the matter was referred to the Office of Inspector General (OIG) by the Commission's Designated Agency Ethics Official. We immediately initiated a review to evaluate the Commission's actions in response to the March 9 incident and to determine whether the Commission had adequate controls to preclude improper disclosures of confidential, nonpublic information by former employees, including Commission members and Chairmen.

IMMEDIATE CONCERN

We confirmed the essence of the allegation, finding that Mr. Wellinghoff had, in fact, disclosed nonpublic OE information in a public setting. We concluded that the disclosure of such information could threaten the integrity of FERC's regulatory and enforcement processes. We found that when advised of the matter, Commission staff took steps to restrict further public

disclosure of the video excerpt by Mr. Wellinghoff and conference organizers. However, we determined that additional actions are necessary to preclude improper disclosures of confidential, nonpublic information in the future.

Commission Response to Report of Unauthorized Release

In response to concerns raised by both internal and external parties relating to the March 9 incident, Commission staff confirmed Mr. Wellinghoff's unauthorized disclosure of the nonpublic video. Further, in coordination with the Chairman at the time, Commission attorneys solicited and received verbal and written assurances from both Mr. Wellinghoff and the organizers of the March 9 conference that additional publication of the deposition excerpt would not occur. In a letter to Commission attorneys, conference organizers advised that they had not and would not distribute the video or disclose it through their Web site or by other electronic transmission such as email. Further, pursuant to a request by the Commission's General Counsel, an attorney for the conference organizers certified that any and all copies of the video were destroyed and no copies were retained. In a separate letter to Commission attorneys, Mr. Wellinghoff agreed "to destroy all content regarding this deposition."

These actions notwithstanding, the Commission staff did not seek to determine if the former Chairman retained any other nonpublic, sensitive internal Commission information after his departure from the Commission. Instead, on April 29, 2015, a day prior to the issuance of our draft management alert, Commission attorneys emailed the former Chairman asking that he: (1) destroy any remaining materials in his possession to which he had access because of his service at the Commission; and (2) confirm in writing his willingness to comply with that request as well as when he has completed destruction of those materials. On May 4, 2015, Mr. Wellinghoff confirmed to Commission attorneys that all materials in his possession to which he had access because of his service at FERC had been securely destroyed.

The delay in taking this action was of concern because the Commission had reason to believe that Mr. Wellinghoff may have retained FERC-related information without full knowledge of the quantity, type, or sensitivity of such materials. Specifically, in a Memorandum to File, a Commission attorney wrote that during a telephone call on March 20, 2015, Mr. Wellinghoff was asked by Commission attorneys to contact them prior to making any disclosure of any other Commission information, for a determination of its status as public or nonpublic. In response, Mr. Wellinghoff agreed to do so but stated he could not think of any other Commission information that he had. According to the memorandum, Mr. Wellinghoff stated that his computer "crashed" and all of his documents were permanently lost. A Commission attorney who participated in the March 20 telephone call told us that Mr. Wellinghoff had indicated his computer crashed in February 2015 and that all of his documents were lost. However, we were told that Mr. Wellinghoff used a personal computing device to show the video clip during the March 9 presentation, despite having told Commission attorneys that all of his documents were lost due to the computer crash. Thus, despite Mr. Wellinghoff's assertions about the loss of materials in February 2015, the events of March 2015 suggest that additional documents may remain on other personal computing devices. We were unable to reconcile this inconsistency. Despite multiple attempts on our part, Mr. Wellinghoff declined to speak with us regarding this matter.

The unauthorized release of the deposition excerpt was troubling on its own. However, in light of our previous management alert on sensitive information disclosures, *Review of Internal Controls for Protecting Non-Public Information at the Federal Energy Regulatory Commission* (DOE/IG-0906, April 2014), our concern with Commission controls was heightened by management's failure to take action to positively ascertain the scope of information still in possession of the former Chairman. Even though the Commission accepted our recommendations to strengthen safeguards over the protection of sensitive information in response to a previous "leak" or unauthorized disclosure, it had not taken affirmative action to ascertain what additional information may remain in the former Chairman's possession. Similarly, in its initial response to the March 9 incident, Commission officials only took action specific to the relevant OE investigation.

We learned that in response to the March 9 incident, Commission attorneys were initially focused on precluding future disclosure of the specific video excerpt in question as well as any other information relating to the OE investigation in which the deposition was taken. Commission attorneys indicated they did not want to take any action that could be perceived as interfering with this or any other ongoing Office of Inspector General review. Commission attorneys also expressed their belief that any further requests of the former Chairman relative to all documents still in his possession would need to be coordinated with the current Chairman. Additionally, they did not believe they had the authority to verify the accuracy of any response that the former Chairman might provide. The stated position of the Commission officials was consistent with an opinion expressed by the Commission's Designated Agency Ethics Official in a letter dated February 28, 2014. That letter, prepared in response to a previous release of sensitive information, advised the Commission that there were limited options in terms of any action that could be taken to address unauthorized releases by former employees, including the former Chairman. However, as previously stated, FERC attorneys did eventually ask Mr. Wellinghoff to destroy all internal Commission information in his possession.

In our view, the seriousness of this matter required more aggressive intervention and involvement by the Commission. Specifically, we believe Commission attorneys should have considered first asking the former Chairman to identify all internal Commission material in his possession prior to requesting that he destroy said material. Such actions may have facilitated the identification of sensitive information still in the former Chairman's possession for proper tracking and disposition purposes. This echoes concerns expressed in our previously mentioned Management Alert as well as our Inspection Report *Review of Controls for Protecting Nonpublic Information at the Federal Energy Regulatory Commission* (DOE/IG-0933, January 2015).

Sensitivity of the Disclosed Video Excerpt

Commission officials who had seen or were familiar with the deposition excerpt indicated it was created from the complete video deposition of the trader. They further told us that the excerpt was meant to demonstrate that the witness portrayed in the clip was being evasive and uncooperative, arguing over such things as the meaning of the words "from" and "to" in the context of email communications.

We were told that the excerpt was used as part of a presentation created by OE for discussion with the energy trading firm under investigation and was shared internally by then Chairman Wellinghoff with members of his senior staff. The presentation, in part, demonstrated that certain individuals associated with the energy trading firm were not fully cooperating in an ongoing market manipulation investigation.

A Commission official present at the March 9 conference indicated that the excerpt could be embarrassing to the trader being deposed due to the nature of the exhibited behavior. The same official advised that Mr. Wellinghoff presented the clip during the conference as an example of how not to behave in front of regulators.

Use of Nonpublic Commission Materials

Commission staff informed us that Mr. Wellinghoff admitted during a conversation with Commission attorneys to having shown at a public conference a video clip of a deposition conducted by Commission staff during an OE investigation. The former Chairman maintained that the video excerpt of the deposition constituted public information. The Commission's General Counsel told us that he found such a statement surprising. He also noted that in a conversation subsequent to the conference he advised Mr. Wellinghoff that the video excerpt was not public, not previously disclosed by the Commission and that OE is "strongly committed to maintaining the nonpublic status of investigative information."

The Commission's General Counsel advised that as a former Chairman, Mr. Wellinghoff should have known, pursuant to OE regulations, that the video excerpt of the deposition was nonpublic. Additionally, the General Counsel informed us that all Commission staff have "a general understanding" that internal Commission materials are nonpublic unless determined otherwise by the Commission, legal proceeding or Freedom of Information Act release. This is consistent with 18 CFR 1b.9, *Confidentiality of Investigations*, with which, as noted below, Mr. Wellinghoff is familiar. Finally, according to the Commission's Web page on ethics,¹ under Major Ethics Requirements, it states that a Commission employee "may not disclose nonpublic information, including draft orders and internal discussions, to the public." The Commission's ethics rules also note that "Each employee is responsible for knowing the ethics rules for behaving ethically. Ignorance is no defense." The Commission's guidance in this regard is consistent with Office of Government Ethics regulations which define "nonpublic information" as information an employee gained through Federal employment that the employee knows or reasonably should know has not been made available to the general public.

It was clear to us that Mr. Wellinghoff was or should have been fully aware that the public release of the video clip he divulged was inappropriate. In fact, in previous correspondence with the Office of Inspector General on a separate matter, the former Chairman detailed the Commission's internal controls for preventing improper disclosure of confidential information. In that communication, then Chairman Wellinghoff wrote, "Office of Enforcement staff are all trained at the outset of their employment that, unless specifically authorized by the Commission pursuant to Commission regulations, nonpublic documents and information contained in them are to remain confidential both during and after the conclusion of an investigation." According

¹ www.ferc.gov/ethics.asp

to the then Chairman, this message is made clear in the Commission's regulations, specifically, 18 CFR 1b.9, *Confidentiality of Investigations*, as well as in the internal investigations procedures manual. As previously noted, we sought to interview Mr. Wellinghoff regarding his access to and display of the video excerpts but he declined to speak with us.

Contributing Factors

The issues outlined in this report relate primarily to the conduct of the former Chairman. However, we also found that there were inconsistencies and weaknesses in the Commission's postemployment guidance and exit process. At the time of the former Chairman's departure, Commission ethics officials sought to prevent, apparently through voluntary compliance, the disclosure of nonpublic information by former employees. Specifically, postemployment guidance provided to the former Chairman at the time of his departure stated, "In any postemployment activity, whether representational or consultative, you may not disclose nonpublic information that came to you through Commission employment and may not otherwise make use of such information for financial gain." While we cannot comment on motivation, clearly the former Chairman disclosed nonpublic information that came to him while he was employed by the Commission.

We noted that the postemployment guidance provided to the former Chairman at the time of his departure relied on regulations and statutes that applied only to current employees. Specifically, postemployment documentation provided by Commission ethics officials to the former Chairman noted that while the requirement for nondisclosure generally flows from the authority contained in 5 CFR 2635.703, *Use of Nonpublic Information*, the specific, enforceable provision relates to current employees and not former employees. Since the former Chairman's departure, and during the conduct of our previous review, the postemployment guidance provided to departing Commission officials was updated. However, we noted that while again seeking compliance, the revised postemployment guidance relies on 18 U.S.C. 1905, *Disclosure of Confidential Information*, which, except under very limited circumstances, again only applies to current Federal employees.

Further, the Commission's exit process did not adequately address how employees leaving the Commission should treat information, specifically nonpublic information, they received during the course of their employment. In this regard, we found that the Commission lacked controls to ensure that employees terminating their employment, including the former Chairman, relinquished all confidential, nonpublic information in their possession before departure. Our review disclosed that, when out-processing, an employee must turn in Government equipment, but is not required to attest that they have not previously removed nor do they plan to take any Commission documents, nonpublic or otherwise, with them. The Commission did not have policies in place that would tell a departing employee what they should do with or how they should treat nonpublic information when they leave the Commission. As a result of this latest incident, Commission attorneys stated they are taking steps intended to enhance postemployment guidance and improve the exit process, which should further inform departing employees, Commissioners included, of how to handle nonpublic information they had access to during their time at the Commission.

Actions Taken

In response to the March 9 incident, Commission staff has taken, or is in the process of taking, steps to: (1) update postemployment guidance for senior Commission officials specific to the handling of nonpublic information; (2) emphasize current employees' responsibility for proper handling of Commission records; and (3) enhance the exit process for all future departing employees. We were informed that the General Counsel discussed with either the Commissioners (including the current Chairman) or their assistants "an incident involving a former FERC employee's use of nonpublic information in a presentation made at a public conference." As a follow up to those discussions, the Commission's Designated Agency Ethics Official provided the current Chairman and Commissioners additional guidance as to the materials they may personally take with them upon the expiration of their term at the Commission.

Specifically, in an email dated April 13, 2015, the Commission's Designated Agency Ethics Official advised the current Chairman and Commissioners that they may choose to delete personal records, such as journals, personal correspondence, or other personal notes that are not prepared, used for, circulated or communicated in the course of transacting Government business, or take personal records with them when they leave the Commission. These officials were also encouraged to contact the Designated Agency Ethics Official to discuss their "decision to personally keep any Agency record" after their departure.

Further, Commission attorneys have taken steps to hold former Commission employees accountable for improper disclosure of internal Commission material after their departure. Specifically, in the April 13 email, the Commission's Designated Agency Ethics Official cited 18 U.S.C. 641, *Public Money, Property, or Records* and 18 U.S.C. 2071, *Concealment, Removal, or Mutilation Generally*, which outline criminal penalties for the unlawful removal or destruction of Federal records. Unlike the regulations and statutes cited in prior postemployment guidance applicable to only current employees, 18 U.S.C. 641 provides criminal penalties for "[w]hoever ... knowingly converts to his use or the use of another ... any record ... of the United States." Moreover, 18 U.S.C. 2071 provides criminal penalties for any custodian of a public record who "willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys ... any record." Additionally, the General Counsel sent an email on May 8, 2015, to Commission employees advising them, in part, that Federal law restricts their ability to remove or personally retain Commission records upon their departure from service at the Commission and that the unlawful removal from the Commission of records, as well as the unlawful destruction of records, is a crime pursuant to 18 U.S.C. 641 and 18 U.S.C. 2071.

Regarding the Commission's exit process, as of April 21, 2015, the Commission developed a form provided to all employees prior to their leaving the Commission. We were told by Commission attorneys that the form identifies and documents any Commission records that the employee plans to take with them. However, upon review, we found the form requires employees to check 'yes' or 'no' regarding whether they plan to remove documents upon their departure. If yes, they must have permission from the Commission's Designated Agency Ethics

Official, but do not need to document on the form specifically what they are taking with them. It also provides notice of the restrictions and possible criminal penalties on removing agency records without proper authorization.

While we believe such efforts are beneficial, we believe that additional action is necessary. Thus, we made several recommendations designed to address these issues.

Impact

We believe that the risk for continued unauthorized disclosure of confidential nonpublic information, such as the video excerpt, by either current or former Commission officials, remains unacceptably high and that such disclosure could undermine the sanctity of the Commission's regulatory and enforcement process. As noted by the law firm that brought the March 9 conference disclosure issue to the Commission's attention, the "unauthorized disclosure by current or former representatives of FERC of confidential nonpublic information threatens the integrity of FERC's investigative process...and could have a chilling effect on the willingness of witnesses and persons or entities under investigation to provide information." Because of the serious nature of these issues, we have made recommendations intended to assist the Commission in enhancing its processes for protecting sensitive information.

RECOMMENDATIONS AND PATH FORWARD

We recommend that the Commission Chairman:

1. Determine if the former Chairman violated the Confidentiality of Investigations requirement and ascertain what, if any, sanctions are available to address the former Chairman's actions.
2. Determine if the Commission currently has the necessary authorities it needs to prevent the disclosure or misuse of sensitive or nonpublic information; and, the authorities to impose sanctions on those who engage in such action, whether employed at FERC currently or in a postemployment status. If statutory or regulatory changes are needed in this regard, take appropriate action to expedite such changes.
3. Expedite the current effort to update and strengthen the Commission's postemployment guidance and exit processes, including ensuring that departing Commission members and other employees are aware of what constitutes "nonpublic information" and their ethical duty to protect such information after they depart.

MANAGEMENT RESPONSE

FERC management agreed to take corrective actions in response to the report's recommendations. We consider FERC's comments and corrective actions, both taken and planned, to be responsive to our recommendations.

Management's comments are included in the Attachment. Management waived an exit conference.

cc: Secretary of Energy
Deputy Secretary of Energy
Executive Director, Federal Energy Regulatory Commission
General Counsel, Federal Energy Regulatory Commission
Designated Agency Ethics Official, Federal Energy Regulatory Commission

MANAGEMENT COMMENTS

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

June 1, 2015

OFFICE OF THE CHAIRMAN

Honorable Gregory H. Friedman
Inspector General
Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Dear Inspector General Friedman:

Thank you for the opportunity to review the Department of Energy (Department) Office of Inspector General's (OIG) draft management alert on Review of Allegations of Improper Disclosure of Confidential, Non-Public Federal Energy Regulatory Commission Information (Draft Management Alert). I appreciate your examination of the incident described in the Draft Management Alert and your careful consideration of the information you received from Commission staff. I concur with the Draft Management Alert's three recommendations.

1. The Draft Management Alert recommends that I determine if the former Chairman's actions described therein violated the confidentiality of investigations requirement and ascertain what, if any, sanctions are available to address those actions. The Draft Management Alert states that unless specifically authorized by the Commission pursuant to the Commission's regulations, non-public documents and information contained in them are to remain confidential both during and after the conclusion of an investigation conducted by the Commission's Office of Enforcement. I agree that the video excerpt discussed in the Draft Management Alert constitutes non-public information from such an investigation. I have directed appropriate senior Commission staff to explore whether further steps are available to address this situation and to share their findings on that issue with me by September 1, 2015.

2. The Draft Management Alert recommends that I determine if the Commission currently has the necessary authorities it needs to prevent the disclosure or misuse of sensitive or non-public information; and, the authorities to impose sanctions on those who engage in such action, whether employed at FERC currently or in a post-employment status. The Draft Management Alert further recommends that if statutory or regulatory changes are needed in this regard, then I take appropriate action to expedite such changes. Commission staff is actively evaluating whether there is a need for additional statutory authority in this area. As appropriate, we will discuss this issue with the Department, other Federal agencies, and Congress.

3. The Draft Management Alert recommends that I expedite the current effort to update and strengthen the Commission's post-employment guidance and exit processes, including ensuring that departing Commission members and other employees are aware of what constitutes "non-public information" and their ethical duty to protect such information after they depart. I appreciate the recognition in the Draft Management Alert of several steps that Commission staff already has taken in response to the March 9th incident to strengthen our post-employment

guidance and exit processes for departing employees. I strongly support those steps. In addition, I have directed the Commission's Office of the General Counsel and Office of the Executive Director to coordinate additional efforts in this area, including incorporating information on these topics into the Commission's annual mandatory ethics training for 2015.

Thank you again for your attention to this matter. We are dedicated to learning from this experience and strengthening our relevant processes going forward. Please do not hesitate to contact me if I can provide any further information.

Sincerely,

A handwritten signature in blue ink that reads "Norman C. Bay". The signature is written in a cursive style with a checkmark at the end.

Norman C. Bay
Chairman
Federal Energy Regulatory Commission

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