



FEDERAL ELECTION COMMISSION
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MEMORANDUM

OCT 21 2015

TO: The Commission

THROUGH: D. Alec Palmer *Cault for*
Staff Director

FROM: Daniel A. Petalas *DAP*
Acting General Counsel

AGENDA ITEM

For Meeting of 10-29-15

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RE: Additional Documents Appropriate for Release

In response to OGC's memorandum of August 5, 2015 (Agenda Document 15-27-B) regarding public disclosure of documents in closed enforcement matters, Chair Ravel asked that we address "other categories of documents that may provide useful information to the public beyond those pertaining to specific enforcement matters."¹

¹ This memorandum is the product of discussions within OGC, review by affected divisions in the Office of the Staff Director and the Office of the Chief Financial Officer, review of recent and currently pending FOIA requests, and examination of the web sites of a number of other agencies of similar size. These included the American Battle Monuments Commission; the Armed Forces Retirement Home; the Export-Import Bank; the Farm Credit Administration; the Federal Mediation and Conciliation Service; the U.S.-Mexico International Boundary and Water Commission; the International Trade Commission; the Millennium Challenge Corporation; the National Transportation Safety Board; the Overseas Private Investment Corporation; and the Presidio Trust.

The OGC Litigation and Policy Divisions took part in OGC's internal discussions, but there were no documents that merited adding from these divisions. Most documents in these divisions are either already public (litigation briefs, agenda documents relating to advisory opinions or regulations); privileged (draft briefs, white drafts of advisory opinions or regulation documents); or not appropriate for automatic public release (communications with opposing counsel in litigation matters, or requesters' counsel in AO requests, etc.).

I. SUBSTANTIVE CAMPAIGN FINANCE MATERIALS

A. Additional Enforcement Statistical Information

Recently, the Press Office has released monthly updates of the number of cases closed, the number of cases closed with civil penalties and administrative fines, and aggregate and average penalties or fines received for the fiscal year to date for the OGC enforcement program, the ADR program, and the Administrative Fines program. This information is in a table with similar information for each previous fiscal year dating to FY 1977.

The Commission has also recently received a number of FOIA requests for the quarterly Status of Enforcement Report. *See, e.g.*, FOIA 2015-61 (Muckrock News). Most of the content of these reports is either confidential under 52 U.S.C. § 30109(a)(12) or subject to one or more of the various litigation privileges. Certain statistical enforcement information does not fall within any identified exemption, however, and as a matter of practice has generally been released upon request.² If the Commission wished, it could add those types of statistics to the web page that currently provides civil penalty data.³

B. Financial Information Pertaining to the Presidential Election Campaign Fund

Every month, the Commission receives from the Department of the Treasury a report of the balance available in the Presidential Election Campaign Fund. The Commission makes this information available on its web site each month.

Moreover, to assist the Treasury in its annual budget submission, the Commission approves every year a "Long Term Budget Estimate for the Presidential Election Campaign Fund." Based on a variety of assumptions, this document estimates collections to and outlays from the Presidential Election Campaign Fund for each of the next ten fiscal years. Although this material may be of only marginal public utility, the budget estimate does not fall within any

² In addition to civil penalty information already released, this information includes:

1. a. Number of EPS dismissals by fiscal year, FY 09 to present, plus EPS dismissals for current quarter compared with same quarter two and four years previously,
b. average and median days to EPS dismissal from case opening over the same period, and
c. average and median days to EPS dismissal from date of last response over the same period;
2. a. Total number of cases closed by fiscal year, FY 11 to present, plus number in current quarter,
b. total number and percentage of cases closed within 450 days over the same period, and
c. average and median days to closure by fiscal year, FY 02 to present, plus average and median for current quarter; and
3. Case closing processing statistics.

³ We also note that in our August 5 memorandum, we recommended that the Commission release the file in most matters in which it "declines to open a MUR," including all such matters generated by Audit or RAD referrals. Adopting that recommendation would reduce any discrepancy between the released statistics and what a reader could calculate by using the Enforcement Query System on the Commission's website.

applicable government privilege once the President's annual budget is released, and we do not believe its public release at that time would put at risk any countervailing agency interest.

C. OGC Memoranda Accompanying Approved Debt Settlement Plans and Administrative Terminations

Debt settlement plans and approvals, along with administrative termination letters, are already made public along with the disclosure reports of the committees in question. However, debt settlement plans and proposed administrative terminations that trigger certain confidential Commission thresholds require review by OGC and approval by vote of the Commission. This review seeks to ensure that none of the debts at issue in both debt settlement plans and administrative terminations suggest potential excessive or prohibited contributions by the creditor and, in the case of administrative terminations, that any remaining cash on hand is not being diverted to personal use or an unlawful purpose. Because there is at least a possibility of ensuing enforcement action, the Commission considers these matters in executive session. The Commission may wish to release OGC's analysis, along with the certification of the Commission's votes, where the debt settlement plans or administrative terminations are approved. Although releasing the OGC materials would constitute a waiver of the privilege for attorney work product, the Commission may conclude that the public availability of such materials outweighs the interest in maintaining the privilege in this class of cases, similar to its decision with respect to the release of certain General Counsel's reports and memoranda in closed enforcement matters. However, we do not recommend that these memoranda be released where the debt settlement plans or administrative terminations are not approved.

II. ADMINISTRATIVE MATERIALS

A. Procurement Information

1. Service Contract Inventory Reports

Section 743 of Division C of the 2010 Consolidated Appropriations Act requires executive agencies covered by the Federal Activities Inventory Reform Act of 1998 (Public Law 105-270) to submit information annually to the Office of Federal Procurement Policy in support of the agency-level inventories for service contracts. The report principally contains a listing by vendor, amount and service rendered (or to be rendered) of each contract for services entered into by the Commission during a fiscal year. The Commission previously posted this report to its website, but has not done so since the report for fiscal year 2012. If the Commission now believes that making the report available to the public would garner increased public awareness and improve transparency in a meaningful manner, it could decide to return to the practice of releasing these inventories without any significant administrative burden.

2. FAIR Act Reports

The Federal Activities Inventory Reform Act of 1998, Pub. L. 105-270, 112 Stat. 2382 ("the FAIR Act"), requires agencies to report annually to the Office of Management and Budget

a list of activities performed by the agency that in the judgment of the agency head are not inherently governmental. The Commission is required to make these reports public by Section 2(c)(1)(A) of the FAIR Act. Thus, these reports should be posted on the Commission's website.

3. FPDS Data

All federal contracts must be reported to the Federal Procurement Data System (FPDS). FPDS is maintained by the General Services Administration; its data is available through <https://www.fpds.gov>. Users of [fpds.gov](https://www.fpds.gov) may manipulate the data in a variety of different ways. If technically feasible, the procurement page on the Commission's web site could link to an [fpds.gov](https://www.fpds.gov) search that shows all Commission contracts.

4. Link to USASpending.gov Page

USASpending.gov is the publicly accessible, searchable website mandated by the Federal Funding Accountability and Transparency Act of 2006 to give the American public access to information on how their tax dollars are spent. It is administered by the Treasury Department. Information about the Commission's non-salary spending is located at <https://www.usaspending.gov/transparency/Pages/AgencySummary.aspx?AgencyCode=9506&FiscalYear=2015>. The Commission could provide on its own website a link to this page. Because the USASpending.gov website is relatively new, however, the Office of the Chief Financial Officer recommends that it have a period of time to become more familiar with the website and, particularly, the integrity and accuracy of the data on it before we post a link to it on the Commission's website.

5. List of Purchase Card Holders

The agency frequently receives and fulfills FOIA requests for lists of agency employees authorized to hold GSA-issued purchase cards. Some agencies have responded to these frequent requests by maintaining such a list on their public websites. The Commission could follow suit, although the information would need to be periodically updated by the appropriate administrative office. On the other hand, because many authorized purchase card holders are not particularly high ranking employees the Commission could determine that release of their names and positions on the Internet serves little public purpose, and could continue to require requesters to obtain this information through the FOIA process.

B. Ethics and Travel Information

1. 1353 Travel Reports

Official travel paid for by non-government sources pursuant to 31 U.S.C. § 1353 must be reported to the U.S. Office of Government Ethics (OGE) biannually. OGE makes these reports available on its website. The Commission could, if it wished, also make its Section 1353 reports to OGE available on its own website or alternatively provide a link to the OGE website page.

2. Annual Foreign Gifts Report to State Department

Pursuant to Public Law 95-105, federal agencies must report annually to the State Department the receipt and disposition of gifts and decorations tendered by foreign governments to federal employees or their spouses or dependents that are valued at more than minimal value, presently \$375. These reports must also include all foreign government gifts of or expenses for travel taking place outside of the United States and valued at more than \$375, except for those expenses accepted under 31 U.S.C § 1353. At the Commission, the Office of Congressional and Intergovernmental Affairs is responsible for compiling and submitting this report. The State Department annually publishes in the Federal Register a list of accepted gifts, organized by agency. Consequently, the Commission could provide its annual report to the State Department on its website as well.

C. EEO MD-715 Reports

Equal Employment Opportunity Commission Management Directive 715 requires all agencies in the Executive Branch to “report annually on the status of activities undertaken pursuant to its equal employment opportunity program under Title VII [of the Civil Rights Act of 1964, as amended] and activities undertaken pursuant to its affirmative action obligations under the Rehabilitation Act [of 1973, as amended]. Agency reports must also include a plan that sets forth steps it will take in the future to correct deficiencies or further improve efforts undertaken pursuant to this Directive.” These reports also contain statistical information about the demographics and disability status of the Commission’s workforce, both overall and sorted by office or division and by pay grade. The Commission makes the report available to all employees on FECNet, but apparently does not proactively release the document to the public. A number of other agencies release the report on their websites, and the Commission could follow suit. However, given the relatively small size of the Commission, some of the statistical information might have to be redacted in order to preserve the privacy of individual employees.

D. Privacy Program Report Information

The Office of Management and Budget annually requires agencies’ Senior Agency Officials for Privacy to report to OMB, through the head of the agency, on various aspects of the agency’s privacy management program. The Commission could release this report to the public.

E. Labor-Management Agreement

Some agencies post their labor-management agreements on their websites, and we recall at least some Commissioners expressing an interest in doing so when the current LMA was being finalized in 2013. We are not aware of any restriction to making the agreement publicly available in this manner, but if the Commission concludes it wishes to do so, as a courtesy the Commission may wish to address that proposal with the relevant union representatives prior to placing the agreement on the website.

III. ITEMS WE SPECIFICALLY RECOMMEND NOT RELEASING

A. Executive Session Agendas

Chair Ravel's request expressly mentioned disclosure of Executive Session agendas. We recommend that the Commission not proactively release executive session agendas, for both substantive and logistical reasons.

As an initial matter, the agendas themselves and certain information they contain may be subject to a variety of legal protections. Beyond those legal concerns, however, the release of executive session agendas would also present substantial logistical challenges. For example, to ensure that no agenda inadvertently is released that contains confidential enforcement information, the Commission could release only those agendas for executive sessions that pre-date the initial Commission action on the oldest matter in house. Under that method, however, there would be a substantial lag between release of the agenda and the activities involved, significantly undermining the value to the public promoting the agenda's release. Alternatively, we could search for the most recent agenda on which no open matters were discussed, release that agenda, and then repeat the process every time a matter closed. However, that would be extremely labor-intensive and in our view the value of releasing that information would not warrant the administrative cost. Another alternative would be to include in the file of each closed enforcement matter an appropriately redacted copy of each agenda on which the matter appeared. Given the Administrative Law Team's limited resources and other proposals the Commission is considering to expand the material released in closed enforcement files, the heavy FOIA docket anticipated through the 2016 election, and the Commission's other priorities, the various alternative proposals we have considered for administering the release of executive session agendas without compromising the confidentiality obligations of the Act are not warranted.⁴

B. SF 278 Financial Disclosure Forms of Commissioners

Along with the annual financial disclosures of all other Presidential appointees, Commissioners' financial disclosures are available on OGE's website. However, we do not recommend duplicating that disclosure on the Commission's website. OGE regulations require persons examining SF 278 forms of Executive Branch officials to make specific requests using OGE Form 201. OGE has implemented an online version of that form for processing requests for presidential appointees' forms through its own website. We do not have a similar capability, and thus should not release SF 278 forms through our website.

⁴ Currently, the Commission's records schedule for executive session agendas provides that the agendas are permanent records, retained by the Commission for 30 years (or a shorter period if the Commission so determines) and, at the end of that time, transferred to the physical and legal custody of the National Archives and Records Administration. After transfer of legal custody to NARA, the agendas are available for inspection by researchers upon request.