

AGENDA DOCUMENT NO. 16-13-A



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM

March 24, 2016

For Meeting of 3-31-16

Memorandum

To: The Commission

From: Lee E. Goodman 
Commissioner

Re: Attached Proposed Policy Regarding Disclosure of Enforcement Documents

Attached please find a proposal for the Commission to supplement its Interim Disclosure Policy with respect to enforcement records. This proposal recommends that the Commission add several categories of documents to its list of documents routinely made part of the public record in closed enforcement matters, with protections for appropriate redactions and assertions of privilege. This policy was last discussed by the Commission at its November 2015 meeting.

I plan to move this proposal at the next public meeting of the Commission under the following procedure which I will request the Chair to adopt:

- First, I will move adoption of the text—excluding the specific categories of documents.
- Following that motion and action by the Commission, I will move approval of each document category (1 thru 8) *seriatim*.
- Following that series of motions, in the event that any Commissioner desires to propose any other category of document not listed in the attached proposal, the Commissioner may propose the additional category which can be moved and voted upon individually.

Attachment



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 24, 2016

MEMORANDUM

TO: The Commission

FROM: Lee E. Goodman 
Commissioner

SUBJECT: Proposed Statement of Policy Regarding the Public Disclosure of Closed Enforcement Files

Summary:

In order to update the Commission's practice of publicly releasing certain documents in closed enforcement actions, promote agency transparency, accountability, and public understanding of Commission decisions and to engage the public and stakeholders in the Commission's activities, the Federal Election Commission is formally supplementing the list of documents that it will routinely place on the public record following the close of an enforcement matter, subject to appropriate redaction, withholding or invocation of privilege on a case-by-case basis.

Supplementary Information:

For approximately the first twenty-five years of its existence, the Federal Election Commission (the "Commission") placed on the public record all documents considered by the Commissioners in their consideration of a matter, except those which are exempt from disclosure under either the Federal Election Campaign Act, 52 U.S.C. 30101, *et seq.* ("FECA" or "the Act"), or under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"). In 2001, following the decision of the district court in *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001), the Commission restricted its public disclosure to documents that reflected the agency's "final determination" with respect to enforcement matters. Although the court of appeals affirmed the judgment of the district court, it did so on a narrower ground, stating "although we agree that deterring future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by [52 U.S.C. 30109(a)], the Commission must attempt to avoid unnecessarily infringing on First Amendment interests where it regularly subpoenas materials of a 'delicate nature . . . represent[ing] the very heart of the organism which the first amendment was intended to protect.'" *AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (quoting *FEC v. Machinist Non-Partisan Political League*, 655 F.2d 380,

388 (D.C. Cir. 1981)). Following the court of appeal's ruling, the Commission adopted an interim disclosure policy that resumed the practice of placing additional categories of enforcement documents on the public record, including but not limited to any "[c]omplaint or internal agency referral," "[r]esponse to a complaint," "General Counsel's Reports that recommend dismissal, reason to believe, no reason to believe, no action at this time, probable cause to believe, no probable cause to believe, no further action, or acceptance of a conciliation agreement," "[n]otification of reason to believe findings (including Factual and Legal Analysis)," and General Counsel's briefs. *See* Statement of Policy Regarding Disclosure of Closed Enforcement or Related Files, 68 Fed. Reg. 70423 (Dec. 20, 2003) ("Interim Disclosure Policy").

The Commission's Interim Disclosure Policy has been reconsidered twice. In 2006, the Commission reconsidered its practice of placing First General Counsel's Reports on the record following a matter in which the Commission adopted a recommendation proposed by the Office of the General Counsel ("OGC") but rejected one of several underlying rationales for the recommendation. Thereafter, OGC began recommending a Factual and Legal Analysis ("F&LA") in all cases, and from January 2007 forward, approved F&LAs were placed on the public record in all matters, not just those in which the Commission found reason to believe. In 2009, the Commission resumed the practice of placing all First General Counsel's Reports on the public record, subject to appropriate redaction and withholding.

Commission Supplement to Interim Disclosure Policy

The Commission has determined that placing additional categories of documents on the public record at the close of enforcement matters will promote Commission transparency and accountability and will provide a clearer understanding of the law to assist compliance efforts and deter future violations.

Accordingly, henceforth, the Commission will place on the public record, in addition to those records currently made public under the Interim Disclosure Policy, the following categories of documents at the close of an enforcement matter, subject to appropriate redactions consistent with the requirements of the Act, the principles articulated by the court of appeals in *AFL-CIO*, and/or assertions of privilege or other exemption set forth in FOIA:

1. Attachments to complaints, responses to complaints;
2. Correspondence (other than a complaint or response to a complaint) exchanged between the Commission and the Respondent discussing the substance of alleged violations and related factual or evidentiary information;
3. Documents prepared by OGC in connection with a specific matter under review and considered or discussed by the Commission as part of its deliberative process prior to finding reason to believe or probable cause to believe in that matter, including but not limited to memoranda summarizing or discussing new factual information and/or

memoranda analyzing applicable law, whether or not these documents contain any of the recommendations described in the Interim Disclosure Policy;

4. Referrals which the Commission votes to open as a matter under review;
5. Complaint notification letters to respondents;
6. Notifications to respondents that were previously identified as “Unknown Respondents”;
7. Tolling agreements; and
8. Upon the request of any Commissioner, proposed Factual and Legal Analyses that are voted on by the Commission but not adopted.

In addition, the Commission intends to approve any FOIA request for any of the above categories of documents that have not been placed on the public record in an enforcement matter closed prior to the date the Commission adopted this policy, subject to appropriate redactions consistent with the requirements of the Act, the principles articulated by the court of appeals in *AFL-CIO*, and the Commission’s assertion of a privilege or other exemption set forth in FOIA. In appropriate cases implicating the law enforcement privilege, the Commission reserves the right to assert privilege to withhold an entire document.

This document amends an agency practice or procedure. This document does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public comment, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedure Act (“APA”). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable here.