**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| CENTER FOR COMPETITIVE POLITICS,<br><br>Plaintiff,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Civ. No. 14-970 (RBW)<br><br>MOTION FOR SUMMARY JUDGMENT |

**FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT**

Defendant Federal Election Commission respectfully moves this Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h). In support of this motion, the Commission is filing a Memorandum in Support of Its Motion for Summary Judgment, the Declaration of Robert M. Kahn, Defendant Federal Election Commission's Statement of Material Facts as to Which There Is No Genuine Dispute, and a Proposed Order.

Respectfully Submitted,

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July 28, 2014

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| CENTER FOR COMPETITIVE POLITICS, | ) | |
| Plaintiff, | ) | Civ. No. 14-970 (RBW) |
| v. | ) | |
| FEDERAL ELECTION COMMISSION, | ) | MEMORANDUM |
| Defendant. | ) | |

**FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Center for Competitive Politics seeks an order requiring the Federal Election Commission to produce, under the Freedom of Information Act, a document containing initial legal analysis and recommendations from the Commission's in-house lawyers, which the attorneys subsequently withdrew and revised, in an administrative enforcement matter that is now the subject of litigation. FOIA plainly does not require disclosure of such a privileged document; summary judgment should be granted to the Commission.

In June 2011, attorneys in the Commission's Office of General Counsel provided the Commission their legal analysis and recommendations regarding certain alleged violations of federal campaign finance laws. Under the enforcement procedures mandated by the Federal Election Campaign Act, 2 U.S.C. § 437g, the administrative enforcement matter could — and did — lead to litigation. The Commission never approved or rejected the June 2011 legal guidance; before the Commission completed action on the matter, the Office of General Counsel withdrew the document from Commission consideration and later submitted a revised legal analysis. Ultimately, three Commissioners voted to accept the recommendations in the later report and three Commissioners voted to reject them.

The Center for Competitive Politics's FOIA complaint asks this Court to order that the withdrawn June 2011 legal analysis be publicly disclosed. But the document is manifestly deliberative and predecisional, and was prepared by Commission attorneys for their client in anticipation of litigation. As such, it is plainly privileged and this Court should grant summary judgment to the Commission.

## BACKGROUND

### I. PARTIES

The Federal Election Commission is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-57 ("FECA" or "Act"). *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. Congress authorized the Commission to "formulate policy" under FECA, *see, e.g.*, 2 U.S.C. § 437c(b)(1), and to make rules and issue advisory opinions, 2 U.S.C. §§ 437d(a)(7), (8); 437f; 438(a)(8). *See also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976). The Commission is also authorized to institute investigations of possible violations of the Act, 2 U.S.C. § 437g(a)(1)-(2), and the agency has exclusive jurisdiction to initiate civil enforcement actions in the United States district courts, 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e), 437g(a)(6).

According to its complaint, plaintiff Center for Competitive Politics ("CCP") is an educational nonprofit corporation organized under 26 U.S.C. § 501(c)(3). (CCP Compl. ¶ 5.) CCP alleges that it regularly represents parties regulated by the Commission. (*Id*.)

### II. FEC ADMINISTRATIVE ENFORCEMENT PROCEDURES

The Act permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 2 U.S.C. § 437g(a)(1). Upon receipt of such a complaint, the Commission's Office of General Counsel prepares a report to the Commission known as a General Counsel's Report or GCR, which analyzes the allegations in the complaint, applies the relevant law to the facts alleged, and sets forth the Office of General Counsel's recommendations for Commission action. The first GCR in an enforcement Matter Under Review ("MUR") usually includes a recommendation from the General Counsel's Office that the Commission take

one of the following actions regarding each alleged violation: (1) find reason to believe that a violation either occurred or is about to occur; (2) find no reason to believe; (3) dismiss the matter as an exercise of prosecutorial discretion; or (4) dismiss the matter with a cautionary message to the respondent regarding its legal obligations under the Act or Commission regulations. The first GCR also typically includes a separate proposed "Factual and Legal Analysis" for each respondent as to which the General Counsel's Office is recommending Commission action. The proposed Factual and Legal Analysis generally sets forth draft factual and legal bases for the recommended Commission action. In matters in which the Commission accepts the recommendations in the General Counsel's Report, the Commission may adopt the proposed Factual and Legal Analysis as its own.

Generally, if one or more Commissioners objects to a first General Counsel's Report after it has been circulated to the Commission, or if fewer than four Commissioners vote to approve or reject the GCR's recommendations by the voting deadline, the Commission considers the enforcement matter at a closed Commission Executive Session during which the Commission may, *inter alia*, discuss the Office of General Counsel's recommendations and vote on whether there is "reason to believe" that a violation has occurred. 2 U.S.C. § 437g(a)(2).

If at least four members of the Commission vote to find reason to believe a violation has occurred, the Commission ordinarily then investigates the allegations. *Id*. After the investigation, the General Counsel's Office may recommend that the Commission find that there is "probable cause" to believe the Act has been violated. 2 U.S.C. § 437g(a)(3). The General Counsel's Office must notify the respondents of its recommendation and provide them with a brief stating the Office's position on the issues. *Id.* The respondents are then entitled to file a

responsive brief. *Id.* Next, the Office of General Counsel prepares a report to the Commission with further recommendations in light of the briefs and investigation. 11 C.F.R. § 111.16.

If at least four members of the Commission vote to find probable cause to believe that a violation has occurred, 2 U.S.C. § 437g(a)(4)(A)(i), the Commission must first attempt to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondents. *Id*. A conciliation agreement may require a respondent to pay a civil penalty "which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved." 2 U.S.C. § 437g(a)(5)(A).[1] If informal methods of conciliation fail, the Commission may, "upon an affirmative vote of 4 of its members," file a *de novo* civil enforcement suit in federal district court. 2 U.S.C. § 437g(a)(6)(A).

If the Commission dismisses a complaint at any stage in the administrative enforcement process, the complainant may seek judicial review of that determination in this District pursuant to 2 U.S.C. § 437g(a)(8)(A). If a reviewing judge declares that a Commission dismissal was "contrary to law," the Court can order the Commission to conform to that declaration within 30 days. 2 U.S.C. § 437g(a)(8)(C). If the Commission fails to conform to the declaration within 30 days, the complainant may obtain a private right of action against the administrative respondents for the alleged violations. *Id.*; *FEC v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 488 (1985).

[1] Commission regulations also permit the agency to enter into a conciliation agreement with a respondent before finding probable cause. *See* 11 C.F.R. § 111.18(d). Any conciliation agreement reached prior to a finding of probable cause has the same force and effect of any other conciliation agreement. *Id.*

## III. ADMINISTRATIVE COMPLAINT AND PROCEEDINGS IN MUR 6396

On October 13, 2010, Public Citizen, ProtectOurElections.org, ProsperityAgenda.us, AmericanCrossroadsWatch.org, Kevin Zeese, and Craig Holman (collectively "Public Citizen") filed an administrative complaint with the Commission alleging that Crossroads Grassroots Policy Strategies ("Crossroads") violated the Act by failing to register as a political committee, file required disclosure reports, and comply with the organizational requirements of the Act. The Commission designated the matter as MUR 6396. Crossroads responded to the administrative complaint by denying that it qualified as a political committee and otherwise denying that it had violated FECA. (Compl. for Decl. & Inj. Relief, *Public Citizen v. FEC*, No. 14-148 (RJL), (D.D.C. Jan. 31, 2014) [Doc. #1] ("Public Citizen Compl.") ¶¶ 37-38.)

On June 21, 2011, the Office of General Counsel provided the Commission a First General Counsel's Report for MUR 6396, which included an accompanying draft proposed Factual and Legal Analysis. (Kahn Decl. ¶¶ 11, 13.[2]) After the Office of General Counsel submitted the June 2011 report to the Commission, the document was circulated by the Commission Secretary for a Commission vote. (*Id.* ¶ 14.) Objections were made to the report and pursuant to a Commission directive, the pending enforcement matter was placed on the agenda for discussion by the Commission at an Executive Session on September 27, 2011. (*Id.*)

The June 2011 report was discussed at the September 27 Commission Executive Session. (*Id.* ¶ 15.) Following that discussion but before the Commission made any determination regarding the recommendations in the report, the Office of General Counsel withdrew the report (including the attached draft proposed Factual and Legal Analysis) from Commission

[2] The Commission submits the Kahn Declaration in lieu of a *Vaughn* index. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) ("[A]n agency may even submit other measures in combination with or in lieu of the index itself."). *See infra* pp. 7-8.

consideration. (*Id.*) The Commission never made any determination regarding its attorneys' recommendations in the June 2011 report, and it never adopted the proposed Factual and Legal Analysis attached to that report. (*Id.*)

On November 21, 2012, attorneys in the General Counsel's Office provided a revised First General Counsel's Report to the Commission setting forth their analyses and recommendations regarding the allegations against Crossroads in MUR 6396. (*Id.* ¶ 16.) The Commission's lawyers recommended that the Commission find reason to believe that Crossroads violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize, register, and report as a political committee, and further recommended that the Commission authorize an investigation to determine whether there was probable cause to believe that Crossroads had violated the Act. (Public Citizen Compl. ¶ 44.)

On December 3, 2013, the Commission voted on the Office of General Counsel's November 2012 recommendations. Three Commissioners voted to find reason to believe that Crossroads had violated FECA, approve the proposed Factual and Legal Analysis attached to the November 2012 report, and authorize an investigation; and three Commissioners voted not to find reason to believe.[3] (Public Citizen Compl. ¶¶ 4, 45.) The Commission then voted unanimously to close the file and the Commissioners thereafter issued "statements of reasons" explaining their reasons for voting as they did. (*Id.* ¶¶ 4, 45-48.) In addition, the Commission publicly released the November 2012 First General Counsel's Report, consistent with a general Commission policy of disclosing certain enforcement documents after an administrative enforcement matter has been closed. *See infra* pp. 22-23. The earlier analysis that the

[3] CCP's Complaint mistakenly alleges (Compl. ¶ 10) that "a majority of the FEC's commissioners declined to find reason to believe" that Crossroads had violated FECA.

Commission's attorneys provided to the Commission in June 2011 but then withdrew was not publicly released.[4]

## IV. CCP's FOIA REQUEST

On April 3, 2014, the Commission received a FOIA request from CCP seeking "an unredacted copy of the First General Counsel's Report, dated June 22, 2011, in the matter of Crossroads Grassroots Policy Strategies (MUR 6396)." (Kahn Decl. ¶ 6; Letter from Allen Dickerson, CCP (Apr. 3, 2014), CCP Compl. Exh. A.)

On April 10, 2014, the Commission's FOIA Requester Service Center ("FOIA Service Center") denied CCP's request, citing FOIA Exemption 5 for intra-agency memoranda that "would not be available by law to a party other than an agency in litigation with the agency." (*See* Kahn Decl. ¶ 7; Email from Robert M. Kahn, FOIA Service Center (Apr. 10, 2014), CCP Compl. Exh. B.) The denial informed CCP that the "document you requested is subject to the privileges protected by Exemption 5, including the deliberative process privilege, attorney work-product privilege, and/or attorney-client privilege." (CCP Compl. Exh. B.) The FOIA Service Center further explained that portions of the requested document were also exempt from disclosure under FOIA Exemption 7(E), which protects from disclosure information in law enforcement records that "would disclose techniques and procedures for law enforcement

[4] Commissioners Petersen and Hunter and Chairman Goodman issued a joint statement of reasons on January 8, 2014, explaining their reasons for not voting to find reason to believe that Crossroads had violated the Act. The three Commissioners attached to their statement a copy of the withdrawn June 2011 report including the accompanying proposed Factual and Legal Analysis attached to it. Because the withdrawn report and accompanying proposed Factual and Legal Analysis are privileged, *see infra* pp. 10-20, and the Commission has not waived any of the applicable privileges, *see infra* pp. 24-25, the portion of the statement of reasons attaching such privileged material was redacted in its entirety in the version of the statement of reasons released to the public. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Peterson in MUR 6396 (Jan. 8, 2014), *available at* http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf.

investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." (*See* Kahn Decl. ¶ 7; CCP Compl. Exh. B (quoting 5 U.S.C. § 552(b)(7)(E)).) The response explained that the requested document "includes information concerning guidelines for law enforcement investigations or prosecutions that if disclosed could reasonably be expected to risk circumvention of the law, and thus the information is covered by Exemption 7(E)." (CCP Compl. Exh. B.)

On April 29, 2014, CCP appealed the FOIA Service Center's denial of the request arguing that the record sought was not privileged under either FOIA Exemption 5 or 7(E). (CCP Compl. Exh. C.) CCP argued that the deliberative-process privilege did not apply to the withdrawn report because the Commission's general policy in favor of publicly releasing First General Counsel's Reports in closed enforcement matters suggested that the Commission's lawyers should not have expected their advice and recommendations to be shielded from public disclosure. (*See* Letter from Allen Dickerson, CCP (Apr. 29, 2014), CCP Compl. Exh. C at 2.) CCP also disputed the applicability of the attorney work-product doctrine, arguing that the possibility of litigation — which is now pending, *see infra.* 12 — was "too remote" to invoke that privilege. (CCP Compl. Exh. C at 3.) And CCP argued that the attorney-client privilege "does not appear to apply" because the Commission's general disclosure policy "eliminate[d] the expectation of confidentiality" upon which the attorney-client privilege relies. (*Id.* at 3.)

In addition to disputing the applicability of any privileges, CCP asserted that "[i]t seems improbable" that the requested report did not contain any reasonably segregable, non-exempt information that could be produced under FOIA. (*Id.* at 4-5.)

On May 28, 2014, the Commission's FOIA Service Center informed CCP that the Commission had "constructively denied" CCP's appeal because the Commission "was unable to render an opinion on whether to approve or deny the appeal by a majority vote." (*See* Email from Robert M. Kahn, FOIA Service Center (May 28, 2014), CCP Compl. Exh. E.)

CCP filed its complaint for declaratory and injunctive relief in this Court on June 9, 2014.[5]

## ARGUMENT

### I. STANDARD OF REVIEW

FOIA matters are typically resolved on motions for summary judgment. *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011). If an agency withholds responsive documents, it bears the burden of demonstrating the applicability of the claimed exemptions. *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011).

The government meets its burden and merits summary judgment when it submits declarations that demonstrate with adequate specificity the reason for the withholding and that "the information withheld logically falls within the claimed exemption." *Id.* at 619; *see also Davis v. Dep't of Justice*, 970 F. Supp. 2d 10, 14 (D.D.C. 2013) (internal citation and quotation

[5] CCP may have failed to properly serve the United States in this matter. Federal Rule of Civil Procedure 4(i), which governs service of process on an agency of the United States government, requires plaintiffs to serve the agency, the Attorney General, and the United States Attorney in the district where the action is brought with a "copy of the summons and of the complaint." CCP served the United States Attorney and the Attorney General with a copy of the summons issued to the Federal Election Commission, but, as noted in the June 11, 2014 minute entry in the docket for this case, did not obtain or serve separate summonses issued to the United States Attorney or the Attorney General. It is unclear whether, as the docket entry suggests, Rule 4 requires a plaintiff suing a federal agency to obtain a separate summons issued to each government entity for which service is required. *See* Fed. R. Civ. P. 4(i)(2) (providing that service on a federal agency requires service on the United States and delivery of "a copy of the summons and of the complaint by registered or certified mail to the agency"). If Rule 4(i) does require a plaintiff to obtain a separate summons for the agency, Attorney General, and United States Attorney, CCP has not properly served the United States in this matter.

marks omitted) ("Summary judgment in a FOIA case may be based solely on information provided in an agency's supporting affidavits or declarations if they are relatively detailed and non-conclusory . . . and when they describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record [or] by evidence of agency bad faith.").

"Agency affidavits submitted in the FOIA context are . . . 'accorded a presumption of good faith.'" *Anguimate v. U.S. Dep't of Homeland Sec.*, 918 F. Supp. 2d 13, 17 (D.D.C. 2013) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

In a case brought under FOIA seeking to enjoin an agency from withholding agency records, the district court "shall determine the matter de novo." 5 U.S.C. § 552(a)(4)(B); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

## II. THE JUNE 2011 FIRST GENERAL COUNSEL'S REPORT IS PRIVILEGED AND NOT SUBJECT TO DISCLOSURE UNDER FOIA

### A. The June 2011 Report is Privileged Under FOIA Exemption 5

The Commission properly denied CCP's FOIA request under Exemption 5 because the requested document is plainly covered by the attorney work-product and deliberative-process privileges. FOIA Exemption 5 prevents disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "Exemption 5 incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant," including the attorney work-product and deliberative-process privileges. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006). "[T]he purpose of the [Exemption 5] privilege is to encourage the frank discussion of legal and policy issues within the government."

*Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991) (quotation marks omitted); *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) ("Exemption five is intended to protect the quality of agency decision-making by preventing the disclosure requirement of the FOIA from cutting off the flow of information to agency decision-makers."). A decision in favor of the Commission here not only adheres to the text of Exemption 5, it manifestly furthers that exemption's purpose by protecting the confidentiality of legal advice provided to the Commission during the pendency of enforcement matters at the administrative phase.

**1. The Entire June 2011 Report is Privileged Attorney Work Product**

The June 2011 report is precisely the type of document to which work-product protection is afforded. "The primary purpose of [the attorney work-product privilege] is to protect against disclosure the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation." *Kishore v. Dep't of Justice*, 575 F. Supp. 2d 243, 260 (D.D.C. 2008) (citing Fed. R. Civ. P. 26(b)(3)). Attorney work product constitutes: 1) any document that is 2) prepared in anticipation of litigation, including administrative proceedings, 3) by or for a party, or by or for that party's representative. *See Upjohn Co. v. United States*, 449 U.S. 383, 397-98 (1981); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980); *Public Citizen v. Dep't of State*, 100 F. Supp. 2d 10, 29-30 (D.D.C. 2000) ("The privilege is not limited to civil proceedings, but extends to administrative proceedings as well.").

There can be no dispute that CCP seeks a document prepared by the Commission's Office of General Counsel (the Commission's representative) for its client (the Commission). The June 2011 report contains the Commission's attorneys' legal theories, analyses, mental

impressions, and advice regarding the application of the Act and Commission regulations to alleged activities that were the subject of a Commission enforcement matter. (Kahn Decl. ¶ 18.)

The report was also plainly prepared in anticipation of litigation. The section 437g enforcement process is a statutorily mandated administrative process that expressly includes paths to litigation by or against the Commission. The Act authorizes the Commission to exercise its enforcement authority and file suit against a respondent to civilly enforce the Act in the event informal conciliation efforts fails. *Id.* at § 437g(a)(6)(A); *supra* p. 4. The Act also expressly provides that if the Commission dismisses an administrative complaint, the complainant may bring suit against the Commission alleging that the dismissal was contrary to law. 2 U.S.C. § 437g(a)(8). Here, it is unnecessary to speculate about the likelihood of litigation arising out of the Commission's resolution of the administrative complaint against Crossroads; such a lawsuit has already been brought against the Commission for its dismissal of that complaint. (*See Compl. Public Citizen v. FEC*, No 14-148 (RJL) (D.D.C. Jan. 31, 2014).) It is thus clear that Commission administrative enforcement matters may lead to litigation — as occurred here and in scores of other cases.[6] The legal analyses and recommendations prepared by Commission attorneys for the Commission's consideration in exercising its enforcement powers thus clearly qualify for work-product protection. *See Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) ("Exemption 5 extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated."), *abrogated on other grounds by Milner v. Dep't. of Navy*, __ U.S. __, 131 S. Ct. 1259 (2011); *Heggestad v. Dep't of Justice*, 182 F. Supp. 2d 1, 11

[6] *See, e.g.*, *FEC v. Craig for U.S. Senate*, 933 F. Supp. 2d 111 (D.D.C. 2013) (The Commission filed de novo suit pursuant to 2 U.S.C. §§ 437d(e) and 437g(a)(8)); *FEC v. Novacek*, 739 F. Supp. 957 (N.D. Tex. 2010) (same); *Herron for Congress v. FEC*, 903 F. Supp. 2d 9 (D.D.C. 2012) (suit brought against the Commission under 2 U.S.C. § 437g(a)(8) alleging that the Commission's dismissal of administrative complaint was contrary to law); *Nader v. FEC*, 823 F. Supp. 2d 53 (D.D.C. 2011) (same).

(D.D.C. 2000) ("The prosecution memoranda at issue here were created as an integral part of the [agency's] investigation and its decision-making process with regard to whether or not to prosecute . . . . This material is precisely the type of information universally held to be attorney work-product in the context of civil discovery.").

CCP complains (Compl. ¶ 28) that the Commission declined to release "even . . . a partially unredacted" version of the June 2011 report, but the Commission had no obligation to do so. Under the attorney work-product doctrine, the *entire* document is privileged and the government is under no obligation to attempt to identify and provide any segregable portions. "[A]ny part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5." *Judicial Watch v. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005); *see also id.* ("[F]actual material is itself privileged when it appears within documents that are attorney work product. If a document is fully protected as work product, then segregability is not required.").[7]

The entire June 2011 report is privileged attorney work product, and was properly withheld under FOIA Exemption 5. The Commission should be awarded summary judgment on that basis alone.

[7] To the extent that CCP is seeking not only the June 2011 report but also the proposed Factual and Legal Analysis attached to it, both of which comprise the redacted material attached to the January 8, 2014 Statement of Reasons of Commissioners Petersen and Hunter and Chairman Goodman, the Commission's arguments in this Memorandum about the June 2011 report apply with equal force to the proposed Factual and Legal Analysis attached thereto. The proposed Factual and Legal Analysis simply summarizes the factual and legal analysis initially recommended by the Office of General Counsel in greater detail in its General Counsel's Report (*see* Kahn Decl. ¶ 13), and is thus privileged and protected by Exemption 5 for all the same reasons that the June 2011 report is privileged and exempt from disclosure.

**2. The Entire June 2011 Report is Protected by the Deliberative-Process Privilege**

The deliberative-process privilege is a special privilege recognizing the importance of internal debate in government. The privilege "protect[s] the decisionmaking processes of government agencies" and "encourage[s] the frank discussion of legal and policy issues" by ensuring that agencies are not "forced to operate in a fishbowl." *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir.1988) (en banc) (internal quotation marks omitted). It is intended to "protect[ ] the 'administrative reasoning process,' or those thoughts, ideas and analyses that encompass the process by which an agency reaches a decision." *United States v. Exxon Corp.*, 87 F.R.D. 624, 636 (D.D.C. 1980). That protection recognizes that "[f]ree and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act." *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958). As the Court of Appeals for the D.C. Circuit has explained, there are three important purposes of the deliberative-process privilege:

> First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided(,) not for matters they considered before making up their minds."

*Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

The deliberative-process privilege protects only those documents that are both (i) "pre-decisional," *i.e.*, temporally antecedent to the challenged policy or decision; and (ii) actually

"deliberative," or related to the process by which the decision was reached. *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997); *In re Apollo Group, Inc. Sec. Litig.*, 251 F.R.D. 12 (D.D.C. 2008). Recognizing that the "deliberative" and "predecisional" requirements "tend to merge," the D.C. Circuit has explained that while deliberative documents "reflect[] the give-and-take of the consultative process," predecisional materials generally "reflect the agency 'give-and-take' leading up to a decision that is characteristic of the deliberative process." *Access Reports*, 926 F.2d at 1195.

The June 2011 report plainly meets both requirements. It is deliberative and reflects the give-and-take of the consultative process: the legal analysis was submitted to the Commission by its attorneys for the purpose of aiding the Commission in the exercise of its powers to seek to obtain compliance with and civilly enforce the Act. 2 U.S.C. § 437c(b)(1); *see* Kahn Decl. ¶ 12. The report is also plainly predecisional: it preceded, and was drafted to help facilitate, the Commission's decision whether to find reason to believe that Crossroads had violated the Act. (Kahn Decl. ¶¶ 12-15.)

Indeed, not only did the June 2011 report precede the Commission's decision in MUR 6396, the Commission *never* completed consideration of that guidance from counsel because the General Counsel's Office withdrew it before any final determination by the Commission. (*Id.* ¶¶ 14-15.) Since FECA authorizes only the Commission, not its attorneys, to formulate policy under and civilly enforce the Act, 2 U.S.C. § 437c(b)(1), the withdrawn analyses and recommendations could not have been anything but deliberative and predecisional. *Id.* at § 437c(c) ("All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission."). A *recommendation* by Commission counsel that *advises* the Commission to

take certain legal action is simply not a reflection of the agency's legal position unless and until the Commission adopts the proposed analyses and takes the recommended actions. *Elec. Frontier Found. v. Dep't of Justice* ("*EFF*"), 739 F.3d 1, 8 (D.C. Cir. 2014), *petition for cert. filed*, 82 U.S.L.W. 3736 (U.S. Jun. 9, 2014) (No. 13-1474) (explaining that advice memorandum of Department of Justice's Office of Legal Counsel provided to FBI officials was "not the law of an agency unless the agency adopts it" and was covered by the deliberative-process privilege). The Commission never took any such action regarding the June 2011 report. (Kahn Decl. ¶ 15.)

CCP is thus plainly mistaken when it suggests (Compl. ¶ 27) that disclosure of the report could "'inform the regulated community about *what the law is*'" by possibly revealing "'information regarding the General Counsel's preferred legal test for determining major purpose,'" a factor relevant to determining whether a group must register with the Commission and file periodic disclosure reports. Even if it were true that the withdrawn report might shed light on certain analysis "preferred" by the General Counsel's Office, such information would not identify "'*what the law is*,'" because only the Commission, acting through a majority vote of its Commissioners, is authorized to interpret and enforce the Act. *See* 2 U.S.C. § 437c(c). A legal analysis prepared and subsequently withdrawn by the Commission's lawyers, never adopted by the Commission, is no statement of "what the law is."

The deliberative-process privilege "calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *EFF*, 739 F.3d at 7 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). Since the withdrawn report does not embody the law and only reflects internal

deliberations before an administrative enforcement matter was resolved, the document is clearly privileged.[8]

Moreover, shielding the reconsidered legal analysis from disclosure furthers the important policy interests underlying the deliberative-process privilege. Here, the interest in encouraging candid internal discussions is implicated not only in the legal analysis and recommendations contained in the June 2011 report; that interest is also implicated in the Office of General Counsel's decision to withdraw its initial legal analysis and produce a revised report for the Commission's consideration. (*See* Kahn Decl. ¶¶ 15-16.) In particular, if the deliberative-process privilege "serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism," *Coastal States Gas Corp.*, 617 F.2d at 866, the privilege must also protect the ability of agency staff to revise or refine their analysis and recommendations to their agency-client without fear that their revisions or refinements will be subject to public scrutiny. *See Heggestad*, 182 F. Supp. at 7 (explaining that deliberative-process privilege protects "not only particular documents, but also the integrity of the deliberative process itself").

An order requiring government agencies to produce earlier versions of staff legal analyses that agency counsel have withdrawn, revised, and resubmitted to their agency-client would contravene the fundamental purposes of the deliberative-process privilege and could have a chilling effect on agency staff, who may be less inclined to refine their analyses and

[8] Since the June 2011 report is not a binding agency opinion or interpretation that the Commission "actually applies in cases before it," it is not "working law," that is "a body of secret law, used by it in the discharge of its regulatory duties and in its dealing with the public, but hidden behind a veil of privilege because it is not designated as formal, binding, or final." *EFF*, 739 F.3d at 7 (internal quotation marks omitted).

recommendations in future administrative matters. *Coastal States Gas Corp.*, 617 F.2d at 866; *see Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001) (explaining that the "object [of the deliberative-process privilege] is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the government'") (citation and quotation marks omitted).

In addition, CCP's claimed interest in the report (Compl. ¶ 27) is not relevant to determining the applicability of any privilege here. In civil discovery, the work-product and deliberative-process privileges can be overcome by a sufficient showing of need. But the needs of plaintiffs in FOIA cases are not relevant in determining whether Exemption 5 privileges apply. *In re Sealed Case*, 121 F.3d 729, 737 n.5 (D.C. Cir. 1997) ("[T]he courts have held that the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure."). CCP's purported interest in the withdrawn report — even if it could be cast as a "need" — is of no moment to the Commission's showing that the report remains privileged.

Finally, the deliberative-process privilege, like the work-product privilege, *see supra* pp. 13-14, exempts the Commission from any obligation to segregate and disclose any factual material contained in the June 2011 report. "[F]actual material . . . assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action" is exempt from disclosure under Exemption 5. *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993). Any facts that appear in the report were selected by Commission attorneys from the universe of available facts for inclusion to support the Office of General Counsel's analysis and recommendations to its client. Analyzing and applying the Act and Commission regulations to certain facts reflects an

"exercise of discretion and judgment calls" by Commission counsel and those facts are exempt from disclosure. *Id.*; *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513-14 (D.C. Cir. 2011) (explaining that factual summaries "culled . . . from the much larger universe of facts presented to [a federal advisory committee] . . . reflect an exercise of judgment as to what issues are most relevant to the pre-decisional findings and recommendations . . . and are exempt under Exemption 5") (citations and quotation marks omitted).

Since the entire June 2011 report plainly reflects "deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co.*, 421 U.S. at 150, the deliberative-process privilege clearly applies and provides an independent basis for the Commission's proper withholding of the entire document under FOIA Exemption 5. For this independent reason as well, summary judgment should be granted in the Commission's favor.[9]

**B. Portions of the June 2011 Report Are Also Subject to FOIA Exemption 7(E)**

Under FOIA Exemption 7(E), certain law enforcement records that would "disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions" need not be released "if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The D.C. Circuit has explained that this exemption sets a "low bar for the

[9] The Commission does not rely on the attorney-client privilege here. That privilege, which the Court of Appeals has limited to communications that rest on confidential information provided by a client to its attorney, *see, e.g.*, *Tax Analysts*, 117 F.3d at 618, is unnecessary to the Commission's defense of this FOIA action and is less clearly applicable to the particular circumstances of this case than the attorney work-product and deliberative-process privileges. Nevertheless, the Commission notes that CCP's assertion (CCP Compl. Exh. C at 3) that the Commission's general policy of disclosing certain enforcement documents in closed enforcement matters precludes the Commission's reliance on the attorney-client privilege is wrong for all of the reasons discussed *infra* at Part III.

agency to justify withholding": the agency need only provide an explanation of what procedures would be disclosed. *Blackwell v. FBI,* 646 F.3d 37, 42 (D.C. Cir. 2011) ("[E]xemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law."); *Public Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary and Water Comm'n*, 740 F.3d 195, 205 (D.C. Cir. 2014) (explaining that the agency must demonstrate that disclosure "might increase the risk that a law will be violated or that past violators will escape legal consequences") (quotation marks omitted).

The Commission explained to CCP (CCP Compl. Exh. B) that the requested document "includes information concerning guidelines for law enforcement investigations or prosecutions that if disclosed could reasonably be expected to risk circumvention of the law." Specifically, the first page of the June 2011 report includes information related to formal scoring criteria that the Commission uses to allocate resources and decide which matters to pursue. (Kahn Decl. ¶¶ 21-22.) Such scores if made public could reveal Commission priorities for pursuing certain types of campaign-finance violations over others. (*Id.* ¶ 22.) As an agency with limited resources, the Commission must often choose among competing demands and priorities. Revealing the Commission's formal scoring criteria could reasonably be expected to risk circumvention of the Act as to violations that, although of lower priority than others, are still unlawful. Thus, regardless of the Court's decision regarding the applicability of FOIA Exemption 5 to the report as a whole, the information on the first page related to the Commission's formal scoring criteria is independently shielded from disclosure under FOIA Exemption 7(E).

## III. THE COMMISSION HAS NOT WAIVED ANY OF THE PRIVILEGES APPLICABLE TO THE JUNE 2011 REPORT

CCP appears to rely (Compl. ¶ 17) on the Commission's general policy "in favor of releasing First General Counsel's Reports" to challenge the applicability of the privileges and FOIA exemptions outlined above. But that policy provides no support for CCP's FOIA claim.

First, the Commission's policy statements addressing disclosure of certain General Counsel's Reports do not discuss reports that, like the document CCP seeks, are withdrawn by the General Counsel's Office prior to any final Commission decision on whether to accept or reject the recommendations contained in the report. Second, the Commission's general policy in favor of releasing certain categories of Commission documents in closed enforcement matters is not a waiver of any privileges that apply to a particular document that was never disclosed. Indeed, even as to those categories of documents that the Commission has clearly indicated its general intention to make public, the Commission has explicitly stated that any disclosure is subject to applicable redactions consistent with FECA or FOIA. *See Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record*, 74 Fed. Reg. 66,132, 66,133 (Dec. 14, 2009) ("2009 Policy"); *Statement of Policy Regarding Closure of Enforcement and Related Files*, 68 Fed. Reg. 70,423, 70,428 (Dec. 20, 2003) ("2003 Policy"). And third, a general policy in favor of releasing certain categories of Commission records is not a binding obligation to release even those documents that are clearly covered by the policy, let alone an obligation to release a privileged agency document not specifically addressed by the policy.

In short, the Commission's policy statements favoring disclosure of certain Commission documents, subject to applicable privileges, do not require the Commission to release, or to waive the privileges and FOIA exemptions applicable to, the withdrawn legal analysis CCP seeks to obtain in this case.

### A. FEC Policy Regarding Disclosure of Certain Commission Documents

In 2003, the Commission issued a statement of policy for publicly disclosing several limited categories of Commission documents that "play a critical role in the resolution of [an enforcement] matter" and are thus "integral to [the Comission's] decisionmaking process" at the conclusion of an enforcement proceeding. 2003 Policy, 68 Fed. Reg. at 70,427. The Commission adopted the 2003 Policy in the wake of a court decision that found impermissible the Commission's prior practice of disclosing a wide range of investigative materials considered by the Commission in its disposition of an administrative enforcement matter. *See* 2009 Policy, 74 Fed. Reg. at 66,132; *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003). Among the categories of documents covered by the 2003 Policy were General Counsel's Reports that recommended "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." 2003 Policy, 68 Fed. Reg. at 70,427. The 2003 Policy specified that the Commission's disclosure of such documents would be subject to redactions consistent with FECA and the Commission's authority to withhold material under an applicable FOIA exemption. *Id.* at 70,428. It contained no discussion of any intended Commission practice regarding General Counsel's Reports that are withdrawn by the General Counsel's Office from Commission consideration prior to the Commission's determination of whether to accept or reject the withdrawn report's recommendations.

In 2006, the Commission reconsidered and decided to discontinue its practice of placing First General Counsel's Reports on the public record, while continuing to disclose certain Factual and Legal Analyses that provided an explanation for the Commission's decision in a particular enforcement matter, *i.e.* proposed Factual and Legal Analyses that were actually

adopted by the Commission. *See* 2009 Policy, 74 Fed. Reg. at 66,132. In 2009, however, the Commission issued a statement of policy announcing the Commission's resumption of its prior practice of placing First General Counsel's Reports on the public record, to restore an approach consistent with the Commission's continued practice of disclosing certain other General Counsel's reports. 2009 Policy, 74 Fed. Reg. at 66,132. The 2009 Policy, like the 2003 Policy, explained that the Commission's disclosure would be subject to redactions consistent with the Act and applicable FOIA exemptions. *Id.* at 66,133. Also like the earlier policy, the 2009 Policy is silent on the Commission's intentions regarding reports that are withdrawn prior to the Commission concluding its consideration of a recommendation.

### B. The 2009 Policy Does Not Address Staff Recommendations That Are Withdrawn From Commission Consideration

As a preliminary matter, in neither the 2009 Policy, nor the 2003 Policy upon which it is based, did the Commission so much as discuss or mention withdrawn reports, let alone express an intent to disclose them. The Commission's explanation that its disclosure policy is intended to make public documents "integral to its decisionmaking process" and "critical" to the resolution of Commission enforcement matters suggests that documents withdrawn from Commission consideration are not covered by the policy. 2003 Policy, 68 Fed. Reg. at 70,427-28. Unlike reports containing advice and recommendations that the Commission determines to accept or reject, withdrawn reports like the June 2011 report CCP seeks here, precisely because they are withdrawn prior to a Commission determination, generally are neither "critical" to the Commission's resolution of an enforcement matter nor "integral" to the Commission's decisionmaking process.

Since the general policy statements about disclosure of staff recommendations do not address those that were withdrawn from Commission consideration, and in light of the important

interests underlying the privileges clearly applicable to the June 2011 report, *see supra* Part II, the Commission's policy statements should not be read expansively to include a confidential and privileged document.[10]

**C. The 2009 Statement of Policy is Not a Waiver**

But even if the 2009 Policy could be read to apply to withdrawn staff recommendations like those in the June 2011 report, it is not a binding, *ex ante* privilege waiver. Indeed, the 2009 Policy, like the 2003 Policy, explicitly qualifies the Commission's stated intent to disclose certain Commission documents as being subject to the Commission's authority to withhold materials exempt from disclosure under FECA and FOIA. 74 Fed. Reg. at 66,133. As explained above, FOIA Exemption 5 encompasses the very privileges applicable to the June 2011 report CCP seeks here.

More fundamentally, where, as here, the Commission has not disclosed the substance of the requested document, the agency plainly has not waived the privileges that adhere to the document. The attorney work-product and deliberative-process privileges may be waived in different ways, but all require *actual disclosure* of the substance of the communication at issue to a third party. *See, e.g.*, 6 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 26.70[6][c] (3d

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[10] CCP also purports to rely (Compl. ¶ 20) on a Commission regulation that, prior to the Court of Appeals decision in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), provided for the Commission's disclosure after the conclusion of an administrative enforcement matter of various categories of Commission investigatory materials, including General Counsel's Reports. The D.C. Circuit in *AFL-CIO* found that section 5.4(a)(4) of the Commission's regulations posed "'serious constitutional difficulties'" because it failed to adequately balance the Commission's disclosure interests against the First Amendment privacy interests of respondents in FEC enforcement matters, and thus concluded that the regulation was "impermissible." *AFL-CIO*, 333 F.3d at 179. CCP's reliance on that regulation is thus misplaced. Indeed, it was the D.C. Circuit's holding in *AFL-CIO* that led the Commission to adopt its subsequent, narrower policy statements promoting the disclosure of "critical" and "integral" enforcement documents, subject to applicable privileges and exemptions. *See* 2003 Policy, 68 Fed. Reg. at 70,427; 2009 Policy, 74 Fed. Reg. at 66,132; *see supra* pp. 22.

ed. 2004) 26–467 ("A waiver of work-product protection encompasses only the items actually disclosed."); 2 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (5th ed. 2007) ("Epstein") 1030-60 (discussing waiver of the work-product privilege); *id.* at 1060-1114 (discussing court decisions recognizing waiver by mandated disclosure of a communication's substance to the government, by inadvertent disclosure or selective disclosure, and by affirmative use of privileged material as a basis for a claim or defense).[11]

No such disclosure has occurred here, and the Commission is unaware of any decision holding that a non-binding expression of general intent to make public certain general categories of documents constitutes a waiver of privileges applicable to a particular future document. On the contrary, in the analogous context of the attorney-client privilege, courts have held that "a mere intention to waive the privilege" even as to a specific document is insufficient, because actual "disclosure rather than a promise is the linchpin of the waiver doctrine." *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 341-42 (9th Cir. 1996) (citing *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 483 (S.D.N.Y. 1993) (holding that privilege holder's "stated willingness" not to invoke privilege did not constitute a waiver in absence of "actual disclosure of privileged communications")).

**D. The 2009 Policy Is Not Binding**

Even if the 2009 Policy could be read both to apply to the withdrawn June 2011 report, and to suggest that the Commission generally *intended* to waive applicable privileges for

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[11] *See also, e.g.*, *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) ("[D]isclosure of work-product materials can waive the privilege for those materials if such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.") (internal quotation marks omitted); *United States v. Deloitte LLP*, 610 F.3d 129, 140 (D.C. Cir. 2010) ("[D]isclosing work product to a third party can waive protection if such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.") (citation and internal quotation marks omitted).

withdrawn General Counsel's Reports, the 2009 Policy is not binding on the Commission, or anyone else. Unlike legislative rules, which implement congressional intent and effect statutory purposes, *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980), general statements of policy, like the 2009 Policy, are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Pacific Gas & Electric Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974) (quoting Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)). General statements of policy are "binding on neither the public, nor the agency." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (internal citations omitted); *see also Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999) ("'A general statement of policy does not establish a binding norm.'") (quoting *Pacific Gas*, 506 F.2d at 38). As the D.C. Circuit has explained, an agency policy statement "merely represents an agency position with respect to how it will treat — typically enforce — the governing legal norm." *Syncor Int'l*, 127 F.3d at 94.

The 2009 Policy did not affect a change in any substantive legal norm. It does not purport to affect the activities of anyone but the Commission itself. Nor does it reflect the Commission's interpretation of congressional intent or any construction of the Act. The Act specifies what information may *not* be made public. *See, e.g.*, 2 U.S.C. § 437g(a)(12)(A) ("Any notification or investigation made under [section 437g] shall not be made public by the Commission . . . without the written consent of the person receiving such notification or the person with respect to whom such investigation is made."). It does not, however, specify what enforcement documents *must* be made public at the conclusion of an enforcement matter.

In sum, under even the broadest reading of the 2009 Policy, that non-binding Commission statement does not require the Commission to release, or to waive the privileges applicable to, the June 2011 report.

## IV. THE COMMISSION FULFILLED ITS LEGAL OBLIGATIONS IN NOTIFYING CCP OF THE DENIAL OF ITS ADMINISTRATIVE APPEAL

CCP cites an irrelevant statutory provision and court decision in alleging (Compl. ¶ 32) that the Commission's denial of its FOIA appeal lacked an adequate explanation and was thus arbitrary and capricious. That allegation is entirely baseless.

FOIA requires an agency to provide the reasons for its initial determination, 5 U.S.C. § 552(a)(6)(A)(i), but contains no similar requirement that an agency provide its reasons for denying a FOIA appeal, *id.* § 552(a)(6)(A)(ii). This makes sense, since, as explained *supra,* p. 10, judicial review of CCP's FOIA claim is *de novo*. The Commission provided the required reasons for denying CCP's FOIA request in its initial response, which explained that the withdrawn June 2011 report was subject to the various privileges, contained sensitive law-enforcement information, and accordingly would be withheld under FOIA Exemptions 5 and 7(E). (Kahn Decl. ¶ 7; CCP Compl. Exh. B.)

CCP's complaint cites (Compl. ¶ 32) 5 U.S.C. § 552(a)(4)(F)(i), but that provision has no application here. Section 552(a)(4)(F)(i) authorizes the Special Counsel to initiate disciplinary proceedings after the court orders the production of records, assesses attorneys' fees, and finds that agency personnel may have acted arbitrarily and capriciously with respect to withholding. That section does not require an agency to explain its reasons for denying a FOIA appeal.

CCP also cites (Compl. ¶ 32) *FEC v. Nat'l Republican Senatorial Comm. v. FEC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). That case involved deferential judicial review of the Commission's dismissal of an administrative complaint pursuant to 2 U.S.C. § 437g(a)(8), which

does require an explanation of the agency's reasoning. *Id.* It did not involve the quite different context of a *de novo* FOIA action.

**CONCLUSION**

For all the foregoing reasons the Court should grant the Commission's Motion for Summary Judgment and dismiss CCP's complaint.

Respectfully Submitted,

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