UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MARK W. MILLER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 1:12-cv-00242-SJD Chief Judge Susan J. Dlott MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(c) and S.D. Ohio Civil R. 7.2, defendant Federal Election Commission ("FEC" or "Commission") respectfully moves for summary judgment because this matter is moot. Plaintiff Mark W. Miller's Complaint seeks only to compel the Commission to respond to his request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. However, the Commission has conducted an adequate and reasonable search for documents responsive to the request and provided all non-exempt materials to Mr. Miller on April18, 2012. Accordingly, the Commission has fully discharged its FOIA obligations, there is no genuine issue of material fact, and the Commission is entitled to judgment as a matter of law.

In support of this motion the Commission submits the attached brief, a statement of material facts not in dispute, the declarations of Commission staff involved in preparing the response to plaintiff's FOIA request, and an index of responsive and redacted records pursuant to *Vaughn v. Rosen*, 523 F. 2d 1136 (D.C. Cir. 1975), describing the information withheld under the applicable FOIA exemptions.

WHEREFORE, the FEDERAL ELECTION COMMISSION respectfully requests that this Honorable Court dismiss the Complaint in this matter.

Respectfully submitted,

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September 21, 2012

CERTIFICATE OF SERVICE

Benjamin A. Streeter III hereby certifies that on September 21, 2012, he filed the foregoing Defendant Federal Election Commission's Motion for Summary Judgment, Memorandum of Law in Support thereof, Fed. Civ. R. Proc 56(c) Statement of Undisputed Material Facts, Declaration of William F. Buckley, Jr., Declaration of Gregory R. Baker, Declaration of Eyana J. Esters, Declaration of Candace J. Salley, Declaration of Christopher Mealy and the Commission's *Vaughn* Index with the Clerk of the United States District Court for the Southern District of Ohio via the electronic filing system, which served a copy of this filing on this date to the following counsel of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MARK W. MILLER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 1:12-cv-00242-SJD MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

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

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Defendant Federal Election Commission ("FEC" or "Commission") moves for summary judgment because the sole claim in plaintiff Mark W. Miller's complaint — that the Commission failed to respond to his Freedom of Information Act ("FOIA") request — was rendered moot by the Commission's production of responsive documents in April 2012, and this Court therefore lacks jurisdiction over this matter. Even if plaintiff had made a claim regarding the adequacy of the Commission's search or its decision to withhold portions of the records, there would be no genuine dispute of material fact and the FEC would be entitled to judgment. The Commission complied with FOIA in its search for and disclosure of records, as demonstrated by evidence provided with this motion, which includes declarations from Commission staff explaining the rigorous search undertaken as well as a detailed *Vaughn* index specifying the FOIA exemptions justifying the withholding of some responsive information. Thus, this Court should enter summary judgment on behalf of the Commission.

BACKGROUND

Congress established the Federal Election Commission to administer and enforce federal campaign finance laws, including the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57. (FEC's Statement of Undisputed Material Facts ("FEC Facts") ¶ 1.) Plaintiff Mark W. Miller is a resident of Ohio (Complaint for Declaratory and Injunctive Relief ("Complaint") ¶ 1 (Doc. 1).)

Requests to the Commission under FOIA, 2 U.S.C. § 552 *et seq*., are processed by the FEC Office of General Counsel's General Law and Advice Division ("GLA"), primarily by GLA's Administrative Law Team, which is also known as the "FOIA Service Center." (FEC Facts ¶¶ 2, 4.) The FOIA Service Center received Miller's written FOIA request on December 5, 2011, via regular mail, although the request was dated November 23, 2011. (FEC Facts ¶¶ 5, 6.)

That request sought "copies of all records received, produced, maintained, or kept by the Federal Elections [sic] Commission pertaining to a letter sent to [the] Commission by Phil Greenberg on behalf of [the] Schmidt for Congress Committee ("Greenberg Letter"). [The AO request did] not request a copy of the Greenberg Letter, nor . . . request a copy of the public comment letter submitted by David Krikorian received by the Commission on October 26, at approximately 3:20 p.m." (FEC Facts ¶ 6.) The referenced letter from Mr. Greenberg, which was dated October 7, 2011, had sought an advisory opinion from the Commission on behalf of the Schmidt for Congress Committee regarding the lawfulness of using campaign funds to pay certain legal expenses related to a lawsuit brought in this Court by one of Congresswoman Jean Schmidt's 2008 election campaign opponents. *See* 2 U.S.C. § 437f; Complaint Exh. A.[1]

Under the FOIA Service Center's standard procedures, Miller's request was logged into the agency's case management system as FOIA Request 2012-13, and a FOIA Intake and Processing Form was prepared. (FEC Facts ¶¶ 5, 9, 13.) FOIA Service Center paralegal Christopher Mealy sent Miller a standard acknowledgement letter via e-mail on December 5, 2011. (FEC Facts ¶ 9.) This standard e-mail gave Miller the tracking number and contact information and also explained that the FOIA Service Center might be able to respond more quickly to a narrower request. (*Id.*)

Shortly after the FEC received the Miller FOIA request, FEC Attorney William F. Buckley, Jr., undertook the assignment to handle the FOIA request. (FEC Facts ¶ 8.) Mr. Buckley calculated that the determination date for the Miller would be January 4, 2012, twenty

[1] The Commission is authorized, pursuant to 2 U.S.C. § 437f, to issue an advisory opinion ("AO") on proposed transactions or campaign finance activity. Individuals who rely in good faith upon Commission-issued advisory opinions cannot be subject to any sanctions for violations of FECA for the activity approved in an advisory opinion. 2 U.S.C. § 437f(c)(1).

working days following receipt of the request. (FEC Facts ¶ 19.) The Commission's FOIA regulations, 11 C.F.R. Part 4, create three possible tracks on which FOIA requests can be processed. In setting a twenty-day deadline for responding to Miller's request, FEC staff determined that the request could be placed on the "simple" track. *See* 5 U.S.C. § 552(a)(6)(A)(i); 11 C.F.R. § 4.7(f); FEC Facts ¶¶ 14, 16. On December 6, 2011, shortly after the FEC received the Miller request, Mr. Buckley transmitted to Larry Calvert, then the Commission's Chief FOIA officer, a draft e-mail that would be sent to the pertinent FEC units asking them to search for relevant documents. (FEC Facts ¶ 20.) Messrs. Calvert and Buckley then determined that the FEC unit that would possess responsive documents was OGC's Policy Division, the only office involved with processing requests for Advisory Opinions. (*Id.*)

Mr. Buckley also noted that Mr. Miller had included his e-mail address in his FOIA request letter, so Mr. Buckley then checked the FEC FOIA e-mail account as far back as November 23, 2011, the purported date of Miller's request, to ascertain if that request had been submitted to the FOIA Service Center by e-mail. (FEC Facts ¶ 10.) Mr. Buckley found no e-mail from Mr. Miller on or about November 23, 2011. (*Id*.) Paralegal Christopher Mealy searched the same FOIA e-mail account at Buckley's behest and also found no November e-mail from Miller. (FEC Facts ¶ 11, 12.)

On January 12, 2012, Mr. Buckley received an e-mail from Candace Salley, a paralegal specialist in the FOIA Response Center, stating that she had received a voice-mail from attorney Christopher Finney on behalf of Mr. Miller, inquiring into the status of his FOIA request. Mr. Buckley instructed Ms. Salley to call Mr. Finney and inform him that the FOIA Service Center was working on the request. (FEC Facts ¶ 21.) Ms. Salley did so on January 12, 2012. (*Id.*)

On January 18, 2012, Mr. Calvert sent an e-mail to Assistant General Counsel for Policy Amy Rothstein and Policy Attorney Cheryl Hemsley, the attorneys who had handled the Schmidt advisory opinion request ("AOR"), asking them to search for documents responsive to Miller's FOIA request. (FEC Facts ¶ 22.) Specifically, the two Policy Division attorneys were requested to provide "all records pertaining to the AOR *except* the AOR itself and the Krikorian comment letter." (FEC Facts ¶ 22; Declaration of William F. Buckley, Jr. ("Buckley Decl."), Exh. 1.) (emphasis in original) Ms. Hemsley delivered potentially responsive documents to Mr. Buckley via e-mail and by hand the following week. (FEC Facts ¶ 23.)

On February 29, 2012, Mr. Buckley received by letter from Mr. Miller a FOIA appeal, dated January 9, 2012, which again included Mr. Miller's e-mail address. (FEC Facts ¶¶ 26, 27.) On or about February 29, 2012, Messrs. Buckley and Mealy and Ms. Salley checked the FOIA Service Center e-mail account to ascertain if Mr. Miller had e-mailed his appeal on January 9, but they found no such e-mail. (FEC Facts ¶¶ 28, 29, 30.)

In March 2012, Gregory R. Baker was named the Commission's Chief FOIA Officer, replacing Larry Calvert. (FEC Facts ¶ 31.) At the same time, Eyana Esters was appointed to fill the vacant position of Assistant General Counsel for Administrative Law and FOIA Public Liaison in an acting capacity. (FEC Facts ¶ 32.) After Ms. Esters was appointed to this first line supervisory position, the FOIA Service Center began processing the pending backlog of nineteen open FOIA requests, as well as seven new FOIA requests that arrived during March 2012. (FEC Facts ¶ 33.) The GLA team had a total of about 54 pending matters to resolve at the time of Ms. Esters's promotion. (FEC Facts ¶ 34.) In selecting FOIA requests for immediate processing, the Service Center considered the age of the request, the complexity of the issues presented, the progress made to date, and the political sensitivity of the request. (FEC Facts ¶ 33.) All draft

FOIA responses must be sent to the first line supervisor and Chief FOIA Officer for review, comment, and approval. (FEC Facts ¶ 25.) Mr. Buckley sent the Miller FOIA response materials to Ms. Esters on March 1, 2012. (FEC Facts ¶ 33.) On April 2, 2011, Ms. Esters completed her review of the Miller FOIA response materials. (FEC Facts ¶ 35.) Mr. Baker also approved the response, and the response was then given its final processing to prepare it for transmittal to Mr. Miller. (FEC Facts ¶ 35.)

On April 18, 2012, Mr. Buckley transmitted the FOIA response to Mr. Miller via e-mail. (FEC Facts ¶ 37.) The response consisted of 218 pages, although the majority of the information on those pages was redacted pursuant to either: (a) FOIA Exemption 3, based on FECA's confidentiality provision for information regarding pending investigations, 2 U.S.C. § 437g(a)(12); or (b) FOIA Exemption 5, because the material consisted of confidential information protected from disclosure by the attorney work product doctrine or the deliberative process privilege. Because the Commission responded fully to Miller's FOIA request in April 2012, the agency denied his FOIA appeal as moot on July 11, 2012. (FEC Facts ¶ 38.)

Mr. Miller filed his Complaint in this action on March 26, 2012, about one week before Ms. Esters completed her review of the proposed FOIA response. The Complaint alleges that the Commission unlawfully denied Mr. Miller access to records he sought pursuant to the Freedom of Information Act, 5 U.S.C. § 552. Mr. Miller seeks a declaration that "the FEC has failed to comply with its legal obligations and duties" under FOIA and an injunction compelling production of all agency records responsive to his FOIA request. (Complaint ¶¶ 43-44.) However, the Complaint challenges neither the adequacy of the FEC's search nor the application of the FOIA exemptions the FEC has invoked.

ARGUMENT

I. SUMMARY JUDGMENT STANDARDS

Summary judgment is proper when the moving party has demonstrated that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The Commission, as the moving party, "has the initial burden of proving that no genuine issue of material fact exists, and [the Court] must draw all reasonable inferences in the light most favorable to the nonmoving party." *Care to Live v. FDA*, 631 F.3d 336, 340 (6th Cir. 2011) (internal citation and quotation marks omitted). Once the FEC has demonstrated the absence of any genuine issue of material fact, Miller "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986) (internal citation and quotation marks omitted). The Court does not weigh the evidence to determine the truth of the matter, but only to decide if there is an issue for trial; should the non-moving party's evidence be "merely colorable" or "not significantly probative," the Court may enter summary judgment. *Sinkfield v. HUD*, No. 10-885, 2012 WL 893876, at * 2 (S.D. Ohio Mar. 12, 2012) (citing *Anderson*, 477 U.S. at 249).

FOIA actions are typically resolved through summary judgment, before a plaintiff can conduct discovery. *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994); *Rimmer v. Holder*, 2011 WL 4431828, at *4 (M.D. Tenn. Sept. 22, 2011) (citing *Reliant Energy Power Generations v. FERC*, 520 F. Supp. 2d. 194, 200 (D.D.C. 2007)). Under FOIA, a court conducts a *de novo* review to determine whether the government properly withheld records under any of FOIA's nine statutory exemptions. 5 U.S.C. § 552(a)(4)(B). The Court may award summary judgment solely on the basis of information provided by the agency in declarations when the declarations 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 nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (footnote omitted). Agency declarations must be "relatively detailed and non-conclusory," but such declarations are accorded a presumption of good faith, which cannot be rebutted by "purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs, Inc.. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal citation and quotation marks omitted).

II. THIS CASE IS MOOT BECAUSE THE COMMISSION FULLY RESPONDED TO PLAINTIFF'S FOIA REQUEST IN APRIL 2012

The Commission's April 2012 response to Miller's FOIA request was the fruit of a reasonable search and provided him every non-exempt document that was responsive to his request. Because the Complaint seeks only to compel the Commission to respond to the FOIA request and does not challenge the agency's search or withholding decisions, this case is now moot and the Court lacks subject matter jurisdiction.

FOIA grants jurisdiction to district courts to enjoin agencies from withholding records and to compel the production of improperly withheld records. 5 U.S.C. § 552(a)(4)(B). Accordingly, federal subject matter jurisdiction here depends upon a showing that the Commission has improperly withheld agency records. *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 142 (1980). But if the agency shows that responsive records have been released to the requester, the suit should be dismissed on mootness grounds, as there is no justiciable case or controversy. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citation and quotation marks omitted). Indeed,

"[m]ootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Constangy, Brooks & Smith v. NLRB*, 851 F.2d 839, 841 (6th Cir. 1988) (internal citation and quotation marks omitted).

Thus, in a FOIA case, "[o]nce the [agency] turned over everything in its possession related to plaintiff's FOIA request, the merits of plaintiff's claim for relief, in the form of production of information, became moot." *GMRI, Inc. v. EEOC*, 149 F.3d 449, 451 (6th Cir. 1998). *See Cornucopia Inst. v. USDA*, 560 F.3d 673, 675 (7th Cir. 2009) (dismissing FOIA claim as moot after agency provided responsive records while suit was pending); *Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993) (holding that plaintiff's "claim was rendered moot by the FBI's response to his request"); *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) (holding case moot because "the agency by now has released all nonexempt materials the Tijerinas seek"). Citing *GMRI*, the Western Division of this District Court dismissed as moot a FOIA case when the agency provided a full response after the complaint had been filed. *See Landers v. Dept. of the Air Force*, No. c-3-00-567 (S.D. Ohio Feb. 25, 2002) (Slip opinion). Although the Commission did not complete its response to Miller's FOIA request before he filed his Complaint, the Commission has provided him all responsive materials to which he is entitled as of five months ago. *See infra* section III. Accordingly, this Court is "unable to grant the requested relief," *Constangy*, 851 F.2d at 841, and Miller's Complaint should be dismissed as moot.

III. EVEN IF PLAINTIFF HAD CHALLENGED THE COMMISSION'S SEARCH FOR RECORDS OR WITHHOLDING DECISIONS, THE RECORD DEMONSTRATES THAT THE COMMISSION RESPONDED FULLY AND ADEQUATELY TO MILLER'S FOIA REQUEST

Even if Miller had challenged the adequacy of the Commission's search for records or its decision to withhold certain privileged documents, such claims would lack merit. On April 18,

2012, the Commission provided about 30 pages of documents in full and another 180 pages or so of documents with full or partial redactions. Thus, the factual record shows that the FEC's FOIA Service Center staff adequately and fully responded to Miller's FOIA request. In support of this motion for summary judgment, the Commission submits a Fed. R. Civ. P. 56(c) statement of undisputed material facts (attached hereto as Exh. A) based on and supported by five affidavits executed by the FEC staff who prepared the response to Miller's FOIA request. These affidavits (attached as Exhs. B-F) describe the steps staff took to locate and assemble responsive records and to redact information pursuant to FOIA's statutory exemptions. 5 U.S.C. § 552(b). The Commission also submits a "*Vaughn* index" (attached as Exh. G) that provides details regarding the basis for withholding information. *See Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975). These materials demonstrate the FOIA Service Center staff's efforts to release all appropriate records pursuant to FOIA's mandate and to memorialize the completeness and adequacy of those efforts. Because the FEC performed an adequate search and responded fully to Miller's request, the agency has satisfied its obligations under FOIA.

A. FOIA Standards

The Freedom of Information Act requires federal agencies to "determine within 20 [work] days" whether they will comply with a request for records made pursuant to the Act. 5 U.S.C. § 552(a)(6)(A)(i). Federal agencies shall "make records available after receiving a request that reasonably describes the records and is made in accordance with the agency's published rules governing such requests." *Care To Live*, 631 F.3d at 340. "The agency may only withhold or limit the availability of records that fall within one of the Act's specific exemptions." *Id.* FOIA embodies "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language," *Dep't of the Air Force v.*

Rose, 425 U.S. 352, 360-61 (1976), and "[t]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA]," *Dep't of the Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 7-8 (2001) (citing *Rose).*

Claims that an agency has denied or refused a FOIA request are reviewed by the district court *de novo*. 5 U.S.C. § 552(a)(4)(B); *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 95 (6th Cir. 1996). The Sixth Circuit has long recognized that FOIA cases arrive in "a peculiar posture, difficult for our adversarial system to handle," *Jones*, 41 F.3d at 242, because only the agency knows the content of any material withheld from production and the plaintiff has not yet been afforded any opportunity for discovery. Courts generally address FOIA cases by carefully examining affidavits provided by agencies to explain their search and withholding decisions, as well as with the *Vaughn* index, "a routine device through which the defend[ing] agency describes the responsive documents withheld or redacted and indicates why the exemptions claimed apply to the withheld material." *Id.* at 241.

> Use of *Vaughn* affidavits is normal procedure in FOIA cases because (1) detailed description of material withheld could reveal exactly what the agency may be entitled … or required to withhold; and (2) agency actions and affidavits are normally entitled to a presumption of good faith.

Id. at 242.

During judicial review, the "factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). The agency bears the burden of establishing the adequacy of its search. 5 U.S.C. § 552(a)(4)(B); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 547 (6th Cir. 2001). The search "need not be perfect, only *adequate*, and adequacy is measured by the reasonableness of the effort in light of the specific request." *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) (emphasis added).

> [T]he agency may rely on affidavits or declarations providing reasonable detail of the scope of the search. In the absence of countervailing evidence or apparent inconsistency of proof [such affidavits] will suffice to demonstrate compliance with the obligations imposed by the Act. . . . This inquiry focuses not on whether additional documents exist that might satisfy the request, but [only] on the reasonableness of the agency's search.

Care to Live, 631 F.3d at 340-41 (internal citations omitted). The affidavits need not "set forth with meticulous documentation the details of an epic search for the requested records." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). "If the agency satisfies its burden of establishing that it conducted a reasonable search, the requestor must make a showing of bad faith . . . sufficient to impugn the agency's affidavits or declarations, or provide some other evidence why summary judgment is inappropriate." *Care to Live*, 631 F.3d at 345 (internal citations and quotation marks omitted).

B. The Commission's Affidavits and *Vaughn* Index Demonstrate that the Agency Conducted a Reasonable and Adequate Search in Response to Miller's FOIA Request

The Commission's search for documents in response to Miller's request was reasonable and clearly met the agency's obligation under FOIA. As exhibits to this memorandum (Exhs. B-F), the Commission is submitting five affidavits from its FOIA Service Center staff that detail the steps taken to respond to Miller's FOIA request. Those affidavits — from personnel including supervisor Eyana Esters, attorney William Buckley, and paralegal specialist Christopher Mealy — describe in detail the processing of the original request pursuant to 11 C.F.R. § 4.7(f); how FEC personnel were selected to conduct a search for responsive documents; how the targeted personnel were contacted and how they responded; and who reviewed the selected documents, applied any appropriate FOIA exemptions, and made the ultimate production to plaintiff.

In particular, the FOIA Service Center staff determined that materials regarding the advisory opinion request that was the subject of the FOIA request would reside in the Office of General Counsel's Policy Division, which handles advisory opinion requests, and the staff properly directed their search to that Division. *See Pac. Fisheries, Inc. v. IRS*, No. 04-2436, 2006 WL 1635706, at *2-*3 (W.D. Wash. June 1, 2006) (agency's search was adequate when the agency sent search queries to people "likely to have responsive documents"). Specifically, on January 18, 2012, the Commission's FOIA staff asked the two Policy Division attorneys who had handled the Schmidt AOR that was the subject of the Miller FOIA request to provide "all records pertaining to the AOR *except* the AOR itself and the Krikorian comment letter."[2] (FEC Facts ¶ 22; Buckley Decl., Exh. 1.) In response, on January 26, 2012, one of these Policy Division attorneys provided to the FOIA staff all relevant documents that the Policy Division had located, including e-mails between the Policy Division and the Office of Communications regarding placing and removing the AOR from the FEC website. (FEC Facts ¶ 23.) The "detailed and non-conclusory" affidavits submitted by the FEC show that the FOIA Service Center "conducted reasonable searches." *Dillard v. Dep't of Treasury, BATF*, 87 Fed. Appx. 524, 526 (6th Cir. 2004).

In sum, the FOIA Service Center staff's affidavits show that standard procedures were followed, the FEC Division that reasonably would be expected to have records relating to advisory opinion requests was contacted, the documents located were carefully reviewed, and all the responsive documents were either produced or withheld subject to an appropriate invocation of FOIA's exemptions, as discussed *infra* section III.C. Indeed, "the adequacy of the search is determined by the appropriateness of the method employed," *Dillard*, 87 Fed. Appx. at 526, and

[2] The two exceptions were expressly excluded from the scope of Miller's FOIA request. (*See* Compl., Exh. B.)

here, "the detailed affidavits that the [agency] submitted to the district court establish the adequacy of its search." *Care to Live,* 631 F. 3d at 341.

The FEC's affidavits are entitled to a presumption of good faith. *Rugiero,* 257 F.3d at 544; *Dillard,* 87 Fed. Appx. at 536; *Chilingirain v .U.S. Attorney Executive Office,* 71 Fed. Appx. 571, 572 (6th Cir. 2003). Miller's Complaint implies (s*ee* Compl. ¶ 26) that there may have been something irregular in the Commission's removal from its website of materials related to AO request 2011-20, but that action preceded Miller's FOIA request and had nothing to do with how his request was processed. In any event, the exempted documents described in the *Vaughn* index show that the AOR was withdrawn from the public record because it was deemed incomplete for legitimate reasons involving FECA's confidentiality provision, 2 U.S.C. § 437g(a)(12), and that later Mr. Greenberg (the original AO requestor) withdrew the request — the AOR was not withdrawn from the website for any actions taken in bad faith.[3] *See, e.g.*, Exh. G at 1-2 (FEC 0002 – 0010). *See also infra* section III.C.1. The record shows that the modest delay in responding to Mr. Miller stemmed from the adverse impact of managerial vacancies and changes that took place in the FOIA Service Center during the pendency of the request.

Moreover, to rebut the Commission's affidavits supporting summary judgment, Miller cannot rely upon mere contentions — even if had made any in his Complaint — about the FEC's search. Instead, he must now produce *facts* sufficient to create a genuine issue of material fact. *Anderson,* 477 U.S. at 248. "However, conclusory allegations that the [FEC] did not conduct a detailed search are insufficient to create a material question of fact precluding summary judgment." *Care to Live,* 631 F.3d at 341. Thus, Miller must advance evidence of bad faith, but

[3] That confidentiality provision prevents public disclosure of the full story behind the removal of AO request 2011-20 from the agency's website, but it has no connection to the adequacy of the Commission's document production in response to Miller's FOIA request.

this he cannot do. "In the absence of evidence that contradicts the government's affidavits or establishes bad faith, the court's primary role . . . is to review the adequacy of the affidavits and other evidence." *Sinkfield*, 2012 WL 893876, at *3. The Court should therefore find that the Commission's search in response to Mr. Miller's FOIA request was adequate and reasonable.

C. The Commission Properly Withheld from Disclosure Certain Responsive Information Pursuant to Applicable Exemptions under FOIA

The Commission appropriately withheld certain information responsive to plaintiff's FOIA request pursuant to well-established FOIA exemptions, as detailed in the *Vaughn* index submitted with this motion. (*See* Exh. G.) The FEC's affidavits and *Vaughn* index describe with specificity each FOIA exemption upon which FEC staff relied in declining production of a record to Mr. Miller on a document-by-document basis. *See Vaughn*, 523 F.2d at 1136. "Use of *Vaughn* affidavits is normal procedure in FOIA cases because … detailed description of material withheld could reveal exactly what the agency may be entitled or required to withhold…." *Jones*, 41 F.3d at 242. As a result, there is sufficient information to "enable[] the court to make a reasoned, independent assessment of the claims of exemption." *Id.* "If the government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with applicable law, the district court should uphold the government's position." *Ingle v. Dep't. of Justice*, 698 F.2d 259, 265 (6th Cir. 1983).[4] In this case, the Commission has relied upon two of the nine potential

[4] If the Court determines that the agency's *Vaughn* index is not sufficiently detailed, FOIA authorizes the Court to review the records *in camera*. *Simon v. Dep't of Justice*, 980 F.2d 782, 784 (D.C. Cir. 1992). "The *in camera* review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved…." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). Although the Commission believes that its *Vaughn* index is sufficiently detailed for the Court to evaluate its withholding decisions without the need for an *in camera* inspection, the Commission will be

exemptions to support its withholding determination: Exemption 3, for matters specifically exempted from disclosure by another statute, *i.e.*, 2 U.S.C. § 437g(a)(12); and Exemption 5, for intra-agency materials that would not be available by law to a party other than an agency in litigation with the agency. *See* 5 U.S.C. §§ 552(a)(4)(B), (b)(3), (b)(5).[5]

1. The Commission properly withheld confidential investigatory records under FOIA Exemption 3

As detailed in the Commission's *Vaughn* index, the agency withheld records relating to ongoing confidential enforcement matters pursuant to FOIA Exemption 3. This exemption applies when *another* statute prohibits disclosure of the information sought in a FOIA request. The supporting statute must be one that either (a) "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue"; or (b) "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A) & (B). To qualify as a statute supporting FOIA Exemption 3, the statute "must, on its face, exempt matters from disclosure." *Reporters Comm. For Freedom of the Press v. Dep't of Justice*, 816 F.2d 730, 735 (D.C. Cir. 1987), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989).

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providing to the Court's chambers an unredacted copy of the responsive materials, as counsel for the Commission noted at the status conference on August 15, 2012.

[5] In addition, small portions of personally identifiable information such as personal e-mail addresses and telephone numbers were removed from produced documents. Such redactions are required by the Privacy Act, 5 U.S.C. § 552a(b), and might also be subject to FOIA Exemption 6, which prohibits the production of "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Given the limited scope of the actual redactions that were made, a full discussion of the applicability of Exemption 6 is not required. The specific redacted documents are: FEC 008, FEC 0112, FEC 0166, FEC 0169 (e-mail address redacted); FEC 0091 (home telephone number redacted); FEC 0141, FEC 0144 (personal telephone number redacted).

FECA's confidentiality provision, 2 U.S.C. § 437g(a)(12), plainly meets the Exemption 3 standard. Section 437g(a)(12) provides that "[a]ny notification or investigation made under this section *shall not be made public* by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." (Emphasis added.) The confidentiality considerations that underlie this FECA provision are analogous to the "strong confidentiality interest" served by Federal Rule of Criminal Procedure 6(e)(6). *In re Sealed Case*, 237 F.3d 657, 666-67 (D.C. Cir. 2001). Section 437g(a)(12) allows information about FEC investigations, which are conducted by the Office of General Counsel's Enforcement Division, to be made public only if the person who is the subject of that inquiry or the recipient of notice provides written consent. In the absence of such written consent, however, section 437g(a)(12) "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3)(A).

Miller's FOIA request sought records concerning AOR 2011-12. Although the confidentiality requirements of 2 U.S.C. § 437g(a)(12) address FEC enforcement proceedings rather than AO requests, documents described in the attached *Vaughn* index show that it quickly became apparent to the Policy staff handling AOR 2011-12 that the issues raised therein implicated a confidential investigation being handled by OGC's Enforcement Division.[6] Indeed, because the Policy staff could see no way to respond to the AOR without breaching the confidentiality of the enforcement matter, they concluded that the AOR had not been perfected and had to be removed from the Agency's public internet site. The AO requester subsequently withdrew the request. Documents FEC 002-003 and FEC 004 from the *Vaughn* index, for

[6] Those documents include FEC 0002 – 0003, FEC 0004, FEC 0006, FEC 0023 – 0024, FEC 0025 – 0033, FEC 0087 – 0088 FEC 0094, FEC 0105 – 0108, FEC 0112 – 0114, FEC 0122, FEC 0129 – 0133, and FEC 0158 – 0159.

example, describe communications between the Policy staff responsible for handling AOR 2011-20 and the attorney representing the respondent in the enforcement matter. Because the respondent in that unnamed enforcement matter never issued the required written consent, section 437g(a)(12) prohibits the release of any information concerning that confidential investigation to Mr. Miller. Thus, the Commission properly withheld such materials pursuant to FOIA Exemption 3. (*See* Buckley Decl. ¶ 33; Exh. G *(Vaughn* Index identifying documents withheld under Exemption 3).)

2. The Commission properly withheld pursuant to FOIA Exemption 5 confidential material subject to the attorney work-product doctrine and the deliberative process privilege

The Commission also exempted a number of documents from production to Mr. Miller based on Exemption 5, which protects "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). In essence, documents that would not "routinely" be disclosed in private litigation are exempt from disclosure under FOIA. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) (citation omitted); *see also Schell v. Dep't of Health and Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988). "Courts have construed this exception to preserve the recognized evidentiary privileges, such as the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege." *Rugiero*, 257 F.3d at 550; *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 5 (6th Cir. 1980). By definition, documents for which a party would have to make a showing of need, such as might justify overcoming qualified privileges in civil discovery, are *not* routinely disclosed. *FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983). Accordingly, an agency need only make a threshold showing that information is protected by a common law privilege to justify withholding it under Exemption 5. *See id.*

The FEC's *Vaughn* index shows that the records the Commission withheld under Exemption 5 constitute attorney work product. The attorney work product privilege "protects the files and mental impressions of an attorney . . . reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways prepared" in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 510 -11 (1947). E-mails among Policy Division attorneys and other FEC attorneys involved in the AOR process, as well as their own individual notes, contain their mental impressions, conclusions, opinions, and legal theories. The work product privilege attaches to such material even if no court case is actually pending or threatened. Indeed, the courts have adopted a flexible approach that asks not if litigation is a certainty, but "whether the document was created with an eye toward litigation." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 146, 148 (2nd Cir. 1994) (internal quotation marks omitted). Once the FEC's Policy Division attorneys recognized that their work on AOR 2012-20 implicated a confidential enforcement matter, they certainly adopted an "eye towards litigation" that informed all their work on that AOR, because all FEC enforcement decisions may themselves lead to litigation, either as *de novo* civil enforcement suits matters (*see* 2 U.S.C. § 437g(a)(6)) or in challenges to FEC decisions by administrative complainants pursuant to 2 U.S.C. § 437g(a)(8). Moreover, the responses of the Commission to advisory opinion requests may themselves lead to litigation. *See, e.g., Unity08 v. FEC*, 583 F. Supp. 2d 50 (D.D.C. 2008). The Commission thus appropriately exempted from disclosure pursuant to Exemption 5 all documents that contain the work product of its attorneys. (*See* Buckley Decl. ¶ 34; Exh. G (*Vaughn* Index identifying documents withheld as attorney work-product under Exemption 5).)

The Commission also withheld confidential, pre-decisional recommendations and opinions under Exemption 5 because they are protected by the deliberative process privilege. The deliberative process privilege protects the "decision making processes of government agencies." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The privilege protects not merely documents, but also the integrity of the deliberative process itself. *Schell*, 843 F.2d at 940. Exemption 5 applies as long as the document is part of the continuing process of agency decision-making. Thus, "[t]he exemption … covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency…. the key question in Exemption 5 cases [is] whether disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* (internal citations and quotations omitted). That standard is clearly met here, where the materials withheld on the basis of Exemption 5 consist mainly of communications among attorneys in the Office of the General Counsel regarding a pending advisory opinion request and that request's relationship to a pending confidential enforcement matter. Disclosure of such information would plainly interfere with agency decision-making and the information was appropriately withheld. (*See* Buckley Decl. ¶ 34; Exh. G (*Vaughn index* identifying documents withheld as protected by the deliberative process privilege under Exemption 5).)

CONCLUSION

Because the Commission has already provided Mr. Miller all the documents to which he is entitled, the Court should dismiss the Complaint in this matter as moot. Even if this Court has jurisdiction, because the Commission's search for responsive documents was thorough and its redactions were appropriate under FOIA Exemptions 3 and 5, any other allegations Miller might

make about the adequacy of the Commission's response would lack merit and the Commission is therefore entitled to summary judgment.

Respectfully submitted,

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