



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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October 20, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael Marinelli
Staff Attorney

SUBJECT: Draft AO 1994-32

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for October 27, 1994.

Attachment

AGENDA ITEM
For Meeting of: OCT 27 1994

DRAFT

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-32

Ms. Kellie Gasink
3150 Rochambeau Ave.
#41D
Bronx, NY 10467

Dear Ms. Gasink:

This refers to your letter of September 8, 1994, which requests an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to proposed communications you wish to have with a newspaper reporter.

You state that you have in your possession a copy of a letter, dated June 10, 1993, which you wrote to the Manhattan District Attorney. This letter contains allegations you made against a past Presidential campaign with which you worked as a volunteer. You state that the letter was made public and its contents were the subject of a New York City press story. Subsequent to this, you filed a complaint with the Federal Election Commission ("the Commission") repeating the allegations made in the June 1993 letter. You state that this letter formed part of the complaint.

You now wish to tell a newspaper reporter that you have filed a complaint with the Commission. Further, you want to discuss with the reporter matters relating to the substance of the June 1993 letter and the complaint. These matters include issues such as your volunteer work for the campaign and your complaint's allegations of fraud by the campaign.

You ask whether you can take these actions without violating the Federal election laws that, in your words, "prohibit the public disclosure of an investigation conducted by the Commission."

The Act provides that it is unlawful for any person to make public any notification or investigation made under 2 U.S.C. §437g(a), without the written consent of the person receiving such notification or of the person with respect to whom such investigation is made. 2 U.S.C. §437g(a)(12)(A).

Pursuant to this provision, the Commission promulgated 11 CFR 111.21 which provides:

... no complaint filed with the Commission, nor any notification sent by the Commission, nor any investigation conducted by the Commission, nor any findings made by the Commission shall be made public by the Commission or by any person or entity without the written consent of the respondent with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.

While the application of the cited confidentiality rules has not been addressed in previous advisory opinions, prior enforcement cases have examined and interpreted the confidentiality provisions. See, for example, Matters Under Review ("MUR") 3573, 3170, 3169, 3168, 1244 and 298. These cases have interpreted 2 U.S.C. §437g(a)(12)(A) and 11 CFR 111.21 as not applicable to situations involving the complainant's conduct leading to the publication or discussion of information or allegations contained in a

3 complaint.^{1/} Whether the disclosure took place before or
4 after the filing of the complaint was not seen as relevant.
5 In these situations, the Commission found no reason to
6 believe that a violation of the Act or Commission regulations
7 had been committed by the complainant.

8 The first enforcement case dealing with section 111.21,
9 MUR 1244, examined the apparent differences between the
10 language of the statute and the language of the regulation
11 which explicitly refers to prohibiting the publication of a
12 complaint. MUR 1244 considered a complainant's actions which
13 had led to the publication in a newspaper of the details of
14 his previously filed complaint. The Commission in that
15 matter noted that the language of section 111.21 must be read
16 in conjunction with section 437g(a)(12) and "should prohibit
17 complainants from disclosing information about their
18 complaints only if such disclosure also amounts to disclosure
19 of a Commission notification or investigation." See MUR
20 1244. As support for this reasoning, language from the
21 explanation and justification of section 111.21 was cited
22 which states that the regulation "sets forth the
23 confidentiality requirements of the Act." See Id. and 45
24 Fed. Reg. 15089 (March 7, 1980). The Commission noted that
25 there would be difficulty in enforcing the regulation if read

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^{1/} MURs 3573, 3170, 3169, 3168 and 1244 dealt with alleged
28 violations of both 2 U.S.C. §437g(a)(12)(A) and 11 CFR
29 111.21. The consideration of MUR 298 took place prior to the
30 promulgation of section 111.21; therefore, violations of
section 437g(a) were the only issue. See footnote 2
below.

3 to extend beyond the wording of the statute and inconsistent
4 with prior cases enforcing the statute.

5 More recent cases have confirmed and continued this
6 interpretation. Relevant to your situation is the
7 Commission's resolution of allegations made in a group of
8 combined enforcement actions, MURs 3170, 3169, 3168. These
9 cases were generated by complaints filed by persons who were
10 the respondents in another enforcement action which had
11 commenced earlier. These respondents presented evidence that
12 the complainants in the earlier case had disclosed their
13 complaint to various radio and television broadcasters and
14 had further caused the complaint to become the subject of
15 certain newspaper articles. The Commission found no reason
16 to believe that these actions violated the Act or Commission
17 regulations.^{2/}

18 In response to your request, the Commission concludes
19 that your proposed discussion with the press regarding the
20 filing of your complaint, the allegations contained in the
21 complaint, and any information contained in the complaint or
22 related to the subject matter of the complaint, would not
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2/ MUR 3573 dealt with allegations of a similar situation
25 with the same resolution by the Commission.

26 By contrast, in MUR 298 the Commission referred to the
27 Department of Justice a case involving a situation of persons
28 unknown violating section 437g(a) by providing information to
29 a newspaper for a published article revealing a Commission
30 decision to issue a subpoena in an open case. The violation
was found because these actions involved disclosure of a
Commission notification which disclosure was made while the
investigation of the complaint was in progress.

3 violate the confidentiality provisions of the Act or
4 Commission regulations. You may also discuss any information
5 contained in, or relating to, the June 1993 letter which
6 formed the basis for the complaint. These actions are
7 indistinguishable from the situations in the prior
8 enforcement cases. However, you may not discuss or disclose
9 any information relating to any notification of findings by
10 the Commission or any action taken by the Commission in an
11 investigation until the case is closed or the respondent
12 waives the right to confidentiality. Disclosure of these
13 phases of the enforcement process is prohibited by 2 U.S.C.
14 §437g(a)(12) and 11 CFR 111.21.^{3/}

15 This response constitutes an advisory opinion concerning
16 application of the Act, or regulations prescribed by the Com-
17 mission, to the specific transaction or activity set forth in
18 your request. See 2 U.S.C. §437f.

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20 For the Commission,

21
22 Trevor Potter
23 Chairman

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26 ^{3/} For an example of the type of disclosure that would
27 violate the confidentiality provisions of the Act, see the
discussion of MUR 298 in footnote two above.

28 The Commission is currently engaged in a rulemaking to
29 offer further guidance on the application of the
30 confidentiality provisions of the Act. See 58 Fed. Reg.
36777 (July 30, 1993).