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October 7, 1994

VIA FACSIMILE AND FCM

N. Bradley Litchfield
Associate General Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Comments On
AOR 1994-32.

Re: Comments on Advisory Opinion Request 1994-32

Dear Mr. Litchfield:

This letter represents my comments on AOR 1994-32.

I. **THIS REQUEST SHOULD BE CLOSED WITHOUT ISSUANCE OF AN OPINION BECAUSE IT DOES NOT QUALIFY AS AN ADVISORY OPINION REQUEST**

The Kellie Gasink AOR is couched in terms of seeking advice about future activity, but it actually relates to an activity that has taken place and therefore does not qualify for an advisory opinion. See 11 CFR § 112.1(b); AOR 1994-24.

Gasink asks whether she may "give the enclosed letter to a Times reporter." Since the New York Times does not have any special legal status under the federal election laws, the generic question is whether she may give the "letter" (hereinafter referred to as "DA Statement") to a journalist.

~~_____~~, on July 8, 1994, the Washington City Paper published a lengthy feature story that was largely based upon Gasink's supposedly confidential FEC complaint. The article expressly states that Gasink gave the writer a copy of her sworn FEC complaint. *

In short, after filing her FEC complaint but before seeking an advisory opinion, Gasink gave the DA Statement to at least one journalist. Her AOR is seeking a legal opinion about past activity. The FEC's advisory opinion mechanism is not intended to be available to a party to try to obtain a stamp of approval for past conduct that the party later realizes may have

* All redactions by OGC.

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been unlawful. Accordingly, this AOR should be closed without issuance of an opinion.

**III. THIS REQUEST SHOULD BE CLOSED WITHOUT ISSUANCE OF AN OPINION
BECAUSE IT IS BASED ON DISPUTED ALLEGATIONS OF FACT AND NOT
MERELY ON INDISPUTABLE HYPOTHETICAL FACTS**

Gasink's AOR is based upon factual allegations that are unclear and/or untrue. Advisory opinions are intended to guide future behavior by both the requestor and by others who may rely upon it. An advisory opinion should not be issued on the basis of ambiguous or untrue factual allegations because that creates confusion rather than greater certainty in the public's

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understanding of the agency's interpretation of the federal election laws.

Gasink asserts that she "made public to the press" the DA Statement "prior to my having filed a complaint with the FEC." The phrase "made public to the press" is incomprehensible. Giving a document to the press is not making it "public." Reporters have gone to jail rather than reveal to the public or to law enforcement authorities documents and statements provided to them by sources. Whether or not the DA Statement was "public" before the filing of the FEC complaint is an issue of fact.¹ The AOR procedure, however, is not a factfinding procedure.

Similar problems are raised by Gasink's phrase that the "contents of this letter had been written about in the NYC press prior to my having filed a complaint with the FEC." Presumably Gasink is referring to the Daily News article [REDACTED]. However, the references in that short article to Gasink's having made a complaint to the Manhattan District Attorney is not equivalent to the actual distribution of the document itself, which is vastly greater in length than the article, and contains dozens of allegations not even alluded to in the article.

Hence, the Commission could not issue a meaningful and responsible advisory opinion without first undertaking a factfinding process. But the AOR procedure is not supposed to be a factfinding process. Therefore no opinion should be issued.

IV. THIS REQUEST SHOULD BE CLOSED WITHOUT ISSUANCE OF AN OPINION BECAUSE IN FACT, OR IN APPEARANCE, THE FEC CANNOT RENDER AN IMPARTIAL DECISION

The Commission is the defendant in two pending lawsuits which arise from the Commission's conduct in connection with Gasink's filing of her complaint. Fulani v. FEC, 94 Civ. 4461 (KTD) (S.D.N.Y.); Fulani v. FEC, No. 94-1593 (D.C.Cir.) In each of them it has an institutional self-interest in portraying Gasink as a credible complainant and in ignoring or minimizing her blatant violations of federal confidentiality requirements, and her use of

¹ The undersigned has filed a sworn declaration in Fulani v. FEC, 94 Civ. 4461 (KTD)(S.D.N.Y.), stating that to the best of his knowledge and the knowledge of his clients the DA Statement was not published or otherwise made public prior to the filing by Gasink of her complaint.

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an FEC complaint filing to solicit media interest in publicizing her accusations against Dr. Lenora B. Fulani and her associates.

The pleadings, briefs, and documents filed in both of these court proceedings, which are already in the possession of your office, are hereby incorporated by reference into these comments.

It would be particularly inappropriate for the FEC to render a decision in this AOR given the positions it has taken in the federal district court case. The FEC has opposed plaintiffs' motion for a protective order to file under seal and to otherwise prevent distribution of documents in the confidential file of the MUR initiated by Gasink. In order to suit its immediate tactical interest of preventing the judge from seeing these documents, the Office of General Counsel is giving a narrow construction to confidentiality protections for which it should be the foremost advocate.

As well, in a brief filed in the district court, the Office of General Counsel has made a factual assertion that is almost identical to the untrue factual assertion set forth by Gasink in this AOR:

Both Gasink's letter to the Manhattan District Attorney . . . and the accompanying New York Daily News article were already public documents when she filed her administrative complaint with the Commission.

(emphasis supplied) FEC Reply Brief dated September 8, 1994 at 16.
(See footnote 1, supra)

The two pending lawsuits against the FEC raise issues about the extent to which the FEC has allowed itself improperly to be manipulated by Gasink, in support of an ongoing political attack against Dr. Fulani and her associates by Gasink and a group of confederates who have been shuttling back and forth between news organizations and law enforcement authorities.

Gasink's AOR is dated one week after I spoke with a New York Times reporter who was preparing an article about Dr. Fulani's candidacy for the Democratic Party gubernatorial nomination in New York State. The reporter's comments showed familiarity with confidential FEC investigative activities concerning the respondents to Gasink's MUR complaint. In her AOR, Gasink seeks

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permission to give the DA Statement to a "Times reporter." Apparently Gasink's AOR request was immediately preceded by her continuing attempts to peddle her story and to discuss confidential FEC proceedings.

Given the pending litigations and the highly politicized context of the FEC's conduct to date in its handling of the Gasink allegations, it would be inappropriate, or, at least, would have the appearance of impropriety, for the Commission to be giving Gasink official "advice" at this stage of the process about what materials and information she may or may not give to the press or go the public. Having gone this far in her use of the FEC's enforcement machinery, if Gasink (who is a law student) wants legal advice about what to do next in her anti-Fulani campaign, then she should get a lawyer. The FEC should not be providing her free legal advice at the taxpayers' expense for her partisan political projects.

V. IF THE FEC ISSUES AN ADVISORY OPINION, IT SHOULD STATE THAT GASINK'S PROPOSED ACTIVITIES WOULD BE UNLAWFUL IN WHOLE OR IN PART

If the FEC does issue an advisory opinion in response to this request, it should state that Gasink's giving of the DA Statement to a journalist would violate 2 U.S.C. § 437g(a)(12)(A) and 11 C.F.R. § 111.21.

Pursuant to 2 U.S.C. § 437g(a)(12)(A), which governs the submission of complaints to the Commission,

[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.

Later in the process, when there has been a response from the accused party and the Commission has analyzed the evidence, the Commission's conclusion is made public.

It clearly is unlawful for a complainant to disclose a filed FEC complaint, or to disclose the fact that any document is a part of a filed FEC complaint. Either or both of these prohibitions apply in this case.

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First, as submitted to the FEC by Gasink, the DA Statement itself constitutes a complaint. It is a statement authored by her, signed by her, belatedly verified by her, which accuses respondents of violations of federal election laws. [REDACTED]

[REDACTED] If Gasink had restated some or all of the allegations in the DA Statement in another document which she submitted to the FEC under Section 437g(a), and had not submitted the DA Statement at all to the FEC, then a different question would be presented as to what she could or could not do with the DA Statement. But that is not what she did. She used the DA Statement itself as a complaint and now she is bound by the confidentiality protections of the enforcement process.

Second, even if the DA Statement is not considered a complaint, it may not be disclosed by Gasink. Gasink has already publicly disclosed that she has submitted the DA Statement to the FEC in a pending MUR. Hence, if she makes any additional distribution of the document, it will be known to the recipients that they are being handed a document that is part of a confidential MUR file. This, obviously, is a disclosure of information about the enforcement matter.

If Gasink had not already aggressively brought about the disclosure to hundreds of thousands of readers of the Washington City Paper, the Daily Challenge, and of other publications that she submitted the DA Statement to the FEC in MUR 3938, then a different question would be presented to the Commission. But these widespread disclosures have been made, and they were instigated by Gasink herself. It is hard to imagine a more blatant attempt to manipulate this agency than for a person to publicize widely the fact that she has filed a document full of accusations against a public figure in a confidential FEC enforcement matter, and then to ask the FEC for permission to distribute the document.

For similar reasons, if the Commission provides responses to the Gasink's secondary questions in the final paragraph of her

[REDACTED]

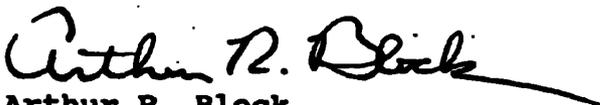
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AOR, then it would answer in the negative. Gasink's intentional, unlawful disclosures about her filed FEC complaint has poisoned the well. At this point, any of her proposed statements will be understood by the listener to be disclosures of accusations Gasink has made in the confidential complaint process. However, for the reasons stated in the preceding points, it would be much more appropriate for the Commission simply to decline to answer these questions, rather than to try to give piecemeal advice about what may or may not be said to the press by an MUR complainant who already has violated confidentiality.

* * *

I have incorporated by reference into these comments a number of documents that are already on file with the Office of General Counsel. They are voluminous. If it is necessary to provide additional copies of these documents to your office in order to have them become fully part of the record of this AOR, then please advise me so that I may supplement these comments with copies of the documents. Thank you.

Very truly yours,


Arthur R. Block

ARB/bp