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December 28, 1994

Federal Election Commission
Office of General Counsel
999 E. St., N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Commissioners:

AOR 1995-01

This is a request for an advisory opinion answering the following questions:

May the respondents in pending MUR 3938 and their attorneys disclose to third parties and/or the public all or part of the responses that respondents have filed with the FEC in opposition to the complaint against them?

If the respondents and their attorneys may make the disclosures described above, can they do so without the making of the disclosures being deemed by the FEC to be a consent by respondents to public disclosure of other confidential materials in the pending MUR 3938 file?

* The undersigned is one of the counsel of record for respondents in MUR 3938, and is counsel of record for complainants in MUR 4032. He makes this request on his own behalf and on behalf of his clients.

Factual Background

Kellie Gasink filed a complaint that was assigned docket number MUR 3938. Several months after this filing the Washington City Paper published a feature article that was largely based on Gasink's allegations, and which specifically stated that Gasink had given the newspaper a copy of her FEC complaint.

After publication of the City Paper article, the respondents in MUR 3938 filed a complaint with the FEC against Gasink for violating the confidentiality provisions of FECA and of the Commission's regulations, MUR 4032. Regulation 11 C.F.R. § 111.21(a) provides:

* See designations of counsel attached hereto
[Ofc note]

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Except as provided in 11 CFR 111.20, 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.

(emphasis supplied). The complaint against Gasink alleged that she had clearly violated this explicit, unambiguous prohibition.

Gasink filed with the Commission a request for an advisory opinion, AOR 1994-32. She asked the question whether she could give a copy of her filed FEC complaint to a newspaper reporter. The undersigned, among others, filed comments to this AOR, stating among other points, that the Commission should decline to issue an advisory opinion because: (a) Gasink had already taken the action about which she sought advice, so her question was not the proper subject of an advisory opinion; (b) the AOR was an obvious attempt to preempt the enforcement process in MUR 4032; and (c) the FEC's entertaining of this request created an appearance of impropriety because the FEC had an institutional interest in rendering Gasink an affirmative answer in order to be consistent with positions taken by OGC in pending litigation with the respondents arising out of MUR 3938.

The Commission's Office of General Counsel issued a draft AOR which did not address any of the comments filed with the Commission, and which gave Gasink an affirmative answer. The draft AOR noted that the question of the confidentiality of complaints was the subject of an open rulemaking proceeding. See Proposed FEC Rules, Notice 1993-16, 58 FR 36764, 36768 (July 8, 1993).

The proposed FEC rules would completely reverse the current regulation. Rather than being confidential, FEC complaints in enforcement proceedings would be kept in a public file, even while the review of allegations was pending. The Notice posed the question "whether such a file should also include the written responses of the persons alleged to have committed the violations."

The undersigned submitted a comment to the draft AO, stating, inter alia, that the FEC should not use an advisory opinion to change a regulation. The issue posed by the Gasink

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AOR could not possibly be characterized as an interpretation of an ambiguous rule. Rather, the draft AO was a circumvention of the procedural safeguards of the Administrative Procedure Act. Moreover, it would create an unfair situation in which persons reading the regulation would believe that filed complaints are confidential, and only a relative handful of persons familiar with this AO would know that complaints are not confidential.

The Commission nevertheless adopted the draft AO.

Implications

Now that the Commission has advised¹ Gasink that she can publicize her complaint against the respondents, the respondents believe that they are entitled to publicize their filed answers to the complaint to the extent they want to do so.

The prejudice to the respondents is intensified by the FEC's irregular and unexplained decision to hold MUR 3938 "in abeyance" for an unspecified time. Hence, the Commission has now created the conditions for a complainant to peddle copies of her FEC complaint to news organizations for months or years to come, while the MUR remains in a "pending" status because of the Commission's deliberate inaction. The Commission should make clear that the respondents, in the meantime, are free to disclose their responses.

Conclusion

The Commission should issue an advisory opinion answering the abovestated questions in the affirmative.

Very truly yours,


Arthur R. Block

¹ By seeking this advisory opinion, the undersigned and his clients are not waiving any and all objections they may have to AO 1994-32, and to any and all claims that AOR 1994-32 is substantively and procedurally unlawful.

STATEMENT OF DESIGNATION OF COUNSEL

MUR 3938

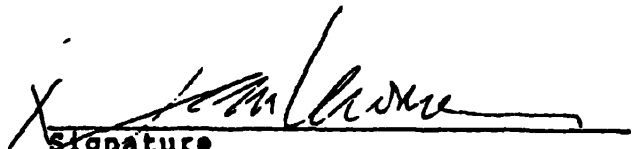
NAME OF COUNSEL: Arthur R. Block, Esq.

ADDRESS: 72 Spring St., Suite 1201
New York, NY 10012

TELEPHONE: (212) 966-0404 **FAX** 212-431-3516

The above-named individual is hereby designated as my
counsel and is authorized to receive any notifications and other
communications from the Commission and to act on my behalf
before the Commission.

4/08/94
Date


Signature

RESPONDENT'S NAME: Fred Newman

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OFFICE OF GENERAL
COUNSEL

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MUR 3938

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4/6/94
Date

Lenora B. Fulani
Signature

RESPONDENT'S NAME: Lenora B. Fulani

STATEMENT OF DESIGNATION OF COUNSEL

MUR 3938

NAME OF COUNSEL: Arthur R. Block, Esq.

ADDRESS: 72 Spring St., Suite 1201

New York, NY 10012

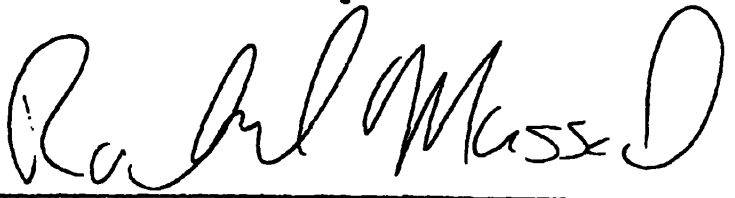
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RESPONDENT'S NAME: Rachel Massad, Treasurer, Lenora B. Fulani for President