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COMMISSION
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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEB 1 3 46 PM '95

February 1, 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael E. Marinelli *SM*
Staff Attorney

SUBJECT: Draft AO 1995-1

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for February 9, 1995.

Attachment

AGENDA ITEM
For Meeting of: FEB 9 1995

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2
3 CERTIFIED MAIL
4 RETURN RECEIPT REQUESTED

5 ADVISORY OPINION 1995-1

6 Arthur Block, Esquire
7 72 Spring Street
8 Suite 1201
9 New York, NY 10012

DRAFT

8 Dear Mr. Block:

9 This refers to your letter of December 28, 1994, which
10 requests an advisory opinion concerning the application of
11 the Federal Election Campaign Act of 1971, as amended ("the
12 Act"), to proposed disclosures you wish to make regarding
13 your response to a complaint filed with the Commission.

14 You state that you are the counsel of record for the
15 respondents in Matter Under Review ("MUR") 3938 which arose
16 from a complaint filed with the Commission by Ms. Kellie
17 Gasink.^{1/} Following the filing of her complaint, Ms. Gasink
18 requested and received a Commission advisory opinion
19 regarding her proposal to communicate to a newspaper reporter
20 information from the complaint and to disclose further facts
21 regarding the allegations contained in the complaint.

22 See Advisory Opinion 1994-32.

23 In view of the issuance of this opinion, the respondents
24 in MUR 3938, and you as their counsel, wish to disclose to
25 third parties, and/or the public, all or part of the
26 responses that respondents have filed with the Commission in
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29 ^{1/} According to the designations of counsel you filed with
30 the Commission, you represent Fred Newman, Lenora B. Fulani,
Rachel Massad, Francine Miller and the Lenora B. Fulani for
President Committee.

3 opposition to the complaint in MUR 3938. You note that the
4 Commission has not yet made any findings in MUR 3938.
5 Assuming these disclosures can be made, you further ask
6 whether they may be made without the Commission deeming them
7 as a consent by the respondents to public disclosure of other
8 confidential materials in MUR 3938.

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

14 Pursuant to this provision, the Commission promulgated
15 regulations, 11 CFR 111.21(a), which provide:

16 ... no complaint filed with the Commission, nor any
17 notification sent by the Commission, nor any
18 investigation conducted by the Commission, nor any
19 findings made by the Commission shall be made
20 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.

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22
23 ^{2/} A recent case, Lind v. Grimmer, 30 F.3d 1115 (9th Cir.
24 1994), has examined the application of a confidentiality
25 rule in Hawaii's election law. The case concerned an attempt
26 of the Hawaii Campaign Spending Commission to prohibit a
27 complainant from releasing information contained in a
28 complaint he had filed with the state commission. The court
29 first found that the state commission's application of the
30 statute to the complainant violated his First Amendment
rights. The court also concluded that the statute itself was
overbroad and unconstitutional. While 2 U.S.C. §437g(a)(12)
is narrower in scope than the confidentiality statute struck
down in Lind, the case nonetheless illustrates the First
Amendment considerations applicable when interpreting the
scope of confidentiality in the context of election law
enforcement procedures.

Advisory Opinion 1994-32 concluded that a complainant who communicates with the press regarding the complaint filed with the Commission would not violate the confidentiality provisions of the Act, provided such person did not:

disclose any information relating to any notification of findings by the Commission or any action taken by the Commission in an investigation until the case is closed or the respondent waives the right to confidentiality. Disclosure of these phases of the enforcement process is prohibited by 2 U.S.C. §437g(a)(12) and 11 CFR 111.21.

Advisory Opinion 1994-32.^{3/}

The Commission notes that there have been no findings made as yet in MUR 3938 and, therefore, a Commission investigation has not started. Furthermore, you propose only to release your response to the complaint filed by Ms. Gasink. Under these circumstances, the Commission concludes that the confidentiality provisions as set forth in 2 U.S.C. §437g(a)(12) and 11 CFR 111.21 would not apply to your release of all or any portion of the responses filed by you on behalf of your clients. Since the confidentiality provisions do not apply, your described actions would not represent any waiver of confidentiality as to other documents or materials which are presently in, or may become

^{3/} This conclusion reflects long standing Commission policy as found in past enforcement matters. See, for example, MURs 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 complaint.

3 a part of, the Commission file in MUR 3938.^{4/} The Commission
4 notes, however, that this conclusion relates only to actions
5 by you or your clients regarding the release of the
6 information contained in your response to the complaint.
7 These conclusions do not affect the rights of the Commission
8 to withhold information from public disclosure pursuant to
9 its investigatory or other privileges. See 11 CFR
10 4.5(a)(1)--(a)(7) and 4.5(a)(7)(i)--(vi).

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

15
16 Sincerely,

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18 Danny L. McDonald
Chairman

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21 Enclosure: (AO 1994-32)

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4/ 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).