

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)

4) MURs 4935 and 5057
5)

6 Dear for Congress, Inc.

2001 001 11 17 12 33
SENSITIVE

7 **GENERAL COUNSEL'S REPORT #18**

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9 I. ACTIONS RECOMMENDED:

10 Deny the Motion to Quash submitted by Dear for Congress.
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13 II. BACKGROUND

14 On July 30, 2001, the Commission approved a Subpoena to Produce Documents and an
15 Order to Provide Written Answers ("Subpoena and Order") to Dear for Congress (the
16 "Committee") and Abraham Roth, as treasurer, and a Subpoena and Order to Abraham Roth in
17 his individual capacity as the principal of Roth & Company, LLP.¹ On August 17, 2001, the
18 Committee submitted to the Commission a Motion to Quash the Subpoena and on August 21,
19 2001, Abraham Roth submitted a Motion to Quash the Subpoena issued to him and Roth &
20 Company, LLP.

21 III. DISCUSSION

22 A. Subpoena and Order to the Committee

23 Generally, the Committee alleges that the Subpoena and Order infringes upon its
24 constitutional rights under the First Amendment, and is overbroad and burdensome. Attachment

25 1.

¹ The Commission also approved a subpoena and order to James Cunningham, a principal of the fundraising consulting firm, Cunningham, Harris & Associates, hired by Dear for Congress. This Office has received Mr. Cunningham's response to the subpoena and order

1 The Committee seems to be particularly concerned with question 17 of the subpoena
2 and order, which asks the Committee to identify the hosts of fundraising events.³ *See id.* The
3 Committee argues that the subpoena seeks “personal and political information about an entire
4 class of Committee supporters without indicating any need – let alone a compelling one – for the
5 full extent of the information sought.” Attachment 1 at 5. The Committee also alleges that the
6 subpoena will have a “ ‘deterrent effect’ on the political activities” of their supporters since the
7 supporters “opposed a candidate who now sits in Congress,” and their association with Mr. Dear
8 will now be thrust into public view since the Commission’s records are placed on the public
9 record at the conclusion of a MUR. *Id.*

10 The Committee argues that Commission investigations are of “a fundamentally different
11 constitutional character from . . . [Securities and Exchange Commission] or [Federal Trade
12 Commission] investigations” because Commission investigations involve the “real potential for
13 chilling the free exercise of political speech and association guarded by the first amendment.”
14 Attachment 1 at 4, quoting *FEC. v. Machinists Non-Partisan Political League*, 655 F.2d 380,
15 388 (D.C. Cir. 1981), *cert. denied* 454 U.S. 897 (1981) (“*Machinists*”). The Committee also
16 argues that due to the nature of the activities investigated by the Commission, the “usual
17 deference to the [administrative] agency is not appropriate,” and “a more exacting scrutiny of the
18 justification offered by the agency” is required, such as showing a “need for the material sought

³ The subpoena and order asks, “Did any individuals host events in which funds were raised on behalf of the Committee? If the answer is yes, please identify the host(s) of each event, list the date and location of each event, identify the persons from the Committee who were liaisons between the Committee and the host(s) of each event, and the persons from the Committee who collected the contributions at each event ”

1 beyond its mere relevance to a proper investigation.” *Id.* at 4-5, quoting *FEC v. LaRouche*
2 *Campaign*, 817 F.2d 233, 234-235 (2d Cir. 1987).

3 An administrative agency subpoena will be enforced so long as it was issued for a proper
4 purpose, the information sought is relevant to the purpose and the statutory procedures were
5 observed. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Morton Salt*
6 *Co.* 338 U.S. 632, 652 (1950); *Federal Trade Commission v. Invention Submission Corp.*,
7 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 910 (1993); *Government of*
8 *Territory of Guam v. Sea-Land Serv.*, 958 F.2d 1150, 1154-55 (D.C. Cir. 1992).

9 In this matter, the subpoena and order was issued for a proper purpose, which was to
10 investigate an apparent violation of 2 U.S.C. § 441f, a provision of the Federal Election
11 Campaign Act of 1971 (the “Act”), as amended, by the Committee for knowingly accepting
12 contributions made by one person in the name of another person. *See* 2 U.S.C. § 437g(a)(2) and
13 2 U.S.C. §§ 437(d)(a)(1) and (3).

14 The information sought in the subpoena and order is relevant to the purpose because the
15 questions are designed to obtain a better understanding of the Committee’s fundraising
16 operations and circumstances surrounding the questionable contributions to the Committee.
17 During the audit of the Committee, conducted pursuant to 2 U.S.C. § 438(b), the Audit staff
18 identified 15 instances in which the Committee accepted from individual contributors, two or
19 more money orders bearing sequential serial numbers. In several instances, it appeared that
20 sequential money orders purporting to be from different individuals were executed in the same
21 handwriting, including the purported signature of the person drawing the money order. The
22 Commission found reason to believe that the Committee violated 2 U.S.C. § 441f by knowingly

1 accepting contributions by one person in the name of another person. There were also reason to
2 believe findings that 61 individuals violated 2 U.S.C. § 441f by making contributions to the
3 Committee. It is possible that the fundraising hosts could provide information about the
4 Committee's fundraising operations and certain contributions to the Committee.

5 Finally, the Commission followed the statutory procedures for issuing subpoenas. The
6 Commission voted by an affirmative vote of at least four of its members that there is "reason to
7 believe" that a violation has occurred and authorized this Office to conduct an investigation.
8 2 U.S.C. § 437g(a)(2); 11C.F.R. §§ 111.8 and 111.10. The Commission also approved by an
9 affirmative vote of at least four of its members to issue the subpoena and order which was
10 properly executed by the Chairman of the Commission. 2 U.S.C. § 437d(a)(3); 11 C.F.R.
11 § 111.12.

12 While the Committee argues that a different standard, such as a "compelling need"
13 standard, applies to enforcement of an administrative agency subpoena when First Amendment
14 concerns are raised, courts have assumed that such compelling need for the information can be
15 shown. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 (D.C. Cir.
16 1981). Even if the Commission assumes that the Committee has shown that First Amendment
17 concerns are implicated, and it does not appear the Committee has shown that identifying hosts
18 of fundraising events where violations may have occurred somehow implicates the First
19 Amendment, the Commission's investigation is still constitutional. First Amendment concerns
20 "do not automatically override either the substantive requirements of the FECA or FEC
21 investigation into allegations of possible FECA violations." *Federal Election Commission v.*
22 *Franklin*, 718 F.Supp. 1272, 1279 (E.D. Va 1989), *aff'd in part*, 902 F.2d 3 (4th Cir. 1989). In

1 *Machinists*, which involved a challenge to the Commission's subject matter jurisdiction to
2 investigate the matter, the court did not "demand of the FEC that it show a compelling interest
3 before it may obtain the information it seeks. Instead, we may assume *arguendo* that if the FEC
4 has statutory jurisdiction to conduct this investigation, then a compelling interest for the
5 subpoenaed information can be shown." *FEC v. Machinists Non-Partisan Political League*, 655
6 F.2d at 380, 389 (D.C. Cir. 1981).

7 This Office believes that violations of the Act may have occurred at the fundraising
8 events, and the fundraising hosts could provide information about the fundraising operations and
9 certain contributions that could assist this Office in deciding whether there is sufficient evidence
10 to recommend a probable cause finding to the Commission. A request to the Committee to
11 identify the fundraising hosts would not have a chilling or deterrent effect on First Amendment
12 rights as asserted by the Committee. Attachment 1 at 5. The argument that the Committee's
13 supporters opposed a candidate who now sits in Congress is hardly a sufficient reason for
14 withholding this information from this Office to investigate an apparent violation of the Act.
15 Moreover, the Committee's concerns that the identity of the fundraising hosts would be included
16 in investigative materials being placed on the public record at the conclusion of a MUR is
17 unwarranted. The fundraising hosts are third party witnesses and not respondents.⁴ An
18 administrative agency can decline to release certain information on third party witnesses because
19 the information is subject to an exemption under the Freedom of Information Act, such as the
20 personal privacy exemption set forth in 5 U.S.C. § 552(b)(7)(C). *See Safeguard Services, Inc. v.*
21 *Securities and Exchange Commission*, 926 F.2d 1197 (D.C. Cir. 1991).

⁴ While the Commission has traditionally been liberal in the type of documents placed on the public record, this policy may be subject to review as a result of pending litigation involving the AFL-CIO.

1 Moreover, to buttress its First Amendment argument, the Committee alleges that the
2 subpoena follows previous efforts by this Office that involved contacts to individuals whereby
3 those individuals were “asked, *inter alia*, why they supported Mr. Dear.” Attachment 1 at 6. The
4 Committee’s allegation mischaracterizes the Office of General Counsel’s informal investigation
5 of this matter. During our informal investigation, this Office made telephone calls to many of the
6 61 individual respondents to confirm that they actually made contributions to the Committee and
7 to obtain information regarding the circumstances surrounding their questionable contributions to
8 the Committee. First Amendment concerns are not present if individuals have not made a
9 contribution to the Committee. This Office asked respondents, *inter alia*, who approached them
10 about giving a contribution to the Dear campaign, who suggested that a money order be used to
11 make the contribution, whether they purchased the money order, whether they filled out the
12 money order, whether they mailed the money order to the Committee or it was collected from
13 them, and whether they knew any individuals who worked on the Dear campaign. Furthermore,
14 with respect to respondents who submitted confirmation statements to the Committee confirming
15 their contributions were made with personal funds, this Office asked whether they recalled
16 receiving a request from the Committee to sign a confirmation statement.⁵

17 The Office of General Counsel also made telephone calls to individuals who are not
18 respondents in this matter, but were listed as hosts on the Committee’s fundraising invitations,
19 and asked questions about those Committee fundraising events, such as whether they could

⁵ Through the informal investigation, this Office has learned that several respondents gave cash contributions even though the Committee submitted confirmation statements purportedly from them confirming a contribution with a money order. There were also several respondents who denied making any contribution to the Committee whatsoever even though the Committee submitted confirmation statements purportedly from them confirming a contribution with a money order.

1 identify Committee representatives who attended the events, who collected the contributions and
2 whether the contributions were in cash, by check or money order. The Office of General Counsel
3 did not ask the respondents nor the fundraising hosts the question "why they supported Mr. Dear"
4 as alleged by the Committee in its Motion to Quash. See Attachment 1 at 6.

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The second argument raised by the Committee is that the subpoena and order is overbroad and burdensome, because the documents requested have already been provided to the Audit staff.⁶ Attachment 1 at 7. Thus, the Committee argues that there is no compelling need for the information sought in the subpoena. *Id.* During the audit, the Committee submitted to the Audit staff copies of letters sent to contributors who made contributions with money orders that requested the contributors to confirm that the contributions were made with personal funds. The Committee also submitted documentation regarding the confirmation statements received from

⁶ This argument refers to document requests #1 through #3.

1 those contributors. The Audit staff identified for the Committee contributions from 61
2 individuals about which it had questions. However, the Committee provided confirmation letters
3 and statements on only 32 individuals to the Audit staff, and it is unclear whether the Committee
4 has confirmation letters and statements from the remaining 29 individuals. For instance, this
5 Office does not know whether the Committee sought confirmation letters and statements from
6 the 29 individuals, whether the individuals did not return the confirmation statements to the
7 Committee, or whether, if such statements were returned, the Committee declined to submit them
8 to the Audit staff.

9 Moreover, during the informal investigation, this Office asked the respondents about the
10 confirmation letters from the Committee and their responses to the Committee. Although the
11 Committee submitted documentation to the Audit staff confirming contributions from several
12 respondents, we learned through conversations with them that they did not make a contribution to
13 the Committee. This discrepancy raises concerns that the Committee may not have submitted all
14 of the documentation regarding the letters to contributors and their responses. The Office of
15 General Counsel is not interested in documents that have already been provided. Thus, this
16 Office is willing to negotiate with the Committee so that it provides confirmation letters and
17 statements that have not been previously submitted, and we could also identify the 29 individuals
18 for which we would like the Committee to provide confirmation letters and statements.⁷ With
19 respect to documents relating to the Committee's business relationship with consulting firms, this
20 Office is also willing to narrow the scope of the documents to be produced to documents that

⁷ The Committee also raises the possibility that the subpoena could be narrowed to obtain information not obtained through the audit process. Attachment 1 at 7.

1 have not already been provided to the Audit staff.⁸ In regard to the Committee's assertion that
2 questions in the subpoena and order relating to how the contributions were handled have already
3 answered during the audit process, this Office believes that a complete understanding of the
4 fundraising operation is necessary, and these questions are essential in deciding whether to
5 recommend a probable cause finding to the Commission. Furthermore, the enforcement process
6 is different than the audit process and this Office needs to clarify the Committee's answers to
7 questions raised during the audit process or needs answers to questions not raised during the
8 audit process so that we obtain a complete understanding of how the contributions were handled.
9 Additionally, this Office is seeking to clarify answers that we received from respondents during
10 our informal investigation.

11 Based upon the Committee's failure to raise sufficient reasons for granting its Motion to
12 Quash, and this Office's willingness to negotiate the documents to be provided and allow the
13 Committee to omit answering one question, this Office believes that the Motion to Quash should
14 be denied. Therefore, the Office of General Counsel recommends that the Commission deny
15 the Motion to Quash submitted by Dear for Congress, and Abraham Roth, as treasurer.
16 Furthermore, this Office recommends that the Commission approve the attached letter to Dear
17 for Congress.

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⁸ This refers to Document Request #3 which asks for contracts, correspondence, memoranda, electronic mail and invoices regarding the business relationship between any consulting firms and the Committee

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IV. RECOMMENDATIONS

1. Deny Motion to Quash submitted by Dear for Congress;
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3. Approve the attached letters.

Lawrence H. Norton
General Counsel

10/11/01
Date

BY: 

Gregory R. Baker
Acting Associate General Counsel