IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

45COMMITTEE, INC., *Plaintiff*, *v.* FEDERAL ELECTION COMMISSION *Defendant*.	Civil Action No. 1:22-cv-00502

REPLY IN SUPPORT OF PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

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As explained in Plaintiff's opening brief, FOIA, FEC regulations, and Supreme Court and D.C. Circuit precedent all require disclosure of records memorializing FEC decisions not to take enforcement actions. Pl.'s Mem. of P. & A. in Supp. of Pl.'s Cross-Mot. for Summ. J. and Opp'n to Def.'s Mot. for Summ. J., Dkt. No. 19-1 ("Cross-Mot."). The FEC does not dispute that the withheld records here reflect decisions not to take enforcement actions, but merely contends that the potential for the Commission to decide to reconsider those decisions at some hypothetical point in the future permits withholding under Exemption 5. That argument is both incorrect and beside the point. *First*, that Exemption is unavailable for final votes and opinions, which FOIA affirmatively requires to be disclosed. *Second*, the mere potential for subsequent decisions does not render past decisions non-final—if it did, there would be no such thing as a final agency decision. And *third*, in all events, the FEC has failed to meet its burden to establish the predecisional and deliberative nature of the specific records at issue, as well as to establish foreseeable harm from their release.

I. FOIA REQUIRES DISCLOSURE OF THE RESPONSIVE RECORDS.

The FEC's brief fails to meaningfully engage with the FOIA provisions requiring disclosure of the vote certifications and statement of reasons at issue. *See* FEC Opp'n to Pl.'s Mot. for Summ. J. & Reply in Support of Mot. for Summ. J., Dkt. No. 22 ("FEC Reply"). While the FEC claims that the lack of a ministerial vote to close the file leaves enforcement matters open indefinitely because Commissioners may, hypothetically, "change their minds," that argument runs headlong into both

FEC regulations and controlling case law. *Id.* at 2-7 (quoting *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021)).

First, nowhere does the FEC acknowledge—let alone explain how its argument complies with—its own regulations, which establish that "[i]f the Commission makes a finding of no reason to believe," that vote "terminates its proceedings" and requires public disclosure of agency votes and any statement of reasons. 11 C.F.R § 111.20(a). The Commission's unsupported assertions regarding "the agency's policy" or "practice" cannot overcome that clear regulatory text. *See* FEC Reply 2-3.[1] In any event, those assertions are inapposite because they rely on dissimilar MURs where the FEC proceeded piecemeal in addressing various allegations in a single administrative complaint and therefore held multiple reason-to-believe votes. And none involved a situation where three current Commissioners have publicly supported disclosure. Dkt. No. 20-2 ("FOIA Statement"). If anything, the abnormality of the withholdings here confirms how unprecedented the FEC's withholdings under the circumstances in this MUR are.

Relatedly, the FEC fails to engage with the substance of the three-Commissioner statements saying the FEC should lose this specific case because the FEC's withholdings are not predecisional (*i.e.*, they follow a final decision or

[1] When it originally promulgated 11 C.F.R. § 111.20(a), the FEC summarized the section as requiring "that final Commission action on all compliance matters shall be made public…." FEC, *Amendments to FECA; Regulations Transmitted to Congress*, 45 Fed. Reg. 15,089 (Mar. 7, 1980). Thus, from the beginning, the Commission has considered "mak[ing] a finding of no reason to believe" as both explicitly *final* agency action and action requiring public disclosure.

adjudication, FOIA Statement), and further supporting 45Committee's arguments regarding finality, Dkt. No. 20-3. Again, if this Court has any doubt about whether MUR 7486 is one of the eight concluded enforcement matters addressed by the Statement Regarding Concluded Enforcement Matters or whether the FEC has taken a reason-to-believe vote, it can and should review the responsive records *in camera*. *See* Cross-Mot. 6 n.1. And the FEC further fails to acknowledge the weight of D.C. Circuit precedent, on which those Commissioner statements relied, treating failed reason-to-believe votes and the resultant deadlock dismissals as final. *See* Cross-Mot. 6-7; *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 785 (D.C. Cir. 2022) ("If at least four Commissioners vote yes, the Commission will investigate; otherwise, the complaint is dismissed.").

Second, turning to Supreme Court precedent, the FEC overreads *Sierra Club* and underreads *Sears*. The documents in *Sierra Club* were drafts that, in fact, left decisionmakers free to change their minds before the documents constituted or reflected any agency decision. 141 S. Ct. at 786. By contrast, the memoranda in *Sears* explained "decisions … not to file a complaint" in response to a private party's charge. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153, 155-59 (1975). That distinction drives the correct result here: The withheld vote certifications and Statement of Reasons are not drafts that can be revised or modified at will and they almost certainly reflect a failed reason-to-believe vote and the underlying reasons because they memorialize Commission actions that took place in the past. Indeed, the FEC itself does not argue the withheld records are drafts or that they do not

contain a reason-to-believe vote. Instead, the Commission contends that the *matter* as a whole "remain[s] open with the potential for deliberations and *further* decisions." FEC Reply 3 (emphasis added). Not only does that phrasing suggest the records reflect Commission decisions already made (disqualifying the documents from Exemption 5 because they cannot be predecisional to decisions already made), but its focus on the overall matter rather than the particular documents and decisions at issue confirms its fallacy. *See Sears*, 421 U.S. at 138 (emphasizing the Court's focus on "the function of the documents in issue").

Moreover, the mere *potential* for reconsideration does not un-finalize decisions already made. "The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *see Nat'l Env't Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) ("An agency action may be final even if the agency's position is subject to change' in the future. This is hardly surprising because many agency actions are subject to reconsideration." (internal citations omitted)). The FEC does not even argue that the Commissioners may modify a past reason-to-believe finding or revise their votes; rather, it contends that the Commissioners may reconsider, overturn, or replace such a finding with a new, different one. Even if that were true, that distinction again highlights the difference between the draft documents in *Sierra Club* and the decisions not to pursue enforcement in *Sears*. *See Sears*, 421 U.S. at 158 n.25 (explaining that the "possibility" of a decision being overturned "does not

affects its finality" for purposes of FOIA); Cross-Mot. 8-9 (collecting further cases). This case falls on the *Sears* side of the line.

II. EXEMPTION 5 IS INAPPLICABLE.

Even if Exemption 5 were available, FOIA exemptions must be "narrowly construed," *FBI v. Abramson*, 456 U.S. 615, 630 (1982), and the FEC has not carried its burden regarding the withholdings at issue. The records are not predecisional, deliberative, or reasonably likely to cause the agency harm in their release.

First, the FEC does not dispute that the withheld documents reflect past Commissioner decisions and their reasons for those decisions; rather, it merely disputes finality and argues that "further decisions" may come. FEC Reply 3. But "[t]he deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The redacted vote certifications reflect that "the Commission took the following actions," not what Commissioners deliberated. Dkt. No. 1-2 at 4; FOIA Statement 3 ("The vote certifications merely record Commission decisions."). The purely factual information regarding the Commission's deadlock decision not to defend another lawsuit that the FEC has released confirms as much. Dkt. No. 1-2 at 5. And the Statement of Reasons, whose author supports its release, reflects the reasons given by the controlling bloc for one of those votes. FOIA Statement 3.

Moreover, a record is predecisional only if it was "prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made." *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). The FEC makes no such argument about the withholdings here, instead relying on "the potential for deliberations and further decisions" and "different results." FEC Reply 3, 7.[2] Such generalized speculation does not meet the government's burden regarding the specific documents in issue. *See CREW v. DOJ*, No. 21-5113, 2022 WL 3569241, at *5-6 (D.C. Cir. Aug. 19, 2022). Indeed, those characterizations (*further* decisions and different *results*) highlight the decisional character of the vote records and Statement of Reasons here. Multimember agency votes cannot "reflect the agency's group thinking" such that they automatically qualify for withholding, as the FEC appears to argue. FEC Reply 8 (quoting *Sears*, 421 U.S. at 153). Otherwise, FOIA's disclosure requirement for such agency votes would become a dead letter. 5 U.S.C. § 552(a)(5). The records here simply reflect "actions" resulting from votes, and the reasons for those votes. Dkt. No. 1-2 at 4; *see* Dkt. No. 18-2 ("*Vaughn* Index"). As explained in cases the FEC's brief ignores, such minutes, votes, and supporting reasons are not predecisional. Mot. 9-11.

[2] While the FEC notes that it has not yet made public its actions on MUR No. 7486 or notified 45Committee of having closed the matter, FEC Reply 3, that does not show that any substantive action remains. Rather, it merely confirms that three Commissioners are refusing to close the file, thereby preventing the FEC from disclosing its "actions." Dkt. 1-2 at 4. That refusal provides no basis for continued unlawful concealment of the records in issue.

Second, the FEC similarly continues to inadequately explain the deliberative nature of the withheld records here. Tellingly, the FEC does not claim that these documents do play, did play, or will play any specific role in any deliberative process; instead, at most, the Commission asserts that these kinds of documents "can play" a deliberative role, "potentially." FEC Reply 7. Aside from the irrelevance of that thought experiment to the Court's inquiry as to whether these specific documents reflect deliberation, it is also incorrect on its own terms. If the rule were just that a past document or past decision might play a role helping decisionmakers reach further decisions, then the government could withhold virtually any document or decision, thereby defeating FOIA's "basic policy that disclosure, not secrecy is the dominant objective of the Act." *CREW*, 2022 WL 3569241, at *2 (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). In the end, there is no indication—and the FEC has offered no evidence—that any further deliberation or action on MUR 7486 is a realistic possibility, let alone that these purely factual documents would play any role in that hypothetical.

And the FEC's continued reliance on *Khatchadourian* for its arguments about the deliberative element is misplaced. *See* FEC Reply 7 (quoting *Khatchadourian v. Def. Intel. Agency*, No. 16-cv-311, 2022 WL 971206, at *10 (D.D.C. Mar. 31, 2022)). That case actually proves Plaintiff's point. *Khatchadourian* involved several categories of documents the court found deliberative, but none of them is comparable to vote records or a decisionmaker's explanation of their vote. 2022 WL 971206, at *11. Those categories included documents from subordinates to superior offices

"updating" and presenting "assessments" and "interim assessments." *Id.* Others included records reflecting "interim assessments" or requesting "further information," responding to the same, and "draft talking points." *Id.* Crucially, the *Khatchadourian* court emphasized that the documents at issue there "went from subordinate officers, who lack decisionmaking authority, to superiors." *Id.* at *12. The opposite is true here, because the withheld materials reflect the "actions" taken by "the Commission" itself and the reasoning for taking those actions as explained by the Commission's Vice Chair. Dkt. 1-2 at 4; *see Vaughn* Index.[3]

Third, the FEC's belated attempt to bolster its litigation counsel's generalized assertions about foreseeable harm also falls short of the agency's burden. To begin, "[t]he significance of agency affidavits in a FOIA case cannot be underestimated," *King v. DOJ*, 830 F.2d 210, 218 (D.C. Cir. 1987), yet the FEC's lone declaration makes no mention of harm. *See* Dkt. No. 18-1. Nor does its *Vaughn* Index. *See Nat'l Sec. Couns. v. CIA*, 960 F. Supp. 2d 101, 188 (D.D.C. 2013) (explaining the need for detail in the agency's declaration and index).

And even if the Court were to consider the arguments of litigation counsel regarding foreseeable harm, unsupported by an agency affidavit, they too come up short. The Commission's continued reliance on cases about draft documents remains

[3] The FEC's argument that the Statement of Reasons "has even clearer potential to alter the course of the deliberative process," FEC Reply 8, is belied by the fact that the statement's author has said that the withholdings here "are neither predecisional nor deliberative" and that 45Committee "deserve[s] to prevail under the law." Dkt. No. 20-2 at 1. The author also placed the Statement of Reasons in the matter file.

inapposite here where the withheld materials memorialize past actions, past decisions, and reasons therefore. As explained by three Commissioners, releasing their votes and Statement of Reasons in no way threatens their ability or that of their staff to candidly communicate among themselves. Mot. 13-14.[4] And here, any potential for public confusion is caused by the Commission's concealment of its past actions, rather than by their disclosure. At bottom, the Commission continues to offer only conclusory, generalized statements about foreseeable harm, not the "thoroughgoing and detailed pages of explanation as to the importance and deliberative value of the specific information in those records in the particular decisional context in which they arose, as well as the precise damage to the relevant agency operations that would result from their release." *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 371-72 (D.C. Cir. 2021).

CONCLUSION

The Court should deny the FEC's motion for summary judgment, grant Plaintiff's cross-motion, and order the FEC to disclose the responsive records.

[4] The single-Commissioner statement cited for the first time in the FEC's opposition does not address MUR 7486 or even FOIA at all, and as such has no bearing on whether the agency has met its foreseeable harm burden as to these specific documents. *See* FEC Reply 10. Even if it did, that statement's arguments about the finality of reason-to-believe votes fail for the reasons Plaintiff has explained.

Dated: August 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2022, I electronically transmitted the foregoing document to the Clerk's Office using the Court's CM/ECF System for filing and distribution to all registered participants of the CM/ECF System, which will serve all counsel of record.

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