UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 22-35 (CRC) OPPOSITION TO MOTION TO COMPEL

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

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The Federal Election Commission ("FEC" or "Commission") opposes plaintiff Citizens for Responsibility and Ethics in Washington's ("CREW") Motion to Compel defendant Federal Election Commission to Produce the Administrative Record and Respond to Requests for Production ("Motion" or "Mot."). (Doc. No. 6). Plaintiff, an experienced litigant in 52 U.S.C. 30109(a)(8) actions against the Commission, seeks to upend the well-established protocol for compiling a record on which to evaluate the Commission's disposition of an enforcement matter. Plaintiff's motion aims to subject the FEC to ordinary discovery through requests for production of documents, which are inappropriate in an administrative review case where the agency has provided the opposing party the relevant administrative record. Further, plaintiff pursues disclosure of all documents reflecting the nature and basis for the FEC Commissioners' deliberations and voting on the underlying Matter Under Review ("MUR"). Any such documents are protected under the deliberative process privilege, attorney-client privilege, and work-product doctrine, and indeed, do not constitute part of the administrative record and are not discoverable. Because the Commission has supplied plaintiff with the full administrative record, and because plaintiff does not attempt to demonstrate extraordinary need for further discovery, the Court should deny the motion to compel.

BACKGROUND

I. THE FEC AND ITS ADMINISTRATIVE ENFORCEMENT PROCEDURES

The FEC is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 ("FECA" or the "Act"). *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52

U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (per curiam). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 30109(a)(6).

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the statute. 52 U.S.C. § 30109(a)(1). Absent waiver, proceedings on such complaints are covered by confidentiality protections, 52 U.S.C. § 30109(a)(12), 11 C.F.R. § 111.21, until the Commission "terminates its proceedings," 11 C.F.R. § 111.20. Upon receipt of an administrative complaint, the Commission's Office of General Counsel ("OGC") is required to notify anyone alleged to have committed such a violation, referred to as a respondent, and to provide such persons with an opportunity to demonstrate in writing that no action should be taken. *Id*. OGC then prepares a report to the Commission known as a General Counsel's Report. The Report analyzes the allegations in the complaint, applies the relevant law to the facts alleged, and sets forth the OGC's recommendations for Commission action. The first General Counsel's Report in an enforcement MUR usually includes a recommendation that the Commission take actions regarding the alleged violations, including most commonly: (1) find reason to believe that a violation occurred and open an investigation; (2) find no reason to believe a violation occurred; (3) dismiss the matter as an exercise of prosecutorial discretion; or (4) dismiss the matter with a cautionary message to the respondent regarding its legal obligations. And FEC votes at this stage are frequently, although not always, on whether to take one or more of these courses of action. *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007).

Generally, if one or more Commissioners objects to a first General Counsel's Report after it has been circulated to the Commission, or if fewer than four Commissioners vote to approve or reject the report's recommendations by the voting deadline, the Commission considers the enforcement matter at an Executive Session. *See generally* FEC, Commission Directive No. 52 (Circulation Vote Proc.) (effective Dec. 1, 2016). Executive Sessions are meetings that are closed to the public during which Commissioners consider pending enforcement matters and other items that must be kept confidential. *See* 11 C.F.R. § 2.4. During such meetings, the Commissioners may, *inter alia*, discuss OGC's recommendations and vote on potential actions like those described above, including whether there is "reason to believe" that a FECA violation has occurred. 52 U.S.C. § 30109(a)(2).

If at least four members of the Commission vote to find "reason to believe" a FECA violation has occurred, the Commission must notify the respondent of the alleged violation and its factual basis, and the agency then ordinarily investigates the allegations. *Id.* On the other hand, if at least four Commissioners determine that there is "no reason to believe" a violation occurred and so it is not appropriate to proceed with an investigation, the file in the matter may be closed. Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546.

After an investigation, OGC may recommend that the Commission find that there is "probable cause" to believe FECA has been violated. 52 U.S.C. § 30109(a)(3). Respondents are entitled to file a responsive brief, *id*., and OGC prepares a report to the Commission with further recommendations, 11 C.F.R. § 111.16. If at least four members of the Commission vote to find probable cause to believe that a violation has occurred, the Commission must first attempt to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter

into a conciliation agreement" with the respondents. 52 U.S.C. § 30109(a)(4)(A)(i). If informal methods of conciliation fail, the Commission may, "upon an affirmative vote of 4 of its members," file a *de novo* civil enforcement suit in federal district court. *Id.* § 30109(a)(6)(A). After the termination of enforcement matters, the Commission places on the public record categories of documents integral to its decision-making process, including certifications of Commission votes. FEC, Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,703 (Aug. 2, 2016).

If the Commission dismisses an administrative enforcement matter, FECA provides that the administrative complainant may seek judicial review in this District pursuant to 52 U.S.C. § 30109(a)(8)(A). Defense of such cases may only be approved through an affirmative vote of four members of the Commission. 52 U.S.C. §§ 30106(c), 30107(a)(6). FECA expressly limits the scope of available relief to a plaintiff challenging an FEC dismissal. If a court in a review action declares that a Commission dismissal is "contrary to law," the court can order the Commission to conform to that declaration within 30 days. *Id.* § 30109(a)(8)(C). If the Commission fails to conform to the declaration within 30 days, the complainant may obtain a private right of action against the administrative respondent for the alleged violations. *Id.*; *FEC v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 488 (1985).

II. FACTUAL BACKGROUND

A. Matter Under Review 7465, Freedom Vote, Inc.

On August 8, 2018, CREW filed an administrative complaint with the FEC, designated MUR 7465, alleging Freedom Vote had violated FECA by failing to register and report as a political committee. Admin. Compl., MUR 7465, Freedom Vote, Inc. (Aug. 8. 2018), https://www.fec.gov/files/legal/murs/7465/7465_01.pdf. On July 25, 2019, the Commission

adopted by a vote of 4-0 the recommendation of the Office of General Counsel ("OGC") finding reason to believe Freedom Vote violated the Act. Cert., MUR 7465, Freedom Vote, Inc., (July 29,2019), https://www.fec.gov/files/legal/murs/7465/7465_16.pdf. The Office of General Counsel proceeded with an investigation of the allegations of plaintiff's administrative complaint and compiled a record of various materials, including formal responses of MUR respondents, business and financial documents and communications of Freedom Vote, deposition testimony, and other documents.

Based on this record and relevant factual and legal analysis, the General Counsel's Brief recommended the Commission find probable cause to believe Freedom Vote violated 52 U.S.C. §§ 30102, 30103, and 30104(a), (b), and (g)(2) by failing to organize, register, and report as a political committee. Gen. Counsel's Br., MUR 7465, Freedom Vote, Inc., (Sept. 20, 2021), https://www.fec.gov/files/legal/murs/7465/7465_27.pdf. Freedom Vote submitted a written response to the General Counsel's Brief on October 5, 2021, and the Commission held a Probable Cause Hearing on the matter on October 14, 2021.

On November 9, 2021, the Commission considered a motion to find probable cause that Freedom Vote violated the relevant provisions of FECA, which failed by a 3-3 vote, having not garnered four necessary votes in the affirmative. Cert, MUR 7465, Freedom Vote, Inc., (Nov. 9, 2021), https://www.fec.gov/files/legal/murs/7465/7465_33.pdf. Commissioners Broussard, Walther, and Weintraub voted affirmatively for the motion, while Commissioners Cooksey, Dickerson, and Trainor opposed. *Id*. That same day, the Commission held a vote on whether to dismiss the matter pursuant to the Commission's prosecutorial discretion pursuant to *Heckler v. Chaney*. This motion similarly garnered a 3-3 vote and did not pass. *Id*. Commissioners Cooksey, Dickerson, and Trainor voted in the affirmative, while Commissioners Broussard,

Walther, and Weintraub opposed. Finally, the Commission voted 4-1 to close the file. *Id.* Commissioners Broussard, Cooksey, Dickerson, and Trainor voted affirmatively for closure; Commissioner Weintraub opposed and then-Commissioner Walther abstained. *Id.* The Commission sent appropriate letters to CREW, the administrative complainant, and respondents notifying those parties of the MUR's disposition and file closure.

B. The Current Lawsuit

On January 6, 2022, Citizens for Responsibility and Ethics in Washington filed this action alleging the Commission's dismissal of the administrative complaint in MUR 7465 was contrary to law. (Doc. No. 1). When the Commission considered whether to authorize defense of this case as required by statute, the vote for such authorization did not receive the required four affirmative votes and failed. Cert., CREW v. FEC, No. 22-35 (Feb. 15, 2022), https://www.fec.gov/resources/cms-content/documents/fec_cert_02-18-2022.pdf; 52 U.S.C. §§ 30106(c), 30107(a)(6). The Clerk entered an Entry of Default on March 29, 2022. (Default, Mar. 29, 2022 (Doc. No. 5).) Shortly thereafter, CREW propounded on the FEC requests for production of documents ("RFPs") on April 20, 2022, and filed a motion to compel the FEC to produce the administrative record and respond to the previously issued requests for production on June 8, 2022. (Mot. to Compel, Jun 8, 2022 (Doc. No. 6); (Doc. No. 6-1).)

As indicated in the parties' November 13, 2023, Consent Motion, and later in the November 9, 2023, Certification released on January 12, 2024, FEC counsel was authorized to appear for the limited purpose of producing the administrative record and agreed with CREW to do so by December 12. (Mot. to Set Schedule and Extend Time, Nov. 13, 2023 (Doc. No. 13).) The Commission compiled and certified the administrative record, filed the certified list of its contents, and commenced supplying plaintiff with the record materials on that date. Due to

issues transmitting produced materials with unexpectedly high file sizes, the Commission completed delivery of the administrative record materials to CREW as quickly as practicable on December 13, 2023.

The parties conferred after CREW's counsel reviewed the then-1,847-page administrative record. As reflected in the December 15th Joint Status Report, two issues remained despite the parties' good-faith efforts to resolve CREW's objections to the record. (Joint Status Rept. (Doc. No. 16).) Thus, CREW elected to continue to pursue the instant motion to compel only as to two sets of documents:

- "Records the FEC received from Freedom Vote in the course of the FEC's investigation of MUR 7465, bearing bates stamps starting at FV01207 and up to at least FV01561,
- Documents, other than the certified votes and post-hoc explanations, reflecting the Commissioners' discussion of and rationale for voting to find reason to believe in July 2019, and its deadlocked votes on probable cause and prosecutorial discretion in November 2021, including any records of the meetings at which those votes were taken"

(*Id.*). CREW seeks this first set of documents as a continuation of its RFP Request 3 and seeks this second set of documents under its RFP Request 4.

As to the MUR respondent production documents, FEC counsel pointed out to CREW that it could obtain such materials through a Freedom of Information Act request specifically for any additional records produced by Freedom Vote records that were not part of the administrative record because they had not been before the agency decisionmakers. CREW declined to agree to utilize this route to resolve the dispute in advance of the status report deadline but later filed such a request nevertheless. Additionally, the Commission indicated its position that any documents reflecting the Commissioners' discussion of and rationale for the

three relevant votes are privileged and not subject to disclosure as part of the administrative record or through discovery. CREW insisting otherwise, the parties agreed on the briefing schedule this Court later approved in its December 19th Minute Order.

In response to plaintiff's FOIA request, the Commission supplied CREW with 397 pages of additional documents from MUR respondent Freedom Vote. That included 42 pages at the beginning of Freedom Vote's production to the Commission, labeled FV00001 through FV00042, in addition to the pages CREW identified in the Joint Status Report, labeled FV01207 through FV01561. The FEC received these records in response to written requests for production in the enforcement matter investigation. These documents were not included initially in the administrative record because they had not been made electronically available to agency decisionmakers, the Commissioners. Because that omission appears, however, to have been due to ministerial error and because agency staff relied on these documents, to narrow the area of dispute in this motion the FEC agreed to stipulate to their inclusion in the administrative record. (Stipulation and Joint Motion (Doc. Nos. 18-19).) The Commission and CREW entered into a stipulation to that effect, providing for the Bates-stamping of the records and filing of a revised certified list of the administrative record's contents. (*Id.*) For these reasons, plaintiff CREW no longer pursues the first component of the instant motion to compel—additional pages of the MUR respondent's production. The parties continue to dispute whether the FEC must provide CREW with documents reflecting Commissioners' discussions of and rationale for votes on its reason to believe, probable cause, and prosecutorial discretion determinations.[1]

[1] The Commission authorized the Office of General Counsel to oppose plaintiff's instant motion to compel. Cert, CREW v. FEC, Civ. No. 22-35 (Nov. 9, 2023), https://www.fec.gov/resources/cms-content/documents/fec-certification-11-09-2023.pdf. On January 9, 2024, the Commission again considered general defense authorization in this case, which, by a 3-3 vote, it did not determine to authorize. Cert., CREW v. FEC, Civ. No. 22-35

ARGUMENT

I. CREW'S DISCOVERY REQUESTS ARE INAPPROPRIATE WHERE THE COMMISSION HAS PROVIDED THE ADMINISTRATIVE RECORD

A. Requests for Production are Unnecessary in Administrative Review Cases, as the Agency Must Already Provide the Full Administrative Record

The APA provides that judicial review shall be based on the "whole record" before the agency. 5 U.S.C. § 706. The "whole record" signifies "the full administrative record" before the agency at the time it made its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Challenges to agency decisions, such as this one under 52 U.S.C. § 30109(a)(8), must be decided based only on the administrative record compiled by the agency. 5 U.S.C. § 706; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (in an APA case, the court reviewing the agency action must judge the propriety of that action solely by the grounds invoked by that agency, considering consider only the materials before the agency when it made its decision).

"[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The complete administrative record "before the agency" includes all documents and materials "directly or indirectly" considered by agency decisionmakers. *Pac. Shores Subdivision Cal. Water Dist. v. United States Army Corps of Eng'rs*, 448 F.Supp.2d 1, 4 (D.D.C.2006); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (citing *Lloyd v. Illinois Regional Transp. Authority*, 548 F.Supp. 575, 590

(Jan. 10, 2024), https://www.fec.gov/resources/cms-content/documents/fec-certification-01-10-2024.pdf; *see also* Statement of Commissioner Dara Lindenbaum Concerning the Defense Authorization in *CREW v. FEC*, Civ. No. 22-35 (CRC) (D.D.C.) (Jan. 11, 2024), https://www.fec.gov/resources/cms-content/documents/Statement-of-DL-in-CREW-v-FEC-1-11-24-FINAL.pdf.

(N.D.Ill.1982); *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299, 317 (D.Del.1979)). "[C]ourts in this circuit have directed agencies to collect those materials 'that were compiled by the agency that were before the agency at the time the decision was made." *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196 (D.D.C. 2005) (quoting *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)); *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (it is "black-letter administrative law" that a reviewing court must have before it "neither more nor less information than did the agency when it made its decision"); *see also Am. First Legal Found. v. Cardona*, 630 F. Supp. 3d 170, 178 (D.D.C. 2022); *Chiayu Chang v. U.S. Cit. & Imm. Servs.*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017).

Accordingly, "[i]n a suit under the APA, discovery rights are significantly limited." *Sharkey v. Quarantillo*, 541 F.3d 75, 92 n.15 (2d Cir. 2008). This is because the administrative record alone supplies the materials necessary for the challengers to make their case and the reviewing court to perform its task, "hav[ing] before [them] neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). Permitting plaintiff discovery beyond the administrative record is unnecessary and contrary to well-established administrative law principles.

It is the province of the agency to compile and submit the administrative record for review by the court. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). Once an agency presents a certified copy of the complete administrative record to the court, the court presumes that the record is properly designated. *Pac. Shores*, 448 F. Supp. 2d at 5 (D.D.C. 2006). Common sense dictates that the agency determines what constitutes the "whole" administrative record because "[i]t is the agency that did the 'considering,' and that therefore is in a position to indicate initially which of the materials were 'before' it—namely, were 'directly

or indirectly considered.'" *Id*. (citing *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (D.D.C. 2003). Thus, "deference is due to the agency's judgment as to what constitutes the whole administrative record." *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012).

"Supplementation of the administrative record is the exception, not the rule." *Pac. Shores*, 448 F. Supp. 2d at 5 (quoting *Motor & Equip. Mfrs. Assn. Inc. v. EPA*, 627 F.2d 1095, 1105 (D.C.Cir.1979)). "Discovery or supplementation of the administrative record is therefore not permitted 'unless [a party] can demonstrate unusual circumstances justifying a departure from this general rule.'" *Am. First Legal Found.*, 630 F. Supp. 3d at 178 (quoting *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010)). This exception is limited to where the administrative record itself is so deficient as to preclude effective review. *Hill Dermaceuticals*, 709 F.3d at 47. But even where further explanation for agency action may be needed, "the preferred procedure is to remand to the agency for its amplification," not to permit discovery by the plaintiff. *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982).

B. The FEC Supplied Plaintiff with All Materials the Commission Considered by Providing the Administrative Record

The Commission produced the administrative record—consisting of 1,847 pages of materials and records—by December 13, 2023. Plaintiff's RFP Requests 1-3 are coextensive with the Commission's requirements for producing the administrative record. To resolve CREW's continuing objection on Freedom Vote documents at issue in the instant motion, the Commission released an additional 397-page supplement to the administrative record on January 16, 2024. Having found that the revised administrative record was sufficiently responsive to its request for all documents the FEC received in the course of its investigation in the MUR, CREW agreed with the Commission that it no longer seeks any additional records received during the

MUR investigation, as previously detailed in the December 15th Status Report. (*See* Stipulation and Joint Motion (Doc. Nos. 18-19).)

Plaintiff has not identified any further objections to the administrative record, apart from Commissioners' discussion of and rationale for relevant votes under RFP Request 4 (addressed in Part II, *infra*). The administrative record as provided included all documents in the FEC's file, including all publicly available records and additional nonpublic records considered by the Commission in MUR 7465, and all existing communications regarding MUR 7465 between the FEC and other persons or entities, including the deposition transcript of James S. Nathanson. As a result, any nonprivileged documents, records, or materials responsive to its remaining RFPs have already been supplied. Plaintiff, having the administrative record in its possession, has not argued that this Court should compel further responses to its RFP Requests 1-3. Accordingly, as to the first issue raised in the Joint Status Report, documents produced to the Commission by Freedom Vote, CREW has withdrawn its motion to compel and the Court need not address it.

In *Pac. Shores*, this Court found that the "sheer volume and complexity" of the administrative record, consisting of 1,593 pages of materials consisting of reports, correspondence, studies, and analyses, "suggest[ed] it [was] complete." 448 F. Supp. at 7. The FEC here has provided CREW with 2,244 pages in this administrative record of various records, reports, analyses, correspondence, etc. While its volume is not dispositive, it certainly indicates the Commission has provided a record that does not reflect "such [a] failure to explain administrative action as to frustrate effective judicial review." *Camp*, 411 U.S. at 142-43; *see also Hill Dermaceuticals*, 709 F.3d at 47. "The [agency] is not obligated to include every potentially relevant document existing within its agency. Only those documents that were directly or indirectly considered by the [agency's] decisionmaker(s) should be included in the

administrative record." *Pac Shores*, 448 F. Supp. at 7 (citing *Fund for Animals v. Williams*, 245 F. Supp 2d. 49, 57 (D.D.C. 2003)). That is what the FEC has done here; further discovery is unwarranted.

II. MATERIALS CONCERNING THE COMMISSION'S DETERMINATION ARE PRIVILEGED AND NOT PART OF THE ADMINISTRATIVE RECORD

Plaintiff CREW specifically requests at this juncture "[d]ocuments, other than the certified votes and post-hoc explanations, reflecting the Commissioners' discussion of and rationale for voting to find reason to believe in July 2019, and its deadlocked votes on probable cause and prosecutorial discretion in November 2021, including any records of the meetings at which those votes were taken." (Joint Status Rept. at 2 (Doc. No. 16)). The categories of documents responsive to this request include executive-session recordings, draft statements of reasons, and communications regarding planned votes and draft statements of reasons. As explained further below, however, the administrative record entails only all *nonprivileged* documents which the agency considered in taking the challenged action.

A. The Deliberative Process Privilege Prevents Disclosure of the Documents CREW Seeks

Any documents meeting plaintiff's description are protected by the deliberative process privilege and are thus not subject to production as part of the administrative record or otherwise. "A complete administrative record . . . does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege." *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008). Specifically, the deliberative process privilege shields from disclosure recommendations and deliberations that comprise part of a process by which governmental decisions and policies are formulated. *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 266 (2021). The D.C. Circuit has held that deliberative documents "are not a part of the administrative record to begin with," are

not discoverable, and "do not need to be logged as withheld from the administrative record." *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019). "On arbitrary and capricious review . . . 'agency deliberations not part of the record are deemed immaterial.'" *Id*. (citing *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998)). And because predecisional documents are "immaterial," they are not "discoverable" under Fed. R. Civ. P. 26(b). *Id*.

The deliberative process privilege exists to promotes free communications within an agency, providing decisionmakers with uninhibited recommendations, and to "protect against premature disclosure of proposed policies before they have been finally formulated or adopted" by the agency. *Judicial Watch v. Dep't of Justice*, 20 F.4th 49, 54 (D.C. Cir. 2021) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). The privilege "protect[s] against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Judicial Watch*, 20 F.4th at 54. As the Supreme Court has articulated, the "deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front-page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (internal citations and quotations omitted). To be protected by the deliberative process privilege, a document must be both "predecisional" and "deliberative." *Khatchadourian v. Defense Intel. Agency*, 597 F. Supp. 3d. 96, 115 (D.D.C. 2022). Withholding "communications within and among the FEC" including "documents . . . reflecting Commissioner's discussion of and rationale for vot[es]" that plaintiff

seeks was permissible based on this privilege. (Plf. CREW's First Request for Production of Documents at 7 (Doc. No. 6-1)); (Joint Status Rept. at 2 (Doc. No. 16)).

1. Commission Pre-Vote Discussions Are Not Settled, Final Decisions

A record is predecisional if it was "generated before the adoption of an agency policy[.]" *Khatchadourian*, 597 F. Supp. 3d. at 115. In this regard, a "record generated after one decision can be the basis of another, future decision." *Id.* "Whether a record is predecisional depends on a record's context relative to particular agency decisions or series of decisions." *Id.* (citing *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 61 (D.D.C. 2014)). "A document is not final solely because nothing else follows it. . . . What matters, then, is not whether a document is last in line, but whether it communicates a policy on which the agency has settled." *U.S. Fish & Wildlife Service*, 592 U.S. at 268. A "document that leaves agency decisionmakers 'free to change their minds' does not reflect the agency's final decision." *Id*. (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 189-90 & n.26 (1975)).

Here, documents reflecting Commissioners' discussions and rationale on reason to believe, probable cause, and prosecutorial discretion determinations at executive sessions or meetings do not reflect final agency decisions. Any such discussions do not "communicate a policy on which the agency has settled," they are merely discussions that help the Commission settle on and later communicate an action. *U.S. Fish & Wildlife Service*, 592 U.S. at 268. Accordingly, because these discussions themselves do not convey a policy, Commissioners are "free to change their minds." *Id*. at 269. The Commission does not treat documents reflecting its discussions and rationale for votes that have not yet occurred as its "final view on the matter." *Id*. at 268. Indeed, the Commission makes subsequent vote certifications—which the Commission releases as a matter of course once a MUR is closed or where the Commission affirmatively

waives privilege prior to a MUR's conclusion—publicly available under the agency's 2016 disclosure policy. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. at 50703. Commissioners also release statements of reasons—formal articulations of their decisions and underlying reasoning—for their final positions. And apart from being accessible on the FEC's website, the three relevant vote certifications and Commissioners' statements of reasons were produced in the administrative record here. (*See* Def. FEC's Certified List (Doc. No. 15-1)).

2. Commission Pre-Vote Discussions Reflect Give-and-Take of the FEC Enforcement's Consultative Process

A record is deliberative if it reflects "the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866; *Khatchadourian*, 597 F. Supp. 3d. at 115. This standard encompasses "recommendations" and other documents that would "inaccurately reflect or prematurely disclose" the agency's views. *Id*. To show that a record meets this requirement, an agency accordingly must establish: (1) the deliberative process was involved; (2) the role the document played in the course of the deliberative process; and (3) the nature of the decision-making authority vested in the office or person issuing the records, along with where the parties to the documents sit in the chain of command. *Id*. at 11. The application of the privilege depends upon the role the document plays in the administrative process. *Judicial Watch*, 20 F.4th at 55. Documents are deliberative if they "reflect [the] agency's group thinking in the process of working out its policy and determining what its law shall be." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 153 (1975).

Any documents reflecting the Commission's discussions of and rationale for the three relevant MUR votes reflect the ongoing "give-and-take" and "group thinking" of the FEC's enforcement process built on consultation among the Commissioners and between the

Commissioners and FEC staff. *Sears, Roebuck & Co.,* 421 U.S. at 150; *Coastal States*, 617 F.2d at 866; *Khatchadourian*, 597 F. Supp. 3d. at 115. The very purpose of the Commission's executive sessions and other predecisional discussion is to deliberate. And the documents plaintiff seeks directly reflect that deliberative process by those ultimately charged with final decision-making authority. While a MUR file is open and under consideration, FEC Commissioners often develop and alter their positions as to the allegations at issue. This deliberative process can encompass FEC staff recommendations, discussion among Commissioners, initial votes, further instructions to staff that may lead to the development of new argument or evidence, additional discussion and deliberations, and later rounds of votes. During this process, Commissioners remain free to reconsider previous determinations and to "change their minds." *U.S. Fish & Wildlife Service*, 592 U.S. at 268. It is not until Commissioners, as ultimate decisionmakers, memorialize their views into a final vote that it becomes concrete, final agency action capable of meaningful review.

This is for good reason. "[E]xcluding deliberative materials from the administrative record[] has two distinct purposes. First, . . . it reflects that it is the agency's articulated justification for its decision that is at issue; the private motives of agency officials are immaterial . . . . Second, [it] advances the functional goal of encouraging the free flow of ideas within agencies, with agency employees not inhibited by the prospect of judicial review of their notes and internal communications." *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 305, 312 (S.D.N.Y. 2012) (citing *In re Subpoena Duces Tecum*, 156 F.3d at 1279; *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n,* 789 F.2d 26, 44–45 (D.C.Cir.1986)). The position CREW urges here could undermine the agency's deliberative process. Revealing piece-by-piece agency deliberations would risk public confusion resulting from the release of non-final

agency determinations that the Commission never articulated as justification or reasoning for its ultimate action. Furthermore, disclosure of such discussion risks stifling the collaborative nature of Commission decision-making in its enforcement process, hindering the ability of Commissioners to develop their views and attempt to reach consensus. Disclosure of preliminary "discussion of and rationale for" relevant votes, as plaintiff terms it, runs the risk of locking in decisions prior to deliberating, limiting the Commission's opportunity to engage in give and take necessary for the effective operation of government.

Accordingly, the materials CREW seeks meet the standards for invoking deliberative process privilege that this Court articulated in *Khatchadourian*. 597 F. Supp. 3d. 96. The Commission engaged in a detailed, lengthy process to evaluate the allegations raised in MUR 7465. That process required extensive deliberation between Commissioners to finalize their positions on reason to believe, probable cause, and prosecutorial discretion determinations. FEC Commissioners finalized their positions, articulated them in votes that were certified and made public, and explained their determinations in statements of reasons. Compelling disclosure of preliminary discussions or communications is unnecessary, and moreover, would be harmful to the consultative decision-making process the agency employs in enforcement matters. As such, this Court should deny the motion to compel as to CREW's second objection raised in the December 15th Status Report and RFP Request 4.

B. The Attorney-Client Privilege and Work Product Doctrine Prevent Disclosure of the Documents CREW Seeks

Plaintiff CREW expressly seeks documents reflecting only Commissioners' discussion of and rationale for relevant MUR votes. However, several topics that would be addressed in these documents invade the realm of protected information in the attorney-client relationship between FEC Commissioners and counsel. Thus, documents meeting plaintiff's description are also

protected by the attorney-client privilege and work product doctrine and are thus not subject to production as part of the administrative record or otherwise.

To establish that the attorney-client privilege applies to documents, an agency must show that (1) the information in the documents was communicated to or by an attorney as part of a professional relationship, (2) the information is confidential, and (3) the communication is based on confidential information provided by the client. *See Cabezas v. FBI*, Civ. No. 19-0145, 2022 WL 898789, at *8 (D.D.C. Mar. 28, 2022) (citing *Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 253–54 (D.C. Cir. 1977); *Pub. Citizen, Inc. v. U.S. Dep't of Educ.*, 388 F. Supp. 3d 29, 40 (D.D.C. 2019)). The privilege applies to testimony as well as documents. *See Sea Tow Int'l, Inc. v. Pontin*, 246 F.R.D. 421, 427 (E.D.N.Y. 2007).

The attorney work-product doctrine protects the mental impressions of attorneys and affords them "a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). "Opinion work product, such as that would disclose the mental impressions, conclusions, opinions, or legal theories of an attorney, may be reflected in interviews, statements, memoranda, correspondence, and countless other tangible and intangible ways." *See Disability Rts. Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 143 (D.D.C. 2007) (citing *Hickman*, 329 U.S. at 511; *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 619 (D.C.Cir.1997)). "[W]hile the work product privilege as set out in the Federal Rules of Civil Procedure speaks of a document, it unquestionably also prohibits the exploration of the lawyer's thoughts, opinions and mental impressions even if they have not taken tactile form." *Chang v. United States*, Civ. No. 02-2010, 2012 WL 28257, at *5 (D.D.C. Jan. 5, 2012) (citing *Alexander v. FBI*, 192 F.R.D. 12, 17 (D.D.C. 2000); *Neese v. Pittman*, 202 F.R.D. 344, 356 (D.D.C. 2001)).

Here, the principal material responsive to plaintiff's request for "Commissioners' discussion of and rationale for" reason to believe, probable cause, and prosecutorial discretion votes are executive-session recordings. Discussions at executive session meetings consist of communications between FEC Commissioners and the FEC's Office of General Counsel ("OGC"). These are not simply intra-Commissioner deliberations but also discussions with agency counsel occurring in anticipation of litigation. Much of the discussion Commissioners engage in at executive sessions may be directed to both other Commissioners and counsel simultaneously. Thus, attorney-client communications are so intertwined with Commissioner deliberations that it would not be possible to separate discussions Commissioners have with counsel.

In their evaluation of MURs at several stages of the process, FEC Commissioners regularly rely on counsel's oral and written communications. Commissioners also have extensive discussions about that advice with OGC and each other at executive sessions where MURs are discussed. Commissioners rely on that advice in their voting, their deliberations, and their statements of reasons. And here, Plaintiff specifically seeks documents reflecting the reasons for Commissioners' voting and plans for future action. The topics plaintiff seeks plainly cover the "mental impressions, conclusions, opinions, or legal theories of an attorney." *Disability Rts. Council*, 242 F.R.D. at 143. And compelling production of any such discussions would further undermine the Commission's deliberative process and its ability to engage in detailed consultation with its attorneys.

Accordingly, plaintiff's request for documents in the Joint Status Report in dispute in this motion not only targets FEC Commissioner deliberations preceding final agency action but also

protected communications between FEC Commissioners and the Commission's counsel. The motion to compel should be denied on this basis as well.

CONCLUSION

The FEC provided CREW with the complete administrative record for MUR 7465, rendering ordinary requests for production of documents redundant and unnecessary. It likewise properly excluded from the record documents reflecting Commissioners' discussion of and rationale for key votes in the enforcement matter that are protected by privilege. For the foregoing reasons, the Court should deny CREW's Motion to Compel.

Respectfully submitted,

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January 22, 2024

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2024, I served on the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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