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FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 23-06-A1
AGENDA ITEM
For meeting of April 19, 2023

TO: The Commission
The Office of the Commission Secretary

FROM: Allen Dickerson *AD*
Commissioner

DATE: April 10, 2023

RE: Press Office Acknowledgment of Complaints

The Federal Election Campaign Act of 1971, as amended (the “Act”), provides that “[a]ny notification or investigation made” under its enforcement authority “shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.” 52 U.S.C. § 30109(a)(12)(A). The Commission’s regulations interpret this language to include a “complaint filed with the Commission.” 11 C.F.R. § 111.21(a).

Nevertheless, the Commission’s Press Office has reportedly had a consistent practice, dating to the agency’s creation, of confirming the existence of complaints in response to press inquiries. Despite having been made aware of this practice at least sixteen years ago, the Commission has failed to provide the Press Office with formal instructions concerning its confidentiality obligations under the Act.

Accordingly, I propose that the Commission, consistent with its regulations and legal advice provided to the Commission by the Office of General Counsel on September 22, 2006, direct that the Press Office decline to confirm or deny the filing of any complaint in response to future inquiries.

I ask that the Chair place this item on the next meeting agenda.





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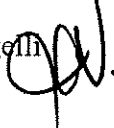
September 22, 2006

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton 
General Counsel

Thomasenia P. Duncan 
Associate General Counsel

John Vergelli 
Attorney

SUBJECT: Press Office acknowledgment of complaints

Question

You asked for an opinion as to whether the Press Office, in response to inquiries from outside the FEC, should acknowledge that a complaint has been filed. As discussed below, our conclusion is that they should not.

Background

We understand that the Press Office receives several inquiries per week from outside the agency about whether a complaint has been filed. The Press Office asks the inquirer to supply the names of the purported complainant and respondents(s). This request for specificity is aimed at discouraging "fishing expeditions." If the inquirer can supply the names, Press will contact Docket as to whether a complaint that matches that description has been filed. If there is such a complaint, Press will acknowledge to the inquirer the filing of the complaint. The Press Office does not seek the permission of the respondent(s) before doing so.

Law

Section 437g(a)(12) provides, “Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.”

This provision was added to the Act in 1974. Pub. L. 93-443, § 208(a) (Oct. 15, 1974). The language originated in the House version of the bill (H.R. 16090). The legislative history includes the following sentence in the House Administration Committee Report on H.R. 16090: “The Board may not disclose any notification or investigation unless it receives written permission to do so by the person notified or under investigation.” House. Rep. No. 93-1239, 93rd Cong., 2nd Sess., July 30, 1974. (The “Board” to which the excerpt refers was replaced by the concept of the Commission later in the legislative process.)

For present purposes, the question is whether the filing of the complaint, and the ministerial act of receiving the filing, are distinct from the notification sent to the respondent and from the ensuing investigation of the complaint. The Commission’s regulation implementing section 437g(a)(12) appears to resolve any uncertainty. Section 111.21(a) of title 11 provides,

“... 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.”

Section 111.21(a) was adopted in 1980. 45 CFR 15080, 15120 (Mar. 7, 1980). The Explanation & Justification explains that this provision “... governs the Commission’s entire compliance proceeding until such time as a case is closed” *Ibid.*

In 1993 the Commission approved a Notice of Proposed Rulemaking (NPRM) addressing, among other things, the Enforcement confidentiality regulations. The ‘93 NPRM addressed a broad range of Enforcement-related subjects, including the confidentiality provisions of the Act and the regulations in the context of acknowledging the filing of a complaint. 58 F.R. at 36768. The NPRM reviewed the then-current policies for handling inquiries about complaints. It also noted, as we have, that the relevant regulation, 111.21(a), is apparently more stringent than the statute, 437g(a)(12), in that the latter could be read not to preclude acknowledgement of the filing of a complaint, while the former apparently does. *Ibid.*

The NPRM proposed revising the regulation to, among other things, "specifically permit the Commission to maintain a public file containing copies of property (*sic*)-filed complaints" The NPRM asserted that such a proposal is consistent with 437g(a)(12), citing to Congress' ultimate rejection of a proposal to include "a specific prohibition on making public '[a]ny complaint filed under this section' without the consent of 'the person who is the subject of such complaint.'" *Ibid.*, quoting from H.R. 5010, H.R. Rept. No 96-422, 96th Cong., 1st Sess., 22-23, 64(1979) (passed by the House on Sept. 10, 1979). (The rejection of this language left us with section 437g(a)(12) as we find it now.) The NPRM also included a number of related proposals that also would have "loosened" the confidentiality provisions, such allowing the Commission to reveal the procedural posture of an ongoing case to the complainant, and establishing a standard procedure for waiving the confidentiality provisions.

In a nutshell, the drafters of the '93 NPRM saw their proposed rule as doing no harm to section 437g(a)(12), while facilitating the handling of certain recurring day-to-day "sticky situations," such as handling circumstances in which a person publicly claimed to have filed a complaint, but had in fact not done so, or in which the complainant had publicized the filing of a complaint.

No action was taken on final rules because, apparently, of the controversial nature of other aspects of the proposed rulemaking.

Section 111.21(a) is arguably broader than the statute that it implements (section 437g(a)(12)) in that it calls for confidentiality of "complaints," in addition to notifications and investigations. The Commission has considered the difference in language between the statute and the regulation in a number of MURs and advisory opinions. *See* Advisory Opinion 1994-32 and MURs cited therein. In AO 1994-32, the requester wished to disclose to the press that she had filed a complaint with the Commission, and to discuss the substance of the complaint with the press. The Commission decided that she was not barred from doing so by section 437g(a)(12), opining,

The Commission in [MUR 1244] noted that the language of section 111.21 must be read in conjunction with section 437g(a)(12) and "should prohibit complainants from disclosing information about their complaints only if such disclosure also amounts to disclosure of a Commission notification or investigation." *See* MUR 1244. As support for this reasoning, language from the explanation and justification of section 111.21 was cited which states that the regulation "sets forth the confidentiality requirements of the Act." *See* *Id.* and 45 Fed.Reg. 15089 (March 7, 1980). The Commission noted that there would be difficulty in enforcing the regulation if read to extend beyond the wording of the statute and inconsistent with prior cases enforcing the statute.

Discussion/Recommendation

We recommend that Commission staff refrain from commenting publicly on matters that are in the enforcement process -- from the point that process is triggered up

to and including the closing of the matter. While there is an argument that acknowledging the Commission's receipt of a complaint does not "amount to disclosure of a Commission notification or investigation," section 111.21 appears to prohibit the Commission from publicly acknowledging the existence of a complaint. The Advisory Opinions noted above that grant dispensation to complainants to comment on the filing of their own complaints do not clearly apply to the Commission. These AOs appear to be driven, in substantial part, from an effort to interpret the Act and applicable regulations in a manner that least intrudes on the complainant's First Amendment rights. In the absence of a similar concern pertaining to the Commission, we should fulfill our obligation *to respondents* to keep confidential the entirety of the enforcement process. *See also Fedders Corporation v. FTC*, 494 F.Supp. 325, 328(1980) (complaint letters received by a law enforcement agency, though unsolicited when received, are subject to FOIA exemption 7(A) when they are compiled into the record of an ongoing investigation). Moreover, confidentiality is the thrust of the applicable provisions of the Act and regulations. There is no reason for a complainant to assume, when he or she files a complaint, that the Commission will publicly reveal the receipt of it, if asked by the media; in fact, a fair reading of our regulations would point to a contrary conclusion.

Finally, there are practical and prudential issues. First, there is an inherent unfairness in disclosing publicly the existence of some complaints but not others, based only on whether a reporter asked. Second, some complaints purport to name respondents; others do not. In OGC, where complaint intake is handled, we do not decide which parties to deem a respondent based on the captioning of the complaint or other designation by the complainant. Rather, our judgment is based on whether the allegations and reasonable inferences contained in the complaint, if true, state a potential claim under the Act and regulations. When our Press Office acknowledges receipt of a complaint pursuant to an inquiry about a particular respondent, it is making assumptions about whether a person will actually be treated as a respondent for purposes of notification. Third, our Press Office might deny the existence of a complaint in response to an inquiry, but then receive the complaint a day or two later. A denial on the public record, which may well be referred to in subsequent news reports, would have the effect of misleading the public, rather than informing it.

In sum, we recommend that we discontinue the practice of acknowledging the receipt of complaints. We think the better practice would be to decline to confirm or deny the filing of a complaint.