

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

GEOFFREY NELS FIEGER

Plaintiff,

CIVIL ACTION NO. 08-CV-14125

vs.

HON. DAVID M. LAWSON

FEDERAL ELECTION COMMISSION,

Defendant.

MICHAEL R. DEZSI (P64530)
Counsel for Plaintiff
FIEGER, FIEGER, KENNEY & JOHNSON, P.C.,
19390 W. Ten Mile Rd.
Southfield, MI 48075
(248) 355-5555

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

By and through counsel, Plaintiff respectfully requests that this Honorable Court deny Defendant Commission's motion for summary judgment in this FOIA action. In its motion for summary judgment, Defendant Commission contends that it has adequately search for documents responsive to Plaintiff's FOIA requests, and that it has produced all such responsive documents not subject to exemption. Based on the affidavits supporting the Commission's motion, Plaintiff contests not only the adequacy of the Commission's search, but also the legitimacy of the Commission's claimed exemptions.

I. Background

Plaintiff filed the instant action on September 29, 2008, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, after Defendant Federal Election Commission

(“FEC”) failed to respond to Plaintiff’s FOIA request dated July 3, 2008. In his FOIA request, Mr. Fieger sought the following documents:

1. Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between officials, agents and/or employees of the FEC and officials, agents and/or employees of the Department of Justice relating to possible violations of the Federal Election Campaign Act by the law firm of Fieger, Fieger, Kenney & Johnson, P.C., including its partners, employees, contractors, associates, and their children and spouses.
2. Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between (to/from) FEC officials, employees or agents, including former FEC Chairman Michael E. Toner, and White House officials, employees or agents, including former White House Aide Karl Rove and former White House Counsel Harriet Miers, or their agents and/or assistants, relating in any way to enforcement of federal criminal statutes, including, but not limited to, the Federal Election Campaign Act.

(**Exhibit A**, FOIA Request Dated July 3, 2008).

In an untimely response dated September 30, 2008, Defendant FEC withheld documents in response to Plaintiff’s FOIA Request No.1, and denied the existence of any documents responsive to Plaintiff’s FOIA Request No. 2 (**Exhibit B**, FEC FOIA Response Dated September 30, 2008).

On October 27, 2008, Plaintiff sent to Defendant Commission a second FOIA request, by and through his undersigned counsel, seeking documents, memoranda, correspondences, and e-mails of *communications* between White House officials and the Federal Election Commission employees and/or agents including former Commission Chairman Toner (**Exhibit C**, FOIA Request Dated October 27, 2008). By letter dated December 3, 2008, Defendant Commission exercised its right to extend its response time to Plaintiff’s FOIA request until December 17, 2008. Defendant Commission later requested an additional extension of time in which to respond to Plaintiff’s second FOIA request. Plaintiff agreed to extend the Commission’s response time until December 31, 2008;

however, at that date Defendant Commission advised Plaintiff that it was unable to comply fully with its response deadline.

On December 31, 2008, Plaintiff filed his Motion for Leave to Conduct Discovery.

On February 9, 2009, Plaintiff filed his First Amended Complaint challenging Defendant Commission's failure to timely comply with both his first and second FOIA requests.

In March 2009, Plaintiff obtained, from an unrelated case pending before the Northern District of Illinois, a privilege log indicating that the Defendant Commission had in its possession e-mails dated July 26, 2006, and authored by former Commission Chairman Michael E. Toner to Sara Taylor (Deputy Assistant to President Bush) and Thomas Josefiak relating to legislative recommendations by the Justice Department concerning the Federal Election Campaign Act (**Exhibit D**, Privilege Log produced in *Beam v. Federal Election Commission*, Case No. 07-1227 (N.D. Ill.)).

At the time of Mr. Toner's e-mail referenced in the Commission's privilege log, Sara Taylor was the Deputy Assistant to President Bush and reported directly to Karl Rove. Like Toner, Thomas Josefiak was a former Chairman of the FEC appointed by President Reagan and later served as General Counsel for the Bush Cheney '04 Campaign. At the time of Mr. Toner's e-mail, Mr. Josefiak was Chief Counsel to the Republican National Convention.

After the accidental uncovering of the Toner e-mail in question, Plaintiff supplemented his motion for discovery given that Defendant Commission had denied the existence of this e-mail in response to Plaintiff's first FOIA request. In response to Plaintiff's supplemental filings, Defendant Commission claimed that the e-mail in question was responsive to Plaintiff's second FOIA request and not his first request and thus it was properly withheld from production. This Court disagreed with Defendant Commission's contention and concluded that the Toner e-mail was indeed

responsive to Plaintiff's first FOIA request and thus should have been produced. *See* Tr. 30-31, Hearing April 16, 2009 on Plaintiff's Motion for Leave to Conduct Discovery ("The claim that the document was not responsive to the second part of the first FOIA request, I think, is very difficult to defend. I think that the document that was ultimately turned over is responsive to the first request . . .").

On June 11 and 12, 2009, Defendant Commission advised Plaintiff that it had completed its production of all non-exempt documents in response to his second FOIA request. Defendant has now moved for summary judgment claiming that it has adequately searched and produced all non-exempt documents responsive to Plaintiff's FOIA requests. In support of its motion for summary judgment, Defendant Commission offers the Declaration of Lawrence Calvert, Jr. who serves as the Chief Freedom of Information Act Officer of Defendant Commission. Also attached to its motion for summary judgment, the Commission submits its *Vaughn* Index identifying those documents, or portions of documents, withheld from production and the claimed exemption.

II. Standard of Review

A district court reviews *de novo* an agency's decisions regarding FOIA requests. 5 U.S.C. § 552(a)(4)(B); *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994). Although a district court generally reviews an agency's affidavits and *Vaughn* index to determine FOIA compliance, the Sixth Circuit has recognized that not all FOIA cases are entitled to summary disposition based on an agency's affidavits and supporting documents. "This presumption may be overcome where there is evidence of bad faith in the agency's handling of the FOIA request" or where there is "evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue." *Jones*, 41 F.3d at 242-43. Where such circumstances are present, "it would be an abdication of the court's

responsibility to treat the case in the standard way and grant summary judgment on the basis of the *Vaughn* affidavits alone. It would risk straining the public's ability to believe – not to mention the plaintiff's – that the courts are neutral arbiters of disputes whose procedures are designed to produce justice out of the clash of adversarial arguments.” *Id.*

II. Discussion and Analysis

As an initial matter, the Commission contends that Plaintiff Fieger has no standing to maintain this action because his name did not appear on the FOIA request. The Court should reject this argument. Although the undersigned counsel was the actual signatory of the FOIA requests, he did so in a representative capacity as counsel for Plaintiff Fieger. In fact, the request was submitted on the Fieger Firm letterhead and on which Mr. Fieger's name obviously appears.

Furthermore, on November 19, 2008, shortly after Plaintiff's second FOIA request, the undersigned counsel advised Commission counsel via letter that the undersigned was representing Mr. Fieger in this matter and “was representing him in a legal capacity at the time of the FOIA requests.” (**Exhibit E**). Plaintiff's First Amended Complaint also makes clear that Plaintiff's FOIA requests were made by and through his undersigned legal counsel. After receipt of the undersigned's letter to Commission counsel, Defendant Commission proceeded to process Plaintiff's FOIA requests in its usual fashion and without objection. In this regard, Defendant Commission should be estopped from now claiming that there was some sort of procedural defect which precludes Plaintiff Fieger from seeking judicial review in this matter.

Putting aside Defendant's procedural objection, the Court should deny Defendant Commission's motion for summary judgment because there are questions concerning the adequacy of the Commission's search, and because the Commission is stretching the statutory exemptions to

shield itself from producing documents which may reveal political bias and embarrassment by Commission officials.

As this Court is aware, Plaintiff has already uncovered at least one e-mail from former Commission Chairman Toner sent to both Karl Rove's top aide, Sara Taylor, and counsel to the Republican National Convention. The e-mail concerns the Justice Department's recommendations regarding the enforcement of federal campaign finance laws. Alone, this e-mail reveals at some level that political considerations were being taken into account by, at least, the former Chairman of the Federal Election Commission. The e-mail was never produced in response to Plaintiff's first FOIA request. Rather, it was accidentally uncovered through an unrelated proceeding from the Northern District of Illinois.

After having been caught withholding this document, the Commission contended that it did not fall within Plaintiff's first FOIA request. This Court has already flatly rejected such a contention. In his declaration, Chief Commission FOIA Officer Calvert attempts to explain away the fact that the agency failed to produce this e-mail. Specifically, Calvert claims that this e-mail was previously produced to Congress and listed on a privilege log, but that there was "nothing about this or any other entry on the log [that] indicated that any of the emails described thereon were related to the enforcement of FECA or any criminal statute[.]" (See Commission's Motion for Summary Judgment, Exhibit G, Calvert Declaration, pg. 6, ¶ 12). Calvert makes this claim even though the document indicated that it was seeking "comments on legislation." *Id.*

Respectfully, the Calvert Declaration only strengthens Plaintiff's claim regarding the adequacy of the Commission's search. Seemingly, the Commission turned a blind eye to a document which clearly fell within the scope of Plaintiff's FOIA request.

Plaintiff also contests many of the Commission's claimed exemptions. Most notably, the Commission has redacted several pages of documents contending that the discussions in such documents are "purely personal" and thus fall within Exemption 6 (unwarranted invasion of personal privacy). *See* 5 U.S.C. § 552(b)(6). For example, in pages 671, 672, 845, 870-1007 of its *Vaughn* index, the Commission claims exemptions for numerous documents and communications between Commission and White House officials. The Commission claims that these documents are exempt under § 552(b)(6) because they are "purely personal." Plaintiff contests such a broad interpretation of exemption 6.

The exemption under § 552(b)(6) refers to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" The statute does not contemplate, in any fashion, that "purely personal" discussions between government officials are exempt from disclosure under FOIA.

Seemingly, the Commission wishes to withhold the production of these documents because, like the Toner e-mail, these documents reveal political considerations and biases between the White House, the Federal Election Commission, and in certain instances the Justice Department. These documents also seem to suggest that certain individuals, including political appointees, were seeking favors and/or *quid pro quo* appointments to top government positions. *See* Bates Nos. 872-880, 898, 973-74, 1007. These are exactly the types of communications that Plaintiff sought in his FOIA requests and to which the public has a right to discover. Such communications are not the type of "personnel" or "medical" files exempted from disclosure under § 552(b)(6).

At a minimum, the Court should conduct *in camera* review of these documents to determine the legitimacy of such an exemption. "FOIA gives a district court the power to take documents *in*

camera. 5 U.S.C. § 552(a)(4)(B).” *Jones*, 41 F.3d at 243. As the Sixth Circuit noted in *Jones*:

The decision to exercise a court’s discretion to review material *in camera* ultimately involves consideration of the following factors: 1) judicial economy –[]; 2) actual agency bad faith – where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called “cover up” is presented, government affidavits lose credibility; 3) strong public interest – where the effect of disclosure or exemption clearly extends to the public at large, such as a request which may surface evidence of corruption in an important government function, there may be a reason to give lesser weight to factors like judicial economy; 4) the parties request *in camera* review – obviously the court cannot be required to conduct a review upon demand, but a request would ameliorate concern that *in camera* inspection was precluding vigorous adversary proceedings or that a court was stepping into an area, as national security, which is the province of the Executive.

Jones, 41 F.3d at 243.

Here, the Court should exercise its discretion to review, at least, a sampling of the allegedly exempt documents given that the descriptions of such documents do not purport to fall within the statutory exemption. Instead, it seems that the Commission is attempting to withhold documents which reveal inappropriate and perhaps embarrassing communications between officials of the Commission and the White House, among others. Tie to this the fact that some of the communications seek comment from high-ranking GOP party members about the enforcement of campaign finance laws. As the Toner e-mail shows, Mr. Toner wanted Mr. Rove’s and the RNC’s commentary on “criminal law enforcement responsibilities under the campaign financing laws.” Why does Mr. Toner, the Chairman of the Federal Election Commission, need the input of Karl Rove and the Republican National Convention as to “criminal law enforcement responsibilities under the campaign financing laws[?]”

Such communications, having been created and sent on governmental servers using governmental e-mail accounts, are not shielded from disclosure under Exemption 6. As the Sixth Circuit emphasized in *Jones*, “FOIA calls for full disclosure of the activities of federal agencies ‘unless information is exempted under clearly delineated statutory language.’ The exemptions are to be “narrowly construed,” and the burden is on the defendant ‘agency to demonstrate, not the requester to disprove, that the materials sought may be withheld due to an exemption.’” *Jones*, 41 F.3d at 244 (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) and *Vaughn v. United States*, 936 F.2d 862, 866(6th Cir. 1991).

Here, the Commission is broadly construing Exemption 6 in order to shield itself from producing responsive documents. Because the Commission’s withholding of such documents violates the Freedom of Information Act, Defendant Commission’s motion for summary judgment should be denied.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

/s/ Michael R. Dezsi

MICHAEL R. DEZSI (P64530)

Attorney for Plaintiffs

19390 W. Ten Mile Road

Southfield, MI 48075

(248) 355-5555

m.dezsi@fiegerlaw.com

Dated: October 1, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this matter.

s/ Michael R. Dezsi

MICHAEL R. DEZSI (P64530)
FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX, P.C.
19390 W. Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555
m.dezsi@fiegerlaw.com

Dated: October 1, 2009

INDEX OF EXHIBITS

| <u>Exhibit</u> | <u>Description</u> |
|-----------------------|---|
| A | Plaintiff's FOIA Letter to FEC dated 7/3/08 |
| B | FEC Response letter to Plaintiff dated 9/30/09 |
| C | Plaintiff's FOIA Letter dated 10/27/08 to FEC Attention: Candace J. Salley |
| D | Federal Election Commission - Privilege Log |
| E | Plaintiff's (Attorney M. Dezsi) letter dated 11/19/08 |

EXHIBIT A

FIGER, FIGER, KENNEY, JOHNSON & GIROUX

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS AT LAW

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DIRECT DIAL (248) 355-3911

E-MAIL: m.dezsi@fiegerlaw.com

MICHAEL R. DEZSI

July 3, 2008

CERTIFIED MAIL

Federal Election Commission
Attn: Candace J. Salley
Room 408
999 E. Street, N.W.
Washington, D.C. 20463

Re: FOIA Request

Dear Ms. Salley:

Pursuant to the Freedom of Information Act, I am hereby requesting the following:

1. Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between officials, agents and/or employees of the FEC and officials, agents and/or employees of the Department of Justice relating to possible violations of the Federal Election Campaign Act by the law firm of Fieger, Fieger, Kenney & Johnson, P.C., including its partners, employees, contractors, associates, and their children and spouses.
2. Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between (to/from) FEC officials, employees or agents, including former FEC Chairman Michael E. Toner, and White House officials, employees or agents, including former White House Aide Karl Rove and former White House Counsel Harriet Miers, or their agents and/or assistants, relating in any way to enforcement of federal criminal statutes, including, but not limited to, the Federal Election Campaign Act.

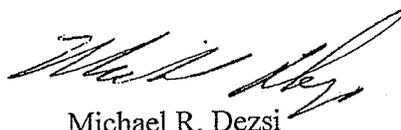
FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX

Federal Election Commission
July 3, 2008
Page Two

I look forward to your prompt response consistent with the requirements of the Freedom of Information Act. Please do not hesitate to contact me with any questions. Thank you for your kind attention to this matter.

Very truly yours,

FIEGER, FIEGER, KENNEY, JOHNSON
& GIROUX, PC

A handwritten signature in black ink, appearing to read "Michael R. Dezsi", is written over the typed name.

Michael R. Dezsi

MRD/jn

EXHIBIT B



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED

OCT 02 2008

Fieger, Fieger, Kenney & Johnson, P.C.

Michael R. Dezsi
Fieger, Fieger, Kenney, Johnson & Giroux, P.C.
19390 West Ten Mile Road
Southfield, MI 48075-2463

SEP 30 2008

Re: FOIA Request No. 2008-56

Dear Mr. Dezsi:

This is in response to your letter dated July 3, 2008 in which you sought information under the Freedom of Information Act. Specifically you requested:

1. Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between officials, agents and/or employees of the FEC and officials, agents and/or employees of the Department of Justice relating to possible violations of the Federal Election Campaign Act by the law firm of Fieger, Fieger, Kenney & Johnson, P.C., including its partners, employees, contractors, associates, and their children and spouses.
2. Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between (to/from) FEC officials, employees or agents, including former FEC Chairman Michael E. Toner, and White House officials, employees or agents, including former White House Aide Karl Rove and former White House Counsel Harriet Miers, or their agents and/or assistants, relating in any way to enforcement of federal criminal statutes, including, but not limited to, the Federal Election Campaign Act.

Because the scope of your request seems to include not only Fieger, Fieger, Kenney, Johnson & Giroux, P.C and third parties, but also you, as an employee of the firm, we have reviewed your request under the FOIA with respect to the firm and third parties and both FOIA and the Privacy Act, 5 U.S.C. § 552a, *et seq.* with respect to you.

We made a thorough search of the Commission's records and files for responsive documents. For purposes of that portion of your request that we treated as a request under the Privacy Act, we did not find any responsive documents that pertained to you individually. We did find documents responsive to your FOIA request. Among the responsive documents found were documents which originated in full or in part with the

Department of Justice (DOJ). As such, we have referred your FOIA request with respect to those documents to the DOJ for direct response.

Enclosed are FEC documents found to be responsive to the first part of your request. However, as discussed in more detail below, the remaining FEC responsive documents are exempt from disclosure based on Exemptions 2, 3, 5, 6, 7C, and 7A of FOIA. *See* 5 U.S.C. §§ 552(b)(2), (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(A).

Under FOIA, agencies are authorized to withhold documents under 5 U.S.C. § 552(b)(2) (Exemption 2) that are “related solely to the internal personnel rules and practices of an agency.” Examples of these types of documents include document routing information and transmittal sheets, and other information that is predominantly internal and of a trivial nature and not of any genuine public interest.

Exemption 3 of FOIA exempts from disclosure those records that are specifically exempted from disclosure by statute . . . provided that the statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3). In this case, the Commission is prohibited under 2 U.S.C. § 437g(a)(12)(A) from disclosing “any notification or investigation made under this section” of “any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.” With respect to persons not represented by you in connection with any enforcement matter, we have received no written notification from any such person consenting to disclosure of records that may pertain to them. Therefore, you are not entitled to such information.

Some of the information you seek is also protected from disclosure by the deliberative process privilege and the attorney work product privilege, as incorporated under Exemption 5 of FOIA. Under Exemption 5 of FOIA, the Government may withhold from disclosure any “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Some of the documents you seek are predecisional intra-office and inter-agency correspondences that were prepared in anticipation of litigation. As such, they are shielded by the attorney work product privilege and have no reasonably segregable portions to release. In addition, releasing the requested documents could adversely affect the agency's deliberative process in those documents that contain recommendations or express opinions on legal or policy matters.

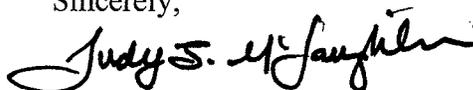
Exemptions 6 and 7(C) of the FOIA protect release of information about individuals from “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy,” or if compiled for law enforcement purposes, “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6), (7)(C). As we understand you to be a third-party requester, information that you seek pertaining to any persons whom you do not represent would be exempt from disclosure.

Last, because some of the documents you seek pertain to ongoing FEC enforcement proceedings, they are exempt under Exemption 7(A) of the FOIA. Under this exemption, “records or information compiled for law enforcement purposes” may be withheld when producing them “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).

With regard to the second part of your request, we did not find any responsive documents pertaining to communications between FEC officials and White House officials about enforcement of federal criminal statutes, including the Federal Election Campaign Act.

If you are dissatisfied with this decision, you may appeal, in writing, to FOIA Officer, Federal Election Commission, 999 E Street, NW, Washington, DC 20463. If you appeal this decision, you should clearly and prominently state on the envelope or other cover and at the top of the first page, “FOIA Appeal.” In addition, you should include a copy of your original request, a copy of this letter, and a statement explaining why you believe that this decision is in error.

Sincerely,



Judy S. McLaughlin
FOIA Request Service Center

EXHIBIT C

FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX

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E-MAIL: m.dezsi@fiiegerlaw.com

MICHAEL R. DEZSI

October 27, 2008

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Federal Election Commission
Attn: Candace J. Salley
Room 408
999 E. Street, N.W.
Washington, D.C. 20463

Re: FOIA Request

Dear Ms. Salley:

Pursuant to the Freedom of Information Act, I am hereby requesting the following:

1. Any and all documents of any kind, including, but not limited to, memoranda, correspondence and e-mails dated from January 2001 through the present between (to/from) FEC officials, employees or agents, including former FEC Chairman Michael E. Toner, and White House officials, employees or agents, including former White House Aide Karl Rove and former White House Counsel Harriet Miers, or their agents and/or assistants, including any and all present and/or former employees and/or agents of the Executive Office of the President and/or Vice President.

I look forward to your prompt response consistent with the requirements of the Freedom of Information Act. Please do not hesitate to contact me with any questions. Thank you for your kind attention to this matter.

Very truly yours,

FIEGER, FIEGER, KENNEY, JOHNSON
& GIROUX, PC



Michael R. Dezsi

MRD/vgb

EXHIBIT D

Beam v. Mukasey
07-cv-1227 (N.D. Ill)
January 28, 2009

Federal Election Commission -- Privilege Log

Documents Withheld in Connection with
Plaintiffs' Request for Production of Documents
Served November 4, 2008

| Date | Document Description | Author | Privilege | Bates #s |
|--------------|--|---------------------------------|---|-----------------|
| 9/19/2006 | FEC First General Counsel's Report and Certification w/ Exhibits | Wassom, A., Shonkwiler, M | Attorney Client Attorney Work Product Law Enf. Priv. 2 USC § 437g(a)(12) | 0001 - 42 |
| 7/23/2007 | E-mail to Kendall Day re: 2 USC 441f inquiry forwarded to Shonkweiler and Wassom | Terzaken, Anne Marie | Attorney Work Product Law Enf. Priv. 2 USC § 437g(a)(12) | 0043 - 44 |
| Undated | Log of telephonic and e-mail contacts with non-FEC entities from 9/26/06 to 11/14/07 with short notes on the substance of the contacts | Unknown | Attorney Client Attorney Work Product Law Enf. Priv. 2 USC § 437g(a)(12) | 0045 - 51 |
| 6/10/2008 | E-mail to Audra Wassom re: Edwards Campaign materials w/ list of Gov't witnesses at criminal trial | Day, Kendall | Attorney Work Product Law Enf. Priv. 2 USC § 437g(a)(12) | 0052 - 56 |
| 6/4/2008 | E-mail string between Wassom and Day re: scheduling meeting | | Attorney Work Product Law Enf. Priv. 2 USC § 437g(a)(12) | 0057 |
| 7/18/2008 | E-mail to Kendall Day requesting copies of certain criminal trial exhibits | Wassom, A | Attorney Work Product Law Enf. Priv. 2 USC § 437g(a)(12) | 0058 - 59 |
| 7/22-23/2008 | E-mail string between Wassom and Day re: scheduling meeting | | Attorney Work Product | 0060 |

7/26/2006

Email from Michael Toner to Sara Taylor and Thomas Josefiak attaching draft FECA legislative recommendations by DOJ as forwarded by OMB

Potential
Deliberative
Process –
Pending with
DOJ

To be
assigned

EXHIBIT E

FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX

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MICHAEL R. DEZSI

November 19, 2008

Greg J. Mueller, Esq.
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: *Fieger v. Federal Election Commission*
U. S. District Court (E.D.) Case No. 08-14125
Our File No. 3959.280

Dear Mr. Mueller,

I wanted to bring to your attention a couple of matters relating to the Freedom of Information case of *Fieger v. Federal Election Commission*. In the Commission's answer to the complaint, it raises the issue that I requested the documents under FOIA and not Mr. Fieger and thus Mr. Fieger could not bring suit under FOIA. Please be advised that I represent Mr. Fieger in this matter and was representing him in a legal capacity at the time of the FOIA requests. As I'm sure you are aware, attorneys routinely request documents from governmental agencies on behalf of their clients and later file suit if necessary. This case is no different.

Also, in response to our FOIA request dated July 3, 2008, the Commission advised me via letter dated September 30, 2008, that it "did not find any responsive documents pertaining to communications between FEC officials and White House officials about enforcement of federal criminal statutes, including the Federal Election Campaign Act. I have information however, that the Commission's response is not exactly accurate. Perhaps the Commission was interpreting verbatim our FOIA request.

Accordingly, we sent a more recent FOIA request dated October 27, 2008, that was broader in scope than our previous FOIA request dated July 3, 2008. I've enclosed the more recent request. As you will see, I have clarified that we were seeking any and all documents between FEC officials, including former FEC Chairman Michael Toner, and White House officials including Karl Rove.

Greg J. Mueller, Esq.
Federal Election Commission
November 19, 2008
Page 2

As I previously indicated, I have information that such communications do indeed exist. If the Commission fails to timely respond to my more recent FOIA request, I will supplement *Fieger v. Federal Election Commission* to include our more recent FOIA request and request that the Court allow discovery as to these documents. *See Jones v. Federal Bureau of Investigation*, 41 F.3d 238 (6th Cir. 1994)(indicating that discovery in a FOIA case may be appropriate upon a showing of bad faith).

Moreover, in its response dated September 30, 2008 response to our FOIA request, the Commission claimed certain documents were “exempt from disclosure based on Exemptions 2, 3, 5, 6, 7C, and 7A of FOIA.”

As to the Commission’s concern regarding exemption under 5 U.S.C. § 552(b)(3), please be advised that I represent Mr. Fieger, the Fieger law firm, and numerous employees and family members of the Fieger firm. I have submitted to the Federal Election Commission my clients’ written Designation of Counsel forms. Accordingly, please accept this letter as my clients’ written consent to release to me those responsive documents that have been withheld under 2 U.S.C. § 437g(a)(12)(A). And because my clients have consented to disclosure of such responsive documents, the Commission cannot rely on Exemptions 6 and 7 to withhold documents. *See Jones*, 41 F.3d at 247 (“Exemption 7(C) leaves the decision about publicity – whether and how much to reveal about herself – in the power of the individual whose privacy is at stake.”).

As to the Commission’s other claimed exemptions, I kindly request that the Commission prepare and provide a “Vaughn” index so as to expedite our disputes arising from the remainder of the Commission’s claimed exemptions.

Also, I understand that the Commission located certain documents that were then sent to the Justice Department for their determination of whether to release the documents. Today, I received a response from the Justice Department indicating that they were withholding about 75 documents, most of which are e-mail correspondences between the DOJ and the FEC. Amusingly, the only documents disclosed by the Justice Department were a copy of the jury instructions from the Fieger criminal case, which of course I have because I wrote many of them during the Fieger trial. Because the withheld documents are e-mails which are still within the possession of the FEC, I intend to litigate the withholding of these documents in *Fieger v. Federal Election Commission*.

Greg J. Mueller, Esq.
Federal Election Commission
November 19, 2008
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Please do not hesitate to contact me if you have any questions. Thank you kindly for your attention to this matter and I look forward to your response.

Very truly yours,

FIEGER, FIEGER, KENNEY, JOHNSON
& GIROUX, P.C.

A handwritten signature in black ink, appearing to read "Michael R. Dezsi", written over a horizontal line.

Michael R. Dezsi

MRD/vgb
Enclosure