

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SPEECHNOW.ORG, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Civ. No. 08-248 (JR)
v.)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
MOTION FOR ENTRY OF PROTECTIVE ORDERS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

The Federal Election Commission (“Commission” or “FEC”) hereby moves this Court for the entry of protective orders governing the treatment of certain confidential materials to be produced by third parties in response to subpoenas duces tecum. One of the key issues in this case is whether unlimited contributions to political committees — made for the purpose of funding independent spending related to candidate elections — have the potential to corrupt elected officials, lead to undue or disproportionate access and influence, or create the appearance thereof. As part of its effort to create a record on this issue, the Commission served subpoenas on several of the largest contributors to “Section 527 organizations,”¹ including contributors to

¹ SpeechNow.org is a “political organization” within the meaning of and for purposes of Section 527 of the Internal Revenue Code of 1986, as amended, but claims it should not be required to register as a political committee within the meaning of the Federal Election Campaign Act of 1971 (“FECA”). Such organizations—exempt from federal tax as political organizations if they file disclosure reports but taking the position that they are not bound by the contribution limits and disclosure rules governing political committees under FECA—are commonly known as “Section 527 organizations” or “527s” and are referred to as such by the Commission in this motion.

both Democratic- and Republican-leaning groups. *See* Declaration of Graham M. Wilson (“Wilson Decl.”) at ¶ 2. All of the subpoenas asked for the same categories of documents, *e.g.*, documents regarding communications between the contributors and elected officials — including communications regarding the 527s’ efforts, solicitations from 527s offering access to candidates or elected officials, and documents related to the contributors’ reasons for giving to 527 groups. *See* Wilson Decl. at ¶¶ 3-5. Three individuals, Herbert M. Sandler, Linda Pritzker, and A. Jerrold Perenchio, have stated that they will only produce responsive documents subject to a protective order;² all three individuals have concerns regarding the public disclosure of documents regarding their private political communications, financial information, giving strategies, and campaign tactics. The Commission has negotiated proposed protective orders that are mutually acceptable to it and the third parties. *See* Attachment 1, Attachment 2, and Attachment 3. Generally, the orders create a procedure for designating documents as confidential; limit the disclosure of confidential documents to the parties, counsel, and other individuals with a connection to the litigation; and, with the exception of Mr. Perenchio’s production, require that the documents be filed with the Court under seal. In addition to filing briefs that contain confidential documents or substantive discussions thereof under seal, the Commission intends on filing public redacted versions. As the third party documents may provide the Court with critical information regarding the central issues of this case and because the confidentiality concerns raised by the third parties are legitimate, the Court should enter the attached proposed protective orders.

² As discussed in further detail below, while Mr. Perenchio was not formally served with a subpoena, his counsel has agreed to produce documents that would be responsive to such a subpoena, subject to a protective order.

Counsel for Speechnow.org and the other plaintiffs (“SpeechNow”) have been consulted about this motion and have indicated that they oppose it.

Factual History

As part of the discovery proceedings in this case, the Commission sent subpoenas to Linda Pritzker, Herbert Sandler, A. Jerrold Perenchio, and several other major contributors to Section 527 organizations that make independent expenditures.

Counsel for Ms. Pritzker agreed to accept a subpoena served by the FEC on September 8, 2008. Wilson Decl. ¶ 3. Although there was some delay in searching for responsive documents because the documents were located in Houston and the search was affected by a recent hurricane, Ms. Pritzker’s counsel eventually identified five documents that were potentially responsive to the subpoena. Wilson Decl. ¶ 3. Given Ms. Pritzker’s confidentiality concerns, her counsel invited counsel for the Commission to her office to quickly review the documents for responsiveness. These documents generally consist of memoranda from an advisor of Ms. Pritzker’s suggesting a proposed political giving strategy. Counsel for the Commission believes that they are responsive to the subpoena and relevant to this case. The Commission then negotiated the attached protective order at the behest of Ms. Pritzker. Wilson Decl. 3. If the protective order is entered, Ms. Pritzker will produce all the documents to the Commission which will then provide copies to SpeechNow.

Mr. Sandler accepted a subpoena served by the Commission on September 9, 2008. Wilson Decl. ¶ 4. In response to the subpoena, counsel for Mr. Sandler indicated that there were responsive documents but insisted that a protective order be in place before producing them. The Commission then negotiated the attached protective order with Mr. Sandler. Wilson Decl. ¶ 4.

The Commission requested that counsel for Mr. Perenchio accept service of a subpoena similar to those served on other third party witnesses in this case on September 4, 2008. Wilson Decl. ¶ 5. However, as Mr. Perenchio was unable to conduct a search for the documents, counsel was not authorized to formally accept service of the subpoena. However, Mr. Perenchio's counsel also offered to work with Mr. Perenchio's staff to make a good faith effort to locate documents that would have been responsive to the subpoena. Ultimately, counsel determined that the only responsive documents were those that Mr. Perenchio had previously produced to the Commission in connection with a prior administrative enforcement case (Matter Under Review 5487), and agreed to authorize the Commission to use such documents in this case, absent only a small number of documents which contained especially private financial information not relevant here (*e.g.*, bank account numbers). This authorization was conditioned on the FEC's agreement to abide by the terms of the attached protective order and then file this order with the Court. Wilson Decl. ¶ 5. This protective order does not require the parties to file documents under seal but does prevent them from being publicly disseminated outside of these proceedings. Counsel for Mr. Perenchio also authorized SpeechNow to have immediate access to the documents if they would agree to abide by the terms of the protective order. The Commission has repeatedly informed SpeechNow of this fact, but they have declined to agree to the terms of the proposed order. Wilson Decl. ¶ 5.

The Commission had hoped to have the attached protective orders entered before fact briefing was submitted in this case. As SpeechNow has redacted or withheld a substantial amount of information from its discovery production to the Commission based on claims of "First Amendment rights to political expression and association," the Commission anticipated that SpeechNow would not object to the protective orders. Wilson Decl. ¶ 6. However, despite

additional time sought from the Court, the parties have been unable to reach an agreement on this matter. Concurrently, the Commission has initiated two other proceedings to ensure compliance with other subpoenas it has served in this case. The Commission has moved to compel Stephen Bing, another large donor to 527 groups, to comply with a subpoena in the U.S. District Court, Central District of California, and has filed a motion with Judge Urbina, U.S. District Court, District of Columbia, in order to resolve an issue regarding a protective order previously entered in litigation with the Club for Growth, which has objected to a subpoena the Commission has served in this case. Based on the outcome of this motion and the other satellite proceedings, the Commission anticipates seeking leave from this Court to file supplemental findings of fact based on whatever new documents it obtains.

Argument

Under Federal Rule of Civil Procedure 26(c):

Upon motion by a party ... and for good cause shown, the court ... may make any order which justice requires to prevent a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... (B) specifying terms, including time and place, for the disclosure of discovery; ... (E) designating the person who may be present while the discovery be conducted; ... (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed in a specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Fed. R. Civ. P. 26(c)(1). More generally, this “rule ‘confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.’”

Klayman v. Judicial Watch, Inc., 247 F.R.D. 19, 22 (D.D.C. 2007) (granting a protective order, *inter alia*, “limiting the use of any information obtained during discovery in this matter to the strict context of the litigation”), *quoting Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

It is the court’s role to “balance[] the governmental and first amendment interests at stake when a

party seeks to disseminate information obtained through pretrial discovery.” *Klayman*, 247 F.R.D. at 22, *citing Avirgan v. Hull*, 118 F.R.D. 252, 253-54 (D.D.C. 1987) (noting that courts have “substantial latitude to fashion protective orders”).

Here, the “good cause” which justifies entering the proposed protective orders is the third parties’ concerns regarding the confidentiality of their First Amendment activities. The “courts have long recognized the sensitivity of information related to [First Amendment] activities,” specifically granting certain protections for “membership and volunteer lists, contributor lists, and past political activities of plaintiffs and of those persons with whom they have been affiliated.” *Int’l Action Center v. U.S.*, 207 F.R.D. 1, 3 (D.D.C. 2002), *citing NAACP v. Alabama*, 357 U.S. 449, 461-463 (1958); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 (D.C. Cir. 1981); *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 95 (1982); *Int’l Union, Etc. v. Nat’l Right to Work Comm.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978). The three individuals whom the Commission has subpoenaed have concerns about this type of information: communications with groups to which they contribute, political strategy, reasons for and descriptions of their political activities, and similar matters. For the purpose of facilitating document production in this case, the Commission is willing to agree that these concerns justify the safeguards in the attached proposed protective orders.

Although SpeechNow has raised some objections to the process of filing confidential documents under seal and creating public, redacted briefs, such procedures are clearly within the Court’s discretion and common in other cases. *See Klayman*, 247 F.R.D. at 22; *Fletcher v. United States Parole Commission*, 550 F. Supp. 2d 30, 32, n. 2 (D.D.C. 2008) (referencing briefs filed in that case including information “subject to a protective order and thus the memorandum was filed under seal, along with a public redacted version”). These procedures are not unduly

burdensome and are justified to protect the First Amendment interests of the individuals who will be providing relevant information to help the Court decide the important constitutional questions at issue in this case.

CONCLUSION

For the reasons stated above, the Commission requests that this Court enter the attached proposed protective orders regarding documents to be produced by third parties Herbert Sandler, Linda Pritzker, and A. Jerrold Perenchio.

Respectfully submitted,

Thomasenia P. Duncan
(D.C. Bar No. 424222)
General Counsel

David Kolker
(D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

Robert Bonham
(D.C. Bar No. 397859)
Senior Attorney

/s/ Graham M. Wilson
Steve Hajjar
Graham M. Wilson
Greg J. Mueller (D.C. Bar No. 462840)
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

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