



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

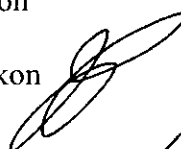
RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

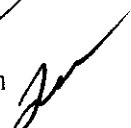
2003 DEC -5 A 10:30


DEC 5 2003


MEMORANDUM


TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

James A. Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

Vincent J. Convery, Jr.   
Assistant General Counsel

SUBJECT: Proposed FEC Policy Statement regarding the Placement of Documents  
on the Public Record in closed Enforcement, Administrative Fines, and  
Alternative Dispute Resolution Cases

**AGENDA ITEM**  
For Meeting of: 12-11-03

**SUBMITTED LATE**

The Office of General Counsel has prepared the attached statement of policy regarding the placement of documents on the public record in closed enforcement, administrative fines, and alternative dispute resolution cases.

The change in policy hereby recommended would apply to all cases closed by the Commission on or after January 1, 2004.

Memorandum to the Commission  
Page Two

**Recommendations:**

1. Approve the attached Statement of Policy for publication in the *Federal Register*.
2. Direct the Office of General Counsel to submit the attached Statement of Policy to Congress in accordance with the Congressional Review Act, 5 U.S.C. §801 *et seq.*

Attachment:  
Statement of Policy

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 4 and 111**

**[NOTICE 2003- ]**

**STATEMENT OF POLICY REGARDING DISCLOSURE OF CLOSED  
ENFORCEMENT AND RELATED FILES**

**AGENCY:** Federal Election Commission

**ACTION:** Statement of Policy

**SUMMARY:** The Commission is adopting an interim policy with respect to placing closed files on the public record in enforcement, administrative fines, and alternative dispute resolution cases. The categories of records that will be included in the public record are described below. This is an interim policy only; the Commission will conduct a rulemaking in this respect, with full opportunity for public comment, in 2004.

**EFFECTIVE DATE:** January 1, 2004

**FOR FURTHER INFORMATION CONTACT:** Vincent J. Convery, Jr., Assistant General Counsel  
999 E Street, NW, Washington, D.C. 20463  
202-694-1650 or 800-424-9530

**SUPPLEMENTARY INFORMATION:** The “confidentiality provision” of the Federal Election

1 Campaign Act, 2 U.S.C. 431 et seq., (FECA), provides that: “Any notification or  
2 investigation under [Section 437g] shall not be made public by the Commission ...  
3 without the written consent of the person receiving such notification or the person  
4 with respect to whom such investigation is made.” 2 U.S.C. 437g(a)(12)(A). For  
5 approximately the first twenty-five years of its existence, the Commission viewed  
6 the confidentiality requirement as ending with the termination of a case. The  
7 Commission placed on its public record the documents that had been considered by  
8 the Commissioners in their determination of a case, minus those materials exempt from  
9 disclosure under the FECA or under the Freedom of Information Act, 5 U.S.C. 552,  
10 (FOIA). See 11 CFR 5.4(a)(4). In AFL-CIO v. FEC, 177 F.Supp.2d 48 (D.D.C. 2001),  
11 the district court disagreed with the Commission’s interpretation of the confidentiality  
12 provision and found that the protection of section 437g(a)(12)(A) does not lapse at the  
13 time the Commission terminates an investigation. 177 F.Supp.2d at 56.

14 Following that district court decision, the Commission placed on the public record  
15 only those documents that reflected the agency’s “final determination” with respect to  
16 enforcement matters. Such disclosure is required under section 437g(a)(4)(B)(ii) of the  
17 FECA and section (a)(2)(A) of the FOIA. In all cases, the final determination is  
18 evidenced by a certification of Commission vote. The Commission also continued  
19 to disclose documents that explained the basis for the final determination. Depending  
20 upon the nature of the case, those documents consisted of General Counsel’s Reports  
21 (frequently in redacted form); Probable Cause to Believe Briefs; conciliation agreements;  
22 Statements of Reasons issued by one or more of the Commissioners; or, a combination of

1 the foregoing. The district court indicated that the Commission was free to release these  
2 categories of documents. See 177 F.Supp.2d at 54 n.11. In administrative fines cases,  
3 the Commission began placing on the public record only the Final Determination  
4 Recommendation and certification of vote on final determination. In alternative dispute  
5 resolution cases, the public record consisted of the certification of vote and the negotiated  
6 agreement.

7         Although it affirmed the judgment of the district court in AFL-CIO, the Court  
8 of Appeals for the District of Columbia Circuit differed with the lower court’s restrictive  
9 interpretation of the confidentiality provision of 2 U.S.C. 437g(a)(12)(A). The Court of  
10 Appeals stated that: “the Commission may well be correct that ... Congress merely  
11 intended to prevent disclosure of the fact that an investigation is pending,” and that:  
12 “detering future violations and promoting Commission accountability may well justify  
13 releasing more information than the minimum disclosures required by section 437g(a).”  
14 See AFL-CIO v. FEC, 333 F.3d 168 (D.C. Cir. 2003) at 174, 179. However, the Court of  
15 Appeals warned that, in releasing enforcement information to the public, the Commission  
16 must “attempt to avoid unnecessarily infringing on First Amendment interests where it  
17 regularly subpoenas materials of a ‘delicate nature ... represent[ing] the very heart of the  
18 organism which the first amendment was intended to nurture and protect.’” Id. at 179.  
19 (Citation omitted). The decision suggested that, with respect to materials of this nature,  
20 a “balancing” of competing interests is required – on one hand, consideration of the  
21 Commission’s interest in promoting its own accountability and in deterring future  
22 violations and, on the other, consideration of the respondent’s interest in the privacy of

23

1 association and belief guaranteed by the First Amendment. Noting that the Commission  
2 had failed to tailor its disclosure policy to avoid unnecessarily burdening the First  
3 Amendment rights of the political organizations it investigates, Id. at 178, the Court  
4 found the agency's disclosure regulation at 11 CFR 5.4(a)(4) to be impermissible.  
5 Id. at 179.

6 The Commission is issuing this interim policy statement to identify several  
7 categories of documents integral to its decisionmaking process that will be disclosed  
8 upon termination of an enforcement matter. The categories of documents that the  
9 Commission intends to disclose either do not implicate the Court's concerns, e.g.,  
10 categories 8, 9 and 10, or, because they play a critical role in the resolution of a matter,  
11 the balance tilts decidedly in favor of public disclosure, even if the documents reveal  
12 some confidential information.

13 With respect to enforcement matters, the Commission will place the following  
14 categories of documents on the public record:

- 15 1. Complaint or internal agency referral
- 16 2. Response to complaint
- 17 3. General Counsel's Reports that recommend dismissal, reason to  
18 believe, no reason to believe, no action at this time, probable cause to  
19 believe, no probable cause to believe, no further action, or acceptance  
20 of a conciliation agreement
- 21 4. Notification of reason to believe findings (including Factual and Legal  
22 Analysis)
- 23 5. Respondent's response to reason to believe findings

- 1                   6. Briefs (General Counsel's Brief and Respondent's Brief)
- 2                   7. Statements of Reasons
- 3                   8. Conciliation Agreements
- 4                   9. Evidence of payment of civil penalty or of disgorgement
- 5                   10. Certifications of Commission votes

6           In addition, the Commission will make certain other documents available which  
7 will assist the public in understanding the record without intruding upon the associational  
8 interests of the respondents. These are:

- 9                   1. Designations of counsel
- 10                  2. Requests for extensions of time
- 11                  3. Responses to requests for extensions of time
- 12                  4. Closeout letters

13           The Commission is placing the foregoing categories of documents on the public  
14 record in all matters it closes on or after January 1, 2004.

15           The Commission is not placing on the public record certain other materials from  
16 its investigative files, such as subpoenaed records, deposition transcripts, and other  
17 records produced in discovery, even if those evidentiary documents are referenced in,  
18 or attached to, documents specifically subject to release under this interim practice.  
19 Release of these underlying evidentiary documents may require a closer balancing of  
20 the competing interests cited by the D.C. Circuit. Accordingly, the Commission will  
21 consider the appropriateness of disclosing these materials only after a full rulemaking  
22 with the opportunity for public comment. However, if a document or record is referenced  
23 in, or attached to, a document specifically subject to release under this interim practice,

1 that document or record will be disclosed if it is, or was, otherwise publicly available.

2 The Commission will place documents on the public record in all cases that are  
3 closed, regardless of the outcome. By doing so, the Commission complies with the  
4 requirements of 2 U.S.C. 437g(a)(4)(B)(ii) and 5 U.S.C. 552(a)(2)(A). Conciliation  
5 Agreements are placed on the public record pursuant to 2 U.S.C. 437g(a)(4)(B)(ii).

6 The Commission will place these documents on the public record as soon  
7 as practicable, and will endeavor to do so within thirty days of the date on which  
8 notifications are sent to complainant and respondent. See 11 CFR 111.20(a). In  
9 the event a Statement of Reasons is required, but has not been issued before the date  
10 proposed for the release the remainder of the documents in a matter, those documents  
11 will be placed on the public record and the Statement of Reasons will be added to the  
12 file when issued.

13 With respect to administrative fines cases, the Commission will place the entire  
14 administrative file on the public record, which includes the following:

- 15 1. Reason to Believe recommendation
- 16 2. Respondent's response
- 17 3. Reviewing Officer's memoranda to the Commission
- 18 4. Final Determination recommendation
- 19 5. Certifications of Commission votes
- 20 6. Statements of Reasons
- 21 7. Evidence of payment of fine
- 22 8. Referral to Department of the Treasury



1 With respect to alternative dispute resolution (ADR) cases, the Commission will  
2 place the following categories of documents on the public record:

- 3 1. Complaint or internal agency referral
- 4 2. Response to complaint
- 5 3. ADR Office's case analysis report to the Commission
- 6 4. Notification to respondent that case has been assigned to ADR
- 7 5. Letter or Commitment Form from respondent participating in the ADR  
8 program
- 9 6. ADR Office recommendation as to settlement
- 10 7. Certifications of Commission votes
- 11 8. Negotiated settlement agreement
- 12 9. Evidence of compliance with terms of settlement

13 When disclosing documents in administrative fines and alternative dispute  
14 resolution cases, the Commission will release publicly available records that are  
15 referenced in, or attached to, documents specifically subject to release under this interim  
16 practice.

17 With this interim policy, the Commission intends to provide guidance to outside  
18 counsel, the news media, and others seeking to understand the Commission's disposition  
19 of enforcement, administrative fines, and alternative dispute resolution cases and, thus, to  
20 enhance their ability to assess particular matters in light of past decisions. In all matters,  
21 the Commission will continue to redact information that is exempt from disclosure under  
22 the FECA and the FOIA

23 As discussed above, the Commission hereby is announcing an interim policy.

1 A rulemaking, with full opportunity for public comment, will be initiated in 2004 once  
2 there is final resolution of the litigation in AFL-CIO.

3  
4  
5  
6  
7  
8  
9

---

Ellen L. Weintraub  
Chair  
Federal Election Commission

10

11 DATED: \_\_\_\_\_  
12 BILLING CODE: 6715-01-U