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MEMORANDUM

AGENDA ITEM
For Meeting of: 11-05-09

TO: The Commission

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RE: Placing First General Counsel's Reports on the Public Record

The Office of General Counsel ("OGC") has reconsidered the fairly recent practice of not placing First General Counsel's Reports on the public record and recommends that the Commission return to the prior practice of disclosing First General Counsel's Reports at the conclusion of an enforcement matter, provided that the Commission reserves the right to make appropriate redactions to these documents, or, in appropriate cases, to withhold them altogether.

The current practice is rooted in concerns regarding the deliberative process privilege and in considerations regarding the difference between a General Counsel's Report, which is the General Counsel's document, and a Factual and Legal Analysis ("F&LA"), which, once

approved, is the Commission's document. This memorandum provides historical background regarding the Commission's past disclosure practices and legal background regarding the deliberative process privilege. It then explains why we believe as a general matter the Commission should place First General Counsel's Reports on the public record while reserving the right to withhold or redact when appropriate. The memorandum then proceeds to identify some of the potential harms in returning to the prior practice and explains how we believe those potential harms may be adequately addressed.

I. BACKGROUND

A. Disclosure Policy History in General and the Deliberative Process Privilege

For approximately the first 25 years of its existence, the Commission placed on the public record, at the close of an enforcement matter, all materials considered by the Commissioners in their disposition of a case, except for those materials prohibited from disclosure by the Federal Election Campaign Act ("FECA" or "the Act") or, in most instances, those exempt from disclosure under the Freedom of Information Act ("FOIA"). *See Statement of Policy Regarding Disclosure of Closed Enforcement or Related Files*, 68 Fed. Reg. 70423 (Dec. 20, 2003) ("Interim Disclosure Policy" or "IDP"). We say "most instances" because in practice the Commission disclosed virtually all General Counsel's Reports, even if those reports were exempt from disclosure as predecisional materials under 5 U.S.C. § 552(b)(5) ("Exemption 5").

Exemption 5 exempts from disclosure, among other things, "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." 5 U.S.C. § 552(b)(5). This provision has been interpreted effectively to incorporate into FOIA's exemptions from disclosure all of the recognized litigation privileges. One of these privileges that is important in the context of Federal agencies is the "predecisional" or "deliberative process" privilege. This privilege shields from disclosure "predecisional" intra-agency documents in recognition of the fact that disclosure of such materials "would injure the consultative process within the government," *United States v. Exxon Corp.*, 87 F.R.D. 624, 636 (D.D.C. 1980), and "represent an extraordinary intrusion into the realm of the agency." *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44 (D.C. Cir. 1986).

However, not every document submitted by a government subordinate to a government superior is subject to the privilege. Staff documents that are either incorporated in a final agency decision or represent the only record of the reasons for that decision or the facts underlying the decision essentially lose their predecisional character when the agency makes the decision for which they provide the basis. Within the context of Commission decisions, the Supreme Court itself recognized a very similar principle when it looked to the General Counsel's Report to provide the legal basis for the Commission's dismissal of a complaint in *DSCC v. FEC*, 454 U.S. 27, 39 n. 19 (1981). Most of the General Counsel's Reports placed on the public record through most of the Commission's history contained recommendations adopted by the Commission, and

in the absence of any other written record, became "post-decisional" documents not subject to the deliberative process privilege.

Nevertheless, the Commission also released General Counsel's Reports in instances where the Commission did not accept, or was divided on the General Counsel's recommendation. Indeed, in the very first case in which a court required the Commission to produce a Statement of Reasons, one of the reasons it did so was because the released report did *not* "suffice[] to show the Commission's reasoning" where the Commission had followed neither the General Counsel's recommendation nor his reasoning. *Common Cause v. FEC*, 676 F. Supp. 286, 291 (D.D.C. 1986).

Between the decision of the District Court in *AFL-CIO v. FEC*, 177 F.Supp.2d 48 (D.D.C. 2001), and the adoption of the IDP in response to the Court of Appeals decision in the same case, the Commission placed on the public record only those documents that reflected the very final action in an enforcement matter and the reasons for that action. Even then, however, the Commission would, from time to time, place on the public record General Counsel's Reports, including First General Counsel's Reports, when those documents reflected the rationales for the Commission's dispositive actions.

After the Court of Appeals decision in the *AFL-CIO* case, the Commission adopted the December 2003 IDP, in which it said it would place on the public record, among other things, "General Counsel's Reports that recommend dismissal, reason to believe, no reason to believe, no action at this time, probable cause to believe, no probable cause to believe, no further action, or acceptance of a conciliation agreement[.]" IDP at 70,424. Although the IDP did not address First General Counsel's Reports specifically, all First General Counsel's Reports are covered, because all such reports will contain a recommendation of dismissal, reason to believe, or no reason to believe. Moreover, the Commission returned to its practice of placing General Counsel's Reports, including First General Counsel's Reports, on the public record even where the Commission rejected the General Counsel's recommendations or reasoning.

B. Change in Practice Concerning First General Counsel's Reports

In 2006, the Commission reconsidered its practice of placing First General Counsel's Reports on the public record after a case arose in which the Commission adopted a recommendation offered by OGC in a General Counsel's Report, but rejected one of the several underlying rationales for the recommendation. After considering a number of court cases applying Exemption 5, we determined that there was some doubt as to whether the portion of the General Counsel's Report with which the Commission agreed could be placed on the public record while the portion with which the Commission disagreed could be redacted. Accordingly, we concluded that the safest action would be for OGC to prepare, and the Commission to adopt, special F&LAs so that the General Counsel's Report could be withheld from the public record in its entirety.

After the matter in question was released to the public record, OGC considered what changes to make in both the Enforcement and General Law and Advice Divisions practice in

order to avoid creating situations in which predecisional material that it would be advisable not to disclose would nonetheless have to be disclosed. Although the case referred to above did not involve a First General Counsel's Report, we acted first with respect to those reports not only because a solution seemed straightforward and relatively uncomplicated for those reports, but because at the time OGC and Commissioners perceived benefits to placing Commission-adopted F&LAs on the public record in lieu of First General Counsel's Reports.

Under Enforcement practice prior to January 2007, F&LAs were prepared only in those matters in which the General Counsel recommended that the Commission find reason to believe ("RTB"). See 2 U.S.C. § 437g(a)(2). In matters where the recommendation was dismissal or no reason to believe, no F&LAs were prepared, and the First General Counsel's Report (assuming its recommendations were adopted) stood as the rationale for the Commission's action. As we considered the issue in late 2006 and early 2007, it seemed that if the Commission approved F&LAs in cases in which it dismissed matters or found no reason to believe, as well as in RTB cases, those documents would always serve as Commission-approved rationales, and First General Counsel's Reports could be withheld from the public record as predecisional in each case. The theory was that this practice would: 1) avoid troublesome redaction issues; 2) emphasize to the public the position of the Commission, as reflected in the Commission-approved F&LAs; 3) allow for more candid analysis on the part of the General Counsel; and 4) allow the Commission to feel less reluctant about disagreeing with the General Counsel. While never adopted by formal vote, Commissioners acknowledged the benefits of the practice and agreed to adopt it. Accordingly, OGC began recommending the approval of F&LAs in all cases, not just those with RTB recommendations, in January 2007, and from that point forward, First General Counsel's Reports were withheld from the public record in new enforcement matters.

No similar approach was developed for other General Counsel's Reports, however. Unlike with First General Counsel's Reports, no document similar to the F&LA is routinely proposed for Commission approval at subsequent stages of an enforcement matter. Accordingly, we continued to place subsequent reports on the public record.

After more than two years of this practice with respect to First General Counsel's Reports, we have examined and evaluated our experience with it. Based on that examination, we recommend that the Commission return to its prior practice. Withholding all First General Counsel's Reports from the public record was both an overbroad and an insufficient solution to the issues we perceived in cases where the Commission adopted OGC's recommendations while rejecting its rationales. The policy was overbroad in that most First General Counsel's Reports do not present that particular scenario, and it was underinclusive in that it only dealt with a portion of the reports in which that problem could arise.

Part II of this memorandum explores the policy reasons for returning to the prior practice, the policy costs of doing so, and concludes that the benefits of returning to the prior practice outweigh the costs. Part III examines situations where a policy of general release of First General Counsel's Reports could pose specific problems, and describes how we believe those problems may be surmounted.

II. DISCUSSION

For a number of reasons, we believe a return to the prior practice is advisable.

A. Transparency Considerations

First and foremost, the release of First General Counsel's Reports, like the release of other reports, promotes transparency – about both the Commission's own operations and the actions of the political actors who are respondents in enforcement matters.

Virtually since its inception the Commission's policy has been to make “the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons contracting with the Commission with respect to trade secrets and commercial or financial information entitled to confidential treatment, and the need for the Commission to promote free internal policy deliberations and to pursue its official activities without undue disruption.” 11 C.F.R. § 5.2.

Placing closed enforcement files on the public record also “accords with the general policy favoring disclosure of administrative agency proceedings.” *FCC v. Schreiber*, 381 U.S. 279, 293 (1965). “In FOIA, after all, a new conception of Government conduct was enacted into law, a general philosophy of full agency disclosure.” *Dep't. of the Interior v. Klamath Water Users Protective Ass'n.*, 532 US 1, 16 (2001) (citations and quotation marks omitted). As with the full disclosure policy Congress enacted in the FECA itself, “Congress believed that this [FOIA] philosophy, put into practice, would help “ensure an informed citizenry, vital to the functioning of a democratic society.” *Id.* (citations omitted).

Furthermore, public confidence in the Commission's performance of its enforcement responsibilities is essential to FECA's goal of preserving public faith in our democratic electoral system. By making closed investigative files public, the Commission enables the public to review how effectively the campaign finance laws are being enforced to protect the integrity of the electoral system and to reassure themselves that the administration of those laws is being conducted in a fair, consistent, and nonpartisan manner.

Disclosure of appropriate General Counsel's Reports also gives the public, and especially campaign finance practitioners, the opportunity to observe and adapt to the complete development of the law. Complaints and responses go on the public record, and those documents will frequently contain legal arguments. The General Counsel will find some arguments in those documents persuasive, and some not. The Commission will likewise find some of the General Counsel's arguments persuasive, and some not. Commissioners may also find unpersuasive arguments that carried the day before the Commission at an earlier time when there were other Commissioners. This process is how the law develops. Releasing the documents that demonstrate how the law develops promotes accountability by allowing the public to decide for itself whether it finds persuasive the same points the Commission finds

persuasive. In addition, making these documents available to the public promotes compliance by giving practitioners the fullest possible education about how the Commission arrived at the outcomes of particular cases. We believe practitioners will find General Counsel's Reports helpful for the same reasons that there is now a demand not merely for the online reported decisions of courts, but for online copies of litigants' briefs.

Disclosure of First General Counsel's Reports is particularly desirable because for many cases, the First General Counsel's Report is also the *only* General Counsel's Report. From the beginning of Fiscal Year 2009 through June 11, 2009, OGC sent to the Commission 81 First General Counsel's Reports, and 56 cases closed at the First General Counsel's Report stage during that time. Fiscal Year 2008, in which the Commission lacked a quorum for six months, does not produce a good comparison; but in Fiscal Year 2007, 101 First General Counsel's Reports were sent to the Commission, and 58 cases closed at the First General Counsel's Report stage. Because a significant proportion of cases close at the First General Counsel's Report stage, disclosure of those reports is particularly important to fuller public understanding of those cases specifically and the Commission's enforcement practice in general.

B. Other Considerations In Favor of Release

Disclosing First General Counsel's Reports will ameliorate the confusion that can result in cases where a Statement of Reasons is required but is not ready when the rest of the case file is released. In these cases, the public would benefit from disclosure of the First General Counsel's Report because, in the absence of the Statement of Reasons, the public record would have little explanation of the case aside from those arguments made in the complaint and response. While only a Statement or Statements of Reasons can explain the rationales for the Commission's (or the controlling group's) action, disclosing the First General Counsel's Report would give the public an early opportunity at least to read the facts and understand the issues, pending release of the Statement of Reasons.

Moreover, through nearly three decades of practice – from 1975 to 2001, and again from December 2003 through December 2006 – disclosure of First General Counsel's Reports posed only limited problems in the relatively few cases litigated under 2 U.S.C. § 437g(a)(8). Where the General Counsel's recommendation is not adopted by the Commission, it is the majority (or the control group's) Statement of Reasons that is the proper subject of review by the court in a case brought under Section 437g(a)(8); the General Counsel's Report is entitled to no deference. The court reviews whether the dismissal of the matter was contrary to law or arbitrary and capricious. *DCCC v. FEC*, 645 F. Supp. 169 (D.D.C. 1986). Thus, by definition the existence of more than one reasonable analysis of the case provides no reason for the court to find for an a(8) plaintiff. As long as the Commission's, or the control group's, rationale is reasonable it will survive review under this standard. As for offensive litigation pursuant to 2 U.S.C. § 437g(a)(6), no part of the enforcement file is released to the public until the entire enforcement matter – including any offensive litigation – is concluded. The ultimate release of a First General Counsel's Report *after* offensive litigation should not affect the positions of the parties *during* that litigation.

C. Policy Costs of Returning to Past Practice

Returning to the past practice with respect to placing First General Counsel's Reports on the public record is not without its costs. As noted above, the reasons for changing the prior practice in the first place included the perceived benefits of emphasizing on the public record F&LAs, which are Commission-approved documents, instead of First General Counsel's Reports, which are not. It was also thought that removing First General Counsel's Reports from the public record would enhance OGC's ability to be candid in its recommendations, analysis and written advocacy, and would diminish any reluctance Commissioners might have to disagree with the General Counsel's analysis that stemmed from the knowledge that analysis would eventually be publicly released.

Moreover, although as noted above, "the arbitrary and capricious" standard should protect any reasonable rationale articulated in a Statement of Reasons, plaintiffs in 437g(a)(8) cases will likely try to turn into whatever benefit they can the knowledge that the Commission's own counsel recommended going forward on their administrative complaints. Even if these arguments are uniformly unsuccessful, release of the First General Counsel's Reports may mean that our litigators have to expend resources meeting these arguments in instances where they otherwise might not have been raised. For example, in one case in the early 1990s, a district court held, *inter alia*, that the rationale of a controlling group of Commissioners "was not mandated by prior FEC precedent, was affected by a 3-3 tie vote and was contrary to the recommendation of the FEC General Counsel." *Common Cause v. FEC*, 720 F. Supp. at 152. While this holding was implicitly overturned later in *NRSC v. FEC*, 966 F.2d 1471 (D.C. Cir. 1992), and while the district court judge should have given no weight to the General Counsel's position, he nevertheless seemed to do so.¹

Nevertheless, in our view the benefits in increased transparency of the Commission's enforcement operations outweigh these costs or potential costs, for the reasons stated herein.

Although the disclosure of First General Counsel's Reports posed few apparent litigation problems in the past, there are a number of situations in which it would be advisable to invoke the deliberative process privilege or other FOIA exemptions to keep some or all of a First General Counsel's Report off the public record. We turn now to some of those scenarios and explain how we would propose to deal with them.

¹ The related *Common Cause* and *NRSC* cases had an unusual procedural history. *Common Cause* filed an administrative complaint alleging that the National Republican Senatorial Committee violated the Act. The Commission found probable cause and ultimately conciliated with NRSC regarding some violations, but split 3-3 as to another. *Common Cause* filed suit under 2 U.S.C. § 437g(a)(8) with respect to the violation on which the Commission split, and it was successful in the District Court. The Commission then split 3-3 on whether to appeal that decision. Unable to agree to appeal, the Commission then voted 6-0 to accept the remand. On remand, the Commission found probable cause that the NRSC violated the Act with respect to the remaining violation, and when post-probable cause conciliation was unsuccessful it sued the NRSC. The same district court judge found for the Commission in the 437g(a)(6) enforcement litigation. The NRSC appealed that decision. Rather than reaching the merits of the appeal in the enforcement action, the Court of Appeals held that the district court's decision in the original 437g(a)(8) suit was erroneous.

III. SPECIFIC PROBLEMS AND THEIR SOLUTIONS

A. Commission Agreement With The General Counsel's Recommendations But Not Her Reasoning

1. First General Counsel's Reports

As noted, we recommend that the Commission return to a general practice of releasing First General Counsel's Reports, even where the recommendations in the report are not adopted by the Commission. However, the one part of the January 2007 change in practice that we would propose to retain is preparing, and recommending that the Commission approve, F&LAs in all enforcement matters – not merely those in which the General Counsel recommends reason to believe. By retaining the practice of preparing F&LAs in all cases, the Commission can easily deal with any instances in which a majority agrees with the First General Counsel's Report's recommendation but not its rationale. In any such instance, the Commission would express its position simply by amending the proposed F&LAs (or by directing that OGC circulate revised ones). At the end of the case both the First General Counsel's Report and the Commission-approved F&LA would go on the public record.

2. Second and Subsequent General Counsel's Reports

We recommend that the Commission follow a similar procedure where the Commission agrees with the General Counsel's recommendation but not the rationale of a second or subsequent General Counsel's Report. The Commission does not generally approve F&LAs in association with these reports unless they contain additional RTB findings. Moreover, our research has confirmed that we may redact as predecisional any portion of a General Counsel's Report that reflects reasoning not adopted by the Commission. However, we believe that in virtually all instances where the Commission adopts the General Counsel's recommendation on different reasoning, a better practice would be for the Commission to release the predecisional portion of the General Counsel's Report along with a "special" F&LA that explains the Commission's rationale.²

B. Other Scenarios

On occasion since January 2007, in light of the policy of not putting First General Counsel's Reports on the public record, we have included in First General Counsel's Reports information that has not been included in the F&LAs.

For example, in a closed MUR where the Commission found no reason to believe that a loan was a contribution from a bank to a candidate, the First General Counsel's Report included specific information provided by the bank about the circumstances of the particular loan. The

² Of course, this analysis applies only to reports that would be released to the public record in the first place under the Interim Disclosure Policy.

bank requested that the information not be made public; accordingly, the F&LA summarized and paraphrased this information but did not provide the detail that was in the First General Counsel's Report. Had the First General Counsel's Report been released to the public record, the specific information would have been exempt from disclosure under FOIA Exemption 4, which covers trade secrets and other confidential business information. Thus, we could have redacted these references.

In other cases, we have identified certain witnesses in the First General Counsel's Reports but have been reluctant to do so in the F&LAs, which are provided to respondents, because of concerns raised by those witnesses about potential retaliation against them if they were known to have cooperated with a Commission investigation. We have recognized – and candidly stated to the witness if asked – that depending on the circumstances of the particular case we might or might not be able to avoid disclosing their identity in response to a FOIA request once the matter is closed. However, FOIA Exemptions 6 (generally) and 7(C) (in the law enforcement context) permit agencies to withhold information the release of which would constitute an unwarranted invasion of personal privacy, and Exemption 7(D) permits agencies to withhold the names of confidential law enforcement informants under certain circumstances. When confronted with a similar situation, we would return to the pre-2007 practice of redacting witness names from publicly released First General Counsel's Reports if necessary, and asserting such FOIA exemptions as may be applicable in the event of a subsequent FOIA request.

We believe that in most instances, if sensitive information is included in a First General Counsel's Report for the Commission's information only, that information can be redacted from the report under one of the FOIA exemptions.

Moreover, we would continue to make routine redactions to released First General Counsel's Reports as we do to other General Counsel's Reports based on the FECA and the FOIA.

IV. CONCLUSION

We recommend that the Commission return to the general practice of placing First General Counsel's Reports on the public record. This recommendation covers both instances in which the recommendations in the First General Counsel's Report are adopted and instances in which they are not. It should be understood that to the extent these documents are predecisional, release under this practice would constitute a discretionary disclosure under FOIA. Thus, the Commission should continue to reserve the right to redact or withhold information that is exempt from disclosure under the FECA and the FOIA. In the ordinary case we would make such redactions to the First General Counsel's Report as are appropriate, which we do now with all documents that go on the public record.

In extraordinary cases, we recommend withholding First General Counsel's Reports entirely. The circumstances where we recommend withholding a First General Counsel's Report are more appropriate for discussion in an Executive Session given that the premature disclosure

of such information is likely to have an adverse effect on future Commission action. Thus, our discussion of this topic and our formal recommendation about it are included in a supplement to this memorandum that we have circulated for discussion in an Executive Session.

We also recommend that the Commission place on the public record, subject to appropriate redaction, First General Counsel's Reports that had been withheld since January 2007 pursuant to the practice that began then. The Commission should be advised that after adoption of the IDP, we did not retroactively place on the public record materials that had been withheld during the "AFL" period between 2001 and 2003 – a roughly comparable period of time to that between January 2007 and the present. However, in that instance, our practice between 2001 and 2003 had been mandated by a court, rather than being the result of a purely internal decision. Moreover, closeout letters had informed complainants and respondents in MURs closing during that period that only dispositive documents would be released to the public record; no similar consideration exists here. Finally, because only dispositive documents were placed on the public record between 2001 and 2003, the volume of documents that the Commission would have had to restore to the public record to be consistent with the IDP would have been larger than the volume of First General Counsel's Reports here.

Where a FOIA request or appeal seeks a General Counsel's Report or accompanying F&LA that has not yet been restored to the public record, we would intend to release those documents, subject to appropriate redaction. Where a question arises as to whether to include such a document in an administrative record lodged with a court in defensive litigation, we would intend to include the document in the record unless there was an important litigation-related reason not to do so.

V. RECOMMENDATIONS

1. Resume the practice of placing First General Counsel's Reports on the public record in closed enforcement matters provided that the Commission reserves the right to redact portions of such documents consistent with the Federal Election Campaign Act and the Freedom of Information Act in appropriate instances.
2. Direct the Office of General Counsel to place on the public record, after appropriate review and redaction, First General Counsel's Reports that have been withheld since January 2007.