



FEDERAL ELECTION COMMISSION
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AGENDA ITEM
For Meeting of: 11-19-09

November 18, 2009

Memorandum

SUBMITTED LATE

TO: The Commission

FROM: Chairman Steven T. Walther *SN*
Vice Chairman Matthew S. Petersen *MSP*
Commissioner Cynthia L. Bauerly *CLB*
Commissioner Caroline C. Hunter *CH*
Commissioner Donald F. McGahn II *DFM*
Commissioner Ellen L. Weintraub *ELW*

Subject: Proposed Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record

Attached is a proposed Statement of Policy with respect to placing First General Counsel's Reports on the public record in closed enforcement matters, subject to appropriate redaction or withholding.

Proposed Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record

The Federal Election Commission ("Commission") will resume the practice of placing all First General Counsel's Reports on the public record, subject to appropriate redaction or withholding as described below.

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").

In 2001, following the decision of the District Court in *AFL-CIO v. FEC*, 177 F.Supp.2d 48 (D.D.C. 2001) ("*AFL-CIO*"), 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. Then, after the Court of Appeals decision in the *AFL-CIO* case, 333 F.3d 168 (D.C. Cir. 2003), the Commission adopted an interim policy, 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[.]" See *Statement of Policy Regarding Disclosure of Closed Enforcement or Related Files*, 68 Fed. Reg. 70423 (Dec. 20, 2003) ("Interim Disclosure Policy").

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 the Office of General Counsel ("OGC") in a General Counsel's Report, but rejected one of several underlying rationales for the recommendation. Thereafter, OGC began recommending the approval of a Factual & Legal Analysis ("F&LA") in all cases, not just those with reason to believe recommendations. From January 2007 forward, F&LAs providing an explanation for the Commission's decisions were placed on the public record in new enforcement matters, but First General Counsel's Reports were not.

In the interest of promoting transparency, the Commission is resuming the practice of placing all First General Counsel's Reports on the public record, whether or not the recommendations in these First General Counsel's Reports are adopted by the Commission.

The Commission will place all First General Counsel's Reports on the public record in closed enforcement matters, prospectively and retroactively, while reserving the right to redact portions of such documents consistent with the Act, the principles articulated by the Court of Appeals in *AFL-CIO*, and subject to the Commission's authority to withhold material under an exemption set forth in the FOIA.

Until such time as all previously undisclosed First General Counsel's Reports have been placed on the public record, the Commission intends to approve any FOIA request seeking a First General Counsel's Report or accompanying F&LA that has not yet been placed on the public record, but reserves the right to redact portions of such documents consistent with the Act, the principles articulated by the Court of Appeals in *AFL-CIO*, and subject to the Commission's authority to withhold material under an exemption set forth in the FOIA.

This document amends an agency practice or procedure. This document does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public comment, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedure Act ("APA"). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.