AGENDA DOCUMENT NO. 15-23-B

2015 APR -2 PM 12:05

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

APR 0 2 2015

MEMORANDUM

AGENDA ITEM

TO: The Commission

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For Meeting of 5-21-15

RE: Material Placed on the Public Record
At the Close of an Enforcement Matter

This memorandum is in response to the request from Commissioner Goodman, relayed by Gary Lawkowski's email of January 23, that the Office of General Counsel prepare a memo to the Commission "summarizing the Commission's history of placing documents on the public record [in enforcement matters], the impact of the 2009 policy [by which the Commission returned to a practice of putting First General Counsel's reports on the public record], and a summary and explanation of which documents in enforcement actions go on the public record automatically, which are available upon request (*i.e.*, FOIA), and which are presumptively privileged."

I. STATUTORY AND REGULATORY REQUIREMENTS AND THEIR HISTORY

The Federal Election Campaign Act of 1971, as amended, mandates that two types of information be made public at the close of an enforcement matter, and prohibits unilateral disclosure by the Commission of a third type of information even after a matter is closed. Specifically, it provides that "[i]f a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent." 52 U.S.C. § 30109(a)(4)(B)(ii) (formerly 2 U.S.C. § 437g(a)(4)(B)(ii)). It also provides that "[i]f the Commission makes a determination that a person has not violated this Act or [the presidential public funding statutes], the Commission shall make public such determination." *Id.* On the other hand, it also provides that "[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission . . . may be made public by the Commission without the

written consent of the respondent and the Commission." 52 U.S.C. § 30109(a)(4)(B)(i) (formerly 2 U.S.C. § 437g(a)(4)(B)(i)). The Commission has historically interpreted this last requirement as extending beyond the active life of an enforcement matter.

1976 amendments to the Act

The requirements for disclosure of conciliation agreements and determinations of no violation were added in the 1976 amendments to the Act, Pub. L. 94-283. The 1976 amendments required that the Commission make public "the results of any conciliation attempt, including any conciliation agreement entered into by the Commission," as well as any determination of no violation. 2 U.S.C. § 437g(a)(6)(C) (1977). This language appears to have required the disclosure of unsuccessful conciliation results, as well as successful ones. The legislative history of the 1976 amendments contains little explanation of these particular requirements.

Commission consideration of internal policies in 1976

President Ford signed the 1976 amendments into law on May 11, 1976. Less than four months later, the General Counsel submitted a memorandum to the Commission recommending that the Commission release at the close of a matter General Counsel's Reports underlying almost all Commission-level decisions in a case, and establish at the least a presumption that the *entire* investigative file be released in each case. Commission Memo No. 833, August 31, 1976, at cover page, 6, 10-11. While the memorandum acknowledged the legal bases for withholding certain documents, it concluded that

> Making them available will enable the public to assess the considerations deemed relevant in enforcement actions. Moreover, in an area where fears of partisan exercise of [the Commission's prosecutorial discretion] are high, publication will enable the Commission to demonstrate that it has dealt fairly and even-handedly with those persons who have transgressed the limits of the law.

Id. at 6.

Disclosure regulations under the Act and under FOIA

The Commission's original disclosure regulation, 11 C.F.R. § 111.8 (1977), did no more than restate the statutory provisions. In the Explanation and Justification for that regulation, the Commission said:

> The statute also mandates that the Commission will disclose its findings that no violation has occurred, and its attempts to secure conciliation agreements, including any agreement entered into. Inasmuch as the statute very specifically requires keeping all notifications of apparent violations and investigations secret [in what is now 52 U.S.C. § 30109(a)(12), which the Commission has generally

> interpreted as applying only to open matters[1]], *and then requires full publicity after any investigation and conciliation*, the Commission has included section 111.8 specifically to reflect that policy here, while reserving for later regulation a full statement of its disclosure policies under the Freedom of Information Act.

H. R. Doc. 95-44 at 76 (1977) (emphasis added).

In its first proposed FOIA rule later that year, the Commission proposed to proactively disclose "General Counsel's Reports and investigatory materials in enforcement files," as well as "opinions of Commissioners rendered in enforcement cases," but only "after the Commission has voted to close a case or take no further action." Proposed 11 C.F.R. § 4.4(a)(3) and (4), 42 Fed. Reg. 59944 (Nov. 22, 1977). The proposed rule contained a "policy" section in which the Commission proposed 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 secret and commercial and financial information, and the need for the Commission to promote free internal policy deliberations and to pursue its official activities without undue disruption.

Proposed 11 C.F.R. § 4.2(a), 42 Fed. Reg. 59944.

The Commission distinguished between the disclosures it would make under the proposed rule and the disclosures required under FECA – that is, the disclosures of findings of no violation and of conciliation attempts. It specifically exempted those materials from the proposed rule, noted that release of them was governed by the Act, and proposed to announce that those materials were available from the Public Records Office. Proposed 11 C.F.R. §§ 4.3(b)(3) and (c), 42 Fed. Reg. 59944. All of these proposals were adopted by the Commission without change when it approved final rules a little more than a year and a half later. 44 Fed. Reg. 33368 (June 8, 1979).

Roughly three months after that, the Commission proposed additional rules to clarify that all available materials in closed enforcement files would be available either through FOIA (11 C.F.R. Part 4) or through the Public Records Office (11 C.F.R. Part 5). These proposed rules also tweaked the description of the investigatory materials that were available to specify that the reference was to "2 U.S.C. 437g" investigatory materials, and they provided that release would occur 60 days after the Commission voted to close the file, unless the Commission had in the interim been sued under then-2 U.S.C. § 437g(a)(9) (later 2 U.S.C. § 437g(a)(8), and now 52 U.S.C. § 30109(a)(8)). In the latter case, the proposed rule provided that the file would be made public when the litigation was concluded or when the case, after remand, was again closed. 44 Fed. Reg. 53924 (September 17, 1979) (proposed amendments to 11 C.F.R. Part 4); 44 Fed Reg. 53924-26 (September 17, 1979) (proposed new 11 C.F.R. Part 5).

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[1] For many years, the Commission did not interpret 2 U.S.C. § 437g(a)(12) (now 52 U.S.C. § 30109(a)(12)) as prohibiting the bringing in open court of actions to enforce subpoenas issued in open MURs. The Court of Appeals for the D.C. Circuit held to the contrary in *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001).

These proposed rules were made final, with one change and one clarification, in May 1980. 45 Fed. Reg. 31291-92 (May 13, 1980) (amending 11 C.F.R. Part 4); 45 Fed Reg. 31292-94 (May 13. 1980) (promulgating new 11 C.F.R. Part 5). The change was that instead of being released 60 days after the completion of Commission action, files were to be released within 30 days of notification to the complainant and respondents that the matter was closed. Reference to potential litigation against the Commission by administrative complainants was dropped. In addition, the final rule clarified that "non-exempt" 2 U.S.C. 437g investigative materials would be available, suggesting that the Commission would withhold information that it would be permitted to withhold under exemptions from the FOIA. These regulations have remained unchanged for 35 years, and are codified today at 11 C.F.R. §§ 4.4(a)(3) and 5.4(a)(3) and (4).

1979 amendments to the Act

Meanwhile, however, Congress was considering additional amendments to the Act, including to its provisions relating to disclosure of enforcement matters. Specifically, the 1979 amendments, Pub. L. 96-187, added the prohibition on release of conciliation information now found at 52 U.S.C. § 30109(a)(4)(B)(i). The House report on the bill stated that release of conciliation information other than the final agreement would require "written consent of the respondent and a vote of four members of the Commission," and explained that the Commission "may not make public the outcome of a conciliation attempt which was unsuccessful or any proposed conciliation agreements which were not signed by the respondent or the Commission." H.R. Rpt. 96-422 at 21 (1979). The Explanation and Justification for the Commission's regulation implementing this requirement, 11 C.F.R. § 111.21(b), states that the regulation applies only to "conciliation efforts, and information derived therefrom, which are not finalized." 45 Fed. Reg. 15080, 15089 (March 7, 1980). However, the language of the regulation itself indicates that no conciliation information at all (other than a final agreement) is to be released, whether or not the conciliation effort results in an agreement. The 1980 regulations also moved the enforcement disclosure regulation from 11 C.F.R. § 111.8 to 11 C.F.R. § 111.20, with some minor changes in language.

In the intervening 35 years, Section 111.21(b), regarding conciliation confidentiality, has never been modified. Section 111.20, regarding disclosure of the rest of the file, has been changed only once, by the addition in 2000 of 11 C.F.R. § 111.20(c). That subsection provides that in the event an enforcement matter results in *offensive* litigation by the Commission, the file will be released within 30 days after notification to the administrative complainant, and all administrative respondents, of the conclusion of the litigation.

Practice from 1980 to 2001

After five years of frequent legislative and regulatory change, the Commission's practice regarding the public disclosure of closed enforcement matters remained relatively constant over the next two decades. General Counsel's Reports acted on by the Commission were generally made public; material related to conciliation negotiations was redacted; and, in cases where the Commission undertook an investigation, discovery requests and their fruits were placed on the

public record. Anecdotally, we understand that by the end of the 1990s, some materials that would otherwise be duplicative, like some attachments to General Counsel's Reports, were not reproduced for the public record. However, the majority of materials in any case were disclosed.

II. *AFL-CIO v. FEC*

In a series of MURs that were treated as a single investigation (MURs 4291 *et al.*,) the Commission investigated allegations of coordination during the 1996 Federal elections between the AFL-CIO and several candidates' committees, as well as the Democratic National Committee. The investigation generated tens of thousands of pages of documents. After the Commission determined not to appeal the District Court's decision in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), the Commission decided to take no further action in the MURs and closed the file. When the Commission informed the AFL-CIO and the DNC that it was about to release to the public many of the documents obtained in discovery, the AFL-CIO and DNC sued the Commission to block release of the documents. On July 17, 2001, within four days of the suit, the U.S. District Court for the District of Columbia issued a preliminary injunction barring release of any materials from the cases except for the General Counsel's Report recommending dismissal; the certification of the Commission's vote to take no further action and close the file; one Statement of Reasons by a Commissioner; and one conciliation agreement with a secondary respondent agreed to earlier in the case. By not later than August, 2001, the Commission was applying the restrictions of the preliminary injunction to all newly closed MURs. In other words, after August, 2001, the *only* documents released to the public from a closed enforcement matter were the conciliation agreement, if there was one, or the finally dispositive General Counsel's Report, if there was not; the certification of the Commission's final disposition; and any Statements of Reasons.

In December 2001, the District Court granted the AFL-CIO and DNC's motion for summary judgment. *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (1991). The Commission appealed. The Court of Appeals for the District of Columbia affirmed the district court's judgment on different grounds. It differed with the lower court's restrictive interpretation of the confidentiality provision of then-2 U.S.C. § 437g(a)(12)(A) as applying even after a case was closed. "[T]he Commission may well be correct," it said, "that . . . Congress merely intended to prevent disclosure of the fact that an investigation is pending." It also acknowledged that the reasons the Commission advanced in support of a policy of full disclosure, "deterring future violations and promoting Commission accountability[,] may well justify releasing more information than the minimum disclosures required by section 437g(a)." *AFL–CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) at 174, 179. Nevertheless, the Court of Appeals warned that, in releasing enforcement information containing internal strategy and lists of members and officials to the public, the Commission must "attempt to avoid unnecessarily infringing on First Amendment interests where it regularly subpoenas materials of a 'delicate nature . . . represent[ing] the very heart of the organism which the First Amendment was intended to nurture and protect.'" *Id.* at 179. (Citation omitted). The decision suggested that, with respect to materials of this nature, a "balancing" of competing interests is required—on one hand, consideration of the Commission's interest in promoting its own accountability and in deterring future violations and, on the other, consideration of the respondent's interest in the privacy of

association and belief guaranteed by the First Amendment. Noting that the Commission had failed to tailor its disclosure policy to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates, including by proposing to release thousands of pages of documents that it had not even reviewed, *id.* at 178, the Court found the agency's disclosure regulation at 11 CFR § 5.4(a)(4) to be impermissible. *Id.* at 179.

III. THE 2003 INTERIM DISCLOSURE POLICY, AND WHICH DOCUMENTS GO ON THE PUBLIC RECORD AUTOMATICALLY

In December 2003, the Commission responded to the Court of Appeals' decision by publishing a policy statement in the Federal Register. *Statement of Policy Regarding Closed Enforcement and Related Files*, 68 Fed. Reg. 70426 (December 18, 2003). The statement represented the Commission's interim implementation of the Court of Appeals decision in *AFL-CIO*, pending future changes to FEC regulations.

For Matters Under Review, the Commission identified ten categories of documents that, to this day, automatically go on the public record at the close of an enforcement matter (albeit with appropriate redactions) "either [because they] do not implicate the Court's concerns, e.g., categories 8, 9 and 10, or, because they play a critical role in the resolution of a matter, the balance tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information."[2] 68 Fed. Reg. at 70427. Those categories are:

1. Complaints, or referrals from within the agency.

2. Responses.

3. General Counsel's Reports, but *only* those that contain one or more of the following recommendations with respect to at least one respondent:

   a. Dismissal;

   b. Reason to believe;

   c. No reason to believe;

   d. No action at this time;

   e. Probable cause to believe;

   f. No probable cause to believe;

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[2] The Commission identified slightly different categories of documents for Alternative Dispute Resolution matters and Administrative Fines matters. 68 Fed. Reg. at 70427-28.

g. No further action; or

h. Acceptance of a conciliation agreement.

4. Notifications to respondents of reason to believe findings (including Factual and Legal Analyses).

5. Respondents' responses to reason to believe findings.

6. Briefs on the issue of probable cause to believe – both the General Counsel's Brief and the Respondent's Brief.

7. Statements of Reasons by Commissioners.

8. Final conciliation agreements.

9. Evidence of payment of a civil penalty, or of disgorgement.

10. Certifications of Commission votes. (In practice, this has for some years meant that certifications of actions related to General Counsel's Reports that go on the public record under the policy will themselves go on the public record – with any appropriate redactions -- and those certifications related to General Counsel's Reports that do not go on the public record also do not go on the public record.)

The Commission also identified four additional categories of documents that, to this day, automatically go on the public record at the close of an enforcement matter because they "will assist the public in understanding the record without intruding upon the associational interests of the respondents." *Id.* These are:

1. Designations of counsel.

2. Requests for extension of time.

3. Responses to requests for extension of time.

4. Closeout letters.

The Commission determined that attachments to any documents that fell into one of the 14 designated categories would be placed on the public record if they had already been made public in some other context, and would not be placed on the public record if they were not already public. *Id.*

To date, the Commission has formally modified these categories only once. In 2007, when it promulgated a new procedural rule granting respondents the opportunity for oral hearings at the probable cause stage of an enforcement matter, the Commission added transcripts

of the hearings to the group of documents disclosed at the conclusion of a matter. 72 Fed. Reg. 64919, 64920 and n.3 (Nov. 19, 2007).

The 2003 statement also addressed which documents would *not* automatically be placed on the public record. In particular, in light of the *AFL-CIO* decision,

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

68 Fed Reg. at 74027.

However, that full rulemaking, which the Commission said would be conducted "in 2004," *id.* at 74026, never occurred, nor was 11 C.F.R. § 5.4(a), which was invalidated by the *AFL-CIO* decision, ever formally removed from the Commission's regulations.

IV. PRACTICE REGARDING FIRST GENERAL COUNSEL'S REPORTS, 2007-09, AND REVERSAL THEREOF BY THE COMMISSION

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 its recommendation. In that case, the Commission agreed to adopt special, mid-case Factual and Legal Analyses so that the public would have an accurate picture of the Commission's rationale and the General Counsel's Report could be appropriately withheld from the public record in its entirety as predecisional.

After the matter in question was released on the public record, OGC considered what changes to make in both the Enforcement and Administrative Law 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, OGC acted first with respect to those reports. 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 it would permit the Commission to withhold First General Counsel's Reports as predecisional. 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; and 3) allow for more candid analysis on the part of 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.

After more than two years of experience with the practice, the General Counsel recommended returning to a prior practice consistent with the 2003 policy. The "first and foremost" reason, she wrote, was "promot[ion of] transparency – about both the Commission's own operations and the actions of the political actors who are respondents in enforcement matters." Agenda Document 09-72, Memorandum to the Commission Re: First General Counsel's Reports and the Public Record, October 14, 2009, at 5. Moreover, "[d]isclosing 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 . . . 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." *Id.* at 6. The memorandum also noted that disclosure of First General Counsel's reports had "posed only limited problems in the relatively few cases litigated under 2 U.S.C. § 437g(a)(8) [now 52 U.S.C. § 30109(a)(8).]" *Id.* It acknowledged some "policy costs" to returning to prior practice, including the loss of the "perceived benefits" of changing the prior practice in the first place, and including the likelihood that "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." *Id.* at 7. Nevertheless, the General Counsel concluded that the benefits of returning to the prior practice outweighed the "policy costs," and recommended that the Commission do so. *Id.* at 7, 10. Ultimately, the Commission adopted a policy statement announcing the agency's return to its prior practice "in the interest of promoting transparency." 78 Fed. Reg. 66132 (December 14, 2009).

V. DISCLOSURE OF CLOSED MUR FILES AND THE LAW OF PRIVILEGES

The four privileges most likely to arise in any question regarding closed enforcement files are: the attorney-client privilege; the protection for attorney work product; the deliberative process privilege; and the law enforcement privilege. We also address briefly the relationship of privilege issues to the Commission's disclosure practice.

Attorney-Client Privilege

Four elements are required to establish the existence of the attorney-client privilege: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of seeking, obtaining, or providing legal assistance to the client. Restatement of the Law Governing Lawyers § 118 (Tentative Draft No. 1, 1988) (*cited in* 1 Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine at 65 (5th ed. 2007) ("Epstein")); *see In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984) (listing prerequisites for invoking

attorney-client privilege). As with any privilege, a communication becomes protected under the attorney-client privilege at the moment in time when all of these elements are met.

Not every communication from attorneys to clients is privileged. In particular, in "[s]ome circuits . . . [,the Courts of Appeals] extend the privilege to legal opinions and communications from attorneys to clients only if and, arguably only to the extent, that the opinion contains within it, and arguably inextricably bound up to the legal opinion, the confidences made by the client to the lawyer that form the basis of the legal opinion." 1 Epstein at 78 (emphasis added).

Attorney Work Product

Attorney work product constitutes (1) any document or tangible thing that is (2) prepared in anticipation of litigation (including administrative proceedings, *Upjohn Co. v. United States*, 449 U.S. 383 (1981)), (3) by or for a party, or by or for that party's representative. In the context of civil discovery, such material is protected from disclosure unless the party seeking to obtain disclosure can demonstrate (1) a substantial need for the materials and (2) inability to obtain the substantial equivalent of the materials without undue hardship. Even then, however, material that meets the first three tests *and* that reflects the attorney's theories, analysis, mental impressions, etc. will remain entirely protected from disclosure. *See* 2 Epstein at 795, 797. In the FOIA context, however, the attorney client privilege, as well as the other Exemption 5 privileges, are absolute and cannot be overcome by a showing of need and undue hardship. *See* U.S. Dep't. of Justice, Guide to the Freedom of Information Act 358-59 (2009 ed.)

Because the section 30109 (formerly 437g) enforcement process is a statutorily mandated administrative process that expressly includes paths to litigation by or against the Commission, all MUR documents prepared by OGC for the Commission are plainly prepared in anticipation of litigation and qualify for work product protection.

Deliberative Process Privilege

The deliberative process privilege is a special privilege that may be asserted only by the government. The purpose of the privilege is to shield 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). It is intended to "protect[ ] the 'administrative reasoning process,' or those thoughts, ideas and analyses that encompass the process by which an agency reaches a decision," *Exxon Corp.*, 87 F.R.D. at 636, in recognition that "[f]ree and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act." *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958). Thus, the privilege protects documents that are both (i) "pre-decisional," *i.e.*, temporally antecedent to

the challenged policy or decision, and (ii) "deliberative," or related to the process by which the decision was reached. *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997); *In re Apollo Group, Inc. Sec. Litig.*, 251 F.R.D. 12 (D.D.C. 2008).

Not every document submitted by a government subordinate to a government superior is subject to the privilege. Staff documents that are expressly adopted as the final agency decision, or that represent the only record of the reasons for or facts underlying that decision, may lose their predecisional character when the agency adopts them. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975); *see, e.g., Nat'l. Council of La Raza v. DOJ*, 411 F.3d 350, 358 (2nd Cir. 2005) (ordering release of memorandum where agency had "publicly and repeatedly depended on the Memorandum as the primary legal authority justifying and driving" its policy decision "and the legal basis therefor") and *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of "underlying memorandum" that was "expressly relied on in a final agency dispositional document"); *cf. DSCC v. FEC*, 454 U.S. 27, 39 n. 19 (1981) (where Commission adopted staff recommendations as the Commission's decision, and released General Counsel's Report with no separate statement of its rationale, Court would presume for purposes of review that report's rationale as well as its result was adopted by agency).

Law Enforcement Privilege

The common law privilege for material in law enforcement files and FOIA's Exemption 7 differ in a number of respects, but the three aspects of their scope that will be examined here are practically identical. First, the privilege protects material disclosure of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552b(7)(A). Second, it protects material in law enforcement files disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552b(7)(C). Third, it protects material that "would disclose techniques and procedures for law enforcement investigations or prosecution, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).

The law enforcement privilege generally does not apply to an entire document otherwise required to be released under the 2003 disclosure policy. It does, however, apply to certain categories of information contained in documents that may otherwise be publicly released.

First, information about specific internal thresholds for the exercise of prosecutorial discretion, such as the Enforcement Priority System or the referral thresholds employed by the Audit and Reports Analysis Divisions, is always redacted. Release of specific information about these thresholds would provide those inclined to do so with a guide as to how much they could violate the Act without fear of prosecution. *Cf.* 5 U.S.C. § 552(b)(7)(E).

Second, while most Commission investigations rely simply on the well-known techniques of informal interviews and interrogatories, and occasionally on compulsory document requests and testimony, we will consider carefully references in reports to less frequently used

investigatory techniques with an eye to whether disclosure of those techniques might enable someone involved in a future investigation to obstruct the Commission's inquiries. Where there is such a danger, we will redact the information. *Cf. id.*

Third, where we are aware of another agency's proceeding regarding a party, we will not disclose information about that proceeding unless we are aware that the other agency's proceeding is either public knowledge or is closed. We follow this procedure to avoid inadvertent interference with the other agency's proceeding. *Cf.* 5 U.S.C. § 552(b)(7)(A).

Finally, although most privacy concerns – both the ordinary personal privacy concerns that animate FOIA exemptions 6 and 7(C) and the concerns with First Amendment-protected associational freedom that animated the *AFL-CIO* decision – are avoided under the 2003 policy by not placing internal strategic documents or member lists (or any other discovery materials) directly on the public record, additional concerns arise where a document that is going to be released refers to another law enforcement agency's proceeding, and we know that proceeding is closed but cannot determine whether the closed proceeding is public knowledge. In such instances, we generally will not be the ones to reveal that an individual has been under scrutiny by the other agency – particularly in criminal cases, where persons who were under criminal investigation but never charged have a strong privacy interest in the fact of the investigation not being made public. Similarly, if a General Counsel's Report indicates that there may be some evidence that a respondent acted in knowing and willful violation of the Act, but for whatever reason we do not recommend a knowing and willful finding, and the Commission never votes on a knowing and willful finding, we will redact the report's discussion of knowing and willful scienter.

VI. RELATIONSHIP BETWEEN FOIA REQUESTS AND THE 2003 DISCLOSURE POLICY

There are several important points to keep in mind about the relationship between FOIA requests and the 2003 disclosure policy.

The first is that the 2003 policy provides for *proactive* disclosure of certain types of documents. Thus, if a document is on the list in the 2003 policy, it generally should not be necessary for anyone to file a FOIA request for the document; instead, interested members of the public can review the documents at the Enforcement Query System page of the Commission's website.

The second is that generally speaking, General Counsel's Reports and Memoranda that go on the public record under the 2003 policy generally will not contain redactions based on the deliberative process or attorney work product privileges, because the documents themselves are subject to those privileges in their entirety and their disclosure pursuant to the 2003 policy amounts to a waiver of those privileges. There may be, however, exceptions regarding particular language in particular cases where redaction of some privileged or otherwise sensitive information is advisable. Moreover, we will always redact conciliation information that is confidential pursuant to 52 U.S.C. § 30109(a)(4)(B)(ii); references (such as citations) to open

matters, which remain confidential pursuant to 52 U.S.C. § 30109(a)(12); and protected law enforcement information consistent with the principles set out in the discussion *supra* at 13-14.

The third is that when reviewing a FOIA request for material not automatically placed on the public record, we will withhold or redact documents as necessary based on applicable litigation privileges (brought into FOIA practice through FOIA Exemption 5), as well as the FOIA exemption for certain types of material found in law enforcement files (Exemption 7). Moreover, in situations where material is withheld or redacted under the FOIA exemption for privacy-sensitive material in law enforcement files (Exemption 7(C)), we will usually also claim FOIA's more general exception for personal privacy material (Exemption 6). The issue rarely arises, but we will also withhold or redact material obtained from commercial entities as appropriate based on the FOIA exemption for "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential" (Exemption 4).

The following is a nonexhaustive list of the types of documents in enforcement files that are not proactively disclosed under the 2003 policy but are available through a FOIA request, subject to appropriate redaction, which may be more or less heavy depending on the unique circumstances of each document:

- Attachments to complaints and responses that are not publicly available, including affidavits/declarations
- Complaint notification letters to respondents
- Notification to a respondent that they had been an "Unknown Respondent"
- Letters notifying respondents of additional information known to the Commission that is not in the complaint, such as news articles, and providing opportunity to clarify or amplify their response
- Letters from respondents clarifying/amplifying response in response to agency letters referenced above
- Messages sending Designation of Counsel forms
- Fax/email cover pages
- Return receipts/messages acknowledging receipt of documents
- Confidentiality advisements
- Subpoenas/document requests
- Discovery material, including subpoena responses
- Deposition transcripts
- Reports of Investigation
- General Counsel's Reports or Memoranda making no recommendations set forth in the 2003 policy
- Certifications reflecting no votes on recommendations set forth in the 2003 policy
- Directive 68 Status Letters to Respondents
- Other email correspondence with respondents and their counsel
- Internal correspondence as to administrative matters (e.g., scheduling meetings)
- Tolling agreements
- Limited waivers of confidentiality based on FEC Disclosure Procedure
- Communications with witnesses that are not respondents.