



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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2015 MAY 14 P 4: 15

May 14, 2015

AGENDA ITEM
For Meeting of 5-21-15

MEMORANDUM

TO: The Commission

FROM: Lee E. Goodman
Commissioner

A handwritten signature in black ink that reads "Lee E. Goodman". The signature is written in a cursive style and is positioned to the right of the printed name "Lee E. Goodman".

SUBJECT: Proposed Statement of Policy Regarding the Public Disclosure of Closed Enforcement Files

Attached is a memorandum recommending that the Commission return to its prior practice of placing additional documents produced during the enforcement process on the public record. I request that this memorandum be made public and placed on the Commission's Open Meeting Agenda for May 21, 2015, for discussion along with the memorandum dated March 9, 2015, regarding Engaging the Public and Stakeholders.

Attachment:

Proposed Statement of Policy Regarding the Public Disclosure of Closed Enforcement Files



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MEMORANDUM

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SUBJECT: Proposed Statement of Policy Regarding the Public Disclosure of Closed Enforcement Files

Summary:

In order to clarify the Commission's practice of publicly releasing certain documents in closed enforcement actions, promote agency transparency, accountability, and public understanding of Commission decisions, and to engage the public and stakeholders in the Commission's activities, the Federal Election Commission is formally returning to its prior policy of placing additional documents on the public record in closed enforcement matters, subject to appropriate redaction or withholding.

Supplementary Information:

For approximately the first twenty-five years of its existence, the Federal Election Commission (the "Commission") placed on the public record all documents considered by the Commissioners in their consideration of a matter, except those exempt from disclosure under either the Federal Election Campaign Act, 52 U.S.C. 30101, *et seq.* ("FECA" or "the Act"), or under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"). In 2001, following the decision of the district court in *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001), the Commission restricted its public disclosure to only those documents that reflected the agency's "final determination" with respect to enforcement matters. Although the court of appeals affirmed the judgment of the district court, it did so on a narrower ground, stating "although we agree that deterring future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by [52 U.S.C. 30109(a)], 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 protect.'" *AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981)). Thus, following the court of appeal's ruling, the Commission adopted an interim disclosure policy that resumed the practice of placing additional categories of

enforcement documents on the public record, including but not limited to any “[c]omplaint or internal agency referral,” “[r]esponse to a complaint,” “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,” “[n]otification of reason to believe findings (including Factual and Legal Analysis),” and General Counsel’s briefs. *See* Statement of Policy Regarding Disclosure of Closed Enforcement or Related Files, 68 FR 70423 (Dec. 20, 2003) (“Interim Disclosure Policy”).

The Commission’s Interim Disclosure Policy has been reconsidered twice. In 2006, the Commission reconsidered its practice of placing First General Counsel’s Reports on the record following a matter in which the Commission adopted a recommendation proposed by the Office of the General Counsel (“OGC”) but rejected one of several underlying rationales for the recommendation. Thereafter, OGC began recommending Factual and Legal Analysis (“F&LA”) in all cases, and from January 2007 forward, approved F&LAs were placed on the public record in all matters, not just those in which the Commission found reason to believe. In 2009, the Commission resumed the practice of placing all First General Counsel’s Reports on the public record, subject to appropriate redaction and withholding.

In order to promote transparency, provide a clearer understanding of the law to “deter[] future violations,” and “promot[e] Commission accountability,” the Commission is resuming its prior policy of placing additional enforcement documents on the public record. Prospectively, the Commission will place the following categories of documents on the public record at the close of an enforcement matter, subject to appropriate Commission-approved redactions consistent with the requirements of the Act, the principles articulated by the court of appeals in *AFL-CIO*, and/or affirmative invocations by the Commission of the Commission’s authority to withhold materials under an exemption set forth in FOIA:

- Correspondence from the Commission to a respondent prior to a finding of reason to believe that notify the respondent of additional information known to the Commission but not found in the complaint or response, requests or invites respondents to respond to new information or clarify information found in their response, and/or provides notice of or an opportunity to respond to new legal theories;
- Correspondence from respondents submitted in response to any of the above;
- Documents prepared by OGC and considered or discussed by the Commission as part of its deliberative process prior to finding reason to believe, including but not limited to withdrawn counsel’s reports, memoranda summarizing or discussing new factual information, and/or memoranda analyzing applicable law, whether or not these documents contain any of the recommendations described in the Interim Disclosure Policy; and
- Proposed F&LAs that are voted on by the Commission.

In appropriate cases implicating the law enforcement privilege, the Commission reserves the right to act by a majority vote to assert the privilege to withhold an entire document.

The Commission intends to approve any FOIA request for any of the above categories of documents that has not been placed on the public record in a closed enforcement matter, subject to appropriate Commission approved redactions consistent with the requirements of the Act, the principles articulated by the court of appeals in *AFL-CIO*, and the Commission's vote to invoke an exemption set forth in FOIA. In appropriate cases implicating the law enforcement privilege, the Commission reserves the right to act by a majority vote to assert the privilege to withhold an entire document.

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 here.