AGENDA DOCUMENT NO. 15-27-B

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AUG 0 5 2015

MEMORANDUM

AGENDA ITEM

For Meeting of 9-11-15

SUBMITTED LATE

TO: Shawn Woodhead Werth
Commission Secretary

FROM: Lisa J. Stevenson
Deputy General Counsel, Law

Lawrence L. Calvert
Special Counsel to ~~the~~ General Counsel

RE: Agenda Placement of Attached Memo

Through an August 4, 2015 email from his executive assistant, Gary Lawkowski, Commissioner Goodman has requested that the attached memo be made public and placed on the agenda for the August 11 open meeting of the Commission under Item V, "Public Disclosure of Closed Enforcement Files."

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AUG 0 5 2015

MEMORANDUM

TO: The Regulations Committee

FROM: Lisa J. Stevenson
Deputy General Counsel, Law

Gregory R. Baker
Deputy General Counsel, Administration

Daniel A. Petalas
Associate General Counsel, Enforcement

Lawrence L. Calvert
Special Counsel to the General Counsel

Katie A. Higginbothom
Assistant General Counsel for Administrative Law

CC: Other Commissioners

RE: Disclosing Additional Categories of Documents to the Public Record At the Close of an Enforcement Matter

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The categories of documents that are automatically included on the public record at the close of an enforcement matter are specified in the Commission's *Statement of Policy Regarding Closed Enforcement and Related Files,* 68 Fed. Reg. 70,426, 70,427 (Dec. 18, 2003) and, with respect to transcripts of probable cause hearings, in the Commission's *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64,919, 64,920 & n.3 (Nov. 19, 2007). At the open session of May 21, 2015, the Commission considered a proposal by Commissioner Goodman that would, among other things, add to the list of documents automatically released to the public. Agenda Document 15-27-A. The Commission did not vote on that proposal, but referred the subject matter to the Regulations Committee.

Subsequently, on May 27, Chair Ravel requested that OGC prepare "a short memo with some specific recommendations on which documents OGC thinks should be added to the public file, both in enforcement cases and with regard to other documents (*e.g.* Executive Session agendas) that are not currently released," along with "OGC's views on procedurally how such changes should be implemented."

This memorandum responds to that request. We first address how the Commission may implement changes in this area. We then provide our recommendations concerning certain categories of documents that the Commission may wish to release on a uniform basis at the close of an enforcement matter, those we recommend not releasing automatically, and another about which we take no position. Finally, we address certain internal procedural and operational concerns raised by Commissioner Goodman's proposal.

I. IMPLEMENTATION

The Commission has three potential procedural vehicles through which it can address which documents go on the public record at the end of an enforcement matter. First, it could engage in full notice-and-comment rulemaking to replace and update 11 C.F.R. § 5.4 and related regulations. Second, it could exercise its authority to "prepare written rules for the conduct of its activities" under 52 U.S.C. § 30106(e) to adopt a direct-to-final procedural rule, without notice and comment rulemaking. Third, it could adopt a policy statement supplementing the 2003 policy statement currently in place, adding or removing items from the list of documents that statement provides will be placed on the public record.

II. CATEGORIES OF DOCUMENTS

The Chair requested that OGC provide recommendations concerning categories of documents that it concludes should either be released or not released in the ordinary course — that is, without requiring further Commission action in specific cases. We address here those items that we believe should uniformly be released, those that should not, and one on which we take no position.[1]

A. Categories Recommended to be Added to the Current Release List

1. Attachments to Complaints, Responses, and Similar Pre-RTB Notifications and Responses

The current disclosure policy designates 15 specific categories of documents that will be released to the public at the conclusion of a matter under review. It further provides that *attachments* to any documents that fall into one of these categories will be placed on the public

[1] We note that our recommendations here relate solely to whether to make public certain types of materials on a uniform basis in every closed enforcement matter; of course, additional documents may become public should any matter proceed to litigation and the Commission may also release additional materials in particular matters by appropriate vote.

record if they have already been made public in some other context, but will not be placed on the public record otherwise. 68 Fed. Reg. at 70,427. We recommend the Commission modify that approach to provide that all attachments to complaints, responses, referrals, and similar pre-reason to believe notifications and complaints that are placed on the public record will be made public, with appropriate redactions. [2]

2. Certain Pre-RTB Notifications and Responses

Agenda Document 15-27-A provides that the Commission would release at the close of a matter:

- Correspondence from the Commission to a respondent prior to a finding of reason to believe that notifies 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; and

- Correspondence from respondents submitted in response to any of the above.

We agree with this proposal. Uniform disclosure of these materials would advance transparency and would be efficient to administer. In the event a response to this type of correspondence could raise *AFL-CIO* concerns — such as correspondence that describes non-public information about internal strategies, membership lists, or names of third parties — we would remain in a position to redact that information as necessary when processing the file for release.

3. Notification to a Respondent that Was an "Unknown Respondent"

These notifications are similar in nature to reason-to-believe notifications, which are released under the current policy; they are merely delayed until we have determined the identity of the person or entity who should have been notified, usually following investigation. Accordingly, we recommend that these notifications also be uniformly released at the conclusion of a matter.

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[2] We do not include here the release of non-public attachments to internal referrals or referrals from other law enforcement agencies. Those documents are more likely to warrant protection under the deliberative process or law enforcement privileges. Likewise, we do not recommend that the Commission uniformly disclose attachments to post-RTB documents. Those generally will involve either conciliation efforts or Commission investigations, and thus subject either to confidentiality restrictions under section 30109(a)(4)(B)(i) or the "closer balancing of the competing interests cited by the D.C. Circuit [in *AFL-CIO*]," 68 Fed. Reg. at 74,027. Thus, we believe a blanket determination to release them is unwarranted. We address investigative materials further below.

4. RAD or Audit Referrals in Which the Commission "Declines to Open a MUR"

Since at least 2007, the Commission places no documents on the public record when it "declines to open a MUR" in an internal referral from the Audit Division or RAD. The basis for this position, as we understand it, is that in such cases there is no "enforcement file" to put on the public record. *See* 11 C.F.R. § 5.4(a) ("such enforcement file"). Given the relatively formalistic rationale for this practice, and that there may be some value to providing the public with materials in these cases on a uniform basis, we believe the Commission should treat for disclosure purposes Audit Division and RAD referrals in which the Commission declines to open a MUR in the same fashion it treats those in which it votes to open a MUR.

5. OGC Memoranda and Reports to the Commission Circulated through the Office of the Secretary in Connection with a Designated MUR

Under the current disclosure policy, a general counsel's report or memorandum will be placed on the public record only if it contains one or more of several specified recommendations with respect to at least one respondent.

Commissioner Goodman's proposal provides that the Commission would also release OGC-prepared documents "considered or discussed by the Commission as part of its deliberative process prior to finding reason to believe" including "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." Agenda Doc. 15-27-A. We agree that memoranda and reports that OGC prepares for the Commission in connection with a pending matter under review circulated through the Office of the Secretary for the consideration and deliberation of the Commission should be disclosed on the public record at the closure of a matter in the same manner as other reports and memoranda that contain recommendations, and for the same reasons. To properly balance the attorney-client and deliberative process concerns that apply to communications between OGC and the Commissioners, however, we recommend that only those OGC reports and memoranda circulated by the Secretary in connection with a designated matter under review -- and not withdrawn, as explained below, be placed on the public record automatically at the close of each matter. If other documents warrant inclusion in the public file of a particular matter when closed, the Commission can make that determination as any such cases arise.

B. Categories Recommended to Be Withheld

1. Withdrawn General Counsel's Reports and Memoranda

Agenda Document 15-27-A recommends that the Commission place on the public record "[d]ocuments 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." Agenda Document 15-27-A at 3. We recommend that the Commission continue the current practice of not automatically disclosing all withdrawn documents upon closure of enforcement cases, for the policy reasons set forth at length in recent litigation filings concerning the same issue in the FOIA context. *See Center for Competitive Politics v. FEC*,

Def's. Mem. in Support of Mot. for Summary Judg't. at 17-18, Civ. No. 14-970 (D.D.C. filed July 28, 2014).

2. *Sua Sponte* Submissions and External Referrals in Which the Commission Declines to Open a MUR

The Commission's interim disclosure policy, which predates the Commission's *Policy Regarding Self-Reporting of Campaign Finance Violations (*Sua Sponte *Submissions)*, 76 Fed. Reg. 16,695 (Apr. 5, 2007), does not address the disclosure of *sua sponte* submissions at the close of a matter. At present, when the Commission declines to open a MUR in such a matter, we do not place any materials on the public record. When the Commission opens a MUR, we do not place the *sua sponte* submission on the record, but do not redact references to it from other documents, such as general counsel's reports, that are themselves included on the public record. In the few *sua sponte* matters the Commission has resolved through Fast Track Resolution, the practice has varied. In ADR matters, which until recently were prepared for the public record by the ADR Office and not OGC, *sua sponte* submissions have been included on the public record.

We recommend that *sua sponte* submissions not be placed on the public record. We believe the Commission's stated policy goal of encouraging *sua sponte* submitters not only to bring violations to the attention of the Commission, but also to provide full and comprehensive submission, and the risk that submitters may decline to provide detailed factual information if those materials will necessarily become public in every case, outweighs the public benefit of disclosing *sua sponte* submissions where the Commission concludes not to open a MUR.

As to *sua sponte* submissions involving a third-party's possible violation of the Act, the Commission's policy statement provides that such submissions "should be resubmitted as a complaint to which other persons would be allowed to respond." 76 Fed. Reg. at 16,696 n.1. In instances involving such submissions, we recommend continuing the current practice of releasing the resulting complaint in the same manner as any other complaint.

Finally — and unlike internal referrals from RAD and the Audit Division, discussed above — we also recommend against disclosing referrals from external agencies and law enforcement sources in which the Commission declines to open a MUR. In those cases, we conclude that the privacy interests of respondents — whose alleged activities the Commission concludes do not warrant enforcement action — in not being identified publicly as the subjects of external law enforcement inquiry may outweigh the Commission's interest in transparency and general deterrence in some instances. Accordingly, in our view the fact of an external referral in which the Commission fails to take action does not warrant automatic placement on the public record in every case.

3. Investigative Materials

We recommend that the Commission not automatically place investigative materials — such as subpoenaed records and other records produced in discovery — on the public record at the close of each enforcement matter that reaches the investigative stage. [3]

4. Miscellaneous, Largely Administrative Documents

We also recommend not adding to the list of items to be disclosed a number of additional types of documents in enforcement files that would not provide significant public value in proactive disclosure, and disclosure of which would unduly increase the administrative burden of processing enforcement files for publication within the 30 day window afforded for that purpose. These include:

- Complaint notification letters to respondents.
- Messages sending blank Designation of Counsel Forms to be filled out and returned.
- Fax/e-mail cover pages.
- Errata.
- Tolling Agreements.
- Directive 68 letters.
- Return receipts/messages acknowledging receipt of documents.
- Other e-mail correspondence with respondents and their counsel.
- Internal correspondence as to administrative matters (such as scheduling meetings).

These materials are generally trivial, non-substantive, or ministerial in nature. Inclusion would usually add little or nothing to the public understanding of a matter, or not enough to justify the administrative burden of reviewing and preparing them for the public record. Therefore, we recommend not adding this category of materials to the list of documents to be released.

C. No Recommendation Concerning Proposed Factual and Legal Analyses that Are Proposed By Commissioners and Voted On By the Commission, But Not Adopted

Agenda Document 15-27-A further recommends that the Commission release all proposed factual and legal analyses that are actually voted on by the Commission. Currently, factual and legal analyses that are *adopted* by the Commission are already released; this proposal would add only those that are voted on but not adopted.

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[3] The Commission might consider, however, whether to release those discovery fruits that are specifically cited or quoted in general counsel's reports or statements of reasons, after appropriate redaction. Portions of those materials already may be revealed in the report or statement that is placed on the public record, and the Commission's interest in transparency may be promoted by public disclosure of those specific investigative materials.

We fully concur that a proposed factual and legal analysis that is formally moved by a Commissioner but not adopted may be particularly important to public expression of that Commissioner's views. Those same views, however, may also be made public through a statement of reasons reciting the same analysis presented in the draft that the Commission failed to approve. Further, in certain matters that involve multiple unsuccessful motions to adopt factual and legal analyses involving different Commissioners or combinations of Commissioners, particularly where there are only minor variations among drafts, it is possible that placing every such failed proposal on the public record could detract from the clarity of the public record when that particular enforcement file is released.

Nonetheless, this issue has no particular impact on OGC's substantive duties, and we have no objection to the proposal.[4] But because the question directly affects the fate of documents that are prepared and offered by Commissioners themselves, we believe that the Commissioners are better suited to assess the perceived costs or benefits of proactively placing all such documents on the public record. We therefore take no position.

D. Recommendation to Modify the Interim Policy Regarding Reports or Memoranda Concerning Signed Conciliation Agreements

With respect to general counsel's reports or memoranda making recommendations concerning acceptance or rejection of a signed conciliation agreement, we recommend that the Commission modify its current policy. Substantively, these reports usually focus on conciliation information that is confidential under section 30109(a)(4)(B)(i) and, consequently, are almost entirely redacted before being placed on the public record. Nonetheless, some public benefit may derive from including such redacted documents on the public record. We recommend that the Commission modify its current policy in part: we recommend that the Commission continue to make available reports or memoranda that concern a signed conciliation agreement, subject to appropriate redaction, under the current practice, *except* for those reports and memoranda concerning signed conciliation agreements that the Commission votes to reject and then to close the file without further action.

III. INTERNAL PROCEDURAL ISSUES

Agenda Document 15-27-A also raises certain procedural issues related to the preparation of files for the public record that we address more specifically below.

A. Commission Approval of Redactions

Agenda Document 15-27-A proposes that the Commission place additional categories of documents on the public record "subject to appropriate *Commission-approved* redactions[.]"

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[4] OGC's role with respect to this issue is ministerial in nature. Drafts of factual and legal analyses that are voted on but not adopted are subject to the deliberative process privilege. That privilege is held by the agency, not individual legal staff or members of the Commission acting as other than a majority. Consequently, the legal staff of the Commission is not at liberty to waive a known privilege belonging to the agency absent a successful vote of the Commission to relinquish it in particular cases (or to amend the disclosure policy generally — which would effect a proactive waiver of privilege for all such documents). .

Agenda Document 15-27-A at 3 (emphasis added). Read literally, this approach would alter the well-established practice of the Commission with respect to redaction of documents that are placed on the public record. It is unclear to us whether that is the intent of the document, but nonetheless we believe such a modification would neither be advisable nor warranted. Although many documents in enforcement files require little to no redactions, certain documents may be subject to Commission privileges and protections, may involve privileges held by outside agencies, or may include information that is confidential under provisions of the Act or personally identifiable information, all of which require redaction prior to public release. And requiring a vote on whether to waive a privilege or protection as to each such document as a matter of course, *see supra* note 3, would severely hamper the ability of the Commission to satisfy its 30-day obligation for public release, required under the relevant regulations. Nonetheless, as always, we remain prepared to discuss any issues relating to redactions in particular matters with any Commissioner who may have questions or concerns.

B. FOIAs

The proposal also refers to "Commission-approved redactions" in processing requests under the Freedom of Information Act and refers to Commission votes "to invoke an exemption set forth in FOIA." Agenda Document 15-27-A at 4. These references appear inconsistent with the Commission's current FOIA process. Specifically, the Commission has adopted a process under which the Deputy General Counsel for Administration, as Chief FOIA Officer, makes the initial determination regarding a FOIA request, and the Commission exercises the appellate function. This design advances the requirements of the FOIA itself. First, by requiring an initial determination from a single decisionmaker in his official capacity as Chief FOIA Officer, the process serves the FOIA requirement that an agency must "at least indicate" within the statutory 20-day period "the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *CREW v. FEC,* 711 F.3d 180, 183 (D.C. Cir. 2013). Reaching a majority consensus of the whole Commission within the 20 days provided for in every FOIA matter does not appear reasonable under the circumstances. Second, FOIA establishes the right of requesters "to appeal *to the head of the agency* any adverse determination." 5 U.S.C. § 552(a)(6)(A)(i) (emphasis added). The nature of the appellate function involves some insulation in decisionmaking between the initial decisionmaker and the appellate decisionmaker. This statutory administrative appeal process "allows the top managers of an agency to correct mistakes made *at lower levels* and thereby obviates unnecessary judicial review." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) (emphasis added). As such, the proposal for Commission approval of all FOIA requests would tend to undermine the purposes of the statutory administrative appellate process.