



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

2016 MAY 19 AM 8:49

AGENDA ITEM

For Meeting of 5-19-16

SUBMITTED LATE

MEMORANDUM

TO: The Commission
FROM: Ellen L. Weintraub *ELW*
RE: Proposed Consensus Statement of Policy Regarding the Public Disclosure of Certain Documents
DATE: May 18, 2016

Please find attached a proposed disclosure policy that finds areas of concurrence between Commissioner Goodman's March 24 document (Agenda Item No. 16-13-A) and Commissioner Ravel's April 27 document (Agenda Item No. 16-13-B). This draft includes contested items that I believe are drawn tightly enough to garner the required four votes for approval, and additional items that I believe are uncontroversial.

Altogether, this draft policy significantly improves the Commission's public disclosure of documents and proposes to supplement and replace the Interim Disclosure Policy with a more comprehensive permanent policy. I appreciate my colleagues' efforts towards this important goal and hope that this document can serve as a source of consensus.

ACTION

Statement Of Policy.

SUMMARY

The Commission is adopting a policy with respect to placing certain documents on the public record in enforcement, administrative fines, and alternative dispute resolution cases, as well as administrative matters. The categories of records that will be included in the public record are described below.

EFFECTIVE DATE

July 1, 2016.

FOR FURTHER INFORMATION CONTACT

Adav Noti, Acting Associate General Counsel, 999 E Street, NW., Washington, DC 20463, 202-694-1650 or 1-800-424-9530.

SUPPLEMENTARY INFORMATION

The “confidentiality provision” of the Federal Election Campaign Act, 52 U.S.C. 30101 *et seq.*, (FECA), provides that: “Any notification or investigation under [Section 30109] shall not be made public by the Commission * * * without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.” 52 U.S.C. 30109(a)(12)(A). For approximately the first twenty-five years of its existence, the Commission viewed the confidentiality requirement as ending with the termination of a case. The Commission placed on its public record the documents that had been considered by the Commissioners in their determination of a case, minus those materials exempt from disclosure under the FECA or under the Freedom of Information Act, 5 U.S.C. 552, (FOIA). See 11 CFR 5.4(a)(4). In *AFL-CIO v. FEC*, 177 F.Supp.2d 48 (D.D.C. 2001), the district court disagreed with the Commission's interpretation of the confidentiality provision and found that the protection of section 30109(a)(12)(A) does not lapse at the time the Commission terminates an investigation. 177 F.Supp.2d at 56.

Following that district court decision, the Commission placed on the public record only those documents that reflected the agency's “final determination” with respect to enforcement matters. Such disclosure is required under section 30109(a)(4)(B)(ii) of the FECA and section (a)(2)(A) of the FOIA. In all cases, the final determination is evidenced by a certification of Commission vote. The Commission also continued to disclose documents that explained the basis for the final determination. Depending upon the nature of the case, those documents consisted of General Counsel's Reports (frequently in redacted form); Probable Cause to Believe Briefs; conciliation agreements; Statements of Reasons issued by one or more of the Commissioners; or, a combination of the foregoing. The district court indicated that the Commission was free to release these categories of documents. See 177 F.Supp.2d at 54 n.11. In administrative fines cases, the Commission began placing on the public record only the Final

Determination Recommendation and certification of vote on final determination. In alternative dispute resolution cases, the public record consisted of the certification of vote and the negotiated agreement.

Although it affirmed the judgment of the district court in *AFL-CIO*, the Court of Appeals for the District of Columbia Circuit differed with the lower court's restrictive interpretation of the confidentiality provision of 52 U.S.C. 30109(a)(12)(A). The Court of Appeals stated that: "the Commission may well be correct that * * * Congress merely intended to prevent disclosure of the fact that an investigation is pending," and that: "deterring future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by section [30109](a)." *See AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) at 174, 179. However, the Court of Appeals warned that, in releasing enforcement information 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, *id.* at 178, the Court found the agency's disclosure regulation at 11 CFR 5.4(a)(4) to be impermissible. *Id.* at 179. In December 2003, the Commission issued an interim disclosure policy, *see* Statement of Policy Regarding Disclosure of Closed Enforcement or Related Files, 68 Fed. Reg. 70,423 (Dec. 20, 2003)("Interim Disclosure Policy").

The Commission is issuing this policy statement to identify several categories of documents integral to its decisionmaking process that will be disclosed upon termination of an enforcement matter, as well as documents integral to its administrative functions. This policy supplements the list of documents that were placed on the public record pursuant to the Interim Disclosure Policy. This policy replaces the Interim Disclosure Policy as the Commission's permanent disclosure policy.

The categories of documents that the Commission intends to disclose either do not implicate the Court's concerns 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. In addition, the Commission will make certain other documents available which will assist the public in understanding the record without intruding upon the associational interests of the respondents.

ENFORCEMENT

With respect to enforcement matters, the Commission will place the following categories of documents on the public record:

1. Complaint or internal agency referral, whether or not the Commission opens a Matter Under Review;

2. Response to complaint;
3. 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;
4. Notification of reason to believe findings (including Factual and Legal Analysis);
5. Respondent's response to reason to believe findings;
6. Briefs (General Counsel's Brief and Respondent's Brief);
7. Statements of Reasons;
8. Conciliation Agreements;
9. Evidence of payment of civil penalty or of disgorgement;
10. Certifications of Commission votes;
11. Attachments to complaints and attachments to responses to complaints;
12. Memoranda and reports from the Office of the General Counsel prepared for the Commission in connection with a specific pending Matter Under Review circulated through the Office of the Secretary for the consideration and deliberation of the Commission;
13. 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 a respondent to respond to new information or clarify information in the response, or provides a respondent with notice of an opportunity to respond to new legal theories, and correspondence from respondents submitted in response to such Commission correspondence;
14. Complaint notification letters, and correspondence from respondents submitted in response to them;
15. Notifications to respondents that were previously identified as "Unknown Respondents," and correspondence from respondents submitted in response to them;
16. Designations of counsel;
17. Requests for extensions of time;
18. Responses to requests for extensions of time;
19. Tolling agreements, and
20. Closeout letters.

The Commission is placing the foregoing categories of documents on the public record in all matters it closes on or after July 1, 2016.

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.

The Commission is continuing its practice of not placing the following categories of documents on the public record:

1. *Sua sponte* submissions and accompanying attachments;
2. Memoranda and reports from the Office of the General Counsel prepared for the Commission and circulated through the Office of the Secretary for the consideration and deliberation of the Commission that have been withdrawn by the Office of the General Counsel;
3. Errata memoranda prepared by the Office of the General Counsel;
4. External referrals from other agencies and law enforcement sources in which the Commission declines to open a Matter Under Review;
5. Documents related to debt settlement plans and proposed administrative terminations in which the Commission does not approve the debt settlement plan or administrative termination.

The Commission will place documents on the public record in all cases that are closed, regardless of the outcome. By doing so, the Commission complies with the requirements of 52 U.S.C. 30109(a)(4)(B)(ii) and 5 U.S.C. 552(a)(2)(A). Conciliation Agreements are placed on the public record pursuant to 52 U.S.C. 30109(a)(4)(B)(ii).

The Commission will place these documents on the public record as soon as practicable, and will endeavor to do so within thirty days of the date on which notifications are sent to complainant and respondent. See 11 CFR 111.20(a). In the event a Statement of Reasons is required, but has not been issued before the date proposed for the release the remainder of the documents in a matter, those documents will be placed on the public record and the Statement of Reasons will be added to the file when issued.

ADMINISTRATIVE FINES

With respect to administrative fines cases, the Commission will place the entire administrative file on the public record, which includes the following:

1. Reason to Believe recommendation;
2. Respondent's response;

3. Reviewing Officer's memoranda to the Commission;
4. Final Determination recommendation;
5. Certifications of Commission votes;
6. Statements of Reasons;
7. Evidence of payment of fine; and
8. Referral to Department of the Treasury.

ALTERNATIVE DISPUTE RESOLUTION

With respect to alternative dispute resolution (ADR) cases, the Commission will place the following categories of documents on the public record:

1. Complaint or internal agency referral;
2. Response to complaint;
3. ADR Office's case analysis report to the Commission;
4. Notification to respondent that case has been assigned to ADR;
5. Letter or Commitment Form from respondent participating in the ADR program;
6. ADR Office recommendation as to settlement;
7. Certifications of Commission votes;
8. Negotiated settlement agreement; and
9. Evidence of compliance with terms of settlement.

When disclosing documents in administrative fines and alternative dispute resolution cases, the Commission will release publicly available records that are referenced in, or attached to, documents specifically subject to release under this interim practice.

ADMINISTRATIVE FUNCTIONS

The Commission will also place on the public record the following documents integral to its administrative functions:

1. Statistics related to number of EPS dismissals by fiscal year and current quarter;
2. Statistics related to number of cases opened and closed by fiscal year and current quarter, average number of days to close a matter, and total civil penalties assessed;

3. Case closing processing statistics;
4. Monthly reports from the Department of the Treasury of the balance available in the Presidential Election Campaign Fund;
5. Yearly Long Term Budget Estimates for the Presidential Election Campaign Fund;
6. Memoranda from the Office of the General Counsel prepared for the Commission in connection with debt settlement plans and proposed administrative terminations circulated through the Office of the Secretary for the consideration and deliberation of the Commission in which the Commission ultimately approves the debt settlement plan or administrative termination;
7. Certifications of Commission votes in which the Commission approves a debt settlement plan or administrative termination;
8. Service Contract Inventory Reports submitted by the Commission to the Office of Federal Procurement Policy pursuant to section 743 of Division C of the 2010 Consolidated Appropriations Act;
9. Annual reports of activities performed by the agency that in the judgment of the agency head are not inherently governmental submitted by the Commission to the Office of Management and Budget pursuant to the Federal Activities Inventory Reform Act of 1998;
10. Reports of official travel paid for by non-government sources made to the U.S. Office of Government Ethics pursuant to 31 U.S.C. § 1353;
11. Annual reports of the receipt and disposition of gifts and decorations tendered by foreign governments to federal employees, spouses, and dependents submitted by the Commission to the State Department pursuant to Public Law 95-105;
12. Annual reports made by the Commission pursuant to Equal Employment Opportunity Commission Management Directive 715; and
13. Annual reports on the agency's privacy management program submitted by the Commission to the Office of Management and Budget.

With this policy, the Commission intends to provide guidance to outside counsel, the news media, and others seeking to understand the Commission's disposition of enforcement, administrative fines, and alternative dispute resolution cases and administrative functions. This will enhance their ability to assess particular matters in light of past decisions. In all matters, the Commission will continue to redact information that is exempt from disclosure under the FECA and the FOIA.

Dated: May 19, 2016.

**Matthew S. Petersen,
Chair, Federal Election Commission.**