



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

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AGENDA ITEM
For Meeting of: 11-05-09

SUBMITTED LATE

November 4, 2009

MEMORANDUM

TO: The Commission

FROM: Vice Chairman Matthew S. Petersen *MSP (JOB)*
Commissioner Caroline C. Hunter *LCH*
Commissioner Donald F. McGahn II *DM*

Subject: Proposed Agency Practice: Placing First General Counsel's Reports on the Public Record

Attached is a proposed agency practice. We have asked to place this draft on the agenda for November 5, 2009.

Attachment



FEDERAL ELECTION COMMISSION
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Date: November 4, 2009

In re: Placing First General Counsel's Reports on the Public Record

The Federal Election Commission ("Commission") will place all First General Counsel's Reports ("FGCR"s) 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. After the Court of Appeals decision in the *AFL-CIO* case, 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" or "IDP").¹

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 the recommendation. Thereafter, OGC began recommending the approval of F&LAs in all cases, not just those with RTB recommendations, and from January 2007 forward, all First General Counsel's Reports were withheld from the public record in new enforcement matters.

Because the current practice does not promote transparency, the Commission is adopting the practice of placing all First General Counsel's Reports on the public record, both instances in

¹ The Commission is currently working on a rulemaking to promulgate a permanent public disclosure policy.

which the recommendations in the First General Counsel's Report are adopted and instances in which they are not, both prospectively and retrospectively.²

New Practice of Placing All First General Counsel's Report on the Public Record

1. The Commission will place all First General Counsel's Reports on the public record in closed enforcement matters, prospectively and retroactively, but reserves the right to redact portions of such documents consistent with the Act as elucidated by *AFL-CIO*, and subject to the Commission's authority to withhold material under an exemption set forth in the FOIA
2. Until such time as all previously withheld First General Counsel's Reports have been placed on the public record, the Commission will approve all FOIA requests seeking a General Counsel's Report or accompanying F&LA that has not yet been restored to the public record, but reserves the right to redact portions of such documents consistent with the Act as elucidated by *AFL-CIO*, and subject to the Commission's authority to withhold material under an exemption set forth in the FOIA

² First General Counsel's Reports have been withheld from the public record since January 2007, under a new practice that was adopted at that time. First General Counsel's Reports were also withheld from the public record between 2001 and 2003, during which time only dispositive document were placed on the public record. Until such time as all these records are restored to the public record, any FOIA request seeking any of these materials will be granted, and the materials will be provided to the requestor and placed on the public record.