



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM

July 14, 2016

MEMORANDUM

TO: The Commission
The Office of the Commission Secretary

FROM: Lee E. Goodman
Commissioner

SUBJECT: Proposed Statement of Policy on the Disclosure of Certain Documents in
Enforcement, Administrative Fines, Alternative Dispute Resolution Cases, and
Administrative Matters

For Meeting of 7-14-16

SUBMITTED LATE

Attached is a revised Statement of Policy with respect to placing certain documents on the public record. This revises the prior version, Agenda Document 16-13-A-1, dated June 16, 2016. I intend to move this document for adoption at the Commission's meeting on July 14, 2016.

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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

September 1, 2016.

FOR FURTHER INFORMATION CONTACT

Adav Noti, Acting Associate General Counsel, 999 E Street, N.W., 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* 11CFR 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: "detering 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 replaces the Interim Disclosure Policy as the Commission's permanent disclosure policy.

The categories of documents that the Commission intends to disclose as a matter of regular practice 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 on a case by case basis 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 (including supplements and amendments thereto);
2. Internal agency referral where the Commission opens a Matter Under Review;
3. Response (including supplements and amendments thereto) to complaint;
4. General Counsel's Reports¹ (including supplements² thereto) 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;
5. Notification of reason to believe findings;
6. Factual and Legal Analyses identified as the subject of a vote in a Commission certification;
7. Respondent's response to reason to believe findings;
8. Briefs (General Counsel's Brief and Respondent's Brief);
9. Statements of Reasons issued by one or more Commissioners;
10. Conciliation Agreements;
11. Evidence of payment of civil penalty or of disgorgement;
12. Certifications of Commission votes;
13. Attachments to complaints and attachments to responses to complaints;
14. Memoranda and reports (and supplements² thereto) 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;
15. Complaint notification letters, and correspondence from respondents submitted in response to them;
16. Notifications to respondents that were previously identified as "Unknown Respondents," and correspondence from respondents submitted in response to them;
17. Designations of counsel;

¹ This category of documents does not include General Counsel's Reports that have been withdrawn by the Office of the General Counsel. The Commission may, upon the affirmative vote of four or more Commissioners, place such documents on the public record on a case by case basis.

² Supplements are documents that contain new or additional substantive analysis. Supplements do not include documents that solely transmit replacement pages to correct errors in circulated reports or memoranda.

18. Requests for extensions of time;
19. Responses to requests for extensions of time;
20. Tolling agreements; and
22. 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, 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). On a case by case basis, the Commission may place on the public record other documents that edify public understanding of a closed matter.

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.

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 policy. The Commission also will not place the following categories of documents on the public record:

1. *Sua sponte* submissions and accompanying attachments;
2. External referrals from other agencies and law enforcement sources in which the Commission declines to open a Matter Under Review;
3. Documents (other than notification letters) related to debt settlement plans and proposed administrative terminations in which the Commission does not approve the debt settlement plan or administrative termination.

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 informational memorandum on assignment 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 or dismissal;
7. Certifications of Commission votes;
8. Settlement agreement executed by the respondent and Commission; 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 policy.

ADMINISTRATIVE FUNCTIONS

The Commission will also place on the public record the following non-exclusive list of 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. This policy does not alter any existing regulation or policy requiring or permitting the Commission to redact documents, including those covered by this policy, to comply with the the FECA, the principles set forth by

the court of appeals in *AFL-CIO*, and the FOIA. In appropriate cases implicating the law enforcement privilege, an entire document may be withheld.

Dated: July 14, 2016.

Matthew S. Petersen,
Chair, Federal Election Commission.