

May 28, 2009

Federal Election Commission
999 E Street NW
Washington, DC 20463

Dear Commissioners:

The Campaign Legal Center (CLC) and Democracy 21 are writing to urge the Commission to comply with the Commission's regulations and Statement of Policy that require disclosure of General Counsel's Reports and Factual and Legal Analyses (FLAs) in all closed enforcement actions.

In recent months, and with unprecedented frequency, the Commission has been closing enforcement actions after failing by a vote of 3-3 to pass motions related to such actions (*e.g.*, motions to find reason to believe, motions to approve FLAs). Despite the fact that the Commission has duly enacted regulations and a Statement of Policy requiring the Commission to publicly release General Counsel's Reports and FLAs related to closed enforcement actions, the Commission has failed to do so with respect to many of the growing number of files closed after a deadlocked 3-3 vote.

Further, the Commission's FOIA Service Center on April 27 denied a FOIA request (2009-34) filed by CLC, which sought disclosure of a General Counsel's Report and FLAs related to closed MUR 5937. The CLC has since filed an appeal in this matter, and has also filed five similar FOIA requests seeking General Counsel's Reports and FLAs in other closed enforcement actions.¹

¹ The CLC filed a FOIA request for the General Counsel's Report and FLA in MURs 5977 and 6005 (American Leadership Project), where the Commission failed by a 2-3 vote to find reason to believe and did not publish the General Counsel's Report or FLA.

The CLC filed a FOIA request for the General Counsel's Report and FLA in MUR 5993 (Fallon), in which the Commission failed by a 3-3 vote to find reason to believe and did not publish the General Counsel's Report. Several weeks after the CLC's FOIA request, the FLA was publicly released as an attachment to a Statement of Reasons by Chairman Walther and Commissioners Bauerly and Weintraub.

The CLC filed a FOIA request for the General Counsel's Report and FLA in MURs 5694 and 5910 (Americans for Job Security), in which the Commission failed by a 3-3 vote to find reason to believe and did not publish the General Counsel's Report. The FLA was publicly released as an attachment to a Statement of Reasons by Chairman Walther and Commissioners Bauerly and Weintraub.

The CLC filed a FOIA request for the General Counsel's Report and FLAs in MUR 5934 (Thompson), where the Commission voted 4-2 to dismiss a complaint and did not publish the General Counsel's Report or FLA.

The CLC filed a FOIA request for the General Counsel's Report in MUR 5854 (Lantern Project), in which the Commission decided by a 4-1 vote to find no reason to believe and published the FLA but did not publish the General Counsel's Report.

In denying FOIA Request 2009-34, the Commission’s FOIA Service Center determined that “the agency is precluded from providing this information as it deals with predecisional documents that are covered under the deliberative process privilege under FOIA Exemption 5. 5 U.S.C. § 552(b)(5).” The FOIA Service Center’s determination was erroneous.

First, FOIA Exemption 5 is not mandatory. It does not preclude the Commission from providing General Counsel’s Reports and FLAs to the public but, instead, provides federal agencies with the option of asserting a privilege and withholding “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Even if this exemption is available under FOIA, the Commission is free as a matter of law and policy to publicly disclose General Counsel’s Reports and FLAs.

Indeed, the Commission has adopted regulations and a policy statement that require the Commission to disclose General Counsel’s Reports and FLAs. This is therefore not a discretionary matter—the Commission and its staff must follow the Commission’s own regulations and policy until they are changed.

If the Commission would like to withhold General Counsel’s Reports and FLAs under Exemption 5, it must open a rulemaking with notice and comment to change the existing regulations, and follow its procedures for amending or withdrawing the policy statement which currently governs this issue. Until then, the Commission’s existing rules and policies require such documents to be disclosed.

I. FOIA Exemption 5 Does Not Preclude the Commission’s Disclosure of Any Documents.

In its rejection of the CLC’s FOIA Request 2009-34 for a General Counsel’s Report and FLAs, the FOIA Service Center determined that the Commission “is precluded from providing this information . . . under FOIA Exemption 5.” This is incorrect. The FOIA Service Center misrepresents well-established law.

FOIA does not preclude the release of any government information. Instead, 5 U.S.C. § 552(a) mandates that federal agencies “shall make available to the public” a wide variety of information, while 5 U.S.C. § 552(b) enumerates nine categories of information to which the broad disclosure mandate of 5 U.S.C. § 552(a) “does not apply.”

The Supreme Court in one of its earliest decisions interpreting FOIA made clear the optional nature of FOIA’s exemptions:

Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types

of information that the Executive Branch must have the option to keep confidential, if it so chooses.

Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973) (emphasis added); *see also Administrator, Fed. Aviation Admin. v. Robertson*, 422 U.S. 255, 262 (1975) (“The exemptions provided by the Act, one of which we deal with here, represent the congressional judgment as to certain kinds of ‘information that the Executive Branch must have the option to keep confidential, if it so chooses[.]’”); *Federal Open Market Committee of Federal Reserve System v. Merrill*, 443 U.S. 340, 353 (1979) (“The House Report [on the FOIA] states that Exemption 5 was intended to allow an agency to withhold intra-agency memoranda which would not be ‘routinely disclosed to a private party through the discovery process in litigation with the agency’” (quoting H.R. REP. NO. 89-1497, at 10 (1966) (emphasis added))).

Similarly, the U.S. Court of Appeals for the D.C. Circuit has explained: “Since the exemptions to the FOIA are permissive rather than mandatory, particularly with respect to information that does not raise issues of individual privacy rights, an agency may impose upon itself a more liberal disclosure rule than that required by the FOIA.” *Mead Data Central, Inc. v. U.S. Dept. of the Air Force*, 556 F.2d 242, 258 (D.C. Cir. 1977); *see also Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1197 (4th Cir. 1976) (“So far as exempt information is concerned, the Act, in the ordinary situation ‘neither authorizes (n)or prohibits the disclosure of such information,’ and the disclosure of such exempt information is ordinarily discretionary with the agency.”), *and Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945, 950 (4th Cir. 1974) (“The Act requires that all records, except those which by its terms need not be disclosed, should be made available to the public. The Act, however, does not forbid disclosure of any records, so government officials may make public that which [the Act] exempts.”).

The Supreme Court and lower courts have long recognized that federal agencies are allowed—not mandated—to assert Exemption 5, as well as other FOIA exemptions. The FOIA Service Center’s claim that the Commission is “precluded” by FOIA Exemption 5 from making public General Counsel’s Reports and FLAs misstates the law and is plainly erroneous.

II. Public Policy Considerations Weigh Heavily in Favor of Disclosure of General Counsel Reports and FLAs.

On January 21, 2009, President Obama published a Memorandum regarding administration of FOIA, stressing the critical importance of government transparency and worth quoting at length:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, “sunlight is said to be the best of disinfectants.” In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to

ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.

President Obama, *Memorandum of January 21, 2009: Freedom of Information Act*, 74 Fed. Reg. 4683 (Jan. 26, 2009).

As directed by the President in his January 21 Memorandum, Attorney General Holder on March 19, 2009, published a Memorandum on FOIA noting that FOIA “reflects our nation’s fundamental commitment to open government” and explaining that his Memorandum was “meant to underscore that commitment.” Attorney General Holder, *Memorandum for Heads of Executive Departments and Agencies: The Freedom of Information Act* (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>. General Holder reiterated President Obama’s command that “The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.” *Id.* General Holder went on to stress that “an agency should not withhold information simply because it may do so legally.” *Id.*

The Supreme Court has likewise made clear that, through enactment of FOIA, Congress intended to mandate broad disclosure of government documents, while creating only limited optional exemptions from this mandate of broad disclosure. The Court has explained:

Upon request, FOIA mandates disclosure of records held by a federal agency, see 5 U.S.C. § 552, unless the documents fall within enumerated exemptions, see § 552(b). “[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act,” *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); “[c]onsistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a narrow compass,” *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); see also *FBI v. Abramson*, 456 U.S. 615, 630 (1982) (“FOIA exemptions are to be narrowly construed”).

Dept. of the Interior et al. v. Klamath Water Users Protective Assoc., 532 U.S. 1, 7-8 (2001) (parallel citations omitted).

These dictates should have special force with the Commission which, after all, is a disclosure agency. A key part of the mission of the Commission is to facilitate the release of information to the public. It is hardly consistent with that mission for the

Commission to withhold from public disclosure information about its own decisionmaking, in the absence of a compelling reason to do so.

There is no good reason here. General Counsel's Reports and FLAs are vitally important to providing the public with an understanding of the General Counsel's interpretation of the laws at issue. It is the General Counsel's analysis of an enforcement matter that largely determines Commissioners' votes on whether or not to proceed with an investigation of alleged violations of the law. Indeed, the Commission's consideration of whether to proceed with investigations, failing with increasing frequency on 3-3 votes, typically include motions to approve recommendations made in General Counsel's Reports, or to approve FLAs. Without knowing what the General Counsel recommended and why, it is impossible for the public to understand the votes of the Commissioners as to whether those recommendations should be approved, or not.

III. Commission Regulations and Policy Statement Require Disclosure of General Counsel Reports and FLAs.

The Commission itself has recognized through enactment of regulations and a Statement of Policy that public policy considerations weigh heavily in favor of disclosure of General Counsel's Reports and FLAs.

Indeed, the Commission has enacted regulations and a Statement of Policy requiring the Commission to disclose General Counsel's Reports and FLAs. The Commission's refusal to disclose such documents not only contravenes the spirit of FOIA and interpretive guidance from the President and Attorney General, but also contravenes the Commission's own regulations and Statement of Policy.

Section 111.20(a) of the Commission's regulations states:

If the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor no later than (30) days from the date on which the required notifications are sent to complainant and respondent.

11 C.F.R. § 111.20(a) (emphasis added).

The Commission's regulations further state that:

[T]he Commission shall make the following materials available for public inspection and copying: . . . Opinions of Commissioners rendered in enforcement cases, General Counsel's Reports and non-exempt 2 U.S.C. 437g investigatory materials shall be placed on the public record of the Agency no later than 30 days from the date on which all respondents are notified that the Commission has voted to close such an enforcement file[.]

11 C.F.R. § 4.4(a) (emphasis added). The Commission’s use of the word “shall” in this regulation makes clear that the Commission’s FOIA Service Center has no discretion to deny FOIA requests for General Counsel’s reports. Further, FOIA requests should not even be necessary for public access to General Counsel’s Reports. The Commission’s regulation requires that the General Counsel’s reports be placed on the public record within 30 days from the date respondents are notified that an enforcement file is closed.

The Commission’s regulation is consistent with the “confidentiality provision” of FECA, which provides that an investigation shall not be made public by the Commission without the written consent of the person under investigation. *See* 2 U.S.C. § 437g(a)(12)(A). After the conclusion of litigation concerning the scope of this confidentiality provision, the Commission issued a “Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files” in 2003 that explained the impact of the litigation on its disclosure policy, and that expressly stated that General Counsel Reports and FLAs would be disclosed. The Statement first noted:

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 C.F.R. 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 437g(a)(12)(A) does not lapse at the time the Commission terminates an investigation. 177 F. Supp. 2d at 56.

Following the 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. . . . The Commission also continued to disclose the documents that explained the basis for the final determination. . . . The district court indicated that the Commission was free to release these categories of documents.

Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426, 70426-27 (Dec. 18, 2003).

The Statement further noted that the Commission appealed the district court decision in *AFL-CIO* and “although it affirmed the judgment of the district court in *AFL-CIO*, the Court of Appeals . . . differed with the lower court’s restrictive interpretation of the confidentiality provision” 68 Fed. Reg. at 70427. The Court of Appeals agreed with the Commission that “detering future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by section 437g(a),” but reasoned that “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.’” *AFL-CIO*, 333 F.3d 168, 179 (D.C. Cir. 2003) (quoting *Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981); see also 68 Fed. Reg. at 70427.

According to the Commission, the appellate court decision:

[S]uggested 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 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.

68 Fed. Reg. at 70427.

The Commission engaged in the balancing exercise suggested by the Court of Appeals and decided that it is in the public interest for the Commission to disclose all General Counsel’s Reports and FLAs. The Commission stated:

The Commission is issuing this interim² policy statement to identify several categories of documents integral to its decisionmaking process that will be disclosed upon termination of an enforcement matter. The categories of documents that the Commission intends to disclose either do not implicate the Court’s concerns, *e.g.*, categories 8, 9 and 10, 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.

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

....

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);

....

² Though this Statement of Policy was implemented on an “interim” basis, indicating that the Commission would “conduct a rulemaking in this respect, with full opportunity for public comment, in 2004[.]” the Commission never conducted such a rulemaking and this policy remains in effect.

The Commission is placing the foregoing categories of documents on the public record in all matters it closes on or after January 1, 2004.

68 Fed. Reg. at 70427 (emphasis added).

Thus, the Commission has formally determined through adoption of regulations and a Statement of Policy—in a manner consistent with the Administrative Procedures Act (APA)—that it will disclose to the public General Counsel’s Reports and FLAs. Given this, a decision by the Commission to withhold from public access such documents, without providing any public notice or opportunity to comment, would be “arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law” and “without observance of procedure required by law” in violation of the APA. 5 U.S.C. §§ 706(2)(a), (d).

IV. The Commission Has Waived the Deliberative Process Privilege-Based Exemption Established by FOIA Exemption 5 with Respect to General Counsel Reports and FLAs

The FOIA Service Center denied FOIA Request 2009-34 based on its misunderstanding that the Commission is “precluded” from disclosing General Counsel Reports and FLAs because the documents “are covered under the deliberative process privilege under FOIA Exemption 5. 5 U.S.C. § 552(b)(5).” As explained in Section I, above, FOIA does not preclude the Commission from disclosing any documents. Instead, “Since the exemptions to the FOIA are permissive rather than mandatory, . . . an agency may impose upon itself a more liberal disclosure rule than that required by the FOIA.” *Mead Data Central, Inc. v. U.S. Dept. of the Air Force*, 556 F.2d 242, 258 (D.C. Cir. 1977).

The Commission has done so here. By issuing its regulations and Statement of Policy requiring disclosure of General Counsel Reports and FLAs, the Commission has waived its right to invoke Exemption 5 for these types of documents. If the Commission (not staff) would like to avail itself of this Exemption in the future for such documents, it must open a rulemaking with notice and comment to change the existing regulations, and follow its procedures for amending or withdrawing the Statement of Policy, which currently governs this issue. Unless and until it does so, the Exemption is waived.

The Supreme Court has explained the operation of FOIA Exemption 5 as follows:

Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5).

. . .

Our prior cases on Exemption 5 have addressed the second condition, incorporating civil discovery privileges. So far as they might matter here, those privileges include the privilege for attorney work-product and what

is sometimes called the “deliberative process” privilege. Work product protects “mental processes of the attorney,” while deliberative process covers “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated[.]” The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance “the quality of agency decisions” by protecting open and frank discussion among those who make them within the Government.

Klamath Water Users Protective Assoc., 532 U.S. at 8-9 (2001) (internal citations omitted).

Stated differently, the deliberative process privilege is intended to protect expectations of confidentiality—so as to allow candid communication among officials who would otherwise refrain from such communication for fear of having the communication subject to public disclosure. The Court of Appeals for the D.C. Circuit put it this way:

Included within [Exemption 5] is the deliberative process privilege, which “protect[s] the decisionmaking processes of government agencies” and “encourage[s] the frank discussion of legal and policy issues” by ensuring that agencies are not “forced to operate in a fishbowl.” Nevertheless, this privilege, like all FOIA exemptions, must “be construed as narrowly as consistent with efficient Government operation.”

Mapother v. Dept. of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (quoting *Wolfe v. Department of Health & Human Services*, 839 F.2d 768, 773-74 (D.C. Cir. 1988) (en banc)).

The Commission has decided through adoption of regulations and a Statement of Policy to release all General Counsel’s Reports and FLAs, reasoning that, “because they play a critical role in the resolution of a matter, the balance tilts decidedly in favor of public disclosure[.]” Statement of Policy, 68 Fed. Reg. at 70427.

To use the D.C. Circuit Court’s terminology, the Commission has “impose[d] upon itself a more liberal disclosure rule than that required by the FOIA[.]” *Mead Data Central, Inc.*, 556 F.2d at 258, by approving regulations and a Statement of Policy requiring disclosure of General Counsel’s Reports and FLAs and thus “forc[ing itself] to operate in a fishbowl.” *Mapother*, 3 F.3d at 1537. In doing so, the Commission has waived its ability to assert the deliberative process privilege of Exemption 5.

For all of the above stated reasons, we request that the Commission make public all General Counsel’s Reports and FLAs in closed enforcement actions.

Respectfully,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
1640 Rhode Island Avenue NW – Suite 650
Washington, DC 20036

Counsel to the Campaign Legal Center