



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6396
Crossroads Grassroots Policy Strategies)

**SUPPLEMENTAL STATEMENT OF REASONS OF
CHAIRMAN LEE E. GOODMAN AND
COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSEN**

On January 8, 2014 we issued our Statement of Reasons ("Statement") in this matter, explaining the basis for our votes not to adopt the Office of the General Counsel's ("OGC") recommendations.¹ As explained in our Statement, OGC issued two First General Counsel's Reports in this matter. The initial First General Counsel's Report, dated June 22, 2011, was withdrawn and later replaced by a second First General Counsel's Report, dated November 21, 2012, which introduced a new legal norm: that a calendar year and only a calendar year is the necessary time frame for determining an organization's political committee status.² Because OGC's legal test was evolving behind closed doors while this enforcement matter was under review, the Respondent and other similarly situated organizations did not have clear prior notice that their respective major purposes would be analyzed by OGC under a single calendar-year rule.

We attached the withdrawn First General Counsel's Report, along with an accompanying Factual and Legal Analysis, to our Statement to illuminate the introduction of this new legal norm.³ As a matter of custom and courtesy, we provided our Statement to our colleagues and OGC before making it public. At that time, OGC and several of our fellow Commissioners expressed their view that the withdrawn First General Counsel's Report might be privileged and should be withheld from the public record. Because the Complainant, the Respondent, and the public deserve an explanation for official actions, particularly in a high profile matter such as this one, we agreed to redact the first report pending further Commission discussions in order to

¹ MUR 6396 (Crossroads Grassroots Policy Strategies), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen ("Statement"), available at <http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf>.

² OGC did seek to incorporate this analysis into other reports prepared roughly contemporaneously with the second First General Counsel's Report in this matter. See, e.g., MUR 6081 (American Issues Project), First General Counsel's Report. Nevertheless, OGC did not and could not root this novel legal theory in prior Commission actions or interpretations.

³ There were other material changes to OGC's analysis of the Respondent's major purpose as well.

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make the rest of the Statement public. We do not believe that these redactions are necessary or consistent with the Commission's Disclosure Policy, discussed more fully below.

As we explained in our Statement, the withdrawn First General Counsel's Report in this matter informed our decision in this matter.⁴ Thus, it should have been publicly released so that it could be available to a reviewing court and litigants as part of the administrative record in this matter.

Although the specific question of the public release of a withdrawn First General Counsel's Report may be new, Commissioners have previously released materially similar documents with neither redactions by OGC nor a vote of the Commission.⁵ The non-disclosure here deviates from past practice and from current policy. Not releasing the report to the public contravenes the Commission's Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record.⁶ In 2009, the Commission determined that "[i]n the interest of promoting transparency, the Commission is resuming the practice of placing *all* First General Counsel's Reports on the public record, whether or not the recommendation in these First General Counsel's Reports are adopted by the Commission" (emphasis added). Here, OGC has taken the position that when a First General Counsel's Report is withdrawn and replaced, it is essentially erased from the administrative record as if that prior document never existed, even if it has been voted on and considered by the Commission. Even if disclosure was not mandated by

⁴ It is incumbent upon us to provide such a statement, because in the event a lawsuit is filed (as has occurred here), a court undertakes judicial review of our decision. *See Public Citizen v. FEC*, Case No. 14-cv-00148 (D.D.C. filed Jan. 31, 2014); *see also* 2 U.S.C. § 437g(a)(8)(A) ("Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia."). When Commissioners fail to adopt the recommendations of the Office of the General Counsel, those Commissioners explain their views in statements that become an essential part of subsequent litigation, if any. *See Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131, 1132 ("[W]hen . . . the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why. Absent an explanation by the Commissioners for the FEC's stance, we cannot intelligently determine whether the Commission is acting 'contrary to law'" (citation omitted)); *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under § 437g(a)(8). . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the division, their rationale necessarily states the agency's reasons for acting as it did."). Since it lays out the position of the Commission, this statement is entitled to full judicial deference. *See id.* ("[The Supreme Court observed] in upholding (against a complainant's § 437g(a)(8) challenge) the Commission's unanimous dismissal of a complaint, 'that the Commission is precisely the type of agency to which deference should presumptively be afforded.' *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44-45, 70 L.Ed.2d 23 (1981) (*DSCC*). Though our *DCCC* opinion limited itself to its facts, we have since expanded it to control generally situations in which the Commission deadlocks and dismisses.").

⁵ *See, e.g.*, MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauery and Ellen L. Weintraub, available at <http://eqs.fec.gov/eqsdocsMUR/29044241152.pdf> (attaching an OGC Factual and Legal Analysis).

⁶ 74 Fed. Reg. 66132 (Dec. 14, 2009), available at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-28.pdf.

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the explicit language of the policy – and we believe it is – non-disclosure clearly frustrates the purpose of the policy to provide greater transparency to agency decisions.

The report at issue was first prepared and styled as a First General Counsel's Report. Thus, it was clearly prepared with an expectation that it would be reviewed by Commissioners and the general public, per Commission policy and practice. The report was circulated by the Commission Secretary for a vote and was voted on as a First General Counsel's Report. Objections were made and, pursuant to Commission directive, the matter was placed on the Commission's September 27, 2011 Executive Session. The report was thus styled as a "First General Counsel's Report" on the agenda for the executive session, discussed at a Commission meeting, and referenced in the approved minutes for the session.

Even assuming *arguenda* that the report is privileged as OGC has argued, we asked our colleagues to support the public release of that First General Counsel's Report and the accompanying proposed Factual and Legal Analysis in the interests of public transparency and full disclosure. We moved to release the document but the vote failed.⁷

We respect it when our colleagues approach the law or individual matters from a different perspective and earnestly want to work with them to move forward in areas where we can find common ground. We recognize that the question of publicly releasing this first report after it was withdrawn involves a delicate balance between withholding privileged material and the public's interest in government transparency. However, particularly in a matter subject to litigation implicating the First Amendment and Due Process rights of citizens, and in furtherance of the Commission's 2009 Disclosure Policy, we voted in favor of transparency.

⁷ MUR 6396 (Crossroads GPS): Redactions in the Statement of Reasons Written by Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, Certification (March 20, 2013).

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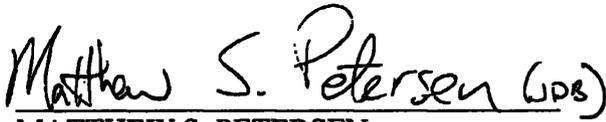
LEE. E. GOODMAN
Chairman

3/25/14
Date



CAROLINE C. HUNTER
Commissioner

3/25/14
Date



MATTHEW S. PETERSEN
Commissioner

3/25/14
Date

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