



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of	)	
	)	MUR 6056
Protect Colorado Jobs, Inc., John Berry, and	)	
Curt Cerveny	)	
	)	
Armstrong for Congress and Brian Wilson	)	
in his official capacity as treasurer	)	

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN  
AND COMMISSIONERS CAROLINE C. HUNTER AND DONALD F. McGAHN**

The complaint that generated this matter asserted that Protect Colorado Jobs, Inc. ("PCJ"); John Berry, PCJ's registered agent; and Curt Cerveny, PCJ's former chairman, "used corporate funds to pay for an attack mailing against" the Complainant, Mike Coffman, a candidate in the 2008 Republican primary for the Sixth Congressional District of Colorado.<sup>1</sup> The Office of General Counsel ("OGC") correctly concluded that the mailing neither contained express advocacy nor constituted an electioneering communication. Nonetheless, OGC recommended that the Commission find reason to believe ("RTB") that PCJ made, and that Armstrong for Congress ("AFC")<sup>2</sup> received, a prohibited in-kind contribution in the form of a coordinated communication, in violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), even though the complaint presented no allegations of coordination between PCJ and AFC.

The basis for OGC's position that coordination may have occurred is one newspaper article, which was not referenced in the complaint, in which anonymous sources from the Complainant's campaign alleged that PCJ and AFC coordinated the content and distribution of the mailer through an intermediary. OGC discovered the article after searching publicly available information following receipt of the complaint. Thus, the newspaper article functioned essentially as a second, unsworn complaint

<sup>1</sup> Complaint, at unnumbered p. 2. Mr. Coffman later won the 2008 primary election as well as the 2008 general election and is now the district's representative in Congress.

<sup>2</sup> AFC was the authorized committee for Wil Armstrong, another candidate in the 2008 Republican primary for the Sixth Congressional District of Colorado.

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consisting of unsubstantiated allegations of dubious reliability, made by anonymous sources associated with the Complainant. Moreover, OGC did not provide the articles containing those allegations to Respondents, denying Respondents the opportunity to address them.

Because the complaint in this matter failed to allege a violation of the Act, and because the additional information discovered by OGC does not provide an adequate foundation on which to base an RTB finding, we voted against finding reason to believe that PCJ and AFC violated the Act<sup>3</sup> and subsequently moved to close the file. Our reasons for reaching this conclusion are set forth in greater detail below.

## I. BACKGROUND

PCJ, according to its Articles of Incorporation, is a pro-business 501(c)(4) corporation whose primary purpose during the 2008 election cycle was to advocate passage of the Colorado Right-to-Work Initiative. In July 2008, PCJ sent a mailer to registered Republican voters in Colorado's Sixth Congressional District that asked recipients to "[c]all Mike Coffman and ask him to stop increasing his office budgets, comply with immigration laws, and adopt strict office protocols to prevent political influence."<sup>4</sup> The mailer included numerous quotes from newspaper articles and radio broadcasts in support of its call to action. The ads generated some controversy because they apparently did not seem to be consistent with PCJ's stated objectives. In response to the criticism, Mr. Berry, PCJ's registered agent, issued a statement in which Mr. Cervený, PCJ's chairman, "took sole responsibility" for the mailer and resigned from PCJ.<sup>5</sup>

Mr. Coffman, the subject of the mailer in question, swore out a complaint against PCJ and Messrs. Berry and Cervený on August 7, 2008, which the Commission received on August 20, 2008. Mr. Coffman's complaint can be quoted here in full, as it was only 56 words in length:

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<sup>3</sup> Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively. The undersigned objected. MUR 6056, Certification dated March 11, 2009.

<sup>4</sup> Chris Bragg, *Sparks Fly in CD 6*, THE COLORADO STATESMAN, Aug. 1, 2008, available at <http://coloradostatesman.com/content/sparks-fly-cd-6> (last visited March 31, 2009); Jeremy Pelzer, *501(c)(4) Chair Arranged Unauthorized Anti-Coffman Attack Piece*, PolitickerCo.com, July 31, 2008, available at <http://www.politicker.com/colorado/5281/501c4-chair-arranged-unauthorized-anti-coffman-attack-piece> (last visited March 31, 2009); Complaint, Ex. A. OGC refers to Mr. Cervený as PCJ's "agent/treasurer."

<sup>5</sup> *Id.* Press reports state that Mr. Cervený was chairman of the group and Mr. Berry was its agent/treasurer. Despite Mr. Cervený's title, it appears that he "had access to the group's bank accounts." Pam Zubeck, *POLITIGAB: Rayburn's a Colorado Resident, No Question About It*, THE COLORADO SPRING GAZETTE, Aug. 4, 2008, available at [http://www.gazette.com/news/rayburn\\_38950\\_\\_article.html/colorado\\_lamborn.html](http://www.gazette.com/news/rayburn_38950__article.html/colorado_lamborn.html) (last visited April 3, 2009).

During the last week of July 2008, approximately three weeks before the Republican primary for the 6th Congressional District, PCJ used corporate funds to pay for an attack mailing against Coffman. The attack piece was mailed to every Republican voter who requested a primary absentee ballot. Cervený signed PCJ's corporate check to pay for the mailing.<sup>6</sup>

The complaint cites no specific provisions of the Act that may have been violated. In fact, it does not even contain a generic statement indicating that a legal violation of any kind might have occurred. Furthermore, nowhere in the complaint is AFC mentioned. And significantly, the complaint does not make any allegations that the mailer may have been a coordinated communication. Instead, the complaint merely stated that corporate funds were used to pay for a mail piece—described in the complaint as an “attack mailing” and an “attack piece”—that was sent to a set of Republicans. Thus, to the extent that an alleged violation is implied in the complaint, it is that the PCJ mailer may have been an illegal corporate expenditure.

The day after this complaint was sworn against PCJ, *The Colorado Statesman* ran an article, based heavily on anonymous sources from the Complainant's campaign, which accused Scott Gessler, who apparently was a legal advisor for both PCJ and AFC, of being a “conduit” between the two in order to produce and distribute the mailer.<sup>7</sup> Specifically, the anonymous Coffman campaign source alleged the following:

- Mr. Cervený “was simply the ‘fall guy’ for the mailing”;
- Mr. Gessler was actually the person behind the mailing, and was almost fired by PCJ as a result;
- At least \$15,000 “was funneled into [PCJ] under the direction of Gessler”; and

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<sup>6</sup> Complaint, at unnumbered p. 2. The complaint also included footnotes indicating that the allegations were based on “information and belief” from statements of Mr. Berry and Andrew Zuppa, “a sampling of Coffman supporters who received the mailing,” and the mailing itself, which was attached. To our knowledge, the statements of Messrs. Berry and Zuppa to which the complaint referred were not included.

<sup>7</sup> Chris Bragg, *Gessler Fingered in Mail Attack on Coffman*, THE COLORADO STATESMAN, Aug. 8, 2008, available at <http://coloradostatesman.com/content/gessler-fingered-mail-attack-coffman> (last visited March 31, 2009) (*hereinafter*, “*Statesman* article”).

- Two donors gave money to PCJ specifically for the mailing who (i) had no previous ties to PCJ, (ii) had close ties to Mr. Armstrong, and (iii) donated the money to PCJ “to shield their identities.”<sup>8</sup>

The Complainant never provided the article to the Commission, and, significantly, never included in his complaint the allegations that the article sourced from his campaign.<sup>9</sup>

On August 26, 2008, the Commission sent letters to PCJ, Mr. Berry, and Mr. Cerveny informing them of the complaint and providing them with the opportunity to respond.<sup>10</sup> Attached to the letters was the complaint. The *Statesman* article was not included. Therefore, no allegation of coordination between PCJ and AFC was presented to these initial Respondents.

PCJ, on behalf of itself, Mr. Berry, and Mr. Cerveny, presented a detailed response to the complaint’s implicit allegation. It provided a thorough discussion of the law regarding prohibited corporate contributions and expenditures. It specifically denied that the mailer in question either contained express advocacy or constituted an electioneering communication. It concluded, therefore, that the mailer was not an improper corporate expenditure and that the complaint should be dismissed immediately.

OGC did not make a recommendation based solely on the complaint and the response. It reviewed publicly available materials, including the *Statesman* article, information about the Colorado Right to Work Committee (an entity not mentioned in the complaint),<sup>11</sup> contributions to that committee from PCJ, a statement from Mr. Berry

<sup>8</sup> *Id.* The article also states, without attribution, that Mr. Cerveny “was paid \$3,000 to \$4,000 for producing the mailing.” Interestingly, the article notes that Mr. Cerveny had “his own ax to grind,” since he had been fired as campaign manager of Coffman’s Secretary of State campaign in 2006.

<sup>9</sup> OGC also found another article dated July 31, 2008, which included similar allegations from anonymous sources that the Armstrong campaign was involved with production of the mailer. See *501(c)(4) Chair Arranged Unauthorized Anti-Coffman Attack Piece*, *supra* note 4. Despite the fact that Mr. Coffman’s campaign manager was cited in the article as saying (though not quoted specifically) that he suspected PCJ “knew the identity of the two funders of the attack piece,” the complaint, sworn a week after the article, did not include a coordination allegation.

<sup>10</sup> The letter specifically states that “[t]his matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter be made public.”

<sup>11</sup> Much of the information about Colorado Right to Work Committee came from ballotpedia.org, “a free, collaborative, online encyclopedia about ballots, ballot measures, ballot access, petition drives, recall, the laws that govern ballot measures, rules about voting, school bond elections, local ballot measures and state legislatures.” *Ballotpedia: About*, at <http://ballotpedia.org/wiki/index.php/Ballotpedia:About> (last visited April 1, 2009). According to its “About” page, “Ballotpedia is a wiki, which means that anyone—including you—[sic] by registering and then editing any article by clicking on the ‘edit this page’ link that appears on every article on Ballotpedia.” *Id.* While we do not here cast judgment on the reliability of a website that anyone can edit, we do note that, like the *Statesman* article, OGC relied upon the filter of anonymous sources (or, here, editors) for its information rather than focusing solely on the sworn complaint filed by the Complainant.

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stating that Mr. Cerveny was the person responsible for the mailing, and statements from each of Mr. Coffman's primary opponents denying responsibility for the mailer.

Thereafter, OGC sent a letter to AFC on December 12, 2008, stating that:

The Federal Election Commission ("Commission") has ascertained information in the normal course of carrying out its supervisory responsibilities indicating that [AFC] may have violated [the Act]. Specifically, the Commission has received information that [PCJ] issued a mailer regarding Mike Coffman during the week of July 28, 2008, prior to the August 12, 2008, primary election ... an election in which Mike Coffman and Wil Armstrong were candidates. Publicly available information suggests that PCJ and an agent of AFC may have coordinated this communication. Therefore, any amounts spent [sic] on preparing and mailing the communication would be considered an impermissible in-kind contribution from PCJ to AFC in the form of a coordinated communication in violation of the Act. ... Further, [AFC] would be required to report the acceptance of the contribution. ...

The Commission's Office of the General Counsel is reviewing this information in connection with making a recommendation to the Commission as to whether there is reason to believe that AFC and you, in your official capacity as treasurer, violated the Act, an initial determination necessary to initiate an investigation into whether a violation has, in fact, occurred.

It provided the PCJ mailer to AFC, but not the *Statesman* article or any other fruits of its research. Nor did it provide Mr. Gessler's name, the alleged "agent" in question.

In response, AFC stated that it (i) never received any contributions from PCJ; (ii) never coordinated any communications with PCJ; (iii) never had any involvement in the preparation, development, or distribution of the mailer at issue; and (iv) never was aware of any involvement by any employee or agent of the campaign in any coordinated activities with PCJ. Although PCJ successfully rebutted the allegations in the complaint, it never had an opportunity to respond to the specifics of the coordination allegation.

Notwithstanding the lack of a coordination allegation in Mr. Coffman's complaint and AFC's explicit denial of any involvement with the PCJ mailer, OGC—on the basis of anonymous, unsworn statements from sources close to the Complainant's campaign—recommended that the Commission find reason to believe that (i) PCJ made, and Curt Cerveny, as a PCJ officer, consented to, a prohibited in-kind contribution in violation of 2 U.S.C. § 441b(a); and (ii) AFC received and failed to report a prohibited in-kind contribution in violation of 2 U.S.C. §§ 441b(a) and 434(b).

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## II. ANALYSIS

The sworn complaint in this matter did not allege a violation of the Act. And to the extent the complaint made an implicit allegation, PCJ meticulously refuted it in its response. Moreover, even if the Complainant had included all of the *Statesman* article allegations in its sworn complaint, there still would have been insufficient evidence on which to rest an RTB finding. Finally, it would have been a troublesome result to have found RTB on the basis of allegations that anonymous sources close to the Complainant divulged to a newspaper reporter, but which Complainant was not willing to swear to in a notarized statement submitted under penalty of perjury. For these reasons, we voted against finding reason to believe and opening an investigation into Respondents' actions. Rather, we voted to close the file.

### A. The Complaint Fails to Allege Any Violation of the Act.

In order for the Commission to determine that a complaint provides reason to believe a violation occurred, the complainant, under penalty of perjury, must provide specific facts from reliable sources that a respondent fails to adequately refute. The Commission has stated:

The Commission may find reason to believe only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . . In addition, . . . a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint . . . .<sup>12</sup>

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<sup>12</sup> MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1-2 (emphasis added). As the Commission has stated, “[p]urely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred.” MUR 5467 (Michael Moore), First General Counsel’s Report, at 5 (citing MUR 4960). Therefore, facts presented in the complaint that are not rebutted must be sufficient to sustain a violation of the law. Only if this threshold is met will there be a reason to investigate. The RTB standard does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges. And, contrary to our colleagues’ suggestion in their Statement of Reasons in MURs 6051 & 6052 (Wal-Mart Stores, Inc.), the RTB standard is not met if the Commission simply “did not have . . . sufficient information to find *no* reason to believe a violation occurred.” Statement of Commissioners Cynthia Bauerly and Ellen Weintraub at 2 (emphasis added). To do so would reverse the standard mandated by the Act. We cannot simply ignore the Act. The Commission must have more than anonymous submissions, unsworn statements, and unanswered questions before it can vote to find RTB and thereby commence an investigation. “Mere ‘official curiosity’ will not suffice as the basis for FEC investigations . . .” *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

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The complaint at issue here is rather threadbare. Complainant alleges that PCJ, along with Messrs. Berry and Cerveny, used corporate funds to pay for an “attack mailing,” the apparent implication being that the PCJ mailer constituted an illegal corporate expenditure.

The Act prohibits a corporation from making an expenditure for express advocacy or an electioneering communication to persons outside its restricted class.<sup>13</sup> OGC correctly concluded that the mailer did not constitute express advocacy under the Commission’s regulations because it contained no words of explicit electoral advocacy and a reasonable person could interpret the mailer as advocating something other than the election or defeat of Mr. Coffman.<sup>14</sup> Instead, it was an issue ad with a call to action for recipients to contact Mr. Coffman and register their views on the three issues the ad raised—Mr. Coffman’s management of his office budget as Secretary of State, his compliance with immigration laws, and his office’s protocols for preventing political influence.

Nor did the mailer constitute an electioneering communication. The scope of the term “electioneering communication” is limited to broadcast, cable, and satellite communications.<sup>15</sup> Since the communication at issue was a mailer, we agree with OGC that it cannot, as a matter of law, be deemed an electioneering communication. The complaint, therefore, failed to allege a violation of the Act, and consequently, it provided no grounds for the Commission to find “reason to believe that [PCJ] has committed ... a violation of this Act ....”<sup>16</sup>

B. The Information Discovered During OGC’s Review of Publicly Available Materials Is Not Sufficient to Support a Reason to Believe Finding That PCJ and AFC Coordinated to Distribute the Mailer.

Though PCJ adequately and thoroughly refuted the Complainant’s allegations, OGC discovered information regarding PCJ and AFC during its review of publicly available materials. Assuming *arguendo* that reliance on such materials is proper, they are of questionable reliability and fall well short of being sufficient for an RTB finding.

The factual allegations in the August 8, 2008, *Statesman* article, upon which OGC primarily relies, were made by one or more anonymous sources associated with the Complainant’s campaign and were not verified by any other sources:

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<sup>13</sup> 2 U.S.C. § 441b(a) & (b)(2); 11 C.F.R. § 114.2.

<sup>14</sup> See 11 C.F.R. § 100.22.

<sup>15</sup> 2 U.S.C. § 434(f)(3)(A)(i).

<sup>16</sup> *Id.* § 437g(a)(2).

- “Scott Gessler ... was the ‘conduit’ behind a mass mailing attacking Armstrong opponent Mike Coffman, *members of the Coffman campaign assert.*”
- “[A]ccording to the source from the Coffman camp, Gessler’s involvement has landed him in hot water.”
- “According to the source close to the Coffman campaign ... Cerveny was simply the ‘fall guy’ for the mailing ....”
- “According to the source close to Coffman, at least \$15,000 was funneled into the Protect Colorado Jobs committee under the direction of Gessler ....”
- “The two donors who gave money to Protect Colorado Jobs in order to use its name were purported to have close ties to Armstrong, *the source close to Coffman charged.*”<sup>17</sup>

The *Statesman* article was published the day after the Complainant signed his own sworn complaint. Thus, individuals speaking on behalf of the Complainant were making the above allegations to the press at the same time that the Complainant was drafting his complaint. Complainant obviously had the opportunity to swear to these allegations in his complaint but did not do so, which we find to be significant.<sup>18</sup> If the Complainant did not believe those allegations enough to swear to them under oath, then without any compelling evidence to the contrary, we will not give those allegations any weight, let alone more weight than those actually sworn to in the complaint itself.<sup>19</sup> Moreover, no “specific facts” were alleged beyond the anonymous, self-serving speculation cited in those articles.

Ultimately, OGC’s coordination analysis relies upon a rather lengthy chain of unsworn suppositions and hearsay. Other than the allegations by anonymous sources connected to the Complainant’s campaign made most prominently in the *Statesman* article, no other evidence was provided. Without more, the links in the chain of

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<sup>17</sup> *Statesman* article, *supra* note 7 (emphasis added).

<sup>18</sup> The Act mandates that any complaint received by the Commission must be written, signed, and sworn “under penalty of perjury.” 2 U.S.C. § 437g(a)(1).

<sup>19</sup> This is consistent with the principle of the last sentence of section 437g(a)(1): “The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.” *See also* MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.) (The Commission concluded that mere allegations in a newspaper (specifically, an unsubstantiated quote) that could be read multiple ways are insufficient evidence to find RTB.).

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anonymous suppositions and hearsay set forth above are too weak to sustain an RTB finding and subject Respondents to a Federal investigation.<sup>20</sup>

We also note that merely because a lawyer represents two distinct entities does not create an inference that the two entities are coordinating with each other. Standing on its own, therefore, the fact that Mr. Gessler may have served as counsel for both PCJ and AFC constitutes wholly insufficient grounds for finding RTB that coordination took place between PCJ and AFC.<sup>21</sup> This conclusion displays a fundamental misunderstanding of the nature of legal representation.<sup>22</sup> There must be something more substantial on which to rest a coordination allegation than one attorney having multiple clients.

Not only are the allegations in the *Statesman* article regarding coordination between PCJ and AFC of uncertain accuracy, assuming *arguendo* that it was proper for OGC to conduct its review prior to an RTB finding by the Commission (and without providing such information to Respondents), most of the publicly available information at the time presents far more plausible motivations for the PCJ mailer, none of which involve coordination. PCJ has already publicly named the individual “responsible for this brochure”—Mr. Cerveny.<sup>23</sup> According to news reports, Mr. Cerveny was fired by Mr. Coffman during the latter’s campaign for Secretary of State in 2006.<sup>24</sup> According to one article cited by OGC, “Cerveny allegedly told several people that he planned to

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<sup>20</sup> Even assuming *arguendo* that AFC had been materially involved with—or had engaged in substantial discussions regarding—the mailer, this still would not have run afoul of the coordination rule since all of the information material to the mailer was publicly available. See 11 C.F.R. § 109.21(d)(2), (3) (stating that the material involvement and substantial discussion standards are “not satisfied if the information material to the creation, production, or distribution of the communication [is] obtained from a publicly available source”). The facts in the mailer were derived from, and cite to, newspaper or radio stories. And the recipients of the mailer were registered Republican voters in the Sixth Congressional District, a list of which is publicly available from the Colorado Secretary of State’s office. See Colo. Sec’y of State’s Office, *Fee Schedule, Election Division*, at [http://www.sos.state.co.us/pubs/info\\_center/fee\\_schedule.htm#ELECTIONS](http://www.sos.state.co.us/pubs/info_center/fee_schedule.htm#ELECTIONS) (last visited March 31, 2009). No other information was necessary to create, produce, or distribute these mailers. Thus, the material involvement and substantial discussion standards could not have been met. Nor was there any information provided suggesting that the request or suggestion standard was met. See *infra* note 22.

<sup>21</sup> Specifically, this fact alone does not suggest that any of the conduct standards at 11 C.F.R. § 109.21(d) that OGC suggested (*i.e.*, “request or suggestion,” “material involvement,” or “substantial discussion”) was met. Nor was there any allegation that any of the other conduct standards (*i.e.*, “common vendor,” “former employee or independent contractor,” or “agreement or formal collaboration”) was met.

<sup>22</sup> Attorneys, unlike laity, are ethically required to maintain the confidences of clients. See, *e.g.*, D.C. Rules of Prof’l Conduct R. 1.6 (“Except when permitted under [certain limited circumstances], a lawyer shall not knowingly ... reveal a confidence or secret of the lawyer’s client ...”).

<sup>23</sup> *Sparks Fly in CD 6, supra* note 4.

<sup>24</sup> *Id.*

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'destroy' Coffman by working through surrogates to attack" him.<sup>25</sup> And the *Statesman* article stated that "Cervený ... has his own ax to grind" against the Complainant due to his firing two years earlier.<sup>26</sup> Thus, it appears that Mr. Cervený had his own motives for attacking the Complainant. Moreover, Mr. Cervený contributed money not to AFC, but rather to Ted Harvey, yet another candidate in the August 2008, primary election.<sup>27</sup> Other than the anonymous Coffman campaign source, there is no indication that Mr. Cervený had connections to Mr. Gessler or anyone else associated with AFC.

To approve OGC's recommendations and find RTB here would turn the statutory standard on its head. Rather than be required to cite specific facts, complainants could assume that, the more vague their complaints, the more potential violations the Commission could identify, and the less chance respondents would have to adequately address those potential violations.

The better result is to adhere to the existing statutory and regulatory requirements as we must.<sup>28</sup> Because the complaint failed to "set[] forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA," and furthermore, because allegations made in the *Statesman* article upon which OGC relies in its coordination analysis, even if properly before us, do not "reasonably give[] rise to a belief in the truth of the allegations presented," we voted against finding RTB in this matter.

C. To Find Reason to Believe Based on Unsworn Facts to Which Respondents Did Not Have an Adequate Opportunity to Respond Would be Inappropriate.

As we have noted already, the complaint in this matter made no allegations, and provided no facts indicating, that PCJ coordinated the content and distribution of the mailer at issue with AFC. Instead, OGC's RTB recommendation regarding coordination was based on information it discovered independently of the complaint. This raises questions about the extent to which OGC, prior to a finding of RTB, may, if at all, gather outside information and then rely on it when making an RTB recommendation.

<sup>25</sup> *501(c)(4) Chair Arranged Unauthorized Anti-Coffman Attack Piece, supra* note 4. None of the information about Mr. Cervený's motives or ties to other campaigns was presented to the Commission in the First General Counsel's Report.

<sup>26</sup> *Statesman* article, *supra* note 7.

<sup>27</sup> *Sparks Fly in CD 6, supra* note 4. Mr. Cervený, in fact, contributed \$2,300 to Mr. Harvey's congressional campaign, the maximum allowable for a 2008 federal primary election. See FEC Disclosure Report Search Results, Ted Harvey For Congress, at [http://query.nictusa.com/cgi-bin/com\\_ind/C00442053/](http://query.nictusa.com/cgi-bin/com_ind/C00442053/) (last visited March 31, 2009). Moreover, Mr. Cervený's consulting firm, Politically Direct, received nearly \$14,500 in business from Mr. Harvey's campaign. *Sparks Fly in CD 6, supra* note 4; Federal Election Commission, April 2008 Quarterly and Pre-Primary reports for Ted Harvey for Congress, at <http://images.nictusa.com/cgi-bin/fecimg/?C00442053> (last visited March 31, 2009).

<sup>28</sup> To do otherwise would be to ignore the Act and our regulations. See *supra* note 13.

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The Act and Commission regulations make clear the conditions that must be met before the Commission may investigate a complaint's allegations. The Act provides that a complaint "shall be in writing, signed, and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury ...."<sup>29</sup> Once the Commission receives a complaint, OGC reviews it for "substantial compliance with the technical requirements of 11 CFR § 111.4,"<sup>30</sup> and then "recommend[s] to the Commission whether or not it should find reason to believe[,] ... no reason to believe[,] ... or that the Commission otherwise [should] dismiss a complaint ...."<sup>31</sup> The Commission may not entertain an RTB finding, let alone undertake an investigation, until the respondent has the opportunity to submit, in writing, reasons why the Commission should take no further action.<sup>32</sup> Moreover "[t]he Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission."<sup>33</sup>

While we do not need to have a detailed examination of the permissible boundaries of pre-RTB inquiries and fact-gathering to reach our conclusion here, we do note that, at some point, such inquiries and fact-gathering, even if they merely involve reviewing information from publicly available sources, reach a threshold where they become investigations without the imprimatur of an RTB finding. The Commission has an obligation under the Act and its regulations to ensure that line is not crossed. And if we assume *arguendo* that certain limited reviews of publicly available materials are permissibly undertaken in "the normal course of carrying out [the Commission's] supervisory responsibilities,"<sup>34</sup> then any unearthed facts or allegations that OGC uses to support RTB recommendations should be provided to respondents so that they may have a full and fair opportunity to challenge them before the Commission votes on those recommendations.

Such an opportunity was not afforded to PCJ and AFC in this matter. Here, the pre-RTB letter sent to AFC only told them that the Commission had uncovered "[p]ublicly available information that PCJ and an agent of AFC may have coordinated

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<sup>29</sup> 2 U.S.C. § 437g(a)(1).

<sup>30</sup> 11 C.F.R. § 111.5(a).

<sup>31</sup> *Id.* § 111.7.

<sup>32</sup> 2 U.S.C. § 437g(a)(1); 11 C.F.R. § 111.6(a).

<sup>33</sup> 2 U.S.C. § 437g(a)(1). Basing an RTB recommendation on information provided to a reporter by anonymous sources associated with a complainant, at a minimum, violates the spirit of this provision. See also MURs 5977 and 6005 (American Leadership Project, *et. al*), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn, at 5 n.20 (discussing disapprovingly OGC's reliance on media reports containing unconfirmed or speculative information provided by anonymous sources).

<sup>34</sup> 2 U.S.C. § 437g(a)(2); 11 C.F.R. §§ 111.3, 111.8(a).

this communication.” Had it at least been provided the *Statesman* article, AFC would have been given Mr. Gessler’s name as well as the basis on which the coordination allegation rested. This information would have enabled AFC to submit a more thorough and useful response. Moreover, PCJ was not notified at all regarding the alleged coordination between itself and AFC. Thus, PCJ never had the chance to contest this new allegation.

The failure to provide a respondent with an opportunity to respond to factual and legal allegations that the Commission will consider in making its RTB determination undermines the command that “[t]he Commission shall not take any action, or make any finding, against a respondent ... unless it has considered [its] response ....”<sup>35</sup> The Commission needs to scrupulously comply with this requirement in all matters.

### III. CONCLUSION

In this matter, had the Commission gone forward and approved this RTB recommendation, it would have established an unfortunate precedent. In addition to the reasons discussed above, a newspaper article containing allegations from anonymous sources close to the Complainant would have, in essence, become a second, unsworn, non-notarized “complaint.” This matter was not an instance where a third-party source felt compelled to maintain anonymity out of a fear of retribution,<sup>36</sup> and then a complainant subsequently relied on the anonymously sourced article to file a complaint. Rather, both the complaint and the anonymous sources originated from the same place—the Complainant’s campaign. It would be inappropriate bootstrapping to allow a complainant to file a bare-bones complaint and then surreptitiously supplement it with newspaper articles based on information given to the reporter by the complainant itself. Not only would this allow an end-run around the complaint process, but it would also unfairly prejudice the respondent by permitting allegations to come before the Commission without any opportunity for the respondent to contest them.

We do not contend that the Complainant in this matter intended to cynically manipulate the complaint process by planting a story with the hope that the Commission would investigate the additional allegations. There is no evidence that suggests this is what happened. But had we voted to find RTB in this matter, we have no doubt that astute observers would have quickly realized that they could “juice up” their complaints, and thus increase the likelihood of RTB findings, by whispering into a friendly reporter’s ear additional allegations that they would not otherwise be willing to include in a sworn, notarized complaint submitted under penalty of perjury. This would not have been a positive development.

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<sup>35</sup> 11 C.F.R. § 111.6(b).

<sup>36</sup> We do not suggest that a fear of retribution or perjury penalties could justify investigating unsworn allegations. The point of penalties for perjury is to encourage factual filings and to deter false or nuisance accusations.

For the reasons stated above, we rejected OGC's recommendation to find reason to believe in this matter and voted to close the file.

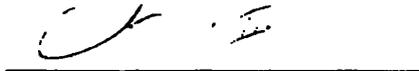
6/1/09  
Date

  
MATTHEW S. PETERSEN  
Vice-Chairman

6/1/09  
Date

  
CAROLINE C. HUNTER  
Commissioner

6-2-09  
Date

  
DONALD F. MCGAHN II  
Commissioner

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