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From: <FOIA@fec.gov>

Date: Mon, 13 Dec 2010 13:32:45 -0500

Subject: FEC Freedom of Information Act (FOIA) Request, No. 2011-09

VIA EMAIL

We have received your FOIA request to the Federal Election Commission (FEC) dated November 2, 2010. You specifically requested the following: "any primarily internal 'Talking Points' or 'Q&A' documents at the FEC ... dating from January 2000 to the present." As articulated in your request, the search was limited to the computer files of Judith Ingram, Julia Queen, Christian Hilland, and Duane Pugh.

We have searched the agency's records and have found documents responsive to your request (see attached). We are withholding one document in its entirety pursuant to the deliberative process privilege, FOIA Exemption 5. 5 U.S.C. § 552(b)(5). Release of this document may harm the interests protected by the deliberative process privilege.

You may appeal any adverse FOIA determination. Any such appeal must be filed in writing and should follow the guidelines set forth in 11 C.F.R. § 4.8. If you have any questions, please contact the FOIA Service Center at FOIA@fec.gov <[FOIA@fec.gov](mailto:FOIA@fec.gov)>, or (202) 694-1650.

Sincerely,

Catherine H. Kelley, Esq.  
FOIA Service Center

## Citizens United Talking Points

- It is, of course, too early to accurately predict the impact of today's opinion.
- The Commission is studying the opinion and will be considering the next steps.
- These steps could include modifying the regulations. In another recent case, *EMILY's List v. FEC*, the Commission has issued a Notice of Proposed Rulemaking to seek public comment on new regulations, and an Interim Final Rulemaking to give committees guidance in the meantime.
- There may be current cases that could be affected by the ruling but we are not authorized to discuss pending enforcement matters.
- (if they persist in asking questions) I can't get out in front of the Commissioners by speculating on what the next steps will be.

BACKGROUND: Citizens United challenged the application of BCRA's electioneering communication provisions (Section 203) to the cable-video-on demand broadcast of a film it produced on Hillary Clinton, as well as to televised advertising for that film. (An EC is basically a broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed within 30 days of a primary election or within 60 days of a general election. Corporations and labor organizations are generally prohibited from using their general treasury funds to finance such communications.) Section 203 prohibits corporations and unions from funding electioneering communications from their general funds. But those electioneering communications that are permitted are subject to BCRA's disclosure and disclaimer requirements.

Citizens United challenged the constitutionality of the disclaimers on, and disclosure and funding of, certain "electioneering communications" (ECs). It sought a court injunction to prevent the FEC from enforcing its electioneering communications provisions. (Citizens United had also

filed an Advisory Opinion request covering some of the same issues as in the current case, which the FEC answered in Advisory Opinion 2004-30. But Bob says there were important differences.)

In July 2008, a three-judge district court found that BCRA was constitutional as applied to all of Citizens United's activity and granted summary judgment to the Commission to enforce the law. Citizens United appealed, and we're awaiting the Supreme Court decision, which looks as if it will go far beyond the issue presented in the original case and address the constitutionality of a couple of key campaign finance laws:

- McConnell (which upheld the control of soft money and the regulation of electioneering communications; Citizens United was one of the plaintiffs in this case), and
- Austin (which ruled that a Michigan state law prohibiting independent expenditures by corporations was constitutional).

**Proposed Response to Media, Public & Other Queries About Recent FOIA**  
July 3, 2007

**Affirmative Talking Points**

- The Commission acted quickly and appropriately when it first learned of these matters.
- The Inspector General brought the Justice Department into the process and the investigation was conducted jointly.
- None of the individuals who engaged in the most serious misconduct are still employed by the agency.
- The Commission has hired a new Staff Director, who has undertaken a reorganization including creation of new Senior Level positions insuring proper lines of authority, responsibility, and oversight over Commission operations
- These changes have included implementation of appropriate measures related to the IG's recommendations.

**Responses to Queries** (to be used only if asked)

Q1. Did the \$10,000 get paid to Mahoney & Mahoney?

A1. No

Q2. How did the "inappropriate use of FEC computers" relate to the other allegations?

A2. Over its course, the investigation uncovered additional evidence of misconduct by other employees, including, among other things, violation of Commission policies on the use of computers.

Q3. The Department of Justice chose not to prosecute the former FEC Staff Director (Mr. Pehrkon), were there other prosecutions?

A3. The U.S. Attorney declined any prosecutions.

Q4. The investigation seems to have had problems – what happened?

A4. First, there were statements from multiple witnesses, as well as documentary evidence, that the IG cited as supporting her conclusions with respect to the alleged conflict of interest.

Second, parts of the statements of one or more witnesses were contradicted by the statements of one or more other witnesses.

And third, over its course, the investigation uncovered additional evidence of misconduct by other employees, including, among other things, violation of Commission policies on the use of computers.

Q5. What was the conclusion of the original harassment complaint?

A5. The investigation did *not* resolve the underlying EEO claims that led to the conflict of interest violation, nor was that the investigation's purpose; there is a separate, statutory process for the resolution of EEO claims.

Information about those matters is confidential to protect the privacy rights of individuals.

Q6. What happened to the people involved?

A6. None of the employees who were allegedly engaged in the most serious misconduct remain employed by the Agency. We can't discuss any of the specifics related to personnel actions. The Commission has a new Staff Director who has undertaken an extensive reorganization which includes clear lines of responsibility through a number of Senior Level positions.

**Additional Talking Points** (to be used if specific questions warrant)

- The report that has been released is the final report to the Commission by the FEC's Office of Inspector General regarding an investigation into allegations of misconduct by several FEC management officials. The investigation was completed in September 2006. It has been released pursuant to a request under the Freedom of Information Act by the *BNA Money and Politics Report*.
- The investigation was triggered by allegations that a senior management official violated conflict of interest laws in the second half of 2005 by attempting personally to settle, on behalf of the agency, an equal employment opportunity complaint in which he was alleged to be the discriminating official.

- When the Commission became aware of the allegations of misconduct at issue in this matter, it acted immediately. Three management employees were immediately placed on administrative leave pending the outcome of the investigation.
- The investigation ultimately determined that the official acted in his own interest while representing the Commission and attempted to expend Commission funds to settle the EEO complaint. It also determined that he failed to follow established Commission procedures regarding the processing of EEO complaints.
- The investigation also uncovered evidence of administrative misconduct by other officials, including the use of FEC computer resources to transmit messages that contained content deemed inappropriate under the Commission's policies regarding employee use of computers. FEC computers were also used to transmit to private parties outside the Commission potentially confidential information regarding FEC budget, personnel, and EEO matters.
- None of the information transmitted, confidential or otherwise, concerned any candidate or political committee, or any member of the Commission's regulated community.
- The investigation did *not* resolve the underlying EEO claims that led to the conflict of interest violation, nor was that the investigation's purpose; there is a separate, statutory process for the resolution of EEO claims.
- The investigation was conducted in cooperation with the FBI and the U.S. Attorney's Office for the District of Columbia. The U.S. Attorney ultimately declined any prosecution. None of the employees who were engaged in the most egregious misconduct remains employed by the Agency.
- All of the redactions to the report are based on exemptions to the Freedom of Information Act. Most of the redactions are based on a determination that release of the information redacted would constitute unwarranted invasion of the personal privacy of specific individuals.

**You only exist for 35 years. Why was it necessary to impose a body like FEC and how did it work before you were established?**

This question is treated a greater length in our 30-Year Report (<http://www.fec.gov/info/publications/30year.pdf>), but in a nutshell:

For over a century, Congress has passed laws intended to reduce corruption and the appearance of corruption in the election process. These laws are intended to:

- limit contributions so that wealthy individuals and special interest groups don't have a disproportionately big influence on federal elections;
- prohibit certain sources of funds for federal campaign purposes, such as contributions from foreign citizens and from corporations;
- control campaign spending, which tends to increase reliance on contributors and fundraisers; and
- require public disclosure of campaign finances to deter abuse and to educate the electorate.

Campaign finance regulation laws were routinely circumvented. The Federal Election Campaign Act (FECA), with more stringent regulations, was passed in 1971. At first, the Clerk of the House, the Secretary of the Senate and the Comptroller General of the United States, head of the General Accounting Office (GAO), monitored compliance with the FECA. The Justice Department was responsible for prosecuting violations of the law referred by the three supervisory officials. Following the 1972 elections, however, the Justice Department prosecuted few of the 7,100 cases referred to it.

Then came the Watergate scandal, which centered around a secret Republican fund that was associated with the heads of President Richard Nixon's re-election campaign and used to finance intelligence-gathering and sabotage against the Democrats.

In 1974, Congress passed a series of amendments to the FECA, including establishment of the Federal Election Commission. It was defined as an independent agency to assume the administrative functions previously divided between Congressional officers and GAO. The Commission was given jurisdiction in civil enforcement matters, authority to write regulations and responsibility for monitoring compliance with the FECA.

The Federal Election Commission is made up of six members, who are appointed by the President and confirmed by the Senate. Each member serves a six-year term, and the terms are staggered. By law, no more than three Commissioners can be members of the same political party, and at least four votes are required for any official Commission action. This structure was created to encourage nonpartisan decisions. The Chairmanship of the Commission rotates among the members each year, with no member serving as Chairman more than once during his or her term.



**How difficult is to adjust election systems of 50 different states in a single thing? Rules are different. What exactly is your task? What do you monitor? Could you overrule a state election commission and on what basis?**

The campaign finance statute is a federal-level law and the FEC regulations, which are designed to implement that statute, are also for the federal level. They deal with the raising and spending of money in connection with federal elections, that is, election to federal, not state, offices. That said, there are many regulations that carry the caveat that they can be enforced only if they do not conflict with the laws of a particular state.

This agency does not deal with issues of ballot access or voting-related issues. The Election Assistance Commission (EAC) deals with some of these issues, while other issues are left to the state offices.

**Is there anything in common in all 50 states?**

See answer to previous question.

**How do you follow the money? Could there be a fraud, unreported funding etc. ?**

The Commission's responsibilities are:

- to disclose campaign finance information
- enforce the provisions of the law such as the limits and prohibitions on contributions, and
- oversee the public funding of Presidential elections.

The Federal Election Campaign Act reflects Congress's belief that democracy works most effectively when voters are able to make informed decisions in the political process; decisions based, in part, on knowing the sources of candidates' financial support. Public confidence in the political process depends not only on laws and regulations to ensure transparency, but also on the knowledge that those who disregard the campaign finance laws will face concrete consequences for non-compliance—hence, the Commission's focus on effective and fair enforcement of the law.

The Commission's everyday work includes close monitoring of the disclosure reports that are filed here and posted on our website, to ensure committees are abiding by the prohibitions and restrictions of FECA. That work is done in our Reports Analysis Division.

Some violations come to light as a result of FEC audits, when auditors examine committees that have a pattern of questionable reporting or other issues. Also, anyone who feels the law has been violated can file a complaint with us. Complaints are handled by the enforcement division.

**How does the financing work? What is legal what is not?**

The FECA requires candidate committees, party committees and PACs to file periodic reports disclosing the money they raise and spend. Candidates must identify, for example, all PACs and

party committees that give them contributions, and they must identify individuals who give them more than \$200 in an election cycle. Additionally, they must disclose expenditures exceeding \$200 per election cycle to any individual or vendor.

The FECA places limits on contributions by individuals and groups to candidates, party committees and PACs.

The FECA places prohibitions on contributions and expenditures to influence federal elections by federal government contractors and [foreign nationals](#). Corporations and labor organizations cannot contribute directly to candidate committees.

Furthermore, with respect to federal elections, no one may make a contribution in another person's name and no one may make a contribution in cash of more than \$100.

In addition, the FECA also prohibits foreign nationals, national banks and other federally chartered corporations from making contributions or expenditures in connection with state and local elections.

**How many complains do you get per elections and what are the most common complains?**

See link in email (<http://www.fec.gov/em/enfpro/enforcestatsfy03-08.pdf>), p. 2 and p. 5.

**Why don't you take advantage of the system (as a party representative), what is stopping you?**

This question is probably best addressed to a Commissioner. The staff are non-partisan employees of the federal government, meaning that while each of us has his or her own political views they cannot be allowed to have an impact on our work. Staff are not permitted to work on political campaigns or even to donate money to political candidates.

**What do you do in non election year, or non election time? What is the duty of FEC?**

Our work is not tied to election cycles, and much of it is very time-consuming. Our analysis, enforcement, litigation, audit and other departments continue to work long after elections to ensure the law and regulations are not being violated. The Commission also works on rulemakings, which set out how laws and court decisions will be implemented in practice.

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