IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR COMPETITIVE POLITICS, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 14-970 (RBW)

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Plaintiff Center for Competitive Politics respectfully opposes Defendant Federal Election Commission's Motion for Summary Judgment (Doc 7). In support of this opposition, Plaintiff submits the following: its Memorandum in Support of Plaintiff's Opposition to Motion for Summary Judgment, Plaintiff Center for Competitive Politics' Opposition to Defendant's Statement of Material Facts as to which there is no Genuine Dispute, the Declaration of David M. Mason, and a Proposed Order Denying Motion for Summary Judgment.

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Introduction

There are certain things upon which the Parties agree. In October 2010, a number of organizations and individuals filed an administrative complaint asking the FEC to find that Crossroads Grassroots Policy Strategies ("Crossroads") violated the law. The resulting proceeding was designated Matter Under Review ("MUR") 6396. On June 21, 2011, the FEC's Office of General Counsel circulated a First General Counsel's Report concerning MUR 6396 ("Report" or "First General Counsel's Report"). That Report is the subject of this litigation.

Beyond that, things become hazy. The First General Counsel's Report was circulated for the Commissioners' vote. Unanimity was not achieved and objections were raised, so the Report was scheduled for discussion at an Executive Session of the Commission. "Before the Commission was scheduled to consider the matter…Respondents [Crossroads] filed a supplemental response with the Commission." FEC, STATEMENT OF REASONS OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSEN, IN THE MATTER OF CROSSROADS GRASSROOTS POLICY STRATEGIES (MUR 6396) ("STATEMENT OF CHAIRMAN GOODMAN, *et al.*") at 26 (Jan. 8, 2014). In response, "OGC circulated a memo to the Commission stating that the supplemental response did not change its recommendation, did not require any edits to its report, and that it was still prepared to discuss the matter at the scheduled Executive Session." *Id*. Whether a vote was taken at that Executive Session is unknown. But at some point, the Office of General Counsel withdrew its Report. We do not know who requested the withdrawal, the rationale or authority for doing so, and whether such a withdrawal had ever previously occurred.

Consequently, the requested document is unique. Commission policy, including an explicit regulation (11 C.F.R. § 5.4(a)(4)) requires such a report to be made publicly available. ("General Counsel's Reports…*shall* be placed on the public record of the Agency") (emphasis supplied). To

Plaintiff's knowledge, no other First General Counsel's Report has ever been "withdrawn from consideration by the Commission," and no authority exists for transforming a Report clearly covered by the Commission's disclosure policies into a "withdrawn" report that somehow loses its original character.

The facts become clearer beginning in November 2012, when the Office of General Counsel prepared a revised report for the Commission's consideration. "On December 3, 2013, [the Commission] voted on" OGC's recommendations. FEC, STATEMENT OF REASONS OF VICE CHAIR ANN M. RAVEL, COMMISSIONER STEVEN T. WALTHER, AND COMMISSIONER ELLEN L. WEINTRAUB, IN THE MATTER OF CROSSROADS GRASSROOTS POLICY STRATEGIES (MUR 6396) (STATEMENT OF VICE-CHAIRMAN RAVEL, *et al.*) at 1 (Jan. 10, 2014). The Commission deadlocked, with three commissioners finding reason to believe that Crossroads had violated the law, and three disagreeing. Consequently, a majority for further action was lacking and, pursuant to D.C. Circuit precedent, the three commissioners who voted against finding reason to believe provided a statement of their reasons. *See Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987); STATEMENT OF CHAIRMAN GOODMAN, *et al.*. In doing so, the Commissioners explicitly relied upon the withdrawn First General Counsel's Report, and incorporated it as part of their reasoning. *Id.* at 26, n. 111 ("Since the first First General Counsel's Report in this matter, dated June 22, 2011, informed our decision and in the interest of ensuring compliance with the [Commission's 2009] Policy [Regarding Placing First General Counsel's Reports on the Public Record], we are attaching that First General Counsel's Report and the accompanying proposed Factual and Legal Analysis"); SUPPLEMENTAL STATEMENT OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSEN, FEDERAL ELECTION COMMISSION, IN THE MATTER OF CROSSROADS GRASSROOTS POLICY

STRATEGIES (MUR 6396) at 1 (Mar. 25, 2014) ("SUPPLEMENTAL STATEMENT") ("the withdrawn First General Counsel's Report in matter informed our decision in this matter"). Indeed, they sought to attach the entire document to their Statement.

Nevertheless, "OGC and several…Commissioners expressed their view that the withdrawn First General Counsel's Report might be privileged and should be withheld from the public record." SUPPLEMENTAL STATEMENT at 1. We do not know if the Commissioners voted to redact the document, but we do know that the controlling commissioners "agreed to redact the first report pending further Commission discussions in order to make the rest of the Statement public." *Id*. at 1-2.

Following the publication of the controlling commissioners' Supplemental Statement, Plaintiff sought to obtain an unredacted version of the June 22, 2011 First General Counsel's Report under FOIA. Ultimately, the FEC "constructively denied" Plaintiff's FOIA request—presumably because the Commission deadlocked as to whether or not the original First General Counsel's Report was exempted from disclosure under FOIA. A breakdown of the Commission vote has not been provided to Plaintiff.

Plaintiff is now before this Court requesting access to a document that, pursuant to the clear language of FEC policies and regulations, ought to be public. Three of the FEC's six commissioners—specifically those who decided the Crossroads matter and relied upon the Report in their decision—have publically stated that the document is not privileged. Nonetheless, the Office of General Counsel has declined to release it.

In practice, the Office of General Counsel, having failed to convince a majority of the FEC to proceed with an enforcement action, began by "withdrawing" its original, invariably public recommendation under unclear circumstances. Then, having failed to convince the Commission a

second time, it now seeks to prevent the three Commissioners that rejected its advice from explaining their decision. In the face of a deadlocked Commission, it now falls to this Court to evaluate the Office of General Counsel's claims as regards this novel, if not unique, situation.

For the reasons that follow, it is unlikely that the Report was prepared with the expectation of confidentiality required to invoke FOIA's Exemption 5. Even if it had been—and the FEC is silent on that point—when three Commissioners explicitly relied upon the Report in voting not to move forward with the Crossroads matter, any privilege that might have existed was waived. Moreover, questions of material fact remain. They are few and, presumably, easily answered. But they remain, and the Commission's motion for summary judgment is premature.

Argument

I. Summary judgment standard

Summary judgment short-circuits the fact-finding function of the federal courts. It is only "granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. In determining whether a genuine issue of fact exists, the court must view all facts in the light most favorable to the non-moving party." *Judicial Watch, Inc. v. Consumer Financial Protection Bureau*, 985 F. Supp. 2d 1, 6 (D.D.C. 2013) (citations omitted). This is equally true here, as "[u]nder FOIA, all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester." *Id.* (citations omitted). Summary judgment is premature in this case, because "only after an agency proves that is has fully discharged its FOIA obligations is summary judgment appropriate." *Id.* (citations omitted).

Indeed, "[t]he withholding agency bears the burden of establishing that the withheld information qualifies for a statutory exemption from disclosure." *Trulock v. Dep't of Justice*, 257 F. Supp. 2d 48, 50 (D.C. Cir. 2003) (citation omitted). While "[t]hat burden may be satisfied

through submission of an agency declaration describing the material withheld," that declaration "must be relatively detailed and non-conclusory." *Trulock*, 257 F. Supp. 2d at 50; *Judicial Watch*, 985 F. Supp. 2d at 6 (citation and quotation marks omitted). In this unusual case, armed only with a short and conclusory affidavit from a FOIA Requester Service Center staff attorney detached from the events at issue, the FEC cannot bear its burden.

II. The Requested document is subject to FOIA.

a. Nondisclosure of government documents is disfavored under FOIA.

"The Supreme Court has explained that the FOIA is a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Shapiro v. Dep't of Justice*, 969 F. Supp. 2d 18, 25 (D.D.C. 2013). The "basic policy" and "dominant objective" of FOIA is to further "disclosure, not secrecy." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). While the FOIA contains a limited number of statutory exemptions, these exemptions "have been consistently given a narrow compass." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citation and quotation marks omitted). As a result, "all FOIA exemptions, must be construed as narrowly as consistent with efficient Government operation." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citation and quotation marks omitted). Accordingly, "[u]nder FOIA, all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester; as such, only after an agency proves that it has fully discharged its FOIA obligations is summary judgment appropriate." *Judicial Watch*, 985 F. Supp. 2d at 6 (citations omitted).

b. The First General Counsel's Report does not fall within one of the narrow exemptions FOIA permits.

In order for the First General Counsel's Report "[t]o qualify for [exemption from FOIA disclosure], a document must…satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath Water User Protective Ass'n*, 532 U.S. at 8. It is undisputed that the Report satisfies the first prong of this test: the FEC is plainly a government agency.

As to the second prong, the Commission has broadly invoked three exemptions: the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.[1] S.J. Mot. at 7-9. These are the "three traditional civil discovery privileges" that "courts have interpreted…into Exemption 5" of the FOIA. *Citizens for Responsibility and Ethics v. Nat'l Archives and Records Admin*., 583 F. Supp. 2d 146, 156 (D.D.C. 2008) ("*CREW*") (citations omitted). FOIA Exemption 5 exempts 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) (2014).

Nevertheless, in its motion for summary judgment, the Commission explicitly disclaimed reliance upon the attorney-client privilege. S.J. Mot. at 19, n. 9. Thus, the Commission relies only upon the deliberative process and work-product privileges, which we discuss in turn.

[1] The FEC also considers the first page of the Report to be exempt under FOIA Exemption 7(E) as it "includes formal scores that the Commission uses to decide which matters to pursue, which to dismiss as a matter of prosecutorial discretion, and which to refer for methods of alternate dispute resolution. Such scores if made public could reveal which type of violations the Commission considers more serious than others." Kahn Decl. at 5-6, ¶22. This information was not previously disclosed to CCP. To the extent that this is an accurate characterization of the first page of the Report, CCP does not object to the Commission's invocation of Exemption (7)(E) as applied to such scores.

c. The deliberative process privilege does not apply to the Report.

"Although there are many cases in this Circuit which discuss the deliberative process privilege, these cases 'are of limited help…because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.'" *CREW*, 583 F. Supp. 2d at 158 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (ellipses original)). This is particularly true in this instance. CCP does not seek internal emails, draft documents, policy manuals, or internal memoranda from the Commission. Rather, CCP simply seeks disclosure of a single document, which—per Commission regulation and policy—is always made public. In fact, the controlling group of commissioners in the Crossroads MUR explicitly declared that they do not believe any privilege attaches to the Report at issue in this case. SUPPLEMENTAL STATEMENT at 2-3. Nevertheless, the other three commissioners and the Office of General Counsel have blocked their attempts to make the Report public.

Given the public nature of First General Counsel's Reports under FEC regulations and implementing policies, it is odd that the Commission here objects to the very transparency it nominally champions. 11 C.F.R. § 5.4(a)(4) ("General Counsel's Reports…*shall* be placed on the public record of the Agency"); FEC, STATEMENT OF POLICY REGARDING PLACING FIRST GENERAL COUNSEL'S REPORTS ON THE PUBLIC RECORD, 74 Fed. Reg. 66132, 66133 (Dec. 14, 2009) ("In 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 recommendations in these First General's Reports are adopted by the Commission"). Nevertheless, the FEC now claims that, contrary to its policy of "approv[ing] any FOIA request seeking a First General Counsel's

Report…that has not yet been placed on the public record," the Report must be shielded to defend the agency's deliberative process.

To determine "whether an agency properly withheld documents under the deliberative process privilege, the critical question is whether 'disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency." *CREW*, 583 F. Supp. 2d at 167 (quoting *Formaldehyde Instit. v. Dep't of Health and Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (brackets original)).

Indeed, the deliberative process privilege only applies "when 'production of contested documents would be injurious to the consultative functions of government that the privilege of nondisclosure protects.'" *Elec. Frontier Found. v. Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)). Otherwise, "under FOIA, agencies must disclose…the reasons which supplied the basis for an agency policy actually adopted." *Elec. Frontier Found.*, 739 F.3d at 14 (citation, quotation marks and brackets omitted).

The Commission's own regulation and implementing policy concerning the release of such reports—which are circulated with the anticipation that they will be published as a matter of course—demonstrate that release of the first First General Counsel's Report poses no injury to deliberative process. The fact that the Commission generally believes that releasing First General Counsel's Reports does *not* threaten such "candid discussion" must merit some consideration.

"To qualify for withholding under the deliberative process privilege, the withheld material must be *both* predecisional and deliberative." *Judicial Watch*, 985 F. Supp. 2d at 8 (emphasis supplied). The Report is neither predecisional nor deliberative.

i. The First General Counsel's Report was not "predecisional."

The "predecisional" nature of the Report is taken for granted in the FEC's briefing. But the "deliberative process privilege is…dependent upon the individual document and the role it plays in the administrative process." *Playboy Enterprises, Inc. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (citations and quotation marks omitted). As the Justice Department itself has noted, one of the rationales for the deliberative process privilege is "to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action." "Exemption 5," FREEDOM OF INFORMATION ACT GUIDE, U.S. DEP'T OF JUSTICE (May 2004).[2] But here, the FEC attempts to use the privilege inappropriately—to withhold a document that *did* inform the "reasons and rationales" undergirding final agency action. Indeed, the Commissioners relied upon it in reaching the final decision in MUR 6396, and expressly adopted it as part of their final decision. Given that the Report served as the basis for the controlling commissioners' vote to reject the second First General Counsel's Report prepared by OGC, the first First Report is not pre-decisional. *See Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975) ("The public has an interest in decisions deferred, avoided, or simply not taken for whatever reason, equal to its interest in decisions made, which from their very nature may more easily come to public attention than those never made").

The controlling commissioners effectively adopted the first First General Counsel's Report as a statement of *present* FEC policy in their Statement of Reasons for rejecting the *second* First General Counsel's Report. SUPPLEMENTAL STATEMENT at 1-2 ("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 [proposed by the second First

[2] *Available at*: http://www.justice.gov/oip/foia-guide-2004-edition-exemption-5.

General Counsel's Report]"). The Report now functions as a "'statement[] of policy and interpretation…adopted by the agency.'" *Elec. Frontier Found.*, 739 F.3d at 4 (quoting 5 U.S.C. § 552(a)(2)).

"[E]ven if a document is clearly protected from disclosure by the deliberative process privilege," it will lose that protection "if a final decisionmaker 'chooses *expressly* to adopt or incorporate [it] by reference.'" "Exemption 5," FREEDOM OF INFORMATION ACT GUIDE (quoting *Nat'l Labor Relations Board et al. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (emphasis original)). This is precisely what the controlling commissioners in the Crossroads GPS MUR did when they cited the First General Counsel's Report in their final decision. These commissioners in fact went a step further, and actually attempted to incorporate the Report itself into their Statement of Reasons. Accordingly, the "document cannot be characterized as predecisional." *CREW*, 583 F. Supp. 2d at 157. To shield the Report from public view would inadvertently "develop a body of secret law, used…in the discharge of [the Commission's] regulatory duties and in its dealings with the public, but hidden behind a veil of privilege, because it is not designated as 'formal', 'binding', or 'final.'" *Tax Analysis v. IRS*, 483 F. Supp. 2d 8, 13 (D.D.C. 2007) (citation and citing quotation marks omitted).

ii. The Report does not qualify as a 'deliberative' document.

Even if this Court accepts the Commission's characterization of the Report as "predecisional", that does not qualify it as a deliberative document under the law of this Circuit. Unless the document is both predecisional *and* deliberative, it must be disclosed. *Judicial Watch*, 985 F. Supp. 2d at 8.

In order to be considered deliberative, a document must "reflec[]t 'the give-and-take of the consultative process.'" *Senate of Puerto Rico v. Dep't of Justice*, 823 F. 2d 574, 585 (D.C. Cir.

1987) (citation omitted). But the Report was "styled as a First General Counsel's Report" and, accordingly, was voted on by the Commission. SUPPLEMENT STATEMENT at 3. As discussed *supra*, the Office of General Counsel does not submit draft Reports to the full Commission for consideration. Mason Decl. ¶ 5. A First General Counsel's Report is only circulated to the full Commission for a vote with the knowledge that it could be adopted as a final agency action. *Id.* at ¶¶ 7, 9. This diminishes any asserted need to "preserve" a "deliberative process." *Cf. Cobell v. Norton*, 213 F.R.D. 1, 6 (D.D.C. 2003) ("Drafts of agency orders, regulations, or officials histories are routinely deemed to be protected by the privilege.") (citations omitted); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006) ("Certainly, the label 'draft' goes to the merits of Exemption 5's…deliberative element[]"). Indeed, even an "underlying memorandum…expressly relied on in a final agency dispositional document," is not shielded by the deliberative process protection. *Niemier v. Watergate Special Prosecution Force*, 565 F.2d 967, 973 (7th Cir. 1977).

The deliberative element is necessarily central to the invocation of the *deliberative* process privilege. *Dudman Comm. Corp v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) (the "key question [is]…whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions"). But as discussed *supra*, it is difficult to understand how a document prepared in anticipation of its likely publication could discourage candid discussion. 11 C.F.R. § 5.4(a)(4). Presumably there *were* such candid discussions during the document's drafting stage; but CCP does not seek such drafts, only the final document that FEC regulations and policy stated, then and now, would be made public. Mason Decl. ¶¶ 14, 16. CCP presumes that OGC attorneys were aware of this fact and acted accordingly. Nothing in the record indicates otherwise.

d. The work-product doctrine does not attach to the Report.

"The purpose of the [work-product doctrine] is to protect the adversary trial process by 'encourag[ing] effective legal representation within the framework of the adversary system[, thereby] removing counsel's fears that his thoughts and information will be invaded by his adversary." *CREW*, 583 F. Supp. 2d at 158 (citing *Coastal States Gas Corp.*, 617 F.2d at 864) (brackets original). But "the work-product rule does not extend to every written document generated by an attorney [or] shield from disclosure everything that a lawyer does." *Id*. (brackets original); *see also United States ex rel. Barko v. Halliburton Co.*, 2014 U.S. Dist. LEXIS 30866 at *10-11 (D.D.C. Mar. 11, 2014) ("Courts need not allow a claim of […work-product] privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege") (citation and quotation marks omitted, brackets original).

Accordingly, in the FOIA context, the work-product exemption is—like all Exemption 5 carve-outs—narrowly applied. "[I]f the agency were allowed to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated." *Citizens for Responsibility and Ethics v. Dep't of Justice*, 955 F. Supp. 2d 4 (D.D.C. 2013) (citations, quotation marks omitted). Therefore, the work-product "privilege has no applicability to documents prepared by lawyers in the ordinary course of business or for other nonlitigation purposes." *Shapiro v. Dep't of Justice*, 969 F. Supp. 2d 18, 30 (D.D.C. 2013) (citations, quotation marks omitted).

"The proponent of work-product protection bears the burden of demonstrating that the prospect of litigation was an independent, legitimate[,] and genuine purpose for the document's creation." *Shapiro*, 969 F. Supp. 2d at 31 (bracket supplied). The "independent" requirement is of particular significance in the instant case. The D.C. Circuit "applies the 'because of' test, asking

whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *United States v. ISS Marine Servs.*, 905 F. Supp. 2d 121, 133-134 (D.D.C. 2012) (citations, quotation marks omitted). Here, "based on the nature of the documents at issue and the context in which they were created" it cannot "'fairly be said to have been prepared or obtained *because of* the prospect of litigation.'" *Shapiro*, 969 F. Supp. 2d at 34 (citing In re *Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)) (emphasis supplied).

Federal law permits third parties to lodge a complaint with the Commission, which OGC typically reviews before recommending "whether or not [the Commission] should find reason to believe that a respondent has committed or is about to commit a violation of statutes or regulations over which the Commission has jurisdiction." 11 C.F.R. § 111.7. If the Commission votes against finding reason to believe, the party bringing the complaint is permitted to seek review of that finding in federal court. 52 U.S.C. § 30109(a)(8)(A).

The FEC contends that because "Commission administrative enforcement matters may lead to litigation" any report concerning reason to believe must remain within the breast of the agency, regardless of context. S.J. Mot. at 12. But the D.C. Circuit "takes a functional approach to the analysis of documents for which the attorney work-product doctrine is asserted." *Shapiro*, 969 F. Supp. 2d at 31. "The mere contingency [of] litigation is not determinative…A more or less routine investigation of a possibly resistible claim is not sufficient to immunize [under work-product] an investigative report developed in the ordinary course of business." *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982). Office of General Counsel investigations into third-party complaints are business as usual, as the Commission's own Guidebook notes: "With regard to each matter assigned to an attorney in the Enforcement Division,

the General Counsel recommends to the Commission whether or not there is 'reason to believe' the respondent has committed or is about to commit a violation of the law. This report, called the First General Counsel's Report…" FEC, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS at 12 (May 2012). *See also* Kahn Decl. ¶ 12 ("The June 2011 report was prepared by attorneys in the Commission's Office of General Counsel in the ordinary course of their duties"). Moreover, the Commission's Office of General Counsel is a substantial organization divided into various groups. *See* Kahn Decl. ¶ 2 (Mr. Kahn is a member of the "Administrative Law Team" that handles FOIA requests). There is no indication that the FEC's litigation team handled the request at issue here.

Thus, the FEC's argument would convert much of the Commission's routine work into work product. This is particularly odd because had the first First General Counsel's Report been accepted by the Commission, the document would certainly have been publicly released. 74 Fed. Reg. 66132. But in order for work product protections to attach, "the lawyer has [to have a]…justifiable expectation that the mental impressions revealed by the materials will remain private." In re *San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1016 (1st Cir. 1988). In order for that to be true of the Report, the Office of General Counsel's attorneys must have anticipated that the Commission would reject their advice. But the FEC, unsurprisingly, does not make this claim. *See also* Mason Decl. ¶ 9.

Consider the regulatory scheme under which the Commission operates—including the 2009 Policy that First General Counsel's Reports will be placed on the public record, and the fact that any adopted report would inevitably be made public. Under this paradigm, any attorney submitting such a report for a full vote by the Commission would likely file the document with the same mental expectation with which she would file "an answer to a complaint…[which is] drawn

with the realization that [it] will be served to the other parties to the case" publicly. *San Juan*, 859 F.2d at 1016. "Since these incursions into the attorney's mental impressions are inevitable, any violation of the zone of privacy is marginal, and the sturdier prophylaxis given to opinion work is neither needed nor warranted."[3] *Id*. at 1017. If the prospect of public release was sufficiently obvious to defeat the deliberative process privilege, it certainly defeats work product, which also requires that a document be prepared because of the specific prospect of litigation.

III. FEC policy is unambiguous: First General Counsel's Reports will be made available.

Commission regulations plainly state that the FEC "shall make…available for public inspection" the "General Counsel's Reports" generated by OGC. 11 C.F.R. § 5.4(a)(4). For most of its existence, the FEC placed First General Counsel's Reports on the public record in accordance with this regulation. 74 Fed. Reg. 66132. The Commission briefly, from 2001-2003 and 2007-2009, did not follow this practice, in response to a D.C. district court opinion and internal agency concern following a case "in which the Commission adopted a recommendation offered…in a General Counsel's Report, but rejected one of several underlying rationales for the recommendation." *Id*.

The FEC asserts that 11 C.F.R. § 5.4(a)(4) is not binding upon the agency by virtue of *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003). S.J. Br. at 24, n. 10. But that case did not deal with the propriety of the Commission releasing General Counsel's Reports, a specific and final

[3] CCP reiterates that, given that the Report impacted the thoughts and reasoning of the Commissioners who rejected OGC's second First General Counsel's Report, it ought to be released. It was part of the controlling commissioners' rationale for rejecting the second First General Counsel's Report. *Democratic Congressional Campaign Comm. 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.")

document, but rather the release of *all investigatory materials in a case*. The documents in that case were not merely FEC generated documents, such as the Report. Rather, the internal workings of an organization under investigation were to be released to the general public, specifically, some 6,000 pages of files which could have included *inter alia* the organization's "political tactics and strategies." *AFL-CIO*, 333 F.3d at 172. Other documents included "the names of hundreds of volunteers, members, and employees." 333 F.3d at 176. Under an exacting scrutiny analysis, the D.C. Circuit properly concluded that "when combined with the Commission's broad subpoena practices, the automatic disclosure regulation encourages political opponents to file charges against their competitors to serve the dual purpose of 'chilling' the expressive efforts of their competitor and learning their political strategy…" *Id.* at 178 (citation and quotation marks omitted). In response to this broad infringement of freedom of association, the FEC argued that the disclosure was acceptable because it was "merely disclosing its own agency records to the public", a position the *AFL-CIO* Court found "quite remarkable." *Id.* (quotation marks and citation omitted).

The *AFL-CIO* case contains precisely two citations to General Counsel's Reports—documents that are *indisputably* agency records. One citation to the phrase "General Counsel's Report" is a rote recitation of 11 C.F.R. § 5.4(a)(4) and one citation is to the FEC General Counsel's Report in the *AFL-CIO* case itself. *Id*. at 171, 172. As Commissioner Mason has attested, the disclosure policy promulgated by the FEC *after AFL-CIO* would still have required the Commission to place the First General Counsel's Report on the public record. Mason Decl. ¶ 14.

Indeed, the Commission's present disclosure policy as to the disclosure of First General Counsel's Reports demonstrates that the *AFL-CIO* case did not render all disclosure of such reports suspect. The present policy permits the Commission to "reserve the right to redact *portions* of

[First General Counsel's Reports]…consistent with…the principles articulated by the court of appeals in *AFL-CIO*." 74 Fed. Reg. 66132, 66133 (emphasis supplied). CCP does not object to such redactions, which, pursuant to *AFL-CIO,* would be undertaken to preserve the privacy of donors, volunteers, and political strategy. CCP does object to the FEC's efforts to use FOIA Exemption 5 to protect itself from the very disclosure its own regulations and policies demand.

Perhaps recognizing the clear applicability of 11 C.F.R. § 5.4(a)(4), in 2009 "the Commission…resum[ed] the practice of placing all First General Counsel's Reports on the public record, whether or not the recommendations in these First General Counsel's Reports are adopted by the Commission." What's more, the FEC specifically determined that "[u]ntil such time as all previously undisclosed First General Counsel's Reports have been placed on the public record, the Commission intends to approve any FOIA request seeking a First General Counsel's Report." *Id.* at 66133.

The FEC's response to these clear statements is unpersuasive. It first argues that "the Commission's policy statements…do not discuss reports that…are withdrawn by the General Counsel's Office prior to any final Commission decision on whether to accept or reject the recommendations contained in the report." S.J. Mot. at 21. This is true as far as it goes. But the requested document was a First General Counsel's Report before it was "withdrawn" under unclear circumstances. There is no known procedure by which such a Report can be alchemized into something else after the fact. Mason Decl. ¶ 8. It is unsurprising that FEC policy makes no explicit allowance for a withdrawal that—to Plaintiff's knowledge and on the record before this Court—is unprecedented in the history of the Commission. That fact works *against* the FEC's claims.

The Commission further argues that "the Commission's general policy… is not a waiver of any privileges that apply to a particular document that was never disclosed." S.J. Mot. at 21.

This assertion is flawed for two reasons. First, the controlling commissioners in MUR 6396 explicitly attempted to release the document; they were stymied only when an evenly-divided Commission declined to overturn the Office of General Counsel's privilege determination. The passive voice in the Commission's brief masks that it was the General Counsel's Office itself that declined to release the requested document.

More importantly, even if the Commission's explicit regulations and policy do not bind it here, any privilege the Commission may have had *was* waived when "a final decisionmaker 'chose[] *expressly* to adopt or incorporate [it] by reference." "Exemption 5," FREEDOM OF INFORMATION ACT GUIDE. That is just what the controlling commissioners did in MUR 6396, as explained *supra* in the context of the Deliberative Process Privilege.

Finally, the Commission argues that a general policy "is not a binding obligation," especially where "a privileged agency document [is] not specifically addressed by the policy." S.J. Mot. at 21. This is not helpful. Even outside its regulations, the FEC has a "binding obligation" imposed by FOIA. It is *FOIA* that requires this document to be released unless it is privileged. Claiming that the report is "privileged" merely begs the question. Because OGC lawyers would be aware of the FEC's clear policies, which did not contemplate withdrawal of a First General Counsel's Report, they would have prepared this particular Report with an eye toward publication. Because no Report had ever been withdrawn and retroactively removed from public view, they could not have known it would cause such a stir until *after* they had written and distributed it. SUPPLEMENTAL STATEMENT at 2 ("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.") (citation omitted). The Supplemental Statement continued, "[t]he 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." SUPPLEMENTAL STATEMENT at 2 (citing 74 Fed. Reg. 66132).

Without any reasonable expectation of confidentiality at the time it was drafted and circulated, the Report is not privileged. The FEC has not put a single fact into the record to dispute this version of events.

IV. The FEC's evidence—limited to a single conclusory declaration—does not dispose of the genuine disputes of material facts in this case.

CCP has made a narrow request for a document which, under the Defendant's own regulations, is public. FEC, STATEMENT OF POLICY REGARDING DISCLOSURE OF CLOSED ENFORCEMENT AND RELATED Files, 68 Fed. Reg. 70426, 70427 (Dec. 18, 2003) ("With respect to enforcement matters, the Commission will place the following categories of documents on the public record…General Counsel's Reports that recommend dismissal, reason to believe, no reason to believe, no action at this time…"). The Defendant seeks to avoid this result, relying upon a "Statement of Material Facts as to Which there is no Genuine Dispute." Doc. 3-7 ("Statement of Facts"). But the declaration supporting this Statement is insufficient to make a serious case for summary judgment: it is incomplete, draws conclusions unsupported by factual assertions, makes conclusory and unclear statements, and in some areas arguably exceeds the personal knowledge of the declarant.

a. The FEC's characterization of the First General Counsel's Report does not render that document privileged.

The Commission's Statement of Facts attempts to sweep the First General Counsel's Report within the scope of the deliberative process and/or work-product privilege by characterizing it as containing "the theories, mental impressions, and advice of the Commission's

attorneys to their agency client."[4] Aside from their legal inapplicability, discussed *supra*, these assertions do not distinguish the Report here from those prepared in other cases—and thus, do not exempt it from the Commission's disclosure policy. Rather, "[t]he 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." SUPPLEMENTAL STATEMENT at 1-2 (Mar. 25, 2014). Such reports are subject to disclosure. 68 Fed. Reg. 70426, 70427. *See also, e.g.*, Mason Decl. ¶¶ 5 ("First General Counsel's Reports are not draft documents…[but are] a final document that has been submitted for review by the full Commission"); 9 ("Once circulated to the Commission, a First General Counsel's Report may be adopted by the Commission pursuant to a tally vote without further activity by the Office of the General Counsel. The FEC admits the First General Counsel's Report that forms the subject of this litigation was, in fact, so circulated") (citing Kahn Decl. ¶ 11); 12 ("the Office of General Counsel prepares and circulates a First General Counsel's Report in anticipation of its publication") (citing 11 C.F.R. § 5.4(a)(4)); 13 ("During my tenure, the Office of General Counsel never submitted a First General Counsel's Report with the intention that it would be rejected by the Commission"); 14-16 (describing the Commission's policy of making First General Counsel's Reports public under FOIA).

Thus, even assuming *arguendo* that the Commission's factual assertions are accurate, the application of the deliberative process privilege and attorney work-product privilege presuppose answers to disputed questions of material fact. In particular, CCP has introduced evidence

[4] Statement of Facts ¶ 3. *See also, e.g., Id.*at ¶ 2 (characterizing the report as "set[ting] forth the Office of General Counsel's legal analysis and recommendations to the Commission regarding the allegations against Crossroads," and "contain[ing] the Commission's attorneys' legal analysis of the allegations against Crossroads, appl[ying] the relevant law to those allegations, and set[ting] forth the Office of General Counsel's recommendations").

suggesting that FEC attorneys would have expected the requested document to be made public, and both drafted and circulated it with that expectation. The FEC does not rebut this assertion. Consequently, there is a dispute concerning this issue.

b. The FEC's characterization of the action taken (or not taken) upon the First General Counsel's Report presents a question of material fact.

It is unclear what action the Commission took regarding the First General Counsel's Report. The Defendant claims that "[t]he Commission never approved or rejected the June 2011 legal guidance; before the Commission completed action on the matter, the Office of General Counsel withdrew the document." S.J. Mot at 1.[5] The controlling group of commissioners, on the other hand, noted that "[t]he 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, 2007 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." SUPPLEMENTAL STATEMENT at 3.

The existence, type, timing, and result of any Commission vote on the Report is material for purposes of FOIA Exemption 5. But none of these factual elements is clear. There is also no indication of who attempted to "withdraw" the report, and under what policy and procedure. Indeed, once voted upon, there was a possibility—if the General Counsel's Office trusted its own judgment, a strong one—that the report would become immediately public as final agency action. *See, e.g.,* Mason Decl. ¶ 10 ("When the Commission takes a 'tally vote,' it may unanimously

[5] *See also* S.J. Mot. 6 ("The Commission never made any determination regarding its attorneys' recommendations in the June 2011 report, and it never adopted the proposed Factual and Legal analysis attached to that report.")

accept the circulated Report. Alternatively, at least four commissioners may vote to accept the Report, with neither of the remaining commissioners objecting to its adoption. In either case, the tally vote is the final vote adopting the First General Counsel's Report, and constitutes an official agency action").

Thus, the circumstances surrounding any vote on the Report is a question of material fact.

c. Elements of the Kahn Affidavit are beyond the scope of the declarant's personal knowledge.

CCP recognizes that "[a]n agency's affidavits or declarations are presumed to be submitted in good faith." *Clemente v. FBI*, No. 08-1252, 2014 U.S. Dist. LEXIS 114254 at *6-7 (D.D.C. Aug. 18, 2014) (citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). Nevertheless, Mr. Kahn's affidavit contains legal conclusions that cannot be accepted as facts because, as demonstrated *supra*, they are subject to genuine dispute. Moreover, it contains some assertions about which Mr. Kahn may lack personal knowledge.

For example, it seems unlikely that Mr. Kahn—whose duties involve the processing of routine FOIA requests, and not the preparation of the Report at issue here—is adequately situated to attest that the report "is subject to the privileges protected by Exemption 5, including the deliberative process privilege, attorney work-product privilege, and/or attorney-client privilege" from personal knowledge. Kahn Decl. ¶7 (citation omitted). Indeed, without being one of the attorneys who prepared that Report, how could he know, for example, whether it had been prepared with the anticipation that it would be made public? In a similar vein, because there is doubt about "any procedure for withdrawal of a Report that had been distributed to the Commission," and because "[s]uch an action would have been extraordinary and contrary to the Commission's usual practices," the effect of such withdrawal would at best be a novel question. Mason Decl. ¶ 8. As

he has not averred with specificity as to the facts surrounding the Report's withdrawal, it is unlikely that Mr. Kahn would have personal knowledge of the legal effect of that unique event.

Finally, the Kahn Declaration is rife with legal conclusions, which in and of itself demonstrates that there *are*, in fact, genuine questions of fact at issue here. *See* CCP Op. to FEC's Stmt. Mat. Facts. For example, the Kahn Declaration asserts that "[t]he June 2011 report is privileged and was thus withheld from disclosure to CCP under FOIA Exemption 5." Kahn Decl. ¶ 20. *See also Id.* at ¶ 23 ("the entire June 2011 report is exempt from disclosure under FOIA Exemption 5, and protected by the work-product and deliberative process privileges.") This is at best a novel question of law and Commission procedure, and at worst begs the question in this litigation.

Conclusion

For the foregoing reasons, the Commission's Motion for Summary Judgment should be denied.

Respectfully submitted this 11th day of September, 2014.

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