FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF CHAIRMAN ALLEN DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III REGARDING FREEDOM OF INFORMATION ACT LITIGATION

The Federal Election Commission is currently defending three lawsuits under the Freedom of Information Act ("FOIA"): *45Committee, Inc. v. FEC*,[1] *National Rifle Association v. FEC*,[2] and *Josh Hawley for Senate v. FEC*.[3] In all three suits, the Commission is seeking to withhold from the plaintiffs information about how the Commission adjudicated administrative complaints in which they are the respondents. In other words, the plaintiffs want to know what happened in *their own cases*, but the Commission will not tell them. Instead, over commissioner objections, the FEC denied plaintiffs' requests for relevant records of the Commission's votes on those complaints and for any statements of reasons filed by commissioners explaining their votes.

The Commission's arguments for refusing to release the full records are wrong and do not reflect the views of a majority of the commissioners. Because the vote certifications and statements of reasons for these complaints are neither predecisional nor deliberative, and because there is no foreseeable harm that could result from their release to these parties, FOIA requires the Commission to produce them. The plaintiffs in these actions—and similarly situated plaintiffs in the future—deserve to prevail under the law.

I. These Vote Certifications and Statements of Reasons Are Neither Predecisional nor Deliberative

The plaintiffs in these lawsuits seek two categories of records under FOIA. The first is vote certifications, which are records of past Commission votes on the merits of administrative complaints against the plaintiffs. A vote certification might indicate, for example, that on a certain date commissioners voted on a motion to find reason to believe that a respondent to an administrative complaint violated a particular provision of the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), and whether that motion was agreed to by the statutorily required four votes.[4] A vote certification might also reflect a vote to find no reason to believe that a FECA violation occurred,[5] or a vote to dismiss allegations of a FECA violation as a matter of prosecutorial discretion.[6]

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1 *45Committee, Inc. v. FEC*, 22-cv-502 (ABJ) (D.D.C. Feb. 25, 2022).

2 *Nat'l Rifle Ass'n of Am. Political Victory Fund v. FEC*, 22-cv-1017 (EGS) (D.D.C. Apr. 12, 2022).

3 *Josh Hawley for Senate v. FEC*, 22-cv-1275 (EGS) (D.D.C. May 10, 2022).

4 52 U.S.C. § 30109(a)(2).

5 *See, e.g.*, Fed. Election Comm'n, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (describing a finding of "no reason to believe" as one of several substantive votes that the Commission may take).

6 *See, e.g., Heckler v. Chaney*, 470 U.S. 821 (1985).

The second category of documents that plaintiffs requested under FOIA are any statements of reasons that commissioners may have filed explaining their votes on the underlying administrative complaints against the plaintiffs. The U.S. Court of Appeals for the D.C. Circuit has instructed the Commission in no uncertain terms that these statements are necessary to enable meaningful judicial review when the Commission declines to adopt the Office of General Counsel's recommendation to proceed with enforcement and adopts no other document to explain its decision.[7] Consequently, statements of reasons weigh heavily on federal courts' judgments of Commission actions, and they have significant legal consequences for respondents.[8] This requirement to issue statements of reasons is not a feature of Commission design; rather, it is a response to explicit instruction from the federal courts to the Commission, which ensures the courts' ability to review the Commission's exercise of its authority under FECA.[9]

The Commission has withheld the relevant contents of responsive vote certifications and statements of reasons from the plaintiffs under FOIA Exemption 5, which covers "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency."[10] "Exemption 5 incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant," including attorney-client privilege, attorney work-product privilege, and—relevant here—deliberative-process privilege.[11] The deliberative-process privilege protects "predecisional" intra- or inter-agency documents to encourage a free and open "administrative reasoning process."[12] As the Supreme Court has explained, the "deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government."[13]

Courts have established two requirements to invoke the deliberative-process privilege.[14] First, the communication must be predecisional, that is, "antecedent to the adoption of an agency

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7 *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (citation omitted).

8 *See*, *e.g.*, *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018).

9 *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) ("*DCCC*"). This 35-year-old precedent remains good law. *See, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) ("A statement of reasons … is necessary to allow meaningful judicial review of the Commission's decision not to proceed") (discussing *DCCC*); *see also id.* at 451 (R.B. Ginsburg, J., dissenting in part and concurring in part) ("I concur in part III of the court's opinion holding the *DCCC* rule applicable, prospectively, to all Commission dismissal orders based on tie votes when the dismissal is contrary to the recommendation of the FEC General Counsel."); *Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 355 (D.C. Cir. 2020); *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 993 F.3d 880, 894 (D.C. Cir. 2021) ("[T]he Commission must provide a statement of reasons explaining dismissal of a complaint.").

10 5 U.S.C. § 552(b)(5).

11 *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006).

12 *U.S. v. Exxon Corp.*, 87 F.R.D. 624, 636 (D.D.C. 1980) (citation omitted).

13 *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (citations and quotation marks omitted).

14 *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

policy."[15] Second, the communication must be deliberative—specifically, "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[16] Communications qualify as predecisional and deliberative if they "reflect[ ] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."[17]

The vote certifications and statements of reasons plaintiffs seek in these cases are neither predecisional nor deliberative. The vote certifications merely record Commission decisions that the controlling commissioners have explained, pursuant to 35-year-old D.C. Circuit law, in statements of reasons.[18] As such, both the certifications and statements reflect final agency action, and they certainly do not threaten the ability of commissioners or their staff to "communicate candidly among themselves" by rendering "each remark [ ] a potential item of discovery and frontpage news."[19] Once the controlling commissioners have signed and issued a statement of reasons, there is no "open and frank discussion among those who make [decisions] within the Government" left to protect.[20]

By their very nature, statements of reasons signed and filed by commissioners are not predecisional. Some might argue, however, that vote certifications could present a closer call. Whatever the merits of that argument, at present, a court need not decide whether all vote certifications are subject to disclosure under FOIA. For purposes of these cases, it is sufficient to say that a vote certification resulting in a statement of reasons explaining a controlling-commissioner vote *is* subject to such disclosure. Indeed, where three or more commissioners have concluded that an enforcement action should end and have indicated that there is no further reason to deliberate on a matter, vote certifications lose any feature of being predecisional, and the Commission has, for all relevant purposes, disposed of the matter.

The theoretical possibility that commissioners might change their votes on an issue at some hypothetical future date, after having already adjudicated the merits of a complaint, cannot make a matter predecisional. In our experience, nothing resembling reconsideration has ever taken place in any matter that our colleagues have refused to make public. And more importantly, it is the fact that the Commission has passed judgment on the entirety of a matter's merits that distinguishes such a case from, for example, a matter that the Commission is considering piecemeal over the course of several executive sessions without voting on all issues presented, which is more colorably predecisional. It undermines principles of fundamental fairness and due process to hold a matter open in the hope that a future slate of commissioners will re-vote and reach a different result. And, of course, it also prejudices both complainants and respondents, who are entitled to learn when the Commission has voted on matters in which they are involved.

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15 *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (cleaned up).

16 *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975).

17 *Taxation With Representation Fund v. Internal Rev. Serv.*, 646 F.2d 666, 677 (D.C. Cir. 1981).

18 Moreover, while FOIA requires "final opinions" to be made public, 5 U.S.C. § 552(a)(2), the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, provides that courts can only review "final agency action," *i.e.*, action which determines rights and obligations or from which legal consequences flow. *See Bennett v. Spear,* 520 U.S. 154, 177–78 (1997). Though the FOIA and APA analyses are distinct, because Commission votes on administrative complaints affect the rights and obligations of the respondents, the certifications reflect final agency opinions under FOIA.

19 *Klamath Water Users Protective Ass'n*, 532 U.S. at 8–9 (citations and quotation marks omitted).

20 *Id.*

Indeed, each of these pending FOIA suits involves a situation where the Commission has been sued under 52 U.S.C. § 30109(a)(8)(C), been adjudged in default, and failed to comply with court orders. In such situations, where complainants are thereby granted a private right of action against the respondents, the Commission must truly be said to be finished with the underlying complaint. It is disingenuous for commissioners to, first, block the Commission from releasing its decisions and force it to default in federal court, and then, to turn around and claim that, having defaulted, the Commission cannot release documents relating to the case on the theory that the Commission is still deliberating. There is simply no credible argument that the Commission's prior votes and other actions with respect to that underlying complaint are still predecisional or deliberative when the Commission has abandoned any further consideration of its merits.

II. Releasing the Certifications and Statements of Reasons Poses No Foreseeable Harm

Even if these vote certifications and statements of reasons were covered in their entirety by the deliberative-process privilege, they nonetheless must be provided to requestors under FOIA because there is no foreseeable harm from their release. The 2016 FOIA amendments provide that agencies should withhold records only where necessary to avoid foreseeable harm to the interests protected by an exemption.[21] Having grown concerned that agencies were overusing FOIA exceptions, Congress deliberately made a "presumption of openness … a permanent requirement for agencies, with respect to FOIA."[22]

Accordingly, the 2016 amendments specified that "[a]n agency shall withhold information … only if … the agency reasonably foresees that disclosure would harm an interest protected by an exemption."[23] "In sum, FOIA now requires that an agency release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law."[24] The courts have recently described the foreseeable-harm requirement as "independent and meaningful," and have observed that "an agency must identify specific harms to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the withheld materials and connect the harms in a meaningful way to the information withheld."[25] "Generic" and "nebulous articulations of harm are insufficient."[26]

Earlier this year, the Attorney General issued updated guidance underscoring the importance of the foreseeable-harm requirement.[27] The new guidelines open with a discussion of the 2016 FOIA

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21 5 U.S.C. § 552(a)(8)(A)(i).

22 H.R. Rep. 114-391, at 9; *see also* S. Rep. 114-4, at 7 (explaining that the FOIA Improvement Act adopts "the policy established for releasing Government information under FOIA by President Obama when he took office in January 2009 and confirmed by Attorney General Holder in a March 19, 2009, Memorandum to all Executive Departments and Agencies").

23 5 U.S.C. § 552(a)(8)(A).

24 *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 105–06 (D.D.C. 2019) (citation omitted) (cleaned up).

25 *Id*. at 106 (citations omitted) (cleaned up).

26 *Rosenberg v. U.S. Dep't of Def.*, 442 F. Supp. 3d 240, 259 (D.D.C. 2020) (quoting *Judicial Watch v. U.S. Dep't of Justice*, No. CV 17-0832 (CKK), 2019 WL 4644029, at *5 (D.D.C. Sept. 24, 2019).

27 Office of the Attorney Gen., Memorandum for Heads of Executive Departments and Agencies re: FOIA

amendment providing that federal agencies may withhold responsive records only if the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions. The Attorney General emphasized that "[i]nformation that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail. Moreover, agencies are strongly encouraged to make discretionary disclosures of information where appropriate."[28]

The Commission has no argument that the release of these vote certifications' content and statements of reasons poses a specific, foreseeable harm to the agency or its operation. Any risk posed by the release of the Commission's vote certifications—indicating the Commission's prior, final action when voting on matters in executive session, and statements of reasons explaining that action—is, at best, purely theoretical and certainly not enough to satisfy the foreseeable-harm standard.[29]

Finally—at least in the three pending FOIA cases that we discuss here—the plaintiffs have all affirmatively waived their confidentiality rights under FECA. For that reason, too, the plaintiffs deserve to fully prevail in these suits.

III. Conclusion

It is regrettable that these plaintiffs' attempts to learn the outcomes of their own cases have been blocked at every turn. Nevertheless, our colleagues' effort to prevent the agency from issuing its enforcement decisions, explaining those decisions to the courts, or disclosing its actions must yield to law. Because the documents at issue are neither predecisional nor deliberative, and because no harm is likely to result from their release, 45Committee, the National Rifle Association, and Josh Hawley for Senate deserve to win these lawsuits.

Guidelines (Mar. 15, 2022), https://www.justice.gov/ag/page/file/1483516/download.

[28] *Id*. at 1.

[29] *See Reporters Comm. for Freedom of the Press v. Fed. Bureau of Invest.*, 3 F.4th 350, 369–70 (D.C. Cir. 2021) ("In the context of withholdings made under the deliberative process privilege, the foreseeability requirement means that agencies must concretely explain how disclosure 'would'—not 'could'—adversely impair internal deliberations.") (citation omitted).