

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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CITIZENS FOR RESPONSIBILITY AND)		
ETHICS IN WASHINGTON,)		
)		
Plaintiff,)		
)		
v.)	Civil Action No. 11-951 (CKK)	
)		
FEDERAL ELECTION COMMISSION,)	MOTION	
)		
Defendant.)		
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**DEFENDANT FEDERAL ELECTION COMMISSION’S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Federal Election Commission (“Commission”) respectfully moves this Court for an order dismissing the Complaint for failure to state a claim upon which relief can be granted. In the alternative, the Commission moves for summary judgment against Plaintiff under Rule 56. A Memorandum in Support of the Commission’s Motion is submitted as required by LCvR 7. A Statement of Material Facts as to Which There is No Genuine Dispute is also submitted in support of the Commission’s alternative motion for summary judgment, as required by LCvR 7.

Respectfully submitted,

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June 23, 2011

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CITIZENS FOR RESPONSIBILITY AND)	
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**FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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**FEDERAL ELECTION COMMISSION’S MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) has received all the materials to which it is entitled under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Its pending claim is thus moot and the Court should grant summary judgment for the Commission. Even if CREW’s claim were not moot, its complaint should be dismissed because CREW has failed to exhaust its administrative remedies. Once a government agency replies to a FOIA request and indicates that it is in the process of responding, the requester must actually exhaust available administrative remedies, allowing the agency to exercise its discretion and preventing premature interference with agency processes. CREW submitted its FOIA request to the Commission on March 7, 2011. Over the next three weeks, the Commission and CREW communicated extensively, beginning two days after CREW submitted its request. The Commission acknowledged receipt of the request, negotiated an agreement to narrow the search for responsive documents, and assured CREW that it would provide documents on a rolling

basis. Because the Commission indicated it was responding to CREW's request and CREW failed to exhaust its administrative remedies before bringing suit, CREW's complaint should be dismissed for failing to state a claim.

I. BACKGROUND

A. The Federal Election Commission

The FEC is the agency of the United States government vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 431-457, and other federal campaign finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," 2 U.S.C. §§ 437d(a)(8), 438(a)(8); to issue advisory opinions concerning the application of FECA or the Commission's regulations to proposed transactions or activities, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. § 437g. The Commission is composed of six commissioners appointed by the President with the advice and consent of the Senate. 2 U.S.C. § 437c(a). No more than three members of the Commission may be affiliated with the same political party. *Id.*

B. CREW's Request

On March 7, 2011, CREW submitted a request to the Commission under the Freedom of Information Act, 5 U.S.C. § 552, seeking various categories of records related to communications between three Commission members and individuals and entities outside the Commission. Compl. ¶ 1. CREW describes itself as a nonprofit corporation "committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials." *Id.* ¶ 4. In its request, CREW sought:

- Correspondence related to any business between Commissioners Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn and any individual or entity outside the Commission from the date each Commissioner took office;
- All calendars, agendas, or other records of the schedules of these three Commissioners;
- All written ex parte communications delivered to any agency ethics official by any of these Commissioners, or by anyone acting on their behalf pursuant to Commission regulations 11 C.F.R. §§ 7.15(c), 201.3(c), and 201.4(a); and
- All statements setting forth the substance and circumstances of any oral ex parte communication prepared by any of these Commissioners or someone acting on their behalf and delivered to an agency ethics official pursuant to Commission regulations, 11 C.F.R. §§ 7.15(d), 201.3(c), and 201.4(a).

C. The Commission's Response

The day after receiving CREW's request, the Commission emailed CREW to acknowledge receipt of the request and to inform CREW that its application for a fee waiver had been granted. Compl. ¶ 17. As CREW notes in its complaint, in "subsequent conversations and communications" with FEC Assistant General Counsel Nicole St. Louis Matthis, CREW agreed to exclude certain categories of documents from the Commission's initial search for responsive records. *Id.* ¶¶ 18-19. This agreement was reached through five conversations between Ms. St. Louis Matthis and CREW, the first of which took place on March 9, two days after CREW submitted its FOIA request.¹ St. Louis Matthis Decl. ¶¶ 2-6. In that March 9 conversation, Ms.

¹ By March 29, 2011, CREW indicated by letter that it had agreed to exclude from its request: (1) correspondence sent by one of the named commissioners in a federal campaign-related matter or rulemaking proceeding solely in his or her authorized capacity as Commission Chair or Vice Chair, (2) correspondence docketed in a federal campaign related matter or rulemaking proceeding and received by one of the named commissioners solely as a carbon copy, and (3) correspondence forwarding official reports to other government agencies or Congress and signed by one of the named commissioners solely in his or her authorized capacity as Chair or Vice Chair, such as agency privacy reports or budget justifications. Compl. ¶ 18. CREW subsequently further clarified that it was excluding from the request correspondence docketed in a federal campaign-related matter or rulemaking proceeding and received by all the commissioners. *Id.* ¶ 19.

Matthis informed CREW that the Commission would provide responsive materials on a rolling basis. *Id.* ¶ 2. In two additional conversations on March 14 and March 18, 2011, Ms. Matthis continued to discuss which categories of documents CREW would allow the Commission to exclude from its initial search. In these two additional conversations she reiterated that the Commission would provide documents on a rolling basis. *Id.* ¶ 3.

On May 4, 2011, Commission attorney Katie Higginbothom became the point of contact for CREW's request because Ms. St. Louis Matthis was preparing to leave her position with the Commission in early June. Higginbothom Decl. ¶ 2. Ms. Higginbothom called CREW that day and informed them that the Commission was still in the process of searching for responsive documents. *Id.* ¶ 3. She also informed CREW that the Commission had located thousands of potentially responsive documents that the Commission was in the process of reviewing. *Id.* She further indicated her hope that the review would allow for provision of the first batch of documents within a matter of weeks. *Id.* On May 23, 2011, CREW filed its complaint in this matter. On June 15, 2011, the Commission provided CREW with 386 pages of responsive materials. *Id.* ¶ 6. On June 21, 2011, the Commission sent to CREW a second batch of responsive documents consisting of 354 pages of materials in electronic form. *Id.* ¶ 7. And on June 23, 2011, the Commission sent CREW a third and final batch of responsive documents consisting of 95 pages of materials in electronic form. *Id.* ¶ 8.

II. CREW'S COMPLAINT SHOULD BE DISMISSED

A. Standard of Review

Dismissal of a complaint is appropriate where, accepting the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 558 (2007) (holding dismissal appropriate “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief”); *Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251, 253 (D.C. Cir. 2008) (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). In deciding a motion to dismiss, the court may consider the complaint and documents referenced in the complaint. See *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002) (noting that court may consider on motion to dismiss documents “incorporated by reference in the complaint”).

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The court must view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Defenders of Wildlife v. Dep’t of Agric.*, 311 F. Supp. 2d 44, 53 (D.D.C. 2004) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-159 (1970)). “To determine which facts are ‘material,’ a court must look to the substantive law on which each claim rests.” *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “A ‘genuine issue’ is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action.” *Id.* (citing *Celotex*, 477 U.S. at 322, and *Anderson*, 477 U.S. at 248).

B. CREW's Claim is Moot

Because CREW has received all the documents to which it is entitled under FOIA, its claim is now moot and must be dismissed. A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979). In FOIA cases generally, "Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made." *Crooker v. U.S. State Dep't*, 628 F.2d 9, 10 (D.C. Cir. 1980). On June 23, 2011, the Commission delivered by courier to CREW the last batch of nonexempt materials it sought. See Higginbothom Decl. ¶ 9.² Having done so, CREW's claims no longer present a live controversy and are moot. See *Drake v. FAA*, 291 F.3d 59, 62 (D.C. Cir. 2002) (holding that FOIA requests are moot once requester "received all the documents to which he is entitled"); *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) (explaining that once the disclosure which the suit seeks has been made the controversy is rendered moot).

C. CREW Failed to Exhaust Administrative Remedies

Even if CREW had not already received all the documents to which is entitled under FOIA, CREW's complaint would merit dismissal because CREW did not exhaust administrative remedies before bringing suit. Potential litigants must generally exhaust administrative remedies before filing suit in federal court in order to give an agency "an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (quoting *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990)). Exhaustion "allows the top managers of an agency to

² The Commission treated correspondence of the type that CREW agreed to exclude from the Commission's initial search as unresponsive to CREW's request. See Higginbothom Decl. Exh. 2.

correct mistakes made at lower levels and thereby obviates unnecessary judicial review.”

Oglesby, 920 F.2d at 61 (D.C. Cir. 1990). “[I]t would be both contrary to ‘orderly procedure and good administration’ and unfair ‘to those who are engaged in the tasks of administration’ to decide an issue which the [agency] never had a fair opportunity to resolve prior to being ushered into litigation.” *Dettmann v. U.S. Dep’t of Justice*, 802 F.2d 1472, 1476 n.8 (D.C. Cir. 1986) (quoting *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952)). In short, the exhaustion requirement “prevent[s] premature interference with agency processes.” *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

“It goes without saying that exhaustion of [administrative] remedies is required in FOIA cases.” *Dettmann*, 802 F.2d at 1476. In such cases, requesters may not bring suit until they have actually or constructively exhausted their administrative remedies. Regarding the former, FOIA section § 552(a)(6)(A) sets forth the time limits that apply to requests and provides for an administrative appeal process of agency denials at the conclusion of which a requester can file suit. This provision specifies that upon receiving a request, an agency must determine within twenty days whether to comply with the request, at which time the agency shall inform the requester “of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A)(i). If appeal is taken, section § 552 gives agencies twenty days to render a decision. *Id.* at § 552(a)(6)(A)(ii). If the agency decides to entirely or even partly uphold its denial, the agency must notify the requester of FOIA’s provision for judicial review, *id.*, which vests the district courts with jurisdiction to order the production of records improperly withheld, 5 U.S.C.

§ 552(a)(4)(B). Nowhere has CREW alleged that it actually administratively appealed anything to the Commission.³

FOIA also provides that a requester can constructively exhaust administrative remedies. FOIA section 552(a)(6)(C) specifies that a requester “shall be deemed to have exhausted his administrative remedies” if the agency fails to comply with the time limits in section 552(a)(6)(A), including the requirement that an agency inform a requester within twenty days whether it will comply with the request and of his appeal rights. Thus, a requester can bring suit if an agency has failed to “respond” within the time limits in section 552(a)(6)(A). *Oglesby*, 920 F.2d at 62 (“If the agency has not responded within the statutory time limits, then, under 5 U.S.C. 552(a)(6)(C), the requester may bring suit.”). “But once the agency responds to the FOIA request, the requester must exhaust his administrative remedies before seeking judicial review.”⁴ *Id.* at 64.

To trigger the requirement that a requester actually exhaust administrative remedies before bringing suit, the government merely needs to indicate that it is in the process of responding to the request — action that the Commission clearly took in this matter. *See Petit-Frere v. U. S. Attorney’s Office for S.D. of Fla.*, 664 F. Supp. 2d 69, 71 (D.D.C. 2009) (quoting *Oglesby*, 920 F.2d at 61); *supra* p. 3-4. And this is true whether or not the agency’s response qualifies as a final decision capable of appeal. In *Petit-Frere*, the plaintiff submitted a FOIA

³ Commission regulations set forth the procedures by which a requester can administratively appeal a denial of a FOIA request or the failure of the Commission to respond to a request within ten working days of receiving it. 11 C.F.R. § 4.8.

⁴ A FOIA requester cannot constructively exhaust administrative remedies so long as the agency responds before the requester files suit, even if the agency responds after the statutory time limit has passed. *Oglesby*, 920 F.2d at 63-64 (“[A]n administrative appeal is mandatory if the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed.”). Because the Commission responded to CREW’s request *before* twenty days had elapsed, however, the Court need not rely on this rule regarding belated pre-suit agency responses.

request to a component office of the Department of Justice in June 2008. Before the plaintiff filed suit, the government notified the requester by letter dated August 28, 2008, “that it would assign the request to one of two tracks, depending on the size of the request, and process the request in the order it was received within the track.” 664 F. Supp. 2d at 70. The government also informed plaintiff that it would take approximately nine months to process his request. *Id.* After ten months had passed and the government had not updated plaintiff on the progress of his request, or otherwise responded to his inquiries, plaintiff filed an administrative appeal. In response, the government informed the plaintiff by letter that it could not consider his appeal because no adverse determination had yet been made. *Id.* Plaintiff filed suit in August 2009 claiming that he had constructively exhausted administrative remedies. *Id.*

The court rejected this claim, holding that the government’s August 2008 letter was a sufficient response to preclude constructive exhaustion. The court explained that “all that is required in this circuit within the time period is ‘a reply from the agency indicating that it is responding to [the] request.’” *Id.* at 71 (quoting *Oglesby*, 920 F.2d at 61). “Because [the government] responded before plaintiff submitted this complaint for filing . . . constructive exhaustion does not apply and the plaintiff is required to exhaust his administrative remedies before he can exercise his right to have this court entertain this suit.” *Id.*

Here, too, the Commission responded before plaintiff filed its complaint, and CREW did not constructively exhaust its administrative remedies. Indeed, within three weeks of CREW’s FOIA request, Commission staff had acknowledged the request, negotiated an agreement to narrow the search for responsive documents, and indicated that responsive documents would be provided on a rolling basis. *See supra* pp. 2-3. Thus, compared with the government’s response to the FOIA request at issue in *Petit-Frere*, the Commission’s response to CREW’s request was

even more sufficient to require CREW to actually exhaust administrative remedies. In *Petit-Frere*, the government merely informed the requester that the request had been assigned to one of two processing tracks and that it would be processed in the order it was received — with no actual document production within ten months. *Id.* at 70. The Commission, in contrast, had spoken on the phone with CREW at least six times before CREW filed suit. In those “conversations and communications,” Compl. ¶ 18, the Commission clearly indicated that it was in the process of responding to CREW’s request. In those pre-suit conversations, the Commission had obtained CREW’s agreement to exclude certain categories of documents from the Commission initial search for responsive records,⁵ had informed CREW that the Commission had located thousands of potentially responsive documents that it was in the process of reviewing, and had informed CREW that it would produce documents on a rolling basis — a production that began only weeks later and that is now complete. *See supra* p. 4.⁶ Given both their frequency and substance, the multiple communications from the Commission more than adequately constitute “a reply from the agency indicating that it is responding to [the] request.” *Petit-Frere*, 664 F. Supp. 2d at 71 (quoting *Oglesbly*, 920 F.2d at 61).

Indeed, judicial review at this juncture would be unnecessary and would defeat the cardinal purpose of exhaustion: to avoid premature interference with agency processes. *See, e.g., Weinberger*, 422 U.S. at 765. Those processes were not only ongoing when CREW filed

⁵ CREW’s original request was extremely broad and would have covered a wide range of documents transmitted to or from individual Commissioners such as carbon copies of rulemaking comments and official reports transmitted by the Chair or Vice Chair of the Commission to Congress or the Office of Management and Budget. *See supra* p.3 n.1.

⁶ The “conversations and communications” with the Commission that CREW alleges, Compl. ¶¶ 17-19, as well as the documents referenced in the complaint, St. Louis Matthis Decl. Exhs. 1-2, are sufficient to show that the Commission adequately responded to the request and that CREW’s Complaint therefore merits dismissal. Alternatively, the Court may rely on the other facts presented in the attached declarations and grant the Commission summary judgment.

suit — indeed they are now complete — but commenced almost immediately upon receipt of CREW’s FOIA request. Within two days of receiving it, the Commission contacted CREW about its request. And as of this filing — within four months of receiving the request — the Commission has already completed its response by providing CREW with 835 pages of documents. *See supra* p. 4. CREW does not, and cannot, allege that Commission staff ever indicated that the Commission would not respond to plaintiff’s FOIA request. To the contrary, when CREW filed suit, it knew that the Commission was searching for responsive documents.

In sum, because no component of the Commission had rendered any decision against CREW that top managers at the Commission could reconsider, *see Oglesby*, 920 F.2d at 61, judicial review would be inappropriate. The Court should not “decide an issue which [the Commission] never had a fair opportunity to resolve prior to being ushered into litigation.” *Dettmann*, 802 F.2d at 1476 n.8.

III. CONCLUSION

For all the foregoing reasons, the Commission respectfully asks this Court to dismiss CREW’s Complaint, or in the alternative, grant summary judgment in favor of the Commission.

Respectfully submitted,

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**DEFENDANT FEDERAL ELECTION COMMISSION’S STATEMENT
OF MATERIAL FACTS AS TO WHICH THERE IS
NO GENUINE DISPUTE**

The defendant Federal Election Commission (“FEC” or “Commission”) submits the following Statement of Material Facts as to Which There is No Genuine Dispute.

1. The defendant Federal Election Commission is the independent agency of the federal government with exclusive jurisdiction to administer, interpret and civilly enforce the Federal Election Campaign Act of 1971, as amended (“FECA”). *See* 2 U.S.C. §§ 437c(b)(1); 437d(a), (e); and 437g. The Commission is broadly empowered to investigate possible violations of the FECA and other federal statutes within the Commission’s jurisdiction, 2 U.S.C. § 437g(a)(1), and has exclusive jurisdiction to initiate civil actions in the United States district Courts to obtain enforcement of these statutes, 2 U.S.C. §§ 437c(b)(1); 437d(a)(6); 437d(e).

2. On March 7, 2011, Citizens for Responsibility and Ethics in Washington (“CREW”) submitted a request to the Commission under the Freedom of Information Act, 5 U.S.C. § 552, seeking various categories of records related to communications between three

Commission members and individuals and entities outside the Commission. Compl. ¶ 1; Higginbothom Decl. Exh. 1.

3. In its request, CREW sought:

- Correspondence related to any business between Commissioners Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn and any individual or entity outside the Commission from the date each Commissioner took office;
- All calendars, agendas, or other records of the schedules of these three Commissioners;
- All written ex parte communications delivered to any agency ethics official by any of these Commissioners, or by anyone acting on their behalf pursuant to Commission regulations 11 C.F.R. §§ 7.15(c), 201.3(c), and 201.4(a); and
- All statements setting forth the substance and circumstances of any oral ex parte communication prepared by any of these Commissioners or someone acting on their behalf and delivered to an agency ethics official pursuant to Commission regulations, 11 C.F.R. §§ 7.15(d), 201.3(c), and 201.4(a). Compl. ¶¶ 13-14; Higginbothom Decl. Exh. 1.

4. The day after receiving CREW's request, the Commission emailed CREW to acknowledge receipt of the request and to inform CREW that its application for a fee waiver had been granted. Compl. ¶ 17.

5. In "subsequent conversations and communications" with FEC Assistant General Counsel Nicole St. Louis Matthis, CREW agreed to exclude certain categories of documents from the Commission's initial search for responsive records. *Id.* ¶¶ 18-19; St. Louis Matthis Decl. ¶¶ 2-6.

6. This agreement was reached through five conversations between Ms. St. Louis Matthis and CREW, the first of which took place on March 9, two days after CREW submitted its FOIA request. St. Louis Matthis Decl. ¶¶ 2-6.

7. In this March 9 conversation, Ms. Matthis informed CREW that the Commission would provide responsive materials on a rolling basis. *Id.* ¶ 2.

8. In two additional conversations on March 14 and March 18, 2011, Ms. Matthis continued to discuss which categories of documents CREW would allow the Commission to

exclude from its initial search. In these two additional conversations she reiterated that the Commission would provide documents on a rolling basis. *Id.* ¶ 3.

9. On May 4, 2011, Commission attorney Katie Higginbothom became the point of contact for CREW's request because Ms. St. Louis Matthis was preparing to leave her position with the Commission by early June 2011. St. Louis Matthis Decl. ¶ 8; Higginbothom Decl. ¶ 2.

10. Ms. Higginbothom called CREW that day, May 4, 2011, and informed them that the Commission was still in the process of searching for responsive documents. Higginbothom Decl. ¶ 3. She also informed CREW that the Commission had located thousands of potentially responsive documents that the Commission was in the process of reviewing. *Id.* She further indicated her hope that the review would allow for provision of the first batch of documents within a matter of weeks. *Id.*

11. On May 23, 2011, CREW filed its complaint in this matter. Compl.

12. On June 15, 2011, the Commission provided CREW with 386 pages of responsive documents. *Id.* at ¶ 6.

13. On June 21, 2011, the Commission provided CREW with 354 pages of responsive documents. *Id.* at ¶ 7.

14. On June 23, 2011, the Commission provided CREW with 95 pages of responsive documents. These documents constituted the remaining agency records responsive to CREW's request. *Id.* at ¶ 8.

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