



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 28, 1994

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-32

Ms. Kellie Gasink
3150 Rochambeau Ave.
#41D
Bronx, NY 10467

Dear Ms. Gasink:

This refers to your letter of September 8, 1994, which requests an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to proposed communications you wish to have with a newspaper reporter.

You state that you have in your possession a copy of a letter, dated June 10, 1993, which you wrote to the Manhattan District Attorney. This letter contains allegations you made against a past Presidential campaign with which you worked as a volunteer. You state that the letter was made public and its contents were the subject of a New York City press story. Subsequent to this, you filed a complaint with the Federal Election Commission ("the Commission") repeating the allegations made in the June 1993 letter. You state that this letter formed part of the complaint.

You now wish to tell a newspaper reporter that you have filed a complaint with the Commission. Further, you want to discuss with the reporter matters relating to the substance of the June 1993 letter and the complaint. These matters include issues such as your volunteer work for the campaign and your complaint's allegations of fraud by the campaign. You ask whether you can take these actions without violating the Federal election laws that, in your words, "prohibit the public disclosure of an investigation conducted by the Commission."

The Act provides that it is unlawful for any person to make public any notification or investigation made under 2 U.S.C. 437g(a), without the written consent of the person receiving such notification or of the person with respect to whom such investigation is made. 2 U.S.C. 437g(a)(12)(A).

Pursuant to this provision, the Commission promulgated 11 CFR 111.21 which provides:

... no complaint filed with the Commission, nor any notification sent by the Commission, nor any investigation conducted by the Commission, nor any findings made by the Commission shall be made public by the Commission or by any person or entity without the written consent of the respondent with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.

While the application of the cited confidentiality rules has not been addressed in previous advisory opinions, prior enforcement cases have examined and interpreted the confidentiality provisions. See, for example, Matters Under Review ("MUR") 3573, 3170, 3169, 3168, 1244 and 298. These cases have interpreted 2 U.S.C. 437g(a)(12)(A) and 11 CFR 111.21 as not applicable to situations involving the complainant's conduct leading to the publication or discussion of information or allegations contained in a complaint.^{1/} Whether the disclosure took place before or after the filing of the complaint was not seen as relevant. In these situations, the Commission found no reason to believe that a violation of the Act or Commission regulations had been committed by the complainant.

The first enforcement case dealing with section 111.21, MUR 1244, examined the apparent differences between the language of the statute and the language of the regulation which explicitly refers to prohibiting the publication of a complaint. MUR 1244 considered a complainant's actions which had led to the publication in a newspaper of the details of his previously filed complaint. The Commission in that matter noted that the language of section 111.21 must be read in conjunction with section 437g(a)(12) and "should prohibit complainants from disclosing information about their complaints only if such disclosure also amounts to disclosure of a Commission notification or investigation." See MUR 1244. As support for this reasoning, language from the explanation and justification of section 111.21 was cited which states that the regulation "sets forth the confidentiality requirements of the Act." See *Id.* and 45 Fed. Reg. 15089 (March 7, 1980). The Commission noted that there would be difficulty in enforcing the regulation if read to extend beyond the wording of the statute and inconsistent with prior cases enforcing the statute.

More recent cases have confirmed and continued this interpretation. Relevant to your situation is the Commission's resolution of allegations made in a group of combined enforcement actions, MURs 3170, 3169, 3168. These cases were generated by complaints filed by persons who were the respondents in another enforcement action which had commenced earlier. These respondents presented evidence that the complainants in the earlier case had disclosed their complaint to various radio and television broadcasters and had further caused the complaint to become the subject of certain newspaper articles. The Commission found no reason to believe that these actions violated the Act or Commission regulations.^{2/}

In response to your request, the Commission concludes that your proposed discussion with the press regarding the filing of your complaint, the allegations contained in the complaint, and any information contained in the complaint or related to the subject matter of the complaint, would not violate the confidentiality provisions of the Act or Commission regulations. You may also

discuss any information contained in, or relating to, the June 1993 letter which formed the basis for the complaint. These actions are indistinguishable from the situations in the prior enforcement cases. However, you may not discuss or disclose any information relating to any notification of findings by the Commission or any action taken by the Commission in an investigation until the case is closed or the respondent waives the right to confidentiality. Disclosure of these phases of the enforcement process is prohibited by 2 U.S.C. 437g(a)(12) and 11 CFR 111.21.^{3/}

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

For the Commission,

(signed)

Trevor Potter
Chairman

1/ MURs 3573, 3170, 3169, 3168 and 1244 dealt with alleged violations of both 2 U.S.C. 437g(a)(12)(A) and 11 CFR 111.21. The consideration of MUR 298 took place prior to the promulgation of section 111.21; therefore, violations of section 437g(a) were the only issue. See footnote 2 below.

2/ MUR 3573 dealt with allegations of a similar situation with the same resolution by the Commission.

By contrast, in MUR 298 the Commission referred to the Department of Justice a case involving a situation of persons unknown violating section 437g(a) by providing information to a newspaper for a published article revealing a Commission decision to issue a subpoena in an open case. The violation was found because these actions involved disclosure of a Commission notification which disclosure was made while the investigation of the complaint was in progress.

3/ For an example of the type of disclosure that would violate the confidentiality provisions of the Act, see the discussion of MUR 298 in footnote two above.

The Commission is currently engaged in a rulemaking to offer further guidance on the application of the confidentiality provisions of the Act. See 58 Fed. Reg. 36777 (July 30, 1993).