



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 10, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-1

Arthur Block, Esquire
72 Spring Street
Suite 1201
New York, NY 10012

Dear Mr. Block:

This refers to your letter of December 28, 1994, which requests an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to proposed disclosures you wish to make regarding your response to a complaint filed with the Commission.

You state that you are the counsel of record for the respondents in Matter Under Review ("MUR") 3938 which arose from a complaint filed with the Commission by Ms. Kellie Gasink.^{1/} Following the filing of her complaint, Ms. Gasink requested and received a Commission advisory opinion regarding her proposal to communicate to a newspaper reporter information from the complaint and to disclose further facts regarding the allegations contained in the complaint. See Advisory Opinion 1994-32.

In view of the issuance of this opinion, the respondents in MUR 3938, and you as their counsel, wish to disclose to third parties, and/or the public, all or part of the responses that respondents have filed with the Commission in opposition to the complaint in MUR 3938. You note that the Commission has made a decision "to hold MUR 3938 `in abeyance' for an unspecified time." Assuming these disclosures can be made, you further ask whether they may be made without the Commission deeming them as a consent by the respondents to public disclosure of other confidential materials in MUR 3938.

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).^{2/}

Pursuant to this provision, the Commission promulgated regulations, 11 CFR 111.21(a), which provide:

... 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.

Advisory Opinion 1994-32 concluded that a complainant who communicates with the press regarding the complaint filed with the Commission would not violate the confidentiality provisions of the Act, provided such person did not:

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.

Advisory Opinion 1994-32.^{3/}

The Commission notes that it has not made any findings of "reason to believe" or "probable cause to believe" that violations of the Act may have been committed in MUR 3938. 2 U.S.C. §437g(a)(2) and (2)(4). Therefore, a Commission investigation has not started. Furthermore, you propose only to release your response to the complaint filed by Ms. Gasink. Under these circumstances, the Commission concludes that the confidentiality provisions as set forth in 2 U.S.C. §437g(a)(12) and 11 CFR 111.21 would not apply to your release of all or any portion of the responses filed by you on behalf of your clients. Since the confidentiality provisions do not apply, your described actions would not represent any waiver of confidentiality as to other documents or materials which are presently in, or may become a part of, the Commission file in MUR 3938.^{4/} The Commission notes, however, that this conclusion relates only to actions by you or your clients regarding the release of the information contained in your response to the complaint. These conclusions do not affect the rights of the Commission to withhold information from public disclosure pursuant to its investigatory or other privileges. See 11 CFR 4.5(a)(1)--(a)(7) and 4.5(a)(7)(i)--(vi).

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.

Sincerely,

(signed)

Danny L. McDonald
Chairman

Enclosure: (AO 1994-32)

1/ According to the designations of counsel you filed with the Commission, you represent Fred Newman, Lenora B. Fulani, Rachel Massad, Francine Miller and the Lenora B. Fulani for President Committee.

2/ A recent case, Lind v. Grimmer, 30 F.3d 1115 (9th Cir. 1994), cert. denied, sub nom. Wang v. Lind, No. 94-897 (U.S. Jan. 17, 1995), has examined the application of a confidentiality rule in Hawaii's election law. The case concerned an attempt of the Hawaii Campaign Spending Commission to prohibit a complainant from releasing information contained in a complaint he had filed with the state commission. The court first found that the state commission's application of the statute to the complainant violated his First Amendment rights. The court also concluded that the statute itself was overbroad and unconstitutional. While 2 U.S.C. §437g(a)(12) is narrower in scope than the confidentiality statute struck down in Lind, the case nonetheless illustrates the First Amendment considerations applicable when interpreting the scope of confidentiality in the context of election law enforcement procedures.

3/ This conclusion reflects long standing Commission policy as found in past enforcement matters. See, for example, MURs 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.

4/ 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).