

May 5, 2015

Daniel A. Petalas
Acting General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6518 & MUR 6746/Failures to Issue Statements of Reasons

Dear Mr. Petalas:

I write to protest the failure of the Commissioners of the Federal Election Commission (“FEC” or “Commission”) to issue statements of reasons explaining their dismissals of Citizens for Responsibility and Ethics in Washington’s (“CREW”) complaints against Newt 2012, Inc., Newt Gingrich, Callista Gingrich, Lisa Lisker, and Gingrich Productions, Inc. (MUR 6518) and against Americans in Contact PAC, Gabriel S. Joseph III, and FreeEats.com, Inc., doing business as ccAdvertising (MUR 6746).

Unfortunately, this is not the first time CREW has needed to lodge a protest with your office over the Commission’s inexcusably delay to fulfill its statutory obligations. CREW recently wrote to you about the Commission’s similar failure to issue a statement of reasons, as required, in MUR 6509. Only after CREW lodged its protest did the Commissioners place on the public record an explanation of their refusal to enforce the FECA. Nonetheless, the FEC appears to continue to neglect its duty to provide a timely explanation for its decisions, to the great prejudice of CREW.

With regard to MUR 6518, the FEC informed CREW that, on June 16, 2015—nearly a year ago—the Commission voted on the FEC Office of Legal Counsel’s (“OGC”) recommendations to find reason to believe the named respondents violated the FECA. With the exception of one recommendation, the Commission failed to garner sufficient votes to adopt the OGC’s recommendations. One recommendation was referred to the Office of Alternative Dispute Resolution (ADR 772). After a negotiated resolution of the matter before the Office of Alternative Dispute resolution was achieved, the Commissioners voted to close the file on March 2, 2016. CREW received notice of the dismissal on March 7, 2016 and was promised “[a] Statement of Reasons providing the basis for the Commission’s decision [would] follow.” To date, however, the FEC has not yet released a statement of reasons explaining the vote of the three Commissioners who chose to deadlock the Commission and bar any further action on the numerous recommendations of the OGC save the single matter referred to alternative dispute resolution.

With regard to MUR 6746, the FEC informed CREW that, on March 15, 2016, the Commission voted to exercise its prosecutorial discretion to dismiss certain allegations in

CREW's complaint, but "was equally divided as to whether to find reason to believe that Americans in Contact PAC and Gabriel S. Joseph, III . . . violated 52 U.S.C. § 30120(a)(3) or 11 C.F.R. § 110.11(a)(3)." Although the FEC provided CREW with a Factual and Legal Analysis to explain its vote to use prosecutorial discretion, no explanation was provided to explain the failure of the Commission to reach an agreement on the remaining allegations. Indeed, to date, *no* documents from the proceeding have been placed in the public record.

As you know, the Commissioners' statement of reasons is essential to satisfy the FEC's legal obligation to adequately justify its actions and demonstrate it was not acting "contrary to law." The FEC's failure to issue a statement of reasons is highly prejudicial to CREW because CREW must determine whether to seek judicial relief within an extremely tight window of time after the FEC's decides to dismiss its complaint.

Under the Federal Election Campaign Act ("FECA"), a complainant may seek judicial review of the FEC's decision to dismiss its complaint. 52 U.S.C. § 30109(a)(8)(A). A court may then declare the dismissal was "contrary to law" and order the matter reinstated. *Id.* § 30109(a)(8)(C). "Absent an explanation by the Commissioners for the FEC's stance," however, neither courts nor the complainant can "intelligibly determine whether the Commission [was] acting 'contrary to law.'" *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) (Ginsburg, J.); *see also 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.").

Moreover, FECA provides an extremely narrow window in which a complainant may seek judicial review. The complainant must determine whether to seek judicial relief within sixty (60) days of the dismissal of its complaint. 52 U.S.C. § 30109(a)(8)(B); *see also Jordan v. FEC*, 68 F.3d 518, 519 (D.C. Cir. 1995) (finding lawsuit filed sixty-three days after FEC dismissal must be dismissed for lack of jurisdiction). By failing to issue a statement of reasons sufficiently before the expiration of the sixty-day window to allow CREW to consider the explanation and determine whether to pursue a judicial remedy, the FEC effectively precludes CREW from considering whether to seek the judicial relief afforded to it by FECA.

Unfortunately, the FEC's delay in providing the statements of reasons in these matters are only two more examples of the Commission's lack of diligence in fulfilling its statutory obligation to "expeditious[ly]" decide complaints brought before it, an obligation made imperative by the need to remedy violations before the next election cycle. *Rose v. FEC*, 608 F. Supp. 1, 6 (D.D.C. 1985) ("It is inconceivable that Congress could have anticipated that a complaint by a presidential candidate running for re-election four years later, or a complaint by a senatorial candidate running for re-election six years later, would remain unresolved by the time of the next election."); *Democratic Senatorial Campaign Comm. v. FEC*, No. 95-cv-0349 (JHG), 1996 U.S. Dist. LEXIS 22849, at *8, *25 (D.D.C. 1996) ("The deterrent value of [FECA's] enforcement provisions are substantially undermined, if not completely eviscerated, by the FEC's failure to process administrative complaints in a meaningful time frame.").

CREW filed its complaints in MUR 6518 and MUR 6746 on December 19, 2011 and August 5, 2013, respectively. Nonetheless, the FEC failed to resolve these matters for years (and eventually did so only by becoming hopelessly deadlocked). Unfortunately, such significant delay appears to be common. *See, e.g.*, MUR 6509 (Friends of Herman Cain) (decision issued almost four years after complaint was filed); MUR 6471 (Commission on Hope, Growth, and Opportunity) (decision issued more than four years after complaint was filed); MUR 6612 (Crossroads GPS) (decision issued more than three years after complaint was filed); MUR 6696 (Crossroads GPS) (same). Moreover, even after finally reaching a decision, the FEC has failed to diligently notify complainants such as CREW of the dismissal, risking the closing of the sixty-day window for judicial review without even notice to the aggrieved party that the time period to seek relief is running. *See, e.g., CREW v. FEC*, 799 F. Supp. 2d 78, 89–90 (D.D.C. 2011) (discussing FEC's failure to provide timely notice).

The FEC's delay in issuing the statements of reasons for its dismissals is highly prejudicial to CREW and the voters who rely on the adequate enforcement of FECA. More than sixty days have passed from the FEC's decision to close the file in MUR 6518, and the sixty-day window is quickly coming to a close in MUR 6746. Accordingly, CREW demands that the Commissioners promptly release statements of reasons explaining their votes. CREW further reserves the right to seek judicial review of the dismissals and equitable tolling of the sixty-day statutory window to allow CREW adequate time to assess the statements to determine whether the dismissals were contrary to law.

Sincerely,



Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics
in Washington

cc: Chairman Matthew S. Petersen
Vice Chairman Steven T. Walther
Commissioner Ann M. Ravel
Commissioner Lee E. Goodman
Commissioner Caroline C. Hunter
Commissioner Ellen L. Weintraub