UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR COMPETITIVE POLITICS, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 14-970 (RBW) REPLY

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Regulations

Miscellaneous

Plaintiff Center for Competitive Politics ("CCP") filed suit under the Freedom of Information Act ("FOIA") to obtain a document containing the initial legal analysis and recommendations of the Federal Election Commission's ("FEC" or Commission") lawyers in an administrative enforcement matter that is now the subject of litigation. The record in this case makes clear that the initial legal analysis and recommendations that CCP seeks was withdrawn, revised, and resubmitted by FEC counsel; was not accepted with its rationale adopted by the Commission, and has never been publicly disclosed. The Commission properly denied CCP's FOIA request for the opinion of its counsel that had been submitted as part of the Commission's deliberations and in anticipation of litigation.

CCP has failed to refute the Commission's demonstration that the withdrawn June 2011 report is exempt from disclosure. Its Opposition to the Commission's summary-judgment motion does not seriously dispute that the report meets the elements of the deliberative-process and work-product privileges. In fact, its proffered declaration of a former FEC Commissioner confirms the predecisional and deliberative nature of legal recommendations like the one CCP seeks.

Compounding CCP's flawed privilege analysis is its erroneous assertion that three Commissioners adopted the withdrawn legal recommendation. Those Commissioners' published statements make clear that they attached the report for precisely the opposite reason — to highlight staff legal recommendations that they disagreed with and wholly rejected.

The heart of CCP's argument is essentially a waiver argument. CCP maintains that withholding the document it seeks is inconsistent with Commission policy statements generally favoring disclosure of certain documents that are integral to the Commission's decisionmaking process. But CCP admits that such policy statements (a) are non-binding, (b) nowhere mention

withdrawn reports, and (c) explicitly reserve the Commission's right to withhold privileged material under applicable FOIA exemptions. CCP also purports to rely on a Commission regulation that provided for disclosure of broad categories of internal documents but the regulation is unenforceable — the Court of Appeals for the D.C. Circuit held that it was "impermissible" more than ten years ago.

The record before the Court is clear and no material facts are in dispute. The document CCP seeks is privileged, the Commission has not waived its privilege, and it therefore properly withheld the document in response to CCP's FOIA request. The Court should grant summary judgment to the Commission.

I. THE JUNE 2011 REPORT IS PRIVILEGED AND EXEMPT FROM DISCLOSURE UNDER FOIA

FOIA Exemption 5, which the Commission relied on in withholding the June 2011 legal analysis that CCP requested under FOIA, incorporates the traditional privileges that the government may assert in civil litigation, including the deliberative-process and work-product privileges. The Commission has demonstrated that these privileges clearly apply to the June 2011 report. In particular, the Commission has established that the document at issue in this case (a) contains the legal analysis and recommendations of the Commission's attorneys, (b) which the Commission's Office of General Counsel provided to the Commission for consideration in connection with a pending administrative enforcement matter, and (c) which was never adopted by the three Commissioners whose decision controlled the outcome of that enforcement matter (the "controlling group" of Commissioners).[1]

[1] The Federal Election Campaign Act provides that affirmative decisions of the Commission "with respect to the exercise of its duties and power under the provisions of th[e] Act shall be made by a majority vote of the members of the Commission," and that certain specified actions require "the affirmative vote of 4 members of the Commission." 52 U.S.C.

CCP fails to refute the Commission's demonstration that the June 2011 report clearly meets the elements of both the deliberative-process and work-product privileges. Instead, CCP confuses the fundamental question of whether a particular privilege applies in the first place with the secondary question of whether an applicable privilege has been waived. It also misconstrues the breadth of the deliberative-process privilege and fails to offer relevant support for its novel construction of the work-product privilege.

A. The Entire June 2011 Report Is Protected by the Deliberative-Process Privilege

The deliberative-process privilege protects agency records that are both predecisional and deliberative, that is, documents that are temporally antecedent to agency decisions and that are related to the process by which such decision are reached. As the Commission previously explained, the June 2011 report clearly meets both requirements. (*See* FEC Mem. in Support of Its Mot. for Summ. J. at 14-15 (Docket No. 7-1) ("FEC Mem.").) It consists of legal analysis that FEC attorneys submitted to the Commission to aid with its exercise of its statutory duty to seek to obtain compliance with and civilly enforce the Federal Election Campaign Act ("FECA" or the "Act"). *See* 52 U.S.C. § 30106(b)(1) (formerly 2 U.S.C. § 437c(b)(1)).[2] More

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§ 30106(c) (formerly 2 U.S.C. § 437c(c)). *See infra* n.2. In particular, the decision to investigate or otherwise pursue enforcement of an administrative complaint requires the assent of at least four Commissioners. 52 U.S.C. §§ 30106(c), 30107(a)(6), (9) (formerly 2 U.S.C. §§ 437c(c), 437d(a)(6), (9)). Thus, when the agency's six Commissioners are evenly divided on whether to pursue an investigation or other enforcement of an administrative complaint, the statute precludes such investigation or enforcement. The Court of Appeals for the D.C. Circuit has held that in such circumstances, any judicial review of the Commission's decision to dismiss the administrative complaint pursuant to 52 U.S.C. § 30109(a)(8) (formerly 2 U.S.C. § 437g(a)(8)), is based on the statement of reasons issued by the Commissioners that voted for dismissal, "[s]ince those Commissioners constitute a controlling group for purposes of the [administrative] decision . . . ." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F. 2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*").

[2] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table,

specifically, the June 2011 report preceded, and was drafted and submitted to help facilitate, the Commission's decision regarding whether to find reason to believe an alleged violation of FECA had occurred. (*See* Declaration of Robert M. Kahn (Docket No. 7-2) ¶¶ 12-15 ("Kahn Decl.").)

1. The June 2011 Report Is Predecisional

The June 2011 legal analysis is plainly predecisional. It is undisputed that the report contained staff legal *recommendations* for a Commission decision and was circulated for the Commission's consideration in advance of that decision. Indeed, to the extent CCP's declaration of David M. Mason — a former Commissioner that left the agency two years before the circumstances underlying this litigation transpired — has any relevance on this question, it confirms the predecisional nature of legal recommendations like those in the June 2011 report.[3] As former Commissioner Mason explains, such reports "reflect the *Office of General Counsel's initial position*" on an administrative enforcement matter "and *recommend that the Commissioners* find reason to believe, no reason to believe, take no action, or dismiss the complaint." (Declaration of David M. Mason (Docket 13-2) ¶ 6 ("Mason Decl.") (emphases added).) The reports are "submitted *for review* by the full Commission" and "*may* be adopted by the Commission." (*Id.* ¶¶ 5, 9 (emphases added).) Consistent with the procedures described by former Commissioner Mason (*id.* ¶ 6), the Office of General Counsel circulated its initial position and recommendations to the Commission. When objections were made to the report, it was placed on the agenda for discussion at an FEC Executive Session.[4] (*See* Kahn Decl. ¶¶ 14-

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http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. To avoid confusion, this submission will indicate in parentheses the former Title 2 citations.

[3] The Mason Declaration also confirms the deliberative nature of the report. *See infra* p. 22.

[4] As explained in the Commission's summary-judgment memorandum, an "Executive Session" is an internal Commission meeting that is closed to the public during which the

15.) Following that discussion, but before the Commission made any determination on the recommendations in the report, it was withdrawn by the Office of General Counsel. (*Id.* ¶ 15.) The Commission never again considered the report or made any determinations regarding its recommendations. (*Id.*) It is manifestly predecisional.

CCP's entire argument (Pl.'s Opp'n to Mot. for Summ. J. (Docket No. 13) at 9-10 ("Opp'n")) that the June 21 report is not predecisional rests on its mischaracterizations of clearly established facts. It is unsurprising that CCP could not find anything to cite in support of its erroneous assertion that the three Commissioners who voted not to find reason to believe that Crossroads violated the Act "*expressly adopted* [the June 2011 report] as part of their final decision" (*id.* at 9 (emphasis added); *see id.* at 18 (same)), because those Commissioners did no such thing. Nor did the Commissioners "*effectively* adopt[]" the withdrawn report, either as their reason for voting to dismiss the allegations against Crossroads or as any "statement of *present* FEC policy."[5] *Id.* at 9 (first emphasis added; second emphasis in original); *see infra* pp. 7-8.

Instead, the three Commissioners issued a 28-page, single-spaced statement of reasons that explained the analysis and rationale underlying their vote. The statement concluded with a "Procedural Background" section in which the Commissioners sought "to explain why it took over three years to resolve th[e Crossroads enforcement matter]." Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen in

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Commissioners may, *inter alia*, discuss the Office of General Counsel's recommendations and vote on whether there is "reason to believe" that a violation has occurred. 52 U.S.C. § 30109(a)(2) (2 U.S.C. § 437g(a)(2)); *see* FEC Mem. at 3; Kahn Decl. ¶ 14.

[5] As explained *supra* at p. 2 n.1, FECA provides that the exercise of the duties and powers of the Commission — including any establishment of Commission policy — may be done only by a *majority* vote of Commissioners. *See* 52 U.S.C. § 30106(c) (2 U.S.C. § 437c(c)). Thus, while a group of three Commissioners can be "controlling" for purposes of court review of a Commission decision not to pursue an enforcement matter, they cannot establish any policy on behalf of the agency.

MUR 6396 at 25-26 (Jan. 8, 2014), http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf, ("Commissioners' Statement of Reasons"). In so explaining, the Commissioners referenced the fact that FEC counsel had "prepared [a] first First General Counsel's Report, which was circulated to the Commission on June 22, 2011," but "[b]efore the Commission was scheduled to consider the matter in an Executive Session on September 27, 2011, Respondents filed a supplemental response with the Commission detailing its activities in 2011 and arguing that this information further rebutted the allegation[s]" in the administrative complaint under consideration. *Id.* at 26. The Commissioners' Statement of Reasons further referenced FEC counsel's indication, following review of the supplemental response, that the "response did not change its recommendation, did not require any edits to its report, and that it was still prepared to discuss the matter at the scheduled Executive Session." *Id.* The Commissioners' Statement of Reasons then described the Commissioners' account of FEC counsel's withdrawal and resubmission of its legal recommendation:

> The discussion during that [Executive Session] apparently caused [the Office of General Counsel] to reconsider its legal theories regarding this matter. Recognizing the need to address the questions raised, the General Counsel requested permission to withdraw the original First General Counsel's Report. On November 21, 2012, over a year after that Executive Session, [the Office of General Counsel] circulated its second First General Counsel's Report. The second First General Counsel's Report recommended an entirely new rule for determining political committee status — the "calendar year" rule. In addition to the significant problems with applying this rule discussed above, we have routinely objected to creating new legal norms in an enforcement context to be applied retroactively upon respondents because doing so would raise serious due process concerns.

Id. (footnotes omitted). Finally, the statement noted, in a footnote, the view of the three Commissioners that not publicly releasing the withdrawn June 2011 legal recommendation "frustrates the purpose behind the Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record." *Id.* at 26 n.111.

The Commissioners subsequently issued a supplemental statement of reasons in which they elaborated on why they sought public disclosure of FEC counsel's withdrawn legal analysis. *See* Supplemental Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen in MUR 6396 (Mar. 25, 2014), http://eqs.fec.gov/eqsdocsMUR/14044352011.pdf ("Commissioners' Supplemental Statement of Reasons"). The Commissioners expressed concerns that FEC counsel's legal analysis "was evolving behind closed doors while this enforcement matter was under review," and the Commissioners thus sought to "illuminate" how *FEC counsel* had analyzed whether Crossroads satisfied the legal requirements for being regulated as a federal political committee. *Id.* at 1. The Commissioners' two statements of reasons make clear that the Commissioners themselves explicitly rejected the legal analysis proposed by FEC counsel. *Compare id.* at 1 (explaining that the Commissioners attached the withdrawn June 2011 report to their statement of reasons in the Crossroads matter "to illuminate" the Office of General Counsel's "introduc[tion of] a new legal norm: that a calendar year and only a calendar year is the necessary time frame for determining an organization's political committee status"), *with* Commissioners' Statement of Reasons at 20-23 (explaining in detail the Commissioners' reasons for rejecting FEC counsel's proposed "calendar-year" approach).

These two statements of reasons lack any indication that the controlling group of Commissioners in the Crossroads enforcement matter *adopted* any part of the June 2011 report as their explanation for dismissing that matter, or that the withdrawn report "now functions as a statement of policy and interpretation . . . adopted by the agency." (Opp'n at 10 (internal quotation marks omitted)). (As explained *supra* at p. 5 n.5, the latter is not even possible under FECA.) In fact, the Commissioners' two statements make clear that the Commissioners attached

the report for precisely the opposite reason — to highlight staff legal recommendations *that they disagreed with and wholly rejected*. That does not negate the predecisional and deliberative nature of the June 2011 report. Indeed, the Court of Appeals for the D.C. Circuit has made clear that it "refuse[s] to equate reference to a report's conclusions with adoption of its reasoning, and it is [only] the latter that destroys the privilege." *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 10 (D.C. Cir. 2014) ("[C]asual allusion in a post-decisional document to subject matter discussed in some pre-decisional, intra-agency memoranda is not the express adoption or incorporation by reference which . . . would remove the protection of Exemption 5.") (*quoting Common Cause v. IRS*, 646 F.2d 656, 660 (D.C. Cir. 1981)).

Electronic Frontier Foundation, which CCP purports to rely on (Opp'n at 10), plainly does not advance its argument. In that case, the Court of Appeals explained that a legal opinion provided by the Department of Justice's Office of Legal Counsel to the FBI was protected by the deliberative-process privilege. 739 F.3d at 8-12. The FOIA requester there had argued that the document was not covered by the privilege because the Office of Inspector General mentioned the opinion in a report, and the FBI's general counsel was asked about it by members of Congress. The Court explained that the adoption exception to the privilege "only applies if 'the reasoning in the [privileged document] is adopted by the [agency] as *its* reasoning.'" *Id.* at 11 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). But since the FBI itself never publicly invoked the opinion as "*its own* reasoning" the adoption exception did not apply. *Id.* The same is true here.

2. The June 2011 Report Is Deliberative

As previously explained (FEC Mem. at 15-16), the June 2011 report is also plainly deliberative and reflects the give-and-take of the consultative process. The staff legal analysis and recommendations were circulated to the Commission by its attorneys to inform the

Commissioners' deliberations over whether there was reason to believe Crossroads violated the Act. (*See* Kahn Decl. ¶ 12 ("The June 2011 report contains the Commission's attorneys' legal analysis of the allegations against Crossroads . . . applies the relevant law to the facts . . . and sets forth the Office of General Counsel's recommendations . . . .").)

As explained *supra* p. 22, CCP's Mason declaration similarly recognizes that First General Counsel's Reports are staff recommendations generated "for review" by the Commission that "reflect the Office of General Counsel's initial position" on an enforcement matter. (Mason Decl. ¶¶ 5, 6, 15.) The Mason Declaration confirms the deliberative nature of such staff recommendations, describing the "method by which a First General Counsel's Report may be placed before the full Commission" for its consideration and by which the Commission may "accept the circulated report," and stating that such recommendations "may be adopted by the Commission" pursuant to certain procedures. (*Id.* ¶¶ 7-10.)

CCP erroneously claims (Opp'n at 11) that the *possibility* that the withdrawn report "could [have] be[en] adopted as a final agency action . . . diminishes any asserted need to 'preserve' a 'deliberative process.'" None of CCP's authorities support this novel notion that a deliberative document loses its deliberative quality because it *could* be adopted by an agency. CCP's argument misunderstands and improperly narrows the purpose of the deliberative-process privilege.[6]

The deliberative-process privilege is not merely intended to protect the confidentiality of singular documents like the June 2011 report. The purpose of the privilege, as its name makes

[6] For the same reasons, CCP's attempts to preclude summary judgment by characterizing as material issues in dispute, questions about whether "there was a possibility" that the June 2011 report could have become public or whether it was originally circulated "with the expectation that it could or would be made public" (Pl.'s Opp'n to Def. Statement of Material Facts at 7 ¶¶ 4-5) are misguided. The *possibility* that a predecisional, deliberative document *could* become public does not undermine the deliberative-process privilege.

clear, is to protect the entire *process* by which agencies flesh out their policies and decide whether and how to act. *See Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (explaining that the deliberative-process privilege "protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided[,] not for matters they considered before making up their minds") (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)) (internal quotation marks omitted); *Heggestad v. U.S. Dept of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000) (explaining that the deliberative-process privilege "protects not only particular documents, but also the integrity of the deliberative process itself"); *United States v. Exxon Corp.*, 87 F.R.D. 624, 636 (D.D.C. 1980) (explaining that deliberative-process privilege "protects the 'administrative reasoning process'").

Through its protection of the full decisionmaking process, the deliberative-process privilege thus encompasses the Office of General Counsel's decision to withdraw and revise its initial legal analysis as much as it protects the thoughts of counsel at the time the report was initially circulated. As the Commissioners stated (*see* FEC Mem. at 17-18), FEC counsel's withdrawal of the initial legal analysis and recommendations resulted from a non-public discussion with the Commissioners during a closed Executive Session, which caused FEC counsel to "recognize[e] the need to address the questions raised" during that confidential Commission meeting and accordingly to "request[] permission to withdraw" counsel's originally circulated legal recommendation. Commissioners' Statement of Reasons at 26. The Commissioners' Statement of Reasons thus confirms the predecisional and deliberative nature of FEC counsel's withdrawal of the June 2011 report.

Shielding that reconsidered analysis from disclosure encourages the candid exchange of ideas by allowing agency staff to revise or refine their analysis and recommendations "without

fear of later being subject to public ridicule or criticism" for their revisions or refinements. *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The Commission thus explained in its summary-judgment memorandum that requiring agencies to disclose reconsidered legal analyses like the June 2011 report could have a chilling effect on agency staff, who may grow reluctant to revise or refine their analyses and recommendations. (*See* FEC Mem. at 17-18.) CCP's Opposition has no response to this point. The fact that First General Counsel's Reports recommending dismissal may be adopted as the agency's rationale subject to judicial review heightens, rather than diminishes, the need for the privilege to protect staff reconsiderations.

CCP also does not offer any authority to support its narrow approach to the deliberative-process privilege, which focuses exclusively on the expectations of agency staff at the moment a particular document was created, while wholly ignoring the give-and-take *process* of which the creation of the document was only one part. CCP does not identify a single case holding that a court's determination of whether the deliberative-process privilege applies depends on whether a document was prepared in anticipation of its possible publication, and whether that might diminish the harm of disclosure. Indeed, although the Commission has identified — and CCP has failed to refute — the harmful chilling effect that disclosure of the June 2011 report could have on the FEC's deliberative process, as a general rule, an agency is not required to show specific harm resulting from any particular disclosure to properly invoke the deliberative-process privilege. *See Judicial Watch, Inc. v. U.S. Dep't of State*, 650 F. Supp. 2d 28, 34 (D.D.C. 2009) (explaining that agency which had provided sufficiently detailed information about the document and its reasons for withholding was not required to "demonstrate any *specific* harm" from disclosure).

CCP has utterly failed to refute the FEC's clear demonstration that the entire June 2011 Report is exempt from disclosure because it is protected by the deliberative-process privilege.

B. The June 2011 Report Satisfies the Elements of the Attorney Work-Product Privilege

It is well settled that the attorney work-product privilege protects the confidentiality of documents prepared in anticipation of litigation, including administrative proceedings, by or for a party or its representatives. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 397-98 (1981); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). The purpose of the privilege is to protect mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation." *Kishore v. U.S. Dep't of Justice*, 575 F. Supp. 2d 243, 260 (D.D.C. 2008) (citing Federal Rule of Civil Procedure 26(b)(3)).

As the Commission previously demonstrated (FEC Mem. at 11-13), the withdrawn June 2011 report is clearly privileged attorney work product: the report contains the legal theories and recommendations of the Commission's lawyers regarding a Commission enforcement matter that could, and did, in fact, result in litigation. (Kahn Decl. ¶ 18.) CCP concedes, as a general matter that First General Counsel's Reports are legal recommendations prepared by Commission lawyers for consideration by the Commission. (Mason Decl. ¶¶ 5, 6, 9). And the Commissioners' Statement of Reasons specifically references the "legal theories" contained in the particular report CCP seeks here. Commissioners' Statement of Reasons at 26. Moreover, as the Commission explained in its summary-judgment memorandum (FEC Mem. at 4, 12), FECA's statutory enforcement scheme is a statutorily mandated administrative process that expressly includes paths to litigation by or against the Commission. *See* 52 U.S.C. § 30109(a)(6)(A), (8)(A) (2 U.S.C. § 437g(a)(6)(A), (8)(A)).

CCP attempts to refute the clear applicability of the work-product privilege by arguing that because investigating administrative complaints is the Office of General Counsel's "business as usual," recognizing the applicability of the attorney work-product privilege to FEC counsel's legal recommendations regarding how to proceed in an administrative enforcement matter would somehow "convert much of the Commission's routine work into work product." (Opp'n at 13-14.) This is nonsense and fails to address the relevant question of whether the particular document at issue here is privileged attorney work product. It is.

"In applying the work product doctrine, the D.C. Circuit has instructed that, it 'should be interpreted broadly and held largely inviolate.'" *Shapiro v. U.S. Dep't of Justice*, 969 F. Supp. 2d 18, 28 (D.D.C. 2013) (quoting *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005)). As such, the privilege has been interpreted to cover documents prepared because of the prospect of "*foreseeable* litigation, even if no specific claim is contemplated." *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (emphasis added) *abrogated on other grounds by Milner v. U.S. Dep't of Navy*, 131 S. Ct. 1259 (2011). Attorneys' legal recommendations about whether to pursue an enforcement matter in an administrative, pre-litigation phase are the quintessential type of materials protected by the privilege. *See Heggestad*, 182 F. Supp. 2d at 11 (explaining that prosecution memoranda are "integral" to an agency's "decision-making process with regard to whether or not to prosecute" and "precisely the type of information universally held to be attorney work-product in the context of civil discovery."). The June 2011 report was clearly prepared with the prospect of foreseeable litigation, either enforcement against Crossroads or against the FEC for judicial review of its dismissal of the administrative complaint against Crossroads. Protecting the clearly privileged

status of that document does not "convert" any other aspects of "the Commission's routine work into [attorney] work product." (Opp'n at 14.)

Neither *Shapiro* nor *Janicker v. George Washington University*, 94 F.R.D. 648 (D.D.C. 1982), which CCP cites (Opp'n at 12-13), support its novel argument that because one of the Commission's many statutory responsibilities is investigating alleged violations of FECA, the legal recommendations containing staff advice about whether to pursue such investigations are a special *un*privileged form of attorney work product.

In *Shapiro*, the district court held that the work-product privilege did not protect the contents of a brief bank maintained by the Department of Justice. Crucial to the court's reasoning was the fact that the brief bank was "not created for the purposes of a specific litigation or even for a particular claim that might arise in multiple cases." 969 F. Supp. 2d at 30. The June 2011 report, in stark contrast, *was* created in the course of a specific investigation that *has* resulted in litigation. *Shapiro* thus confirms that the June 2011 report *is* privileged work product. As the district court there observed, documents "prepared by government lawyers in connection with active investigations of potential wrongdoing" clearly qualify as privileged attorney work product because they were "prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind." *Id.* (*quoting In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998); *Coastal States Gas Corp.*, 617 F.2d at 865).

In *Janicker*, the magistrate judge held that the work-product privilege did not cover a university's investigative reports concerning the causes of a fire in a campus building. The court explained that since the purpose of the reports was to prevent repetition of the tragedy, rather than to aid in possible future litigation, the reports did not qualify for the work-product privilege. 94 F.R.D. at 650. *Janicker* is thus clearly inapposite.

It is also of no moment, as CCP argues (Opp'n at 14), whether the "FEC's litigation team handled the request at issue here." CCP offers no support for its suggestion that only an agency's litigators can prepare materials in anticipation of foreseeable litigation. The protective shield of the work-product privilege extends much further. Indeed, the work-product privilege can even "apply to preparatory work performed not only by attorneys, but also, in some circumstances by nonlawyers" as well. *Shapiro*, 969 F. Supp. 2d at 28.

As it did with the deliberative-process privilege, CCP argues (Opp'n at 14-15) that the possibility that the report would be made public renders the attorney work-product privilege inapplicable. This argument again confuses the fundamental question of whether the document CCP seeks is privileged with the secondary question of whether an applicable privilege has been waived. And CCP's only purported authority in support of its backwards analysis of whether the withdrawn legal recommendation is attorney work-product is an out-of-circuit opinion upholding an order that required parties to identify deposition exhibits in advance of scheduled depositions (Opp'n at 14 (citing *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1016 (1st Cir. 1988)).) That case referenced a lawyer's expectation of privacy only in the context of how to balance the court's interests in case management for disclosure of exhibits that all parties agreed would ultimately be submitted to the opposing party. *Id.* at 1017. The decision does not address attorney opinions that have been reconsidered; the analogue in that discovery context would have been to order the parties to disclose exhibits attorneys had initially selected but *already* determined not to use at deposition. The case does no such thing and certainly does not suggest that a withdrawn legal recommendation related to an administrative enforcement matter, which contains the legal analysis and recommendations of agency counsel, is excluded from work-product protection.

CCP has thus also failed to refute the FEC's clear demonstration that the entire June 2011 Report is exempt from disclosure because it is privileged attorney work product.[7]

II. THE COMMISSION HAS NOT WAIVED ANY OF THE PRIVILEGES APPLICABLE TO THE JUNE 2011 REPORT

CCP does not dispute that the substance of the June 2011 report has never been publicly disclosed.[8] (Pl.'s Opp'n to Def. Statement of Material Facts at 5 ¶ 6.) This alone should dispose of CCP's contention that the Commission has waived the applicable privileges. As the Commission previously explained (FEC Mem. at 24-25), the attorney work-product and deliberative-process privileges may be waived in different ways, but all require *actual disclosure* of the substance of the communication at issue to a third party.

CCP also continues to argue that the Commission's 2003 and 2009 policy statements deprive the June 2011 report of any privileges that would otherwise adhere to it. But neither policy statement mentions withdrawn General Counsel's Reports, which even CCP admits (Opp'n at 17) is "true as far as it goes." In fact, there are at least two previous instances in which the Office of General Counsel withdrew General Counsel's Reports that it had submitted to the

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[7] CCP apparently does not contest that if the report is exempt pursuant to the attorney work-product and/or deliberative-process privileges, the entire document is privileged and the government is under no obligation to attempt to identify and provide any segregable portions. (*See* FEC Mem. at 13, 18-19.) And CCP has affirmatively stated that it does not oppose the Commission's withholding of the information on the first page of the report related to formal scoring criteria that the Commission uses to allocate resources and decide which matters to pursue, which is exempt from disclosure under FOIA Exemption 7(E). (Pl.'s Opp'n to Def. Statement of Material Facts at 5-6.)

[8] In light of the parties' agreement that the Commission has never publicly disclosed the contents of the June 2011 report or the proposed Factual and Legal Analysis attached thereto (*see* Pl.'s Opp'n to Def. Statement of Material Facts at 5), CCP's discussion of the lack of precedent for a situation in which a "Report had . . . been withdrawn *and retroactively removed from public view*" is misleading and irrelevant. (Opp'n at 18 (emphasis added).) Moreover, as explained *infra* p. 17 & n.9, in previous instances in which the Office of General Counsel withdrew a General Counsel's Report that it had submitted to the Commission, those withdrawn legal analyses were not publicly disclosed.

Commission and the fact of that withdrawal has been made public. One instance occurred in 2008, after the publication of the *Statement of Policy Regarding Closure of Enforcement and Related Files*, 68 Fed. Reg. 70,426 (Dec. 18, 2003) ("2003 Policy"). In both cases, the Commission did not disclose the withdrawn reports.[9] CCP likewise does not contest the fact that neither statement of policy is legally binding on the Commission. (FEC Mem. at 25-27.)

Moreover, as the Commission previously explained (*id.* at 25), neither policy statement expresses anything more than a general intent to make public certain categories of Commission documents, "*subject to the Commission's authority to withhold material under an exemption set forth in the FOIA*." *Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record*, 74 Fed. Reg. 66,132, 66,133 (Dec. 14, 2009) ("2009 Policy") (emphasis added); *see* 2003 Policy, 68 Fed. Reg. at 70,428 (same). CCP's limited concession that the 2009 Policy "permits the Commission to 'reserve the right to redact *portions* of [First General Counsel's Reports . . . consistent with . . . the principles articulated by the court of appeals in *AFL-CIO*" (Opp'n at 16-17 (alterations by CCP)) is insufficient and omits the relevant portion of that policy statement. The statement explicitly goes on to reserve "the Commission's authority to withhold material under an exemption set forth in the FOIA." 2009 Policy, 74 Fed. Reg. at 66,133. As explained above, and in the Commission's summary-judgment memorandum, the

[9] *See* Memorandum from Thomasenia P. Duncan, General Counsel, et al., Federal Election Commission, to the Commission, MUR 9785, Re: Withdrawal and Resubmission of General Counsel's Report #2 (July 23, 2008), http://eqs.fec.gov/eqsdocsMUR/28044204310.pdf (withdrawing a General Counsel's Report that contained the Office of General Counsel's recommendations regarding the Commission's probable cause determination in a pending administrative enforcement matter and noting FEC counsel's circulation of a revised recommendation); Memorandum from Lawrence M. Noble, General Counsel, et al., Federal Election Commission, to the Commission, Re: MUR 4621 — Withdrawal of General Counsel's Report dated May 13, 1999 (May 27, 1999), http://eqs.fec.gov/eqsdocsMUR/00000A6E.pdf (describing Office of General Counsel's withdrawal of a General Counsel's Report, which had been circulated to the Commission in connection with a pending administrative enforcement matter, in order to revise the report to incorporate additional information).

entire June 2011 report is privileged and exempt from disclosure, and withholding the document is plainly consistent with the reservation of rights in the 2009 Policy. And CCP has not cited any decision or principal of law to support its novel claim that a non-binding expression of general intent to disclose certain enforcement documents, subject to the Commission's authority to withhold material pursuant to a FOIA exemption, constitutes a waiver of all privileges applicable to a specific future document. (*See* FEC Mem. at 21-27.)

Likewise flawed is CCP's argument (Opp'n at 15-17) that the Commission is bound to disclose the withdrawn report by a Commission regulation that the Court of Appeals for the D.C. Circuit invalidated more than ten years ago. Setting aside the fact that 11 C.F.R. § 5.4(a)(4), like the 2003 and 2009 policy statements, makes no mention of General Counsel's Reports that are withdrawn, CCP's purported reliance on that regulation is belied by the clear holding of the Court of Appeals in *AFL-CIO v. FEC*, in which the court concluded that the regulation was "impermissible." 333 F.3d 168, 170 (D.C. Cir. 2003). CCP fails to explain how a Court of Appeals decision that broadly "conclude[d] that the regulation [wa]s impermissible," leaves the regulation not only permissible but legally binding on the Commission here. As the Commission previously explained (FEC Mem. at 22, 24 n.10), the clear holding of the Court of Appeals in *AFL-CIO* is what led the Commission to adopt its narrower policy statements favoring disclosure of "critical" and "integral" enforcement documents, subject to applicable privileges. *See* 2009 Policy, 74 Fed. Reg. at 66,132; 2003 Policy, 68 Fed. Reg. at 70,427. CCP's reliance on an "impermissible" FEC regulation is clearly misplaced.

And finally, CCP is just plain wrong when it accuses the Commission of "mask[ing] that it was the General Counsel's Office itself that declined to release the requested document." (Opp'n at 18.) That false allegation ignores the record and reflects CCP's apparent

misunderstanding of FECA's statutory requirement for *affirmative* agency action such as a decision to waive an applicable privilege to be made pursuant to "a majority vote of the members of the Commission." 52 U.S.C. § 30106(c) (2 U.S.C. § 437c(c)); *see supra* p. 2 n.1, 5; FEC Mem. at 15.[10] As explained in the Commissioners' Supplemental Statement of Reasons, the three Commissioners that preferred disclosure of the June 2011 report thus "asked [their] colleagues [on the Commission] to support the public release of [the withdrawn] First General Counsel's Report" and "moved to release the document *but the vote failed*." Commissioners' Supplemental Statement of Reasons at 3 (emphasis added). CCP's attempt to portray FEC counsel's defense of that official outcome as an *ultra vires* act by the General Counsel's Office is completely off the mark.

III. THERE ARE NO MATERIAL FACTUAL DISPUTES AND THE COMMISSION HAS MET ITS BURDEN UNDER FOIA TO DEMONSTRATE THE VALIDITY OF ITS EXEMPTION CLAIMS

CCP attempts to avoid summary judgment in favor of the Commission by disputing (a) "[w]hether the General Counsel's Office had the ability to 'withdraw' a report 'from commission consideration,'" and (b) "[w]hether the [C]ommission 'made any determination regarding the recommendations in the June 2011 Report, including the attached proposed Factual and Legal Analysis.'" (Pl.'s Opp'n to Def. Statement of Material Facts at 4.) CCP further suggests that it "cannot take a position" on whether the June 2011 report sets forth the Office of General Counsel's legal analysis and recommendations to the Commission regarding allegations in an administrative complaint, and whether the report contains the theories, mental impressions,

[10] This is different from judicial review of the decision not to purse enforcement of the allegations in the Crossroads matter. Because FECA requires that FEC investigative and enforcement actions be approved by a vote of at least four Commissioners, 52 U.S.C. §§ 30106(c), 30107(a) (2 U.S.C. §§ 437c(c), 437d(a)), a group of three Commissioners can be "controlling" for purposes of court review of a decision not to pursue such investigative or enforcement actions. *See supra* p. 2 n.1; FEC Mem. at 6.

and advice of the Commission's attorneys to their agency client. (*Id.*) And CCP claims that it contests some of the assertions in the Kahn Declaration submitted in support of the Commission's summary-judgment motion. As explained below, each of these contentions is fundamentally flawed and none precludes this Court from granting summary judgment to the Commission.

First, CCP has no basis for disputing whether the June 2011 report *could* have been withdrawn; the three Commissioners who voted for disclosure of that document have repeatedly confirmed that it *was* "withdrawn." *See* Commissioners' Statement of Reasons at 26 (stating that during an Executive Session concerning the Crossroads matter, the General Counsel "[r]ecogniz[ed] the need to address the questions raised" and thus "requested permission to withdraw the original First General Counsel's Report" and then "over a year after that Executive Session, [the Office of General Counsel] circulated its second First General Counsel's Report"); *id.* at 26 n.111 (addressing situation "when a First General Counsel's Report is withdrawn and resubmitted"); Commissioners' Supplemental Statement of Reasons at 1 (referring to the "withdrawn First General Counsel's Report"). CCP itself has quoted the Commissioners' references to "'the *withdrawn* First General Counsel's Report'" (Opp'n at 3 (quoting Commissioners' Supplemental Statement of Reasons at 1) (emphasis added).) CCP nevertheless claims to dispute the withdrawal of the June 2011 report based on the declaration of a former FEC Commissioner, who asserts that "[d]uring [his] tenure with the Commission," which expired before the circumstances at issue here occurred, he "was unaware of any procedure for withdrawal of a Report that had been distributed to the Commission." (Mason Decl. ¶ 8.) As explained above, however, in at least two previous, publicly documented instances — one of which occurred during former Commissioner Mason's tenure — the Office of General Counsel

did, in fact, withdraw General Counsel's Reports that it had submitted to the Commission and references to such withdrawals were made public. *See supra* p. 17 & n.9. Former Commissioner Mason's recollections regarding the withdrawal of General Counsel's Reports before the circumstances at issue in this case occurred have no bearing on whether the document at issue *here* was withdrawn. As the Commissioners themselves have made clear, it was.

Second, the Commissioners' Statement of Reasons confirms the statements in the Kahn Declaration describing the Office of General Counsel's submission and withdrawal of the June 2011 report. *Compare* Kahn Decl. ¶¶ 14-16 (explaining that the June 2011 report was circulated to the Commission, discussed at the September 27 Executive Session, and withdrawn by the Office of General Counsel before the Commission made any determination regarding the recommendations in the report), *with* Commissioners' Statement of Reasons at 26 (explaining that the June 2011 report was circulated to the Commission, discussed during the September 27 Executive Session, that "[t]he discussion during that meeting apparently caused [the Office of General Counsel] to reconsider its legal theories" and in "[r]ecogni[tion of] the need to address the questions raised, the General Counsel requested permission to withdraw the original First General Counsel's Report," and that "over a year after that Executive Session, [the Office of General Counsel] circulated its second First General Counsel's Report").[11]

Nevertheless, even if CCP were correct in arguing (Opp'n at 21-22) that the public record is vague about the extent to which the Commission made any determination regarding the recommendations in the June 2011 report, and it is not, the public record is crystal clear on the only determination that matters — whether the Commission *adopted* the report as its reasoning.

[11] CCP's claim that there remain material issues in dispute concerning "who" withdrew the June 2011 Report and how it was withdrawn (Pl.'s Opp'n to Def. Statement of Material Facts at 7 ¶ 3) are thus undermined by both the Kahn Declaration and the Commissioners' Statement of Reasons.

The statements of reasons from the controlling group of Commissioners in the administrative enforcement matter preclude any interpretation that the Commissioners adopted the Office of General Counsel's legal analysis as their own. *See supra* p. 7. As explained above, the Commissioners explained that they attached the June 2011 report to "illuminate" staff legal analysis and recommendations that the Commissioners explicitly disagreed with and wholly rejected. *Id.*[12]

Third, CCP's purported uncertainty about the nature of the withdrawn legal analysis it seeks is undermined by its own Mason Declaration, which describes the contents of First General Counsel's Reports generally, as well as the controlling group of Commissioners' statements of reasons, which reference the June 2011 report in particular. As the Mason Declaration observes, "First General Counsel's Reports reflect the Office of General Counsel's initial position" on an administrative enforcement matter "and recommend that the Commissioners find reason to believe, no reason to believe, take no action, or dismiss the complaint." (Mason Decl. ¶ 6.) And as specifically explained in the Commissioners' Statement of Reasons, the withdrawn report at issue here reflected FEC counsel's "legal theories regarding this matter," which "[t]he discussion

[12] CCP's related attempt (Opp'n at 21-22; Pl.'s Opp'n to Def. Statement of Material Facts at 6-7 ¶¶ 1-2) to manufacture a genuine issue of material fact regarding whether and when any vote was taken on the June 2011 legal recommendation is similarly misguided and fails to identify any basis for denying the Commission's summary-judgment motion. The Commission has submitted a sworn declaration attesting to the circumstances surrounding the Commission's consideration of the June 2011 report, including the fact that the Office of General Counsel withdrew the report before the Commission made any determination regarding the recommendations in it. (Kahn Decl. ¶¶ 14-15.) CCP has offered nothing to contradict the Kahn Declaration, which is consistent with the description in the Commissioners' Statement of Reasons, *see supra* p. 21, and even with the general procedures outlined in CCP's own Mason Declaration (Mason Decl. ¶ 10). The nonpublic details of the Commission's deliberations, including the details and timing of its voting, on a staff legal recommendation that was not adopted as a Commission decision are themselves subject to the deliberative-process privilege and, in any event, immaterial to the only question here — whether the June 2011 report is privileged and thus was properly withheld.

during [a closed Commission Executive Session] apparently caused [the Office of General Counsel] to reconsider." Commissioners' Statement of Reasons at 26.

And finally, CCP's attempt to manufacture a material factual dispute by contesting "elements" of the Kahn Declaration is misguided. (Opp'n at 22-23.) As described above, the two statements of reasons issued by the controlling group of Commissioners in the Crossroads enforcement matter *confirm* the material factual assertions in the Kahn Declaration, *i.e.* that the June 2011 report was withdrawn from Commission consideration, its reasoning was not adopted by the Commission, and the report contained FEC counsel's "legal theories." Indeed, as to the nature of the June 2011 report, CCP's own Mason Declaration confirms that it falls in a category of documents that reflect FEC counsel's legal recommendations to the Commission on how to proceed in an administrative enforcement matter.

"The Court may award summary judgment based solely on the information provided in affidavits or declarations if they: (1) describe the documents and justification for nondisclosure with reasonably specific detail; (2) demonstrate that the information withheld logically falls within the claimed exemption; and (3) are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 292 (D.D.C. 2007) (internal quotation marks omitted); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir.1981)); *see also Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (explaining that agency affidavits and declarations "are accorded a presumption of good faith"). "Once satisfied . . . that the information logically falls into the exemption claims, the courts need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982) (internal quotation marks omitted). The Kahn Declaration not

only is uncontroverted by either contrary evidence in the record or evidence of agency bad faith, it is corroborated by two separate Commissioner statements of reasons and even by CCP's own declaration of a former Commissioner.

CCP is correct that the Kahn Declaration also describes the legal determinations regarding applicable privileges that led the Commission's FOIA Service Center to deny CCP's underlying FOIA request. But CCP's disagreement about the applicability of those privileges does not create a material *factual* dispute nor does it preclude the Court from resolving that legal question now. As the Commission explained in its summary-judgment memorandum, in a case such as this in which a FOIA requester seeks to obtain records that were withheld in response to a FOIA request, the district court determines the matter de novo. (FEC Mem. at 10 (citing 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989)).) For all the reasons explained in this Reply and in the Commission's memorandum in support of its summary-judgment motion, the Court should affirm the Commission's privilege determinations and award summary-judgment in the Commission's favor.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Commission's Memorandum in Support of its Motion for Summary Judgment, the Court should grant the Commission's motion and award judgment in favor of the Commission.

Respectfully Submitted,

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