IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARK W. MILLER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 1:12-cv-00242-SJD Chief Judge Susan J. Dlott REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

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December 21, 2012

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I. INTRODUCTION

This case is moot. The only substantive claim properly before this Court is whether the Federal Election Commission ("Commission" or "FEC") responded to plaintiff Mark Miller's Freedom of Information Act ("FOIA") request, and it is undisputed that the Commission did so in April 2012. Indeed, in plaintiff's Opposition to the FEC's Motion for Summary Judgment ("Opp." (Doc. No. 11-1)), plaintiff concedes that the FEC responded to his FOIA request and that the Commission conducted an adequate and reasonable search for responsive records (Opp. at 9). Because plaintiff has proffered no evidence to prevent a finding of summary judgment for the Commission (*see* Plaintiff's Response to FEC's Proposed Undisputed Facts (Doc. No. 11-3)), there is no genuine dispute of material fact, and the Commission is entitled to summary judgment or dismissal for lack of subject matter jurisdiction.

Miller claims that summary judgment is inappropriate because he seeks attorneys' fees, and he faults the Commission for not addressing that issue in its opening brief (Opp. at 6). But plaintiff cannot prevail on the merits, and he has not yet filed a motion for fees under Fed. R. Civ. Proc. 54(d)(2), so there was no reason for the Commission to address that issue in its summary judgment motion. In any event, Miller is not entitled to fees because he has not "substantially prevailed": He has not obtained any favorable judgment and he cannot show that his suit has caused any voluntary change in the Commission's position regarding his FOIA request. To the contrary, the Commission has presented extensive and detailed evidence — which Miller has specifically declined to challenge — showing that the agency worked steadily to respond to the FOIA request from its initial receipt. The agency's staff searched for responsive materials, evaluated the fruits of that search, redacted privileged materials, and

provided documents *only nine days* after learning that this suit had been filed — a series of steps that were mostly completed before this lawsuit.

Plaintiff now argues for the first time in his opposition brief that the Commission's decisions to withhold certain material in 64 of the 77 responsive documents under FOIA Exemptions 3, 5, and 6 were incorrect. (Opp. at 9-24.) But plaintiff has failed to amend his complaint to reflect these claims and failed to exhaust his administrative remedies to give the agency an opportunity to reevaluate its decisions, so this Court has no jurisdiction to consider the claims. Even if the Commission's withholding decisions were properly before the Court, the agency has sustained its burden of showing that it properly withheld this material by providing a detailed *Vaughn* index and supporting declarations.

Because the Commission has responded fully to plaintiff's FOIA request and there is no basis to award attorneys' fees, the Court should grant summary judgment and dismiss this case.

II. THE FEC IS ENTITLED TO JUDGMENT BECAUSE THE ONLY SUBSTANTIVE CLAIM IN MILLER'S COMPLAINT IS MOOT AND THE AGENCY HAS RESPONDED FULLY TO HIS FOIA REQUEST

A. Miller's Complaint Is Moot and Should Be Dismissed

As the Commission explained in its Memorandum in Support of Motion for Summary Judgment ("FEC Mem.") (Doc. No. 8-1, at 7-8), "[o]nce the [agency] turned over everything in its possession related to plaintiff's FOIA request, the merits of plaintiff's claim for relief, in the form of production of information, became moot." *GMRI, Inc. v. EEOC*, 149 F.3d 449, 451 (6th Cir. 1998). *See Landers v. Dep't of the Air Force*, No. c-3-00-567 (S.D. Ohio Feb. 25, 2002) (Rice, C.J.) (slip opinion). Sixth Circuit law requires dismissal of FOIA suits once requestors have received the responsive, non-exempt documents, even if the response is late. "Mootness results when events occur during the pendency of a litigation which render the court unable to

grant the requested relief." *Constangy, Brooks & Smith v. NLRB*, 851 F.2d 839, 841 (6th Cir. 1988) (internal citation and quotation marks omitted). Miller's complaint seeks only a response to his FOIA request — it has never been amended to challenge the adequacy of the actual April 2012 response — so the Commission's production of responsive documents is an "event" that renders this case moot.

Miller asserts that "when a plaintiff seeks information under FOIA and associated attorney fees, courts retain equitable jurisdiction to adjudicate the fee claim after the defendant produces the requested information and thus renders the FOIA claim moot." (Opp. at 6 (citation omitted).) And it is true that "[t]he issue of fees and costs is ancillary to the underlying action and *survive[s] independently* under the court's equitable jurisdiction." *GMRI*, 149 F.3d at 451 (internal quotation marks omitted; emphasis added). But Miller puts the cart before the horse when he argues that the Commission's pending motion is incomplete because it does not affirmatively address his pro forma request for attorneys' fees in the last paragraph of the complaint. (*See* Complaint ¶ 44 (Doc. No. 1).) The Commission has moved for summary judgment on the merits of Miller's claim that the agency did not provide a response to his FOIA request. To prevail on that motion, the Commission is not required to demonstrate that Miller is *not* entitled to fees, so there is no merit to Miller's novel argument that the "FEC's motion is best characterized as a motion for partial summary judgment" (Opp. at 8). Once the Court rules on the pending motion, plaintiff may choose to file a separate motion for attorneys' fees under Fed. R. Civ. Proc. 54(d)(2) (if he prevails), but any such motion now would be premature.[1]

[1] Moreover, as we explain below, because the Commission's FOIA response was adequate and Miller cannot demonstrate that this lawsuit caused a change in the agency's handling of his request, he is not entitled to attorneys' fees.

Thus, at this juncture, the Court lacks jurisdiction over the merits of the case. "It is well established that the federal courts have no authority to rule where the case or controversy has been rendered moot." *Cornucopia Inst. v. USDA*, 560 F.3d 673, 676 (7th Cir. 2009) (dismissing FOIA claim as moot after agency provided responsive records while suit was pending); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992).

B. Plaintiff's New Claims Regarding the FEC's Withholding Decisions Are Not Properly Before This Court, and in Any Event, the Commission Properly Withheld Certain Information Under Applicable FOIA Exemptions

1. The operative complaint in this case contains no claim regarding the Commission's document withholding decisions

Plaintiff devotes the bulk of his opposition brief to new claims that the FEC improperly applied relevant FOIA exemptions to 64 responsive documents and failed to sustain its burden of justifying its decisions in its *Vaughn* index. Miller raises these objections for the first time in his Opposition; he has never sought to amend his complaint to challenge the withholding decisions about which he now complains. As a result, such claims are not properly before this Court, and plaintiff's arguments should be rejected for this reason alone. *See Guzman v. U.S. Dept. of Homeland Sec.*, 679 F.3d 425, 429-30 (6th Cir. 2012) (upholding a district court's refusal to consider a claim first raised in plaintiff's opposition to a motion to dismiss, noting that plaintiff did not include the claim in his complaint and had never moved for leave to amend the complaint under Fed. R. Civ. Proc 15(a)).

2. Plaintiff did not exhaust his administrative remedies before challenging the Commission's document withholding decisions

Miller's new claims regarding the Commission's withholding decisions are also not properly before the Court because Miller failed to exhaust his administrative remedies prior to challenging the agency's FOIA withholding decisions. "It goes without saying that exhaustion

of [administrative] remedies is required in FOIA cases." *Dettmann v. U.S. Dep't of Justice*, 802 F.2d 1472, 1476 (D.C. Cir. 1986).

> Exhaustion [in FOIA suits] is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Citizens for Responsibility and Ethics in Washington v. FEC, 839 F. Supp. 2d 17, 28 (D.D.C. 2011), *appeal docketed*, No. 12-5004 (D.C. Cir. Jan. 11, 2012). Further, "[p]roviding the FEC the opportunity to review [Miller's] objections through the administrative appeals process would among other things allow the agency time to correct any errors alleged by [Miller], and create a full record for the Court to review should [Miller] seek additional review of the FEC's decision. Requiring exhaustion in this case will only further the ends of justice." *Id*.

Although Miller filed an administrative appeal of the agency's failure to provide responsive materials (FEC's FRCP 56 (c) Statement of Undisputed Material Facts ("FEC Facts") ¶¶ 26, 38 (Doc. No. 8-2)), he has never appealed the specific withholding decisions. Upon receipt of the FEC's FOIA response, Miller could easily have followed the Commission's FOIA appeal procedures under 11 C.F.R. § 4.8 and also requested a stay of proceedings in this suit. Because he did not, the Commission has been deprived of "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 (D.C. Cir. 1990)). *See id.* at 1259-60 (holding that FOIA requester failed to exhaust administrative remedies, even though he had brought an administrative appeal, because the appeal was filed *before* the FBI had completed action on the FOIA request).

3. Even if the FOIA withholding decisions were properly before this Court, the Commission has amply justified those decisions

Even if Miller had exhausted his administrative remedies and properly included a challenge to the Commission's withholding decisions in his Complaint – which he has not — the Commission has shown that its decisions were proper. (FEC Mem. at 14-19.)

Miller's challenge to the FEC's invocation of FOIA exemptions centers on alleged deficiencies in the five staff affidavits and the detailed *Vaughn* index that the FEC submitted in support of its motion for summary judgment. Plaintiff asserts the "Court must evaluate and determine the propriety of the claimed exemptions by . . . consider[ing] not only the law and the narrow scope of the exemptions themselves, but also the sufficiency of the FEC's *Vaughn* index and the ability and effort by the FEC to segregate exempt from non-exempt information." (Opp. at 11.)[2] The Commission's *Vaughn* index and the affidavits are entitled to a presumption of good faith, and Miller does not suggest to the contrary. (FEC Mem. at 11-12.) Moreover, plaintiff's repeated insistence (Opp. at 11-14) on greater detail in the declarations and the *Vaughn* index, which carefully describes each document withheld as well as the basis for withholding, would undermine the very FOIA exemptions that the agency has invoked. (*See* FEC's *Vaughn* Index (Doc. No. 8-8).) Nor is there any deficiency in the supporting affidavits. FEC attorney William Buckley clearly explained in his declaration why the FOIA Exemptions at issue applied to the information the Commission redacted. (Declaration of William Buckley ("Buckley Decl.") ¶¶ 33-34 (Doc. No. 8-3).) The Commission has fully and adequately

[2] Because Miller does not know the contents of the withheld material, his proposal for an "oral argument wherein the sufficiency *vel non* of the descriptions of the [sic] each and every withheld records [sic] could be addressed" would not aid the Court. (Opp. at 14 n.8.) Plaintiff can offer little more than speculation about the precise nature of the redacted material.

sustained its burden, 5 U.S.C. § 552(a)(4)(B), of justifying its actions in responding to plaintiff's FOIA request.

Of course, the main purpose of these materials is to assist the Court, which has the task of ensuring that the Commission's decisions to withhold material were statutorily authorized. In doing so, the Court "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld," 5 U.S.C. § 552(a)(4)(B), and as a precaution, the Commission has already voluntarily submitted the withheld material to the Court. Reviewing the documents *in camera* may well provide the most efficient way to assess the FEC's invocation of FOIA exemptions, as well as minimize the risk of breaching important confidentiality interests, especially 2 U.S.C. § 437g(a)(12), when discussing the rationale behind the treatment of a particular document in the supporting affidavits. Although *in camera* inspections should be used "sparingly," *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 544 (6th Cir. 2001), such a review of the 64 documents at issue in this matter would be limited in scope. And even if this Court should deem the Commission's affidavits or *Vaughn* index deficient in some way and deem it premature to conduct an *in camera* inspection, the proper recourse would not be denial of the Commission's motion for summary judgment, but an order requiring the Commission to provide additional explanation. *See Campaign for Responsible Transplantation v. FDA*, 511 F.3d 187, 196 (D.C. Cir. 2007).

a. The Commission properly invoked FOIA Exemption 3

The Commission demonstrated in its opening brief (FEC Mem. at 15-17) that 2 U.S.C. § 437g(a)(12) constitutes precisely the sort of withholding statute that supports the invocation of FOIA Exemption 3, namely one that either (a) "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue"; or (b) "establishes particular

criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A). Thus, the Commission properly withheld some or all of 35 records responsive to plaintiff's FOIA request because of the confidentiality requirements of § 437g(a)(12).[3] But plaintiff now argues that the scope of this section is so limited that only a "notification" of the filing of an administrative complaint and the subsequent "investigation" — which can only begin following a Commission finding that there is "reason to believe" the law has been violated, 2 U.S.C. § 437g(a)(2) — are protected. (Opp. at 18-19.)

Plaintiff's unduly narrow interpretation of § 437g(a)(12) is not only based on a fundamental misunderstanding of the confidentiality provision but is contrary to established precedent. The D.C. Circuit has rejected a narrow interpretation of section 437g(a)(12) and made clear that the Commission cannot unilaterally disclose information that would reveal the existence of an administrative complaint or a pending investigation. In *In re Sealed Case,* 237 F.3d 657 (D.C. Cir. 2001), the Commission brought an action to enforce a subpoena issued to a third party during the course of an administrative investigation, and that action was supported by a number of exhibits placed on the court's public docket.

> Among the exhibits, the FEC included a copy of the complaint that prompted the investigation, an FEC prepared "Factual and Legal Analysis" detailing Appellants' alleged FECA violations, an FEC certification finding "reason to believe" that Appellants had violated FECA, and information referencing a separate FEC investigation that had no bearing on the subpoena enforcement action or the investigation of Appellants.

Id. at 662. Another party then moved to place the entire matter under seal, which the lower court denied. On appeal the D.C. Circuit held that "both 2 U.S.C. § 437g(a)(12)(A) and [the

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[3] Section 437g(a)(12) provides that "[a]ny notification or investigation made under this section *shall not be made public* by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." (Emphasis added.)

implementing regulation at] 11 C.F.R. § 111.21(a) plainly prohibit the FEC from disclosing information concerning ongoing investigations under any circumstances without the written consent of the subject of the investigation." *Id.* at 666-67. "In other words, the Commission shall not make public an ongoing investigation or its findings concerning such an investigation without written consent." *Id.* at 667. *See also AFL-CIO v. FEC*, 333 F.3d 168, 174, 178 (D.C. Cir. 2003) (explaining importance of confidentiality of enforcement materials in matters that never proceed past the "reason to believe" stage).

Although *In re Sealed Case* speaks in terms of keeping "an investigation" confidential, the ruling clearly applies to pre-"investigation" materials, such as the original administrative complaint; materials submitted in response to that complaint by administrative respondents under 2 U.S.C. § 437g(a)(1), which may well include sensitive "strategic information," *AFL-CIO*, 333 F.3d at 178; and the "FEC prepared 'Factual and Legal Analysis,'" *In re Sealed Case*, 237 F.3d at 662. This last document sets forth the factual and legal basis for the agency's reason to believe finding and is transmitted to a respondent along with the notification that the Commission has found reason to believe that the respondent has violated or is about to violate FECA. 2 U.S.C. § 437g(a)(2) ("Such notification shall set forth the factual basis for such alleged violation.").

Thus, contrary to plaintiff's claim that § 437g(a)(12) is limited to "notifications" and "investigations," the D.C. Circuit has held that the confidentiality provision applies far more broadly. Plaintiff appears to seek the release of virtually all pre-"reason to believe" material in the ongoing enforcement matter implicated by the advisory opinion request at issue here. But as the D.C. Circuit recognized, "[t]he plain language of these provisions [2 U.S.C. § 437g(a)(12) and 11 C.F.R. § 111.21(a)] and the overall purpose and structure of the statutory scheme create a

strong confidentiality interest analogous to that protected by Federal Rule of Criminal Procedure 6(e)(6). In both contexts, secrecy is vital to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation." *In re Sealed Case*, 237 F.3d at 667 (citation and internal quotations omitted).[4] Thus, contrary to plaintiff's claim (Opp. at 19), Paragraph 33 of FEC attorney Buckley's affidavit did not attempt to expand FECA's confidentiality provision but simply provided the respondent in an enforcement Matter Under Review ("MUR") to which Buckley referred the secrecy guaranteed by the statute.

FEC personnel were likewise required to protect the confidentiality of anyone involved in the pending enforcement matter both in making withholding decisions under FOIA Exemption 3 and in the descriptions of documents contained in the *Vaughn* index. For example, a Memorandum to File by FEC attorney Cheryl Hemsley (FEC 0002-0003) was withheld from production pursuant to Exemption 3 because it contains a reference to a specific MUR; as is true with grand jury proceedings, FEC staff are constrained not to reveal even the existence of specific enforcement matters. Another example is the cover letter for the response submitted in a specific MUR (FEC 0023-0024). The entire letter and fax cover sheet were properly withheld under Exemption 3, and the *Vaughn* index does not identify the matter or any individual.

In sum, the Commission properly refused to breach FECA's confidentiality requirements regarding ongoing enforcement matters, and the Commission's interpretation of its own statute and regulations is entitled to deference. *FEC v. Democratic Senatorial Campaign Comm.*, 454

[4] As Miller acknowledges (Opp. at 19-20), 11 C.F.R. § 111.21(a) requires in part that "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 …."

U.S. 27, 37 (1981); *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999); *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988).

b. The Commission properly invoked FOIA Exemption 5

As the Commission explained, the agency properly invoked FOIA Exemption 5 in withholding records subject to the attorney work-product doctrine and the deliberative process privilege. (FEC Mem. at 17-19.) Plaintiff's objection to the Commission's reliance on the work product doctrine as the basis for FOIA Exemption 5 boils down to the convoluted claim that "in order to justify the putative availability of the work product doctrine, the FEC attempts to elevate the potential of litigation regarding the unidentified or nebulous 'confidential enforcement matter' and then to bootstrap that enforcement matter onto most of the work relating to AOR 2011-20." (Opp. at 22.) But as explained in the previous section, FECA's confidentiality provision requires maintaining the confidentiality of the existence of an enforcement matter, and here such a matter would have been affected by AOR 2011-20. Commission staff cannot publicly identify such a matter in light of the grand jury-like confidentiality requirements imposed by 2 U.S.C. § 437g(a)(12).

In any case, the information the Commission withheld is subject to the work-product doctrine because FECA's enforcement scheme is designed to and often does result in litigation. Offensive enforcement actions pursuant to 2 U.S.C. § 437g(a)(6)(A) must be filed in federal district court; the Commission may not unilaterally impose civil penalties for FECA violations. Even when the Commission dismisses administrative complaints, litigation can occur pursuant to 2 U.S.C. § 437g(a)(8), which permits an administrative complainant with standing to challenge the dismissal in court if he or she believes it is contrary to law. As a result, FEC attorneys must work on administrative enforcement matters while anticipating district court litigation, although

they may not know precisely where the litigation path will lead. Thus, these enforcement documents often contain "files and mental impressions of an attorney," *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947), that are prepared with "an eye toward litigation," *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146 (2d Cir. 1994). The FEC Policy Division attorneys recognized that AOR 2011-20 would affect a pending enforcement action, and so their "mental impressions" reflected an awareness that the MUR could lead to litigation. And FEC advisory opinion responses may themselves lead to litigation. *See, e.g.*, *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010).

The information withheld in response to plaintiff's FOIA request illustrates these principles. For example:

- FEC 0019-0022, withheld from production, consists of a copy of the October 7, 2011 letter of Phil Greenberg requesting the initiation of what became AOR 2011-20, with extensive handwritten comments and notes in the margin by FEC attorney Hemsley. Those notes specifically refer to the open enforcement matter and clearly reflect the mental impressions of an attorney. The initial advisory opinion request is already part of the public record, and this copy of the document with non-segregable attorney notes was properly withheld under the work-product doctrine.

- FEC 0105-0108, also withheld from production, is an email string among four FEC attorneys discussing the impact of the pending enforcement matter upon the question of closing AOR 2011-20 and referring to a similar situation involving another AO request affected by another MUR. This discussion also involved concerns about publicly identifying the enforcement matter by its specific MUR number. Although the discussion does not specifically reference anticipated litigation, it reflects consideration of the future consequences of the FEC attorneys' actions upon AO requests and enforcement matters that can lead to litigation. So the attorney work-product doctrine applies and invocation of Exemption 5 was proper.

The Commission also properly withheld material under the deliberative process privilege. Plaintiff argues that the Commission has not shown that harm would result from the release of the material the agency withheld. (Opp. at 24.) But, in fact, the Commission's evidence did

show that disclosure of this pre-decisional, deliberative material "would expose [the] agency's decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." *Schell v. Dep't of Health and Human Servs.*, 843 F.2d 933, 940 (6th Cir. 1988). Specifically, the materials withheld were candid communications among Commission attorneys reflecting the "give-and-take of the consultative process," *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (citation omitted), regarding decisions involved in handling the pending advisory opinion request. (*See* Buckley Decl. ¶ 34.) If confidential deliberative communications like these were to be publicly disclosed, it would impair the ability of federal agencies to make decisions on matters of national importance.[5]

c. The Commission properly invoked FOIA Exemption 6

Plaintiff takes issue (Opp. at 10 n.6) with the Commission's redaction of four personal e-mail addresses and three individual phone numbers under FOIA Exemption 6 and the Privacy Act, 5 U.S.C. § 552a(b), suggesting that the Commission's decision not to discuss these redactions in detail precludes summary judgment on the issue. But section 552a(b) of the Privacy Act plainly limits the release of certain personal information without that person's written consent, and the Commission fully explained its decisions in its opening memorandum. (*See* FEC Mem. at 15 n.5.) If necessary, this Court can make an *in camera* review of the

[5] *Schell* indicates that the deliberative process privilege applies broadly to communications among staff at different levels. That decision applied the privilege to protect a memorandum written by administrative law judges that was sent "to their superiors at several levels in the organization," 843 F.2d at 940, noting that "a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the other direction is more likely to contain instructions to staff explaining the reasons for a decision already made," *id*. at 942 (citation omitted). In general, "[d]iscussions among agency personnel about the relative merits of various positions which might be adopted . . . are as much a part of the deliberative process as the actual recommendations and advice which are agreed upon." *Id*. (citation omitted).

relevant documents to verify that personal identifying information has been redacted. This information is clearly protected from disclosure, and in any event, plaintiff has articulated no need for it.

C. Because Plaintiff Has Not "Substantially Prevailed" on His FOIA Claim, He Is Not Entitled to Attorneys' Fees

Even if Miller's request for attorneys' fees were properly before the Court at this time, which it is not, he would not be entitled to any award of fees.

As Miller notes (Opp. at 7), courts may assess reasonable attorneys' fees against federal agencies only if the FOIA plaintiff has "substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). Under the FOIA attorneys' fee provision, as significantly modified by the OPEN Government Act of 2007, Public L. No. 110-175, § 4, 121 Stat. 2524 (2007), a plaintiff is deemed to have substantially prevailed if he "has obtained relief though either — (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii).

Plaintiff cannot meet his burden of showing that he has "substantially prevailed" in this action. First, Miller has not obtained any relief through any "judicial order, or an enforceable written agreement or consent decree." To meet the second standard, plaintiff's lawsuit must have *caused* the Commission to take some affirmative action to change its position, but Miller has not made, and cannot make, that showing. As the Commission's comprehensive undisputed evidence shows, the agency has *never* changed its position about how it would handle plaintiff's FOIA request. In fact, the Commission consistently and deliberately proceeded to respond to the FOIA request, which it did in April 2012. Rather than offer any evidence of a voluntary change, Miller only speculates that "without the initiation of this [cause of] action the FEC would have

continued to refuse to acknowledge or respond to Mr. Miller's request for these public documents from the FEC." (Opp. at 8.) This unsupported argument is woefully inadequate to establish that Mr. Miller is a prevailing party. Plaintiff simply asserts, without providing any evidence, that the initiation of this lawsuit caused "a voluntary or unilateral change in [the] position by the agency." 5 U.S.C. § 552(a)(4)(E)(ii).

The undisputed facts demonstrate otherwise. As the Commission's opening memorandum details, the evidence shows that Commission staff had been working to respond to Miller's FOIA request for months *before* they learned on April 9 that plaintiff had filed this suit. (FEC Mem. at 2-5.) Between receipt of the FOIA request in an e-mail on December 5, 2011, and the filing of the lawsuit, the FEC had taken multiple steps to process and respond to Mr. Miller's request, including gathering and reviewing responsive documents, submitting a draft response to higher management for review, and determining which FOIA exemptions, if any, were relevant. (*See* FEC Facts ¶¶ 9, 20, 21, 23, 24, 32-35.) By April 2, 2012, the FOIA Public Liaison officer had forwarded the close-to-final draft FOIA response to the Chief FOIA officer, Greg Baker, for his review and approval (FEC Facts ¶ 35). Miller had filed this case about a week earlier on March 26, but Commission staff did not learn that he had done so until April 9, a week *after* Mr. Baker had received the draft response for his final approval and just nine days before the FEC provided materials in response to Miller's FOIA request on April 18. (FEC Facts ¶¶ 36-37.) The record thus provides no support for Miller's request for attorneys' fees.

Moreover, because Miller's newly raised objections to the Commission's specific withholding decisions are not properly before this Court and lack merit, those objections cannot separately justify an award of fees. The D.C. Circuit has stated that "if the government was 'correct as a matter of law' to refuse a FOIA request, 'that will be dispositive.'. . . Plaintiffs who

sue to force disclosure in such circumstances are not entitled to attorney fees." *Brayton v. Office of the United States Trade Representative*, 641 F.3d 521, 528 (D.C. Cir. 2011) (citations omitted). Because the Commission is entitled to summary judgment, Miller cannot justify a fee award:

> It is undeniable that considering the merits of an agency's nondisclosure decision will frequently complicate the adjudication of motions for attorneys fees. But on the other side of the ledger is the concern that courts should not dole out fee awards to plaintiffs who bring FOIA lawsuits that cannot survive a motion for summary judgment. We resolved this tension long ago when we stated that "there can be no doubt that a party is not entitled to fees if the Government's legal basis for withholding requested records is correct."

Id. at 528 (citation omitted). In this case, the Commission was "correct as a matter of law" to withhold from Miller those documents that were exempt from production. Consequently, Miller is not a prevailing party, and he is not entitled to recover attorneys' fees under FOIA.

CONCLUSION

Because plaintiff's complaint seeks only that the Commission respond to his FOIA request, and the Commission has fully responded, the Court should dismiss the complaint as moot. Although the propriety of the FEC's decisions to withhold certain information pursuant to FOIA exemptions is not properly before this Court, those exemptions were properly invoked. And because plaintiff cannot prevail in this matter, his request for attorneys' fees should not be granted. Therefore, this Court should grant the Commission's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Benjamin A. Streeter III hereby certifies that on December 21, 2012, he filed the foregoing Defendant Federal Election Commission's Reply Memorandum in Support of Its Motion for Summary Judgment with the Clerk of the United States District Court for the Southern District of Ohio via the electronic filing system, which served a copy of this filing on that date to the following counsel of record:

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