

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL OR-  
GANIZATIONS and DNC SERVICES  
CORPORATION/DEMOCRATIC NA-  
TIONAL COMMITTEE,**

*Plaintiffs,*

v.

**FEDERAL ELECTION COMMISSION,**

*Defendant.*

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**No. CA-01-1522-GK**

**BRIEF AMICUS CURIAE OF THE JAMES MADISON CENTER  
FOR FREE SPEECH IN SUPPORT OF PLAINTIFFS**

**INTEREST OF AMICUS CURIAE**

**THE JAMES MADISON CENTER FOR FREE SPEECH**, (hereinafter “Madison Center”) is an internal educational fund of the James Madison Center, Inc., a District of Columbia non-profit corporation. The mission of the Madison Center is to support litigation and public education activities in order to defend the rights of political expression and association by citizens and citizen groups as guaranteed by the First Amendment of the United States Constitution. The purposes of the Madison Center, therefore, are to promote, through educational activities, respect for the rights of freedom of speech and freedom of association guaranteed by the First Amendment to the United States Constitution, and to defend the rights of freedom of

speech and freedom of association by providing legal representation to those persons and entities whose rights are threatened by government action. More on the Madison Center can be found at its web-site [www.jamesmadisoncenter.org](http://www.jamesmadisoncenter.org).

The Madison Center has supported First Amendment litigation on behalf of citizens and citizens's groups in order to challenge state and federal election laws and regulations that suppress their free speech and free association rights. Those cases are listed on the Madison Center web-site described above. While generally representing conservative groups, the Madison Center is dedicated to preserving the rights of free speech and association for all United States citizens. In addition, General Counsel for the Madison Center, James Bopp, Jr., has represented numerous organizations in FEC investigations and cases, most notably, The Christian Coalition in *FEC v. The Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). The full panoply of cases Mr. Bopp and his firm have litigated can be found in his resume which is also posted on the Madison Center web-site.

The Madison Center believes that the Federal Election Commission (hereinafter "FEC"), by placing information obtained during a confidential FEC investigation in the public domain through both its affirmative copying of documents for public viewing in its "public room" and release of information in response to FOIA requests, is violating the First Amendment rights of free speech and association of the numerous organizations and individuals whom it investigates. FEC investigations, by their nature, intrude into matters at the heart of the First Amendment. The investigations require the organizations and individuals investigated to divulge to the government confidential information which reveals their political strategy to political opponents.

This information may include everything from the strategy employed to lobby congress to pass legislation to information on how to persuade constituents to make donations to the organization. The knowledge that this information will be made public in the event of an FEC investigation may very well chill the right of association since people will be reluctant to share information that will be made public. Thus, the FEC's "automatic release" of investigatory information encourages political opponents to file charges against their competitors to serve the dual purpose of "chilling" the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant's advantage. In short, the FEC's "automatic release" of investigatory information without justification is an affront to the fundamental rights of free speech and free association secured by the First Amendment to the United States Constitution.

As evidenced by a memo from Lois Lerner regarding "processing closed cases for the public record," dated July 5, 2001, this affront is compounded by the fact that the FEC releases this information in an inconsistent and arbitrary manner. That memo, which is attached hereto as *Exhibit A*, states that "because of changed circumstances, particularly computerization, and lack of demand, several of the procedures established in Directive 48 are no longer followed." *See Id.* p.4, n.3. That memo also confirms that since the commission doesn't write "opinions" that the FEC releases documents which "provide a the reader with a clear view" as to what would normally be contained in an opinion. *Id.* at p.2. FOIA does not require an agency to create records and doesn't require an agency to substitute the documents contained in a confidential investigatory file for a final opinion. As stated above, the "automatic release" *without justification* of confidential documents violates the First Amendment. Thus, the Madison Center seeks to

advance its interests by addressing the issues in this case.

### **SUMMARY OF THE ARGUMENT**

The American Federation of Labor and Congress of Industrial Organizations (hereinafter “AFL-CIO”) and the DNC Services Corporation/Democratic National Committee (hereinafter “DNC”) have asked this court to permanently enjoin the FEC from disclosing confidential information that it obtained during an investigation which was closed in July 2000. This Court granted Plaintiffs’ motion for a temporary restraining order and Plaintiffs are now asking that the Court make that ruling permanent in their motion for summary judgment.

This memorandum argues that the disclosure of that information is a violation of the Federal Election Campaign Act (“FECA”), the Freedom of Information Act (“FOIA”), and the First Amendment to the United States Constitution. Specifically, FECA provides that all investigations will be confidential and only allows for the disclosure of specific information after the conclusion of an investigation. Further, FOIA Exemption 3 does not allow the release of information that is protected from disclosure by another statute.

Finally, the FEC’s violation of these two statutes is an intolerable infringement of the First Amendment rights of Plaintiffs and others who have been or will be subject to the FEC’s investigation and subsequent disclosure of confidential information. Federal courts have long recognized that a government investigation is a “chill” on free speech and association. That chill, while allowed to the extent that an agency investigation does not exceed its statutory authority, becomes an unconstitutional violation of a party’s First Amendment rights when confidential materials disclosed during an otherwise lawful investigation are made public without

substantial justification when that investigation is complete.

The Madison Center recognizes that the fruits of an investigation can be made public in certain circumstances. Specifically, the fruits of an FEC investigation may be used in an enforcement action or to defend an action by a complainant who sues the Commission, pursuant to 2 U.S.C. § 437g(a)(8)(A), for failure to act. In these situations, the limited disclosure of information obtained during an investigation is justified to punish violations of FECA or show that the FEC has acted according to law in its decision not to pursue further action. It should be noted, however, that the disclosure of information in these situations is subject to the protections of the rules of civil procedure, evidence, and protective orders issued by the court. The information is not, as is the case with the FEC's "automatic release" policy, simply thrust into the public domain because the FEC has the information available.

Further, the limited disclosure under FECA, the release of conciliation agreements and findings of no reason to believe and the basis therefore, is justified because the release of findings and the basis therefore provides information to complainants so that they can decide whether to pursue an action under 2 U.S.C. § 437g(a)(8)(A). Those same documents also provide the public with guidance as to whether their actions are prohibited under FECA and allow public scrutiny as to whether the FEC is doing its job. Similarly, the limited release of documents under FOIA allows public scrutiny as to what the FEC is doing. Thus, the limited release of information under FECA has been narrowly tailored to serve the justifications for its release. FOIA, in turn, contains provisions prescribing how information is released, including exemptions protecting information that Congress has deemed confidential. The FEC's "auto-

matic release,” without justification, of investigatory information upon the closure of the investigation ignores these safeguards and tramples on the First Amendment Rights of the numerous organizations and individuals whom it investigates each year.

## ARGUMENT

### I. FECA, On Its Face, Prohibits the Release of Information Obtained During an Investigation.

“The FEC is authorized to investigate potential violations of the Federal Election Campaign Act [(“FECA”).]” *In re: Sealed Case 00-5116*, 237 F.3d 657, 665 (D.C. Cir. 2001).

While the FEC has broad powers to investigate alleged violations, its investigations are subject to the confidentiality provision in 2 U.S.C. § 437g(a)(12)(A), which provides as follows:

Any 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.

The FEC regulations, in turn, provide 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 with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.

11 C.F.R. § 111.21(a).

This Circuit has previously held “that both 2 U.S.C. § 437g(a)(12)(A) and 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.” *In*

*Re: Sealed Case 00-5116*, 237 F.3d at 666-7. In that case, this Circuit stated that “the statute and regulation at issue are unambiguous and directly address the issue presented in this case. Their plain meaning therefore controls our decision.” *Id.* at 667. Although *In re: Sealed Case 00-5116* was decided in the context of an “on-going” investigation, there is nothing in either the statute or the regulations that would dictate a different result in the case of a closed file.

However, if an investigation results in a conciliation agreement or if the Commission determines that a person has not violated FECA, 2 U.S.C. § 437g(a)(4)(b)(ii) provides that the Commission “shall make public any conciliation agreement” or its determination that the act was not violated. The corresponding FEC regulation provides:

If the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent.

11 C.F.R. § 111.20(a).

The FEC has interpreted the above statute and regulation to allow it to disclose the contents of closed investigatory files. Still, these narrow exceptions do not give the FEC the authority to disclose the contents of an otherwise confidential investigatory file and, as in *In Re: Sealed Case 00-5116*, “the statute and regulation are unambiguous and directly address the issue presented in this case.” *Id.* 237 F.3d at 667. Thus, while “[t]he agency’s interpretation [] will prevail unless it is plainly erroneous or inconsistent with the plain terms of the disputed regulation,” *id.* (internal quotation marks omitted), the FEC’s interpretation of the above statute and regulation are inconsistent with the plain terms. Therefore, the FEC’s interpretation is not

entitled to the substantial deference normally accorded an agency's interpretation of its own regulations. Since neither FECA nor the FEC regulations provide for the "automatic release," without justification, of investigatory information contained in closed files, the Court should permanently enjoin the FEC from disclosing such information.

## **II. FOIA Prohibits the Release of Information That is Protected from Disclosure by Statute.**

Although FECA does not allow the distribution of information contained in closed investigatory files, the FEC claims that it is required to release that information under the Freedom of Information Act ("FOIA"). *See Exhibit A*, p. 2 and FEC *memorandum*, date July 5, 2001, regarding "Closed MURs 4291 et al: disclosure of documents" p. 4, attached hereto as *Exhibit B*. Specifically, the FEC relies on 5 U.S.C. § 552(a)(2) which provides:

Each agency, in accordance with published rules, shall make available for public inspection and copying—

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- (C) administrative staff manuals and instructions to staff that affect a member of the public;
- (D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
- (E) a general index of the records referred to under subparagraph (D). . . .

The FEC regulation purporting to implement 5 U.S.C. § 552(a)(2) provides:

- (a) In accordance with 5 U.S.C. § 552(a)(2), the Commission shall make the

following materials available for public inspection and copying: . . .

(3) Opinions of Commissioners rendered in enforcement cases, General Counsel’s Reports and non-exempt 2 U.S.C. 437g investigatory materials shall be placed on the public record of the Agency no later than 30 days from the date on which all respondents are notified that the Commission has voted to close such an enforcement file.

11 C.F.R. § 4.4. As Plaintiffs have demonstrated in their brief, nothing in 5 U.S.C. § 552(a)(2) provides for the “automatic release” of confidential investigatory materials. *Plaintiffs’ Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction*, pp. 30-32.

Further, 5 U.S.C. § 552(b) provides, in relevant part, as follows:

This section does not apply to matters that are— . . .

(3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (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; . . . .

FOIA exemptions are to be narrowly construed in accordance with the purpose of disclosure. *Nix v. United States*, 572 F.2d 998, 1002 (4th Cir. 1978). Materials obtained from private parties and in possession of federal agency may be agency records within meaning of 5 U.S.C. § 552. *Weisberg v. U.S. Dept. of Justice*, 631 F.2d 824, 827 (DC Cir. 1980). 5 U.S.C. § 552(b)(3) was not intended to be triggered by every statute which in any way gave administrators discretion to withhold documents from the public; rather § 552(b)(3) was intended to prohibit disclosure pursuant to a legislative determination and not at agency discretion. *Irons & Sears v.*

*Dann*, 606 F.2d 1215, 1220 (D.C. Cir 1979). “Only explicit non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.” *Id.* For application of Exemption 3 (5 U.S.C. § 552(b)(3)), the court “need only determine the existence of a relevant statute, no matter how unwise, self-protective, or inadvertent it may be, and the inclusion of the withheld material within the statute’s coverage.” *Medoff v. CIA*, 464 F. Supp. 158, 162 (D. N.J. 1978) (internal quotations and citation omitted). Documents are exempt under 5 U.S.C. § 552(b)(3) if there is no material dispute as to existence of exemption confidentiality statute, nor any material dispute that matters withheld under exemption are within ambit of statute. *Fonda v. CIA*, 434 F. Supp. 498, 504 (D.D.C. 1977).

The FEC claims that the FOIA exemptions, mirrored in 11 C.F.R. § 4.5(a), are trumped by its discretion to release exempt information “if it determines that it is in the public interest and that rights of third parties will not be prejudiced.” 11 C.F.R. § 4.6. Although a finding of an exemption from mandatory disclosure generally requires subsequent consideration by the reviewing agency of the public interest in releasing information, such consideration is not permitted where, as in the application of Exemption 3, non-disclosure is required by statute, since to allow such discretion in the face of a statutory exemption would allow the agency to usurp a congressional decision that certain information is confidential and non-disclosable.

Thus, Exemption 3 requires that an agency withhold information that is required by statute to be confidential as long as it meets 1 of the 2 specified criteria. 2 U.S.C. § 437g(a)(12)(A) is such a statute. 2 U.S.C. § 437g(a)(12)(A) “requires that matters be withheld

from the public in such a manner as to leave no discretion on the issue.” *See* 5 U.S.C. § 552(b)(3)(A). Further, 2 U.S.C. 437g(a)(4)(b)(ii) which provides that the Commission “shall make public any conciliation agreement” or its determination that the act was not violated, does not allow the agency discretion as to what materials may be released but, rather, “establishes particular criteria for withholding” by establishing which types of documents may be released. *See* 5 U.S.C. § 552(b)(3)(B). Thus, the FEC’s “automatic release” of confidential investigatory information violates a clear prohibition of both FECA and FOIA. Therefore, the FEC should be permanently enjoined from disclosing confidential information obtained during the investigatory process.

**III. If a Government Investigation is a “Chill” on First Amendment Rights, the Public Disclosure of Information Obtained During that Investigation is an Intolerable Abridgment of a Person or Entities’ First Amendment Rights.**

As shown above, the unambiguous language of the statutes and regulations at issue in this case prevent the disclosure of the information compiled as a result of the FEC’s “confidential” investigation of a party. Further, regardless of whether those statutes allow the dissemination of the contents of the FEC’s investigatory file, the First Amendment requires that those documents continue to be kept confidential after the investigation is closed. Thus, the First Amendment requires that the FEC be enjoined from continuing the “automatic release,” without justification, of investigatory information.

“Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). “This right was enshrined in the First Amendment of the Bill of Rights. Exercise of

these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.” *Id.* at 250-51. “Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters.” *Id.* at 250.

Here, the FEC has “interfered in these matters” by requiring the disclosure of confidential information during its investigation. That is true even though the FEC ultimately decided to close the investigation and take no further action, except, of course, the disclosure of the confidential information gleaned during the investigation. That the investigation itself “chills” First Amendment expression is shown in the following:

The investigation by the HUD officials unquestionably chilled the plaintiffs’ exercise of their First Amendment Rights. It is true that the agency did not ban or seize the plaintiffs’ materials, and officials in Washington ultimately decided not to pursue either criminal or civil sanctions against them. But in the First Amendment context, courts must “look through forms to the substance” of government conduct. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 [] (1963). Informal measures, such as “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,” can violate the First Amendment also. *Id.* n.8. This court has held that government officials violate this provision when their acts “would chill or silence a person of ordinary firmness from future First Amendment activities.”

*White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000).

Thus, although the FEC may conduct proper investigations that do not exceed its statutory authority, it must recognize that certain of its actions may “chill” the First Amendment activities of the citizens it investigates and circumscribe its conduct accordingly. The FEC alone, of all government agencies, is in the particular position of being charged with enforcing laws that

by their nature infringe on First Amendment Activity. *See FEC v. Machinists Non-Partisan Political League*, 655 F. 2d 380, 387 (D.C. Cir. 1981) (“The subject matter which the FEC oversees [] relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.”). “The creation of such an agency raised weighty constitutional objections, and its authority to exercise control over an area where ‘uninhibited, robust, and wide open’ activity is constitutionally protected was approved by the Supreme Court only after being meticulously scrutinized and substantially restricted.” *Id.*

“[T]he subject matter of these materials represents the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and office holding.” *Id.* at 388. In this case, as in virtually all cases the FEC investigates, the FEC demands all available material concerning a groups internal communications regarding its political activities. *See id.* Thus, the government becomes privy to knowledge concerning which of its citizens is doing what politically. “This information is of a fundamentally different constitutional character from the commercial or financial data which forms the bread and butter of SEC or FTC investigations, since *release of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.*” *Id.* (emphasis added). Thus, investigations and the release of information obtained thereby should be carefully circumscribed.

“Current first amendment jurisprudence makes clear that before a state or federal body can compel disclosure of information which would trespass upon first amendment freedoms, a ‘subordinating interest of the State’ must be proffered, and it must be compelling.” *Id.* at 389.

“The Supreme Court has warned that

It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas. . . .

*Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957)). Here, the FEC has already used its power to obtain confidential information about the AFL-CIO and the DNC and now wants to place the information so obtained in the public domain. Since the U.S. Supreme Court has recognized that an investigation itself is an infringement on First Amendment rights in that it “chills” expressive behavior, it is not difficult to see how much more “chilling” the “automatic release,” without justification, of information obtained during an investigation would be.

“Governmental action may be subject to constitutional challenge even though it only has an indirect effect on the exercise of First Amendment rights.” *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972). “The fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of first amendment rights as imprisonment, fines, injunctions, or taxes.” *American Communications Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950). “It is axiomatic that when the actions of government officials so directly affect citizens’ First Amendment rights, the officials have a duty to take the least intrusive measures necessary to perform their assigned functions.” *White*, 227 F. 3d at 1237. “In making their First Amendment claim, Plaintiffs were obligated to prove only that the officials’ actions would have chilled or silenced ‘a person of ordinary firmness from future First Amend-

ment activities,” not that their speech and petitioning were ‘actually inhibited or suppressed.’” *Id.* at 1241 (quoting *Mendocina Environmental Ctr.*, 192 F. 3d at 1300).

Thus, the question before this Court is whether “the [FEC’s] actions [in releasing confidential investigative files] would [] chill[] or silence[] a person of ordinary firmness from future First Amendment activities.” The Supreme Court has already held that an investigation itself can “chill” First Amendment activities. *See Sweezy*, 354 U.S. 234. However, it permits the FEC and other government organizations to investigate as long as their investigation does not overstep constitutional boundaries or infringe on constitutional rights no more than necessary to address a compelling governmental interest.

In *Buckley v. Valeo*, 424 U.S. 1, the U.S. Supreme Court circumscribed the power delegated to the FEC by Congress to only that which would further the governmental interest in ferreting out corruption and the appearance of corruption. By conducting its investigation, the FEC has completed that purpose and now claims that it must release the information it derived from that investigation to achieve another compelling governmental interest, the interest of providing the public with the information necessary to determine what an agency is up to. *See Exhibit B*, p.14-16. However, that interest is protected by the limited disclosure allowed under FECA, and by permissible challenges, by a complainant, to the FEC’s decision not to prosecute. Therefore, the FEC’s affirmative disclosure of confidential investigatory information is not narrowly tailored to achieve a compelling governmental interest and should be enjoined in order to protect the free speech and associational rights of not only the named plaintiffs but also the numerous individuals and organizations that are the subjects of its investigations.

Further, as acknowledged by this Circuit in *Machinists Non-Partisan Political League*, 655 F.2d 380, FEC investigations, by their nature, intrude into matters at the heart of the First Amendment. The investigations require the organizations and individuals investigated to divulge to the government confidential information which reveals their political strategy to political opponents. This information may include everything from the strategy employed to lobby congress to pass legislation to information on how to persuade constituents to make donations to the organization. The knowledge that this information will be made public in the event of an FEC investigation may very well chill the right of association since people will be reluctant to share information that will be made public. Thus, the FEC's "automatic release" of investigatory information encourages political opponents to file charges against their competitors to serve the dual purpose of "chilling" the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant's advantage. Thus, the FEC's "automatic release" of investigatory information without justification is an affront to the fundamental rights of free speech and free association secured by the First Amendment to the United States Constitution.

### **CONCLUSION**

For the foregoing reasons, the Court should grant the AFL-CIO and DNC's Motion for Summary Judgment, declare that the FEC's "automatic release," without justification, of investigatory information violates FECA, FOIA and the First Amendment rights of free speech and association, and permanently enjoin the FEC from releasing the information it obtained during its confidential investigation.

Dated this 15th day of August 2001.

Respectfully submitted,

WEBSTER, CHAMBERLAIN & BEAN

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## Certificate of Service

I hereby certify that copies of the foregoing motion have been served on the following counsel of record at the following addresses by first class mail, postage prepaid, on this 15th day of August 2001, and that all counsel required to be served have been served.

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