

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON,)	
)	Civil Action No. 22-35-CRC
Plaintiff,)	
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
_____)	

**PLAINTIFF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON’S
MOTION TO COMPEL DEFENDANT FEDERAL ELECTION COMMISSION TO
PRODUCE THE ADMINISTRATIVE RECORD AND
RESPOND TO REQUESTS FOR PRODUCTION**

Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) hereby respectfully moves for an order pursuant to Rule 37 of the Federal Rules of Civil Procedure directing the Defendant Federal Election Commission (“FEC” or “Commission”) to produce the administrative record in Matter Under Review 7465 concerning CREW’s complaint to the FEC against Freedom Vote, and to order the FEC to produce documents responsive to CREW’s First Request for Production of Documents (“First RFP,” attached as Exhibit A). Despite service of CREW’s complaint on the FEC on January 19, 2022 and service of CREW’s First RFP on April 18, 2022, the FEC has yet to produce to CREW any portion of its administrative record or to respond to CREW’s requests for production, notwithstanding repeated attempts by CREW’s counsel to confer with FEC counsel. Litigation of this matter, notwithstanding the FEC’s default, requires CREW to “establish[h] [its] claim or right to relief by evidence that satisfies the court,” Fed. R. Civ. P. 55(d), and thus CREW is entitled to receive the evidence wholly in the control of

the FEC that demonstrates the FEC's dismissal of MUR 7465 is reviewable and was contrary to law.

BACKGROUND

On August 8, 2018, CREW filed an administrative complaint with the FEC alleging, among other things, that Freedom Vote, a tax-exempt nonprofit, qualified as a political committee no later than 2016 but that it failed to register and file required disclosures. Compl. ¶¶ 1, 26. CREW's complaint detailed extensive political spending by Freedom Vote, including more than \$1 million spent on a television advertisement expressly advocating the defeat of Ohio United States Senate candidate Ted Strickland, *id.* ¶ 27, and other spending that demonstrated more than half of Freedom Vote's expenditures in 2014, 2015, and 2016 were devoted to influencing federal elections, *id.* ¶ 28.

The FEC's Office of General Counsel recommended the FEC find CREW's complaint raised a reason to believe Freedom Vote violated federal law by failing to register and report as a political committee, which recommendation the Commission unanimously adopted. *Id.* ¶¶ 29–30. Accordingly, the FEC investigated CREW's complaint, amassing a “record derived from this investigation [that] confirmed that, by 2014, Freedom Vote's major purpose had become the nomination or election of a federal candidate and further revealed that ... over 71% of its expenditures aggregating over \$3.4 million constituted federal campaign activity.” General Counsel's Brief 1, MUR 7465 (Freedom Vote), Sept. 20, 2021, <https://perma.cc/4AAV-M9MJ>; *see also* Comp. ¶¶ 32–36. The FEC's Office of General Counsel describes at least portions of the materials amassed as part of the investigation, including a deposition of Freedom Vote's executive director James S. Nathanson, General Counsel's Brief at 2 & n.5, 3 & nn.6–7, 13, 5 nn.24–26, 9 nn.42–43, 10 nn.44–45, 11 nn.47–49, 12 n.55, 13 nn.59–60, 62, 15 nn.65–66, 16 n.68, 19 n.82, Freedom Vote's communications with donors, *id.* at 10

n.46, 16 nn.67–70, a “Ledger of 2014 Freedom Vote Receipts and Expenses,” *id.* at 3 n.11, 5 n.23, 6 nn.27–28, 8 n.34, 9 nn.40, 42, a “Ledger of 2015 Freedom Vote Receipts and Expenses,” *id.* at 6 n.27, 11 nn.50, 52, a “Ledger of 2016 Freedom Vote Receipts and Expenses,” *id.* at 5 n.23, 6 n.27, 13 n.58, 13 nn.61–62, 14 n.63, a “Ledger of 2017 Freedom Vote Receipts and Expenses,” *id.* at 6 n.27, 17 nn.71–72, 75, a “Ledger of 2018 Freedom Vote Receipts and Expenses,” *id.* at 6 n.27, 17 nn.73, 75, 19 n.83, two “Ledger[s] of Partial 2018 and 2019 Freedom Vote Receipts and Expenses,” *id.* 6 n.27, 17 nn.74–75, emails from Freedom Vote’s Executive Director to a vendor, *id.* at 6 n.31, a hanger from Freedom Vote advocating for Republican Primary Candidate John Boehner, *id.* at 6 n.32, vendors’ invoices to Freedom Vote, *id.* at 8 nn.35–38, 9 nn.41–42, 12 nn.53–54, 14 n.63, a memorandum of “Key Findings from a Survey of Republican Primary Voters in Kentucky’s 4th CD,” *id.* at 12 nn.56–57, Freedom Vote’s articles of incorporation, *id.* at 2, 2 nn. 2-3, Freedom Vote tax returns, *id.* at 2 n. 4, 3 nn.9, 10, 12, 4 nn.14–19, 5 n.26, Freedom Vote’s Certificate of Dissolution, *id.* at 19 n.81, and documents bates stamped through FV01521, *id.* 10 n.46. In addition, the General Counsel’s Brief referred to a supplemental response of Freedom Vote dated July 6, 2021, *id.* at 18 n.78, which response has not been made public, *see* MUR 7465, <https://perma.cc/2JZY-LEBN>.

Based on this extensive record, the FEC’s Office of General Counsel recommended the Commission find probable cause to believe Freedom Vote violated federal law. Compl. ¶ 38. The Commission, however, deadlocked three-to-three on the recommendation on November 9, 2021. *Id.* ¶ 39. The Commission then voted on whether to dismiss the matter as an exercise of the FEC’s prosecutorial discretion, but declined to invoke that power. *Id.* Nonetheless, with proceedings unable to move forward, one commissioner who voted to find probable cause that

Freedom Vote violated the law, and voted against dismissing the case as an exercise of prosecutorial discretion, provided the necessary fourth vote to close the matter. *Id.* ¶ 40.

Thereafter, CREW brought the instant action pursuant to 52 U.S.C. § 30109(a)(8) challenging the FEC's dismissal of CREW's complaint against Freedom Vote as contrary to law. CREW served the complaint on the FEC, as well as the Attorney General and the District Attorney for the District of Columbia, no later than January 20, 2022. *Aff. in Supp. of Request for Entry of Default* ¶¶ 4–5, ECF No. 4-1. The FEC failed to respond, however, and on March 29, 2022, the Clerk for the United States District and Bankruptcy Courts for the District of Columbia entered default against the FEC. *Default*, ECF No. 5.

Shortly after default, CREW's counsel reached out to various counsel at the FEC on April 4, April 6, April 8, and April 12 to enquire if anyone would be willing to confirm production of the administrative record. *See Aff. in Supp. of Mot. to Compel* ¶¶ 3, 4, attached as Exhibit B. In the April 12 email, CREW's counsel raised the prospect of a subpoena to obtain the documents the FEC is required to produce. *Id.* CREW's First RFP was then served on the FEC on April 18, 2022. *See Aff. of Service*, attached as Exhibit C. The First RFP requested items that would have been included in the administrative record, including the record of the FEC's investigation, *see Ex. A*, RFP Requests 1, 2, 3, as well as records of intra-FEC communications that would provide the record of the Agency's consideration of and decision on MUR 7465, *id.* Request 4. CREW's First RFP provided a return date 30 days out from service: May 19, 2022. *Id.*

After service, CREW's counsel again reached out to FEC counsel on May 9 to determine if the FEC would respond to CREW's First RFP and produce the administrative record. *Ex. B* ¶ 4. CREW's counsel attempted contact with FEC counsel again on May 20, 2022, and left a

voicemail with the FEC's General Counsel on May 23 raising the prospect of this motion to compel and the basis thereof. *Id.* ¶ 5. CREW's counsel attempted contact via email and voicemail again on June 7, providing a copy of this motion to the FEC and notifying them of the imminent filing if the FEC did not respond and agree to produce the administrative record and produce documents responsive to CREW's First RFP. *Id.* ¶ 6. Notwithstanding CREW's counsel's repeated attempts, counsel for the FEC has never responded to any CREW's counsel's entreaties, produced the administrative record, or produced documents in response to CREW's First RFP. *Id.* ¶ 7

ARGUMENT

“A party seeking discovery may move for an order compelling an answer, designation, production, or inspection” if “a party fails to produce documents ... as requested under Rule 34.” Fed. R. Civ. P. 37(a)(3)(B). CREW propounded on the FEC requests for production under Rules 26, 34, and 45 and provided the FEC thirty-days to respond. To date, CREW has received no response or objection from the FEC. Furthermore, “courts in this circuit have directed agencies to collect those materials ‘that were compiled by the agency that were before the agency at the time the decision was made.’” *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196 (D.D.C. 2005) (quoting *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)); *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (reviewing courts must have “neither more nor less information than did the agency when it made its decision”). CREW has not received those materials despite the thirty-day deadline to produce them having long since passed, LCvR. 7(n).

Those materials in the administrative record and which CREW seeks in discovery are not only relevant to this case, Fed. R. Civ. P. 26(b)(1), but absolutely essential. In this case, CREW bears the burden of demonstrating that the FEC's dismissal was premised on “an impermissible

interpretation of [FECA]” or that the “FEC’s dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.” *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). CREW’s complaint alleged, and the Commission dismissed, a claim that Freedom Vote qualified as a political committee no later than 2016. Compl. ¶ 1, 26. The determination of whether a group is a political committee involves a “fact-intensive” “case-by-case analysis.” FEC, Political Committee Status, 72 Fed. Reg. 5595-02, 5601 (Feb. 7, 2007). To perform that analysis, the FEC’s Office of General Counsel conducted an extensive investigation of Freedom Vote’s activities, which investigation “confirmed” that Freedom Vote qualified as a political committee but failed to register and report as one. General Counsel’s Brief 1.

A determination of whether the Commission’s dismissal was “arbitrary or capricious, or otherwise an abuse of discretion,” *Orloksi*, 795 F.2d at 161, will require consideration of the administrative record, including the investigatory materials, and the strength with which they supported CREW’s claims. Further, a determination of whether the dismissal was premised on an “impermissible interpretation” of the FECA, *id.*, requires understanding the weight of the evidence dependent on that interpretation as compared to other evidence, *see, e.g., CREW v. FEC*, 209 F. Supp. 3d 77, 80, 84, 92 (D.D.C. 2016) (evaluating FEC’s administrative record in dismissal action).

Beyond the merits, a potential defense the FEC could raise is to attack the justiciability of this action. *See CREW v. FEC*, 993 F.3d 880, 889 (D.C. Cir. 2021) (holding that where the “Commission’s nonenforcement decision ... rested in part on ‘prosecutorial discretion,’” the decision “is not subject to judicial review”); *see also* Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery ... relevant to any party’s claim or defense”). Here, notwithstanding the fact

that the Commission voted not to exercise prosecutorial discretion and the fact that the commissioner who provided the decisive fourth vote to close the case expressly voted against doing so based on prosecutorial discretion, *see* Certification, MUR 7465 (Nov. 9, 2021), <https://perma.cc/74XH-Z4EE>, a court in this circuit has found *sua-sponte* in a comparable circumstance that a minority of the commissioners may still invoke prosecutorial discretion *post-hoc* to block judicial review, *see End Citizens United v. FEC*, 21-cv-1665 (TJK), 2022 WL 1136062, at *2 (D.D.C. Apr. 18, 2022); *but see CREW v. FEC*, 892 F.3d 434, 438 n.5 (D.D. Cir. 2021) (rejecting *post-hoc* statement of reasons by FEC commissioners as inappropriate because “[a]n agency cannot *sua sponte* update the administrative record when an action is pending”). The district court did so on the assumption that the statement accurately reflected a “further articulation of [the agency’s] reasoning,” *End Citizens United*, 2022 WL 136062, at *2 (quoting *Loc. 814, Int’l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976)), and did not “differ from the [reasoning] provided originally” at the time of the vote to close the file, *id.*

Accordingly, it is vital to know the contents of the discussion of the Commission of the FEC at the time of the vote to close the file. An invocation of prosecutorial discretion after the vote to close the file would differ from the reasoning provided originally if the invoking commissioners provided other reasons, or no reason to all, to persuade the decisive fourth commissioner who joined them to close the file. Indeed, here, a *post-hoc* invocation of prosecutorial discretion very likely “differ[s] from the [reasoning] provided originally” at the time of the vote close, *End Citizens United*, 2022 WL 136062, at *2, as the Commission expressly declined to exercise its power of prosecutorial discretion, with the commissioner providing the fourth decisive vote to close the file expressly voting *not* to exercise prosecutorial discretion, *see* Certification.

An order compelling production is necessary because repeated attempts by CREW's counsel to obtain materials from the FEC have been ignored. CREW's counsel has contacted various counsel for the FEC over the course of two months through email and voicemail to no avail. *See* Aff. in Supp. of Mot. to Compel ¶¶ 2–7, Ex. B. CREW has therefore attempted to resolve this matter in “good faith” without involving this Court. Fed. R. Civ. P. 37(a). CREW regrets the fact the FEC's silence has necessitated this Court's involvement.

Finally, the FEC's default in this case does not alleviate the agency of its obligation to provide the administrative record and respond to discovery.¹ The default did not remove CREW's obligation to “establish[h] [its] claim or right to relief by evidence that satisfies the court.” Fed. R. Civ. P. 55(d), As such, CREW's requests remain relevant to this action. Fed. R. Civ. P. 26(b)(1). Further, though the FEC's default also means it did not participate in a Rule 26 conference, Rule 26(d)'s bar on pre-conference discovery does not apply to actions like this that are exempt from initial disclosures, specifically one “for review of an administrative record.” Fed. R. Civ. P. 26(a)(1)(B)(i), (d)(1); Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 386 (2000) (Committee Note) (“[T]here is no restriction on commencement of discovery in these [exempt] cases.”). In any event, the FEC's failure to provide the administrative record and default provides “good cause” to permit pre-conference discovery. *Arista Records, LLC v. Does 1-19*, 551 F. Supp. 2d 1, 6 (D.D.C. 2008) (“good cause” exists if discovery is necessary “before th[e] suit can progress further”). Defaulted parties, moreover, are

¹ Out of an abundance of caution, CREW served discovery on the FEC pursuant to Rule 45 of the Federal Rules of Civil Procedure, which applies to non-parties, in addition to Rules 26 and 34. *Compare Minx, Inc. v. West*, 2:11-cv-00895-BSJ, 2011 WL 5844486, *2 (D. Utah Nov. 21, 2011) (“[I]t is nonsensical for a defaulted party to be considered a nonparty”) *with Success Village Apartments, Inc. v. Amalgamated Local 376*, 234 F.R.D. 36, 39 n.1 (D. Conn. 2006) (federal rules “ultimately decid[ed] to treat a default defendant as a non-party for discovery purposes”).

“subject to the tools of discovery.” *Martie v. M&M Bedding, LLC*, 528 F. Supp. 3d 1252, 1257 (M.D. Fla. 2021).

CONCLUSION

Notwithstanding the FEC’s default, CREW bears the burden of demonstrating the dismissal below was contrary to law and must be prepared to rebut a defense that the dismissal is nonjusticiable. CREW cannot satisfy that burden until such time as the FEC produced the complete administrative record, including the investigatory record, and responds in full to CREW’s First RFPs. CREW hopes that an order from this Court compelling production will at last rouse FEC’s counsel to action.

Dated: June 8, 2022

Respectfully submitted,

/s/ Stuart McPhail
Stuart C. McPhail
(D.C. Bar No. 1032529)
Citizens for Responsibility and Ethics
in Washington
1331 F Street, N.W., Suite 900
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Certificate of Good Faith Attempt at Conferral

In accordance with Rule 37(a)(1) and Local Civil Rule 7(m), I, Stuart McPhail, certify that I made good faith attempts to resolve this matter without resorting to the court, as outlined in the attached Affidavit in Support of the Motion to Compel.

/s/ Stuart C. McPhail
Stuart C. McPhail

Certificate of Service

I certify that on June 8, 2022, I caused service of the attached motion and supporting documents to be made on defendant Federal Election Commission by U.S.P.S. First Class Mail as follows:

Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

/s/ Stuart C. McPhail
Stuart C. McPhail

Exhibit A

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

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 22-cv-35 (CRC)

**PLAINTIFF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON’S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT
FEDERAL ELECTION COMMISSION**

In accordance with Federal Rules of Civil Procedure 26, 34, and 45, Plaintiff Citizens For Responsibility And Ethics In Washington (“CREW”) hereby requests that Defendant Federal Election Commission (“FEC”) produce for inspection and copying each of the documents and other things described below within 30 days, at a place to be agreed upon by the parties.

The information and documentary materials herein requested include not only those personally known or available to the party to whom these document requests are directed, but also those known or available to all of the FEC’s attorneys, agents, servants, employees, representatives, private investigators, and others who are in possession of or who may have obtained information for or on behalf of the FEC.

DEFINITIONS

In the event of any conflict or ambiguity in the following definitions, common usage and reference to any cited rules, statutes, or regulations should be used to provide the broadest interpretation of the term in question. Furthermore, these definitions apply to their respective terms regardless of capitalization or use of the singular or plural.

1. “And” and “or” are terms of inclusion and not of exclusion and are to be construed to bring within the scope of these requests any documents or responses that might otherwise be considered outside their scope.

2. “Any” and “all” mean “each” and “every.”

3. “Communications” means every contact of any nature, whether oral or written, from one person to another, whether in the form of facts, ideas, inquiries, or otherwise, and any evidence of such contact, including without limitation any correspondence, memoranda, notes, diaries, daily calendars, electronic mail messages, computer files, electronic or magnetic media, or other documents concerning such contacts.

4. “Defendant,” “You,” or “FEC” mean Defendant Federal Election Commission, any of its current or former commissioners, members, officers, employees, agents, and representatives, including attorneys.

5. “Document” is used in the broadest sense and shall have the full meaning ascribed to it by Rule 34(a) of the Federal Rules of Civil Procedure, and in particular includes, without limitation, electronic or computerized data and graphic or recorded matter of any kind or nature, whether written, printed, typed, recorded, filmed, punched, transcribed, taped, stored electronically or digitally, or produced or reproduced by any means. A draft or non-identical copy, including without limitation copies containing handwritten notes, markings, stamps or interlineations, is a separate document within the meaning of this term. “Document” includes not only documents created or prepared by the FEC, but also documents obtained from third parties and in the FEC’s custody or control.

6. “Electronic Media” means any magnetic, optical, or other storage media device used to record Electronically Stored Information (“ESI”) including computer memory, hard

disks, floppy disks, flash memory devices, CDs, DVDs, Blu-ray discs, cloud storage (*e.g.*, DropBox, Box, OneDrive, or SharePoint), tablet computers (*e.g.*, iPad, Kindle, Nook, or Samsung Galaxy), cellular or smart phones (*e.g.*, BlackBerry, iPhone, or Samsung Galaxy), personal digital assistants, magnetic tapes of all types, or any other means for digital storage or transmittal.

7. “Electronically Stored Information” or “ESI” means information that is stored in electronic media, regardless of the media or whether it is in the original format in which it was created, and that is retrievable in perceivable form and includes metadata, system data, deleted data, and fragmented data.

8. “Including” means “including but not limited to,” or “including, without limitation.” Any examples which follow these phrases are set forth to clarify the request, definition, or instruction but not to limit the request.

9. “Person” refers to a natural person, a group of natural persons acting as individuals, a group of persons acting in a collegial capacity (*e.g.*, as a committee, board of directors, etc.), a trust, a corporation, a partnership, a limited partnership, a joint venture, a limited liability company, a government or governmental agency, and/or any other incorporated or unincorporated business, government or entity.

10. “Regarding” means regarding, relating to, referring to, referencing, reflecting, describing, evidencing, constituting, alluding to, germane to, mentioning, analyzing, setting forth, summarizing, and/or characterizing, directly or indirectly, expressly or implicitly, in whole or in part, the subject matter of the request.

11. “Respondents” means persons identified as respondents in Matter Under Review 7465, including Freedom Vote, Inc., Fighting for Ohio Fund, Christopher Marston, or any other

person from whom the FEC has requested a response to the complaint in Matter Under Review 7465, including such person's current or former agents, employees, directors, officers, members, and representatives, including attorneys. For purposes of these Requests, Respondents also include Freedom Vote's Executive Director, James S. Nathanson.

12. The present tense includes the past and future tense.

13. The use of the singular form of any word includes the plural and vice versa.

14. The use of the masculine pronoun shall include the feminine and vice versa and shall be construed as necessary to bring within the scope of the request all responses that might otherwise be outside of its scope.

15. Each request shall be construed independently and not with reference to any other request for the purpose of limitation and shall be construed as being inclusive rather than exclusive. Questions concerning the interpretation of these requests should be resolved in favor of the broadest possible construction.

INSTRUCTIONS

1. You are requested to produce all documents in your possession, custody, care, or control that are described below. In so doing, please furnish documents that are in the possession of your commissioners, officers, employees, attorneys, accountants, representatives, or agents, or that are otherwise subject to your custody, care, or control.

2. Unless otherwise indicated, the documents to be produced include all documents created, stored, prepared, sent, dated, or received, or those that otherwise came into existence, at any time.

3. The production by one person of a document does not relieve another person from the obligation to produce his, her, or its own copy of that document, even if the two

documents are identical.

4. In producing documents, you are requested to produce a copy of each original document together with a copy of all non-identical copies and drafts of that document. If the original of any document cannot be located, a copy shall be provided in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

5. Documents shall be produced as they are kept in the usual course of business. All documents shall be produced with a copy of the file folder, envelope, or other container in which the documents are kept or maintained. All documents shall be produced intact in their original files, without disturbing the organization of documents employed during the conduct of the ordinary course of business and during the subsequent maintenance of the documents.

6. Documents not otherwise responsive to this discovery request shall be produced if such documents mention, discuss, refer to, or explain the documents which are called for by this discovery request, or if such documents are attached to documents called for by this discovery request and constitute routing slips, transmittal memoranda, letters, comments, evaluations, or similar materials.

7. Each document requested herein is requested to be produced in its entirety and without deletion or excisions, regardless of whether you consider the entire document to be relevant or responsive to this request.

8. If you assert an objection to any request, you must nonetheless respond and produce any responsive documents or ESI that are not subject to the stated objection. If you object to part of a request or category, you must specify the portion of the request to which you object and must produce documents responsive to the remaining parts of the request.

9. Notwithstanding a claim that a document is protected from disclosure, any

document so withheld must be produced with the portion claimed to be protected redacted.

10. If any document or ESI is known to have existed but no longer exists, has been destroyed, or is otherwise unavailable, you must identify the document or ESI, the reason for its loss, destruction, or unavailability, the name of each person known or reasonably believed by you to have present possession, custody, or control of the original and any copy thereof (if applicable), and a description of the disposition of each copy of the document or ESI.

11. If no document or ESI responsive to a request exists, please state that no responsive document or ESI exists.

12. Plaintiffs reserve the right to propound additional document requests.

13. These requests shall be deemed continuing so as to require reasonable supplemental responses and productions as the FEC or its attorneys obtain further information or materials from the time its answers are served until the time of trial.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All documents contained in the FEC's file, including both public and nonpublic files, for Matter Under Review 7465.

2. All communications regarding Matter Under Review 7465 between the FEC and persons other than the FEC, including Respondents, witnesses, or other third persons, and including records, recordings, or transcripts of interviews, phone calls, or depositions. This request includes the records, recordings, or transcripts of the May 12, 2021 deposition of James S. Nathanson referred to in the September 20, 2021 General Counsel's Brief in Matter Under Review 7465.

3. All documents received by the FEC in the course of the FEC's investigation in

Matter Under Review 7465, whether from Respondents, witnesses, or other third parties, including documents received in response to compulsory process. This request includes documents bearing bates stamps FV00001 through FV01551 referred to in the September 20, 2021 General Counsel's Brief in Matter Under Review 7465.

4. All communications within and among the FEC regarding Matter Under Review 7465, including records, recordings, or transcripts of any meetings of the Commission and executive sessions of the Commission.

Dated: April 14, 2022

/s/ Stuart C. McPhail

Stuart C. McPhail (D.C. Bar No. 1032529)

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Adam J. Rappaport (D.C. Bar No. 479866)

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Laura Iheanachor (Pending D.C. Bar Admission)

CITIZENS FOR RESPONSIBILITY AND ETHICS

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*Counsel for Citizens for Responsibility and
Ethics in Washington*

Exhibit B

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

**CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON,**

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 22-35-CRC

AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL

Pursuant to 28 U.S.C. § 1746, I, Stuart C. McPhail, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

1. I am Senior Litigation Counsel at Citizens for Responsibility and Ethics in Washington, and I am an active member of the D.C. Bar in good standing.
2. On April 4, 2022, I emailed Lisa Stevenson, Acting General Counsel of the FEC, requesting an opportunity to discuss this litigation. *See* Exhibit B-1. I followed up with that email on April 6. *Id.*
3. On April 6, 2022, I contacted Kevin Deeley, Associate General Counsel of the FEC, Harry Summers, Assistant General Counsel of the FEC, and Jacob Siler, Assistant General Counsel of the FEC, requesting an opportunity to discuss this litigation. *See* Exhibit B-2. I followed up on that email on April 8 and 12, and raised the prospect of a subpoena in the April 12 email. *Id.*
4. On May 9, after service of CREW’s First Request for Production of Documents, I followed up on my email with Mr. Deeley, Mr. Summers, and Mr. Siler again asking to discuss the subpoena and the FEC’s production. *Id.* I followed up on that email on May 20, raising the prospect of a motion to compel. *Id.*

5. On May 23, 2022, I left a voicemail with the FEC's General Counsel requesting to speak with FEC counsel about the agency's production in this matter and again raised the prospect of a motion to compel.
6. On June 7, 2022, I once again emailed Ms. Stevenson, Mr. Deeley, Mr. Summers, and Mr. Siler notifying them of the impending filing of this motion to compel unless the FEC responded and agreed to produce the administrative record and documents responsive to CREW's requests for production, and provided a copy of this motion. *See* Exhibit B-2. On the same day, I left a voicemail with the FEC's General Counsel providing notice of the same.
7. At no point did counsel for the FEC respond to my requests to discuss the FEC's production in this case.

Executed on June 8, 2022.

/s/ Stuart McPhail
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Exhibit B-1



Stuart McPhail <smcphail@citizensforethics.org>

Ability to discuss CREW v. FEC, 22-cv-35?

Stuart McPhail <smcphail@citizensforethics.org>
To: Lisa Stevenson <l Stevenson@fec.gov>

Wed, Apr 6, 2022 at 10:34 AM

Following up on this email - would someone in the FEC's OGC be able to speak with me about this case?

Thanks
Stuart

On Mon, Apr 4, 2022 at 2:09 PM Stuart McPhail <smcphail@citizensforethics.org> wrote:

Ms. Stevenson,

Would anyone in your office be available for a brief conversation this week to discuss CREW v. FEC, 22-cv-35, notwithstanding the FEC's default in the action? I understand the Commission deadlocked on the vote to defend the suit, but I was nonetheless hoping I could discuss some outstanding procedural issues of the case with your office.

Sincerely,

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Stuart McPhail
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Exhibit B-2



Stuart McPhail <smcphail@citizensforethics.org>

Ability to discuss CREW v. FEC, 22-cv-35?

6 messages

Stuart McPhail <smcphail@citizensforethics.org>

Wed, Apr 6, 2022 at 11:09 AM

To: Kevin Deeley <kdeeley@fec.gov>

Cc: Harry Summers <hsummers@fec.gov>, "Jacob S. Siler" <jsiler@fec.gov>

Kevin,

Would anyone from your office be available for a brief conversation this week to discuss CREW v. FEC, 22-cv-35, notwithstanding the FEC's default in the action? I understand the Commission deadlocked on the vote to defend the suit, but I was nonetheless hoping I could discuss some outstanding procedural issues of the case with your office.

Sincerely,

--

**Stuart McPhail**Senior Litigation Counsel | Citizens for Responsibility and Ethics in
Washington

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Stuart McPhail <smcphail@citizensforethics.org>

Fri, Apr 8, 2022 at 9:24 AM

To: Kevin Deeley <kdeeley@fec.gov>

Cc: Harry Summers <hsummers@fec.gov>, "Jacob S. Siler" <jsiler@fec.gov>

Following back up on this email - would anyone from your office be available for a short conversation about 22-v-35?

Thanks

Stuart

[Quoted text hidden]

Stuart McPhail <smcphail@citizensforethics.org>

Tue, Apr 12, 2022 at 1:46 PM

To: Kevin Deeley <kdeeley@fec.gov>

Cc: Harry Summers <hsummers@fec.gov>, "Jacob S. Siler" <jsiler@fec.gov>

Circling back to this - can you confirm whether you are able to discuss the case or whether you will not be able to? We are hoping to avoid legal process, but may need to resort to subpoenas if you aren't able to talk.

Thanks

Stuart

[Quoted text hidden]

Stuart McPhail <smcphail@citizensforethics.org>

Mon, May 9, 2022 at 9:28 AM

To: Kevin Deeley <kdeeley@fec.gov>

Cc: Harry Summers <hsummers@fec.gov>, "Jacob S. Siler" <jsiler@fec.gov>

Kevin, Harry, and Jacob,

By now you should have received our subpoena in CREW v. FEC, 22-cv-35, to the FEC to produce documents related to MUR 7465. Would you or someone else in your office have time to discuss this subpoena and the FEC's production in the next week?

Thank you,
Stuart

[Quoted text hidden]

Stuart McPhail <smcphail@citizensforethics.org>
To: Kevin Deeley <kdeeley@fec.gov>
Cc: Harry Summers <hsummers@fec.gov>, "Jacob S. Siler" <jsiler@fec.gov>

Fri, May 20, 2022 at 10:05 AM

Kevin, Harry, and Jacob,

Yesterday was the deadline for the FEC to produce documents in response to our subpoena. We still have not received any production or communication from the FEC with regard to our subpoena. Our next step is to obtain an order compelling the FEC's production and, possibly, sanctions.

Please let me know if the FEC is planning to produce responsive documents or if you would otherwise like to discuss the subpoena without the need to involve the court.

Thank you,
Stuart

[Quoted text hidden]

Stuart McPhail <smcphail@citizensforethics.org> Tue, Jun 7, 2022 at 11:54 AM
To: Lisa Stevenson <l Stevenson@fec.gov>, Kevin Deeley <kdeeley@fec.gov>, Harry Summers <hsummers@fec.gov>, "Jacob S. Siler" <jsiler@fec.gov>

Counsel,

Please be advised that, tomorrow, CREW intends to file a motion to compel the FEC to produce the administrative record and to respond to CREW's First RFPs if the FEC continues to ignore CREW's requests to resolve these issues without court involvement. I have attached a copy of that motion and the RFPs here. Please also note the award of costs and attorney fees provided for under Rule 37(a)(5)(A).

If we do not hear from the FEC by 9 a.m. tomorrow, June 8, CREW will file the attached motion. We hope to avoid the need to involve the court, however, and hope to hear from you that the FEC will be producing responsive materials shortly.

Sincerely,
Stuart McPhail

[Quoted text hidden]

2 attachments

 **Motion to compel - FINAL.pdf**
33K

 **RFPs to FEC.pdf**
23K

Exhibit C

Citizens for Responsibility and Ethics in Washington

Plaintiff

Case No.: 22-cv-35 (CRC)

vs.

Federal Election Commission

Defendant

AFFIDAVIT OF SERVICE

I, Vance M. Warren, Sr., a Private Process Server, being duly sworn, depose and say:

That I am over the age of eighteen years and not a party to or otherwise interested in this matter.

That I have been duly authorized to make service of the Plaintiff Citizens for Responsibility and Ethics in Washington's First Request for Production of Documents to Defendant Federal Election Commission in the above entitled case.

That on 04/18/2022 at 11:55 AM, I served Federal Election Commission at 1050 First Street, NE, Washington, DC 20463 with the Plaintiff Citizens for Responsibility and Ethics in Washington's First Request for Production of Documents to Defendant Federal Election Commission by serving Stanley Houser, Administrative Assistant, authorized to accept service.

Stanley Houser is described herein as:

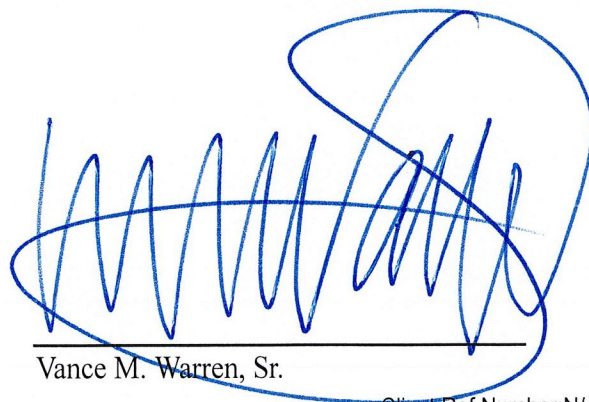
Gender: Male Race/Skin: Black Age: 55 Weight: 180 Height: 5'9" Hair: Black Glasses: Yes

I declare under penalty of perjury that this information is true and correct.

4/18/2022

Executed On




Vance M. Warren, Sr.

Client Ref Number: N/A
Job #: 1601670

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

)	
CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON,)	
Plaintiff,)	Civil Action No. 22-35-CRC
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
)	

[PROPOSED] ORDER COMPELLING PRODUCTION

Upon consideration of Plaintiff Citizens for Responsibility and Ethics in Washington’s Motion to Compel Defendant Federal Election Commission to Produce the Administrative Record and Respond to Requests for Production (the “Motion”), it is hereby

ORDERED that the Motion is **GRANTED**; and it is further **ORDERED** that:

1. The Federal Election Commission shall provide to CREW within five (5) days of this order the entire administrative record of MUR 7465,
2. The Federal Election Commission shall produce to CREW within ten (10) days all other documents responsive to CREW’s First Request for Production, ECF No. ___, not otherwise part of the administrative record of MUR 7465.

SO ORDERED.

Date: _____

HON. CHRISTOPHER R. COOPER
United States District Judge