

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS)
COMMITTEE,)
)
)
Plaintiff,)
)
v.)
)
FEDERAL ELECTION COMMISSION,)
)
Defendant.)

Case No. 1:04cv00007 (JDB)

COMBINED JOINT MOTION FOR
PROTECTIVE ORDER AND
SUPPORTING MEMORANDUM

**JOINT MOTION FOR ENTRY OF PROTECTIVE ORDER
AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

The Federal Election Commission (“the Commission” or “FEC”) and Kean for Congress Committee (“Kean Committee” or “the Committee”) jointly move this Court for entry of a protective order. On February 15, 2005, the Court granted the Commission’s motion for a voluntary remand in this suit challenging the Commission’s dismissal of an administrative complaint filed by the Kean Committee. The Court also scheduled a status conference for April 15, 2005. In advance of that conference, the Commission is planning to file a status report of the action taken during the remand. However, any action the Commission might take on remand other than again dismissing the Committee’s administrative complaint would trigger the confidentiality requirement, 2 U.S.C. 437g(a)(12)(A), of the Federal Election Campaign Act (“FECA” or “Act”). The accompanying proposed order would satisfy the requirements of section 437g(a)(12) and enable the Commission to share confidential information, if necessary,

with the Kean Committee's litigation counsel, Anthony S. Cicatiello of the Committee, and Tom Kean, Jr.

1. On May 31, 2000, the Kean Committee filed an administrative complaint with the Commission in which the Committee requested the Commission to take action against the Council for Responsible Government, Inc., a Virginia corporation, and its "Accountability Project" ("CRG"). First Amended Complaint ("FAC") ¶¶ 2, 22. The Committee alleged that CRG had financed and mailed brochures advocating the defeat of Mr. Kean in the June 2000 primary election and in doing so violated various provisions of the FECA. FAC ¶¶ 12, 14, 15, 18, 19. On November 4, 2003, the Commission voted 3-3 on whether to find there as "reason to believe" that the FECA had been violated. Lacking the necessary four votes to proceed to the next administrative stage, the Commission then voted unanimously to dismiss the complaint and close the file.

On January 5, 2004, the Kean Committee filed its initial complaint for judicial review of the Commission's dismissal, and on March 4, 2004, the Committee filed an amended court complaint. See 2 U.S.C. 437g(a)(8). The amended complaint alleges that the dismissal was arbitrary, capricious, and contrary to law. FAC ¶¶ 7, 33.

On January 13, 2004, the three "controlling" Commissioners who had voted against finding "reason to believe" issued a Statement of Reasons explaining their November 4, 2003, votes. The Commission takes the position that, because it had voted prior to the Supreme Court's decision in McConnell v. FEC, 540 U.S. 93 (2003), issued in December 2003, the Commissioners relied on pre-McConnell law. On February 7, 2005, the Commission filed a motion for voluntary remand so that the Commission could reconsider its November 2003

decision in light of McConnell.¹ On February 15, 2005, this Court granted the Commission's motion to remand and also its accompanying motion to hold summary judgment briefing in abeyance. The Court set a status conference for April 15, 2005.

2. The Commission has not yet reached a final decision on remand, but it is planning to do so by the April 15 deadline. The FECA's confidentiality requirement, 2 U.S.C. 437g(a)(12)(A), will apply to any action the Commission takes other than another dismissal of the Kean Committee's administrative complaint. Section 437g(a)(12)(A) states 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." 2 U.S.C. 437g(a)(12)(A). See also 11 C.F.R. 111.21(a). A companion provision, 2 U.S.C. 437g(a)(12)(B), imposes a penalty of up to \$2,000 upon "[a]ny member or employee of the Commission, or any other person who violates" section 437g(a)(12)(A), and a fine of up to \$5,000 for "knowingly and willfully" violating that provision. Section 437g(a)(12)(A), and its corresponding Commission regulation, 11 C.F.R. 111.21, "plainly prohibit the FEC from disclosing [on the court's public record] information concerning ongoing investigations under any circumstances without the written consent of the subject of the investigation." In re Sealed Case, 237 F.3d 657, 667 (D.C. Cir. 2001). See also id. at 666; McConnell v. FEC, 251 F.Supp.2d 919, 928-31 (D.D.C. 2003). Cf. AFL-CIO v. FEC, 333 F.3d 168, 178 (D.C. Cir. 2003) (Even in closed administrative enforcement cases, the Commission must "tailor its [disclosure] policy to avoid unnecessarily

¹ Prior to moving for a remand, the Commission had moved to dismiss the case for lack of standing. On January 25, 2005, the Court denied that motion and allowed the case to proceed to the merits of the Kean Committee's previously filed motion for summary judgment. In that motion, the Kean Committee relied extensively upon the Supreme Court's decision in McConnell.

burdening the First Amendment rights of the political organizations it investigates.”). Thus, section 437g(a)(12) precludes the Commission from disclosing any information that would indicate even the existence of an investigation (without the consent of the administrative respondent) until the administrative proceedings have ended. In re Sealed Case, 237 F.3d at 667. See also AFL-CIO, 333 F.3d at 178 (releasing confidential material “gives parties a large potential ‘bonus’ for filing a[n administrative] complaint because even if their allegations of wrongdoing are rejected, they may still obtain access to thousands of pages of their opponents’ internal strategic information”).

Section 437g(a)(12)(A) states only that the described information “shall not be made public.” 11 C.F.R. 111.21(c), part of the regulation that implements section 437g(a)(12)(A), provides that “[n]othing in these regulations shall be construed to prevent the introduction of evidence in the courts of the United States.” As a result, under 11 C.F.R. 111.21(c), materials covered by 2 U.S.C. 437g(a)(12)(A) may be used in litigation and filed in court so long as the materials are filed under seal. Sealed Case, 237 F.3d at 669 (“There is only one way to read this regulation consistently with § 437g and § 111.21(a): the FEC can introduce evidence pursuant to the Federal Rules, but it cannot introduce evidence concerning an ongoing investigation on the public record — that is, any evidence may be introduced as long as it is placed under seal”). Cf. Freeman v. Seligson, 405 F.2d 1326, 1348 (D.C. Cir. 1968) (“We hold that Section 8 of the Commodity Exchange Act — which says that the Secretary of Agriculture may not ‘publish’ ‘business transactions of any person and trade secrets or names of customers’ — does not bar the Secretary’s compliance with this subpoena ... [and] that limited disclosure in judicial proceedings, carefully curtailed by judicious use of protective orders ... is not a publishing barred by the section”).

3. The Commission and the Kean Committee therefore move this Court to enter a protective order covering information protected by 2 U.S.C. 437g(a)(12) that the Commission may need to present to the Court as a result of its reconsideration of the Kean Committee's administrative complaint on remand.² The proposed protective order limits the parties' use of such information to this litigation. The proposed order permits disclosure only to litigation counsel for the Committee (J. Gerald Hebert; Trevor Potter; Kimberly N. Brown; Kirk L. Jowers; and Donald J. Simon), Anthony S. Cicatiello of the Committee, and Tom Kean, Jr. The order also provides that if either party uses any protected information in any submission to the Court, that information must be filed under seal. "The courts can limit, and in actual practice do limit, the persons having access to the information, their freedom to discuss the information to which they are given access, and the uses to which the information may be put." Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984).

CONCLUSION

For the reasons given above, the Commission and the Kean Committee jointly request this Court to enter the proposed protective order filed concurrently with this Motion to protect confidential information as required by 2 U.S.C. 437g(a)(12)(A). Because the Commission anticipates filing its status report by April 13, 2005, the parties request that the Court enter the proposed order by that date. This will allow the Commission to serve counsel for the Kean

² When the Commission files its status report next week, it will simultaneously file a motion to seal that report, if necessary, for the reasons explained in the instant motion.

Committee with a status report that includes confidential information and will enable discussion of the information, if necessary, at the status conference.³

Respectfully submitted,

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April 8, 2005

³ It may also become necessary for the Court to seal the courtroom during the April 15 status conference.