



FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20461

THIS IS THE BEGINNING OF MUR # 3660

DATE FILMED 6/23/93 CAMERA NO. 4

CAMERAMAN [REDACTED] E.E.S.

93040950097

DR. PHILIP W. OGILVIE
1227 FRANKLIN ST., NE
WASHINGTON, DC 20017

September 29, 1992

Ms. Kay Melchisedech Olson
Executive Editor
Flower & Garden
700 W. 47th St., Suite 310
Kansas City, MO 64112

Dear Ms. Olson,

I wish to cancel my subscription to *Flower & Garden* immediately and to protest in the strongest terms your politicizing a magazine of horticulture. At best your use of the President's wife's picture on the cover of your November 1992 issue is an exercise in bad taste and political insensitivity. At worst it is an undeclared contribution to the Bush/Quayle re-election campaign. Under any circumstance I no longer wish to be associated with your magazine even as a reader!

Sincerely,



cc: ✓ Federal Election Commission
Judy Dawson, VP Circulation and Marketing

93040950098

SPECIAL HOLIDAY ISSUE

FLOWER & GARDEN

THE WORLD'S HOME GARDENING MAGAZINE

The "Dirt" on Barbara Bush?

Don't Worry, It's
All From The Garden

World Gardens
From Alaska
To
New Zealand

Irises That
Rebloom In
Summer & Fall

Your Lawn
& The Law

November 1992 \$2.95

Two
Million
Blooming Mums?
We Show
You Where

Is It Time
To Reorganize
Your Perennials?

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WASHINGTON DC 20017-2422

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 14, 1992

Dr. Philip W. Ogilvie
1227 Franklin Street, NE
Washington, DC 20017

Dear Dr. Ogilvie:

This is to acknowledge receipt on October 1, 1992, of your letter dated September 29, 1992. The Federal Election Campaign Act of 1971, as amended ("the Act") and Commission Regulations require that the contents of a complaint meet certain specific requirements. One of these requirements is that a complaint be sworn to and signed in the presence of a notary public and notarized. Your letter did not contain a notarization on your signature and was not properly sworn to.

In order to file a legally sufficient complaint, you must swear before a notary that the contents of your complaint are true to the best of your knowledge and the notary must represent as part of the jurat that such swearing occurred. The preferred form is "Subscribed and sworn to before me on this ____ day of ____, 19__." A statement by the notary that the complaint was sworn to and subscribed before him/her also will be sufficient. We are sorry for the inconvenience that these requirements may cause you, but we are not statutorily empowered to proceed with the handling of a compliance action unless all the statutory requirements are fulfilled. See 2 U.S.C. § 437g.

Enclosed is a Commission brochure entitled "Filing a Complaint." I hope this material will be helpful to you should you wish to file a legally sufficient complaint with the Commission. The file regarding this correspondence will remain confidential for a 15 day time period during which you may file an amended complaint as specified above. If the defects are not cured and the allegations are not refiled, no additional notification will be provided and the file will be closed.

If you have any questions concerning this matter, please contact me at (202) 219-3410.

Sincerely,

Retha Dixon
Retha Dixon
Docket Chief

Enclosure

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DR. PHILIP W. OGILVIE
1227 FRANKLIN ST., NE
WASHINGTON, DC 20017

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COMMISSION
MAIL ROOM

OCT 19 1 56 PM '92

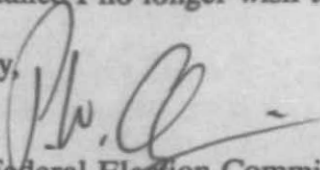
MUR 3660

Ms. Kay Melchisedech Olson
Executive Editor
Flower & Garden
700 W. 47th St., Suite 310
Kansas City, MO 64112

Dear Ms. Olson,

I wish to cancel my subscription to *Flower & Garden* immediately and to protest in the strongest terms your politicizing a magazine of horticulture. At best your use of the President's wife's picture on the cover of your November 1992 issue is an exercise in bad taste and political insensitivity. At worst it is an undeclared contribution to the Bush/Quayle re-election campaign. Under any circumstance I no longer wish to be associated with your magazine even as a reader!

Sincerely,



cc: Federal Election Commission
Judy Dawson, VP Circulation and Marketing

Ms. Retha Dixon
Docket Chief
Federal Election Commission
Washington, DC 20463

October 17, 1992

Dear Ms. Dixon:

This is to acknowledge receipt on October 16, 1992, of your letter dated October 14, 1992. In compliance with your request I am having the above complaint notarized.

Subscribed and sworn to before me on this 17th day of October, 1992.



MY Commission Expires
MAY 14, 1994

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RECEIVED
FEDERAL ELECTION
COMMISSION
OCT 19 1 56 PM '92



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 26, 1992

Dr. Philip W. Ogilive
1227 Franklin Street, NE
Washington, DC 20017

RE: MUR 3660

Dear Dr. Ogilive:

This letter acknowledges receipt on October 19, 1992, of your complaint alleging possible violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by the Flower & Garden magazine. The respondents will be notified of this complaint within five days.

You will be notified as soon as the Federal Election Commission takes final action on your complaint. Should you receive any additional information in this matter, please forward it to the Office of the General Counsel. Such information must be sworn to in the same manner as the original complaint. We have numbered this matter MUR 3660. Please refer to this number in all future correspondence. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anne Weissenborn".

Anne Weissenborn
Acting Assistant General Counsel

Enclosure
Procedures

93040950102



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 26, 1992

Ms. Kay Melchisedech Olson
Executive Director
Flower & Garden
700 W. 49th Street
Suite 310
Kansas City, MO 64112

RE: MUR 3660

Dear Ms. Olson:

The Federal Election Commission received a complaint which indicates that Flower & Garden may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 3660. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against Flower & Garden in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

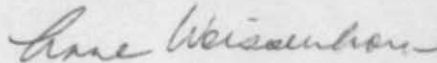
This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

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Ms. Kay Melchisedech Olson
Flower & Garden
Page 2

If you have any questions, please contact Jeffrey Long, the staff member assigned to this matter, at (202) 219-3690. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,



Anne Weissenborn
Acting Assistant General Counsel

Enclosures

1. Complaint
2. Procedures
3. Designation of Counsel Statement

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November 3, 1992

Jeffrey Long
General Counsel's Office
Federal Election Commission
Washington, DC 20463

MUR 3660

Dear Mr. Long:

I am writing in response to the complaint you are analyzing regarding FLOWER & GARDEN Magazine's October-November 1992 issue. It has been our company's strategy to pursue visible people (celebrities, political figures and the like) who have an interest in our editorial subjects. The reviews, profiles or interviews with these well-known people are presented as a service to our readers. Our WORKBENCH Magazine, for instance featured Jimmy Carter on a recent cover; Deborah Norville appeared on the cover of our WORKBASKET Magazine; and Beverly Sills is scheduled for an upcoming FLOWER & GARDEN cover.

Because Barbara Bush has demonstrated a great love of gardening -- and because she was honored by Jackson & Perkins with a rose variety named in her honor -- we requested an interview with Mrs. Bush on several occasions. When her schedule permitted, she did grant us an interview.

The entire interview and resulting article dealt exclusively with Mrs. Bush's interest in gardening. The article was neither intended to nor did carry political overtones. I regret the dissatisfaction one of our readers experienced with this particular issue but defend our decision to feature a prominent individual with an interest in gardening in a magazine such as ours.

If you require further information or explanation, please do not hesitate to contact me again.

Sincerely,

Kay M. Olson

Kay Melchisedech Olson
Executive Editor
FLOWER & GARDEN

cc: John C. Prebich, Publisher

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR #s 3483, 3605, 3615, 3624,
3660, 3706, 3709, 3710

STAFF MEMBER: Lawrence L. Calvert, Jr.

COMPLAINANTS:

MUR 3483: Gerald B. Wetlaufer
MUR 3605: Rodney G. Gregory, as General Counsel to
Friends of Corinne Brown
MUR 3615: Don Brewer Jr., as Chairman of the Duval
County Republican Executive Committee
MUR 3624: Walter H. Shapiro
MUR 3660: Dr. Philip W. Ogilvie
MURs 3706, 3709, and 3710: William D. White

RESPONDENTS:

MUR 3483: George Bush
Bush-Quayle '92 Primary Committee
and J. Stanley Huckaby, as treasurer
KXIC Radio
U. S. Small Business Administration

MUR 3605: Andrew E. Johnson
Committee to Elect Andy Johnson
and Andrew E. Johnson, as treasurer
WVOJ Radio

MUR 3615: Clinton/Gore '92 Committee and
Robert A. Farmer, as treasurer
WJXT-TV

MUR 3624: Bush-Quayle '92 Primary Committee
and J. Stanley Huckaby, as treasurer
Bush-Quayle '92 General Committee
and J. Stanley Huckaby, as treasurer
WBT Radio

MUR 3660: Flower & Garden Magazine

MUR 3706: Lynn Yeakel
Lynn Yeakel for U. S. Senate Committee and
Sidney Rosenblatt, as treasurer
Arlen Specter
Citizens for Arlen Specter and
Stephen J. Harmelin, as treasurer
WDUQ Radio
Kevin Gavin

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MUR 3709: Lynn Yeakel
Lynn Yeakel for U. S. Senate Committee and
Sidney Rosenblatt, as treasurer
WPXI-TV
Lawrence Convention Center
Monro Muffler/Brake
Welch Foods, Inc.
Richardson-Vicks, Inc.
MAACO
Quality Furniture Co.
Edgar Snyder and Associates
Red Lobster Restaurants
International Paper Co.
Turnpike Toyota
West Penn Power Co.
Cinema World, Inc.
Medic Alert
General Mills, Inc.
Willi's Ski Shop
Willoughby Communications

MUR 3710: Arlen Specter
Citizens for Arlen Specter
and Stephen J. Harmelin, as treasurer
WPXI-TV

RELEVANT STATUTES: 2 U.S.C. § 431(8)(A)
2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 431(11)
2 U.S.C. § 441a(a)(1)
2 U.S.C. § 441b
2 U.S.C. § 441b(a)
2 U.S.C. § 441d
2 U.S.C. § 441d(a)(1)
26 U.S.C. § 9003(d)
11 C.F.R. § 100.7(a)(1)(iii)(A)
11 C.F.R. § 100.7(b)(2)
11 C.F.R. § 100.8(b)(2)
11 C.F.R. § 114.4(e)
11 C.F.R. § 114.9(d)
47 C.F.R. § 73.1940(b)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTERS

These matters arise from various complaints filed in 1992 concerning several 1992 elections. Each complaint alleges that a news story or broadcast constituted a prohibited in-kind

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contribution from a media corporation to candidates or committees in violation of 2 U.S.C. § 441b. Accordingly, the complaints are treated in one report. Details about the generation of each particular matter and the material facts of each case will be provided in the next section.

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

The Federal Election Campaign Act of 1971, as amended ("the Act"), provides that no corporation, except through a separate segregated fund, may make a contribution or expenditure in connection with any Federal election. 2 U.S.C. § 441b. However, the Act and the Commission's regulations exclude, under certain conditions, costs associated with the production or dissemination of news stories, commentaries or editorials from the definitions of "contribution" and "expenditure". 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2).

In Readers' Digest Ass'n. v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981), the court, interpreting the Act, stated that the media exemption applies when the distribution of news or commentary falls within the media entity's "legitimate press function," and when the entity is not owned or controlled by any political party, political committee, or candidate. The Commission has interpreted the media exemption broadly, consistent with Congress' admonition that the Act was not intended "to limit or burden in any way the first amendment freedom of the press." H. R. Rep. No. 943, 93d Cong., 1st Sess., at 4 (1974). For instance, although Section 431(9)(B)(i) speaks only of "news

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stor[ies], commentar[ies], or editorial[s]", the Commission's regulations have extended the protection to "costs incurred in covering or carrying" exempt material. 11 C.F.R.

§§ 100.7(b)(2) and 100.8(b)(2). See also, e.g., Advisory Opinion 1982-44 (cable television network's donation of time to national party committees for broadcasts in which candidates and other party leaders discussed issues and solicited contributions was protected by media exemption).

Section 431(9)(B)(i) identifies only "broadcasting station[s], newspaper[s], magazine[s], or other periodical publication[s]" as press entities entitled to the exemption. To determine whether a medium of communication fits one of these descriptions, the Commission has applied the definitions of "broadcaster," "newspaper", and "magazine or other periodical publication" in its Explanation and Justification of 11 C.F.R. § 114.4(e). See, e.g. MURs 2277 and 2567. Although that regulation deals with the sponsorship of candidate debates by news organizations, the definitions in the Explanation and Justification were explicitly drafted with the media exemption in mind. See Explanation and Justification of 11 C.F.R. § 114.4(e), 44 Fed. Reg. 76,734 (1979).

According to the Explanation and Justification, "the term 'broadcaster' is meant to include broadcasting facilities licensed by the Federal Communications Commission [("FCC")], as well as networks." 44 Fed. Reg. at 76,735. Magazines and "other periodical publications" are "publication[s] in bound pamphlet form appearing at regular intervals (usually either weekly,

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bi-weekly, monthly or quarterly) and containing articles of news, information, opinion and entertainment, whether of general or specialized interest. Only magazines and periodicals which ordinarily derive their revenues from subscriptions and advertising" are to be exempt. 44 Fed. Reg. at 76,735.

In addition to the "legitimate press function" test, the Commission must also determine whether the press entity is owned or controlled by any political party, political committee or candidate. This test is a straightforward inquiry into whether the complaint, response or other data available to the Commission suggest that a media entity is so owned or controlled. See, e.g., MUR 3645. If it is, it qualifies for the exemption only in certain narrowly defined situations described in the regulations. See 11 C.F.R. §§ 100.7(b)(2)(i) and (ii) and 100.8(b)(2)(i) and (ii).¹

Paid advertising expressly advocating a candidate's election or defeat would not qualify for the media exemption and would be subject to the requirements of 2 U.S.C. § 441d. That section provides disclaimer requirements "whenever any person makes an

1. Under the cited provisions, if a media entity is owned or controlled by a party, committee or candidate the media exemption extends only to the costs of news stories "(i) which represent . . . bona fide news account[s] communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which [are] part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area" These provisions are not applicable to any of the MURs discussed in this report. However, it is important to note that, contrary to the assertion of complainant William D. White in MURs 3706, 3709 and 3710, the "reasonably equal coverage" requirement is triggered only by a finding that a media entity is owned or controlled by a party, committee or candidate.

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expenditure" for "general public political advertising" containing express advocacy. Obviously, Congress did not intend through the media exemption to exempt paid advertising containing express advocacy from the definition of "expenditure"; otherwise, Section 441d would be a nullity. By contrast, paid non-political advertising sponsorship of a broadcast or publication protected by the exemption is permitted, provided that the sponsor exercises no control over the exempt content. See Advisory Opinion 1987-8 (corporate sponsorship of magazine and television interview series with presidential candidates was not prohibited).

B. The Cases

1. MUR 3483

This matter was generated by a complaint received from Gerald B. Wetlaufer of Iowa City, Iowa against KXIC Radio of Iowa City; then-President George Bush; the Bush-Quayle '92 Primary Committee, Inc. and J. Stanley Huckaby, as treasurer; and the U. S. Small Business Administration (SBA). The complaint alleges that taped radio public service announcements produced by SBA and broadcast by KXIC contained the statement "President Bush knows our challenges", leading into a voice-over message from the President promoting SBA export assistance programs. The complaint appears to allege that because President Bush was a candidate for re-election at the time the public service announcement was broadcast, the announcement expressly advocated his candidacy and was a thing of value to his campaign. Consequently, the complaint theorizes that the production and airing of the public service announcement constituted a prohibited in-kind contribution from

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the SBA and KXIC to the Bush campaign. Attachment A-1.

As a threshold matter, this Office is of the opinion that the Commission lacks jurisdiction over the SBA in this case. Although 2 U.S.C. § 441a(a)(1) provides that "no person" shall make contributions in excess of certain limits, 2 U.S.C. § 431(11) provides that "the term 'Person' . . . does not include the Federal Government or any authority of the Federal Government." The SBA is, of course, a federal agency. Moreover, for reasons that will be shown, even if the SBA were subject to the Commission's jurisdiction this Office would still recommend that the Commission find no reason to believe the SBA violated any provision of the Act.

KXIC asserts it broadcast the announcement "to meet its responsibilities as a licensee of the Federal Communications Commission to present programming that addresses issues of concern to the community," and argues that the broadcast of public service announcements like the one at issue here is per se within the legitimate press function of a radio station. Attachment A-3 at 2.

In Advisory Opinion 1978-76, the requester, a member of Congress, had produced a film on the services his office made available to constituents. A television station in the member's home district proposed to broadcast the film free of charge as a public service announcement. The Commission determined that the media exemption was "available when, in the exercise of its responsibility [as an FCC licensee] to serve the public interest, convenience and necessity, the station carries a . . . public

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service announcement to inform constituents of facilities and services provided" by the member's office.

The SBA announcement appears to meet the test articulated in AO 1978-76. KXIC asserts it broadcast the announcement in furtherance of its obligation as an FCC licensee, and, by providing a toll-free telephone number listeners could call to order SBA publications, the announcement informed listeners of services provided by the Federal government.² Attachment A-3 at 5. Additionally, KXIC's general manager, Steven Winkey, declared that KXIC's parent, Iowa City Broadcasting Co., is neither owned nor controlled by a party, committee or candidate. Id. at 4. Because the announcement appears to be within the press exemption, it does not appear to contribute a contribution to the Bush-Quayle '92 Primary Committee.

Therefore, this Office recommends that the Commission find no reason to believe that KXIC Radio, the U. S. Small Business Administration, George Bush, or the Bush-Quayle '92 Primary Committee and J. Stanley Huckaby, as treasurer, violated any provision of the Act with respect to MUR 3483 and close the file.

2. MUR 3605

This matter was generated by a complaint received from

2. Cf. former 47 C.F.R. § 73.1810(d)(4), the FCC's former definition of a "public service announcement", which provided that announcements for which the broadcaster made no charge and which promoted the activities and services of Federal agencies, among other entities, qualified as public service announcements. Although the FCC has removed the regulation from the Code of Federal Regulations, see 49 Fed. Reg. 33,658 (August 24, 1984), it has continued to refer to the definition. See In the Matter of Policies and Rules Concerning Children's Television Programming, 5 FCC Rcd. 7199, 7204-05 n. 10 (1990).

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Rodney G. Gregory, as general counsel to Friends of Corinne Brown, against Andrew E. Johnson, the Committee to Elect Andy Johnson and Andrew E. Johnson, as treasurer, and WVOJ Radio of Jacksonville, Florida.³ The complaint alleged that Johnson continued to host a call-in radio program on WVOJ after becoming a candidate for Congress, and that this arrangement may have constituted a prohibited in-kind contribution from WVOJ to the Johnson campaign. Attachment B-1. WVOJ's response indicates that both before and after becoming a candidate for Congress, Johnson paid WVOJ for two hours of live broadcast time every weekday afternoon and a two hour replay at night. See Attachment B-2 at 1. The station asserts that after Johnson became a Congressional candidate, the time was paid for by his campaign committee. Id. at 3. The committee's disclosure reports appear to corroborate the assertion.

As discussed supra at 5-6, paid political advertising falls outside the scope of the news media exemption. Furthermore, because it appears that WVOJ charged Johnson the usual and normal charge for air time consistent with 11 C.F.R.

§ 100.7(a)(1)(iii)(A), this Office recommends the Commission find no reason to believe that WVOJ violated 2 U.S.C. § 441b, and close

3. Friends of Corinne Brown was the principal campaign committee of Corinne Brown, who, like Johnson, was a candidate for the Democratic nomination for U. S. Representative from the Third Congressional District of Florida. In the September 1, 1992 Florida Democratic primary, Brown and Johnson received 43 percent and 31 percent of the vote, respectively, qualifying them for the October 1, 1992, run-off election. In the run-off, Brown was nominated, receiving 64 percent of the vote to Johnson's 36 percent. Brown was elected to the U. S. House of Representatives in the November 3, 1992 general election.

the file with respect to WVOJ.⁴

However, WVOJ's response raises the question of whether Johnson's call-in show carried a legally sufficient disclaimer. The response indicates that after Johnson became a candidate, the show was identified as a "Paid Political Broadcast." Attachment B-2 at 2. 2 U.S.C. § 441d(a)(1) provides that political advertising, "if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee." A disclaimer identifying Johnson's show as a "Paid Political Broadcast" without identifying who paid for it would not meet Section 441d(a)(1)'s requirements. Accordingly, this Office recommends that the Commission find reason to believe that the Committee to Elect Andy Johnson and Andrew E. Johnson, as treasurer, violated 2 U.S.C. § 441d(a)(1).

4. 11 C.F.R. § 100.7(a)(1)(iii)(A) provides that the provision of services to a political committee at less than the usual and normal charge for such services will constitute an in-kind contribution to the committee. Both the contract between WVOJ and Johnson and the FCC's regulations governing the sale of broadcast time to candidates provide that if air time is used by candidates personally within 45 days of a primary or run-off election, the station may charge the "lowest unit charge of the station for the same class and amount of time for the same period;" prior to 45 days before an election, the station may charge not more than "the charges made for comparable use of such station time by other users." Attachment B-2 at 3; 47 C.F.R. § 73.1940(b) (reprinted at 11 C.F.R. Supp. A., p. 265 (1992 ed.)). Moreover, the rates on the contract appear generally consistent with the advertising rates quoted for WVOJ in the *Gale Directory of Publications and Broadcast Media 1993*, taking into consideration the time of broadcast and the station's wattage. Therefore, it appears that WVOJ charged Johnson the "usual and normal" charge for air time.

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3. MUR 3615

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This matter was generated by a complaint received from Don Brewer, Jr., chairman of the Duval County (Florida) Republican Executive Committee, against WJXT-TV in Jacksonville, Florida and the Clinton-Gore '92 Committee and Robert A. Farmer, as treasurer. The complaint alleges that WJXT broadcast a live call-in interview program featuring Democratic presidential nominee Bill Clinton on September 9, 1992.⁵ According to the complaint, WJXT invited the public and placed television sets on its premises outside its studio building so that members of the public could watch the program. It then allegedly allowed the Clinton campaign to erect a tent over the television sets and exclude persons who were not Clinton supporters from the tent. The Clinton committee purportedly "enclosed the area with police tape and police officers to prevent non-Clinton supporters from viewing the program. Approximately two hundred and fifty Clinton supporters were allowed into [the] viewing area while approximately seventy non-Clinton supporters were held away from the event by police lines." Attachment C-1. Moreover, the complaint alleges that "WJXT . . . allowed Clinton financial supporters into the station to meet privately with Governor Clinton." Id. The cumulative effect of these events, the complaint alleges, was a prohibited corporate in-kind contribution from WJXT to the Clinton campaign.

Both responses dispute the complaint's version of the facts.

5. The broadcast was apparently carried statewide over the "Florida News Network," which consists of WJXT and several other television stations.

While Clinton apparently did appear on WJXT's September 9 broadcast, both responses indicate that the television sets were brought onto WJXT's property by the Clinton campaign, not WJXT. Attachment C-2 at 3; Attachment C-3 at 3. However, WJXT management apparently did not object to the sets' presence; management had already decided to permit the general public to gather on its property while Clinton was inside the studio building, attachment C-2 at 2, and it appears that this decision may have come in response to a request from the Clinton committee. Attachment C-3 at 5. Station management explicitly gave the Clinton campaign permission to put up the tent, but not until the tent was partially erected. Attachment C-2 at 3. Neither response directly disputes the complaint's contention that persons opposed to Clinton's candidacy were excluded from the tent. However, WJXT asserts that crowd control at the site was handled by local police (including some off-duty officers with whom it contracted to direct traffic in its parking lot) and the U. S. Secret Service, and that any actions by those agencies or by Clinton supporters to exclude Clinton opponents from the premises were taken without station management's knowledge or approval. Id. at 2. Finally, WJXT denies that it hosted a "private meeting" between Clinton and "financial supporters"; instead, it asserts it hosted a small reception after the program for Clinton and local

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dignitaries. Id. at 3-4.⁶

The broadcast itself appears to fall within the "media exemption." A call-in interview with a major party nominee for President is a legitimate news story, and it makes no difference that the station is producing, as well as covering, the news story. Cf. MUR 2567 (debates produced by broadcasters are news stories within meaning of exemption). WJXT is an FCC licensee, and there is no indication that it is owned or controlled by a party, candidate, or committee. Moreover, there appears to be no factual basis for any implication in the complaint that the event after the broadcast was a Clinton fundraiser.

This Office does not concur with WJXT or the Clinton-Gore Committee's contention that any costs incurred by WJXT with regard to the tent, including the opportunity costs of allowing the Clinton Committee to use WJXT property to install TV sets and a tent were "costs incurred in covering or carrying" Clinton's appearance on the broadcast and therefore exempt pursuant to 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2). Contrary to WJXT's assertions, the station's ability to carry the broadcast was in no way altered by its decision to allow demonstrators on station property. In fact, granting permission to the Clinton Committee to set up TV sets and to erect a tent to shelter the TVs and Clinton supporters is entirely unrelated to the station's

6. WJXT does acknowledge that some Clinton supporters entered the station building and "were restricted to a roped off area" in the lobby, although the station claims WJXT personnel did not let them into the building. The station also acknowledges that Mr. Clinton shook hands with these supporters as he walked through the lobby on his way out. See C-2 at 12-13.

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broadcast function and should not be viewed as a "cost incurred in covering or carrying a new story."

Under the Act, corporations are prohibited from making any contribution or expenditure in connection with the election of a Federal candidate, and candidates and political committees are prohibited from knowingly accepting any such contributions or expenditures. 2 U.S.C. § 441b(a). For purposes of Section 441b, "contribution or expenditure" is defined to include "any direct or indirect payment, distribution, loan advance, deposit or gift or money, or any services, or anything of value to any candidate, campaign committee, or political committee or organization in connection with a federal election." 2 U.S.C. § 441b(b)(2). In this case, the use of WJXT's property by the Clinton campaign clearly constitutes an in-kind contribution prohibited under Section 441b.⁷

WJXT advances two arguments for concluding that, even without the protection of the news media exemption, it made no contribution or expenditure in this case. First, the station argues that none of its actions were taken for the purpose of influencing a federal election as would be required by 2 U.S.C. § 431(8) under Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986). That case involved an address at a picnic by an incumbent officeholder in his capacity as a Member of Congress; here Clinton

7. While the Corporations Division of the Office of the Secretary of State of Florida lists no corporation under the name "WJXT," the Gales Directory of Publications and Broadcast Media 1992 lists WJXT as owned by Post-Newsweek Stations, Inc. of Washington, D.C.

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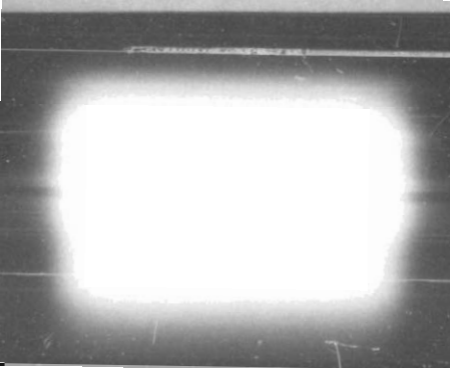
spoke to Florida voters not in his capacity as Governor of Arkansas but in his capacity as a Presidential candidate.⁸ The station also argues that its actions do not constitute expenditures on the grounds that they lack "express advocacy." WJXT attempts to rely on the Supreme Court's holding "that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of Section 441b. FEC v. Massachusetts Citizens for Life, 479 U.S. 246, 249 (1986). Respondent's argument carries no weight here since this case does not involve independent expenditures but rather in-kind contributions for which the "express advocacy" limitation does not apply.

Accordingly, it appears that WJXT made, and the Clinton campaign knowingly received, a prohibited contribution. Therefore, this Office recommends that the Commission find reason to believe that WJXT-TV violated 2 U.S.C. § 441b(a) and that the Clinton-Gore '92 Committee and Robert A. Farmer, as treasurer, knowingly violated 2 U.S.C. § 441b(a) and violated 26 U.S.C. § 9003.

4. MUR 3624

This matter was generated by a complaint received from Walter H. Shapiro of Charlotte, North Carolina, against WBT Radio of Charlotte, the Bush-Quayle '92 Primary Committee, the Bush-Quayle '92 General Committee, and J. Stanley Huckaby, as treasurer of both committees. The complaint alleges that by

8. WJXT actually invited both major party candidates to appear for Town Meeting programs. The Bush campaign initially declined the offer and then subsequently agreed to participate in a program broadcast on October 23, 1992. See Attachment C-2 at 2.



broadcasting the nationally syndicated Rush Limbaugh radio program, WBT effectively broadcast three hours a day of unpaid advertising for the Bush-Quayle campaign and thereby made a prohibited in-kind contribution. Attachment D-1. On November 30, 1992, Shapiro amended his complaint, alleging that Limbaugh was in a business relationship with Roger Ailes, a consultant to former President Bush's 1988 campaign, and that Bush and then-Vice President Quayle appeared on the Limbaugh program while other candidates for President and Vice President did not. Attachment D-2.

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WBT is licensed by the FCC, and is owned not by any party, candidate or committee but by Jefferson-Pilot Communications Co., a North Carolina media corporation. In a sworn affidavit in response to the complaint, Richard Jackson Whitt, WBT's general manager, stated that the Limbaugh program is a nationally syndicated "call-in" talk show broadcast for three hours every weekday. On the typical show, Limbaugh "states his opinion on some subject and then invites callers, who may express opposing or supporting views. . . . Politics may or may not be discussed on any given day." Attachment D-4 at 5-6. Limbaugh's program therefore appears to be commentary by a third party not employed by WBT; such third-party commentary is squarely within the "legitimate press function" of a broadcaster. Advisory Opinion 1982-44. WBT's broadcast of the Rush Limbaugh program thus appears to be protected by the media exemption, and there appears to have been no prohibited in-kind corporate contribution for

either Bush-Quayle committee to accept.⁹ Accordingly, this Office recommends that the Commission find no reason to believe that WBT Radio, the Bush-Quayle '92 Primary Committee, the Bush-Quayle '92 General Committee, and J. Stanley Huckaby, as treasurer of both committees violated any provision of the Act with respect to MUR 3624, and close the file.

5. MUR 3660

This matter was generated by a complaint received from Dr. Philip W. Ogilvie of Washington, D. C. against Flower & Garden magazine. The complaint alleges that Flower & Garden's use of Barbara Bush's picture on the cover of its November 1992 issue was an illegal in-kind contribution to the presidential campaign of Mrs. Bush's husband. Attachment E-1.

As the response of KC Publishing, Inc., the parent of Flower & Garden, points out, Barbara Bush was a public figure whose interest in gardening was newsworthy for a general-interest publication devoted to that topic; the cover picture accompanied an interview with Mrs. Bush printed inside the magazine. Attachment E-2. Moreover, Flower & Garden would appear to be a "bona fide" magazine. From a xerographic copy of the magazine's cover, it would appear that Flower & Garden is in bound pamphlet form. It is published every other month, and apparently has a

9. Shapiro's amendment to the complaint, which must be read broadly even to find an allegation of conduct that would violate the Act, may be an attempt to allege that through a web of unsubstantiated relationships between the committees, Ailes, and Limbaugh, the costs associated with the program constituted in-kind contributions. No factual support is offered for such an allegation.

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regular subscription price of \$12.95 per year, a subscription and newsstand circulation of more than 570,000, and regular advertising rates. 1 Gale Directory of Publications & Broadcast Media 1993 1165. Further, it appears to contain articles of interest to the general gardening public. Therefore, Flower & Garden's interview with Barbara Bush appears to have been within its legitimate press function.

KC Publishing's response does not explicitly address the issue of ownership or control, but no available data suggest that KC Publishing is a party, committee or candidate. FEC indices reveal no campaign activity by KC Publishing or publisher John C. Prebich in the 1992 election cycle. Accordingly this Office recommends that the Commission find no reason to believe that KC Publishing, Inc., violated 2 U.S.C. § 441b, and close the file on MUR 3660.

6. MURs 3706, 3709, and 3710

These matters were all generated by complaints filed by William D. White of Pittsburgh, Pennsylvania.¹⁰ In MUR 3706, White filed a complaint against Lynn Yeakel; the Lynn Yeakel for U.S. Senate Committee and Sidney Rosenblatt, as treasurer; Senator Arlen Specter; Citizens for Arlen Specter and Stephen J. Harmelin,

10. White claims to have been an independent candidate for United States Senator from Pennsylvania in the November 3, 1992 general election. See, e.g., Attachment F-1 at 2. However, White failed to file a Statement of Candidacy with the Commission for the 1992 election, and counsel for one of the respondents in these matters stated upon information and belief that White failed to qualify for the Pennsylvania ballot. Attachment F-2 at 2.

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as treasurer;¹¹ WDUQ Radio of Pittsburgh; and Kevin Gavin, WDUQ's news director. The complaint alleges that WDUQ provided free air time to the Yeakel campaign, and that this constituted an illegal in-kind contribution. It also implies that Gavin, who is WDUQ's news director, personally contributed services to the Yeakel campaign by interviewing Yeakel during the broadcast produced with WDUQ's grant of free air time. Additionally, White alleges that WDUQ's coverage of Yeakel and Specter's participation in the League of Women Voters' "Citizens' Jury" program constituted an illegal in-kind contribution from WDUQ to both campaigns.

Attachment F-1.

WDUQ's general manager, Judy Jankowski, averred in a sworn affidavit that the station made "free and essentially unrestricted time" available to all candidates for the U. S. Senate from Pennsylvania, including White. Attachment F-4 at 2. WDUQ's donation of air time was similar to that approved by the Commission in Advisory Opinion 1982-44, and to the donation of free newspaper space held to be within the media exemption in MUR 486 (cited in AO 1982-44). WDUQ's coverage of the League of Women Voters' "Citizens' Jury" appears to have been spot news coverage. Moreover, WDUQ is an FCC licensee; therefore, the broadcasts at issue appear to have been within WDUQ's legitimate press function. Additionally, WDUQ appears to be owned not by a party, committee or candidate, but by Duquesne University.

11. Senator Specter was the Republican nominee for U. S. Senator from Pennsylvania in the 1992 general election, and Yeakel was the Democratic nominee. Senator Specter was re-elected, receiving 51 percent of the vote to Yeakel's 49 percent.

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Attachment F-4 at 1. Accordingly, this Office recommends that the Commission find no reason to believe that WDUQ Radio or Kevin Gavin violated any provision of the Act with respect to MUR 3706. Because there appears to have been no prohibited contribution to accept, this Office further recommends that the Commission find no reason to believe that Lynn Yeakel, the Yeakel for Senate Committee or Sidney Rosenblatt, as treasurer, Senator Arlen Specter, or Citizens for Arlen Specter or Stephen J. Harmelin, as treasurer violated any provision of the Act with respect to MUR 3706 and close the file.

In MUR 3709, White filed a complaint against Yeakel, the Yeakel committee, and WPXI-TV of Pittsburgh. The complaint alleged that WPXI's hour-long broadcast of a "call-in" interview featuring Yeakel constituted an illegal in-kind contribution from WPXI to the Yeakel campaign. Attachment G-1. On December 2, 1992, White amended his complaint to name each of the program's advertisers as respondents, and, on January 8, 1993, White again amended his complaint to name as a respondent Willoughby Communications, an advertising agency that acted as purchasing agent for one of the advertisers.¹² The amendments alleged that

12. The advertiser respondents in MUR 3709 are:

Lawrence Convention Center
Monro Muffler/Brake
Welch Foods, Inc.
Richardson-Vicks, Inc.
MAACO
Quality Furniture Co.
Edgar Snyder and Associates
Red Lobster Restaurants
International Paper Co.
Turnpike Toyota

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the advertisers' sponsorship of the program constituted illegal in-kind contributions to the Yeakel campaign. Attachments G-2 and G-3.

WPXI responds that the program about which White complains was a "regularly scheduled news program." Attachment G-4 at 1. Confirming this assertion, all of the advertiser respondents contend that they bought time on WPXI news programming generally, and had no knowledge (much less intent) that they were buying time on a broadcast featuring Yeakel. For instance, respondent Monro Muffler/Brake asserted that "one spot was ordered to run every other week from July 11 through October 3, 1992 in the WPXI Saturday morning 'news block' between 8 a.m. and 12 p.m." Attachment G-6. The specific placement of advertisements within that time period was apparently left up to WPXI.

Regularly scheduled news programs are protected by the media exemption. Moreover, WPXI is an FCC licensee and does not appear to be owned or controlled by a party, committee or candidate. Accordingly, it appears to be within the media exemption, and this Office recommends that the Commission find no reason to believe that WPXI-TV violated any provision of the Act with respect to MUR 3709.

As discussed supra at 6, non-political advertising on or sponsorship of material which qualifies for the media exemption is

(Footnote 12 continued from previous page)

West Penn Power Co.

Cinema World, Inc.

Medic Alert

General Mills, Inc.

Willi's Ski Shop

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not prohibited by 2 U.S.C. § 441b, provided that the advertiser exercises no editorial control over the content of the exempt material. Because none of the advertiser respondents appeared to exercise editorial control over the content of WPXI's interview with Yeakel, this Office recommends that the Commission find no reason to believe that any of the advertiser respondents or Willoughby Communications violated any provision of the Act. Finally, because there appears to have been no prohibited in-kind contribution, this Office recommends that the Commission find no reason to believe that Lynn Yeakel or the Lynn Yeakel for Senate Committee, or Sidney Rosenblatt, as treasurer, violated any provision of the Act with respect to MUR 3709 and close the file.

In MUR 3710, White filed a complaint against Senator Specter, the Specter committee, and WPXI. The allegations were substantially the same as those involving Yeakel, the Yeakel committee, and WPXI in MUR 3709. Attachment H-1. However, unlike in MUR 3709, White did not name individual advertisers on the program as respondents. The allegations and responses in MUR 3710 are sufficiently similar to those in MUR 3709 for the same analysis to apply. Accordingly, this Office recommends that the Commission find no reason to believe that any respondents violated any provision of the Act with respect to MUR 3710 and close the file.

III. RECOMMENDATIONS

A. With respect to MUR 3483:

1. Find no reason to believe that KXIC Radio, the U. S. Small Business Administration, George Bush, or the Bush-Quayle '92 Primary Committee or J. Stanley Huckaby, as treasurer, violated any provision of the Act.

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2. Approve the appropriate letters.

3. Close the file.

B. With respect to MUR 3605:

1. Find no reason to believe that WVOJ Radio violated 2 U.S.C. § 441b, and close the file with respect to WVOJ radio.

2. Find reason to believe that the Committee to Elect Andy Johnson and Andrew E. Johnson, as treasurer, violated 2 U.S.C. § 441d(a)(1).

3. Approve the attached Factual and Legal Analysis.

4. Approve the appropriate letters.

C. With respect to MUR 3615:

1. Find reason to believe that WJXT-TV violated 2 U.S.C. § 441b(a).

2. Find reason to believe that the Clinton-Gore '92 Committee and Robert A. Farmer, as treasurer, knowingly violated 2 U.S.C. § 441b(a) and violated 26 U.S.C. § 9003.

3. Approve the attached Factual and Legal Analyses.

4. Approve the appropriate letters.

D. With respect to MUR 3624:

1. Find no reason to believe that WBT Radio, the Bush-Quayle '92 Primary Committee, the Bush-Quayle '92 General Committee, or J. Stanley Huckaby as treasurer of both committees, violated any provision of the Act.

2. Approve the appropriate letters.

3. Close the file.

E. With respect to MUR 3660:

1. Find no reason to believe that KC Publishing, Inc., violated 2 U.S.C. § 441b.

2. Approve the appropriate letters.

3. Close the file.

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F. With respect to MUR 3706:

1. Find no reason to believe that WDUQ Radio, Kevin Gavin, Lynn Yeakel, the Lynn Yeakel for U. S. Senate Committee or Sidney Rosenblatt, as treasurer, Arlen Specter, or Citizens for Arlen Specter or Stephen J. Harmelin, as treasurer, violated any provision of the Act.
2. Approve the appropriate letters.
3. Close the file.

G. With respect to MUR 3709:

1. Find no reason to believe that Lynn Yeakel, the Lynn Yeakel for U. S. Senate Committee or Sidney Rosenblatt, as treasurer, WPXI-TV, Lawrence Convention Center, Monro Muffler/Brake, Welch Foods, Inc., Richardson-Vicks, Inc., MAACO, Quality Furniture Co., Edgar Snyder and Associates, Red Lobster Restaurants, International Paper Co., Turnpike Toyota, West Penn Power Co., Cinema World, Inc., Medic Alert, General Mills, Inc., Willi's Ski Shop, or Willoughby Communications violated any provision of the Act.
2. Approve the appropriate letters.
3. Close the file.

H. With respect to MUR 3710:


1. Find no reason to believe that Arlen Specter, Citizens for Arlen Specter or Stephen J. Harmelin, as treasurer, or WPXI-TV violated any provision of the Act.
2. Approve the appropriate letters.
3. Close the file.

Lawrence M. Noble
General Counsel

Date

5/17/93

BY:


Lois G. Lerner
Associate General Counsel

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 3660
Flower and Garden Magazine)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on May 25, 1993, do hereby certify that the Commission decided by a vote of 5-0 to take the following actions in MUR 3660:

1. Find no reason to believe that KC Publishing, Inc. violated 2 U.S.C. § 441b.
2. Approve the appropriate letters as recommended in the General Counsel's report dated May 17, 1993.
3. Close the file.

Commissioners Aikens, Elliott, McGarry, Potter, and Thomas voted affirmatively for the decision; Commissioner McDonald was not present.

Attest:

5-27-93
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary of the Commission

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

JUNE 8, 1993

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Dr. Philip W. Ogilvie
1227 Franklin St., N.E.
Washington, DC 20017

RE: MUR 3660

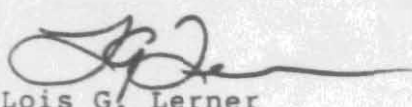
Dear Mr. Ogilvie:

On May 25, 1993, the Federal Election Commission reviewed the allegations of your complaint dated September 29, 1992, and found that on the basis of the information provided in your complaint that there is no reason to believe that KC Publishing, Inc., as parent of Flower & Garden, violated 2 U.S.C. § 441b. Accordingly, on May 25, 1993, the Commission closed the file in this matter.

The Federal Election Campaign Act of 1971, as amended ("the Act") allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

Lawrence M. Noble
General Counsel

BY: 
Lois G. Lerner
Associate General Counsel

Enclosure
General Counsel's Report

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUNE 8, 1993

Kay M. Olson, Executive Editor
Flower & Garden
700 W. 47th Street, Suite 310
Kansas City, MO 64112

RE: MUR 3660
KC Publishing, Inc.

Dear Ms. Olson:

On October 26, 1992, the Federal Election Commission notified Flower & Garden of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

On May 25, 1993, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe that KC Publishing, Inc., as parent of Flower & Garden, violated 2 U.S.C. § 441b. Accordingly, the Commission closed its file in this matter.

The confidentiality provisions at 2 U.S.C. § 437g(a)(12) no longer apply and this matter is now public. In addition, although the complete file must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the file may be placed on the public record before receiving your additional materials, any permissible submissions will be added to the public record upon receipt.

Sincerely,

Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

Enclosure
General Counsel's Report

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 3660

DATE FILMED 6/23/93 CAMERA NO. 4

CAMERAMAN ~~XXXXXXXXXX~~ E.E.S.

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