



NYCLU

NEW YORK CIVIL LIBERTIES UNION

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October 9, 2015

Monica Stamm, Esq.
General Counsel
Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207

Sent via email

Re: Appeal of the denial of an exemption from Source of Funding disclosure requirements

Dear Ms. Stamm:

The New York Civil Liberties Union (NYCLU) is an entity that engages in lobbying and that retains lobbyists and must, therefore, file semi-annual reports with the Commission on Public Ethics (JCOPE) under New York law. Such reports must identify the source of any funding in excess of \$5,000 unless the filing organization is granted an exemption from disclosure, under New York Legislative Law §1-h(c)(4)(ii). This provision requires that JCOPE “shall not require disclosure” and shall grant an exemption from disclosure where it determines, after “a review of the relevant facts presented by the reporting lobbyist that such disclosure may cause harm, threats, harassment or reprisals to the [funding] source or to individuals or property affiliated with the source.”

On July 13, 2015, the NYCLU applied for an exemption. In a letter dated September 25, 2015, JCOPE denied the application. The NYCLU hereby appeals from that denial.

Authority for this appeal rests, first, and foremost upon Section 1-h(c)(4)(ii) of the Legislative Law, which provides that, if JCOPE denies the application for an exemption,

“[t]he reporting lobbyist may appeal the commission’s determination and such appeal shall be heard by a judicial hearing officer who is independent and not affiliated with or employed by [JCOPE], pursuant to regulations promulgated by [JCOPE]. The reporting lobbyist shall not be required to disclose the sources of funding that are the subject of such appeal pending final judgment on appeal.”

Accordingly, the statute confers upon the NYCLU the right to appeal from JCOPE's September 25 determination, and to have that appeal heard by an independent judicial hearing officer. The NYCLU chooses to avail itself of this right to appeal.

The regulations promulgated under this section, and set forth in Title 19 NYCRR Part 938, cannot be interpreted so as to deny the authority to pursue an appeal in this case. An interpretation of the regulations negating the right to appeal would be in direct conflict with the statutory mandate and, therefore, *ultra vires*. *Gross v. New York City Alcoholic Bev. Control Bd.*, 7 N.Y.2d 531, 540 (1960) (administrative rule invalid where it contravenes legislative procedures and deprives applicants of substantial rights to review); *Lighthouse Pointe Prop. Assoc. LLC v. N.Y. State Dept. of Env'tl. Conservation*, 14 N.Y.3d 161, 176 (2010) (where a regulation runs counter to the statutory provision, "it should not be accorded any weight"). Moreover, Part 938.6 of the regulations addresses the question of appeals by entities that are lobbyists and those that retain lobbyists and must file semi-annual reports. In doing so, Part 938.6(b) expressly provides that all such entities "may appeal a denial of an application for an exemption."

Under the regulations, the procedural nature of any appeal may vary depending upon the provision under which the lobbyist requests the exemption. The regulations contain two provisions respecting applications for exemptions. Applications for exemptions by all lobbyists and entities that retain lobbyists, including entities that are recognized by the IRS as 501(c)(4) organizations, can be considered by JCOPE under Part 938.4(a) of the regulations. Applications for exemptions by 501(c)(4) organizations can also be pursued under Part 938.4(b) of the regulations. But the regulations further state that an appeal from the denial of a 938.4(a) application will be heard by an independent judicial hearing officer whereas applications initiated under Part 938.4(b) will not be treated in this way. This distinction between an appeal under Part 938.4(a) and 938.4(b) is inapplicable here for a number of reasons.

First, to deny the NYCLU an appeal before a judicial hearing officer would, as noted above, violate the express legislative mandate set forth in Legislative Law §1-h(c)(4)(ii). In this respect, the regulation that purports to deny an appeal before an independent judicial officer conflicts with state law and is unenforceable.

Second, there is administrative precedent for disregarding the distinction between appeals from the denial of applications under Part 938.4(a) and 938.4(b). This issue arose in 2014 when the NYCLU appealed from the denial, by JCOPE, of an application for an exemption from disclosure. In entertaining the appeal, the judicial hearing officer considered and rejected the distinction between an application made under Part 938.4(a) and one made under Part 938.4(b). In doing so, the judicial hearing officer concluded that, even though the NYCLU application appeared to have been made under Part 938.4(b), "the substance of the application, as well as [JCOPE's] denial of the exemption, covers issues presented by any application under subsection (a) and this appeal will not be dismissed because of a technicality. It will be considered and decided as if the Application has specified Part 938.4(a) instead of Part 938.4(b)." (Exh. A at 2.)¹

¹ Attached documents include the July 13, 2015, application and supporting letter of the NYCLU requesting exemption, as well as the exhibits presented with that application: the July 11, 2014 decision of Judicial Hearing Officer George C. Pratt reversing JCOPE's 2014 denial of the NYCLU's previous application for an exemption

Thus, because the NYCLU application for an exemption could have been brought under Part 938.4(a), the judicial hearing officer held that it retained jurisdiction to entertain the appeal. Precisely the same reasoning applies here. Because 501(c)(4) organizations can apply under Part 938.4(a) as well as 938.4(b), appeals from the denial of an application can and should be given the more favorable treatment accorded appeals from 938.4(a) denials.

Third, under the circumstances of this case, the NYCLU's appeal before a judicial hearing officer cannot be curtailed based upon the claim that the application for an exemption rested upon Part 938.4(b) and that, therefore, no appeal before a judicial hearing officer can be taken from such an application. Such a claim must be rejected because, in this case, the NYCLU's application for an exemption rested upon both Part 938.4(b) and Part 938.4(a). On the application form to JCOPE, the NYCLU designated the application as resting upon Part 938.4(b). And on the second page of the supporting letter to JCOPE, the NYCLU made clear that the request for an exemption also rested upon the language from Part 938.4(a), which is cited at footnote 4 of the letter. For all of these reasons, the NYCLU application must be treated as one arising out of an application under 938.4(a) and must be referred to an independent judicial hearing officer.

The merits of the NYCLU's request for an exemption from disclosure are amply set forth in the July 13, 2015 letter from Donna Lieberman and Robert Perry to Ms. Letizia Tagliaferro, then Executive Director of JCOPE, and in the exhibits appended to that letter. No rehearsal of the legal arguments and factual presentation set forth in that letter is necessary here. The NYCLU relies upon that submission in support of this appeal but supplements that submission here to address briefly the reasoning employed by JCOPE in its September 25 letter denying the NYCLU's application for an exemption.

JCOPE's September 25 letter offers three reasons in support of its rejection of the NYCLU application. First, "the Commission found that many of the incidents of [reprisals and harassment] were remote in time and geography." (Addendum at 2.) Second, it concluded that "the majority of the information contained in the NYCLU's application pertains to its staff members or pertains generally to the ACLU." (*Id.*) Third, it claimed that "some of the incidents described by NYCLU [involve] . . . constitutionally protected speech." (*Id.* at 3.) These explanations are not persuasive.

The claim that the incidents discussed in the NYCLU application were "remote in time" ignores the fact that JCOPE's own regulations provide that, in evaluating applications for exemptions, consideration should be given to "the duration of past or present harm" (Part 938.4(a)(ii)). The incidents described by the NYCLU demonstrate a long history of antagonism by some to the NYCLU and to its parent organization, the American Civil Liberties Union (ACLU) and its affiliates. As former Federal Judge George C. Pratt, sitting as a judicial hearing officer, recognized in his July, 2014 opinion, the NYCLU has been able to identify "many and

(Exh. A); the April 24, 2014 letter of the NYCLU seeking to appeal from JCOPE's April 4 denial of the NYCLU's application for an exemption (Exh. B); the December 3, 2013 application and letter in support of the NYCLU's original request for exemption (Exh. C); and photos of a NYCLU member's car which was vandalized with threats and epithets (Exh. D). We have also attached, as an Addendum, the September 25, 2015 denial letter from JCOPE.

severe incidents extending over a period of years that show a ‘pattern of threats’ and ‘manifestations of public hostility’ to the NYCLU and its affiliates because of their advocacy for constitutional rights” (Exh. A at 8.) That pattern has existed over time; and the pattern persists. Only this past April, the NYCLU’s New York City offices received a bomb threat requiring an investigation by the New York City Police Department. That serious and recent incident is described in the NYCLU’s application. Yet, the JCOPE letter of September 25 utterly ignores that event even though it serves as evidence that episodes of hostility and threats continue. In this context, the past is prologue. There is no reason in logic or law to believe that the episodes of harassment and reprisals experienced by the NYCLU, the ACLU and its affiliates that have taken place over an extended period of time will suddenly end. The bomb threat in April of this year supports the need for ongoing vigilance.

JCOPE’s criticism that the incidents described in the NYCLU application are “geographically remote” and that they are directed more at staff than at donors ignores the essence of the application. At its heart, the NYCLU application demonstrates that the NYCLU and its ACLU affiliates are regarded as controversial organizations by many individuals; that the controversial nature of the advocacy undertaken by these organizations provokes hostility and antagonism among some persons; and that such hostility will be directed at those who associate with the NYCLU, the ACLU and its affiliated organizations whether such associations involve paid employees, volunteers or donors. So understood, descriptions of incidents involving other ACLU affiliates and descriptions of antagonism directed at staff are all relevant to the inquiry as to whether being identified as a supporter of the NYCLU or ACLU will expose one to the risk of retaliation, reprisals or harassment. In this respect, JCOPE’s own regulations recognize the risk of retaliation against those who affiliate with controversial organizations or with those who support controversial organizations. By its terms, the regulation at Part 938.4(a)(ii) calls for consideration of the “likelihood of harm, threats, harassment or reprisal to the Source or individuals or property affiliated with the Source.” At bottom, it is the association with the NYCLU or ACLU that exposes one to the risk of reprisals.

In rejecting the NYCLU application, JCOPE further asserts that “some of the incidents described by NYCLU [involve] no more than constitutionally protected speech.” JCOPE advances this assertion without even identifying the incidents to which it is referring. But, more importantly, this criticism of the NYCLU application rests upon a fundamental misunderstanding of the constitutional foundation for protecting the associational privacy of controversial organizations. In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Supreme Court recognized that “compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint upon freedom of association” (*Id.* at 462).

To be sure, “true threats” involving constitutionally unprotected speech and physical acts of intimidation may operate to impede rights of political association. *Virginia v. Black*, 538 U.S. 343 (2003). But the Court in *NAACP v. Alabama* was not simply concerned about such physical behavior or threatening speech -- as intimidating as such conduct might be. The Court also recognized that economic reprisals, loss of employment and words of hostility that might be conveyed in the form of “constitutionally protected speech” may, nevertheless, function to dissuade individuals from identifying with controversial organizations (357 U.S. 449 at 462-63). A business person in a politically conservative community may well not want to publicize the

fact that she supports a controversial woman's rights organization. So too, a member of a liberal community might not want it known that he provides financial support to a conservative think tank.

The point is that the constitutional protection of associational privacy that is extended to controversial organizations does not turn upon whether the hostility directed against the controversial groups is conveyed through words that are unprotected or protected by the First Amendment. The essential question is whether the First Amendment right of association will be burdened by the risk of retaliation or reprisals if the names and identities of individuals who support controversial organizations are made public. The Supreme Court has repeatedly answered that question in the affirmative. *Buckley v. Valeo*, 424 U.S. 1, 64-74 (1976); *Brown v. Socialist Workers '74 Campaign*, 459 U.S. 87, 94-102 (1982). The only remaining question is whether the NYCLU qualifies as a controversial organization within the Court's doctrinal line of authority. The record that the NYCLU submitted to JCOPE on July 13 amply demonstrates that this is the case.

For the reasons set forth in the NYCLU's application for an exemption, as supplemented by this letter, the NYCLU is entitled to an exemption from disclosure of its financial supporters under the standards recited in JCOPE's regulations. It must be noted, however, that JCOPE's regulatory standards deviate from federal constitutional precedent in ways that should render the regulations facially invalid and render constitutionally impermissible a decision based upon the regulatory standard. In *Brown*, the Supreme Court held that disclosure provisions could not constitutionally be applied to the Socialist Workers Party where the party demonstrated a "reasonable probability" of exposure to threats, harassment or reprisal (459 U.S. 87 at 101). The JCOPE regulations deviate from this standard in ways less generous to constitutional rights of political association. The regulations demand a "substantial likelihood" of harm. In this way the regulations fail to adhere to the constitutional standard and remain impermissible on this ground.

For all of these reasons, this appeal should be presented to an independent judicial hearing officer and the September 25 decision of JCOPE should be reversed.

Sincerely,

A handwritten signature in cursive script that reads "Donna Lieberman".

Donna Lieberman
Arthur Eisenberg
Robert Perry

Attachments

**APPLICATION REQUESTING AN EXEMPTION FROM
SOURCE OF FUNDING DISCLOSURE REQUIREMENTS**

NYS Joint Commission on Public Ethics
540 Broadway, Albany, NY 12207
518-408-3976/jcope@jcope.ny.gov

The regulations governing a Client Filer's obligation to disclose sources of funding are contained in 19 NYCRR Part 938. These regulations provide that a Client Filer may seek an exemption from the source of funding disclosure requirements. Part 938.4 sets forth the applicable standards upon which an exemption shall be granted by the Joint Commission on Public Ethics. In addition to completing this form, please review the procedures to apply for an exemption in Part 938.5.

**ALL CLIENT FILERS SEEKING AN EXEMPTION TO THE SOURCE OF FUNDING
DISCLOSURE OBLIGATIONS MUST FILL OUT THIS FORM.**

Name of Client Filer Requesting Exemption:	NEW YORK CIVIL LIBERTIES UNION
Name of Individual Authorized to File Request:	DONNA LIEBERMAN
Title:	EXECUTIVE DIRECTOR
Telephone Number:	(212) 607-3300
Address:	125 BROAD ST - 19TH FLOOR NEW YORK, NY 10004
E-Mail Address:	INFO@NYCLU.ORG

1. Client Filer is an IRC §501(c)(4) organization seeking an exemption from disclosing all Sources pursuant to 19 NYCRR Part 938.4(b), which requires a showing that the Client Filer's "primary activities involve areas of public concern that create a substantial likelihood that disclosure of ... its Sources will cause harm, threats, harassment or reprisals to the Sources or individuals or property affiliated with the Sources." X

or

2. Client Filer is seeking an exemption for a Source, Sources, or class of Sources pursuant to 19 NYCRR Part 938.4(a), which requires a showing by "clear and convincing evidence that disclosure of the Source [or Sources] will cause a substantial likelihood of harm, threats, harassment or reprisals to the Source or individuals or property affiliated with the Source [or Sources]." _____

All Client Filers must submit, *with this form*, a letter addressed to the Commission requesting an exemption and setting forth in detail why the applicable regulatory standard (19 NYCRR Part 938.4(a) or (b)) has been met.

- All information in support of the exemption request must be submitted together with the letter.
- The letter must also contain the following signed declaration: "I declare that the information contained in this application is true, correct, and complete to the best of my knowledge and belief."

All information submitted in support of an exemption will be made publicly available and discussed in the Public Session of the Commission's meeting. The only exception to this rule is information for which the Commission has granted a Client Filer's request for confidential treatment.

**IMPORTANT INFORMATION FOR CLIENT FILERS SEEKING CONFIDENTIAL TREATMENT
OF INFORMATION SUBMITTED IN SUPPORT OF AN EXEMPTION**

Pursuant to 19 NYCRR Part 938.8, a request for confidential treatment of information may only be granted by the Commission upon a showing of particular circumstances, such as when the information would reveal an ongoing investigation by a governmental body that has not been made public, or information that, if revealed, would constitute an unwarranted invasion of personal privacy.

Please indicate if the Client Filer is requesting, pursuant to 19 NYCRR Part 938.8, that specific information submitted in support of the exemption be treated as confidential. _____

Procedure for a Client Filer Requesting Confidential Treatment of Certain Information.

1. In a separate letter, indicate precisely what material is the subject of the confidentiality request and set forth, in detail, why such material is entitled to be treated as confidential pursuant to Part 938.8.
2. Provide two copies of the material for which confidentiality is requested.
 - One copy of the material must be in an un-redacted form.
 - The second copy of the material must include any proposed redactions. The redacted version of the material is the version that, should the Commission grant the confidentiality request, will be made publicly available (together with the material for which no confidential treatment has been requested).

Generally, proposed redactions should only include personal information which, because of a name, number, symbol, mark or other identifier, can be used to identify a person, such as an address, telephone number, birth date, or social security number. If the Client Filer is unable to submit a redacted version that adequately preserves the requested confidentiality, provide a detailed explanation setting forth the reasons why the material in its entirety should remain confidential.

Impact of a Grant or Denial by the Commission of a Confidentiality Request.

- If the Commission *grants* the confidentiality request, the material that is the subject of the request will be considered by the Commission in an Executive Session that is closed to the public. All other material, and the Client Filer's application for an exemption from the source of funding disclosure requirements as a whole, will be made publicly available and considered by the Commission in a Public Session.
- If the Commission *denies* the confidentiality request, the Client Filer has two options. Indicate below whether the Client Filer elects Option A or Option B (*choose only one*):
 - (A) The material that is the subject of the confidentiality request that was rejected by the Commission will remain confidential and will not be considered by the Commission when evaluating the application for exemption. _____
 - or
 - (B) The material that is the subject of the confidentiality request that was rejected by the Commission will be made *publicly available, in an un-redacted and complete form (or with redactions made by the Commission in its discretion)*, and will be considered by the Commission in the Public Session when evaluating the application for an exemption. _____



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Sent by email

July 13, 2015

Ms. Letizia Tagliaferro
Executive Director
New York State Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207

Re: Request for exemption from the disclosure requirements in the Source of Funding Regulations adopted by the Joint Commission on Public Ethics¹

Dear Ms. Tagliaferro:

In October of 2013, the Joint Commission on Public Ethics (JCOPE) adopted regulations that require organizations engaged in lobbying activities to provide JCOPE information regarding donors – including names, addresses, employers, and amounts contributed – who have donated more than \$5,000 to such organizations.² These Source of Funding Regulations provide that JCOPE would make such information publicly available.

The regulations, as required by the state's Lobbying Law, provide organizations an exemption from the source-of-funding disclosure provisions under certain circumstances.

On July 11, 2014, the NYCLU was granted, pursuant to appeal, an exemption from the disclosure provisions in the Source of Funding Regulations. The ruling granting the NYCLU an exemption from the regulation is attached as **Exhibit A**.³

We write, on behalf of the NYCLU, seeking an exemption from these reporting requirements for the current reporting period.

¹ 19 NYCRR 938, 43 N.Y. Reg. 18-19 (Oct. 23, 2013) (JPE-43-13-00021-EP) (adopted as amended, May 21, 2014).

² *Id.*

³ Decision of George C. Pratt, Judicial Hr'g Officer, reversing denial of exemption (July 11, 2014). On Jan. 28, 2014, JCOPE denied the NYCLU's application for an exemption from the disclosure requirements in the Source of Funding Regulations. The NYCLU's letter appealing that determination, dated April 24, 2014, provides background regarding action taken by JCOPE on the NYCLU's exemption request; the letter also analyzes the underlying statute, the state's Lobbying Act, pursuant to which JCOPE has promulgated the Source of Funding Regulations. The NYCLU's letter of April 24, 2014 is included herewith (without attachments) as **Exhibit B**.

The NYCLU's claim for an exemption from the disclosure provisions in the Source of Funding Regulations

We bring this request for an exemption from the disclosure requirements in the Source of Funding Regulations under Part 938.4 of NYCRR Title 19, which states that the Commission “shall grant an exemption to disclose a Source of a Contribution, if the Client Filer shows by clear and convincing evidence that disclosure of the Source will cause a substantial likelihood of harm, threats, harassment or reprisals to the Source or individuals or property affiliated with the Source.”⁴

This section of the regulation also states that the Commission “shall grant an exemption to disclose all Sources of Contributions to a Client Filer, if (i) the Client Filer has exempt status under I.R.C. §501(c)(4); and (ii) the Client Filer shows that its primary activities involve areas of public concern that create a substantial likelihood that disclosure of its Source(s) will cause harm, threats, harassment or reprisals to the Source(s) or individuals or property affiliated with the Source(s).”⁵

The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. The NYCLU is organized under the I.R.C. as a §501(c)(4) organization. Members of the NYCLU staff are registered lobbyists pursuant to New York's Lobbying Act,⁶ and the NYCLU reports as a lobbying “client.”⁷ The organization has approximately 50,000 members and supporters statewide, with offices in Buffalo, Rochester, Syracuse, Albany, White Plains, Hempstead (Nassau County), and Central Islip (Suffolk County), as well as New York City.

In requesting this exemption from the Source of Funding Regulations, we restate our objection to the standard by which the Commission will make determinations regarding such an exemption. It is well established by the Supreme Court that the appropriate standard for exempting organizations from the requirement to publicly disclose information regarding their financial donors is the showing of a “reasonable probability” such disclosure would cause harm, threats or reprisal to those donors or to their property.⁸ However, the regulation adopts a heightened standard – “substantial likelihood” of harm or harassment – as the basis for granting such an exemption. We believe this is in error both as a matter of constitutional law and public policy; and the NYCLU reserves the right to appeal a ruling by JCOPE that is made pursuant to this standard.

⁴ 19 NYCRR 938.4(a).

⁵ 19 NYCRR 938.4(b).

⁶ N.Y. Leg. Law 1-a, *et seq.*

⁷ *See* N.Y. Leg. Law § 1-j(4).

⁸ *Buckley v. Valeo*, 424 U.S. 1, 88 (1976).

Having stated this objection, we set out herein the record and reasoning that demonstrate the NYCLU should be granted an exemption from the reporting requirements in the Source of Funding Regulations.

There is a substantial likelihood that public disclosure of personal information about the NYCLU's financial donors will result in threats, harassment and possibly violence

The evidence submitted by the NYCLU in support of this exemption application demonstrates that when the names and addresses of the NYCLU's members are made public, they have episodically become the targets of harassment and threats of violence. This record further demonstrates that there is a "substantial likelihood" that if the identities of those who financially support the NYCLU's work were disclosed, they would face similar treatment.

Following adoption of the Source of Funding Regulations, in October of 2013, the NYCLU filed with JCOPE an application for an exemption from the donor-disclosure provisions in the regulation. That filing included extensive documentation of harassment directed at NYCLU employees, members and volunteers, as a consequence of their association with the NYCLU. Individuals associating with the NYCLU have been stalked at their homes and threatened with physical harm; their property has been vandalized. (See December 3, 2013 Exemption Request, attached as **Exhibit C**.) This has occurred not only to those associated with the NYCLU, but also to ACLU members and employees throughout the country.

That record covered a fourteen-year period, from 1999 through 2013. It was on the basis of this factual record that the NYCLU was granted an exemption from the Source of Funding Regulations in 2014.

However, that record must be understood in context. Threats and acts of reprisal are inherent to the NYCLU's advocacy on behalf of civil rights and civil liberties. Persons associated with the NYCLU have been targets of this type of reprisal since the organization was established in 1951 – the most recent example being a bomb threat directed at the New York City office in April of 2015.

Excerpts from the factual record included in the NYCLU's 2013 request for an exemption from the donor-disclosure requirements appear below, in abbreviated form. (For the complete filing, see **Exhibit C**, attached.)

- An NYCLU staff member involved in litigation regarding the free-speech rights of Ku Klux Klan members was the target of a campaign of reprisal organized by individuals opposing the NYCLU's involvement in that case. These individuals made threatening phone calls to the staff member and her family; rang her apartment door bell at all hours of the night; entered her apartment building without authorization; and even attempted to break into the apartment. The manager of the apartment building and the manager of the NYCLU's offices were required to provide twenty-four-hour security at each site.
- A cross was set afire on the lawn outside the home of an NYCLU client in Central New York who had spoken publicly about hosting an event for LGBT teenagers.

- An NYCLU member in New York’s Southern Tier who publicly opposed a proposed town ordinance that would ban all lawn signs had the tires of his car deflated; the phrases “F--- u ACLU” and “die fag” were painted on the car while it was parked in the driveway at his home. (See **Exhibit D**, attached). The NYCLU member also received a ransom-style letter with a death threat.
- An NYCLU staff member who responds to telephone calls at the office has received a number of death threats and threats of physical assault while at work. On several occasions callers threatened that they would come to the NYCLU offices and attack the staff member when he left the office building.
- A man dressed in a black robe would regularly appear at the offices of the NYCLU and ACLU in lower Manhattan. The man would march outside the building waving signs that denounced the organizations’ staff members as “dogs” and “Jews.” He also maintained a web site that charged the organizations were parties to a Jewish conspiracy.
- At least five members of the NYCLU became subject to community hostility after their names and addresses were made public pursuant to a statutory reporting scheme, according to federal court ruling, which found that as a consequence these individuals were deterred from associating with the NYCLU.⁹

The NYCLU is the state affiliate of the ACLU, a national organization. The factual record presented in the NYCLU’s exemption request filed in December 2013 also included incidents involving other state affiliates of the ACLU, which all share a common institutional mission – upholding civil rights and civil liberties.¹⁰ In this sense all affiliates of the ACLU are similarly situated; and indeed these affiliates report similar incidents of harassment related to their advocacy.

The Supreme Court has recognized in *Buckley v. Valeo*, 424 U.S. 1, 74 (1977) that controversial organizations seeking exemptions from disclosure obligations are permitted to rely upon incidents involving comparable organizations.¹¹ Following are examples of harassment directed at ACLU affiliates in reprisal for their advocacy.

- ACLU staff members have been listed in the “Nuremberg Files” website, which vilifies reproductive advocates and health care professional. Dr. Barnett Slepian, a Buffalo physician, was identified on the web site; he was murdered by an anti-abortion zealot.

⁹ *NYCLU v. Acito*, 459 F.Supp 75 (1978).

¹⁰ The Supreme Court has recognized in *Buckley v. Valeo*, 424 U.S. 1, 74 (1977) that controversial organizations seeking exemptions from disclosure obligations are permitted to rely upon incidents involving comparable organizations.

¹¹ Court rulings that have developed the legal standards in *Buckley* have affirmed this principle. See, e.g., *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 98, 99-102 (1982).

- A high-ranking official with the ACLU’s affiliate in Iowa received a threatening letter after commenting in a newspaper on an ACLU report that addressed racial disparities in marijuana arrests. The letter stated, “Get your nasty ass out of Iowa by July 1st or end up like that Darkie in Sanford, Florida, that is dead as last weeks rock and roll hit.”
- In response to advocacy for LGBT rights, the ACLU of Oklahoma was sent a hostile music video that intercut pictures of activists with images of fire. The video was delivered with a message that read in part, “A prayer has gone out against you. . . . When you play with fire you will get burned. . . . So be prepared to defend yourselves for the actions you take. You can never say you were never warned.”
- In July 2010, Byron Williams loaded his car with guns and body armor. He headed for San Francisco with the intention of killing employees at the offices of the ACLU of Northern California. Police apprehended Williams before he reached San Francisco.

In granting the NYCLU an exemption from the reporting requirements in the Source of Funding Regulations, Judge George C. Pratt cited the evidence that JCOPE considers in evaluating such an exemption request, including: (i) Specific evidence of past or present harm, (ii) The severity, number of incidents, and duration of past or present harm, and (iii) A pattern of threats or manifestations of public hostility.¹² He added that,

All three of these, however, include evidence of harm not only to or against the ‘Source,’ i.e., the donor, but also, more broadly, to or against the ‘Client Filer,’ i.e., the Appellant. Moreover, in the third category, pattern of threats or manifestation of public hostility, is further broadened to include as the targets ‘individuals or property affiliated with the Source(s) or Client Filer.’ (Emphasis in the original.)¹³

After applying this evidentiary standard to an excerpt from the factual record included in the NYCLU’s application for an exemption, Judge Pratt concluded,

[E]ven in the abbreviated form it is clear that Appellant provided ‘specific’ evidence’ of many and severe incidents extending over a period of years that show a ‘pattern of threats’ and ‘manifestations of public hostility’ to Appellant and its affiliates because of their advocacy for constitutional rights. The uncontroverted and unchallenged evidence fully satisfies the [evidentiary] requirements of the Commission’s regulations and, when evaluated realistically, the evidence in the record shows there was ‘a substantial likelihood of harm, threats, harassment [and] reprisals to the ‘Client Filer’ [Appellant] and to ‘individuals [and] property affiliated with the . . . Client filer.’¹⁴

Judge Pratt’s ruling, based upon the record summarized above, was issued just one year ago, on July 11, 2014. That record, covering a fourteen-year period, remains timely; the facts remain pertinent to this exemption request – and no less persuasive in 2015 than in 2014. This is because

¹² Decision of George C. Pratt, *supra* note 3 and **Exhibit C**, at 8 (citing 19 NYCRR 938.4(a) and (b)).

¹³ *Id.* at 8-9.

¹⁴ *Id.* at 8-9.

it is in the very nature of the NYCLU's mission – to uphold the civil liberties of an individual or minority group in the face of a hostile majority – that strong feelings are aroused, and that these feelings are sometimes expressed in a threatening or violent manner.

This phenomenon can be observed throughout the history of the organization. A recent example, from April of this year, involved a bomb threat directed at the NYCLU offices in New York City, which required a police investigation. The message that accompanied the threat referred to the 9/11 attacks. Following 9/11, the NYCLU was vilified in some quarters for its advocacy on behalf of civil liberties in the face of government anti-terrorism initiatives – and, in particular, for objecting to discriminatory conduct directed at Muslims and Sikhs.

The foregoing analysis demonstrates that financial contributors to the NYCLU face a substantial likelihood of harm if JCOPE were to make public their personal information. And for this reason, the NYCLU should be granted an exemption from the Source of Funding Regulations.

The NYCLU requests an exemption of three years from the disclosure requirements in the Source of Funding Regulations

In making this application for an exemption from the reporting provisions in the Source of Funding Regulations, we also request that members of the Joint Commission on Public Integrity reconsider the requirement that organizations granted an exemption must resubmit an exemption application on an annual basis.

The NYCLU has provided an extensive record of harassment, including threats and acts of violence, directed at NYCLU staff and members in a fifteen-year period. The record demonstrates that the NYCLU meets the standard for an exemption from the reporting provisions in the Source of Funding Regulations. The record also demonstrates that the evidence on which the application is based is not unique, unusual or situational; threat of reprisal against the NYCLU, and against its clients, members and property, is a routine and recurring phenomenon.

For this reason, we request that the Commission grant to the NYCLU, and to organizations similarly situated, an exemption for three years from the provisions in the Source of Funding Regulations.

I declare that the information contained in this application is true, correct, and complete to the best of my knowledge and belief.

Sincerely,



Donna Lieberman
Executive Director

Robert Perry
Legislative Director

Exhibit A:

**July 11, 2014 Decision of Judicial Hearing Officer George C. Pratt
Granting the New York Civil Liberties Union an Exemption from
Source of Funding Disclosure Requirements**

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

In the Matter of the Appeal of
NEW YORK CIVIL LIBERTIES UNION

Before:

George C. Pratt
Judicial Hearing Officer

DECISION

The New York Civil Liberties Union ("Appellant") appealed on April 24, 2014, from the April 4, 2014, decision by the Joint Commission on Public Ethics ("the Commission") that denied the Appellant's Application for an exemption from the Commission's Source of Funding Reporting Requirements. The appeal was taken under Part 938.6 of the Commission's Source of Funding Regulations and was assigned by the Commission to the undersigned as a Judicial Hearing Officer.

BACKGROUND

Appellant is the New York State affiliate of the American Civil Liberties Union. Its mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U. S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy and equality, and due process of law for all New Yorkers. Because members of Appellant's staff are registered lobbyists, Appellant reports to the Commission as a lobbying "client". By advocating on behalf of individuals' rights and liberties Appellant is often engaged in highly public controversies that arouse strong opinions and feelings.

Under the amended regulations Appellant, as an organization that engages in lobbying activities, is required to disclose the names, addresses, employers, and contribution information regarding any contributor who provides to it at least \$5,000. However, the regulations provide for possible exemptions, which presents the problem now under consideration.

The Application.

Appellant applied to the Commission on December 3, 2013, for an exemption from its source-of-funding disclosure regulations as amended on Oct. 23, 2013. Its Application consisted of a seven-page, single-spaced letter, a three-page, single-spaced Supplemental Statement of Facts, and a three-page application form. The Application appears to be made under Part 938.4(b), but no appeal is permitted from the denial of an application under that subsection. (938.6(a)). However, the substance of the application, as well as the Commission's denial of the exemption, covers issues presented by an application under subsection (a), and this appeal will not be dismissed because of the technicality. It will be considered and decided as if the Application had specified Part 938.4(a) instead of Part 938.4(b).

To be entitled to an exemption, Appellant was required to show to the Commission by "clear and convincing evidence that disclosure of the Source will cause a substantial likelihood of harm, threats, harassment or reprisals to the Source or individuals or property affiliated with the Source." (938.4(a)). Appellant claimed entitlement to the exemption because disclosure of the names of sources of contributions over \$5,000 would "cause a substantial likelihood of harm, threats, harassment, or reprisals to the Source or individuals or property affiliated with the

Source." (938.4(a)). Appellant also objected to the Commission's regulations having changed the standard of proof required from "reasonable probability" to "substantial likelihood", claiming that the heightened standard is "in error both as a matter of constitutional law and public policy" (App. at 2), and Appellant reserved its right to challenge the revised standard on appeal, but that issue need not be addressed in this decision, which addresses only whether the Commission's denial of the exemption was "clearly erroneous in view of the evidence in the record." (938.7(c)).

Appellant contended that its activities in controversies and conflicts that are related to the exercise, or suppression, of civil liberties subject the organization, its staff, and its members to harassment and intimidation, and that disclosing personal information about its donors and supporters would subject those individuals to risks of harm, threats, harassment, and reprisal that are both unwarranted and unnecessary.

The Evidence.

In support, Appellant's Application included the following evidence [summarized], which Appellant argued showed over a period from 1999 through 2013 a "phenomenon of retaliatory animus toward the NYCLU [that] is inherent to the advocacy the organization pursues." (App. at 6)

- After suing on behalf of a group affiliated with the Ku Klux Klan and challenging an ordinance that banned wearing masks in public, Appellant received threats and harassment, and a staff member received threatening phone calls at home and was subjected to an attempted home invasion that was stopped by police.

- An opposing group publicly announced efforts to target a high-level official of Appellant, who continually receives emails or letters that are threatening in nature.
- The same official and other staff members receive Christmas greetings reviling Appellant and, in some cases, offering prayers for its demise.
- Harassment and threats to Appellant's directors, staff, and regional offices, including a cross-burning, threats of death and physical assault, picketing of offices and homes. One picket waived a sign denouncing the NYCLU and ACLU as "dogs" and Jews".
- A decision by the U. S. District Court for the Southern District of New York that at least five of the NYCLU's approximately 40,000 members have been subjected to community hostility after their association with [the NYCLU] had become known.

In a supplemental statement of facts, the Application also set forth details of events where Appellant's affiliates around the country had been the victims of threats:

- Threats by anti-abortion activists, such as being listed in the "Nuremburg Files" website, which vilifies reproductive-rights advocates as well as health care professionals involved in reproductive services, one of whom was murdered in 1988.
- A threat to a high ranking official of the Iowa affiliate that had commented on racial disparities in marijuana arrests "Get your nasty ass out of Iowa by July 1st or end up like that Darkie in Sanford, Florida, that is dead as last weeks rock and roll hit."

- A judge's 2008 ruling in Colorado based on threatening and harassing communications following the affiliate's challenge to police action seizing records of a tax-preparation firm to identify undocumented immigrants using fraudulent social security numbers. The ruling was that the risk of retaliation and harassment directed at the clients of the tax preparer was so great that they could proceed in the litigation as anonymous "John Doe" plaintiffs.
- In response to advocacy promoting LGBT rights the Oklahoma affiliate received a hostile music video that intercut pictures of activists with images of a fire. With the video was a message that said in part, ". . . When you play with fire, you will get burned. . . So be prepared to defend yourselves for the actions you take. You can never say that you were never warned."
- In July 2010 a Byron Williams loaded his car with guns and body armor and headed for San Francisco with the intention of killing employees at the offices of Appellant's Northern California affiliate. He was apprehended by police on the way there.

The Commission's Decision.

The Commission denied the Application by vote of five to three. The Majority's four-paragraph decision states in its first paragraph that it is "set[ting] forth reasons and bases for the denial of the application", but after two paragraphs describing the statutory and regulatory background the Majority merely concluded in its fourth paragraph that

the NYCLU's application did not present sufficient evidence demonstrating that the NYCLU's compliance with the disclosure requirements would create a 'substantial likelihood' of harm to its sources of funding (including individuals and property associated with those sources). Rather, the evidence presented was too remote and speculative to establish a substantial likelihood of harm.

In dissent, the Minority protested the Majority's narrow interpretation of the governing statute, arguing that the demonstration of "substantial likelihood of harm", as required by the Majority, was "an impossible standard for any applicant to meet."

The Appeal.

Appellant's appeal from the Commission's denial is dated April 24, 2014. The regulations provide that the record on appeal "shall consist of the original application for exemption together with any supporting materials that were submitted pursuant to Part 938.5 and the Commission's written denial." (938.7(b)). Those materials were received from the Commission on June 30, 2014. Under the regulations this decision may "affirm, reverse or remand the decision of the Commission" (938.7(d)), but may reverse "only if such denial is clearly erroneous in view of the evidence in the record." (938.7(c)).

DISCUSSION

As indicated by the foregoing, the task of the Judicial Hearing Officer on this appeal is to determine whether the Commission's denial of an exemption to Appellant was "clearly erroneous in view of the evidence in the record." "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the

entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Since there was no evidentiary hearing before the Commission, and since no opposing papers were submitted, the only "evidence in the record" is what was included in Appellant's written Application to the Commission. None of that evidence was presented under oath, but as required by the Commission's application form, Appellant's letter Application included a declaration "that the information contained in this application is true, correct, and complete to the best of our knowledge and belief." (App. at 7). Of course, all of the Appellant's evidence was hearsay, but the rules of evidence do not apply in this type of proceeding, and there has been no challenge to any of the statements and reports included in the application, nor does anything in those statements and reports inherently suggest any question as to their reliability.

If the Application showed by "clear and convincing evidence that disclosure of the Source will cause a substantial probability of harm, threats, harassment or reprisals", the Commission was bound to grant the exemption ("The Commission shall grant the exemption" [938.4(a) emphasis added]). The issue on appeal thus becomes: Assuming that the events and circumstances described in Appellant's Application occurred as described, was the Commission's denial of the exemption clearly erroneous? Because disclosure of donors had not previously been required, it was apparent, to the Legislature in enacting the statute, and to the Commission in promulgating the regulations, that an applicant would most likely be unable to present evidence of actual harm, etc. to its donors. Because donors' identities had not been previously disclosed, such harm simply would not have occurred.

The regulations, however, provide guidance for bridging this apparent gap. They list five types of evidence that the Commission is to consider when determining whether the required showing of harm, etc. had been made. The first three are:

- (i) Specific evidence of past or present harm,
- (ii) The severity, number of incidents, and duration of past or present harm,
and
- (iii) A pattern of threats or manifestations of public hostility.

All three of these, however, include evidence of harm not only to or against the "Source", i. e. the donor, but also, more broadly, to or against the "Client Filer", i.e. the Appellant. Moreover, the third category, pattern of threats or manifestations of public hostility, is further broadened to include as the targets "individuals or property affiliated with the Source(s) or Client Filer." (emphasis added).

A failure to consider and follow these regulations would make the Commission's denial "clearly erroneous", particularly in light of the regulations' mandatory requirement that the exemption "shall" be granted upon the described showing.

Analyzed in light of the above considerations, the decision of the Commission is, indeed, clearly erroneous. The evidence in the record is described above in abbreviated form. The Application itself provides significantly more detail and additional examples. But even in the abbreviated form it is clear that Appellant provided "specific evidence" of many and severe incidents extending over a period of years that show a "pattern of threats" and "manifestations of public hostility" to Appellant and its affiliates because of their advocacy for constitutional rights. This uncontroverted and unchallenged evidence fully satisfies the requirements of Parts (i), (ii), (iii) and (iv) of

Part 938.4 of the Commission's regulations and, when evaluated realistically, the evidence in the record shows that there was "a substantial likelihood of harm, threats, harassment [and] reprisals" to the "Client Filer" [Appellant] and to "individuals [and] property affiliated with the . . . Client Filer". The Commission's findings that the Application "did not present sufficient evidence" and that "the evidence presented was too remote and speculative" were clearly erroneous. The exemption must be granted.

An exemption for qualified donors to the Appellant is consistent with the intent of the Legislature in enacting the Lobbying Act, which proclaimed:

This disclosure shall not require disclosure of the sources of funding whose disclosure, in the determination of the commission based upon a review of the relevant facts presented by the reporting lobbyist, may cause harm, threats, harassment, or reprisals to the source or to individuals or property affiliated with the source. (Lobbying Act § 1-h(c)).

As pointed out in the Appellant's application, the sponsors of the legislation stated that civil rights and civil liberties organizations, among others, "are expected to qualify for such an exemption in the Joint Commission's regulations", and "organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation, or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption." (App at 2).

Moreover, an exemption to Appellant gives proper deference to the constitutional requirement to protect the First Amendment rights of citizens to express their views on controversial issues by providing financial support to organizations that further their favored causes.

CONCLUSION

The decision appealed from is clearly erroneous and is therefore reversed.

July 11, 2014



George C. Pratt

Judicial Hearing Officer

Exhibit B:

April 24, 2014 Letter from the New York Civil Liberties Union



NYCLU

NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

April 24, 2014

Rob Cohen
Special Counsel & Director of Ethics and Lobbying Compliance
New York State Joint Commission on Public Ethics
540 Broadway
Albany, N.Y. 12207

Dear Mr. Cohen:

The New York Civil Liberties Union (“NYCLU”) writes to appeal the decision by the Joint Commission on Public Ethics (“JCOPE” or “the Commission”) to deny the NYCLU’s application for an exemption from JCOPE’s Source of Funding Reporting Requirements. Founded in 1951, the NYCLU is a not-for-profit, nonpartisan organization with eight chapters and approximately 50,000 members across New York State. The NYCLU’s mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. Members of the NYCLU staff are registered lobbyists pursuant to New York’s Lobby Act¹ and the NYCLU reports to JCOPE as a lobbying “client.”² The NYCLU is required to submit semi-annual lobbying reports to JCOPE twice annually, on January 15 and July 15 each year.³ The NYCLU also files bi-monthly lobbying reports to JCOPE six times a year.

In 2013, JCOPE promulgated a regulation requiring organizations to report information regarding their financial donors, including personal information about individual donors. The NYCLU submitted several applications for an exemption from JCOPE’s Source of Funding disclosure requirements.⁴ The NYCLU was notified in writing on April 4, 2014, that its application for an exemption had been rejected by the Commission.

The NYCLU appeals the determination that it did not successfully demonstrate that disclosure of personal information about its donors would present a “substantial likelihood” that those donors would be subject to harassment. The NYCLU’s ten page application to the Commission included multiple specific, recent examples of NYCLU staff and members being targeted for threats and violence – including attempted home invasions, slashed tires, crosses burned on front lawns, the words “F--- u ACLU” and “die fag” painted on cars, and repeated death threats. The factual record set out in the NYCLU’s application demonstrates that the pattern of threats and harassment

¹ N.Y. Leg. Law 1-a, *et seq.*

² *See* N.Y. Leg. Law § 1-j(4).

³ *See* N.Y. Leg. Law § 1-j(4); N.Y. Leg. Law §§ 1-j(a),(b).

⁴ *See* 19 N.Y.C.R.R. § 938.4(b).

reflects overt hostility toward the NYCLU's advocacy on issues of civil rights and civil liberties. These facts also make clear that harassment and violence directed at the staff and members of the NYCLU would also be directed at the organization's financial donors if the State requires publication of their personal information.

Moreover, there are reasons to believe that the Commission's rejection of the NYCLU's request for an exemption did not rest upon a meaningful discussion of the merits of the NYCLU's application or the potential threat posed to the NYCLU's donors. This conclusion is supported both by an examination of the records of the JCOPE meetings and by the statements of members of the Commission who dissented from the denial of the NYCLU's application. In short, JCOPE's denial of an exemption was clearly erroneous, and should be reversed on appeal in the interest of protecting the personal safety and constitutional rights of the NYCLU's financial supporters, and in the interest of rudimentary consideration of fair processes.

A. Background

New York's Lobby Act requires organizations subject to regulation by JCOPE to report information on donors who contribute more than \$5,000 to such organizations (regardless of whether the funds were actually used for lobbying) if the organization has made lobbying expenditures that exceed a certain threshold amount.⁵ JCOPE has promulgated a series of "Source of Funding" regulations, pursuant to this statutory requirement.⁶ While the Lobby Act requires organizations to report the names of Single Source donors (organizations or individuals who have contributed more than \$5,000 to the organization),⁷ JCOPE's regulations require filing entities to supply additional personal information about financial supporters – including business addresses and dates of contributions.⁸

On January 9, 2013, JCOPE issued a Notice of Emergency Adoption and Revised Rule Making regarding the new Source of Funding reporting requirements. The proposed regulations went into effect immediately after issued, six days before the January 15 filing deadline. Consistent with the underlying statute, the regulations permitted a 501(c)(4) organization to seek an exemption from reporting donors' personal information if the organization showed that its "primary activities involve areas of public concern that create a *substantial likelihood*" that complying with the reporting requirements "will cause harm, threats, harassment or reprisals to the Single Source(s) or individuals or property affiliated with the Single Source(s)."⁹ The NYCLU submitted comments that raised a number of constitutional concerns with the Single Source Disclosure regulations on February 8, 2013. The NYCLU's comments are included as Exhibit C.

On April 30, 2013, the JCOPE Commissioners met and subsequently announced revisions (effective immediately) to the substantive standard used to grant exemptions from the Source of

⁵ N.Y. Legis. Law § 1-j(4).

⁶ 19 N.Y.C.R.R. 938 *et seq.*

⁷ N.Y. Legis. Law § 1-j(4).

⁸ 19 N.Y.C.R.R. 938.3(e).

⁹ 19 N.Y.C.R.R. 938.4(b) (Jan. 9, 2013).

Funding disclosure requirements.¹⁰ Specifically, the new regulation permitted exemptions to be granted if organizations demonstrated a “*reasonable probability*” that sharing personal information about donors would cause “harm, threats, harassment or reprisals” to the donors.¹¹

The NYCLU submitted an application for exemption from the Source of Funding reporting requirements on July 10, 2013. The five-page application contained multiple examples of acts of harassment and property damage at the homes and offices of NYCLU staff and NYCLU members across the state. On July 24, 2013, the NYCLU supplemented its application with additional evidence of threats against other NYCLU staff and against staff at ACLU affiliates across the country. The regulations, as they existed at the time of the NYCLU’s initial filing, required that any materials submitted in support of an exemption from the Source of Funding requirements “shall” be kept confidential by JCOPE.¹²

On October 23, 2013, JCOPE issued another Notice of Emergency Adoption and Proposed Rule Making for the Source of Funding Regulations.¹³ The regulation, again, changed the standard by which JCOPE would determine whether to grant exemptions, reverting back to the requirement that organizations demonstrate a “*substantial likelihood*” that disclosure would result in threats to donors.¹⁴ The new regulations also eliminated the provision that required JCOPE to maintain the confidentiality of the contents of applications for exemptions.¹⁵ The regulations were, once again, effective immediately. The NYCLU was informed of the imminent change on October 17, 2013, and was required to re-submit its application, along with any proposed redactions to protect the confidentiality of people mentioned in the application, within six days. In light of the fact that the NYCLU had to follow up with ACLU affiliates around the country in order to obtain approval for making public the personal stories of harassment, the NYCLU was given an extension to file an amended application. The NYCLU submitted its revised application on October 29, 2013. The revised application included a request to redact certain names and other personal information about the NYCLU and ACLU staff profiled in the application.

The NYCLU was next contacted by JCOPE on November 27, 2013 and informed that its request to redact names and personal information submitted in support of its exemption application had been rejected by the Commission. The NYCLU was required to re-submit its application within four business days, including the Thanksgiving holiday – this time, with a new cover sheet created by JCOPE, and with the understanding that any materials submitted in support of the NYCLU’s application would be made publicly available. The NYCLU submitted its revised application on

¹⁰ See Joint Commission’s Revisions to the Source of Funding Regulations and Reportable Business Relationship Disclosure Guidelines (May 2013), *available at* www.jcope.ny.gov/pubs/eblast/May%202013%20RBR%20%20SOF%20EBLAST%20FINAL.pdf.

¹¹ 19 N.Y.C.R.R. 938.4(b) (April 30, 2013). With this amendment to the standard for granting an exemption from the requirement to disclose donor information, the Commission adopted the standard prescribed by the U.S. Supreme Court. *See, e.g., Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 367 (2010) (“as-applied challenges [are] available if a group could show a *reasonable probability* that disclosure of its contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties”) (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

¹² 19 N.Y.C.R.R. 938.4(b) (April 30, 2013).

¹³ Proposed Amended Source of Funding Regulations Now in Effect (Oct. 2013 e-blast), *available at* www.jcope.ny.gov/public/2013/eblast/SOFrevised.pdf.

¹⁴ 19 N.Y.C.R.R. 938.4(b) (Oct. 23, 2013).

¹⁵ 19 N.Y.C.R.R. 938.8 (Oct. 23, 2013).

December 3, 2013. A copy of this version of the NYCLU's application, which is the version considered by JCOPE, is attached as Exhibit A.

On January 28, 2014, the Commission voted to deny the NYCLU's application for an exemption from the Source of Funding disclosure requirements. On April 4, 2014, the NYCLU received a written denial of its application. A copy of the denial is attached as Exhibit B.

Pursuant to 19 N.Y.C.R.R. 938.6, the NYCLU herewith appeals JCOPE's denial of its exemption from the Source of Funding reporting requirements. The standard for review on appeal is whether the Commission's denial was "clearly erroneous in view of the evidence in the record."¹⁶

B. The NYCLU demonstrated a substantial likelihood that public disclosure of personal information about the NYCLU's financial supporters will result in threats, harassment and possibly violence.

The evidence submitted by the NYCLU in support of its exemption application demonstrates that when the names and addresses of the NYCLU's members are made public they have episodically become the targets of harassment and threats of violence.¹⁷ Individuals associating with the NYCLU have been stalked at their homes and threatened with physical harm; their property has been vandalized.¹⁸ This has occurred not only to those associated with the NYCLU, but also to ACLU members and employees throughout the country. These episodes are sufficiently disturbing as to warrant protection against their reoccurrence.

This record further demonstrates there is a "substantial likelihood" that if the identities of those who financially support the NYCLU's work were disclosed, they would face similar treatment. The Commission's rejection of the NYCLU's application for an exemption from the Source of Funding disclosure rules is based upon a perfunctory and conclusory assertion that the evidence presented by the NYCLU in support of its application was "too remote and speculative to establish a substantial likelihood of harm."¹⁹ In support of its conclusion, the Commission offered no analysis of the legal standard as applied to the facts. And for these reasons the Commission's ruling regarding the NYCLU's application is unsupported and unsupportable.

The Supreme Court has consistently recognized that compelled disclosure of information about the financial supporters of organizations "can seriously infringe on privacy of association and belief guaranteed by the First Amendment."²⁰ The Court has accordingly held that the Constitution

¹⁶ 19 N.Y.C.R.R. 938.7(c) (as of April 24, 2014). JCOPE has subsequently promulgated another emergency regulation, effective immediately, that eliminates the right to appeal denials of Source of Funding exemptions sought by 501(c)(4) organizations. *See* 43 N.Y. Reg. 8-9 (Jan. 22, 2014) (JPE-43-13-00021-E) (adding Part 938.6(a) to Title 19 N.Y.C.R.R.). Commissioners have stated that they do not intend the removal of the right to an appeal to apply "retroactively" to organizations that were denied exemptions at a meeting of JCOPE commissioners on January 28, 2014. *See* Video of the Feb. 18, 2014 Commission Meeting (*available at* http://www.jcope.ny.gov/public/webcast/20140218_JCOPE.wmv). The NYCLU submits this appeal in reliance on that assertion.

¹⁷ *See* NYCLU Request for exemption from the disclosure requirements in the revised source-of-funding regulations adopted by the Joint Commission on Public Ethics, (Dec. 3, 2013) ("Exhibit A") at 3-10.

¹⁸ *Id.*

¹⁹ JCOPE Denial of NYCLU Source of Funding Disclosure Requirements, (April 4, 2014) ("Exhibit B") at 2.

²⁰ *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

requires that organizations must be granted exemptions from compelled disclosures of their members if the organization can demonstrate a “*reasonable probability*” that the forced disclosure of their donors or members will “subject them to threats, harassment, or reprisals from either Government officials or private parties.”²¹ The Court has noted that organizations must be afforded “sufficient flexibility” in the evidence that they are permitted to submit to demonstrate a likelihood of injury.²² The principle underlying these cases is clear: nobody should be required to publicly disclose their affiliation with a controversial organization if it will result in physical or mental harm.

The Lobby Act, JCOPE’s enabling statute, states that Source of Funding disclosures “shall not apply to” registered 501(c)(4) organizations where:

[The (c)(4) organization’s] primary activities concern any area of public concern determined by the commission to create a substantial likelihood that application of this disclosure requirement would lead to harm, threats, harassment, or reprisals to a source of funding or to individuals or property affiliated with such source, **including but not limited to the area of civil rights and civil liberties and any other area of public concern determined pursuant to regulations promulgated by the commission to form a proper basis for exemption on this basis from this disclosure requirement.**²³

The statute’s legislative history further says that:

The bill expressly identifies the area of “civil rights and civil liberties” as one area in which organizations are expected to qualify for such an exemption in the Joint Commission’s regulations. **Among other issues included in this area, organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption.**²⁴

Every day, the NYCLU engages in activities to advocate on behalf of individuals and communities across New York State. In the daily pursuit of its mission, the NYCLU seeks to prohibit discrimination on the basis of race, gender, sexual orientation, ethnicity, or gender expression; to

²¹ *Brown et al. v. Social Workers’ ’74 Campaign Committee*, 459 U.S. 87, 93 (1982); *see also*, *Citizens United v. F.E.C.*, 130 S. Ct. 876, 914 (2010). The NYCLU maintains its objection, noted in its exemption application, to the evidentiary standard being employed by the Commissioners in determining whether organizations have demonstrated that disclosures will result in harm to their donors. The Supreme Court has consistently stated that the appropriate standard is whether organizations can demonstrate a “reasonable probability” that disclosure will result in harm. JCOPE’s requirement that applicants demonstrate a “substantial likelihood” of harms deviates impermissibly from the constitutionally required standard.

²² *Socialist Workers*, 459 U.S. at 93.

²³ N.Y. Leg. Law. § 1-j(c)(4)(ii) (emphasis added).

²⁴ 2011 NYS Legislative Bill and Veto Jackets, S:5679, L 2011, ch 399, at 10 (2011) (emphasis added).

expand rights for non-citizens; to reform the criminal justice system and uphold the constitutional protections for those impacted by the criminal justice system; and to safeguard the free speech rights of all New Yorkers, including those whose message the majority does not agree with, and those perceived to have a diminished right to speak. The contest over the exercise of civil rights and civil liberties often pits the interests of an individual or a minority group against a far more powerful majority.

It is therefore not surprising that the NYCLU's work frequently becomes a matter of controversy that arouses strong feelings among members of the public, and occasionally results in threats to people affiliated with the organization. In support of its application for an exemption from the JCOPE Source of Funding disclosures, the NYCLU submitted a ten page document which included extensive examples of specific acts of harassment and violence directed at NYCLU staff members, and at persons associated with ACLU affiliates around the country. The evidence submitted by the NYCLU demonstrated that when certain individuals know where to find people affiliated with the NYCLU, those individuals harass and threaten people affiliated with the NYCLU.

When aggressive acts are directed against individuals associated with the NYCLU such acts occur because of the controversial issues with which the NYCLU is involved. To suggest that those who have intense animus against the NYCLU will act on that animus towards employees and members of the NYCLU (JCOPE does not question or challenge the factual record submitted by the NYCLU) but will not act on that animus against the NYCLU's financial donors is simply to ignore the reality as set out in the factual record the NYCLU submitted to the Commission. The Commission would seem to require a demonstration of past harm to the NYCLU's donors before granting the organization an exemption from the Source of Funding disclosure rule. But the NYCLU has never published the personal information of its donors out of the very concern that led the Legislature to require an exemption from such a disclosure requirement: to do so would place those individuals at serious risk of harm, and that this threat of harm would not only jeopardize the safety of these individuals but would also seriously compromise their constitutional rights of association and belief.

Following are examples of threats and harassment directed at individuals associated with the NYCLU. These incidents appear, with further context and factual detail, in the NYCLU's application to JCOPE seeking an exemption from the Source of Funding disclosure requirements.

- An NYCLU staff member involved in a case defending the Ku Klux Klan's free speech rights received multiple threatening calls at their home, was harassed with ringing doorbells all hours of the night, and ultimately had their apartment building broken into in an attempted home invasion. The apartment building and NYCLU office building were subsequently required to hire 24-hour security to protect the staff member and other inhabitants of the buildings.
- An NYCLU client had a cross burned on their front lawn, after speaking publicly about their intent to host an event for LGBT teenagers at their youth center.
- An NYCLU member who had been a vocal opponent of an ordinance to ban law signs had their car tires deflated, and had the phrases "F--- u ACLU" and "die fag" painted on their car while it was parked in their front driveway.

- NYCLU Chapter Offices around the State and the NYCLU main office in Manhattan have received bomb and death threats.
- NYCLU staff members have been forced to remove their names from their mailboxes and request removal from the phone book to avoid harassment at their homes.

In addition to acts of harassment and violence against NYCLU staff members, the NYCLU also submitted specific incidents of threats to staff at other ACLU affiliates across the country. The evidence included examples of bomb threats and actual bombing attempts, regular harassment, and even the assertion that staff would “end up like that Darkie in Sanford, Florida, that is dead as last weeks rock and roll hit.”²⁵

JCOPE’s Source of Funding regulations are novel, and the NYCLU has never before been required to publicly share extensive personal information about its financial supporters. It is therefore impossible for the NYCLU to submit evidence that its financial supporters have been the target of similar harassment, when their personal information and NYCLU affiliation have not been made public. However, the evidence submitted by the NYCLU clearly demonstrates that if there is public disclosure of persons who fund the NYCLU’s work, it is likely that harassment or threats will be directed, at some point, to one or more of the funders.

C. The Commission failed to meaningfully consider the NYCLU’s application for an exemption from the Source of Funding disclosure provisions.

It is difficult for the NYCLU to respond to the Commission’s denial of its application for an exemption from the Source of Funding reporting requirements when the NYCLU was not provided with any specific reasons for its rejection. The denial letter (included as Exhibit B) simply states that the NYCLU’s application “did not present sufficient evidence” that compliance would create a “substantial likelihood” of harm to the NYCLU’s donors, and that the evidence presented was “too remote and speculative.” As discussed above, the NYCLU submitted ten pages of specific, recent examples of NYCLU staff and members being harassed, threatened, and targeted at their homes and businesses when those addresses were publicly available.

It is not surprising that JCOPE failed to provide the NYCLU with specific reasons for the denial: a review of the Commission meetings at which the NYCLU’s exemption application was considered reveals that the substance of the application was never even discussed by the Commissioners.²⁶ The Commissioners never talked about the evidence submitted by the NYCLU; they made no findings and offered no analysis regarding the multiple examples of harassment against NYCLU staff and affiliates. In fact, the entire public review of the NYCLU’s application was comprised of comments by a single Commissioner who stated that, in that Commissioner’s opinion, the NYCLU *had* supplied compelling circumstantial evidence that compelled disclosure of donors’ personal information would lead to their harassment.²⁷ At the subsequent JCOPE meeting, despite

²⁵ See Exhibit A at 3-10.

²⁶ See, generally, Video of the Jan. 28, 2014 Commission Meeting (*available at www.jcope.ny.gov/public/webcast/20140128_JCOPE.wmv*); Video of the Feb. 18, 2014 Commission Meeting (*available at http://www.jcope.ny.gov/public/webcast/20140218_JCOPE.wmv*).

²⁷ See, Video of the Jan. 28, 2014 Commission Meeting (*available at www.jcope.ny.gov/public/webcast/20140128_JCOPE.wmv*).

multiple requests by Commissioners that there be public statements about the merits of the applications for exemptions, there was no further discussion.²⁸

In their dissent to the NYCLU's denial, Commissioners Castellero, Jacob, and Judge Roth, observed that "there was no meaningful discussion by the Commission of the evidence proffered by the applicants" and that the Majority "ignored a dissenter's request to consider the threats and acts of hostility directed at the officers, employees, volunteers and affiliates of the applicants in determining whether the required demonstration of substantial likelihood of harm had been met."²⁹

D. Conclusion

In support of its request for an exemption from the disclosure provisions in the Source of Funding regulation, the NYCLU submitted to JCOPE a substantial factual record. The record indicated there is a substantial likelihood that NYCLU donors would be subjected to harm, threats and harassment if information identifying them were made public by the State.

Those commissioners who voted to deny an exemption to the NYCLU simply ignored the factual record; they dismissed the evidence out of hand. And in failing to exercise a good faith effort to provide a basis in law and fact for its determination, the commissioners of JCOPE reached a result that is clearly erroneous.

In the interest of protecting the NYCLU's financial supporters from threats and harassment, the NYCLU respectfully requests that the decision to deny its exemption from the Source of Funding disclosure requirements is reversed.

Sincerely,



Arthur Eisenberg
Legal Director

Donna Lieberman
Executive Director

Robert Perry
Legislative Director

²⁸ Video of the Feb. 18, 2014 Commission Meeting (*available at http://www.jcope.ny.gov/public/webcast/20140218_JCOPE.wmv*).

²⁹ Exhibit B at 2.

Exhibit C:

**December 3, 2013 Exemption Request and Supporting Letter of the
New York Civil Liberties Union**

APPLICATION REQUESTING AN EXEMPTION FROM
SOURCE OF FUNDING DISCLOSURE REQUIREMENTS

NYS Joint Commission on Public Ethics
540 Broadway, Albany, NY 12207
518-408-3976/icope@icope.ny.gov

The regulations governing a Client Filer's obligation to disclose sources of funding are contained in 19 NYCRR Part 938. These regulations provide that a Client Filer may seek an exemption from the source of funding disclosure requirements. Part 938.4 sets forth the applicable standards upon which an exemption shall be granted by the Joint Commission on Public Ethics. In addition to completing this form, please review the procedures to apply for an exemption in Part 938.5.

**ALL CLIENT FILERS SEEKING AN EXEMPTION TO THE SOURCE OF FUNDING
DISCLOSURE OBLIGATIONS MUST FILL OUT THIS FORM.**

Name of Client Filer Requesting Exemption:	NEW YORK CIVIL LIBERTIES UNION
Name of Individual Authorized to File Request:	DONNA LIEBERMAN
Title:	Executive Director
Telephone Number:	(212) 607-3300
Address:	125 Broad St. #19 New York, N.Y. 10004
E-Mail Address:	info@nyclu.org

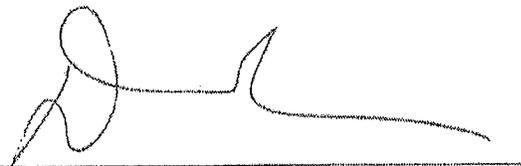
1. Client Filer is an IRC §501(c)(4) organization seeking an exemption from disclosing all Sources pursuant to 19 NYCRR Part 938.4(b), which requires a showing that the Client Filer's "primary activities involve areas of public concern that create a substantial likelihood that disclosure of ... its Sources will cause harm, threats, harassment or reprisals to the Sources or individuals or property affiliated with the Sources."
2. Client Filer is not an IRC §501(c)(4) organization and is seeking an exemption for a Source, Sources, or class of Sources pursuant to 19 NYCRR Part 938.4(a), which requires a showing by "clear and convincing evidence that disclosure of the Source [or Sources] will cause a substantial likelihood of harm, threats, harassment or reprisals to the Source or individuals or property affiliated with the Source [or Sources]."

All Client Filers must submit, *with this form*, a letter addressed to the Commission requesting an exemption and setting forth in detail why the applicable regulatory standard (19 NYCRR Part 938.4(a) or (b)) has been met.

- All information in support of the exemption request must be submitted together with the letter.
- The letter must also contain the following signed declaration: "I declare that the information contained in this application is true, correct, and complete to the best of my knowledge and belief."

All information submitted in support of an exemption will be made publicly available and discussed in the Public Session of the Commission's meeting. The only exception to this rule is information for which the Commission has granted a Client Filer's request for confidential treatment.

I declare that the information contained in this application is true, correct, and complete to the best of our knowledge and belief.

A handwritten signature in black ink, appearing to be 'Donna Lieberman', written over a horizontal line.

Donna Lieberman
Executive Director
New York Civil Liberties Union

12/3/13
Date



NYCLU

NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

Sent by email

December 3, 2013

Robert Cohen
Special Counsel and Director of Ethics and Lobbying Compliance
New York State Commission on Public Integrity
540 Broadway
Albany, New York 12207

Re: Request for exemption from the disclosure requirements in the revised source-of-funding regulations adopted by the Joint Commission on Public Ethics¹

Dear Mr. Cohen:

On October 23, 2013, the Joint Commission on Public Ethics (JCOPE) adopted amendments to recently promulgated regulations that require an organization that engages in lobbying activities to disclose the names, addresses, employers and contribution information regarding any contributor who provides at least \$5,000 to such an organization.² We write on behalf of the New York Civil Liberties Union (NYCLU) seeking an exemption from the regulations' public disclosure provisions related to source(s) of funding.

The revised regulations provide that the Commission "shall grant an exemption to disclose all Sources of Contributions to a Client Filer if (i) the Client Filer has exempt status under I.R.C. §501(c)(4); and (ii) the Client Filer shows that its primary activities involve areas of public concern that create a *substantial likelihood* that disclosure of its Source(s) will cause harm, threats, harassment or reprisals to the Source(s) or individuals or property affiliated with the Source(s)."³ (Emphasis added.)

In requesting this exemption from the source-of-funding disclosure provisions, we state our objection to the amended standard by which the Commission will determine eligibility for such an exemption. The Supreme Court has long held that the appropriate standard for exempting organizations from the requirement to publicly disclose information regarding their financial

¹ 43 N.Y. Reg. 18-19 (Oct. 23, 2013) (JPE-43-13-00021-EP) (Amendment of Part 938 of Title 19 NYCRR).

² *Id.*

³ *Id.* at § 938.4 (b)

donors is a showing that there is a “reasonable probability” such disclosure would cause harm, threats or reprisal to those donors or to their property.⁴ It is this standard that was adopted by the commissioners of JCOPE in a regulation adopted on April 10, 2013.⁵ The newly amended regulation, however, adopts a heightened standard – “substantial likelihood” of harm or harassment – as the basis for granting such an exemption. We believe this is in error both as a matter of constitutional law and public policy; and the NYCLU reserves the right to appeal a ruling by JCOPE that is made pursuant to this standard.

Having stated this objection, we set out below a legal analysis and factual record that demonstrates the public disclosure of information as required by the source-of-funding regulations would, in fact, create a substantial likelihood of harm to the NYCLU and to its members and donors.

The NYCLU’s mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. The NYCLU is organized under the I.R.C. as a §501(c) (4) organization. Members of the NYCLU staff are registered lobbyists pursuant to New York’s Lobby Act,⁶ and the NYCLU reports as a lobbying “client.”⁷ The organization has approximately 40,000 members statewide, with offices in Buffalo, Rochester, Syracuse, Albany, Hempstead (Nassau County), and Central Islip (Suffolk County).

The contest over the exercise of civil rights and liberties often pits the interests of an individual or a minority group against a far more powerful majority, which not infrequently is aligned with government entities that wield the power and authority of the state. It is in the very nature of this contest that strong opinions and feelings are aroused. To advocate on behalf of individuals’ rights and liberties is to engage in what is often a highly public controversy.

It is expressive advocacy of this nature that legislators sought to exempt from the public disclosure regulations promulgated pursuant to the Public Integrity Reform Act of 2011 (PIRA).⁸ The sponsor’s memorandum accompanying that legislation explicitly states that “civil rights and civil liberties” organizations, among others, “are expected to qualify for such an exemption in the Joint Commission’s regulations.”⁹ The commentary on the bill, as provided by the sponsoring legislators, elaborates on this point: “[O]rganizations whose primary activities focus on the question of abortion rights, family planning discrimination or persecution based upon race, ethnicity, gender, sexual orientation or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption.”¹⁰

⁴ *Buckley v. Valeo*, 424 U.S.1, 88 (1976).

⁵ 35 N.Y.Reg. 17-19 (April 10, 2013) (JPE-37-12-0010-E).

⁶ N.Y. Leg. Law 1-a, *et seq.*

⁷ See N.Y. Leg. Law § 1-j(4).

⁸ Chapter 399, Laws of 2011

⁹ Legislative Introduction, A.8301 (2011). (See Sponsor’s memorandum, Part B, Section 1: “Disclosure by Lobbyists . . .”)

¹⁰ *Ibid.*

The substantive issues of law and policy identified in the sponsors' commentary on the proposed Public Integrity Reform Act read as if they had been excerpted from the NYCLU's mission statement. The NYCLU's advocacy agenda, in support of this mission, is well documented in the organization's annual reports.

Even a cursory review of news reports will confirm that the aforementioned issues often generate fierce, and violent, controversy. Such controversy is driven by deeply held opinions and intense emotions, which often lead to overt acts of hostility and aggression towards the NYCLU and its staff.

This is in the very nature of the advocacy in which the NYCLU engages. Following are a number of examples:

- In 1999, the NYCLU filed a lawsuit on behalf of a group affiliated with the Ku Klux Klan, an organization widely known for its hostility directed at certain minority groups. The suit challenged a state law banning more than two individuals wearing masks from congregating in public. The NYCLU argued that the ordinance violated First Amendment rights of expression and association. Individuals and groups opposed to the plaintiff's ideology began protesting against the NYCLU for its decision to litigate the case.

Protests against the NYCLU escalated as the case progressed. NYCLU staff affiliated with the case became the targets of threats, harassment, and, on one occasion, an attempted home invasion. For example, an organization found the home address of a staff member on the case, and posted it to the group's website. This individual began receiving threatening phone calls at home. Unknown individuals rang the staff member's door buzzer at all hours of the night. Several members of the group entered this individual's apartment building and tried to break into the staff member's apartment. A neighbor called the police who chased the men out of the building.

In December 2002, the group held a protest at the staff member's home and the building was obliged to hire security guards for the duration of the case to protect residents from any further problems. These activities made it necessary to hire private security guards to protect NYCLU staff for the duration of the case. During this period, the staff member, fearful for the safety of family members, would not enter or exit the apartment building with family members.

- The same group that targeted NYCLU staff during the litigation related to the ban on wearing of masks also publicly announced efforts to target a high-level NYCLU official during the same period. However, the NYCLU official had an unlisted home telephone number and the group failed to locate the official's home address. The official nonetheless felt compelled to remove their name from any visible listings in their apartment building directory and mail boxes.

Every year, this NYCLU official receives a half dozen or more email messages or letters that are of a threatening nature. For a number of years, in the Christmas season, this official and the NYCLU staff receive dozens of greeting cards and letters reviling the

organization and, in some cases, offering prayers for the demise of the organization, which is typically characterized as God-less or satanic. This official was likewise the recipient of hostile and belligerent communications as a result of the organization's support for the establishment of a new mosque near the former site of the World Trade Center.

- On a daily basis, the NYCLU's seven regional offices across the State are engaged in advocacy on behalf of minority groups, and represent people expressing unpopular positions within their communities. The NYCLU employees who staff these offices, as well as local NYCLU members, have actively engaged in efforts to promote the rights of religious minority groups, including Muslim communities in the wake of the September 11th attacks; the rights of communities of color in predominantly white portions of upstate and central New York; and the freedoms of expression and association of gay and transgender teenagers.

The directors of the NYCLU's chapter and regional offices and their local NYCLU members have been subject to harassment and threats as a direct result of these efforts. For example, in June 2009, an NYCLU client in Sherburne, N.Y., was threatened with a cross burning on his lawn after he publicly suggested the possibility of hosting a night for gay teenagers at his youth center, an event which the NYCLU was supporting his right to hold.

In 2007, the NYCLU's Central New York Chapter Director and an NYCLU member were opposing a proposed town ordinance that would ban all lawn signs. After several months of attending town meetings and testifying against the proposed lawn sign ban, the NYCLU member had his car tires deflated, and had the phrases "F--- u ACLU" and "die fag" painted on his car while it was parked in the driveway at his home. The member also received a ransom-style letter with a death threat. After this incident, the chapter director and the NYCLU member had to be escorted by law enforcement in order to attend the town hall meeting where the lawn sign ban was ultimately voted on. These are just a few of many other times when NYCLU members have been threatened with violence in connection with their public affiliation with the NYCLU.

- S (who prefers not to have his name identified in this document) answers telephone calls made to the main number at the NYCLU's New York City office. He responds to general inquiries and he takes information from individuals regarding alleged civil liberties violations. He receives many calls from individuals angry with the advocacy of the NYCLU or other ACLU affiliates around the country. S has been employed with the NYCLU for thirty-one years, during which time he has received approximately six death threats or threats of physical assault while at work. In one instance, a caller stated that he would come to the NYCLU's offices and "go postal." On another occasion a caller said he would come to the building, wait for S to emerge, and attack him. On several occasions, S has received suspicious packages at the front desk, which required building security agents to remove the packages for inspection with an X-ray device.

In order to protect himself, S uses a pseudonym when conversing with those who call the NYCLU to report a civil liberties violation or to complain about a position taken by the

NYCLU. In order to protect his identity, he does not allow reporters who attend news conferences at the NYCLU offices to photograph him at his desk. And for this reason his actual name does not appear on the NYCLU's web site. He takes these precautions out of concern that members of the public could use this information to carry out the threat of an attack against him.

- The director of the NYCLU's Western Regional office has received death threats on three occasions, in response to the organization's advocacy work in the Buffalo area. The first of these threats was made in 2000 by an individual who told the executive director in a phone call, "If I catch you, I'll kill you."

The second death threat – to bomb the NYCLU's office in Buffalo – was made in the period shortly after September 11, 2001. Police had directed an individual to remove from his van a sign that read, "Allah sucks." The individual complied; later he called the NYCLU, claiming his First Amendment rights had been violated. The NYCLU's director explained that there was no longer a controversy because the man had complied with the police order. He responded with a voice-mail message threatening to bomb the NYCLU's offices.

The third death threat against this employee also involved detonation of a bomb at the NYCLU offices. In 2003 the anti-abortion group Army of God threatened to bomb the NYCLU's Western Regional office and a women's health clinic. Both offices were located in Buffalo. A few years earlier Barnett Slepian, a physician who provided abortion services in Buffalo, had been murdered outside his home.¹¹ In 2003, Dr. Slepian's killer was on trial for the crime. Members of the Army of God came to Buffalo to show their support for the murderer, and to condemn the supporters of abortion rights – among whom the NYCLU and women's health clinic were prominent.

- In 2013, the NYCLU published notification regarding certification of a prospective class of plaintiffs in litigation charging that legal services to indigent defendants often failed to meet constitutional standards. In response, one individual sent a letter to the NYCLU that was addressed, "Dear Bloodsuckers." The author of the letter exclaimed, "F--- you---you bastards are just trying to tear down society, and acting pious all the time." The letter demanded, "Who pays for this bulls--t?"

- In 2007, a man dressed in a black robe would regularly appear at the NYCLU's offices in lower Manhattan – which is also the location of the national office of the ACLU. The man marched outside the building, waving signs denouncing the NYCLU and ACLU as "dogs" and "Jews." He also maintained a website with claims that the NYCLU and ACLU were parties to a broad Jewish conspiracy. On this website he posted photographs of several ACLU and NYCLU staff and clients.¹²

¹¹ http://www.prochoice.org/about_abortion/violence/james_kopp.html. David Staba, "Abortion Foe who killed doctor is sentenced to 25 years to life" NYTimes (May 10, 2003), <http://www.nytimes.com/2003/05/10/nyregion/abortion-foe-who-killed-doctor-is-sentenced-to-25-years-to-life.html?ref=barnettaslepian&gwh=4011064C66A9222C06DB5C58E6C7D613>.

¹² Brother Nathanael's website is available at <http://www.brothernathanael.com/index.php>. A picture of him at the NYCLU and ACLU office in New York is available at <http://www.flickr.com/photos/nickcalyx/800628902/>. A

• In January of 2011, the director of the NYCLU's chapter office in Rochester, New York, received a series of emails from an individual who had contacted the office to complain about the local court system. The hostility expressed in these emails intensified over time; as it did, the NYCLU seemed to become part of the problem. The last in this series of emails included this comment: "this government is the enemy and people better start realizing that sooner than later. They better drive around in bullet proof cars. [...] Best of luck in life. I'm buying a weapon I can find fast. I suggest you do the same."

These examples of harassment and intimidation are not extraordinary, or even unusual, events in the course of the NYCLU's work. They represent, unfortunately, the volatile nature of public discourse when issues of civil rights and civil liberties are in dispute.

As the New York State affiliate of the American Civil Liberties Union, the NYCLU is often implicated in controversies and conflict related to the exercise, or suppression, of civil liberties that arise anywhere in the United States. (See, attached, Supplemental Statement of Facts.)

The phenomenon of retaliatory animus toward the NYCLU is inherent to the advocacy the organization pursues. And as the Supreme Court has observed, a government requirement that an organization (such as the NYCLU) disclose the identity and personal information of financial supporters can compromise that mission by "seriously infring[ing] on privacy of association and belief guaranteed by the First Amendment."¹³

The federal court for the Southern District of New York has held that a statutory reporting scheme requiring "political committees" to make public reports of information related to receipts and expenditures, including the names and addresses of contributors, imposed "excessive restraints on the exercise of First Amendment rights. . . ."¹⁴ The ruling includes what is, in effect, a judicial finding that the required source of funding disclosures will cause direct harm to the staff and members of the NYCLU and, more broadly, to the First Amendment rights of others who advocate on behalf of New Yorkers' civil rights and civil liberties.

Defendants admit that at least five of the NYCLU's approximately 40,000 members have been subjected to community hostility after their association with plaintiff had become known. This, admittedly, was sufficient to deter these persons from associating with plaintiff. Based on the above facts . . . [p]laintiff has demonstrated, as required by the Supreme Court in *Buckley v. Valeo*, 424 U.S. at 74, that there is a "reasonable probability that the compelled disclosure of a (group's) contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."¹⁵

collage that includes a picture of NYCLU legal director Art Eisenberg and an interview in which Brother Nathanael discusses his protest of the NYCLU and ACLU is available at <http://www.realjewishnews.com/?p=18>. A collage with a picture of ACLU/NYCLU client Edie Windsor and ACLU legal director Steven Shapiro is available at <http://www.realjewishnews.com/?p=835>.

¹³ *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

¹⁴ *NYCLU v. Aalto*, 459 F.Supp. 75 (1978)

¹⁵ *Id.* at 88 (footnote omitted).

In reviewing this request for an exemption from the disclosure provisions of the source of funding regulation, the NYCLU urges the members of the Commission on Public Ethics to consider the underlying rationale that informs the New York State Legislature's and the Supreme Court's adoption of rules and standards that protect organizations engaged in promoting civil rights and civil liberties from disclosing information about donors and supporters.

It is well settled in Supreme Court jurisprudence that the right to petition the government to take a position on proposed legislation is among the freedoms protected by the First Amendment.¹⁶ In a representative democracy "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."¹⁷

And to require that the NYCLU (and similarly situated organizations) disclose personal information of donors and supporters is to subject those individuals to risk of harm, threats, harassment and reprisal. This is an unwarranted risk, and an unnecessary one. It is a risk that we ask the Commission to eliminate as regards the NYCLU by providing the organization an exemption from the public disclosure requirements.

We believe that, at this juncture and on the basis of this submission, including the attached supplemental statement of facts, the NYCLU should be granted the exemption that we seek here. I declare that the information contained in this application is true, correct, and complete to the best of our knowledge and belief. However, if the Commission regards this submission as inadequate for any reason, we would be prepared to supplement further our legal and factual presentation.

Thank you for your consideration of this matter.

Yours sincerely,



Donna Lieberman
Executive Director

Robert Perry
Legislative Director

Arthur Eisenberg
Legal Director

¹⁶ See, e.g., *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (U.S. 1961).

¹⁷ *Id.* at 137.

Supplemental statement of facts in support of the NYCLU's request for an exemption from the source-of-funding disclosure requirements

December 3, 2013

The facts presented in the foregoing letter, to which this supplement is attached, describe incidents involving NYCLU staff members and the organization's non-staff members and supporters who have been the target of threats and harassment as a direct consequence of their affiliation with the NYCLU and its advocacy on behalf of civil rights and civil liberties.

With this supplemental statement of facts, the NYCLU provides further evidence of the threats and harassment that are often directed at the organization's employees, clients and supporters. We do so in the interest of providing the members of the Commission with a deeper understanding as to the heightened risk of harm that would be created if the NYCLU were required to make public the personal information of the organization's supporters.

It has been recognized that controversial organizations seeking exemptions from disclosure obligations under *Buckley v. Valeo*,¹⁸ and under court rulings that develop the legal standards articulated in *Buckley*,¹⁹ are permitted to rely upon their own organizational experiences as well as those of comparable organizations. We follow those precedents here.

The NYCLU is the New York affiliate of the American Civil Liberties Union. There is an ACLU affiliate in every state, and in Puerto Rico. The ACLU affiliates pursue a common mission – upholding individual rights and liberties. For that reason the staff of the ACLU's state affiliates report similar experiences regarding threats and reprisal that follow from this type of advocacy. In this sense all ACLU affiliates are similarly situated.

It is also the case that state affiliates often become the representation of the national ACLU, particularly when the national organization is involved in controversy. For example, should the ACLU's national office bring widely publicized litigation on behalf of an individual in California or Florida, personnel with the state affiliates throughout the country become the representatives, and spokespersons, for the ACLU. That is, local staff members become the face of a national controversy. To the general public, the local affiliate is the ACLU. And to the extent the ACLU is associated with a controversial or provocative issue, people will often direct their support, or rage, at the local affiliate.

We ask that JCOPE consider this institutional dynamic in its review of the facts set out below.

- The reproductive rights programs of the ACLU and the NYCLU undertake litigation, legislative advocacy and public education with the objective of increasing access to reproductive health care, including abortion care. This advocacy, particularly as regards abortion rights, has made staff members the target of threats by anti-abortion activists. For example, a former director of the ACLU, as well as a former ACLU staff attorney and legal fellow, are listed in the "Nuremberg Files" website, which vilifies reproductive-

¹⁸ 424 U.S. 1, 74 (1974)

¹⁹ See, e.g., *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 99-102 (1982).

rights advocates as well as health care professionals involved in reproductive services.²⁰ The web site displays the names and locations of various doctors who perform abortions throughout the United States. Dr. Barnett Slepian, a Buffalo physician, appears on the site's list of "aborted or nearly aborted abortionists." In 1988, Dr. Slepian was murdered by an anti-abortion zealot. In 2007, the Ninth Circuit Court of Appeals ordered "Wanted" posters removed from the website because they constituted a "true threat" to the physicians identified in the posters.²¹

- A high-ranking official of the ACLU's affiliate in Iowa, received a threatening letter in June of 2013, the day after he was quoted in a newspaper article commenting on an ACLU report that addressed racial disparities in marijuana arrests. The letter stated,

"Dear Shithead []:

I read with disgust your article ... accusing the police of targeting the Darkies. That is nothing but a pack of lies. You're just trying to stir-up trouble like your two-bit ACLU is well known for. Well, I have an ultimatum for you. Get your nasty ass out of Iowa by July 1st or end up like that Darkie in Sanford, Florida, that is dead as last weeks rock and roll hit."

After a fictitious signature, the letter closed with: "By the way, thought of a new meaning for your groups [sic] initials which is much more fitting: Atheists Create Ludicrous Untruths."

- In October 2008, local law-enforcement officials in Weld County, Colorado, seized the business records of a local tax-preparation company. The records had been seized in an effort to identify undocumented immigrants using fraudulent social security numbers. The ACLU of Colorado ultimately represented clients of the business who filed a lawsuit challenging the seizure of their records.²² Prior to the filing of the lawsuit, ACLU lawyers spoke out in opposition to the Weld County police actions. The ACLU staff, and people involved in the litigation, received a number of threatening and harassing communications as a result of their public comments about the police action. For example, on November 15, 2008, the plaintiff received a phone message, "Watch your step lady!" Another phone message a few days later stated, "You're a criminal. Go back to Mexico with your people. [...] I hope like heck that they run your butt back over the border. I don't care if you're an American citizen or not, you need to go back where they're coming from." The ACLU received similar messages as well, including this email on January 14, 2009, "Hey Retards! [...] You people need to move away, somewhere very far away, like deep into Mexico . . . Kiss off, a-holes!" The judge in this case ruled from the bench that the risk of retaliation and harassment directed at the clients of the tax preparation business was so great that they could proceed in the litigation as anonymous "John Doe" plaintiffs.

²⁰ Nuremburg Files, <http://www.christiangallery.com/atrocity/aborts.html>.

²¹ *Planned Parenthood v. Amer. Coalition of Life*, 290 F.3d 1058 (9th Cir. 2002).

²² *In Re Search of Amalia's Translation and Tax Service*, summary and filings available at <http://aclu-co.org/case/re-search-amalias-translation-and-tax-service>.

- In response to advocacy promoting LGBT rights, the ACLU of Oklahoma was sent a hostile music video that intercut pictures of activists with images of a fire.²³ The video was delivered with a message: "In watching the link to [the] song/video, understand that though the courts may give you a false sense of victory, soon you will receive the treatment that is being applied in France. A prayer has gone out against you. It is only a matter of time. You are unnatural. When you play with fire, you will get burned. You are forcing your disgusting, vile, corrupt, and immoral lifestyle upon people who soundly reject it, and for that you will ultimately suffer consequences. So be prepared to defend yourselves for the actions you take. You can never say that you were never warned!"

As recently as last week, the ACLU of Oklahoma continues to receive threats to the safety of their staff. On Friday, October 18, 2013, the ACLU of Oklahoma received a bomb threat in the form of a voicemail. The caller asked:

Are y'all part of the same ACLU that sued the [unintelligible] school district in Ohio because they had a picture of Jesus?...That's a bunch of goddamn bullsh---. You know what? Maybe I should go up there and bomb your goddamn place, you mother f---ers. Pissing people off. Mother f---ers.

- In July 2010, a man named Byron Williams loaded his car with guns and body armor. He then headed for San Francisco with the intention of killing employees at the offices of the ACLU of Northern California and at the offices of the Tides Foundation, a philanthropic organization that supports environmental preservation and other social justice issues.²⁴ Before Williams reached San Francisco, police pulled him over for driving erratically, and he engaged in a brief gun battle with the officers. After his arrest, authorities reported he told them that his goal had been to "start a revolution."²⁵

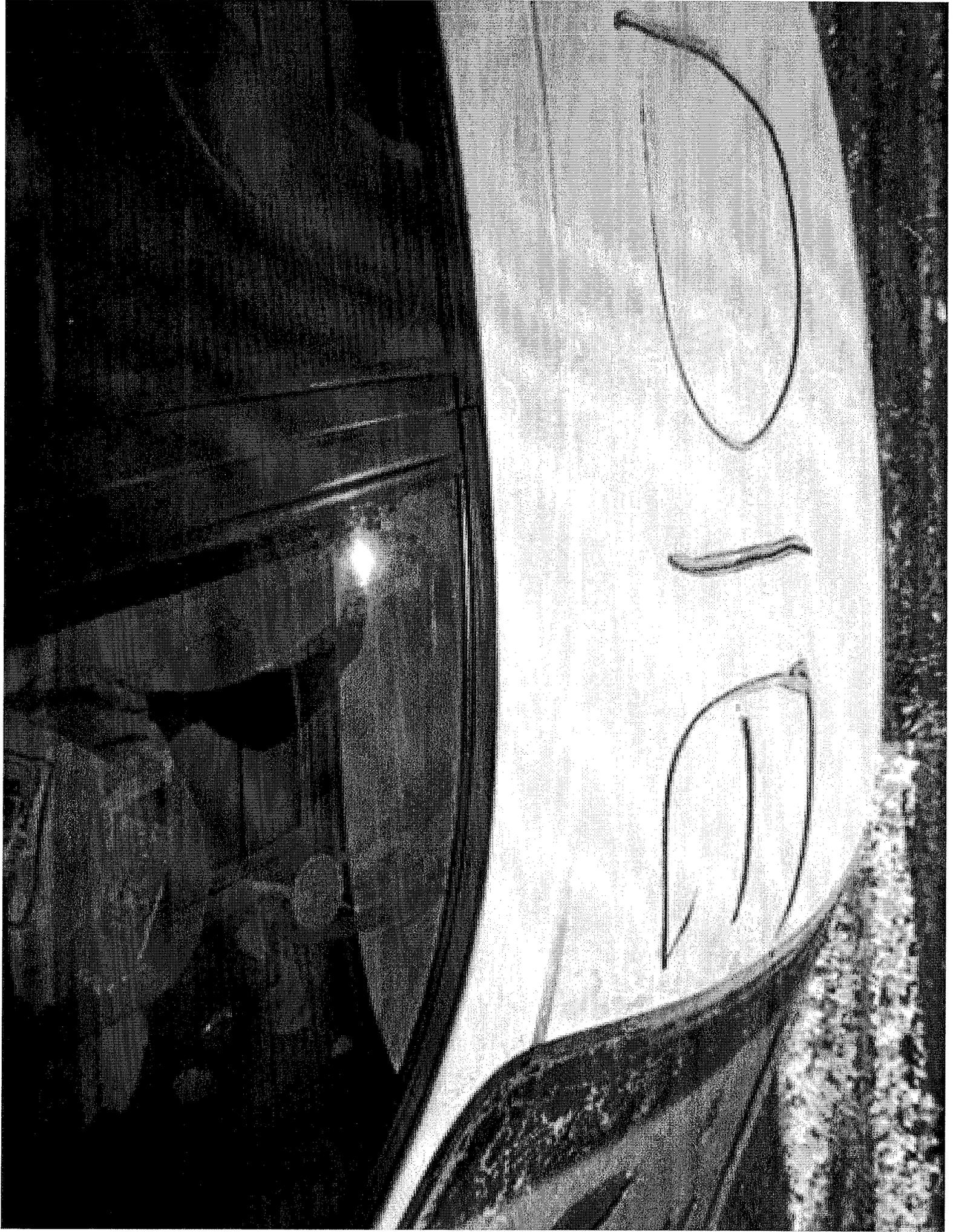
²³ The video is available at http://www.youtube.com/watch?v=BEQNIanUW_E.

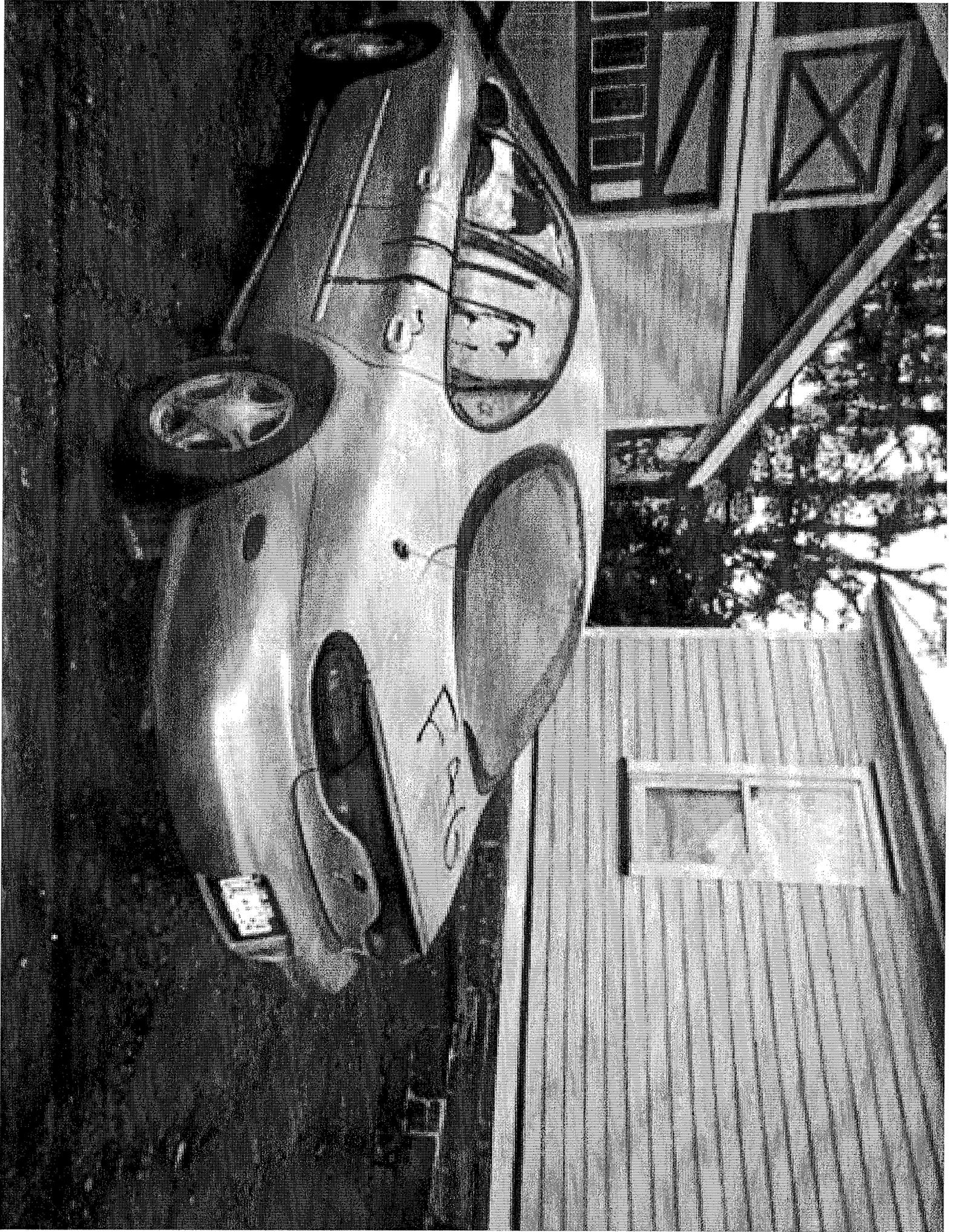
²⁴ Henry K. Lee, "Alleged gunman says he wanted a 'revolution,'" SFGate.com (July 21, 2010), <http://www.sfgate.com/crime/article/Alleged-gunman-says-he-wanted-a-revolution-3180744.php>

²⁵ Ibid.

Exhibit D:

Photos of NYCLU Member's Car







FIVE DOLLARS

PICK UP

Addendum:

**September 25, 2015 Exemption Denial Letter of the New York State
Joint Commission on Public Ethics**

DANIEL J. HORWITZ
CHAIR

DAVID ARROYO
HON. JOSEPH COVELLO
MARVIN E. JACOB
SEYMOUR KNOX, IV
HON. EILEEN KORETZ
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MICHAEL A. ROMEO, SR.
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September 25, 2015

Donna Lieberman
Executive Director
New York Civil Liberties Union
125 Broad Street, 19th floor
New York, New York 10004

Dear Ms. Lieberman:

On July 13, 2015, New York Civil Liberties Union ("NYCLU") submitted an application to the Joint Commission on Public Ethics ("Commission") for an exemption from the Source of Funding Disclosure requirements contained in Legislative Law Article 1-A §§1-h(c)(4), 1-j(c)(4) and 19 NYCRR Part 938. The statute provides that whether to grant an exemption is a discretionary determination of the Commission. The Commission considered NYCLU's application at its August 4, 2015 meeting. The Commissioners reviewed the application and supporting evidence prior to the meeting and evaluated the application under the relevant legal standard during the public session. NYCLU's application for exemption failed to receive a vote of the majority of the Commissioners, therefore, the application was denied. Pursuant to Part 938.5(d), the Commission hereby sets forth the reasons and basis for the denial.

By way of background, the Public Integrity Reform Act of 2011 ("PIRA") (Chapter 399, Laws of 2011) amended Legislative Law Article 1-A by enacting strict disclosure requirements that, through increased transparency, better inform the public about efforts to influence governmental decision-making. The source of funding disclosure provisions of the law require lobbyists who lobby on their own behalf and clients of lobbyists, who devote substantial resources to lobbying activity in New York State, to make publicly available each source of funding exceeding \$5,000 for such lobbying. The purpose of these statutory provisions is to provide the public with information about those who seek to influence the government.

While under both the statute and the regulations entities are permitted to apply for exemptions from disclosure, NYCLU was required to show, by clear and convincing evidence, that its primary activities involve areas of public concern that create a substantial likelihood that disclosure of its source(s) of funding will cause harm, threats, harassment or reprisals to the source or

individuals or property affiliated with the Source. 19 NYCRR Part 938.4; *see* also Legislative Law §§1-h(c)(4), 1-j(c)(4). It should be noted that the Commission enacted these regulations to conform to legislative intent seeking the broadest interpretation in favor of disclosure. (19 NYCRR 938.1). NYCLU sought an exemption pursuant to Part 938.4(b), which is available for organizations that have exempt status under Section 501(c)(4) of the Internal Revenue Code of the United States.

Part 938.4 sets out a list of five nonexclusive factors the Commission will consider when determining whether an applicant has made a clear and convincing showing of substantial likelihood of harm, threats, harassment or reprisals to the applicant's source(s) of funding if disclosure were required. It is the Commission's view that unless an applicant makes a persuasive showing under multiple factors it is unlikely to prevail.

In reviewing NYCLU's application, the Commission finds that NYCLU has failed to make the requisite showing in support of its exemption request. NYCLU's application for exemption states that it is an organization whose primary mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. (NYCLU's Application for Exemption, pg. 2). While the Commission recognizes that NYCLU's primary activities involve areas of public concern (19 NYCRR Part 938.4(b)), the Commission finds that NYCLU seems to rely solely on that fact for its assertion that it is eligible for the exemption.

First, the Commission considered the number, recurrence and location of incidents identified in NYCLU's application. The Commission found that many of the incidents were remote in time and geography. Notably, NYCLU's application relies heavily on the information it proffered in its 2013 application for exemption. Accordingly, there is limited evidence of incidents in the last two years. While NYCLU's application claims to cover incidents spanning a fifteen-year period, little information is provided about the dates of specific incidents. For example, the fourth bullet on page 4 describes an incident involving five members of the NYCLU who became subject to "community hostility" after being identified, but based on footnote 9, this may have taken place in or before 1978. Further, at least three of the ten incidents mentioned in the application itself occurred well outside of the New York area.

Second, NYCLU's application has limited information related to supporters of NYCLU, the American Civil Liberties Union ("ACLU"), and similar organizations. Many supporters attend rallies or publicly identify themselves through social media or other venues, and NYCLU has been unable to adequately demonstrate that these supporters experience adverse effects from being associated with entities or causes similar to that of the NYCLU. For example, the NYCLU website calendar includes a Legislative Lobbying Day (May 5, 2015) and numerous public meetings and chapter events. (See <http://www.nyclu.org/event>.) The majority of the information contained in NYCLU's application pertains to its staff members or pertains generally to the ACLU. Thus NYCLU's application fails to establish a nexus between the information it offered in support of its application and the likelihood that supporters, donors, or sources of funding will experience harm, threats, harassment, or reprisals.

Third, some of the incidents described by NYCLU rise to no more than constitutionally protected speech as opposed to clear and convincing evidence of a substantial likelihood of harm, threats, harassment or reprisal if disclosure is required.

The burden is on the applicant to establish through “clear and convincing evidence” a “substantial likelihood of harm.” This high standard for an exemption is in keeping with the purpose, “...to better inform the public about efforts to influence governmental decision making through increased transparency.” (19 NYCRR Part 938.1(4)). To be eligible for the exemption NYCLU’s application must contain clear and convincing evidence, by way of specific instances/examples, that disclosure of source(s) of funding would create a substantial likelihood of harm, threats, reprisal or harassment to the source(s) of funding or individuals or property affiliated with such source. The Commission has concluded that NYCLU failed to meet that burden. Therefore, NYCLU’s application for the exemption is denied.

Sincerely,
Commissioners

Hon. Joseph Covello
Marvin E. Jacob
Seymour Knox, IV
Gary J. Lavine
Hon. Mary Lou Rath
David A. Renzi
George H. Weissman