

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 1<sup>st</sup> 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