NYCLU
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November 6, 2017

Acting Chair Michael K. Rozen
General Counsel Monica Stamm
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 Mr. Rozen and Ms. Stamm:

Please accept this letter as notice of the NYCLU's intent to appeal the Commission's denial of our July 14, 2017 application for an exemption from the source of funding disclosure requirements made pursuant to Part 938.4(b). As required by the Commission's regulations at Part 941.18(b), we append our application, as well as the denial letter dated October 16, 2017.

The Commission's regulations at Part 941.18 set forth its procedures for administrative appeal. Those regulations expressly bar administrative appeal to a Judicial Hearing Officer for client filers who seek a 'blanket exemption' under 938.4(b).[1] However, the regulations also state immediately thereafter that "[a] client filer may appeal a denial of an application for exemption."[2] The regulations do not further clarify whether any other form of administrative appeal may be available where the Commission has denied a blanket exemption application made under Part 938.4(b).

Additionally, the NYCLU notes that the regulations provide "15 business days" for a filer to take one of two prescribed actions: either provide notice of appeal, or waive the right to appeal and instead comply with the disclosure requirement following denial.[3] The regulations state:

> A client filer may appeal a denial of an application for exemption. A notice of appeal must be in writing and include the original application for exemption

[1] 19 NYCRR Part 941.18(a). *See also* Part 938.6.
[2] Part 941.18(b)
[3] Part 938.5(e); Part 941.18(b).

> together with any supporting materials that were submitted pursuant to section 938.5 of this Title. The written notice of appeal must be received by the commission no later than 15 business days after the date of the denial. Any notice of appeal received by the commission later than 15 business days after the date of the denial will not be considered and the client filer will be deemed to have waived the right to appeal.[4]

The regulations similarly require that "[if] a request for an exemption is denied, *and the client filer does not appeal*, the client filer shall, within 15 business days of the date of denial, amend the client semi-annual report to include required information relating to the subject of the application for exemption."[5]

Again, the Commission's regulations do not clarify what action any filers barred from the regulatory appeal process must take in order to avoid having been administratively deemed to have 'waived' the right to appeal. The regulations indicate that a filer's failure to provide notice within 15 business days will have this result. For this reason and others, the NYCLU hereby provides in good faith such notice as the regulations might require of our intent to seek whatever review may be available.

In addition, it is unclear whether those who intend to seek review of a denial may still be bound to request any further administrative review before the Commission, such as a rehearing or reconsideration. Therefore, the NYCLU requests that the Commission consider referring our appeal to a Judicial Hearing Officer for review; below, we argue as we have in the past that grounds for such referral remain in the statute itself. If the Commission will not refer our appeal, we request that the Commission instead reconsider our exemption application in its entirety, in the specific light of the Lobbying Act's mandate that the Commission's disclosure requirements "shall not apply to" any §501(c)(4) exempt organization working in controversial areas "including ... civil rights and civil liberties[.]"[6]

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Authority for referral of this appeal to a Judicial Hearing Officer rests, first and foremost, within the Lobbying Act itself.

Section 1-h(c)(4)(ii) of the Lobbying Act sets forth an exemption from its source of funding disclosure requirement, and three categorical exclusions. The second of the three exclusions provides that source of funding disclosures "shall not apply to" any §501(c)(4) exempt organization "whose 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."[7]

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[4] Part 941.18(b).

[5] Part 938.5(e).

[6] N.Y. Leg. Law §1-h(c)(4), §1-j(c)(4). References to §1-h(c)(4) hereinafter also refer to the identical §1-j(c)(4).

[7] N.Y. Leg. Law §1-h(c)(4) (emphasis supplied). Note that the Supreme Court has long held that the appropriate standard for exempting organizations from the requirement to publicly disclose information regarding their

Rather than promulgate regulations on those "area[s] of public concern" that would form a "proper basis for exemption" from disclosure, however, the Commission opted to lump blanket exemptions for 501(c)(4)s seeking coverage under this provision in with the periodic exemption provided for in the prior paragraph of the statute.[8] In its regulations at Part 938, the Commission provides the standards of review for both types of application, including at Part 938.4(a) factors the Commission will consider for both;[9] it also sets forth a periodic, semi-annual application process for both types of exemption.[10]

The Commission later clarified, in its regulations, its view that 501(c)(4) organizations applying for a blanket exemption from the disclosure requirement pursuant to Part 938.4(b) are not entitled to a statutory appeal before a Judicial Hearing Officer.[11] However, the Lobbying Act expressly provides for an appeal before a Judicial Hearing Officer for filers whose periodic exemption applications are denied – and so, to the extent that blanket exemption applications are treated as periodic exemption applications in the Commission's regulations, it remains a matter of uncertainty whether and why blanket 501(c)(4) applicants should be treated differently and denied an appeal before a Judicial Hearing Officer.

Regarding appeal from denial of a periodic source of funding disclosure exemption application, Section 1-h(c)(4)(ii) of the Legislative Law provides that, if the Commission denies 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 the commission, pursuant to regulations promulgated by the commission. 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."

First, as noted above, to deny the NYCLU an appeal before a Judicial Hearing Officer while treating its eligibility for exemption as periodic and not categorical would appear to violate the express legislative mandates set forth in Legislative Law §1-h(c)(4)(ii). The Commission could have opted to regulate the 501(c)(4) "blanket exemption" in an appropriately narrow manner, as it does the other categorical exclusions in that section of statute, and set forth a rule that describes the category of entities covered and determines eligibility for the exemption. Instead, it has chosen to regulate the "blanket exemption" with a heavier and more authoritative hand – just like the periodic exemption, the denial of which is statutorily subject to review by an

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financial donors is a showing of a "reasonable probability" of harm, threats, harassment or reprisal. (*Buckley v. Valeo,* 424 U.S. 1, 88 (1976)). This standard was originally adopted by the Commission in a 2013 regulation, but was later amended. The current "substantial likelihood" standard has been much debated by the Commission as to its applicable meaning, and is much more strident than First Amendment jurisprudence allows. We aver, as we have in the past, that applying this standard 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.

[8] N.Y. Leg. Law 1-h(c)(4). Arguably, this treatment alone enlarged the Commission's authority beyond the constitutional scope of the statute, by requiring all covered 501(c)(4) organizations to participate in a periodic quasi-adjudicatory proceeding twice annually, when the statute deems such organizations eligible for an ostensibly permanent or long-term categorical exclusion in order to comport with First Amendment requirements.

[9] Part 938.4(a). Note that Part 938.4(b) incorporates these factors and the substance of Part 938.4(a) by reference.

[10] Part 938.5.

[11] Part 938.6; Part 941.18(a). Again, this disfavored treatment appears to further enlarge the Commission's authority in violation of the express statutory mandate that the disclosure requirement "shall not apply" to qualifying 501(c)(4)s working in appropriate areas of public concern such as civil rights and civil liberties.

independent Judicial Hearing Officer. To the extent the statute provides the Commission any heightened authority over the periodic exemptions, it also necessarily provides an additional layer of independent review as a check on that increased authority. In this respect, those regulations that purport to treat the 501(c)(4) blanket exemption as periodic and subject to semi-annual determinations by the Commission, yet bar independent review of the Commission's determinations, are in conflict with state law and may be deemed unenforceable.

In addition, there is administrative precedent for disregarding the regulatory distinction between appeals from applications made under Part 938.4(a) and 938.4(b). This issue arose in 2014 when the NYCLU appealed from the Commission's denial of its application for 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 the Commission'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 had specified Part 938.4(a) instead of Part 938.4(b)."[12]

There, because the NYCLU application for an exemption could have been brought under Part 938.4(a), and because its substance relied upon the test set forth in Part 938.4(a), the Judicial Hearing Officer held that he retained jurisdiction to entertain the appeal, despite the Commission's regulations to the contrary. Precisely the same reasoning applies here. Because 501(c)(4) organizations can apply under Part 938.4(a) as well as Part 938.4(b), and because the substantive factors set forth in Part 938.4(a) make up the entire substance of any application under Part 938.4(b), appeals from the denial of an application for exemption can and should be given the more favorable treatment accorded appeals from 938.4(a) denials.

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The merits of the NYCLU's request for an exemption from disclosure are amply set forth in the July 14, 2017 letter and application, including the past materials and exhibits appended. The NYCLU relies upon that submission in support of this appeal, but supplements that submission here to address briefly the reasoning employed by the Commission in its October 16 letter denying the NYCLU's application for an exemption.

The Commission's denial letter offers four reasons for its rejection of the NYCLU application.[13] First, "in the Commission's view, the new material does not amount to specific and direct threats, nor has NYCLU presented any evidence of incidents of actual harm to anyone associated with NYCLU since its last submission." Second, as it has in the past, "the Commission found that many of the incidents [of threat, reprisal and harassment] were remote in time and geography." Third, as it has in the past, it concluded that "the majority of the information contained in the NYCLU's application pertains to its staff members or pertains

[12] Decision of Judicial Hearing Officer George C. Pratt (July 11, 2014), reversing JCOPE's 2014 denial of the NYCLU's previous application for an exemption, at 2, attached herein. As noted above, attached documents include the Commission's denial letter of October 16, 2017, and the July 14, 2017 application of the NYCLU requesting exemption, as well as the exhibits presented with that application, including the 2014 decision.

[13] Joint Commission on Public Ethics Denial Letter signed by Acting Chair Michael Rozen (October 16, 2017), at 2-3, attached herein.

generally to the ACLU." Finally, and again as it has in the past, it claimed that "some of the incidents described by NYCLU rise to no more than constitutionally protected speech."

As we have in the past, and as we did in some detail in the July 14 application letter itself, the NYCLU asserts that denial of our application on these grounds disregards both the statute and the Commission's own regulatory test for exemption.

First, this reasoning fails to resolve itself with, or even acknowledge, the clear and express intent of the statute to wholly exempt from disclosure, on First Amendment grounds, the set of "civil rights and civil liberties" organizations and other non-profit groups historically subject to hostility related to their controversial work. Once again, in deliberating upon exemption from disclosure, the Commission relies openly on its statutory transparency mandate by "seeking broad disclosure in promulgating its regulations governing the exemption process,"[14] and opts to disregard the statute's First Amendment mandate, which is given its effect in the exemption process.[15]

The Commission's denial letter opens by asserting its own reading of its authority regarding the statutory exemption at issue: "the statute provides ... that the decision whether or not to grant an exemption is entirely within the discretion of the Commission, upon due deliberation."[16] However, regarding 501(c)(4) filers working on controversial matters, the statute itself actually says that the disclosure requirement "shall not apply" to qualifying organizations including those working in "the area of civil rights and civil liberties" – and the Commission's charge is to set forth regulations that determine which "area[s] of public concern" should qualify an organization for the exemption. Again, the Commission's statement of its own authority is considerably broader than the statute provides, and disregards its First Amendment mandate.

Second, the Commission's own regulations require it to consider broad factors such as "past or present harm, threats, harassment or reprisals" to donors, filers, or associates;[17] the "severity, number ... and duration" of such harms;[18] the "pattern of threats or manifestations of public hostility" against donors, filers, or associates;[19] and evidence of these harms against "similar" organizations.[20] The Commission's stated ad-hoc evidentiary standard that "unless an applicant makes a persuasive showing under multiple factors it is unlikely to prevail" vastly exceeds the discretion prescribed by its own disjunctive and non-exclusive list of factors – and regardless, we are certain that the record provided capably meets and exceeds the regulatory test persuasively and across multiple factors.

In light of these overly strident readings of the statute and regulations, it is unsurprising that the Commission finds itself perennially unable to make out grounds for an exemption in any application that comes before it. This inability to uphold the statutory mandate jeopardizes the expressive rights of controversial non-profits and their contributors – and it jeopardizes the constitutionality of the Lobbying Act itself as a result.

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[14] *Id.* at 2.
[15] N.Y. Leg. Law § 1-a.
[16] Denial Letter at 1.
[17] Part 938.4(a)(1); Part 938.4(a)(2).
[18] Part 938.4(a)(2).
[19] Part 938.4(a)(3).
[20] Part 938.4(a)(4).

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For all of these reasons, this appeal should be referred to an independent Judicial Hearing Officer; or, if the Commission will not do so, in the alternative, we request a rehearing in light of the statute's express exclusion of controversial "civil rights and civil liberties" organizations such as the NYCLU from the reach of its own disclosure requirements.

We appreciate the time and consideration of the Commission and staff in attending to this matter.

Sincerely,

Donna Lieberman

Donna Lieberman
Executive Director

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JOINT COMMISSION ON PUBLIC ETHICS

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October 16, 2017

Donna Lieberman
Executive Director
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Dear Ms. Lieberman:

On July 14, 2017, the New York Civil Liberties Union ("NYCLU") applied to the Joint Commission on Public Ethics ("Commission") for an exemption from the Source of Funding Disclosure requirements in Legislative Law Article 1-A §§1-h(c)(4), 1-j(c)(4) and 19 NYCRR Part 938. The statute provides in relevant part that the decision whether or not to grant an exemption is entirely within the discretion of the Commission, upon due deliberation. The Commission carefully considered NYCLU's application at its September 19, 2017 meeting. The Commissioners reviewed the application and supporting evidence and discussed and evaluated the merits of the application under the relevant legal standard during the public session of the meeting, creating a full record of the basis for its decision. NYCLU's application for exemption failed to receive a vote of a majority of the Commissioners, therefore its application is denied. Pursuant to Part 938.5(d), the Commission hereby sets forth the reasons and basis for the denial.

By way of background, the source of funding disclosure provisions increase transparency by providing the public with information about the individuals or entities attempting to influence government decision-making by funding lobbying activities. Specifically, the source of funding disclosure provisions 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 $2,500 for such lobbying.[1]

[1] The source of funding disclosure requirements were first established by the Public Integrity Reform Act of 2011 ("PIRA") (Chapter 399, Laws of 2011), and most recently amended by Part D of Chapter 286 of the Laws of 2016.

Under both the statute and the related regulations, entities are permitted to apply for exemptions from disclosure. It should be noted that the Commission sought to effectuate the legislative intent seeking broad disclosure in promulgating its regulations governing the exemption process. (19 NYCRR 938.1.) NYCLU applied for an exemption pursuant to Part 938.4(b), which applies to organizations that have exempt status under Section 501(c)(4) of the Internal Revenue Code of the United States. To qualify for an exemption, NYCLU is required to show 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).

Part 938.4 sets out a list of five nonexclusive factors the Commission must consider when determining whether an applicant has shown a 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.

The burden is on the applicant to establish 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).) Thus, to be eligible for the exemption, NYCLU's application must contain evidence, by way of specific instances/examples, that disclosure of source(s) of funding would create a substantial likelihood of harm, threats, harassment or reprisals to the source(s) of funding or individuals or property affiliated with such source.

In support of its application, NYCLU relies in large part on its January 2017 and July 2015 applications for exemption, both of which the Commission denied.[2] Accordingly, the Commission incorporates herein its assessments of NYCLU's January 2017 and July 2015 applications. In addition, to support its current application, NYCLU provides information of more recent origin in the form of ten holiday cards, three letters and 14 assorted photos or posters that were delivered to NYCLU.

The Commission considered all of the alleged incidents of "harm, threats, and harassment" identified by NYCLU in support of its application, both old and new. For the reasons set forth below, the Commission reaffirms its prior findings concerning the previously submitted evidence, and concludes that the new evidence does not meet the burden required for the Commission to alter its previous assessments.

First, in the Commission's view, the new material does not amount to specific and direct threats, nor has NYCLU presented any evidence of incidents of actual harm to anyone associated with NYCLU since its last submission. Indeed, only some of the new evidence appears to be directed at the American Civil Liberties Union ("ACLU") and NYCLU, and even that evidence does not implicate their supporters or sources of funding.

Second, in considering the previous applications, the Commission considered the number, recurrence and location of incidents identified in NYCLU's application. The Commission found that

[2] The January 2017 and July 2015 applications, along with NYCLU's December 2013 application, are all appended to NYCLU's instant application.

many of the incidents were remote in time and geography. Notably, because NYCLU's application is primarily based on the information it proffered in its prior applications, there is limited evidence of incidents occurring in recent years. Further, the Commission previously noted that at least three of the ten incidents mentioned in the 2015 application occurred well outside the New York area.

Third, NYCLU's July 2017 application provides no new information related to supporters of NYCLU, ACLU and similar organizations. Many supporters attend rallies or publicly identify themselves through social media or other venues, and NYCLU has been unable to demonstrate sufficiently that these supporters experience adverse effects from being associated either with NYCLU or with similar entities or causes. The majority of the information contained in NYCLU's application pertains to staff or to the ACLU generally. NYCLU's application fails to establish a nexus between any information it has proffered in support of its current or prior applications and the likelihood that disclosure of these supporters, donors, or sources of funding will lead to harm, threats, harassment, or reprisals.

Finally, in the opinion of this Commission, some of the incidents described by NYCLU rise to no more than constitutionally-protected speech as opposed to evidence of a substantial likelihood of harm, threats, harassment or reprisal if disclosure were to be required.

For the aforementioned reasons, the Commission has concluded that NYCLU not only has failed to establish a "substantial likelihood of harm" but also has failed to show even a "reasonable probability" of such harm. Therefore, the Commission denies NYCLU's application for the exemption.

Sincerely,

Michael K. Rozen (on behalf of himself
and the following Commissioners)

Marvin E. Jacob
Seymour Knox, IV
Gary J. Lavine
J. Gerard McAuliffe, Jr.
George H. Weissman