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March 21, 2018

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

Dear Ms. Lieberman:

On January 16, 2018, 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 February 27, 2017 meeting. The Commissioners reviewed the application and supporting evidence prior to the meeting 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 the 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 that attempt 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

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

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.

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 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.

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 on previous July 2017, January 2017 and July 2015 applications for exemption, all of which the Commission denied.² Accordingly, the Commission is incorporating herein its assessments of NYCLU's July 2017, January 2017 and July 2015 applications. In addition, to support its current application, NYCLU provides information of more recent origin in the form of 13 holiday cards, one birthday card, one postcard, 12 letters, and four assorted photos or posters which were delivered to NYCLU. Also included are additional descriptions of communications via social media and calls to an American Civil Liberties Union ("ACLU") employee, as well as ten other descriptions of mail, incidents or several series of communications to state affiliate employees (which appear to be state affiliates other than NYCLU).

The Commission considered all the alleged incidents of "harm, threats, and harassment" identified by NYCLU in support of its application, both old and new. The Commission also considered alleged incidents directed at ACLU employees and to the state affiliates employees other than NYCLU and weighed the probative value of such incidents. The Commission additionally read and weighed the five nonexclusive factors set out in 19 NYCRR Part 938.4(a) regarding the standard for review of an exemption application. For the reasons set forth below, the Commissioner 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.

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 many of the incidents were remote in time and geography. Notably, because NYCLU's application is primarily based on

² The July and January 2017 and July 2015 applications, as well as the December 2013 application are all appended to NYCLU's instant application.

the information it proffered in its prior applications, there is only limited evidence of incidents directed at NYCLU occurring in recent years.

Third, NYCLU's January 2018 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, or to employees of other state affiliates of the ACLU. NYCLU's application fails to establish a nexus between any information it offered 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 directed at them.

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 failed to meet the burden of establishing 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,

Marvin E. Jacob
Seymour Knox, IV
Gary J. Lavine
David J. McNamara
George H. Weissman