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Jeff S. Jordan  
Office of General Counsel  
Federal Election Commission  
999 E. Street, N.W.  
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Re: MUR 7160

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FEDERAL ELECTION  
COMMISSION  
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OFFICE OF GENERAL  
COUNSEL

Dear Mr. Jordan:

We write as counsel to Correct the Record ("CTR") and Elizabeth Cohen in her official capacity as treasurer ("Respondents") in response to the complaint filed by the William Pflaum on October 24, 2016 (the "Complaint"). The Complaint fails to set forth sufficient facts which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act").<sup>1</sup>

**Legal Analysis**

- 1. Complainant relies exclusively on documents that are the product of a sophisticated foreign espionage attack on Hillary Clinton campaign staff and lack "any indicia of reliability."**

"The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."<sup>2</sup> If those facts are not based upon personal knowledge, they must be "accompanied by an identification of the source of information which gives rise to the complainants['] belief in the truth of such statements."<sup>3</sup> That requires "specific facts from reliable sources."<sup>4</sup> In 2010, three Commissioners voted to dismiss a complaint that was based solely on a newspaper article that relied on anonymous sources "whose credibility and accuracy are difficult to ascertain."<sup>5</sup>

Lacking personal knowledge of any violation of the Act, the complainant cites alleged leaked emails from the account of Hillary for America ("HFA") campaign chair John Podesta that were

<sup>1</sup> See 11 C.F.R. § 111.4(d)(3).

<sup>2</sup> FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

<sup>3</sup> 11 C.F.R. § 111.4(d)(2).

<sup>4</sup> FEC Matter Under Review 6002 (Freedom's Watch, Inc.), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 6 (Aug. 13, 2010).

<sup>5</sup> *Id.*

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published on WikiLeaks.org.<sup>6</sup> U.S. intelligence agencies concluded that these emails were the result of a sophisticated foreign espionage attack against Hillary Clinton's presidential campaign authorized by Russia's senior-most officials.<sup>7</sup> The Central Intelligence Agency has concluded that Russia's motivation was explicitly to help Donald Trump win the Presidency.<sup>8</sup> The theft, publication and manipulation of these emails remains under active government review.<sup>9</sup>

These stolen, unauthenticated emails are "sources whose credibility and accuracy are difficult to ascertain."<sup>10</sup> The Complaint notes one instance in which a fake news item circulated in response to emails published on WikiLeaks,<sup>11</sup> but cybersecurity experts warned that it would be easy for WikiLeaks or its sources to "salt the files they release with plausible forgeries," and impossible to tell which emails were authentic.<sup>12</sup> The Clinton campaign has never publicly authenticated the emails on WikiLeaks.<sup>13</sup>

The emails alone are thus not "reliable sources" from which "specific facts" can give the Commission reason to believe Respondents have violated the Act.<sup>14</sup> Nor should the Commission put Mr. Podesta to the burden and expense of authenticating these emails. The Commission has stated that its purpose is "to safeguard the integrity of our elections."<sup>15</sup> The Russian operation against Mr. Podesta had the purpose of "undercut[ing] confidence in the integrity of the vote."<sup>16</sup>

<sup>6</sup> Complaint ¶¶ 1–6; *see also* Complaint ¶¶ 13–25.

<sup>7</sup> Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security (Oct. 7, 2016), <https://www.dni.gov/index.php/newsroom/press-releases/215-press-releases-2016/1423-joint-dhs-odni-election-security-statement>.

<sup>8</sup> Adam Entous, Ellen Nakashima, and Greg Miller, *Secret CIA assessment says Russia was trying to help Trump win White House*, Washington Post (Dec. 9, 2016), [https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-bc2a-11e6-94ac-3d324840106c\\_story.html?tid=a\\_inl&utm\\_term=.55390640cffe](https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-bc2a-11e6-94ac-3d324840106c_story.html?tid=a_inl&utm_term=.55390640cffe).

<sup>9</sup> *See* David E. Sanger, *Obama Orders Intelligence Report on Russian Election Hacking*, N.Y. Times (Dec. 9, 2016), available at <http://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html?smid=tw-share&r=0>; *see also* Jennifer Steinhauer, *Senate and House Leaders Call for Inquiry of Russian Hacking in Election*, N.Y. Times (Dec. 12, 2016), available at <http://www.nytimes.com/2016/12/12/us/politics/mccconnell-supports-inquiry-of-russian-hacking-during-election.html>.

<sup>10</sup> FEC Matter Under Review 6002 (Freedom's Watch, Inc.), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 6 (Aug. 13, 2010).

<sup>11</sup> Complaint ¶ 3a.

<sup>12</sup> Eric Zorn, *The inherent peril in trusting whatever WikiLeaks dumps on us*, Chicago Tribune (Oct. 13, 2016), <http://www.chicagotribune.com/news/opinion/zorn/ct-WikiLeaks-potential-hoax-zorn-perspec-1014-jm-20161013-column.html>.

<sup>13</sup> *Id.*

<sup>14</sup> FEC Matter Under Review 6002 (Freedom's Watch, Inc.), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 6 (Aug. 13, 2010).

<sup>15</sup> FEC Matter Under Review 6952 (Fox News Network, LLC), Statement of Reasons of Commissioner Ann M. Ravel at 1 (Jun. 30, 2016).

<sup>16</sup> David E. Sanger & Scott Shane, *Russian Hackers Acted to Aid Trump in Election, U.S. Says*, N.Y. Times (Dec. 9, 2016), <http://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html>.

If the Commission finds reason to believe based solely on emails published by WikiLeaks, it would create perverse incentives for campaigns to benefit from foreign attacks on the integrity of American elections. In fact, in July, Mr. Trump further invited Russia to hack Hillary Clinton's emails.<sup>17</sup> Even if the Commission were inclined to trust WikiLeaks as a source of information, it should consider whether pursuing an enforcement action that would reward foreign espionage to undermine election integrity "best fits the agency's overall policies" and fits within a "proper ordering of its priorities."<sup>18</sup> Because the Complaint relies entirely on information obtained by theft, the Commission should exercise its prosecutorial discretion and dismiss it.

**2. Even if the alleged emails were reliable, they fail to show activity that would constitute a violation of the Act.**

Even assuming *arguendo* the authenticity of the alleged emails cited in the Complaint, the Complaint fails to show sufficient facts that would give the Commission reason to believe that Respondents violated the Act. The Complaint misreads the Act to argue that CTR improperly coordinated with the Hillary Clinton campaign. In fact, the Act does not prohibit coordination on communications other than "public communications," and the Complaint fails to allege that CTR coordinated with HFA on public communications.

Under 11 C.F.R. § 109.21, a communication is a coordinated communication if it meets three prongs: first, it is paid for by a person other than the candidate, authorized committee, or political party; second, it must satisfy one or more content standards; and third, it must satisfy one of several conduct standards.<sup>19</sup> The content prong can be satisfied in one of five ways.<sup>20</sup> It is satisfied if the communication is an "electioneering communication," which must be publicly distributed by a television station, radio station, cable television station, or satellite system within 60 days before a general election or 30 days of a primary election.<sup>21</sup> The Complaint does not identify any communication that would qualify as an "electioneering communication."

The remaining four ways to satisfy the content prong require that the communication be a "public communication,"<sup>22</sup> which the Act defines as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility,

<sup>17</sup> Michael Crowley and Tyler Pager, *Trump urges Russia to hack Clinton's email*, Politico (July 27, 2016), <http://www.politico.com/story/2016/07/trump-putin-no-relationship-226282>.

<sup>18</sup> *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

<sup>19</sup> See 11 C.F.R. § 109.21.

<sup>20</sup> FEC Matter Under Review 6722 (House Majority PAC), General Counsel's Report at 4 (Aug. 6, 2013) (citing 11 C.F.R. § 109.21(c)(1)-(5)).

<sup>21</sup> See *id.* (citing 11 C.F.R. §§ 109.21(c)(1), 100.29(a), (b)(1)).

<sup>22</sup> *Id.* (citing 11 C.F.R. § 109.21(c)(2)-(5)).

mass mailing, or telephone bank to the general public or any other form of general public political advertising.”<sup>23</sup>

Under Commission regulations, “general public political advertising” does “not include communications over the Internet, except for communications placed for a fee on another person’s Web site.”<sup>24</sup> In its regulations and several Matters Under Review, the Commission has consistently held that online content—including costs associated with researching and producing that content—is not a “public communication” unless a fee is paid to post it on another’s website.<sup>25</sup> That also applies to distributing materials to reporters over the Internet.

At its inception, CTR publicly announced that it would limit its activities in order to be able to coordinate with HFA.<sup>26</sup> Specifically, CTR limited its activities to communications activities that would not qualify as a contribution to HFA that would violate the Act’s source and amount restrictions.

The Complaint highlights alleged emails that purport to show HFA and CTR coordinating over strategy, i.e., to attack Republican candidates<sup>27</sup> and to rebut an author who had attributed a fake quote to former President Bill Clinton.<sup>28</sup> However, none of these alleged emails refers to any specific communication that would qualify as a “public communication” under 11 C.F.R. § 109.21 or any other type of in-kind contribution. All of these emails are consistent with CTR’s

<sup>23</sup> 52 U.S.C. § 30101(22).

<sup>24</sup> 11 C.F.R. § 100.26.

<sup>25</sup> See, e.g., Federal Election Commission, Internet Communications, 71 Fed. Reg. 18589, 18595 (May 12, 2006)(explanation and justification) (“[P]osting a video on a Web site does not result in a ‘public communication’ unless it is placed on another person’s Web site for a fee,” even if costs were incurred to film the video); FEC Matter Under Review 6722 (House Majority PAC), General Counsel’s Report (Aug. 6, 2013)(video placed on YouTube for no fee is not a public communication); FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress, *et al.*) General Counsel’s Report at 7 (Feb. 5, 2013) (YouTube and Facebook postings and a website fail the content prong of the coordinated communications test because they are not placed for a fee on another’s Web site and are therefore not public communications); FEC Matter Under Review 6477 (Turn Right USA), General Counsel’s Report at 8 (Dec. 27, 2011) (video posted on a website for which respondent paid no fee did not satisfy the content prong of the coordinated communication test); FEC Matter Under Review 6657 (Akin for Senate), General Counsel’s Report at 6-7 (May 16, 2013) (“The Commission has narrowly interpreted the term Internet communication ‘placed for a fee,’ and has not construed that phrase to cover payments for services necessary to make an Internet communication,” including renting an email list); FEC Matter Under Review 6414 (Carnahan in Congress Committee *et al.*), General Counsel’s Report at 12 (Apr. 11, 2012) (a website is not a public communication even though researchers were paid to help build it).

<sup>26</sup> See Matea Gold, *How a super PAC plans to coordinate directly with Hillary Clinton’s campaign*, The Washington Post (May 12, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign/?utm\\_term=.f738afad796](https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign/?utm_term=.f738afad796).

<sup>27</sup> Complaint ¶¶ 13, 15.

<sup>28</sup> *Id.* ¶ 14.

publicly-announced intentions to pursue only those activities, like free Internet communications, that allowed it to coordinate with HFA.

The Complaint also takes issue with two alleged emails that purport to show Mr. Podesta communicating with donors to CTR

e.<sup>29</sup> Neither of these alleged emails include an explicit solicitation by Mr. Podesta. Instead, Mr. Podesta was allegedly asked to discuss his opinion of the efficacy of CTR's work<sup>30</sup>.<sup>31</sup> An agent of a federal candidate is permitted to solicit soft money on behalf of an outside organization if the individual acts in his own capacity and not on the authority of the federal candidate.<sup>32</sup> Here, there is no evidence that Mr. Podesta actually did solicit soft money for these outside organizations, and even if he had, there is no evidence that he did so in his capacity as an agent for HFA as opposed to in his individual capacity.

The Complaint identifies three alleged emails that contain legal advice.<sup>33</sup> Respondents have not waived attorney-client privilege with regards to emails containing legal advice. Under the District of Columbia Bar's Ethics Opinion 318, an opposing counsel may not use a document if 1) its privileged status is readily apparent on its face; 2) receiving counsel knows that the document came from someone who was not authorized to disclose it; and 3) receiving counsel does not have a reasonable basis to conclude that the opposing party waived the attorney-client privilege with respect to such document. Here, the privileged status of alleged emails containing legal advice and options is readily apparent, complainant knows that the emails were part of a database of emails stolen by foreign agents who were not authorized to disclose the information, and complainant has no reasonable basis to conclude that Mr. Podesta waived the attorney-client privilege with respect to these alleged emails. The District of Columbia Bar's ethics rules therefore prohibit the use of such privileged emails in this Complaint.

The Complaint objects to an email that purports to show that Mr. Podesta attended a fundraiser for super PACs and received a seating chart.<sup>34</sup> A federal candidate and an agent of a candidate is permitted to attend fundraisers at which soft money is raised as a "featured guest."<sup>35</sup> Such participation includes receiving advanced information on logistics for the event, including information about the seating chart. Again, nothing in the alleged email suggests that Mr. Podesta solicited soft money for these outside organizations, and even if he had, there is no

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<sup>29</sup> Complaint ¶¶ 16

<sup>30</sup> *Id.* ¶ 16.

<sup>31</sup> *Id.*

<sup>32</sup> FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 7.

<sup>33</sup> Complaint ¶¶ 20-22.

<sup>34</sup> Complaint ¶ 23.

<sup>35</sup> 11 C.F.R. § 300.64.

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evidence that he did so in his capacity as an agent for HFA as opposed to in his individual capacity, which would have been permitted.<sup>36</sup>

Finally, the Complaint objects to an email that purports to show Mr. Podesta receiving a list of super PACs who may be willing to help the campaign turn out voters.<sup>37</sup> Nonpartisan get-out-the-vote efforts are not in-kind contributions—even if the group may have communicated with a campaign—because they do not meet the “content” standard for public communications under § 109.21.<sup>38</sup> “Unwarranted legal conclusions from asserted facts” or “mere speculation” are not enough to support a finding of reason to believe that Respondents violated the Act.<sup>39</sup> Here, the alleged email provides no specific evidence that Mr. Podesta coordinated with any particular group to produce a get-out-the-vote effort that would qualify as a public communication under § 109.21. To conclude from an alleged email providing a list of groups that might help with voter turnout that the Clinton campaign (1) did coordinate with any one of those groups (2) on a public communication that was partisan and satisfied the “content” prong of § 109.21 is “mere speculation” unsupported by the evidence provided.

Even as it relies on untrustworthy documents that were stolen by foreign agents intent on undermining the American electoral process, the Complaint fails to allege specific facts that would give the Commission reason to believe that CTR and HFA coordinated in a way that would result in an impermissible in-kind contribution to HFA, and there is no reason to believe that Respondents violated the Act.

### Conclusion

For the foregoing reasons, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,



Marc E. Elias  
Ezra W. Reese  
Counsel to Respondents

<sup>36</sup> FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 7.

<sup>37</sup> Complaint ¶¶ 24–25.

<sup>38</sup> See FEC Matter Under Review 5684 (Sean Combs), First General Counsel’s Report at 8 (July 26, 2006).

<sup>39</sup> FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).