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Jeff S. Jordan
Office of General Counsel
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Re: MUR 7160

Dear Mr. Jordan:

I write as counsel to the DNC Services Corporation/Democratic National Committee (the "DNC") and Andrew Tobias in his official capacity as treasurer ("Respondents") in response to the complaint filed by 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").¹

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LEGAL ANALYSIS

- 1. **Because the Complaint relies entirely on documents disseminated as a result of a foreign intelligence operation, the Commission should close the file and take no action.**

This Complaint relies entirely on emails that all seventeen U.S. intelligence agencies have concluded were stolen from Hillary for America's campaign chair, John Podesta, at the direction of the Russian government and provided to Wikileaks through intermediaries for publication.² The theft, manipulation and publication of these documents were intended "to sow confusion and undermine Americans' faith in their government" during the 2016 presidential general election,

¹ See 11 C.F.R. § 111.4(d)(3).
² 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>; see also Eric Lipton, David E. Sanger and Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES, Dec. 13, 2016, http://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html?_r=0.

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and even “to steer the election’s outcome” itself.³ The circumstances surrounding the Complaint’s cited documents are now the subject of active government review.⁴

The Commission should exercise its discretion to avoid initiating an investigation that relies entirely on information obtained and distributed through a hostile foreign intelligence operation.⁵ As one Commissioner has stated: “The purpose of the Federal Election Commission is to safeguard the integrity of our elections.”⁶ And yet the purpose of the Russian operation was, among other things, to “undercut confidence in the integrity of the vote.”⁷

Treating the Wikileaks material like any other source of documentation would further promote foreign objectives and detract from the FEC’s core purpose of ensuring election integrity. It would create an incentive for others to steal confidential information from the politically active, knowing that they could compound the victims’ injury by triggering mandatory legal processes against their supported candidates and causes—processes involving burden and expense even when a complaint is entirely meritless. The Commission can and should consider these factors when deciding whether an enforcement action “best fits the agency’s overall policies” and fits within a “proper ordering of its priorities.”⁸

Besides promoting foreign intelligence objectives, the Complaint’s cited email raise problems of authenticity and veracity that have stopped the Commission from proceeding in more conventional cases. “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].”⁹ 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.”¹⁰

³ See Max Fisher, *Russia and the U.S. Election: What We Know and Don’t Know*, N.Y. TIMES (Dec. 12, 2016), <http://www.nytimes.com/2016/12/12/world/europe/russia-trump-election-cia-fbi.html>.

⁴ See David E. Sanger, *Obama Orders Intelligence Report on Russian Election Hacking*, N.Y. TIMES (Dec. 9, 2016), 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), <http://www.nytimes.com/2016/12/12/us/politics/mcconnell-supports-inquiry-of-russian-hacking-during-election.html>.

⁵ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁶ FEC Matter Under Review 6952 (Fox News Network, LLC), Statement of Reasons of Commissioner Ann M. Ravel at 1 (Jun. 30, 2016).

⁷ 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>.

⁸ *Heckler*, 470 U.S. at 831-32.

⁹ 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).

¹⁰ 11 C.F.R. § 111.4(d)(2).

However, such a finding requires “specific facts from reliable sources.”¹¹ For example, 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,” they said, “are difficult to ascertain.”¹² These stolen, unauthenticated emails are certainly no less dubious. While the Complaint notes one instance in which a fake news item circulated in response to emails published on WikiLeaks,¹³ cybersecurity experts have warned that it would be easy for WikiLeaks or its sources to “salt the files they release with plausible forgeries,” making it impossible to tell which emails were authentic.¹⁴ Thus, the emails are not “reliable sources” from which “specific facts” can provide a basis for a reason-to-believe finding.¹⁵

Because this Complaint relies entirely on spurious, stolen information, 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 makes scant reference to the DNC and presents no conceivable violation by Respondents. It claims merely that a Hillary for America memorandum “laid out plans for working with the Democratic National Committee and Correct the Record, a Super PAC”¹⁶ and that a campaign meeting agenda inquired whether attacks on Republican candidates “should go through HRC, surrogates, DNC [or] CTR ...”¹⁷ Even if the DNC had participated in or was aware of these exchanges, and even if it had engaged in the proposed courses of action they

¹¹ 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).

¹² *Id.*

¹³ Complaint ¶ 3a.

¹⁴ 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>.

¹⁵ 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).

¹⁶ Complaint ¶ 13.

¹⁷ *Id.* ¶ 15. Paragraphs 20-22 of the Complaint claim to relay legal advice from Hillary for America’s counsel in which the DNC is mentioned. 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. In this case, no party has waived any privilege regarding any document, and so Paragraphs 20-22 should not be considered in this matter.

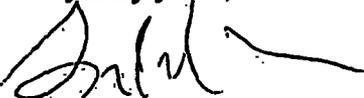
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described, there is nothing inherently untoward about a party committee communicating with the campaign of one of its candidates.

Conclusion

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

Very truly yours,



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Counsel to Respondents

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