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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 Hillary for America ("HFA") and José H. Villarreal in his official capacity as treasurer, Secretary Hillary Rodham Clinton, John Podesta, Robby Mook, Dennis Cheng, Charlie Baker and Karen Finney ("Respondents")[1] 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").[2]

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 Mr. Podesta at the direction of the Russian government and provided to WikiLeaks through intermediaries for publication.[3] 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, and even "to steer the election's

[1] Mr. Podesta was HFA's campaign chair. Mr. Mook, Mr. Cheng, Mr. Baker and Ms. Finney were HFA employees.
[2] *See* 11 C.F.R. § 111.4(d)(3).
[3] 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.nytiines.com/2016/12/13/us/politics/russia-hack-election-dnc.html?_r=0.

outcome" itself.[4] The circumstances surrounding the Complaint's cited documents are now the subject of active government review.[5]

The Commission can and should avoid initiating an investigation that relies entirely on information obtained and distributed through a hostile foreign intelligence operation.[6] As one Commissioner has stated: "The purpose of the Federal Election Commission is to safeguard the integrity of our elections."[7] And yet the purpose of the Russian operation was, among other things, to "undercut confidence in the integrity of the vote."[8]

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."[9]

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]."[10] 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."[11]

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[4] *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.

[5] *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.

[6] *See* Heckler v. Chaney, 470 U.S. 821 (1985).

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

[8] 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.

[9] *Heckler*, 470 U.S. at 831-32.

[10] 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).

[11] 11 C.F.R. § 111.4(d)(2).

However, such a finding requires "specific facts from reliable sources."[12] For example, 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."[13] These stolen, unauthenticated emails are no less dubious. Even the Complaint notes one instance in which a fake news item circulated in response to emails published on WikiLeaks,[14] and 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.[15] Thus, these emails are not "reliable sources" from which "specific facts" can provide a basis for a reason-to-believe finding[16]

Because this Complaint relies entirely on spurious, stolen information, the Commission should dismiss it and close the file.

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:

First, the Complaint misreads the Act to argue that Respondents coordinated with Correct The Record ("CTR"). In fact, the Act does not prohibit coordination on communications other than "public communications," and the Complaint never alleges that HFA coordinated with CTR on public communications.

A communication is "coordinated" under 11 C.F.R. § 109.21 if it meets three prongs: first, if it is paid for by a person other than the candidate, authorized committee, or political party; second, if it satisfies one of multiple content standards; and third, if it satisfies one of multiple conduct standards.[17]

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[12] 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).
[13] *Id.*
[14] Complaint ¶ 3a.
[15] 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.
[16] 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).
[17] *See* 11 C.F.R. § 109.21.

The content prong can be satisfied in one of five ways.[18] 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.[19] The Complaint does not identify any communication that would qualify as an "electioneering communication." The remaining four ways to satisfy the content prong require the communication to be a "public communication,"[20] which the Act defines as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public or any other form of general public political advertising."[21]

However, "general public political advertising" does "not include communications over the Internet, except for communications placed for a fee on another person's Web site."[22] 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.[23] The same reasoning 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 communicate freely with HFA.[24] 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.

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[18] 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)).
[19] *See id.* (citing 11 C.F.R. §§ 109.21(c)(1), 100.29(a), (b)(1)).
[20] *Id.* (citing 11 C.F.R. § 109.21(c)(2)-(5)).
[21] 52 U.S.C. § 30101(22).
[22] 11 C.F.R. § 100.26.
[23] *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).
[24] *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=.f738afadf796.

The Complaint disregards the actual criteria by which the content standard is met, and by which legal coordination is triggered. It highlights alleged emails that purport to show HFA and CTR coordinating over strategy, i.e., to attack Republican candidates[25] and to rebut an author who had attributed a fake quote to former President Bill Clinton.[26] 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 publicly-announced intentions to pursue only those activities, like free Internet communications, that allowed it to communicate freely with HFA. The Complaint identifies no communication that is "coordinated" under 11 C.F.R. § 109.21, and there is none.

Second, the Complaint also takes issue with six alleged emails that purport to show communications involving Mr. Podesta and non-party, non-candidate groups.[27] None of these alleged emails present any potential violation of law by Mr. Podesta, HFA or any other Respondent:

- The first email simply shows a representative of CTR asking Mr. Podesta to speak to a potential donor, which Mr. Podesta was expressly permitted to do in his personal capacity.[28] The Complaint acknowledges that the potential donor "has not donated to CTR," casting even further doubt on the veracity of the claim.

- The third email shows Mr. Podesta solicited for suggestions about who should serve on the board of a Super PAC. Yet, as to groups that raise and spend nonfederal funds, the Commission has flatly stated: "Neither the Act nor Commission regulations prohibit such

[25] Complaint ¶¶ 13, 15.
[26] *Id.* ¶ 14. Paragraph 14 appears to be the sole reason why Ms. Finney has been identified as a Respondent, and yet, for the reasons stated above, it presents no potential violation by her or HFA whatsoever.
[27] Complaint ¶¶ 16
[28] *See, e.g.*, FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 7 (affirming that individuals who are agents of federal candidates may solicit nonfederal funds for other organizations while acting in their own capacities, exclusively on behalf of the other organizations).
[29] Complaint
[30] *See* 11 C.F.R. § 300.2(m)(3)(iii).

recommendations."[31] Agents acting on behalf of an officeholder or candidate may indeed help such organizations "plan the structure of their fundraising and spending activities."[32]

- The fifth email purports to show that Mr. Podesta received a seating chart for a Super PAC fundraising event.[34] Yet even an agent of a candidate may attend a nonfederal fundraising event.[35] Nothing in the alleged email suggests that Mr. Podesta solicited funds. 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, which would have been permitted.[36]

- The sixth email purports to show Mr. Podesta receiving a list of super PACs who may be willing to help the campaign turn out voters.[37] Yet this allegation alone is insufficient to provide reason to believe that a violation may have occurred. For example, a generic get-out-the-vote effort would not meet the "content" standard for public communications under § 109.21.[38] "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.[39] And yet the Complaint relies on just that sort of speculation here.

Third, several of the illegally obtained emails on which the Complaint relies appear to contain legal advice.[40] Even if these emails could somehow be construed to present a potential violation, Respondents have not waived attorney-client privilege as to them. 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

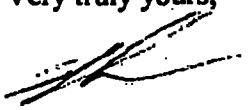
[31] *See* FEC Advisory Opinion 2005-02 (Corzine).
[32] *Id.*
[33] Complaint
[34] Complaint ¶ 23.
[35] 11 C.F.R. § 300.64; *see also* FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 8.
[36] FEC Advisory Opinion 2015-09 at 7.
[37] Complaint ¶¶ 24–25.
[38] *See* FEC Matter Under Review 5684 (Sean Combs), First General Counsel's Report at 8 (July 26, 2006).
[39] 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).
[40] Complaint ¶¶ 20–22. It is apparently because of these emails that the Commission named Robby Mook and Charlie Baker as respondents.

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 these emails is readily apparent; the Complainant knows that they were stolen by people who were not authorized to disclose them; and Complainant has no reasonable basis to conclude that Respondents waived the attorney-client privilege with respect to these alleged emails. The District of Columbia Bar's ethics rules prohibit their use and they should be disregarded.

CONCLUSION

Relying on spurious documents 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 any Respondent violated the Act. We accordingly request that the Commission dismiss this matter and take no further action.

Very truly yours,



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