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FOR JUSTICE



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Via Email: martin.levine@jcope.ny.gov

NYS Joint Commission on Public Ethics
c/o Martin Levine, Director of Lobbying and FDS Compliance
540 Broadway
Albany, NY 12207

Re: Proposed Advisory Opinion 15-0X

Dear Commissioners,

As you know, the Brennan Center for Justice and Common Cause/NY have longstanding, documented public positions in favor of disclosure and transparency. We applaud your efforts to address the increased role of consultants in lobbying activity; indeed, Common Cause/NY has submitted public comment supporting the enhanced disclosure requirements in the Proposed Advisory Opinion ("PAO").

However, upon further reading of the PAO, we are concerned over the potential First Amendment implications of the portion of the PAO addressing conversations with reporters and editorial boards, and the burdens it appears to impose on important speech between citizens and the media.

Like many policy organizations, some of which lobby and some of which do not, we speak to reporters, editorial boards, and op-ed writers on a regular basis – directly and via PR agencies – about issues of importance to our members and the community. The issues may have a legislative component. Sometimes we are hoping that the media outlet will cover our issue or that it will be addressed in an editorial. Sometimes we serve as experts and respond to a reporter's questions. More often than not, these conversations are unconnected to any effort to

place an op-ed in which our organization exhorts the public to take action on an issue. We have no control over the ultimate decision of the editor, reporter or writer whether or how to cover any particular issue (or indeed, whether a “call to action” ultimately appears in the paper).

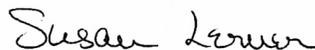
We do not believe that these conversations are “lobbying” as defined by the Lobbying Act. Is the PAO intended to expand the reach of the Act by defining lobbying activity to include conversations with the media to advance a message?¹ If so, we are concerned that the PAO imposes a constitutional and ministerial burden on individuals and not-for-profit organizations as well as their PR firms, which would have to choose between registering and establishing a complicated record-keeping system of hundreds or thousands of conversations, making – without clear guidance -- judgment calls about which conversations constituted lobbying, or curtailing their work.² Moreover, we believe that such an expansion would be an intrusion on protected speech well beyond what is permitted by *U.S. v. Harriss*, because – among other reasons – the public interest in “know[ing] who is being hired, who is putting up the money, and how much,” *Harriss*, 347 U.S. 612 at 625 (1954), is already served by the media entity performing its constitutionally protected function as investigator and intermediary.

Whatever the intent of this section of the PAO, its lack of clarity would render compliance extremely difficult and enforcement almost impossible. Moreover, the issues raised by any governmental burden on protected speech are complicated and highly sensitive. We urge the Commission to reconsider adopting this section of the PAO, or at the very least, we believe that it is essential to have a public hearing to weigh the important constitutional issues at stake.

Respectfully submitted,



Elisa Miller
General Counsel, Brennan Center for Justice



Susan Lerner
Executive Director, Common Cause/NY

¹ See Revised PAO at p.9 (redlined version) (“Further, a public relations consultant who contacts a reporter or editorial board in an attempt to get the media outlet to advance the client’s message would also be delivering a message. Any attempt by a consultant to induce a third party – whether the public or the press – to deliver the client’s lobbying message to a public official would constitute lobbying under these rules.”)

² Notably, the burden on JCOPE itself of processing, managing, and reviewing such an extraordinary influx of disclosures would likely be significant.