

NEW YORK STATE  
JOINT COMMISSION ON PUBLIC ETHICS

In the Matter of the Appeal of  
FAMILY PLANNING ADVOCATES OF NEW YORK STATE

Before:

George C. Pratt  
Judicial Hearing Officer

**DECISION**

Family Planning Advocates of New York State ("Appellant") appealed on April 25, 2014, from the April 4, 2014, decision by the Joint Commission on Public Ethics ("the Commission") that denied the Appellant's application for an exemption from the Commission's Source of Funding Reporting Requirements. The appeal was taken under Part 938.6 of the Commission's Source of Funding Regulations and was assigned by the Commission to the undersigned as a Judicial Hearing Officer.

**BACKGROUND**

Appellant is a 501(c)(4) organization that represents New York's family planning providers, including the state's ten Planned Parenthood affiliates. Its primary activities performed on behalf of its members involve issues of significant public concern and attention: support for abortion rights and access and in the 2013 legislative session, lobbying efforts in support of the Women's Equality Agenda, including the provision that would codify the rights established in the Supreme Case *Roe v. Wade* into New York law. Because of its lobbying activities, Appellant reports to the Commission as a lobbying "client".

Under the amended regulations Appellant, as an organization that engages in lobbying activities, is required to disclose the names, addresses, employers, and contribution information regarding any contributor who provides to it at least \$5,000. However, the regulations provide for possible exemptions, which presents the problem now under consideration.

**The Application.**

Appellant applied to the Commission on October 25, 2013, for an exemption from its source-of-funding disclosure regulations as amended on Oct. 23, 2013. Its Application consisted of a four-page, single-spaced letter, three multi-page attachments, and a three-page application form. The Application appears to be made under Part 938.4(b), but no appeal is permitted from the denial of an application under that subsection. (938.6(a)). However, the substance of the Application, as well as the Commission's denial of the exemption, covers issues presented by an application under subsection (a), and this appeal will not be dismissed because of the technicality. It will be considered and decided as if the Application had specified Part 938.4(a).

To be entitled to an exemption, Appellant was required to show to the Commission by "clear and convincing evidence that disclosure of the Source will cause a substantial likelihood of harm, threats, harassment or reprisals to the Source or individuals or property affiliated with the Source." (938.4(a)). Appellant claimed entitlement to the exemption because disclosure of the names of sources of contributions over \$5,000 would "create a substantial likelihood of harm, threats, harassment or reprisals to FPA and its sources of funding . . ." (App. at 4).

## **The Evidence.**

Appellant's Application presents some evidence of threats and harassment to Appellant's staff, but it leans heavily on incidents and events that have affected affiliates and other organizations and individuals having similar views, particularly Planned Parenthood. The many incidents of threats, harassment, and reprisals directed at such organizations and individuals make it clear that Appellant and its contributors, as supporters of women's right to choose, i.e. abortion, will soon be targeted, if, indeed, that has not already occurred. Among the specific examples included in Appellant's application are the following:

- In 2012 Planned Parenthood affiliates reported over 100 incidents of harassing phone calls and emails, vandalism, aggressive picketing, receipt of suspicious packages, and receipt of materials with fear-inducing religious messages against abortion.
- Threatening calls and mailings to affiliated health centers and abortion providers.
- A posting to NARAL's Facebook page of a tribute to individuals who had shot and killed abortion providers.
- Picketing at the home of a contractor who was constructing a new facility for Planned Parenthood.
- Postings on the website of Abortion Wiki of the names and photos of abortion providers and supporters. Abortion Wiki is designed "to expose the abortion industry" and to hold "accountable" those involved in providing or supporting abortion. The organization asks abortion opponents to provide information that

includes names and photos of abortion providers and health center employees, photos of businesses that have business relationships with abortion providers and evidence of businesses that support abortion providers or pro-choice organizations.

- A report by the National Abortion Federation of incidents of violence and disruption against abortion providers in the U.S. and Canada from 1977 through 2011 that shows over 6,000 incidents of "violence", including 8 murders, 17 attempted murders, 175 arsons, 100 attempted arsons/bombings, 391 invasions, which together with lesser incidents produced a grand total of over 6,000 incidents of violence.
- The same report specified over 175,000 incidents of picketing, hate mail and harassing phone calls, plus 769 incidents of clinic blockades.
- The same report included 19 pages of details about many of the reported incidents.
- Life Decisions International, an anti-abortion organization, compiles a list of organizations that support abortion or planned parenthood, and urges supporters to boycott those organizations. The list is publicized by a large number of organizations who urge their supporters to participate in boycotting organizations and individuals with a connection to Planned Parenthood or that support abortion. The reprisals and boycotts have included many incidents against a wide variety of organizations across the country and have even reached as far as the Girl Scouts and their cookie sales.

### **The Commission's Decision.**

The Commission denied the application by vote of five to three. The Majority's four-paragraph decision states in its first paragraph that it is "set[ting] forth reasons and bases for the denial of the application", but after two paragraphs describing the statutory and regulatory background the Majority merely concluded in its fourth paragraph that

FPA's application did not present sufficient evidence demonstrating that the FPA's compliance with the disclosure requirements would create a 'substantial likelihood' of harm to its sources of funding (including individuals and property associated with those sources). Rather, the evidence presented was too remote and speculative to establish a substantial likelihood of harm.

In dissent, the Minority protested the Majority's narrow interpretation of the governing statute, arguing that the demonstration of "substantial likelihood of harm", as required by the Majority, was "an impossible standard for any applicant to meet."

### **The Appeal.**

Appellant's appeal from the Commission's denial is dated April 25, 2014. The regulations provide that the record on appeal "shall consist of the original application for exemption together with any supporting materials that were submitted pursuant to Part 938.5 and the Commission's written denial." (938.7(b)). Those materials were received from the Commission on June 30, 2014. Under the regulations this decision may "affirm, reverse or remand the decision of the Commission" (938.7(d)), but may reverse "only if such denial is clearly erroneous in view of the evidence in the record." (938.7(c)).

## DISCUSSION

As indicated by the foregoing, the task of the Judicial Hearing Officer on this appeal is to determine whether the Commission's denial of an exemption to Appellant was "clearly erroneous in view of the evidence in the record." "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Since there was no evidentiary hearing before the Commission, and since no opposing papers were submitted, the only "evidence in the record" is what was included in Appellant's written Application to the Commission. None of that evidence was presented under oath, but as required by the Commission's application form, Appellant's letter Application included a declaration "that the information contained in this application is true, correct, and complete to the best of my knowledge and belief." (App. at 4). Of course, all of the Appellant's evidence was hearsay, but the rules of evidence do not apply in this type of proceeding, and there has been no challenge to any of the statements and reports included in the application, nor does anything in those statements and reports inherently suggest any question as to their reliability.

If the application showed by "clear and convincing evidence that disclosure of the Source will cause a substantial probability of harm, threats, harassment or reprisals", the Commission was bound to grant the exemption ("The Commission shall grant the exemption" [938.4(a) emphasis added]). The issue on appeal thus becomes: Assuming that the events and circumstances described in Appellant's Application occurred as described, was the Commission's denial of the exemption clearly

erroneous? Because disclosure of donors had not previously been required, it was apparent, to the Legislature in enacting the statute, and to the Commission in promulgating the regulations, that an applicant would most likely be unable to present evidence of actual harm, etc. having already occurred to its donors. Because donors' identities had not been previously disclosed, such harm simply would not have occurred.

The regulations, however, provide guidance for bridging this apparent gap. They list five types of evidence that the Commission is to consider when determining whether the required showing of harm, etc. had been made. The first four are:

- (i) Specific evidence of past or present harm,
- (ii) The severity, number of incidents, and duration of past or present harm,
- (iii) A pattern of threats or manifestations of public hostility, and
- (iv) Evidence of harm, threats, harassment or reprisals directed against organizations or individuals holding views similar to those of the Source(s) or Client Filer.

All four of these include evidence of harm not only to or against the "Source" i. e. the donor, but also, more broadly, to or against the "Client Filer", i.e. the Appellant. The third category, pattern of threats or manifestations of public hostility, is further broadened to include as the targets "individuals or property affiliated with the Source(s) or Client Filer." (emphasis added), and the fourth category is expanded even further to include evidence of harm, etc. "directed to organizations or individuals holding views similar to those of the Source(s) or Client Filer." (emphasis added). Appellant's

Application relied primarily on incidents in the third and fourth categories, many of them involving Planned Parenthood, a direct affiliate of Appellant.

A failure to consider and follow these regulations would make the Commission's denial "clearly erroneous", particularly in light of the regulations' mandatory requirement that the exemption "shall" be granted upon the described showing.

Analyzed in light of the above considerations, the decision of the Commission is, indeed, clearly erroneous. The evidence in the record is described above in abbreviated form, but the Application itself provides significantly more detail and additional examples. Even in the abbreviated form, however, it is clear that Appellant provided "specific evidence" of many and severe incidents extending over a period of years that show a "pattern of threats" and "manifestations of public hostility" to Appellant's affiliates and to others holding similar views because of their advocacy for women's rights, particularly in the abortion and family planning fields.. This uncontroverted and unchallenged evidence fully satisfies the requirements of Parts (iii) and (iv) of Part 938.4 of the Commission's regulations, and when evaluated realistically, the evidence in the record shows that there was "a substantial likelihood of harm, threats, harassment [and] reprisals" to the "Client Filer" [Appellant] and to "individuals [and] property affiliated with the . . . Client Filer". The Commission's findings that the application "did not present sufficient evidence" and that "the evidence presented was too remote and speculative" were clearly erroneous. The exemption must be granted.

An exemption for qualified donors to the Appellant is consistent with the intent of the Legislature in enacting the Lobbying Act, which proclaimed:

This disclosure shall not require disclosure of the sources of funding whose disclosure, in the determination of

the commission based upon a review of the relevant facts presented by the reporting lobbyist, may cause harm, threats, harassment, or reprisals to the source or to individuals or property affiliated with the source. (Lobbying Act § 1-h(c)).

The sponsors of the legislation significantly noted that "organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation, or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption."

Moreover, an exemption to Appellant gives proper deference to the constitutional requirement to protect the First Amendment rights of citizens to express their views on controversial issues by providing financial support to organizations that further their favored causes.

### CONCLUSION

The decision appealed from is clearly erroneous and is therefore reversed.

July 11, 2014

  
George C. Pratt

Judicial Hearing Officer