

March 24, 2020

BY EMAIL: FOIA@fec.gov

Federal Election Commission
Attn: Chief FOIA Officer
1050 First Street, NE
Washington, DC 20463

Re: Freedom of Information Act Appeal – Request No. 2020-028

Dear Chief FOIA Officer:

Citizens for Responsibility and Ethics in Washington (“CREW”) hereby appeals the March 13, 2020 determination of the Federal Election Commission (“FEC”) with respect to the above-referenced Freedom of Information Act (“FOIA”) request.

On February 6, 2020, CREW submitted a FOIA request to the FEC seeking “records sufficient to identify all contributors to the Commission on Hope, Growth and Opportunity, along with the dates and amounts of the contributions, from January 1, 2010 to July 31, 2012.” CREW’s request explained that the requested records would likely shed light upon the FEC’s prior exercise of prosecutorial discretion in declining to pursue enforcement of the Federal Election Campaign Act (“FECA”) against CHGO. The request also noted the importance of effective FEC enforcement to voters’ right to know who contributes to politically active organizations. For your convenience, a copy of this request is enclosed as Exhibit A.

By email dated March 13, 2020, Robert Kahn advised CREW that the FEC was withholding all responsive records under FOIA Exemptions 6 and 7(C), which protect from disclosure information that would or could reasonably be expected to constitute an unwarranted invasion of personal privacy. A copy of this communication is enclosed as Exhibit B. On March 19, 2020, CREW spoke with the FEC to clarify the initial determination. On the call, FEC staff advised CREW that the withheld records may include information about both corporations and individuals, but that the staff could not confirm.

The FEC’s initial determination should be reversed. First, to the extent that the withheld records include information about corporations or trusts, such entities do not enjoy the privacy interests protected by Exemptions 6 and 7(C). The Supreme Court has recognized that FOIA’s protections for “personal privacy” apply only to natural persons. *FCC v. AT & T, Inc.*, 562 U.S. 397, 409–10 (2011). This category does not include business entities or trusts, as the D.C. Circuit has repeatedly confirmed. *See, e.g., Doe, I v. FEC*, 920 F.3d 866, 872 (D.C. Cir. 2019) (“Revealing the name of the trust could not constitute an ‘unwarranted invasion of personal privacy’ because ‘personal privacy’ in Exemption 7(C) refers to ‘individuals,’ not ‘corporations or other artificial entities.’”), *cert. denied* No. 19-484, slip op. at 3 (U.S. Sup. Ct. Mar. 23, 2020); *Multi Ag Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1228 (D.C. Cir. 2008) (noting that Exemption 6 “has not been extended to protect the privacy interests of businesses or

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corporations”); *cf. ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011) (“FOIA mandates a strong presumption in favor of disclosure, and . . . the statutory exemptions, which are exclusive, are to be narrowly construed.” (internal citations and quotation marks omitted)). Accordingly, Exemptions 6 and 7(C) provide no basis to shield information regarding corporate entities or trusts from disclosure and the FEC should immediately release any such information to CREW.

Second, any expectation of privacy by CHGO’s contributors—whether corporations, trusts, or natural persons—is *de minimis* because CHGO operated as a political committee and thus was required by the FECA and accompanying regulations to disclose its contributors. *See* 52 U.S.C. § 30104 (describing reporting requirements for political committees); 11 C.F.R. §§ 104.1, 104.3(a) (same). Both the FEC’s Office of General Counsel and the only judge in the D.C. Circuit to consider the merits of this question agreed there was reason to believe that CHGO operated unlawfully as a political committee. *See* Amended Administrative Record (“A.R.”) at 201–41, 926–43, 1467–93, *CREW v. FEC*, 15-CV-02038 (D.D.C.) (General Counsel’s reports recommending the FEC find reason to believe CHGO operated as a political committee); *CREW v. FEC*, 892 F.3d 434, 452 (D.C. Cir. 2018) (Pillard, J., dissenting) (noting there was “undeniable ‘reason to believe’ that CHGO operated unlawfully as a political committee”). The Commission declined to enforce the FECA against CHGO based not on a review of the merits, but rather due to discretionary considerations such as CHGO’s “defunct” status. A.R. 1516–20. But for CHGO’s violation of the FECA, and its subsequent dissolution in the face of the FEC’s investigation, CHGO’s contributors would have been disclosed already. Such flouting of federal law cannot give rise to a cognizable privacy interest under FOIA Exemptions 6 and 7(C) to bar disclosure of CHGO’s contributors. The records accordingly must be disclosed. *See Multi Ag*, 515 F.3d at 1229 (“[I]f no significant privacy interest is implicated . . . FOIA demands disclosure.” (ellipsis in original) (quoting *Nat’l Ass’n of Ret. Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989))); *Charles v. Office of Armed Forces Med. Examiner*, 935 F. Supp. 2d 86, 99–100 (D.D.C. 2013) (ordering disclosure of records when defendant failed to show a protectible privacy interest).

For the above reasons, CREW respectfully requests that you overturn the initial determination and disclose to CREW all responsive records.

Sincerely,

A handwritten signature in black ink that reads "Jessica Lutkenhaus". The signature is written in a cursive, flowing style.

Jessica Lutkenhaus
Legal Fellow

Exhibit A

February 6, 2020

BY EMAIL: FOIA@fec.gov

Federal Election Commission
Attn: FOIA Requester Service Center
1050 First Street, NE
Washington, DC 20463

Re: Freedom of Information Act Request

Dear FOIA Officer:

Citizens for Responsibility and Ethics in Washington (“CREW”) makes this request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Federal Election Commission (“FEC”) regulations.

Specifically, CREW requests records sufficient to identify all contributors to the Commission on Hope, Growth and Opportunity, along with the dates and amounts of the contributions, from January 1, 2010 to July 31, 2012.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records, as well as emails to which the subjects of this request were cc’ed or bcc’ed.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. See *Mead Data Central v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A) and FEC regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a

significant way. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

The Commission on Hope, Growth and Opportunity (“CHGO”) was founded in early 2010 by a longtime political operative.¹ The organization’s express goal, according to its internal documents, was “[t]o make an impact using express advocacy” in targeted congressional races.² Beginning in September 2010, CHGO broadcast advertisements in at least thirteen congressional elections, including that of now-Acting Chief of Staff Mick Mulvaney.³ CHGO ultimately spent over \$4 million in 2010 on federal campaign activity—85% of CHGO’s total spending that year.⁴ Despite these extensive political expenditures, CHGO did not register as a political committee or report its contributors.⁵

In 2011, CREW filed a complaint with the FEC alleging that CHGO’s actions violated the Federal Election Campaign Act (“FECA”).⁶ CREW later amended the complaint to specifically allege that CHGO was unlawfully operating as a political committee.⁷ After an extensive investigation, aided by the use of compulsory process authorized by the Commissioners, the FEC’s Office of General Counsel (“OGC”) recommended finding reason to believe that CHGO unlawfully failed to register and report as a political committee.⁸ Nonetheless, the Commission deadlocked three-to-three on the recommendation and accordingly dismissed CREW’s complaint.⁹ The three Commissioners who voted not to begin enforcement proceedings justified their votes on the grounds that the “statute of limitations [had] effectively expired” and enforcement was “futile” because CHGO was now “defunct” and had “no people acting on its behalf.”¹⁰

CREW challenged the dismissal in court.¹¹ The D.C. Circuit ultimately upheld the dismissal as an unreviewable exercise of the FEC’s discretion, without reaching the merits of whether CHGO unlawfully failed to register and report as a political committee.¹² Judge Pillard, dissenting from the D.C. Circuit’s decision, would have held there was “undeniable ‘reason to believe’ that CHGO operated unlawfully as a political committee.”¹³

¹ A.R. 90. “A.R.” refers to the Amended Administrative Record produced by the FEC to CREW in the action *CREW v. FEC*, 15-CV-02038 (D.D.C.).

² A.R. 332.

³ A.R. 1496–500.

⁴ A.R. 1484.

⁵ A.R. 1486. *See also* 52 U.S.C. § 30104 (describing disclosure requirements for political committees); 11 C.F.R. §§ 104.1, 104.3(a) (same).

⁶ A.R. 25–40.

⁷ A.R. 164–96.

⁸ A.R. 201–41 (First General Counsel’s report); A.R. 926–43 (Second General Counsel’s report); A.R. 1467–93 (Third General Counsel’s Report).

⁹ A.R. 1503–04.

¹⁰ A.R. 1516–20.

¹¹ Complaint, *CREW v. FEC*, 15-CV-02038 (D.D.C. Nov. 23, 2015).

¹² *CREW v. FEC*, 892 F.3d 434, 441–42 (D.C. Cir. 2018).

¹³ *Id.* at 452 (Pillard, J., dissenting).

The requested records are likely to shed light upon the FEC's exercise of prosecutorial discretion in dismissing CREW's complaint. Voters' right to know who contributes to politically active organizations is only as effective as the agency that enforces it. *Cf. Citizens United v. FEC*, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."). Given the overwhelming evidence that CHGO operated as a political committee without registering and reporting in accordance with the FECA, the records would provide insight into the reasons behind the FEC's decision not to pursue enforcement. In this way, they would reveal important information about the functioning and decisions of the FEC.

There is no basis to withhold the requested records from CREW or the public. In a prior FOIA request, CREW sought the administrative record of the FEC's investigation into CHGO.¹⁴ The administrative record produced in response to this request included certain contribution information, with contributor names redacted pursuant to Exemption 6 and Exemption 7(C) of the FOIA. Both of these exemptions, which protect personal privacy, are inapplicable here—because CHGO was a political committee required to report contributions over \$200, individuals who made contributions over that amount have no privacy interest in remaining anonymous. *See Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) ("[I]f no significant privacy interest is implicated . . . FOIA demands disclosure." (ellipsis in original) (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)); *Alliance for Wild Rockies v. Dep't of Interior*, 53 F. Supp. 2d 32, 36–37 (D.D.C. 1999) (requiring disclosure when commentators on an agency rulemaking had no expectation of privacy). Moreover, any privacy interest is outweighed by the public interest in understanding the FEC's exercise of prosecutorial discretion. *Cf. People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 306 (D.D.C. 2007) ("[T]he public interest in knowing who may be exerting influence on NPS officials sufficient to convince them to change the video outweighs any privacy interest in one's name.").

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, www.citizensforethics.org. The release of information obtained through this request is not in CREW's financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. *See Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a "representative of the news media" and broadly interpreting the term to

¹⁴ See Freedom of Information Act Request from CREW to FEC (May 13, 2016).

include “any person or organization which regularly publishes or disseminates information to the public”).

CREW routinely and systematically disseminates information to the public in several ways. CREW’s website receives tens of thousands of page views every month. The website includes a blog that reports on and analyzes newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts all documents it receives under the FOIA its website, and those documents have been visited hundreds of thousands of times.

Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

Conclusion

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 408-5565 or jlutkenhaus@citizensforethics.org. Also, if CREW’s request for a fee waiver is not granted in full, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the requested records to jlutkenhaus@citizensforethics.org or Jessica Lutkenhaus, Citizens for Responsibility and Ethics in Washington, 1101 K St, N.W., Suite 201, Washington, D.C. 20005. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Jessica Lutkenhaus". The signature is written in a cursive style with a large, looping initial "J".

Jessica Lutkenhaus
Legal Fellow

Exhibit B

From: FOIA FOIA@fec.gov
Subject: Your Freedom of Information Act Request to the Federal Election Commission FOIA 2020-028
Date: March 13, 2020 at 5:11 PM
To: jlutkenhaus@citizensforethics.org
Cc: Press Office press@fec.gov



VIA ELECTRONIC MAIL

Jessica Lutkenhaus
Legal Fellow
Citizens For Responsibility and Ethics in Washington
1101 K St. NW
Washington, D.C. 20005
Main: (202) 408-5565
Email: jlutkenhaus@citizensforethics.org

**Re: Your Freedom of Information Act Request to the Federal Election Commission
FOIA 2020-028**

Dear Ms. Lutkenhaus:

This email is in response to your Freedom of Information Act (FOIA) request to the Federal Election Commission (FEC), which was received in our office on February 6, 2020. You requested:

[R]ecords sufficient to identify all contributors to the Commission on Hope, Growth and Opportunity, along with the dates and amounts of the contributions, from January 1, 2010 to July 31, 2012.

We have searched the Agency's records and located documents responsive to your request. However, we have determined that all of the responsive documents, a total of approximately nineteen (19) pages of material, are exempt from disclosure in their entirety under FOIA Exemptions 6 and 7(C). FOIA Exemption 6 protects from disclosure information that if released would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). FOIA Exemption 7(C) protects from disclosure records or information compiled for law enforcement purposes that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C § 552(b)(7) (C). Accordingly, the Commission is denying your FOIA request.

You may contact our FOIA Public Liaison, Christine McClarin at (202) 694-1485, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

You may appeal any adverse FOIA determination. Any such appeal must be filed in writing and should follow the guidelines set forth in 11 C.F.R. § 4.8. If you have any questions, please contact the FOIA Requester Service Center at FOIA@fec.gov, or (202)

694-1650.

Sincerely,

Robert Kahn
FOIA Service Center