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RE: Freedom of Information Act Request

To whom it may concern:

The Campaign Legal Center submits this request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, for records pertaining to executive branch employees who may violate 5 C.F.R. 2635.702.

I. Background

On February 9, speaking from the White House briefing room, President Trump senior advisor Kellyanne Conway used an interview with Fox News to promote the business of the president's daughter, Ivanka Trump: "Go buy Ivanka's stuff, is what I would tell you. 'I'm going to give a free commercial here: Go buy it today, everybody. You can find it online.'"¹

This product endorsement, made in Conway's official capacity, amounted to a facial violation of 5 C.F.R. 2635.702,² prompting criticism from both Republicans and Democrats in Congress.³ The controversy generated significant public attention—in fact, the Office of Government Ethics (OGE) website crashed following the "extraordinary volume of contacts from citizens" expressing concern about the ethics violation.⁴

The White House stated publicly that it "counseled" Conway on the violation, yet, according to the *New York Times*, "Sean Spicer, the president's press secretary, would not elaborate on what the counseling entailed."⁵

On February 13, OGE Director Walter Shaub wrote in a letter to the White House that "there is strong reason to believe" Conway violated the Standards of Conduct for Employees of the Executive Branch and recommended disciplinary action.⁶ The letter also noted that OGE had not yet been notified of any disciplinary or other corrective action against Conway.

Records likely to be disclosed in response to this request will contribute significantly to the public's understanding of how the Trump administration responded to this ethics violation, and what forms of training and guidance have been provided to executive branch employees about using public office for private gain, among other matters of public interest.

II. Requested Records

CLC is requesting copies of all following records:

- All training or education materials regarding 5 C.F.R. 2635.702 provided to Kellyanne Conway;

¹ Richard Perez Pena and Rachel Abrams, *Kellyanne Conway Promotes Ivanka Trump Brand, Raising Ethics Concerns*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html? r=0>.

² § 2635.702 Use of public office for private gain: An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.

³ Gideon Resnick, *Kellyanne Conway Torched for Ivanka Infomercial*, DAILY BEAST (Feb. 9, 2017), <http://www.thedailybeast.com/articles/2017/02/09/kellyanne-conway-torched-for-ivanka-infomercial.html>.

⁴ Kyle Cheney, *Office of Government Ethics website breaks after Conway promotes Ivanka's brand*, POLITICO (Feb. 9, 2017), <http://www.politico.com/story/2017/02/office-of-government-ethics-breaks-down-234857>.

⁵ Perez Pena and Abrams, *supra* note 1.

⁶ Letter from Walter M. Shaub, Jr., Director of OGE, to Stefan Passantino, Deputy Counsel to the President and Designated Ethics Official (Feb. 13, 2017), <http://i2.cdn.turner.com/cnn/2017/images/02/14/office-of-government-ethics-to-white-house-feb-13-2017.pdf?iid=EL>.

- All correspondence pertaining to Kellyanne Conway’s endorsement of Ivanka Trump’s brand (excluding correspondence received from the general public);
- All records pertaining to the counseling provided to Kellyanne Conway or other executive branch employees who may violate or have violated 5 C.F.R. 2635.702;
- All legal opinions, memoranda, advisories, or other records addressing 5 C.F.R. 2635.702;
- All training materials and educational and policy memoranda, advisories, or evaluations regarding 5 C.F.R. 2635.702;
- All training materials and educational and policy memoranda, advisories, or evaluations pertaining to 5 C.F.R. 2635.702;
- All correspondence with White House Counsel Don McGahn.

This request encompasses both digital and physical records.

Please note that this request applies to all emails, sent and received, on governmental email addresses, as well as to all emails, sent and received, on all other email addresses and accounts used to conduct official business.

The timeframe for this request is November 9, 2016 to February 16, 2017.

To the extent that any of the requested records may be considered “personnel . . . [or] similar files,” such records may only be withheld under FOIA Exemption 6 if disclosure “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C.A. § 552(b)(6).⁷ This requires “a balancing of the individual’s right to privacy against the preservation of the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny.’” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976); accord *Dep’t of State v. Ray*, 502 U.S. 164 (1991). Under this exemption, “the presumption in favor of disclosure is as strong as can be found anywhere in the Act.” *Arieff v. Dep’t of Navy*, 712 F.2d 1462, 1467 (D.C. Cir. 1983). The privacy invasion must be tangible and substantial, 425 U.S. at 380, n.19 (1976), and high-level public officials such as Ms. Conway have a diminished privacy interest, which is further diminished when the underlying conduct and the fact of the investigation is already public knowledge. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*, 746 F.3d 1082, 1092 (D.C. Cir. 2014); see also *Hardy v. Dep’t of Def. No. CV-99-523-TUC-FRZ* (D. Ariz. Aug. 27, 2001). Relevant factors in conducting a FOIA balancing test include the rank of the public official involved and the seriousness of the misconduct alleged. 746 F.3d at 1094-96. Here, the already-diminished privacy interests of officials who may have violated the ethics code are not outweighed by the substantial public interest in learning about how the executive branch responds to the use of public office to benefit the private interests of the President and his family.

⁷ The requested records cannot fall under the “Law Enforcement Records” exemption at 5 U.S.C.A. § 552(b)(7) since a violation of 5 C.F.R. 2635.702 will not result in civil or criminal sanctions. *Stern v. F.B.I.*, 737 F.2d 84, 88-9 (D.C. Cir. 1984).

If some portions of the requested records are exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. 5 U.S.C. § 552(b). If any portion of the requested records is exempt from disclosure, please provide an index of the withheld materials as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972).

III. Application for Fee Waiver or Limitation of Fees

A. The request is made for non-commercial purposes and will contribute significantly to public understanding of the operations or activities of government.

FOIA provides that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

As described above in Part I, the requested materials involve matters of significant public interest. Records likely to be disclosed in response to this request will contribute significantly to the public’s understanding of what guidance has been provided to executive branch employees about the use of public office for private gain and how the White House has responded to apparent violations of these ethics provisions, among other matters of public interest. These details are not already publicly available and the records would provide a more thorough public understanding of the operations of the administration.

CLC will use records responsive to this request in the creation of widely disseminated materials and analysis that will educate the public about these matters and the operations of the government. CLC anticipates analyzing the materials gathered through this FOIA request to develop reports,⁸ write blogs,⁹ and author op-eds.¹⁰ CLC’s research and reports are widely disseminated on its blog,¹¹ through its own website,¹² through social media platforms like

⁸ See, e.g. Lawrence M. Noble and Brendan M. Fischer, *Funding the Presidential Nominating Conventions: How a Trickle of Money Turned Into a Flood*, Campaign Legal Center (July 26, 2016), <http://www.campaignlegalcenter.org/sites/default/files/Funding%20the%20Presidential%20Nominating%20Conventions%20Report.pdf>.

⁹ See, e.g., Brendan M. Fischer, *How Trump’s Plan to Repeal the Johnson Amendment Could Unleash ‘Super Dark Money’ Into Our Elections*, Campaign Legal Center blog (Feb. 3, 2017), <http://www.campaignlegalcenter.org/news/blog/how-trump-s-plan-repeal-johnson-amendment-could-unleash-super-dark-money-our-elections>; *Filling the Swamp: Inauguration and Transition Funding*, Campaign Legal Center blog (Jan. 19, 2017), <http://www.campaignlegalcenter.org/news/blog/filling-swamp-inauguration-and-transition-funding>;

¹⁰ See e.g. Trevor Potter, *Donald Trump Hasn’t Solved Any of His Conflicts of Interest*, WASH. POST (Jan. 11, 2017), https://www.washingtonpost.com/posteverything/wp/2017/01/11/donald-trump-hasnt-solved-any-of-his-conflicts-of-interest/?utm_term=.0e80b538fb8f.

¹¹ See Campaign Legal Center blog at <http://www.campaignlegalcenter.org/news/262>.

¹² See Campaign Legal Center “Reference Materials” library, <http://www.campaignlegalcenter.org/research/reference-materials>.

Facebook¹³ and Twitter,¹⁴ and regular emails to its supporters, among other communications outlets.¹⁵

CLC staff have significant knowledge in ethics and government accountability, and news media regularly rely upon CLC's analysis and expertise,¹⁶ including on stories related to the executive order at issue in this request.¹⁷ In addition to its own blogs and reports, CLC anticipates analyzing the requested records and disseminating the materials among traditional news outlets.

Requester CLC is a non-profit public interest organization organized under Section 501(c)(3) of the Internal Revenue Code and this request is made for non-commercial purposes.

As such, we request that any applicable fees associated with this request be waived pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). A fee waiver in this instance would fulfill Congress' intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

B. CLC qualifies for a fee waiver as a "representative of the news media."

CLC additionally requests that it not be charged search or review fees for this request because the organization meets the definition of a "representative of the news media" for purposes of the FOIA, since CLC "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(II)-(III).

As the D.C. Circuit has held, the "representative of the news media" test is focused on the requestor rather than the specific FOIA request. *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1121 (D.C. Cir. 2015). CLC satisfies this test because (as noted in Part III(A)) CLC applies its expertise and editorial skills to turn raw materials into reports, articles, and op-eds that are widely disseminated on its blog,¹⁸ through its own website,¹⁹ through social media platforms and

¹³ <https://www.facebook.com/CampaignLegalCenter/>

¹⁴ <https://twitter.com/CampaignLegal>

¹⁵ See Campaign Legal Center blog at MEDIUM, <https://medium.com/clc-blog>.

¹⁶ See e.g. Manu Raju, *Trump's Cabinet Pick Invested in Company, Then Introduced a Bill to Help It*, CNN (Jan. 17, 2017), <http://www.cnn.com/2017/01/16/politics/tom-price-bill-aiding-company/>; Christina Wilkie and Paul Blumenthal, *Trump Just Completely Entangled His Business and the U.S. Government* HUFFINGTON POST (Jan. 11, 2017), http://www.huffingtonpost.com/entry/trump-business-conflicts-of-interests-treasury_us_5876928de4b092a6cae4ec7b; Emma Brown and Danielle Douglas-Gabriel, *Betsy DeVos's ethics review raises further questions for Democrats and watchdogs*, WASH. POST (Jan. 24, 2016)

¹⁷ See, e.g., Bill Allison and Ben Brody, *Trump's Ethics Order Seen as Boost for Shadow Lobbying*, BusinessWeek (Jan. 30, 2017) <https://www.bloomberg.com/politics/articles/2017-01-30/trump-s-ethics-order-seen-as-potential-boost-for-shadow-lobbying>; Isaac Arnsdorf, *Trump Lobbying Ban Weakens Obama Rules*, POLITICO (Jan. 28, 2017), <http://www.politico.com/story/2017/01/trump-lobbying-ban-weakens-obama-ethics-rules-234318>.

¹⁸ See Campaign Legal Center blog at <http://www.campaignlegalcenter.org/news/262>.

regular emails to its supporters, and through other communications outlets.²⁰ CLC additionally applies editorial skill to analyze and disseminate materials to other news media outlets, which regularly cite and rely upon CLC's work. The D.C. Circuit has held that an requester may qualify as a news media entity if it "'distribute[] [its] work' by issuing press releases to media outlets in order to reach the public indirectly" 799 F.3d. at 1125-26.

Courts have found that other organizations with functionally similar missions and engaged in similar public education activities qualify as "representatives of the news media," even if engaged in litigation or other advocacy beyond educating the public about the operations of government. *See e.g. Cause of Action v. F.T.C.*, 799 F.3d 1108, 1121-25 (D.C. Cir. 2015) (finding a public interest advocacy organization that comments to other media outlets about documents it obtains under FOIA a news media requester); *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding "public interest law firm" Judicial Watch a news media requester); *Elec. Privacy Info. Ctr. V. DOD*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding nonprofit public interest group that published a biweekly email newsletter a news media requester).

"It is critical that the phrase 'representative of the news media' be interpreted broadly if the act is work as expected, . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986), cited in *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989).

In the event the fee waiver is not granted, I may not be charged for the first two hours of search time, or for the first hundred pages of duplication. Please contact me and advise me of the cost of this request if processing costs exceed \$100.

* * *

I request that the processing of this request be expedited. Additionally, in order to expedite delivery of these requested documents and in order to reduce possible fees incurred, I am requesting that these documents be delivered to me either digitally via email (in PDF format), or on a data disk via the U.S. Postal Service.

Please email copies of responsive documents to:

Bfischer@campaignlegalcenter.org

Or, please mail copies of responsive documents to:

¹⁹ See Campaign Legal Center "Reference Materials" library, <http://www.campaignlegalcenter.org/research/reference-materials>.

²⁰ See Campaign Legal Center, MEDIUM, <https://medium.com/clc-blog>.

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Should you elect, for any reason, to withhold, redact, or deny the release of any record responsive to this request, I request that you provide me with an explanation for each withholding/redaction, along with pertinent legal citations.

Please confirm the receipt of this request and provide me with an estimate of processing time.

Thank you,

/s/

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