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WRITING SAMPLE

In February 2017, I wrote and filed an administrative appeal that challenges a determination by the Office of Legal Counsel (OLC) to deny the ACLU's request for expedited processing of a Freedom of Information Act (FOIA) Request concerning President Trump's conflicts of interest.

In order to construct this appeal, I conducted legal research to find 28 C.F.R. § 16.5(e)(1)(iv), a regulation that allows for expedited processing of FOIA requests that concern “questions about the government’s integrity that affect public confidence.” Based on my legal argument and my application of this regulation, the reviewing official determined that the OLC erred in its initial denial. The agency’s decision was reversed, and the Request was remanded to the OLC for expedited processing. Because the vast majority of administrative appeals are denied, the reversal of this denial was a noteworthy outcome.

Please note that due to the ACLU’s internal legal policies, my supervising attorney, Brett Max Kaufman, signed the final document.



February 7, 2017

Director, Office of Information Policy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530-0001

Via UPS

**Re: Freedom of Information Act Appeal
FOIA Request #FY17-029**

AMERICAN CIVIL LIBERTIES
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TREASURER

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”) write to appeal the determination by the Office of Legal Counsel (“OLC”) to deny the ACLU’s request for expedited processing of FOIA Request #FY17-029 (the “Request,” attached as Exhibit A). The ACLU’s FOIA request (the “Request”), dated January 19, 2017, seeks copies of all records concerning: (1) legal opinions, memoranda, or advisories addressing President Trump’s actual or potential financial or other ethical conflicts of interest; (2) policy, educational, or program-management memoranda, advisories, or evaluations addressing President Trump’s actual or potential financial or other ethical conflicts of interest; and (3) communications to, from, or about the presidential transition addressing actual or potential financial or other ethical conflicts of interest. *See* Request.

In a letter dated January 27, 2017 (the “Response,” attached as Exhibit B), Special Counsel Paul P. Colborn denied the ACLU’s request for expedited processing under 28 C.F.R. § 16.5(e)(1)(ii) because he found that “[the ACLU had] not established that [it] is primarily engaged in disseminating information.” *See* Response. The ACLU hereby appeals from this decision.¹

* * *

I. Expedited processing of the Request is urgently needed to inform the public about an actual or alleged government activity, and the

¹ As of February 7, 2017, one agency—the Office of Government Ethics—has granted expedited processing of an identical FOIA request.

ACLU is an organization primarily engaged in disseminating information.

As explained in detail in the Request, there is a “compelling need” for the requested records, as defined in the statute and regulations, because the records are urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity. 5 U.S.C. § 552(a)(6)(E)(v); 28 C.F.R. § 16.5(e)(1)(ii). Expedited processing is therefore warranted.

The ACLU is “primarily engaged in disseminating information” because it “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.” *ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004); see also *Leadership Conference on Civil Rights v. Gonzalez*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding an organization that, like the ACLU, “disseminates information regarding civil rights and voting rights to educate the public, promote[s] effective civil rights laws, and ensure[s] their enforcement” was “primarily engaged in disseminating information”); Request at 5-8 (explaining in detail the ACLU’s extensive information-dissemination activities, which include publishing information obtained through FOIA requests).

There is, moreover, an urgent need for the information sought through the Request. The requested records pertain to President Trump’s actual or potential business, family, and other ethical conflicts of interest, which, if unaddressed or unexamined, could corrupt the motivation and decision-making of President Trump in his execution of the duties of the highest office of the United States. It is indisputable that the conduct of the President could affect millions of Americans as well as lives abroad.

Due to its increasing burdens on the integrity of our government and democratic values, Trump’s conflicts of interest have been the subject of widespread public controversy and media attention. See *Donald Trump: A List of Potential Conflicts of Interest*, BBC, Jan. 10, 2017, <http://bbc.in/2gKym88>.² In the short time span since the election, there has been an unprecedented degree of sustained and ongoing attention in the media, reflecting the considerable public interest in the records sought.

For instance, Trump’s appointment of his son-in-law, Jared Kushner, to the office of senior White House adviser sparked debates among legal experts about whether the President violated federal nepotism laws. See Alan Yuhas, *Jared Kushner Cleared for Trump Job, Breaking with Decades of Legal Advice*,

² See also Jeremy Venook, *Donald Trump’s Conflicts of Interest: A Crib Sheet*, Atlantic, Feb. 6, 2017, <https://www.theatlantic.com/business/archive/2017/02/donald-trump-conflicts-of-interests/508382/>.

Guardian, Jan. 21, 2017, <https://www.theguardian.com/us-news/2017/jan/21/jared-kushner-donald-trump-job-white-house-nepotism>.³

The President's business entanglements have also stirred debates over whether his financial interests will interfere with his duties as commander-in-chief. For example, the President's May 2016 financial disclosure forms revealed that he invested up to \$1 million in Energy Transfer Partners (ETP)—an operator of the contentious Dakota Access oil pipeline—and likewise, received over \$100,000 in campaign contributions from the chief executive of ETP. See Oliver Milman, *Dakota Access Pipeline Company and Donald Trump Have Close Financial Ties*, Guardian, Oct. 26, 2016, <https://www.theguardian.com/us-news/2016/oct/26/donald-trump-dakota-access-pipeline-investment-energy-transfer-partners>. Since the election, the President has signed presidential memoranda approving the project.⁴ There is also speculation that President Trump—an owner of several golf courses—may seek to overturn an environmental rule requiring golf courses to adhere to stricter clean water regulations, raising concerns that personal stakes may play a role in his decision.⁵

Furthermore, reporting on President Trump's vast business empire⁶ has alarmed the public about myriad potential ethical problems. See John W. Schoen, *Inside Trump's Holdings: A Web of Potential Conflicts*, CNBC, Jan. 23, 2017, <http://cnb.cx/2jCpIwo>. Among these problems is the possibility that Trump will use his public office to advance his businesses abroad. Because many of Trump's businesses are connected with foreign governments,⁷ policy and ethics advisers warn that Trump's private business interests could influence his presidential decision-making. See Drew Harwell and Anu Narayanswamy, *A Scramble to Assess the Dangers of President-elect Donald Trump's Global Business Empire*, Wash. Post, Nov. 20, 2016, <http://wapo.st/2gc4UaM>.⁸ For instance, observers have questioned the "eight mysterious Trump companies

³ See Michael S. Schmidt, *Jared Kushner, Trump's Son-in-Law, Is Cleared to Serve as Adviser*, N.Y. Times, Jan. 21, 2017, <https://nyti.ms/2jKEKQq>.

⁴ Serena Marshall & Morgan Winsor, *Trump Moves to Advance Keystone XL, Dakota Access Pipelines*, ABC News, Jan. 24, 2017, <http://abcn.ws/2jmK23L>.

⁵ See Greg Allen, *Trump's Supreme Court Nominee Could Hear Case Affecting Trump Golf Courses*, NPR, Jan. 29, 2017, <https://n.pr/2k6xDC1>.

⁶ See Aaron Williams & Anu Narayanswamy, *How Trump Has Made Millions by Selling His Name*, Wash. Post, Jan. 25, 2017, <http://wapo.st/2kunSv8>.

⁷ See Kevin Sullivan, *Trump's Foreign Network: The President-elect's Unorthodox Overseas Business Partners*, Wash. Post, Jan. 13, 2017, <http://wapo.st/2jNnqv1>.

⁸ See also *Fresh Air: Ethics Lawyers Call Trump's Business Conflicts 'Nakedly Unconstitutional'*, NPR (Jan. 19, 2017), <https://n.pr/2iFEwdO>; Drew Harwell, *Trump Outlines Plan to Shift Assets, Give Up Management of His Company*, Wash. Post, Jan. 11, 2017, <http://wapo.st/2j8h9sT>; Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. Times, Feb. 3, 2017, <https://nyti.ms/2kytJIP>.

established on the eve of Trump's campaign to develop luxury real estate projects in Saudi Arabia—a country that Trump explicitly said he hopes to protect as president.”⁹ Such decisions could have profound and far-reaching impacts on Americans but also millions of lives abroad. Joshua Kurlantzick, a Southeast Asia specialist at the Council on Foreign Relations, said that “any involvement by Trump in a project, even if it's just his name, can create a conflict of interest—complicating any national security, foreign policy or economic concerns the U.S. has with a particular country.”¹⁰ Citizens for Responsibility and Ethics in Washington, a nonprofit organization devoted to ensuring government accountability to the public, has filed a lawsuit against Trump, arguing that he violated the Emoluments Clause of the Constitution by accepting payments from foreign governments.¹¹

Following Trump's executive order banning immigration from seven Muslim-majority countries, news organizations and policy institutes widely questioned¹² the absence of countries whose nationals had perpetrated fatal attacks, despite the national-security justification on which the executive order was based. Some observers suggested that their absence was related to Trump's business interests in them.¹³ Whether a coincidence or not, the mere appearance of a conflict of interest along these lines exacerbates the large-scale public controversy and resistance that immediately followed the ban and underscores the prompt need for greater transparency.

Moreover, the records sought are urgently needed because the President's conflicts of interest have been the subject of immense and ongoing interest by the Congress, the executive branch, and the public. House Judiciary Committee Member John Conyers, Jr. and several House Judiciary Subcommittee Members have “called on the [DOJ] and [OGE] to review concerns of nepotism and conflicts of interest arising from...Donald Trump's

⁹ Jeff Nesbit, *A Handy List of Donald Trump's Biggest Conflicts of Interest*, Time, Nov. 21, 2016, <http://ti.me/2gdgIu1>; Mark Hensch, *Trump: "I would want to protect Saudia Arabia"*, Hill, Jan. 5, 2016, <http://thehill.com/blogs/ballot-box/presidential-races/264748-trump-we-made-iran-a-power>.

¹⁰ Jackie Northam, *Trump Business Deals In Southeast Asia Raise Conflict of Interest Concerns*, NPR, Jan. 6, 2017, <https://n.pr/2iJ4lb>.

¹¹ See Press Release, Citizens for Responsibility and Ethics in Washington, *Crew Sues Trump Over Emoluments* (Jan. 22, 2017), <http://www.citizensforethics.org/press-release/crew-sues-trump-emoluments/>; see also *Ethics Lawyers Sue Trump Over Foreign Payments*, BBC, Jan. 20, 2017, <http://www.bbc.com/news/world-us-canada-38714446>; Eric Lipton & Adam Liptak, *Foreign Payments to Trump Firms Violate Constitution, Suit Will Claim*, N.Y. Times, Jan. 22, 2017, <https://nyti.ms/2kg7mOy>.

¹² See Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, Cato Institute: CATO at Liberty (Feb. 2, 2017 10:24 AM), <https://www.cato.org/blog/little-national-security-benefit-trumps-executive-order-immigration>.

¹³ See Rosalind S. Helderman, *Countries Where Trump Does Business Are Not Hit by New Travel Restrictions*, Wash. Post, Jan. 28, 2017, <http://wapo.st/2jBqDwg>.

appointment of his son-in-law Jared Kushner.”¹⁴ Legislation has been introduced by Democrats that would, among other ethical standards, require the President and Vice President to divest any conflicted holdings into an independently-managed blind trust and disclose three years’ worth of tax returns. *See* Elana Schor, *Democratic Bill Would End Trump’s Conflict-of-Interest Exemptions*, Politico, Jan. 09, 2017, <http://politi.co/2isAkdi>. And when the Office of Government Ethics (“OGE”) publicly asked Trump to either divest or place assets in a blind trust in connection with his global business empire, the Trump Organization, Trump refused, instead appointing his sons to run the business. *See* Meg Kelly, *Trump Follows Michael Bloomberg, Former New York Mayor, In Ethics Steps*, NPR, Jan. 29, 2017, <https://n.pr/2kk2CYN>. In doing so, Trump departed from actions of past U.S. presidents, all of whom traditionally followed OGE guidance.¹⁵ OGE Director Walter M. Shaub, Jr. harshly criticized the plan, saying that it is “wholly inadequate”¹⁶ and “doesn’t meet the standards...that every president in the last four decades has met.”¹⁷ Asserting the dangers of conflicts of interest to honest government, Shaub, quoting the Supreme Court, described a conflict of interest as “an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of corruption.”¹⁸ The ongoing nature of these debates heightens the urgent need for the public to access the requested records here.

II. The Request addresses a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence. 28 C.F.R. § 16.5(e)(1)(iv).

The number and severity of the aforementioned allegations, proven or otherwise, about President Trump’s conflicts of interest sheds doubt on his credibility and “continually undermines the idea that the government is acting in the best interests of its people.”¹⁹ For the same reasons as given above,

¹⁴ Letter from House Judiciary Comm. Members John Conyers, Jerrold Nadler, Sheila Jackson Lee, Henry Johnson, Zoe Lofgren & Steven Cohen to Attorney General Loretta Lynch & OGE Director Walter Shaub (Jan. 9, 2017), <https://democrats-judiciary.house.gov/news/press-releases/conyers-top-house-judiciary-democrats-ask-justice-ethics-review-kushner>.

¹⁵ *See id.*

¹⁶ Susanne Craig & Eric Lipton, *Trump’s Plans on Business May Fall Short*, N.Y. Times, Jan. 11, 2017, <https://nyti.ms/2jPZsOP>.

¹⁷ Walter M. Shaub, Jr., Director, Off. of Gov’t Ethics, Remarks at the Brookings Inst. (Jan. 11, 2017), [https://www.oge.gov/web/OGE.nsf/0/DCC328BD6DB515CC852580A50079449D/\\$FILE/Remarks%20of%20W%20M%20Shaub%20Jr.pdf](https://www.oge.gov/web/OGE.nsf/0/DCC328BD6DB515CC852580A50079449D/$FILE/Remarks%20of%20W%20M%20Shaub%20Jr.pdf).

¹⁸ *Id.*

¹⁹ Jeremy Venook, *Did Trump’s Financial Ties Influence the Immigration Order?*, Atlantic, Jan. 30, 2017, <http://theatltn.tc/2kWf5Wr>.

expedited processing is necessary here because the subject of the request implicates the integrity of the government and its effect on public confidence.

Delaying a response to the Request will therefore deprive the American public of an urgent and compelling interest in understanding the nature of Trump's conflicts of interests "beyond the public's right to know about government activity generally." 28 C.F.R. § 16.5(e)(3).

* * *

For the reasons explained above, as well as those set forth in the Request, the OLC's decision to deny the ACLU's request for expedited processing was in error. The OLC should grant expedited processing and promptly process the Request.

Thank you for your attention to this matter. Please furnish all further correspondence to:

Brett Max Kaufman
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
212.549.2603
bkaufman@aclu.org

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

Brett Max Kaufman
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U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

January 27, 2017

Brett Max Kaufman
American Civil Liberties Union
bkaufman@aclu.org

Re: FOIA Tracking No. FY17-029

Dear Mr. Kaufman:

This letter acknowledges receipt of your January 19, 2017 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC") on behalf of the American Civil Liberties Union and American Civil Liberties Union Foundation (together, the "ACLU"), seeking "records pertaining to financial and other ethical conflicts of interest in connection with the presidential transition of President-Elect Donald J. Trump" in several enumerated categories "created on or between November 9, 2016 and January 20, 2017." Your request has been assigned tracking number **FY17-029**. Based on our preliminary review of your request, and pursuant to 28 C.F.R. § 16.5(b), your request has been tentatively assigned to the "simple" processing track.

You have requested expedited treatment of your request on the ground that the documents sought are "urgently needed to inform the public about actual or alleged government activity." See 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(e)(1)(ii). Department of Justice regulations set forth the basis for expedited processing, providing for expedited treatment when a request involves "[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information." 28 C.F.R. § 16.5(e)(1)(ii).

I have determined that your request for expedited processing under 28 C.F.R. § 16.5(e)(1)(ii) should be denied. While you have stated that publishing and disseminating information "are critical and substantial components of the ACLU's work and are among its primary activities," you have not established that the ACLU is "primarily engaged in disseminating information." Courts have held that to qualify under this standard, an organization must be "primarily, and not just incidentally, engaged in information dissemination." *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 276 (D.D.C. 2012). Put another way, information dissemination must be "the main activity" of the requestor, and not merely "a main activity." *ACLU of N. Cal. v. DOJ*, No. 04-4447, 2005 WL 588354, at *14 (N.D. Cal. Mar. 11, 2005). Accordingly, courts have upheld the denial of requests for expedited processing from such legal policy advocacy organizations as the American Civil Liberties Union of Northern California and the Landmark Legal Foundation. See *Landmark Legal Found.*, 910 F. Supp. 2d at 275-76; *ACLU of N. Cal.*, 2005 WL 588354, at *14. A review of the ACLU's public statements about its mission and work indicates that, like these organizations, its primary activity is legal policy

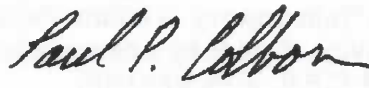
advocacy and not information dissemination. *See, e.g., About the ACLU*, <https://www.aclu.org/about-aclu> (last visited Jan. 26, 2017) (describing the ACLU as “our nation’s guardian of liberty, working daily in courts, legislatures and communities to defend and preserve . . . individual rights and liberties”). Therefore, because information dissemination is not the ACLU’s main activity, you have not satisfied this standard.

Because of the considerable number of FOIA requests received by OLC before your request, including other previously expedited requests, our staff has not yet been able to complete a search to determine whether there are documents within the scope of your request. Please note that it also is likely that we will be unable to respond to your request within the twenty-day statutory deadline. I regret the necessity of this delay, but I assure you that your request will be given priority and processed as soon as practicable. In the meantime, if you have any questions or wish to discuss your request, you may contact Melissa Golden, our Lead Paralegal and FOIA Specialist, at (202) 514-2053, or at Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5511, Washington, DC 20530.

We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request.

You have the right to an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy (“OIP”), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP’s FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked “Freedom of Information Act Appeal.”

Sincerely,



Paul P. Colborn
Special Counsel



U.S. Department of Justice
Office of Information Policy
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1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

February 23, 2017

Brett M. Kaufman, Esq.
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Re: Appeal No. DOJ-AP-2017-002255
Request No. FY17-029
SRO:MTC

VIA: Email

Dear Mr. Kaufman:

This is to advise you that your administrative appeal from the action of the Office of Legal Counsel (OLC) of the United States Department of Justice was received in this Office on February 9, 2017. You appealed from OLC's denial of your request for expedited treatment of your Freedom of Information Act request.

After carefully considering your appeal, and based on the information presented, the Office of Public Affairs has determined that expedited processing of your request is warranted under standard (iv). Accordingly, I am remanding your request to OLC, where it will be processed as quickly as practicable.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal for expedited treatment of your request, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(6)(E)(iii).

Sincerely,

Sean R. O'Neill
Chief, Administrative Appeals Staff