

Agenda

Item #1



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commissioners
From: Jonathan Wayne, Executive Director
Date: October 18, 2010
Re: Update on Investigation of the Cutler Files Website

At the October 20, 2010 meeting, the Commission staff wishes to update you on the investigation of the Cutler Files website and to respond to the legal arguments presented to you by the attorney for the Cutler files. To date, the staff investigation has consisted of one interview of someone whom we believe has knowledge of the development of the Cutler Files website and two individuals who have no connection to the site. The attorney for the Cutler Files has submitted the attached affidavit in response to a questionnaire we sent to him. Some of the information in the affidavit is corroborated by the interview responses.

I have attached a September 26 letter from Dan Billings presented to you at the September 30, 2010 meeting. Since then, we have received written materials from Norman Hanson & DeTroy, LLC on behalf of the Cutler campaign; the Maine Civil Liberties Union; and the Electronic Frontier Foundation. Tomorrow, we expect to receive a submission from Richard Spencer on behalf of the Cutler campaign, which we will forward to you by e-mail.

**AFFIDAVIT OF
IN RESPONSE TO QUESTIONS FROM THE STAFF OF MAINE COMMISSION ON
GOVERNMENTAL ETHICS & ELECTION PRACTICES**

I, _____, after being duly sworn, do hereby depose and say as follows:

QUESTION No. 1 How many individuals conducted the research, writing, editing, and graphics of the Cutler Files website? Include any consultants or other individuals who were paid. Please provide a breakdown between (A) individuals in a "core group," and (B) individuals whose contributions were less significant or were peripheral.

ANSWER: Two individuals primarily conducted the research, writing, editing, and graphics of the Cutler Files website. Others provided suggestions which were incorporated into the content. No person or entity has been paid, directly or indirectly, for any work related to the site.

QUESTION No. 2 Please describe the work (e.g., research, graphics, writing, editing) performed by each individual counted in question (1), referring to them by whatever convention you prefer (e.g., Person 1 . . .).

ANSWER: One individual primarily completed the research and the second individual primarily completed the writing and graphics for the website. The second individual also conducted a small amount of additional research and checked the references for some information. Both individuals have been involved with the editing of the site content.

QUESTION No. 3 Of the individuals counted in question (1), please identify those who were compensated for their labor.

ANSWER: None of the individuals counted in question (1) were compensated in any way for their labor.

QUESTION No. 4 Did any candidate authorize the development of the website or an expenditure for the website?

ANSWER: No candidate authorized the development of the website or an expenditure for the website. No candidate was involved in the development of the website or had knowledge that it was being developed.

QUESTION No. 5 Did any party committee authorize the development of the website or an expenditure for the website?

ANSWER: No party committee authorized the development of the website or an expenditure for the website. No party committee was involved in the development of the website or had knowledge that it was being developed.

QUESTION No. 6 Did any political action committee authorize the development of the website or an expenditure for the website?

ANSWER: No political action committee authorized the development of the website or an expenditure for the website. No political action committee was involved in the development of the website or had knowledge that it was being developed.

QUESTION No. 7 Please describe the process by which the research for the site was conducted or obtained. Include any response you wish to make to the October 6, 2010 letter from the Cutler campaign's counsel.

ANSWER: The research was conducted online, often at night, from our home computers. Most of the material was uncovered using Google to search for information accessible online. When Mr. Cutler first announced his campaign, there were limited online references to him, which made the research easier than it would be today due to the many online sources that now reference his campaign. It should be noted that the research was not done with

any specific purpose or outcome in mind -- the research was a project for purely personal reasons. The idea of a website did not emerge until the summer of 2010.

Our sources cited in an October 5, 2010 memo by Mr. Cutler's pollster are inaccurately characterized to serve their own narrow purposes of portraying our work as something it's not.

For example:

- The Bates interview is accessible online through the Muskie Archives and easily found using Google;
- Cutler's law firm website and press releases are also online and easily found using Google;
- Local property tax records are online and readily available through municipal websites;
- No foreign language newspapers were cited in our work. Perhaps the pollster is referring to the 2009 article titled "Firsthand lobbying lessons from a Washington lawyer" which appeared in the Global Times, an ENGLISH LANGUAGE newspaper published in China, readily found online using Google. As a side note, Google has a TRANSLATE button which handily converts any foreign language website, even one in Mandarin Chinese, into English automatically; and
- The 1977 letter from the President's Office of Science and Technology Policy to OMB when Cutler was an associate director was quoted directly from a Los Angeles Times PULITZER PRIZE-WINNING article published in December 1977, titled "Mid-Level Budget Officials Block Dam Inspections", and found using Google.

QUESTION No. 8 Describe when the research was compiled or obtained. If a major portion of the research was obtained during a specific time period, please identify that period.

ANSWER: We began the research when Mr. Cutler announced his candidacy in August of 2009 and continued sporadically until approximately February of 2010. Additional research and checking of sources was conducted in the summer of 2010.

QUESTION No. 9 Were payments of money made in connection with the research included in the site? If yes, please provide the amounts and dates of the payments with as much specificity as is possible within the time limitation of this request.

ANSWER: During the initial period of research from August 2009 through February 2010, I paid for three or four articles that I obtained online. I estimate that each of those articles cost no more \$3.99 each. I am unable to provide any more detail because the research was conducted some time ago without any anticipation of ever having to account for the costs. Two additional online articles were obtained more recently -- one on August 5th for \$2.95 and one on September 6th for \$3.95. We also obtained a copy of Mr. Cutler's mortgage from the Cumberland County Registry of Deeds. Based on the number of pages in the mortgage as listed online and the cost of \$1.50 per page, my best estimate for the cost for obtaining the mortgage is \$39.00.

QUESTION No. 10 Was anyone compensated for the labor of gathering the research displayed on the site? If so, who was compensated and how much.

ANSWER: No person was compensated for the labor of gathering the research displayed on the site.

QUESTION No. 11 Provide an actual or estimated total of payments for research (including compensation) that is included on the site.

ANSWER: The total of the costs detailed in the answer to Question No. 9 is \$61.86.

QUESTION No. 12 Did you receive research for the site from some other source?

ANSWER: No. The allegation that the site is a result of paid research provided by a political campaign is false.

QUESTION No. 13 How much has been spent to date on the domain name for the site?
Please provide the date of the purchase.

ANSWER: The domain name was registered on August 4, 2010. The cost of registering the domain name was \$15.87.

QUESTION No. 14 How much has been spent to date on the hosting of the site?

ANSWER: \$9.82. A monthly hosting fee of \$4.83 was paid on August 29, 2010 and a monthly hosting fee of \$4.99 was paid on September 20, 2010.

QUESTION No. 15 Please describe any other payments made in connection with the website?

ANSWER: None.

QUESTION No. 16 What is the total anticipated cost of the website, including payments for research?

ANSWER: \$92.54.

QUESTION No. 17 Please state which individuals referred to in question (2) made payments for the site.

ANSWER: Both made payments from personal funds.

QUESTION No. 18 Please state whether any payments were made in connection with the site (including research) by any other individuals or organizations.

ANSWER: There have been no other payments than those detailed above.

Dated:

STATE OF MARYLAND

COUNTY OF _____, ss.

Dated:

Personally appeared the above named
foregoing.

and swore to the truth of the

Before me,

PUBLIC

Printed name: _____

My Commission expires _____

21-A MRSA § 1014. PUBLICATION OR DISTRIBUTION OF POLITICAL COMMUNICATIONS

1. Authorized by candidate. Whenever a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through broadcasting stations, newspapers, magazines, campaign signs or other outdoor advertising facilities, publicly accessible sites on the Internet, direct mails or other similar types of general public political advertising or through flyers, handbills, bumper stickers and other nonperiodical publications, the communication, if authorized by a candidate, a candidate's authorized political committee or their agents, must clearly and conspicuously state that the communication has been so authorized and must clearly state the name and address of the person who made or financed the expenditure for the communication. The following forms of political communication do not require the name and address of the person who made or authorized the expenditure for the communication because the name or address would be so small as to be illegible or infeasible: ashtrays, badges and badge holders, balloons, campaign buttons, clothing, coasters, combs, emery boards, envelopes, erasers, glasses, key rings, letter openers, matchbooks, nail files, noisemakers, paper and plastic cups, pencils, pens, plastic tableware, 12-inch or shorter rulers, swizzle sticks, tickets to fund-raisers and similar items determined by the commission to be too small and unnecessary for the disclosures required by this section. A communication financed by a candidate or the candidate's committee is not required to state the address of the candidate or committee that financed the communication. A communication in the form of a sign that clearly identifies the name of the candidate and is lettered or printed individually by hand is not required to include the name and address of the person who made or financed the communication.

 **2. Not authorized by candidate.** If the communication described in subsection 1 is not authorized by a candidate, a candidate's authorized political committee or their agents, the communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication. If the communication is in written form, the communication must contain at the bottom of the communication in print that is no smaller in size than 10-point bold print, Times New Roman font, the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE."

2-A. Other communications. Whenever a person makes an expenditure to finance a communication that names or depicts a clearly identified candidate and that is disseminated during the 21 days before a primary election or 35 days before a general election through the media described in subsection 1, the communication must state the name and address of the person who made or financed the communication and a statement that the communication was or was not authorized by the candidate. The disclosure is not required if the communication was not made for the purpose of influencing the candidate's nomination for election or election.

3. Broadcasting prohibited without disclosure. No person operating a broadcasting station within this State may broadcast any communication, as described in subsections 1 to 2-A, without an oral or written visual announcement of the disclosure required by this section.

3-A. In-kind contributions of printed materials. A candidate, political committee or political action committee shall report on the campaign finance report as a contribution to the candidate, political committee or political action committee any contributions of in-kind printed materials to be used in the support of a candidate or in the support or defeat of a ballot question. Any in-kind contributions of printed materials used or distributed by a candidate, political

committee or political action committee must include the name or title of that candidate, political committee or political action committee as the authorizing agent for the printing and distribution of the in-kind contribution.

3-B. Newspapers. A newspaper may not publish a communication described in subsections 1 to 2-A without including the disclosure required by this section. For purposes of this subsection, "newspaper" includes any printed material intended for general circulation or to be read by the general public, including a version of the newspaper displayed on a website owned or operated by the newspaper. When necessary, a newspaper may seek the advice of the commission regarding whether or not the communication requires the disclosure.

4. Enforcement. An expenditure, communication or broadcast made within 20 days before the election to which it relates that results in a violation of this section may result in a civil fine of no more than \$200. The person who financed the communication or who committed the violation shall correct the violation within 10 days after receiving notification of the violation from the commission. An expenditure, communication or broadcast made more than 20 days before the election that results in a violation of this section may result in a civil fine of no more than \$100 if the violation is not corrected within 10 days after the person who financed the communication or other person who committed the violation receives notification of the violation from the commission. If the commission determines that a person violated this section with the intent to misrepresent the name or address of the person who made or financed the communication or whether the communication was or was not authorized by the candidate, the commission may impose a fine of no more than \$5,000 against the person responsible for the communication. Enforcement and collection procedures must be in accordance with section 1020-A.

5. Telephone calls. Prerecorded automated telephone calls and scripted live telephone communications that name a clearly identified candidate during the 21 days before a primary election or the 35 days before a general election must clearly state the name of the person who made or financed the expenditure for the communication, except for prerecorded automated telephone calls paid for by the candidate that use the candidate's voice in the telephone call and that are made in support of that candidate. Telephone calls made for the purposes of researching the views of voters are not required to include the disclosure.

21-A MRSA § 1019-B. REPORTS OF INDEPENDENT EXPENDITURES

1. Independent expenditures; definition. For the purposes of this section, an "independent expenditure":

A. Is any expenditure made by a person, party committee, political committee or political action committee, other than by contribution to a candidate or a candidate's authorized political committee, for any communication that expressly advocates the election or defeat of a clearly identified candidate; and [2003, c. 448, §3 (NEW) .]

B. Is presumed in races involving a candidate who is certified as a Maine Clean Election Act candidate under section 1125, subsection 5 to be any expenditure made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and is disseminated during the 21 days, including election day, before a primary election; the 35 days, including election day, before a general election; or during a special election until and on election day. [2007, c. 443, Pt. A, §20 (AMD) .]

2. Rebutting presumption. A person presumed under this section to have made an independent expenditure may rebut the presumption by filing a signed written statement with the commission within 48 hours of making the expenditure stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. The commission may gather any additional evidence it deems relevant and material and must determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

3. (TEXT EFFECTIVE UNTIL 8/1/11) (TEXT REPEALED 8/1/11) Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election, a copy of the same information must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements and matching fund provisions under chapter 14. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. [2009, c. 524, §6 (RPR) .]

B. A report required by this subsection must contain an itemized account of each expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate. [2009, c. 524, §6 (RPR) .]

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. [2009, c. 524, §6 (RPR) .]

This subsection is repealed August 1, 2011.

4. (TEXT EFFECTIVE 8/1/11) Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election in a town or city that has chosen to be governed by this subchapter, a copy of the same information must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements and matching fund provisions under chapter 14. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2□A. [2009, c. 524, §7 (NEW) .]

B. A report required by this subsection must contain an itemized account of each expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17□A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate. [2009, c. 524, §7 (NEW) .]

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. [2009, c. 524, §7 (NEW) .]

This subsection takes effect August 1, 2011.

**MARDEN, DUBORD,
BERNIER & STEVENS**

ATTORNEYS AT LAW

Daniel L. Billings, Esq.
dbillings@mardendubord.com

44 ELM STREET
P.O. BOX 708
WATERVILLE, ME 04903-0708
www.mardendubord.com

PHONE (207) 873-0186
FAX (207) 873-2245

September 26, 2010

Jonathan Wayne, Executive Director
Maine Commission on Governmental Ethics & Election Practices
135 State House Station
Augusta, Maine 04333-0135

RE: Investigation of the Cutler Files

Dear Mr. Wayne:

Thank you for the opportunity to submit legal arguments on behalf of the Cutler Files. Given the important constitutional issues involved with this matter, my client(s) very much appreciate(s) the Commission's respect for his/her/their wish to cooperate with the Commission while retaining anonymity. While it is certainly unusual for the Commission to consider a matter without the identity of one of the parties being known, moving forward in such fashion is appropriate and legally justified.

FACTS

www.Cutlerfiles.com (hereinafter "the Cutler Files") was created approximately one month ago to provide information to the public about Eliot Cutler that has been largely ignored by the mainstream media. While the author(s) would certainly admit to not supporting Mr. Cutler's bid for Governor, the blog was not intended as a campaign vehicle but rather an exercise in citizen journalism – researching, reporting, and analyzing information about a candidate for major office. Just like the mainstream media, the blog both reports facts and offers analysis and opinion based on those facts.

The total amount spent to create and maintain the Cutler Files has been less than \$100.00. No person or entity has been compensated, directly or indirectly, to create the content or design of the site. Technology has advanced so that people with modest technical expertise can create websites and blogs easily and inexpensively. The major expense in creating the blog was the cost of registering and hosting the URL.

The blog is not owned, operated or controlled by any political party, political committee, candidate or candidate's immediate family.

Your conclusion in your September 21, 2010 memo that the website is anonymous by choice and not by accident is correct. In fact, the issue of anonymity has been addressed on

the front page of the blog since it was originally posted. The person(s) behind the blog do not claim to be unsophisticated. The person(s) simply claim that the blog, whether sophisticated or unsophisticated, is protected by the First Amendment and does not fall within the jurisdiction of the Ethics Commission.

ANONYMOUS SPEECH IS PROTECTED BY THE FIRST AMENDMENT

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” Talley v. California, 362 U.S. 60, 64, 80 S.Ct. 536, 538 (1960). American history illustrates a respected tradition of anonymity in the advocacy of political causes going back to the founding of our Republic. The most famous example of this practice is the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed “Publius.” The Anti-Federalists also tended to publish under pseudonyms: prominent among them were “Cato,” believed to be New York Governor George Clinton; “Centinel,” likely Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; “The Federal Farmer,” who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and “Brutus,” who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 H. Storing, ed., The Complete Anti-Federalist (1981).

People may choose to speak anonymously to avoid persecution or “an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity.” McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342 115 S.Ct. 1511, 1517 (1995). “Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.” Id. In the case of the Cutler Files, though the authors certainly don’t consider themselves “unpopular”, they do believe that their identities might detract from the impact of the information set forth on the blog. In addition, Mr. Cutler, the subject of the blog and the complaining party in this matter, has shown a willingness to spend hundreds of thousands of dollars of his own money to advance his political aspirations; it is certainly plausible that he might turn his resources towards seeking vengeance on the authors of the Cutler Files.

The United States Supreme Court has left no doubt that anonymous speech is protected by the First Amendment. In Talley v. California, the Supreme Court invalidated a city ordinance prohibiting all anonymous leafleting, holding that the First Amendment protected the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60, 80 S.Ct. 536. California defended the Los Angeles ordinance at issue as a law “aimed at providing a way to identify those responsible for fraud, false advertising and libel.” 362 U.S. at 64, 80 S.Ct., at 538. The Supreme Court rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those unlawful acts. Id.

Anonymous political speech is afforded the First Amendment’s broadcast protection. McIntyre, 514 U.S. at 346, 115 S.Ct. at 1519. In McIntyre v. Ohio Elections Commission, the

Supreme Court held unconstitutional an Ohio statute prohibiting anonymous political campaign literature. *Id.* at 357, 115 S.Ct. at 1524. The plaintiff in *McIntyre* had distributed leaflets at a public meeting in which the local schools superintendent was discussing a school tax levy proposal. *Id.* at 337, 115 S.Ct. at 1514. In the leaflets, plaintiff advocated against the tax proposal, and she left some of the leaflets unsigned. *Id.* After a complaint was lodged against the plaintiff by a supporter of the tax levy, Ohio's Elections Commission fined the plaintiff for failing to sign the leaflets in violation of an Ohio statute prohibiting anonymous political campaign literature. *Id.* at 338, 115 S.Ct. at 1514. The Supreme Court found that the law burdened core political speech and applied "exacting scrutiny" which required the law to be narrowly tailored to serve an overriding state interest. *Id.* at 347, 115 S.Ct. at 1519. In holding the statute unconstitutional, the Supreme Court found that Ohio's informational interest in providing relevant information to the electorate was insufficient to support the disclosure requirement. *Id.* at 348-49, 115 S.Ct. at 1519-20. The Supreme Court also held that while the state had an interest in preventing fraud and libel, the statute was not narrowly tailored to serve those interests. *Id.* The Supreme Court also emphasized the importance of anonymous publications in our national political discourse, noting that "[a]nonymity is a shield from the tyranny of the majority." *Id.* at 357, 115 S.Ct. 1511. The Court found that Ohio had "not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech." *Id.*

MAINE'S DISCLOSURE STATUTE IS NOT NARROWLY TAILORED

21-A M.R.S.A. §1014 prohibits anonymous political communications that advocate the election or defeat of a clearly identified candidate¹ and, during the 21 days before a primary or 35 days before a general election prohibits anonymous political communications that merely names or depicts a clearly identified candidate². Like the statute at issue in *McIntyre*, Maine law imposes a broad ban on anonymous political speech which cannot survive the exacting scrutiny imposed on laws that burden core political speech.

It is certainly true that courts have upheld laws that require disclaimers on political communications by a candidate, party or political committee. However, it is important to note that Federal law does not impose a broad ban on anonymous speech like Maine law. Federal law has much more limited disclaimer requirements which take into consideration the identity of the speaker and the nature of the communication namely, whether they are associated with

¹ It is the position of the Cutler Files that the site does not, and has not, expressly advocated the election or defeat of a clearly identified candidate. However, the owner(s) of the site do intend to keep the site online during the 35 days before the general election and there is no question that the site names a clearly identified candidate. As a result, whether or not the site does now, or formerly, expressly advocated the election or defeat of a candidate is immaterial to the issue now before the Commission.

² The statute does not require a disclaimer on items which are so small that including the name and address of the person making the expenditure would not be legible or feasible. This limited exception to Maine's broad ban on anonymous political speech is not sufficient to make the law "narrowly tailored" and is not material to the constitutional analysis of the law.

a party, candidate or committee and such communication was associated with more than a de minimis expenditure of money. See Exhibit A, Special Notices on Political Ads and Solicitations, Federal Election Commission, October 2006.

Assuming arguendo that the State of Maine has an overriding interest to require disclaimers on certain political communications, Maine's law is not narrowly tailored because it applies to all expenditures that expressly advocate the election or defeat of a candidate. Certainly, Maine law cannot have an overriding interest that trumps the broad protections that the Constitution provides political speech when such communication is not done by a party, candidate or committee and such communication cost merely a de minimis amount of money. For example, if an individual spends \$5.00 to make 100 copies of a home-made leaflet advocating for a named candidate, seemingly, Maine law requires that the leaflet include the individual's name and address and the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE." It is extremely unlikely that a court would find that a law with such a broad application is narrowly tailored³ and would more likely find that application to be a constitutional violation.

**21-A M.R.S.A. §1014 SHOULD BE INTERPRETED AS TO NOT APPLY TO
INTERNET ACTIVITY CONDUCTED BY INDIVIDUALS AND BLOGGERS**

21-A M.R.S.A. §1014 requires disclaimers to be included when "an expenditure" is made to finance a communication. As a result, only communications which constitute "an expenditure" as defined by Maine law require a disclaimer. Expenditure is defined by 21-A M.R.S.A. §1012(3). If a communication does not constitute "an expenditure" as defined no disclaimer is required.

21-A M.R.S.A. §1012(3)(B)(1) states that the term "expenditure" does not include:

Any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family;

This exact language also appears in federal law. See 2 U.S.C. §431(9)(B)(i) and 11 CFR 100.73 and 100.132. This exemption, commonly known as the "news story exemption" or the "media exemption" has been interpreted by the Federal Elections Commission (hereinafter "the FEC") to apply to media entities on the Internet, including websites or any other Internet or electronic publication. See Exhibit B, Internet Communications and Activity, Federal Election Commission, May 2006. The FEC has also ruled that the media exemption applies to entities with only an online presence and to bloggers. Id. The same exemption applies to internet activity conducted by individuals. Id. This interpretation

³ Federal law would not require a disclaimer on such a flyer produced by an individual advocating the election of a candidate for federal office. See Exhibit A.

recognizes that today the Internet is the distribution method for information that was traditionally distributed through broadcast outlets, newspapers, magazines, and other periodicals⁴. In fact, in several national polls, the majority of respondents report that they seek their political information primarily from online sources.

As a result of the FEC's ruling, if the person(s) behind the Cutler Files had instead devoted their time to researching and anonymously writing about the background of First District Congressional Candidate Dean Scontras and published the material on a site called the Scontras Files, the site would be exempt from regulation under federal law⁵.

The Ethics Commission is not required to interpret Maine law in the same manner as the FEC has interpreted federal law. However, there is a strong justification that Maine law should be interpreted the same as the exact language has been interpreted at the federal level. If the Commission decides to regulate blogs like the Cutler Files, there are literally dozens of Maine political websites, online editorials, blogs, facebook pages and postings that would be impacted⁶. The FEC has wisely decided not to get bogged down in such a morass and the Ethics Commission should do the same.

There are many Maine based political sites that discuss candidates including online editorials associated with bricks and mortar publications, often in a harsh and partisan manner. Most political websites have a clear, ideological point of view and could certainly be characterized as express advocacy. I am not aware of a single site that includes the disclaimer required by 21-A M.R.S.A. §1014. The only substantive difference between the Cutler Files and the other Maine political sites and blogs is that the Cutler Files is the subject of a complaint by a candidate that would prefer, for obvious reasons, the information contained on the blog not be available for public consumption and the others, so far, are not. If the Commission decides its jurisdiction extends to political websites and blogs, assuming it survived a legal challenge in the courts, the Commission will be asked regularly to investigate complaints against political websites and blogs by wealthy thin-skinned candidates. In this instance, this presumption is especially outrageous where the complaining party, Mr. Cutler, an attorney, has not challenged the veracity of the facts reported, and thoroughly cited, on the blog. And furthermore, has stated dismissively, when asked by the press about the Cutler Files that it is merely a byproduct of the Internet age.

⁴ Any other interpretation would have created significant constitutional issues. The First Amendment would not allow a government agency to decide what entities are and are not legitimate media entities or for media entities to be treated differently based on the method used for distributing content.

⁵ There is an actually an anonymous blog that focuses on the activities of Senator Susan Collins. See <http://collinswatch.blogspot.com/>. The Collins Watch blog was very critical of Susan Collins during her 2008 campaign without complaint from the Collins campaign or any investigation by the FEC.

⁶ See, e.g., <http://www.pinetreepolitics.com/>; <http://www.asmainegoes.com/>; <http://www.asmainegoeslolz.com/>; <http://www.dirigoblue.com/>; & <http://www.mainepolitics.net/>.

Beyond the fact that the authority of both the Ethics Commission and the FEC are limited by the Constitution, interpreting Maine law in the same manner as the FEC interprets federal law will promote uniformity. Many entities located outside of Maine's borders take interest in, and comment on, Maine politics. Such entities which are familiar with FEC policy on online activities would likely assume that similar rules apply in Maine. For example, video from a recent press conference by Republican gubernatorial candidate Paul LePage was posted on many political websites around the country and this resulted in considerable online commentary about Mr. LePage, including comments on Mr. LePage's fitness for office. None of this commentary included the disclosures required by Maine law.

The Ethics Commission can avoid the constitutional conflict discussed above, and the litigation that is likely to ensue, by interpreting Maine law as the FEC has interpreted federal law. Under such an interpretation, websites owned or controlled by a political party, political committee, candidate or candidate's immediate family, and paid online advertising, would be required to meet the requirements of 21-A M.R.S.A. §1014 but all other sites and blogs, such as the Cutler Files, would not.

CONCLUSION

The United States of America was founded on the premise of free political speech. We wage wars to protect the rights of others to challenge their governments or those seeking to govern. Issues relating to free speech should never be taken lightly, especially when the only reason they are subject to an investigation is because of the complaints of a wealthy candidate for higher office and his legal team. The First Amendment of the U.S. Constitution protects the content published on the Cutler Files. The Cutler Files is a political blog expressly excluded from the jurisdiction of the FEC and, for the sake of both uniformity and in respect of the tenets of free speech, not within the jurisdiction of the Maine Ethics Commission. A contrary holding would put at risk of investigation every online blog, posting, editorial or biased article that seeks to report facts about a candidate for office in a partisan manner. As such, on behalf of my client(s), I respectfully request that the Commission vote to end the investigation of the Cutler Files and to take no further action in this matter.

I will be present at Thursday's meeting and will be prepared to address the Commission as the Commissioners see fit.

Very truly yours,

electronically /s/ 9/26/10

Daniel I. Billings



Campaign Finance
Reports and Data

Meetings and
Hearings

Enforcement
Matters

Help with Reporting
and Compliance

Law & Regulations



Commission Calendar

FEDERAL ELECTION COMMISSION



[Skip Navigation](#)

[ABOUT THE FEC](#)

[PRESS OFFICE](#)

[SEARCH ANSWERS](#)

[SITE MAP](#)

[Enter search here](#)

[HOME](#) / [COMPLIANCE HELP](#) / [BROCHURES](#) / [SPECIAL NOTICES ON POLITICAL ADS AND SOLICITATIONS](#)

Special Notices on Political Ads and Solicitations

Published in October 2006

Contents

- [Introduction](#)
- [Disclaimer Notices](#)
 - [What is a disclaimer notice?](#)
 - [When is a disclaimer required?](#)
 - [What must the disclaimer say?](#)
 - [How and Where must the disclaimer appear?](#)
 - [When is a disclaimer not required?](#)
- [Additional Statements Required in Fundraising Solicitations](#)
 - [Federal Election Purpose Notification](#)
 - ["Best Efforts" Notification](#)
 - [IRS Disclosure Requirements](#)

Introduction

This brochure has been developed to help clarify the rules relating to the following types of special notices:

- Disclaimer notices;
- Federal election purpose notification;
- Best efforts notifications; and
- IRS disclosure notices.

Each notice may be required (as appropriate) when persons finance communications related to federal elections or solicit funds for federal political committees. ¹ A section-by-section explanation of these rules is provided within.

Please be advised that this brochure is not intended to provide an exhaustive discussion regarding this area of the election law. The citations refer to the [Federal Election Campaign Act \(FECA\)](#), as amended by the [Bipartisan Campaign Reform Act of 2002 \(BCRA\)](#), [Federal Election Commission Regulations \(11 CFR\)](#) and [Advisory Opinions \(AOs\)](#). If you have any questions after reading the brochure, please contact the FEC:

Federal Election Commission
999 E Street, NW
Washington, DC 20463
(202) 694-1100 (local)
(800) 424-9530 (toll free)
(202) 219-3336 (for the hearing impaired)

Disclaimer Notices

What is a Disclaimer Notice?

For the purpose of this brochure, a "disclaimer" notice is defined as a statement placed on a public communication that identifies the person(s) who paid for the communication and, where applicable, the person(s) who

authorized the communication.

When is a Disclaimer Required?

Basic Rule

Political Committees

Political committees must include a disclaimer on (1) all "public communications" (defined below), (2) bulk electronic email (defined as electronic mail with more than 500 substantially similar communications) and (3) web sites available to the general public, regardless of whether the communication expressly advocates the election or defeat of a clearly identified candidate, or solicits funds in connection with a federal election (i.e., contributions for a federal candidate or federal political committee).²

Individuals and Other Persons

A disclaimer must appear on any "electioneering communication" (defined below) and on any public communication by any person that expressly advocates the election or defeat of a clearly identified candidate or solicits funds in connection with a federal election.

Application

Specific examples of public communications that would require a disclaimer include:

- Public communications coordinated with a federal candidate (i.e., in-kind contributions or coordinated party expenditures) that are paid for by a political committee or that contain express advocacy or a solicitation;
- Independent expenditures;
- Electioneering communications;
- A communication that solicits funds for a federal candidate or a federal political committee or that contains express advocacy; and
- Political committees' web sites.

Definitions

Public Communications

As defined in FEC regulations, the term "public communication" includes:

- Broadcast, cable or satellite transmission;
- Newspaper;
- Magazine;
- Outdoor advertising facility (e.g., billboard);
- Mass mailing (defined as more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period);
- Telephone banks (defined as more than 500 telephone calls of an identical or substantially similar nature within any 30-day period); or
- Any other general public political advertising. General public political advertising does not include Internet ads, except for communications placed for a fee on another person's web site

11 CFR 110.11(a).

Electioneering Communications

As defined in FEC regulations, an "electioneering communication" is a broadcast, cable or satellite communication that fulfills each of the following conditions:

- Refers to a clearly identified federal candidate;
- Is publicly distributed within 30 days before a primary election or within 60 days before a general election; and
- In the case of Congressional candidates only, is "targeted to the relevant electorate" (can be received by 50,000 or more persons in the

district or state the candidate seeks to represent)

11 CFR 100.29. See also Federal Register notice 2005-29 [PDF].

Independent Expenditures

An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and is not made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate, authorized committee or their agents, or a political party committee or its agents. 11 CFR 100.16.

Coordinated Party Expenditures

Coordinated party expenditures are expenditures made by national or state party committees on behalf of their nominees in connection with the general election. Such expenditures may be coordinated with the candidate, but are reported only by the party committee that makes the expenditure. These expenditures are subject to a special monetary limit. 11 CFR 110.11(d)(1).

Exempt Party Activities

State and local party committees may engage in certain candidate-support activities without making a contribution or expenditure provided specific rules are followed. These "exempt" party activities refer to the three types of communications listed below:

- Registration and get-out-the-vote drives on behalf of the Presidential ticket;
- Campaign materials distributed by volunteers on behalf of federal candidates; and
- Certain slate cards, sample ballots and palm cards listing at least 3 candidates for public office.

11 CFR 100.80, 100.87 and 100.89; 100.140, 100.147 and 100.149 and 110.11(e).

What must the Disclaimer Say?

The actual wording of the disclaimer depends on the type of communication, as explained below. In each example, it is presumed that the ad qualifies as a "public communication" in connection with a federal election.

Messages Authorized and Financed by a Candidate

On a public communication that is authorized and paid for by a candidate or his/her campaign committee, the disclaimer notice must identify who paid for the message. 11 CFR 110.11(b)(1).

Example: "Paid for by the Sheridan for Congress Committee."

Messages Authorized but Not Financed by a Candidate

On a public communication that is authorized by a candidate or his/her campaign committee, but is paid for by another person, the disclaimer notice must identify who paid for the communication and indicate that the candidate authorized the message. 11 CFR 110.11(b)(2).

Example: "Paid for by the XYZ State Party Committee and authorized by the Sheridan for Congress Committee." ³

Messages Not Authorized by a Candidate

On a public communication that is not authorized by a candidate or his/her

campaign committee, the disclaimer notice must identify who paid for the message, state that it was not authorized by any candidate or candidate's committee and list the permanent street address, telephone number or World Wide Web address of the person who paid for the communication. 11 CFR 110.11(b)(3).

Example: "Paid for by the QRS Committee (www.QRScommittee.org) and not authorized by any candidate or candidate's committee."

Coordinated Party Expenditures

Pre-nomination Period

On a public communication that is made as a coordinated party expenditure before a nominee is chosen, the disclaimer notice must identify the committee that paid for the message, but need not state whether the communication was authorized. 11 CFR 110.11(d)(1).

Example: "Paid for by XYZ State Party Committee."

Post-nomination Period

Once a candidate has been nominated for the general election, the disclaimer notice must also state who authorized the communication.

Example: "Paid for by the XYZ State Party Committee and authorized by the Sheridan for Congress Committee."

The committee that actually makes the expenditure is considered to be the person who paid for the public communication even when the committee is acting as the designated agent of a different party committee.

Exempt Party Activities

On exempt activity communications (for example, campaign materials) the disclaimer notice must identify the committee that paid for the message. 11 CFR 110.11(e).

Example: "Paid for by the XYZ State Party Committee."

[Return to top](#)

How and Where must the Disclaimer Appear?

In order to give the reader sufficient notice about the person(s) paying for or authorizing a public communication regardless of its medium, the disclaimer notice must be "clear and conspicuous" on the committee's communications, solicitations and response materials. The notice will not be considered to be "clear and conspicuous" if:

- It is difficult to read or hear; or
- The notification is placed where it can be easily overlooked.

11 CFR 110.11(c)(1).

Additional requirements are described below.

Printed Materials

On printed materials, the disclaimer notice must appear within a printed box set apart from the other contents in the communication. The print must be of a sufficient type-size to be clearly readable by the recipient of the communication, and the print must have a reasonable degree of color contrast between the background and the printed statement. 11 CFR 110.11(c)(2)(i), (ii) and (iii).

Example:

Paid for by the Save the Seahorses
Committee and authorized by the
McKay for Senate Committee.

As long as the disclaimer appears somewhere within the communication it does not have to appear on the front page or cover of multiple-paged documents. However, in the case of single-sided documents and billboards, the disclaimer must appear on the front. 11 CFR 110.11(c)(2)(iv).

Safe Harbor for "Clearly Readable"

The regulations contain a safe harbor that establishes a fixed, 12-point type size as a sufficient type size for disclaimer text in newspapers, magazines, flyers, signs and other printed communications that are no larger than the common poster size of 24 inches by 36 inches. 11 CFR 110.11(c)(2)(i). Please note, disclaimers for larger communications will be judged on a case by case basis.

Safe Harbor for "Reasonable Degree of Color Contrast"

The regulations additionally provide two safe harbor examples that would comply with color contrast requirement:

- The disclaimer is printed in black on a white background; or
- The degree of contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication.

11 CFR 110.11(c)(2)(iii).⁴

Packaged Materials

When communications are distributed in a package or as a group, the distributing entity must evaluate each item separately in order to determine whether a disclaimer notice is required on that item. A message or ad that would require a disclaimer notice if it were distributed separately must still display the notice when it is included in a package of materials. 11 CFR 110.11(c)(2)(v). Example: A campaign poster is mailed with a campaign brochure and solicitation letter. A disclaimer notice must appear on each of these items.

Radio and Television Communications Authorized by the Candidate**Radio**

A radio broadcast must include an audio statement that is spoken by the candidate. The statement must identify the candidate, and state that he or she has approved the communication. 11 CFR 110.11(c)(3)(i).

Television

Like radio broadcasts, televised communications must include an oral disclaimer spoken by the candidate in which the candidate identifies himself or herself and states that he or she has approved the communication. 11 CFR 110.11(c)(3)(ii).⁵

This disclaimer can be conveyed in one of two ways:

- A full-screen view of the candidate making the statement (11 CFR 110.11(c)(3)(ii)(A)); or

- A "clearly identifiable photographic or similar image of the candidate" that appears during the candidate's voice-over statement. (11 CFR 110.11(c)(3)(ii)(B)).

The communication must also include a "clearly readable" written statement that appears at the end of the communication "for a period of at least four seconds" with a "reasonable degree of color contrast" between the background and the disclaimer statement. 11 CFR 110.11(c)(3)(iii).

Radio and Television Messages Not Authorized by the Candidate

Radio

The disclaimer notice must include the name of the political committee or person responsible for the communication and any connected organization. Example, "ABC is responsible for the content of this advertising." 11 CFR 110.11(c)(4).

Television

The disclaimer described above must be conveyed by a "full-screen view of a representative of the political committee or other person making the statement," or a "voice-over" by the representative. 11 CFR 110.11(c)(4)(ii) and 2 U.S.C. 5441d(d)(2).

The disclaimer statement must also appear in writing at the end of the communication in a "clearly readable manner" with a "reasonable degree of color" contrast between the background and the printed statement "for a period of at least four seconds." 11 CFR 110.11(c)(4).

[Return to top](#)

When is a Disclaimer Not Required?

Although the FEC recommends that disclaimer notices be included on all campaign materials, the notices are not required in the following situations.

Disclaimer Placement is Inconvenient

In situations where a disclaimer notice cannot be conveniently printed, the notice is not required. This provision affects items such as pens, bumper stickers, campaign pins, campaign buttons and similar small items. Further, a disclaimer notice is not required for communications using skywriting, clothing, water towers or other forms of advertisement where it would be impracticable to display the disclaimer notice. 11 CFR 110.11(f) (See also AO 2002-9)

Internal Corporate/Labor Communications

A disclaimer notice is not required for solicitations or communications made by a separate segregated fund or connected organization to its "restricted class." 11 CFR 110.11(f)(2).

Materials Used for Administrative Purposes Only

A disclaimer notice is not required on checks, receipts or similar items of minimal value that do not include a political message and are used only for administrative purposes. 11 CFR 110.11(f)(1)(iii).

[Return to top](#)

Additional Statements Required in Fundraising Solicitations

Federal Election Purpose Notification

In order to deposit undesignated contributions into its federal account, a federal committee must inform donors that their contributions will be used in connection with federal elections or that they are subject to the limits and prohibitions of the Act. The committee may satisfy this requirement by including that information in its solicitation materials. 11 CFR 102.5(a)(2)(ii) and (iii).

[Return to top](#)

"Best Efforts" Notification

Under the Act and FEC regulations, political committees must report the name, address, occupation and employer of any individual who contributes more than \$200 in a calendar year (or in an election cycle, in the case of an authorized committee) (11 CFR 104.3(a)(4)). Committees must make their "best efforts" to obtain and report this information.

To satisfy the "best efforts" requirement, a political committee must include a statement on its solicitations explaining that it is required to make its best efforts to obtain and report contributor information. This statement is referred to as the "best efforts" notification; two examples are listed below:

- Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year, or
- To comply with Federal law, we must use our best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 per calendar year.

If the committee does not receive the required contributor information, it must make a follow-up request within 30 days. Any contributor information provided or otherwise available to the committee must be disclosed on FEC reports. In some cases, it may be necessary for the committee to amend previous reports. 11 CFR 104.7.

[Return to top](#)

IRS Disclosure Requirements

Under the Internal Revenue Service Code (26 U.S.C. §6113), certain tax-exempt organizations that are not eligible to receive tax deductible charitable contributions, and whose gross annual receipts normally exceed \$100,000, must disclose in an "express statement (in a conspicuous and easily recognizable format)" that contributions to the organization are not deductible for Federal income tax purposes as charitable contributions. For more information, contact [the IRS](#) at (800) 829-3676, (202) 622-7352.

Safe Harbor for "Format of Disclosure Statement"

Print Medium

In the case of a solicitation by mail, leaflet, or advertisement in a newspaper, magazine or other print medium, the following four requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not

- deductible as charitable contributions for Federal income tax purposes,"
- o "Contributions or gifts to [name of organization] are not tax deductible," or
- o "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is in at least the same size type as the primary message stated in the body of the letter, leaflet or ad;
- The statement is included on the message side of any card or tear off section that the contributor returns with the contribution; and
- The statement is either the first sentence in a paragraph or itself constitutes a paragraph.

Telephone

In the case of solicitation by telephone the following three requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - o "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - o "Contributions or gifts to [name of organization] are not tax deductible," or
 - o "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is made in close proximity to the request for contributions, during the same telephone call, by the telephone solicitor; and
- Any written confirmation or billing sent to a person pledging to contribute during the telephone solicitation complies with the requirements under Print Medium Solicitations.

Television

In the case of solicitation by television the following two requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - o "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - o "Contributions or gifts to [name of organization] are not tax deductible," or
 - o "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- If the statement is spoken, it is in close proximity to the request for contributions; if the statement appears on the television screen, it is in large easily readable type appearing on the screen for at least five seconds.

Radio

In the case of a solicitation by radio the following two requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - o "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - o "Contributions or gifts to [name of organization] are not tax deductible," or
 - o "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is made in close proximity to the request for contributions during the same radio solicitation announcement.

These safe harbors will remain in effect until further notice from the IRS. Please refer to the [IRS](#) by phone at (800) 829-3676, (202) 622-7352 for changes to these safe harbors and with any questions you might have

pertaining to the safe harbors.

[Return to top](#)

FOOTNOTES:

1 This brochure serves as the small entity compliance guide to Commission regulations regarding Communications and Solicitations, as required by section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

2 The FEC recommends placing disclaimer notices on all campaign materials.

3 Please note that for communications listing several candidates, the disclaimer notice may state that the message was authorized by the candidates identified in the message or, if only certain candidates have authorized it, by those candidates identified with an asterisk (AO 2004-37)

4 These examples do not constitute the only ways to satisfy the color contrast requirement.

5 For additional information on broadcast advertising (e.g., radio, TV), please contact the [Federal Communications Commission](#) at (202) 418-1440 or (202) 418-7096 (for cable broadcasts).

6 The restricted class includes the executive and administrative personnel of the organization, its stockholders, or its members (noncorporate), and their families. See [11 CFR 114.1\(f\)](#). See also [11 CFR 114.5 \(g\)\(1\) and \(2\)](#); [114.7 \(a\) and \(c\)](#).

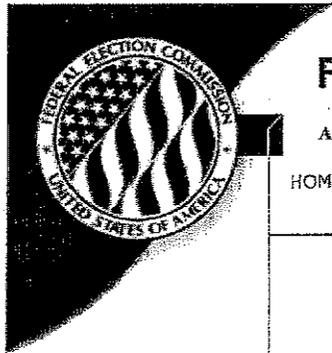
This publication provides guidance on certain aspects of federal campaign finance law. This publication is not intended to replace the law or to change its meaning, nor does this publication create or confer any rights for or on any person or bind the Federal Election Commission (Commission) or the public. The reader is encouraged also to consult the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431 et seq.), Commission regulations (Title 11 of the Code of Federal Regulations), Commission advisory opinions, and applicable court decisions. For further information, please contact:

Federal Election Commission
999 E Street, NW
Washington, DC 20463
(800) 424-9530; (202) 694-1100
info@fec.gov
www.fec.gov

[Return to top](#)

[What's New](#) [Library](#) [FOIA](#) [USA.gov](#) [Privacy](#) [Links](#) [eFiling](#) [Inspector General](#) [No Fear Act](#) [Subscribe](#)

Federal Election Commission, 999 E Street, NW, Washington, DC 20463 (800) 424-9530 In Washington (202) 694-1000 For the hearing impaired, TTY (202) 219-3336 Send comments and suggestions about this site to the web manager.



FEDERAL ELECTION COMMISSION

[Skip Navigation](#)
[ABOUT THE FEC](#)
[PRESS OFFICE](#)
[FAQS/ANSWERS](#)
[SITE MAP](#)
[Enter search here](#)
[HOME / COMPLIANCE HELP / BROCHURES / INTERNET COMMUNICATIONS AND ACTIVITY](#)
[Campaign Finance Reports and Data](#)
[Meetings and Hearings](#)
[Enforcement Matters](#)
[Help with Reporting and Compliance](#)
[Law & Regulations](#)

[Commission Calendar](#)

Internet Communications and Activity

Published in May 2006 (updated June 2007)

Introduction

On March 27, 2006, the Commission approved regulations governing certain types of Internet communications. The rules took effect May 12, 2006. [71 FR 18589 \(4/12/06\) \[PDF\]](#). The questions and answers that follow address not only those regulations, but also past Commission precedents regarding use of the Internet in connection with federal elections. Copies of both the regulations and the cited advisory opinions (AOs) are available via the [FEC's web site](#).

If you have any questions after reading this, please call or write:

Federal Election Commission:
 999 E Street, N.W.
 Washington, D.C.
 800/424-9530
 202/694-1100 (local)
 202/219-3336 (for the hearing impaired)
info@fec.gov

Contents

- [Internet Activity Conducted by Individuals](#)
- [Internet Activity Conducted by Federal Political Committees](#)
- [Internet Activity by Corporations/Labor Organizations/Trade Associations](#)
- [Activity Conducted By Press Entities and Bloggers](#)

Internet Activity Conducted by Individuals

Can I use my computer for political activity in connection with federal elections? How about a library computer, school computer, or neighbor's computer?

Yes. An uncompensated individual or group of individuals may engage in Internet activities for the purpose of influencing a federal election without restriction. The activity would not result in a "contribution" or an "expenditure" under the Act, and would not trigger any registration or reporting requirements with the FEC. This exemption applies to individuals acting with or without the knowledge or consent of a campaign or a political party committee. [11 CFR 100.94](#) and [100.155](#). Possible Internet activities include, but are not limited to, sending or forwarding electronic mail, providing a hyperlink to a web site, creating, maintaining or hosting a web site and paying a nominal fee for the use of a web site. [11 CFR 100.94\(b\)](#). Please note that these exemptions apply regardless of whether the individual owns the computer he/she is using.

What are the rules for sending personal e-mails regarding political topics or federal elections?

Basically, there are no rules for individuals. Individuals may send unlimited e-mails on any political topic without identifying who they are or whether their messages have been authorized by any party or campaign committee. 11 CFR 110.11(a).

May I post comments to a blog in connection with a federal election?

Yes. Uncompensated blogging, whether done by individuals or a group of individuals, incorporated or unincorporated, is exempt from regulation. See 11 CFR 100.94 and 100.155. This exception applies even in those cases where a nominal fee is paid. See also "**How has the Commission applied the Act to online news media?**" under Press Entities below.

Are the rules different if I pay to place an ad on someone else's web site?

Yes. Internet communications placed on another person's web site for a fee are considered "general public political advertising," and are thus "public communications" under the law. 11 CFR 100.26. As such, State, district and local party committees, and State and local candidates, must use federally-permissible funds to pay for them if the communications promote, support, attack, or oppose a candidate for Federal office. Paying to place a communication on another person's website may result in contributions or expenditures under the Act. Other regulations regarding coordinated communications, 11 CFR 109.21 and 109.37, and disclaimer requirements, 11 CFR 110.11(a), would also apply.

May I use my work computer for online political activity?

Yes, subject to your employer's rules for personal use of computers and Internet access, and so long as you are not compensated for the activity. 11 CFR 100.94 and 114.9(a) and (b). See "**May a corporation or union allow its employees or members to use their work computers for individual volunteer activity?**" under Internet Activity by Corporations/Labor Organizations/Trade Associations, see below.

TOP

Internet Activity Conducted by Federal Political Committees**Is a disclaimer required on e-mail or our web site?**

Yes. The Act and regulations require FEC-registered political committees to place disclaimers on their public web sites. Moreover, if a political committee sends more than 500 substantially similar e-mails, each message must include a disclaimer. 11 CFR 110.11(a). For specific disclaimer requirements, see 11 CFR 110.11(b) and the Commission's brochure "Special Notices on Political Ads and Solicitations."

Do the new regulations affect online fundraising by our committee?

No. Over the years, the Commission has issued several opinions concerning online fundraising by political committees. The AOs make it clear that political committees must adapt online fundraising to comply with the Act's recordkeeping and reporting provisions.

First, committees using the Internet for fundraising must make "best efforts" to obtain and report the identification of donors who contribute more than \$200 during a calendar year. Committees must maintain electronic records and contributor data for three years after the date on which it reported the

contributions. AOs [1999-22](#) and [1995-09](#).

Second, to avoid receiving prohibited contributions, web sites soliciting contributions in connection with a federal election must inform potential contributors of all of the Act's prohibitions, including the prohibitions on contributions from corporations, labor organizations, federal government contractors and foreign nationals,² and the restrictions at [11 CFR 110.19](#) on contributions from minors. AOs [1999-22](#), [1999-09](#) and [1995-09](#) contain detailed examples of Commission-approved language and mechanisms for vetting contributors.

Third, in several AOs, the Commission has said that online contributions may be made via credit card or electronic checks. Such contributions are acceptable for publicly funded Presidential campaigns and are matchable provided that the correct documentation is provided to the Commission. See [11 CFR 9034.2\(c\)\(8\)](#) and AOs [1999-36](#), [1999-22](#), [1999-09](#) and [1995-09](#). The Commission has also permitted businesses to administer online fundraising for political committees, so long as they provide their services at the usual and normal charge and in their ordinary course of business. See below.

Finally, separate segregated funds established by corporations, labor organizations or trade associations should consult "[Are there special rules concerning online fundraising for corporate/labor/trade association PACs?](#)" under Internet Activity by Corporations/Labor Organizations/Trade Associations, see below.

[TOP](#)

Internet Activity Conducted by Corporations/Labor Organizations/Trade Associations

Our corporation normally provides commercial services online – may we do so for candidates and political committees?

Yes, this is permissible as long as the corporation charges the usual and normal fee for its services. Failure to do so could result in a prohibited contribution. For example, in [AO 2004-06](#), an online service offering a web platform for arranging local gatherings was permitted to provide both its free and fee-based services to federal candidates and political committees as long as it did so on the same terms it offered to all similarly situated persons in the general public. In contrast, in [AO 1996-2](#), the Commission concluded that a corporation could not provide online accounts--for which it normally charged a fee--to candidates free of charge.

May our corporation/labor union/trade association send out an e-mail to endorse a federal candidate or place an endorsement on its web site?

It depends. As has long been the case, a corporation, union or trade association may only direct express advocacy communications to its restricted class. So, if the organization addressed its e-mail endorsing a federal candidate only to individuals within its restricted class, it would be permissible. By contrast, the organization generally cannot place endorsements or solicitations for a candidate on its web site, unless access to those portions of the site is limited to members of the restricted class.³ See [AO 1997-16](#), [2 U.S.C. §441b\(b\)\(2\)\(A\)](#) [PDF] and [11 CFR 114.3](#).

Are there special rules concerning online fundraising for corporate/labor/trade association PACs?

Yes. Since a corporate/labor/trade association PAC may only solicit contributions from its restricted class, access to online solicitations must be limited to members of that group (e.g., password protected).⁴ [2 U.S.C. §441b\(b\)\(4\)](#) [PDF]. Alternatively, a corporation/labor organization/trade association could maintain an e-mail listserv--i.e., mailing list--to send PAC solicitations to members of the organization's restricted class. [AO 2000-07](#).

May a corporation or union allow its employees or members to use their work computers for individual volunteer activity?

Yes, a corporation or a labor organization may permit its employees, shareholders, officials and members to use its computer and Internet facilities for individual volunteer Internet activity, without making a prohibited contribution. This exemption is contingent on the individual completing the normal amount of work for which the employee is paid, or is expected to perform, that the activity would not increase the overhead or operating costs of the organization, and that the activity is not coerced. The organization may not condition the availability of the Internet or the computer on their being used for political activity or for support for or opposition to any particular candidate or political party. Revised 11 CFR 114.9(a)(2) and (b)(2).

[TOP](#)

Activity Conducted By Press Entities and Bloggers

How has the Commission applied the Act to online news media?

Under the Act and FEC regulations, a media entity's costs for carrying news stories, commentary and editorials are not considered "contributions" or "expenditures." See 2 U.S.C. §431(9)(B)(i) [PDF] and 11 CFR 100.73 and 100.132. This exemption, commonly known as the "news story exemption" or the "media exemption" now extends to media entities that cover or carry news stories, commentary and editorials on the Internet, including web sites or any other Internet or electronic publication. See also AOs 2005-16, 2004-07 and 2000-13.

The media exemption applies to the same extent to entities with only an online presence as those media outlets that maintain both an offline and an online presence. See the explanation and justification for revised regulations 11 CFR 100.73 and 100.132.

Are bloggers considered press entities?

Bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities. However, the Commission has decided not to change its rules regarding the media exemption so as to specifically include **all** blogging activity within the "media exemption." Many bloggers may also be entitled to the new Internet activities exemptions for individuals. 11 CFR 100.94 and 100.155. This includes incorporated blogs that are wholly-owned by an individual, are engaged primarily in Internet activities and derive a substantial portion of their income from their Internet activities. See the explanation and justification for revised regulations 11 CFR 100.73 and 100.132 and AO 2005-16. Whether covered by the media exemption or the individual activity exemption, blogging will generally not be subject to FEC regulation.

[TOP](#)

Footnotes

1. *Because the activity is exempt from the definitions of "contribution" and "expenditure," a group of individuals that spends more than \$1,000 on such activity does not trigger political committee status under the Act and FEC regulations. See 11 CFR 100.5.*

2. *See 2 U.S.C. §§441b, 441c and 441e [PDF].*

3. If the organization routinely posts press releases on its web site, it may post a release announcing its endorsement of a federal candidate in the same manner. 11 CFR 114.4(c)(6).

4. See 11 CFR 114.5(a), 114.7(a) and 114.8(c).

[TOP](#)

This publication provides guidance on certain aspects of federal campaign finance law. This publication is not intended to replace the law or to change its meaning, nor does this publication create or confer any rights for or on any person or bind the Federal Election Commission (Commission) or the public. The reader is encouraged also to consult the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431 et seq.), Commission regulations (Title 11 of the Code of Federal Regulations), Commission advisory opinions, and applicable court decisions. For further information, please contact:

Federal Election Commission
999 E Street, NW
Washington, DC 20463
(800) 424-9530; (202) 694-1100
info@fec.gov
www.fec.gov

[TOP](#)

[What's New](#) [Library](#) [FOIA](#) [USA.gov](#) [Privacy](#) [Links](#) [eFiling](#) [Inspector General](#) [No
Fear Act](#) [Subscribe](#)

Federal Election Commission, 999 E Street, NW, Washington, DC 20463 (800) 424-9530 In Washington (202) 694-1000
For the hearing impaired, TTY (202) 219-3336 Send comments and suggestions about this site to the [web manager](#).



Norman Hanson & DeTroy, LLC
Attorneys at Law
415 Congress Street
P.O. Box 4600
Portland, ME 04112-4600

T 207.774.7000
F 207.775.0806
www.nhdlaw.com
pdetroy@nhdlaw.com

Peter J. DeTroy, Esq.
Direct 207.553.4628

October 6, 2010

VIA E-MAIL AND U. S. MAIL

Phyllis Gardiner, Esq.
Assistant Attorney General
Office of the Attorney General
General Government Div.
6 State House Station
Augusta, ME 04333-0006

RE: Governmental Ethics Complaint Filed on Behalf of Cutler 2010

Dear Ms. Gardiner:

This letter is in response to the request for written submissions made on September 30, 2010 at the hearing before the Maine Commission on Governmental Ethics and Election Practices ("Commission"), in the above matter relating to the State's investigation of the "cutlerfiles.com" website. This submission is made on behalf of Eliot Cutler and his campaign, Cutler 2010, in support of the Commission's power and authority to investigate legal compliance with applicable disclosure laws of the website in issue, run by a person, group, or entity who are currently identified as "The Cutler Files" (hereafter "TCF"). Specifically, the attorney for TCF claims that Commission investigation, including subpoena powers, directed to the individual or individuals responsible for that website would violate that individual or individuals' First Amendment right to maintain anonymity.

At the September 30, 2010 hearing, the Commission formally requested an opinion from your office regarding the constitutional issue raised by TCF's attorney and invited counsel for TCF and for Cutler 2010 to provide you with information that might be helpful to you in forming your opinion. In accord with that invitation, please find below citation to legal authority making clear that the Commission may inquire into the identity of those behind TCF, in the course of investigating whether those individuals have complied with applicable election law disclosure requirements. In addition, we are also submitting to you herewith a memorandum from Keith Frederick of FrederickPolls,

Phyllis Gardner, Esq.

October 6, 2010

Page 2

LLC; Mr. Frederick is an experienced campaign operative and professional pollster (now the pollster of Cutler 2010). As stated in his affidavit, in his considered professional opinion the website content contains the hallmarks of classic "opposition research report" data which in the political consultation field constitutes paid-for research of considerable expense. If in fact the source of the information on the website represents an expenditure of this magnitude (and by all indications, that is precisely the case here) – and if in fact the source can be traced to a former or present campaign – then the disclosure laws could very well be implicated (as well as other laws within the Commission's jurisdiction). The Commission acts well within its power and jurisdiction to investigate based upon this reasonable indicia, and doing so does not violate any person's rights under the United States Constitution or otherwise.

Introduction

The issue presently before the Commission is whether it has the power to effectively investigate alleged violations of Maine's disclosure laws applicable to the publication or distribution of political communications. For those laws to have any force, the answer to this question must be yes. The simple requirement that those who use information of sophisticated political operations, for the express purpose of convincing voters that an identified candidate is unfit for a particular office, must identify themselves and the source of the funding that resulted in the gathering of that information, does not violate the right to anonymity in political speech as articulated by the United States Supreme Court.

Discussion

Under 21-A M.R.S.A. § 1014(1),

[w]henver a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through . . . publicly accessible sites on the Internet . . . the communication, if authorized by a candidate, a candidate's authorized political committee or their agents, must clearly and conspicuously state that the communication has been so authorized and must clearly state the name and address of the person who made or financed the expenditure for the communication

Alternatively, under 21-A M.R.S.A. § 1014(2),

[i]f the communication described in subsection 1 is not authorized by a candidate, a candidate's authorized political committee or their agents, the communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication

In the present case, the Commission is confronted with a website that has as its avowed purpose to expressly advocate for the defeat of a clearly identified candidate – independent candidate for Governor of Maine Eliot Cutler. No one seriously disputes this focus of the website. The persons responsible for the website have also admitted that “an expenditure to finance the communication” did occur in connection with establishing this publicly accessible site on the Internet. But, furthermore, the information on the site clearly represents, as a whole, a significant expenditure, likely the product of expensive paid-for “opposition research.” The site is filled with obscure and difficult to obtain information (intertwined with false political “spin” and character assassination) that is characteristic of the kind of “opposition research” for which some sophisticated political operations pay several tens of thousands of dollars. There is no reasonable indicia that this website is just the result of “armchair” research compiled by amateurs; to the contrary, the only reasonable inference to be drawn is that the website is derived from, or exists as, paid-for high end and professional research by a professional opposition research consultant.

Given that this information is “publicly accessible [] on the Internet” it is obvious to a neutral observer that 21-A M.R.S.A. § 1014 operates to require the disclosure of the “name and address of the person who made or financed” TCF. Nevertheless, the attorney for TCF has presented a number of different arguments as to why such disclosure should not be obtained. Each argument will be addressed in turn below.

I. There is No Absolute Right to Anonymous Political Speech.

TCF's attorney has previously argued that the right to anonymous political speech has been recognized by the United States Supreme Court in cases such as *McIntyre v. Ohio Elections Commission*. 514 U.S. 334 (1995). While this is no doubt true, the inquiry does not end there. First Amendment rights, like any Constitutional rights, are not absolute.

As recognized by the Law Court, the first step in analyzing “all challenges to the constitutionality of laws that regulate speech . . . [is to] determine what level of judicial

scrutiny should be applied to its validity.” *Mowles v. Commission on Governmental Ethics and Election Practices*, 2008 ME 160, ¶ 11, 958 A.2d 897, 901. Judge Hornby of the United States District Court of Maine recently provided guidance on this issue in the context of the same statute at issue here in *National Organization for Marriage v. McKee*, ___ F. Supp. 2d ___, 2010 WL 3270092 (D. Me. 2010).

In *McKee*, the National Organization for Marriage (“NOM”), among other arguments, challenged the attribution/disclaimer requirements of 21-A M.R.S.A. § 1014 as unconstitutional. *Id.* at *7. In analyzing this claim, Judge Hornby noted that “[t]he Supreme Court has made clear that when election-related speech is not prohibited, but simply carries consequences such as [those provided in § 1014], courts must apply ‘exacting scrutiny’ to the law.” *Id.* at *9. *See also Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 914 (2010) (reiterating that “[d]isclaimer and disclosure requirements . . . impose no ceiling on campaign-related activities, [] do not prevent anyone from speaking . . . [and are subjected] to exacting scrutiny.” (internal quotation marks and citations omitted)).

Under the “exacting scrutiny” standard applicable to the disclosure statute at issue in this case, the disclosure may be investigated and compelled as long as there is “a ‘substantial relation’ between disclosure requirements and a ‘sufficiently important’ governmental interest.” *McKee*, 2010 WL at *9, *Citizens United*, 130 S.Ct. 876, 914. Maine’s statute clearly meets this test.

A. Maine’s “Substantial Governmental Interest” in Requiring Identity Disclosure Under 21-A M.R.S.A. § 1014.

In executing the applicable “exacting scrutiny” analysis in *McKee*, Judge Hornby first noted that the Supreme Court has long held that “[d]isclosure requirements . . . ‘directly serve substantial governmental interests.’” *Id.* at *9 (quoting *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)). The Supreme Court has held that there are at least three categories of “substantial governmental interests” served by disclosure requirements of the kind in § 1014. These include providing

the electorate with information as to where political campaign money comes from and how it is spent . . . deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity . . . [and providing] an essential means of gathering the data necessary to detect violations of [statutory campaign] contribution limitations

Id. (quoting *Buckley*, 424 U.S. 1 at 66-68) (internal quotation marks omitted). Judge Hornby went on to hold that the same “substantial governmental interests” recognized in *Buckley* as applicable to federal elections applied equally to the context of a Maine state election. *Id.* Judge Hornby then held that Maine has a “compelling reason” for compiling the information required by § 1014 including “the goal of providing information to Maine voters about the interest groups that spend money referring to candidates in an election - and indeed Maine has polling data demonstrating the public’s interest in such information.” *Id.*

B. 21-A M.R.S.A. § 1014 has a “Substantial Relation” to the Harm Sought to be Addressed.

Maine has a “sufficiently important” governmental interest, and, indeed, as found by Judge Hornby a “compelling reason” to require the disclosure of the identity of those who make an expenditure to advocate for the defeat of an identified candidate through a website. Thus, the only remaining question is whether § 1014 carries a “substantial relation” to those interests to survive constitutional muster. As held, once again by Judge Hornby, the statute is “designed to provide information to the public about the source of monies being spent in an election; and Maine, through its Commission website and otherwise, makes that information easily available to the public.” *Id.* at *10. Therefore, “Maine’s measures are substantially related to the governmental interests [previously] described . . . [and] the disclosure . . . requirements [are] not unconstitutionally burdensome.”¹ *Id.*

¹ In *Citizens United*, the Supreme Court recognized that under some circumstances an “as-applied” challenge to the constitutionality of a disclosure statute might succeed where a “facial” challenge fails if the group being required to disclose its identity could show “a reasonable probability that disclosure of its contributors’ names will subject them to threats, harassment, or reprisals from either Government or private parties.” *Citizens United*, 130 S.Ct. at 914. There has been some loose talk from TCF’s attorney regarding the possibility that identifying those behind TCF might subject them to retribution from Mr. Cutler himself. A similar claim was rejected by the Supreme Court in *Citizens United* as forming the basis for a proper “as-applied” challenge to the disclosure requirement in that case because the group at issue there “offered no evidence that its members may face [] threats or reprisals.” *Id.* at 916. Similarly, there is no claim, nor could there be, that Mr. Cutler, or anyone associated with Mr. Cutler, has made a “threat of reprisal” against those behind TCF. As a result, the unfounded and unsupported claim on this front pursued by TCF’s attorney should be afforded no weight in the Constitutional analysis.

II. The Plain Language of Maine's Disclosure Requirements Apply to Websites.

TCF's attorney has also argued that, even if the disclosure requirements contained in § 1014 are constitutional, the State should nevertheless refuse to enforce those requirements against websites. In support of this argument, TCF's attorney has argued that a regulation promulgated under federal election law by the Federal Election Commission, purportedly interpreting a federal statute identical in relevant respects to Maine's disclosure statute, exempts websites from its disclosure requirements. As a result, TCF's attorney argues that Maine should follow federal law and similarly exempt websites from § 1014's disclosure requirements. This argument is misplaced.

As an initial matter, there is absolutely no reason why Maine should be compelled to follow interpretations of federal election laws. That said, TCF's attorney is simply mistaken to the extent he argues that federal election disclosure law is identical in relevant part to § 1014.

Specifically, 2 U.S.C. § 434(f) is the federal election statute section that most closely covers the ground governed in Maine by 21-A M.R.S.A. § 1014. Under 2 U.S.C. § 434(f), any person who expends in excess of \$10,000 in any calendar year in "producing and airing electioneering communications" is required to disclose "the identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement." 2 U.S.C. §§ 434(f)(1)-(2). For purposes of subsection f of section 434, the term "electioneering communication" is statutorily defined as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3). Notably absent from this definition is any mention of Internet websites.

In contrast to the omission of websites from 2 U.S.C. § 434(f), Maine's law under 21-A M.R.S.A. § 1014(1) states that "[w]henever a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through broadcasting stations, newspapers, magazines, . . . [or] **publicly accessible sites on the Internet**, . . . the communication" must disclose who is responsible for the communication. (emphasis added). The plain language of § 1014 could not be more clear in explicitly including Internet websites among the forms of media to which the disclosure requirements apply. Therefore, regardless of any Federal regulations promulgated under the materially different Federal election statute, the Commission has no authority to ignore the direct command of the Legislature as clearly enunciated in 21-A M.R.S.A. § 1014(1).

Further, although there is no need to even read the Federal regulations relied upon by TCF's attorney as purportedly providing an exemption for websites under Federal law, it is nevertheless notable that neither 11 C.F.R. § 100.94 nor 11 C.F.R. § 100.155 provide a blanket exemption to websites of the kind argued for by TCF's attorney. Both of those regulations, under subsection (a), state that

When an individual or a group of individuals . . . engage in Internet activities for the purpose of influencing a Federal Election, neither of the following is a contribution by that individual or group of individuals:

- (1) The individual's uncompensated personal services related to such Internet activities;
- (2) The individual's use of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services

The regulations go on to define the terms "equipment and services" as including "Computers, software, Internet domain names, Internet Service Providers (ISP), and any other technology that is used to provided access to or use of the Internet." 11 C.F.R. § 100.94(c); 11 C.F.R. § 100.155(c).

It is important to remember that the issue in this matter before the Commission is not one of holding an individual or individuals accountable for time they personally spent organizing information to put on the TCF website, nor is it a matter of forcing disclosure related to the use of technological equipment necessary to create or maintain that website. Rather, the investigation is based on the reasonable prospect that the website relies on information that a sophisticated political operation devoted several tens of thousands of dollars worth of resources for professional research, the purpose of which was to uncover information that could be twisted and manipulated to advocate for the defeat of Eliot Cutler's campaign efforts in this year's race for Governor of Maine. This is a website containing classic professional "opposition research report" content. Nothing in either of the federal election regulations relied on by TCF's counsel would exempt such materials from the Federal election disclosure requirements. Therefore, even were Federal election law on this topic comparable in relevant ways to Maine's election law, which it is not, disclosure of the names and addresses of those behind TCF would be mandatory under Federal law and, by TCF's own attorney's logic, under Maine law as well.

Phyllis Gardner, Esq.
October 6, 2010
Page 8

III. Conclusion

At bottom, this is a simple decision. Maine has an election law directly on point that requires those behind TCF to simply identify who developed or financed the information supplied on the website. Such disclosure requirements under Federal law have, in *Citizens United*, been upheld by the Supreme Court and, under Maine law, been upheld in *McKee*. Both cases were decided within the past year; neither have, to this point, been acknowledged as relevant authority by TCF's attorney, and both provide direct and forceful authority for the constitutionality of 21-A M.R.S.A. § 1014.

As a result, we strongly urge that the Commission determine it has the authority to investigate this matter, and to subpoena the names and addresses of those behind TCF, for the purposes of determining who financed the research and information gathered on the website, and so determine whether the website complies with expenditure disclosure requirements.

Very truly yours,



Peter J. DeTroy

PJD/pmh
enclosure
cc: Jonathan Wayne

FREDERICKpolls

TO: Ted O'Meara; Eliot Cutler Campaign
FROM: Keith Frederick; FrederickPolls, LLC
DATE: October 5, 2010
RE: Website – Cutlerfiles.com

1. As you know, I have been a professional pollster active in national political campaigns since 1979. Being exposed to developments in the campaign industry that long means I have witnessed numerous innovations throughout the years that have now become familiar practice in statewide, federal and local campaigns. One such development: professional opposition research. It has become a more frequent practice that has spawned an industry of professional practitioners to produce an "Oppo Research Book" on any and all serious candidates in a race.
2. After review of the website "cutlerfiles.com" there is no doubt in my mind this is the work of a professionally oriented opposition researcher of the kind described above. The techniques, the content and the interpretation are 100% recognizable in the industry.
3. This researcher clearly went to great lengths to uncover and expose obscure information from specific sources only a dedicated opposition researcher would utilize including...
 - A 10-year old interview with Bates College;
 - Law firm websites and press releases;
 - Local voting records for decades past;
 - Local tax roles;
 - A FOREIGN LANGUAGE newspaper editorial from China (translated from a Chinese dialect to English); and
 - A 1977 letter from the President's Office of Science and Technology Policy to OMB when Mr. Cutler was an OMB Associate Director.
4. Not only did this researcher produce obscure research documents, but their report on them utilizes typical political opposition research "spin."

For example, the fact that Eliot Cutler did attend Bangor public schools up to his sophomore year is spun into a negative that he then ventured off to an out-of-town school to finish.

The same can be said for the implications made about where Eliot was "based" during his professional career as opposed to where he homesteaded and paid taxes as a permanent resident.

5. All in all, this website is a clear and standard piece of professional opposition research work, for which persons within the campaign industry will often expend considerable sums to have produced.

2101 Wilson Blvd., Suite 104

Arlington, VA 22201

(703) 528-3031 (p)

(703) 528-1204 (f)

Keith@FrederickPolls.com

www.FrederickPolls.com



MAINE CIVIL LIBERTIES UNION FOUNDATION

October 6, 2010

VIA ELECTRONIC MAIL

Phyllis Gardiner, Esq.
Assistant Attorney General
Office of the Attorney General
General Government Div.
6 State House Station
Augusta, ME 04333-0006
Phyllis.Gardiner@maine.gov

Re: The Cutler Files and Anonymous Speech

Dear Ms. Gardiner:

On behalf of the Maine Civil Liberties Union, thank you for the opportunity to provide comments on the request for an investigation into the Cutler Files (www.cutlerfiles.com). The MCLU is a nonpartisan advocacy organization that does not endorse political candidates, and we do not represent any party in this dispute. Hopefully, our submission will aid you, and the Commission, in the resolution of this issue.

The Maine Commission on Governmental Ethics and Election Practices has been requested to initiate an investigation into the Cutler Files blog for violation of 21-A M.R.S.A. §1014, and it has shown admirable caution about doing so. The statute undeniably serves a public interest in illuminating the dimensions of political debate. But, as you have recognized, the constitutional protection of freedom of speech includes, in some instances, protection against the disclosure of one's identity. Requiring the public disclosure of the author(s) of the Cutler Files would violate that First Amendment protection, and the Commission ought to decline to intrude in this protected area.

Commission Authority

As an initial matter, the commission's authority as a body and as individual commissioners is circumscribed by both the United States Constitution and the Constitution of

the State of Maine, and it cannot act beyond its limits. The question of an administrative body's authority to make constitutional determinations is not an easy one. The Maine Supreme Judicial Court has not yet provided clear guidance on this issue, but the Supreme Court of Tennessee recently provided a helpful roadmap for consideration of this issue. While administrative bodies are generally not authorized to invalidate statutes on constitutional grounds (because of separation of powers principles), such bodies can and should exercise discretion to ensure that the application of otherwise-valid statutes does not intrude into constitutionally-protected territory.

Administrative tribunals do not lack the authority to decide every constitutional issue. It is essential, however, to distinguish between the various types of constitutional issues that may arise in the administrative context. In *Richardson*, we developed three broad categories of constitutional disputes: (1) challenging the facial constitutionality of a statute authorizing an agency to act or rule, (2) challenging the agency's application of a statute or rule as unconstitutional, or (3) challenging the constitutionality of the procedure used by an agency. Administrative tribunals have the power to decide constitutional issues falling into the second and third categories, but the first category falls exclusively within the ambit of the judicial branch.

Colonial Pipeline Co. v. Morgan, 263 S.W. 3d 827, 843 (Tenn. 2008) (internal citations omitted). This categorization safeguards three principles: first, the separation of power principle, that agencies (as part of the Executive branch) are to enforce the law; second, the constitution principle, that all government actors take an oath to uphold the constitution; and third, the agency principle, that agencies are delegated both the authority and the discretion to act. Sometimes, the agency principle leads to the adoption of rules and procedures (the third category recognized by the Tennessee court in *Colonial Pipeline*), but it is no less pressing when the agency action at issue is whether to initiate an investigation or an enforcement action. See also *Prince George's County v. Ray's Used Cars*, 398 Md. 632, 651 (Md. 2007) (recognizing the authority of Maryland administrative agencies to consider the constitutionality of statutes). State Supreme Courts are nearly unanimous in holding that an administrative agency lacks the authority to facially invalidate a statute, but that is not what is being urged here. The Cutler Files, as we understand it, is only urging you to consider, at this point, the constitutionality of the application of §1014, in light of the facts presented.

The Right to Anonymous Speech

The First Amendment protects the right to anonymous speech. See *Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150, 160, 166–67 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199–200 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995); *Talley v. California*, 362 U.S. 60, 64–65 (1960). Anonymous speech, whether artistic or political, has played an “important role in the progress of mankind.” *McIntyre*, 514 U.S. at 341. Speakers choose anonymity for a variety of reasons—fear of retaliation, concern about ostracism, or an interest in preserving privacy. *Id.* at 342. Whatever the reasons, courts are broadly protective of the right of authors to remain anonymous. Such anonymity protects speakers from persecution, while allowing them to criticize oppressive practice and laws. See *Talley*, 362 U.S. at 64. There is a “rich tradition of First Amendment protection for anonymous political discourse” and “unpopular viewpoints would often not be expressed if attribution were always required.” *Yes for Life Political Action Committee v. Webster*, 74 F.Supp.2d 37, 39 (D.Me. 1999) (enjoining enforcement of disclosure requirements against a PAC).

Mr. Cutler has suggested that *McIntyre* has been overruled, but that view finds no support in the case law. The right to anonymity is, like almost all areas of First Amendment protection, subject to limits, but the right has not by any stretch been eliminated, nor has the case law supporting it been overruled. Supreme Court cases, such as *McIntyre*, are not overruled until the Supreme Court says they are overruled. See *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). That Justice Thomas, as a lone dissenter, perceives a contradiction between *McIntyre* and portions of the Court’s opinion in *Citizens United* does not even hint that four more Justices see the same contradiction; in fact, the failure of any justices to join Justice Thomas’s dissent is more strongly suggestive of the opposite view. See *Citizens United v. FEC*, 130 S.Ct. 876, 980 (Thomas, J. dissenting) (suggesting that the Court undermines *McIntyre* by recognizing the validity of disclaimer/disclosure requirements as applied to well-funded corporate contributors).

Regulating Speech vs. Regulating Mechanics

The right to anonymity is strongest when the speaker is engaged in “pure speech,” and it weakens as the activity become more remote from communicative acts. *See Doe v. Reed*, 130 S.Ct. 2811, 2828 (2010) (“Regulations of this nature [requirement that an individual use their real name when voting or disclose their identity on a publicly reviewable signature petition], however, stand ‘a step removed from the communicative aspect of petitioning,’ and the ability of States to impose them can scarcely be doubted.”) (internal citations omitted); *see also McIntyre* 514 U.S. at 345 (contrasting measures to “control the mechanics of the electoral process” with the “regulation of pure speech”). Here, as compared with other recent issues before this commission, the regulation concerns pure speech: views about a candidate for public office. That speech is entitled to the highest level of protection. *See Roth v. United States*, 354 U.S. 476, 484 (1957). In the regulation of political speech (as opposed to, for example, commercial speech), the government is even foreclosed from preventing or punishing false speech, as the First Amendment does not allow the government to substitute its view (however well-formed) for that of the public. *See Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988) (the State “cannot substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.”)

Balancing Anonymity and the Public’s Right to Know

The Public has an interest in knowing the identity of individuals participating in the political process, and at times that interest comes into conflict with the desire of individuals to remain anonymous. The Supreme Court has provided some guidance for reconciling these conflicts through its application of “exacting scrutiny”—which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest” to

uphold the statutory disclosure requirement. *See Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010) (internal citations omitted).

Specifically, the Court has identified three interests that justify disclaimer and disclosure requirements: “[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government.” *McConnell*, 540 U.S. at 206 n.88 (internal citations omitted). These interests were well served by the application of the disclosure requirement to large-scale corporate spending on election material. *See Citizens United*, 130 S.Ct. at 916 (noting the appropriateness of pairing of “corporate independent expenditure” with “effective disclosure”). But, that is not the case here, and the Court has made it clear that, while a disclosure requirement may be constitutional on its face, “as-applied” challenges must remain available. *See id.* at 914. Here, unlike in *Citizen’s United*, the speaker is not a large corporation with the potential to corrupt elected officials. Maine’s economy is small, but no governor will be corrupted by a forty dollar website. And, the expressed concern of the creator(s) of the Cutler Files of a fear of retaliation or reprisal is entirely believable. If, for example, the creator(s) are either journalists or government employees, it could be disastrous professionally to be linked to such comments about the (potential) Governor. The Supreme Court has ensured protection for such individuals, even against valid statutes. *See id.* (recognizing that as-applied challenges to disclosure requirements are available to protect anonymous speakers from “threats, harassment, or reprisals from either Government officials or private parties.”) (internal citations omitted). The author(s) of the Cutler files are not shielded by the corporate form, and counsel has suggested that they are (at most) a small group. There is undeniable safety in numbers, and a small group or an individual is more deserving of the protection from potential retaliation that comes with anonymity.

A large entity spending a great deal of money, then, has the weakest claim to the protections of anonymity, because the public interest in preventing corruption is high and the need for protection from retaliation is low. But, in the case of the Cutler Files, the public has little or no anti-corruption interest in learning the identity of an individual or small group who has spent a minimal amount of money on a website, and the need for protection is the highest because the creator(s) is either an individual or a small group, which leaves them exposed to reprisal.

The Commission ought to decline the invitation to initiate an investigation into the identity of the author(s) of the Cutler files and urge Mr. Cutler to avail himself of alternative remedies for speech that he finds disagreeable. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring) (recommending “discussion” to expose “falsehoods and fallacies” and “the process of education” to “avert evil.”).

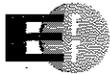
The MCLU appreciates the opportunity to comment on this dispute, and I would welcome the chance to discuss the matter further with you and the commission.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Zachary L. Heiden', written in a cursive style.

Zachary L. Heiden
Legal Director
Maine Civil Liberties Union Foundation

cc: Jonathan Wayne, Esq.
Daniel Billings, Esq.
Peter J. DeTroy, Esq.
Richard A. Spencer, Esq.



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

October 8, 2010

Phyllis Gardiner, Esq.
Assistant Attorney General
Office of the Attorney General
General Government Div.
6 State House Station
Augusta, ME 04333-0006

**Re: Governmental Ethics Complaint Filed on Behalf of Cutler 2010
Seeking Identifying Information for Internet Speaker at
CutlerFiles.com**

Dear Ms. Gardiner,

I am the Legal Director of the Electronic Frontier Foundation (“EFF”). EFF is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society.

EFF writes in support of CutlerFiles.com, and to provide some perspective on the proper First Amendment legal analysis that should be applied in situations, as this one, where the question is whether to breach anonymity of an online speaker on a matter of public concern. EFF has handled well over a dozen similar cases, all across the country, and has helped developed the caselaw addressing such situations.¹

As we understand it, in response to a complaint from counsel for the Cutler 2010 campaign (“Campaign”), the Maine Commission on Governmental Ethics and Election Practices (“Commission”) is considering whether to use its subpoena power to require the host of the website www.CutlerFiles.com to reveal the identity of the individuals whose speech is hosted on the website. The basis for this request is the suspicion of the Campaign that the speech on the website is the result of “opposition research” by Mr. Cutler’s political opponents (presumably in the upcoming election) and so be subject to Maine’s disclosure laws. In effect, the Campaign seeks to have the Commission use its subpoena power to determine whether its suspicions are correct.

With respect, we do not believe that suspicion that speech is “opposition research” is a sufficient basis under the First Amendment to breach the anonymity of the speakers on [CutlerFiles.com](http://www.CutlerFiles.com).² To assist you in your evaluation, and to support our conclusion, please allow us to review the relevant First Amendment law.

¹ A sampling of the cases on anonymous online speech where EFF has participated is available at <http://www.eff.org/related/3005/case>.

² Alternatively it appears that the Campaign may believe that Maine’s disclosure laws require the

1. The Right to Speak Anonymously Is Constitutionally Guaranteed.

The United States Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that “[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.” McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995). See also, e.g., id. at 342 (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”); Talley v. California, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, noting that “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”). Anonymity receives the same constitutional protection whether the means of communication is a political leaflet or an Internet message board. See Reno v. ACLU, 521 U.S. 844, 870 (1997) (there is “no basis for qualifying the level of First Amendment protection that should be applied to” the Internet). See also, e.g., Doe v. 2theMart.com, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (“The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas.”). And as discussed below, these fundamental rights protect anonymous speakers from forced identification, be they from overbroad statutes or unwarranted discovery requests.

This strong First Amendment right is especially critical when the anonymous speaker is expressing political views. NAACP v. Alabama, 357 U.S. 449, 461 (1958) (“The effect of broadly compelling disclosure of the identities of persons expressing political views is ‘unconstitutional intimidation of the free exercise of the right to advocate.’”); NAACP, 357 U.S. at 460 (“Freedom to engage in association for the advancement of beliefs is an inseparable aspect of the liberty assured by the due process clause of the First Amendment”). Thus, the fact that the speech at issue here is an expression of political views increases the need for serious First Amendment scrutiny.

2. Anonymous Speakers Enjoy a Qualified Privilege Under the First Amendment.

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts³ to pierce anonymity are subject to a qualified privilege. Courts must “be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas.” Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999). This

identification of anyone speaking about an election or a candidate for election. Such an interpretation is even more inconsistent with the First Amendment right to anonymous speech, for the reasons discussed below, than the claim that the website is actually the work of one of Mr. Cutler’s opponents in the upcoming election.

³ A subpoena, even if granted to a private party, is state action and hence subject to constitutional limitations. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 265 (1964); Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

vigilant review “must be undertaken and analyzed on a case-by-case basis,” where the court’s “guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.” Dendrite Int’l v. Doe No. 3, 775 A.2d 756, 761 (N.J. App. 2001). Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. See, e.g., Sony Music Entm’t Inc. v. Does 1-40, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) (“Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns.”); Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987)

The constitutional privilege to remain anonymous is not absolute, however. Identity information may be necessary to pursue meritorious litigation. Id. at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) (“Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection.”). The same is true for investigations necessary to enforcing regulation such as Maine’s disclosure laws. However, subpoena power may not be used to uncover the identities of people who have simply made statements that are critical of a person. Accordingly, courts evaluating attempts to unmask anonymous speakers in cases similar to the one at hand have adopted standards that balance one person’s right to speak anonymously with a litigant’s legitimate need to pursue a claim.

3. The Test for Removing Anonymity.

The seminal case setting forth First Amendment restrictions upon the ability to compel an online service provider to reveal an anonymous party’s identity is Dendrite Int’l, Inc. v. Doe No. 3, supra, in which the New Jersey Appellate Division adopted a test for protecting anonymous speakers that has been followed by courts around the country:⁴

- (1) make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense;
- (2) set forth the exact statements that Petitioner alleges constitutes actionable speech;
- (3) allege all elements of the cause of action and introduce prima facie evidence within the litigant’s control sufficient to survive a motion for summary judgment; and,
- (4) “[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant’s First Amendment right of anonymous free speech against the strength

⁴ See, e.g., Independent Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009); Mobilisa, Inc. v. John Doe 1, 170 P.3d 712, 717-721 (Ariz. App. 2007); Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698-99 (N.Y. Sup. Ct. 2007); see also Highfields Capital Mgmt. v. Doe, 385 F. Supp. 2d 969, 974-76 (N.D. Cal. 2005); Cahill, 884 A.2d at 459-60 (applying a modified Dendrite test).

of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.”

Dendrite, 775 A.2d at 760-61.

4. Applying the First Amendment Test, the Request Here Fails.

Applying the Dendrite test, the request for a subpoena here clearly fails both the third and fourth prong.

First, the Campaign presents no evidence supporting its suspicion that the speaker on CutlerFiles.com is indeed subject to the disclosure laws, much less evidence to support a prima facie claim that the website operator has violated the disclosure laws sufficient to survive a motion for summary judgment. Instead the Campaign presents only its own suspicions that the website operator is somehow affiliated with Mr. Cutler's political opponents and a memo from a campaign operative that expresses similar suspicions based on the assertion that the website appears to be “opposition research.” Such suspicions, even when couched in a memorandum from a political operative, are simply not admissible evidence sufficient to survive a motion for summary judgment.

Second, even if the statements of suspicion were sufficient, they would not be sufficient to survive the balancing test of the fourth prong of Dendrite. The free speech interests of the speakers on www.CutlerFiles.com are very strong – this is political speech at the heartland of the First Amendment. Moreover, necessity of the disclosure of the identity of the speaker by the website host is not great because, as noted below, the Commission has other tools to use if it suspects that the website is actually run by one of Mr. Cutler's opponents in the upcoming elections.

EFF has handled several similar cases in which the basis for the subpoena is suspicion that an anonymous speaker is actually someone covered by a particular regulation or who is otherwise legally liable for the speech. For instance, in USA Technologies v. Doe 2010 WL 1980242 (N.D.Ca 2010) the court rejected a claim that the identity of a speaker was needed to determine whether the speaker was engaged in the sale or purchase of a security at the time of his speech and so had violated securities laws. Similarly in Town of Manalapan v. Moskovitz, the court rejected a claim that an anonymous speaker must be unmasked because they suspected he was actually the defendant in a legal malpractice case brought by the town against its former town counsel. Ruling from the bench, the Court noted:

There are First Amendment issues with regard to disputes with the past administration [of the town of Manalapan] and anyone has a right to make their feelings clear . . . and . . . not to be intimidated by the issuance of discovery requests . . . and the blogger, . . . has a right not to be

drawn into the litigation and forced to reveal identity or to impede on his or her First Amendment rights simply on a suspicion, however founded or unfounded.⁵

Finally in Burd v. Cole, the plaintiff sought to issue a subpoena seeking the identities of speakers on a political message board based on the suspicion that they were actually the defendant in a defamation case. The subpoena was withdrawn after EFF filed a motion to quash on behalf of the anonymous speakers.⁶

The pattern is clear – in each case the complainant sought to unmask anonymous speakers in order to determine whether they were in fact someone else who has some special duty or legal exposure under the law. And the correct response in each is equally clear – mere suspicion that a speaker may have violated the law is not a sufficient basis to unmask an anonymous speaker consistent with the First Amendment protection for freedom of speech.

Also similar to these other cases, the refusal to directly unmask the speaker does not eliminate the possibility of a further investigation by the Commission. It remains concerned that the website is actually “opposition research” funded by one of Mr. Cutler’s opponents, as the Campaign indicates, the Commission can direct a subpoena to the campaigns or agents of Mr. Cutler’s opponents directly and require that they state under penalty of perjury whether they are affiliated with CutlerFiles.com. This would allow the investigation to continue but would ensure that the inquiry is not merely a fishing expedition. It would also prevent the Commission’s investigation from unwittingly becoming a method by which lawful critics are intimidated and legitimate political speech is chilled.

⁵ Transcript of Motions, Manalapan v. Moskovitz, Superior Court of New Jersey, Monmouth County, Docket No.: Mon-L02895-07 (December 21, 2007), available at <http://www.eff.org/files/filenode/manalapan/1221moskovitzpmp.pdf>.

⁶ The Burd v. Cole case file is available at <https://www.eff.org/cases/burd-v-cole>.

Phyllis Gardiner, Esq.
Page 6

Thank you for considering this letter. We hope that the Commission will ensure that the First Amendment rights of anonymous speakers are protected even as it exercises its authority to investigate claims arising from Maine's disclosure laws. Please feel free to contact me with any questions or concerns at 415-436-9333 x108 or Cindy@eff.org.

Sincerely,

ELECTRONIC FRONTIER FOUNDATION

A handwritten signature in black ink, appearing to read "C.A. COHN". The signature is fluid and cursive, with a long horizontal stroke at the end.

CINDY A. COHN

Legal Director

Richard A. Spencer (207) 772-1941
(207) 772-3627 Fax
rspencer@dwmlaw.com (800) 727-1941
84 Marginal Way, Suite 600 Admitted in ME, NH
Portland, ME 04101-2480 only
www.dwmlaw.com

Daniel Amory*
David J. Backer*
S. Campbell Badger*
Jerrol A. Crouter*
George T. Dilworth*
Jessica M. Emmons*
Peter C. Feimly*
Anthony T. Fratianne*
Jonathan M. Goodman*
Sara S. Hellstedt*
Eric R. Herlan*†
Melissa A. Hewey*†
Michael E. High*
David M. Kallin*
John S. Kaminski*
Edward J. Kelleher*
Jeanne M. Kincaid*†
Benjamin E. Marcus*
Robert P. Nadeau*
Daina J. Nathanson*†
Mark A. Paige†
Jeffrey T. Piampiano*
William L. Plouffe*
Aaron M. Pratt*†
Harry R. Pringle*
Daniel J. Rose*†
George Royle V*
Gregory W. Sample*
David S. Sherman, Jr.*
Richard A. Shinay*
Kaighn Smith, Jr.*
Bruce W. Smith*
Richard A. Spencer*†
Christopher G. Stevenson*
E. William Stockmeyer*†
Amy K. Tchao*†
Joanna B. Tourangeau*†
M. Thomas Trenholm*
Matthew H. Upton†
Gary D. Vogel*
Ronald N. Ward*
Brian D. Willing*
Gerald M. Zelin†

Consultants

Ann S. Chapman
Policy & Labor Relations

Roger P. Kelley
Labor Relations &
Conflict Management

Christopher P. O'Neil
Governmental Affairs

Michael J. Opuda Ph.D.
Special Education

Of Counsel

Joseph L. Delafield III*
Robert L. Gips*
Donald A. Kopp*
Hugh G. E. MacMahon*
Harold E. Woodsum, Jr.*

* Admitted In Maine

† Admitted In New Hampshire

October 19, 2010

Walter F. McKee, Esq.
Chairman
Governmental Ethics Commission
Maine Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333

RE: Cutlerfiles Website

Dear Chairman McKee and Members of the Maine Governmental Commission on Governmental Ethics and Election Practices:

I am writing to follow up on my discussions with Jonathon Wayne of the Commission staff and with Phyllis Gardiner, Esq., of the Maine Attorney General's office to request that the Commission continue its investigation of the Cutlerfiles website. The Cutler campaign is making a fairly simple request of the Commission: That the Commission carry out its statutory responsibility to continue its investigation until it determines on the basis of reliable and credible evidence (1) whether or not the reporting requirements for independent expenditures of 21-A M.R.S. §1019-B have been violated in connection with the Cutlerfiles website, and if so, that the Commission require those involved to comply with the reporting requirements of Maine law; and (2) whether the facts of this case justify an exercise of the Commission's enforcement discretion to pursue the clear facial violation of 21-A M.R.S. § 1014. The Cutler campaign and the voters of Maine are entitled to know how much has really been spent on the Cutlerfiles website, who is making these expenditures to defeat the candidacy of Eliot Cutler, and whether they have been acting in concert with a political campaign, a political party, or a political action committee.

While we believe that it is the Commission's job to enforce all of Maine's election laws and to let the courts decide their constitutionality, as we have previously argued, we would emphasize to the Commission does not yet have reliable facts on which to base an exercise of its enforcement discretion of 21-A M.R.S. §1014. Furthermore, we would like to emphasize that the more difficult legal issues which may be raised by the

October 19, 2010

Page 2

Commission's enforcement of 21-A M.R.S. §1014 (the "disclaimer" statute) will not be significantly implicated by continuing the Commission's investigation of a possible violation of 21-A M.R.S. §1019-B (the "independent expenditure reporting requirement"). There is a clear distinction in recent first amendment jurisprudence between the burden on the exercise of free speech posed by disclaimer statutes with no *de minimis* exception and the burden of such exercise by independent expenditure reporting statutes which require after-the-fact reporting of independent expenditures with a statutory threshold, such as 21-A M.R.S. §1019-B with its minimum reporting threshold of \$100.

After-the-fact financial reporting requirements that result in the disclosure of the identity of a speaker do not impose as great a burden on an individual's First Amendment rights as a concurrent disclaimer requirement that becomes a part of the speaker's message because the after-the-fact reporting allows the speaker to convey his or her message with the benefits of anonymity at the time of the speech while more narrowly serving important government interests. This distinction was highlighted by the Supreme Court in *McIntyre v. Ohio Elections Comm'n* when it contrasted a disclosure requirement that became part of a leaflet with an after-the-fact reporting requirement functionally identical to Maine's Section 1019-B:

True, in [a] portion of the *Buckley [v. Valeo]*, 424 U.S. 1, (1976) opinion we expressed approval of a requirement that even "independent expenditures" in excess of a threshold level be reported to the Federal Election Commission. But that requirement entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate. Though such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document-particularly a leaflet-is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill-and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 354-56, (1995) (internal citations removed). As the Ninth Circuit articulated after reviewing this and other precedents:

As these precedents indicate, requiring a publisher to reveal her identity on her election-related communication is considerably more intrusive than simply requiring her to report to a government agency for later publication how she spent her money. The former necessarily connects the speaker to a particular message directly, while the latter may simply expose the fact that the speaker spoke.

October 19, 2010

Page 3

Am. Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 991 (9th Cir. 2004); *See also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 198-99 (1999) (contrasting an unconstitutional time-of-speech requirement that a petition circulator wear a name tag with the less burdensome requirement that the petitioner later submit an affidavit containing his or her name to a state agency); *Cf. Buckley v. Valeo*, 424 U.S. 1, 82-84 (1976) (upholding a reporting requirement for expenditures above \$100 that expressly advocate for a particular election result). Thus, the anonymity concerns raised under Section 1014 are not significant concerns under the reporting requirements of Section 1019-B. The fact that these requirements apply equally to expenditures on a website and expenditures on other forms of communication is not legally significant.

Similarly the *de minimis* threshold concerns that may be present in Section 1014 do not exist in Section 1019-B. Judge Hornby has held that Maine's reporting requirements for independent expenditures over \$100 meet the exacting scrutiny standard because the requirement is substantially related to important government interests of insuring the integrity of the electoral process by providing information to voters, protecting against corruption or the appearance of corruption, and as an essential means for a state to gather data necessary to ensure compliance with its campaign finance laws. *Nat'l Org. for Marriage v. McKee*, CIV 09-538-B-H, 2010 WL 3270092, *9-11 (D. Me. Aug. 19, 2010). Furthermore, Judge Hornby held that Maine's legislative threshold of \$100 satisfies the *de minimis* requirement that has been recognized by courts in other jurisdictions. *Id.* at *11 (upholding Maine's \$100 threshold and stating that "the judgment about the threshold is still best left to the legislature"); *Cf. Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (overturning Montana's "zero dollar" threshold).

In this case, it would be a serious abdication of the Commission's enforcement responsibilities under 21-A M.R.S. §1019-B for the Commission to discontinue its investigation on the basis of an anonymous affidavit which only appears to tell part of the story and which may contain significant misrepresentations of fact.

The anonymous affidavit asserts that the aggregate cost of the Cutlerfiles website to date has been only \$92.54. This sum includes a monthly hosting fee of \$4.83 paid on August 29, 2010 and a monthly hosting fee of \$4.99 paid on September 20, 2010. If the people behind the website pay a third monthly hosting fee of \$4.99 for October, the total spent on the Cutlerfiles website according to the anonymous affidavit will be \$97.53 or \$2.47 below the \$100.00 reporting threshold of Section 1019-B. The Commission should not accept the accuracy of this figure at face value on the basis of an unsupported anonymous affidavit without further investigation. Even the anonymous affidavit itself contains language designed to protect the affiant if the Commission's investigation shows that the affidavit understates the amount of the independent expenditures that have been made on the website. In answer to Question 9 the anonymous affiant states:

During the initial period of research from August, 2009 through February, 2010, I paid for three or four articles that I obtained on line. I estimate that each of those articles cost no more than \$3.99 each. I am unable to provide any more detail

October 19, 2010

Page 4

because the research was conducted some time ago without any anticipation of ever having to account for the costs.

This statement does not actually say that no other costs were incurred by the anonymous affiant and it does not even say that he or she reviewed his or her credit card records, checkbooks, emails and other financial records to determine how much he or she actually expended on the website. The anonymous affiant does not include any information about expenditures that may have been made by the other individual who according to the affiant also “primarily conducted” the research, writing, editing and graphics for the website. The affidavit does not describe that person’s expenditures or state clearly that none were made. Furthermore, the anonymous affidavit does not speak to any expenditures that may have been made by the “others” who according to the anonymous affiant also provided suggestions which were incorporated into the website. The Commission should investigate whether those behind the website made expenditures for software, access to subscription databases, telephone expenses, mailing, FedEx charges, travel expenses or any other miscellaneous costs that have not been described or disclosed by the anonymous affiant.

The anonymous affiant does state that no person or entity has been paid directly or indirectly for any work related to the site. That statement, however, is conclusory and should not be accepted at face value without further investigation by the Commission. If, as seems possible, the Commission finds that the research for the Cutlerfiles site was conducted by a paid consultant on behalf of a gubernatorial primary campaign in anticipation of running a general election campaign against Eliot Cutler, the Commission should investigate whether that research was conducted in whole or in part by a paid campaign consultant, by paid campaign staff or by other persons in the inner circle of a campaign who should be considered to have been agents of that campaign for this purpose.

If further investigation by the Commission establishes that the research was done on behalf of or in conjunction with a paid consultant to a gubernatorial primary campaign, the Commission should investigate who owned the research material when the primary campaign ended – was it the paid consultant to the campaign, the campaign, or someone else in the campaign’s inner circle. The Commission should also determine whether that research material had “value” within the meaning of the term “expenditure” under 21-A M.R.S. §1012(3) which would make a sale, gift or loan of that material an “independent expenditure” under 21-A M.R.S. §1019-B. Finally the Commission should investigate whether one of the two people identified by the anonymous affiant, or, a person closely associated with them tried to sell the research material to a general election campaign, a political party, or a political action committee for tens of thousands of dollars to help them to develop negative attack ads against Mr. Cutler.

If the Commission’s investigation finds that the Cutlerfiles website has involved independent expenditures in excess of the \$100 statutory reporting threshold of Section 1019-B(1), as we believe it will, the Commission should then require those involved to file an independent expenditure report pursuant to that section.

October 19, 2010

Page 5

The Commission should also review the anonymous affidavit after completion of its investigation to determine whether it contains a material false statement or a statement that includes a material misrepresentation in violation of 21-A M.R.S. §1004-A(5). If that proves to be the case, the Commission should then take further enforcement action under that section.

Again, as stated in the first paragraph of this letter, the Cutler campaign is making a simple request of the Commission: That the Commission carry out its statutory responsibility to continue its investigation until it determines on the basis of reliable and credible evidence (1) whether or not the reporting requirements for independent expenditures of 21-A M.R.S. §1019-B have been violated in connection with the Cutlerfiles website, and if so, that the Commission require those involved to comply with the reporting requirements of Maine law; and (2) whether the facts of this case justify an exercise of the Commission's enforcement discretion to pursue the clear facial violation of 21-A M.R.S. § 1014. Again, the Cutler campaign and the voters of Maine are entitled to know how much has really been spent on the Cutlerfiles website, who is making these expenditures to defeat the candidacy of Eliot Cutler, and whether they have been acting in concert with a political campaign, a political party, or a political action committee.

We appreciate the attention that the Commission and the Commission's staff have already devoted to these issues and hope that you will vote to continue the Commission's investigation until the questions outlined above have been answered in a satisfactory manner on the basis of reliable and credible information.

Thank you for your consideration of this request.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Richard A. Spencer".

Richard A. Spencer

RAS/kmr