

Agenda

Item #2



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: January 21, 2011

Re: Draft Cutler Files Determination for Your Review

I have attached a draft Cutler Files determination for your review that contains findings of fact and conclusions of law.

If you would like me to make any changes before the January 27 meeting, please call me at 287-4179 or e-mail me at Jonathan.Wayne@maine.gov.

Thank you.

STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE 04333
(207) 287-4179

IN THE MATTER OF:

The Cutler Files Website

COMMISSION DETERMINATION

I. Introduction and Procedural History

The Cutler Files website (www.cutlerfiles.com) became publicly accessible on the Internet on or about August 30, 2010. The website did not contain any statements indicating who had paid for or authorized it, and it did not provide any contact information other than an electronic mail address. On September 7, 2010, the Commission received a letter from the gubernatorial campaign of Eliot Cutler requesting that the Commission investigate the website for possible violations of several campaign finance disclosure laws. At a public meeting on September 9, 2010, the Commission authorized its staff to conduct an investigation, pursuant to 21-A M.R.S.A. § 1003, based on finding sufficient grounds to believe that a violation of 21-A M.R.S.A. § 1014 may have occurred.

The staff began its investigation, focusing on the “disclaimer” requirement in 21-A M.R.S.A. § 1014(2) that “whenever a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate” and the communication is not authorized by a candidate, 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 communication.”

The individuals involved in the Cutler Files website advised the staff that they wished to remain anonymous. They retained legal counsel and asked for an opportunity to present arguments to the Commission for terminating the investigation. At its next regular meeting on September 30, 2010, the Commission heard presentations from legal representatives of the Cutler

Campaign and the website concerning whether the investigation should continue. The website's attorney, Daniel I. Billings, Esq., argued that its creator(s) had a constitutional right to remain anonymous under the First Amendment of the United States Constitution. Mr. Billings urged the Commission to find Section 1014 inapplicable and to terminate the investigation on the grounds that: a) a *de minimis* amount of money had been expended to finance the website; b) the site was a form of citizen journalism that should be exempt from the definition of expenditure, under 21-A M.R.S.A. § 1012(3)(B)(1); and c) Maine's disclaimer statute is overbroad because it compels ordinary individuals who are spending a modest amount of their own funds to speak about candidates to disclose themselves in their communications. The Cutler Campaign, represented by Richard Spencer, Esq., urged the Commission to continue its investigation. He argued that: a) the website appeared to be the creation of a professional political consultant for no other purpose than to attack a political candidate; b) the website is not a blog, and is not entitled to the exception for journalism and commentary; c) the right to anonymity claimed by the creators of the website has been contradicted by a recent federal court decision; and d) the Commission should enforce Maine's disclaimer statute. The Commission declined to terminate the investigation, but instructed staff to proceed in a manner that would protect the anonymity of the persons involved with the website for purposes of the investigation, pursuant to 21-A M.R.S.A. § 1003(3-A).

Representatives of the Cutler Campaign and the Cutler Files website appeared before the Commission again at a regular meeting on October 20, 2010. The Cutler Files submitted an anonymous affidavit, with name of the author redacted, responding to a number of factual questions that had been posed by the Commission's staff. The Cutler Campaign outlined areas of inquiry that the Commission should explore and urged the Commission not to conclude from the affidavit that no violation occurred. The Campaign urged the Commission to carry out its statutory responsibility to ascertain the full cost of the website, and to determine whether the website constituted an "independent expenditure" that required the submission of a financial report to the Commission.

At the October 20, 2010 meeting, the Commission authorized the staff to continue the investigation of possible violations in a confidential manner. In addition to the disclaimer requirement in 21-A M.R.S.A. § 1014, the Commission directed the staff to investigate whether the website creators violated the independent expenditure reporting requirement in 21-A M.R.S.A. § 1019-B. Under that section, a person who makes "any expenditure for any communication that expressly advocates the election or defeat of a clearly identified candidate" "shall file a report with the commission" if the expenditures "aggregate[e] in excess of \$100 during any one candidate's election"

The staff continued its investigation, as directed by the Commission, and concluded it in mid-December. The staff summarized the results of the investigation in a confidential report,

provided only to the Commission and to Mr. Billings, in accordance with 21-A M.R.S.A. § 1003(3-A).

At its meeting on December 20, 2010, the Commission heard further legal argument from the attorneys for the Cutler Files and the Cutler Campaign. The Commission then reviewed the staff's confidential investigative report during an executive session, held in accordance with 1 M.R.S.A. § 405(6)(E) and (F) and 21-A M.R.S.A. § 1003(3-A)(D), at which the Commission members also had an opportunity to ask questions of the Cutler Files' attorney concerning the matters in the investigative report. In the following public session, the Commission voted to find one individual in violation of 21-A M.R.S.A. §§ 1014(2) and (2-A), as set forth below, and directed staff to prepare findings of fact and an order for consideration at the next regular Commission meeting on January 27, 2011.

II. Findings of Fact

On November 2, 2010, the State of Maine held a general election for the office of Governor. Five candidates were on the ballot, including Republican candidate Paul LePage, Democratic candidate Elizabeth Mitchell, and three independent candidates, Eliot Cutler, Shawn Moody, and Kevin Scott.

On or about August 30, 2010, a website with the title of "The Secret File on Eliot Cutler" appeared at the address of www.cutlerfiles.com. It was a "publicly accessible site[] on the Internet," which is one of the communications media included within the scope of 21-A M.R.S.A. § 1014.

The homepage of the website accused Eliot Cutler of telling "outright lies on the campaign trail" and stated "He's a phony and a fraud." The page questioned Mr. Cutler's independence as a candidate and alleged that he left Bangor, Maine to attend an "elite private school." Without providing details, the homepage stated that the candidate's incompetence as a government manager "may have led to the deaths of 39 people." The website promised "to help voters see the full picture of the man" and encouraged them "to check back often. You'll find everything that Cutler doesn't want you to know." Other pages were devoted to different topics, such as Mr. Cutler's work as an attorney and his residency. Additional pages on different topics were added in the weeks leading up to the November 2, 2010 general election. The entire content of the website was focused on Eliot Cutler.

At its inception, the website expressly advocated for the defeat of Eliot Cutler in the gubernatorial election. Throughout its public posting, the website contained a number of sharply negative statements about Eliot Cutler that questioned his qualifications for office (trustworthiness, competence, *etc.*). During its first 10 or 11 days on the internet, (approximately

August 30 to September 9, 2010), the site also contained such phrases as "You'll see why Eliot Cutler is unfit to be Maine's next governor," "[Cutler] would make a lousy governor," "Eliot Cutler, alleged independent candidate for Maine governor." During this period, the website had no other reasonable meaning than to urge Mr. Cutler's defeat.

On September 9 or 10, 2010, the language on the website changed. Some of the most direct statements against Mr. Cutler's candidacy were removed, but references to the office of governor, and to Mr. Cutler's campaign and candidacy (including his motivation for running) continued. The website continued to challenge his qualifications for office.

The website was discontinued on or about October 29, 2010 – four days before the general election. The website was publicly accessible for two months.

Throughout its history, the Cutler Files website did not contain a statement of who made the expenditure for the website, which is a requirement of the disclaimer statute.

Initially, the website did not include a statement concerning whether any candidate authorized the communication. In the September 9 or 10 modifications, the message "Not paid for or authorized by any candidate" was added to the site, in capital letters.

Two individuals conducted the research that led to the creation of the Cutler Files website: Dennis Bailey and another individual who will be identified in this determination as John Doe #1 (referred to below as "JD1"). Neither individual was compensated in any way for the time they spent on research or development of the website.

Dennis Bailey is a well-known political and public relations professional based in Maine. He has worked on a number of candidate and ballot question campaigns. He served as the spokesperson for former Governor Angus King and for CasinosNO!, a leading anti-gambling organization in the state. In the 2010 gubernatorial elections, Mr. Bailey and his firm, Savvy, Inc., performed consulting services for Democratic primary candidate Rosa Scarcelli prior to the June 8, 2010 primary election. After the primary, Mr. Bailey worked as a paid consultant to the general election campaign for independent gubernatorial candidate Shawn Moody.

Much of the research material used to develop the content of the website was gathered by JD1, during the period from August or September 2009 through February, 2010. JD1 began researching Eliot Cutler after learning that Mr. Cutler was running for Governor in the 2010 elections. The research was mostly conducted through online searches of various facets of Mr. Cutler's professional and personal background. The research was compiled in a three-ring notebook of news articles. Most of the articles were obtained by JD1 at no cost, but in late 2009 JD1 personally incurred about \$12 of incidental expenses to procure news articles. JD1

conducted the research on his computer at home. He discontinued active research in or around February 2010. In August 2010, he spent an additional \$39 to copy a document from the Cumberland County Registry of Deeds. No individual or firm was compensated by JD1, Dennis Bailey, or any other source to research Eliot Cutler. The Commission's investigation confirmed from credible sources that JD1 was personally motivated to conduct the research and did so from home.

In late 2009, Mr. Bailey was aware that JD1 was conducting research concerning Mr. Cutler. Neither of them had specific plans at that time as to how the research would be used, but it appears likely that JD1 thought it could be used somehow in the November 2, 2010 general election. Soon after the primary election in June, Mr. Bailey tried unsuccessfully to interest members of the press in some parts of JD1's research.

During the summer of 2010, Dennis Bailey and JD1 decided to launch a website to publish the research. They believed that Eliot Cutler was not accurately describing his work and personal history. They were frustrated that the press had not covered Cutler's background, from their point of view. Dennis Bailey asserted that the goal of the website was to provide the research to the press, so that it would ultimately be disseminated to the public.

Mr. Bailey was experienced in the creation of websites. He registered the domain name for the site and, through his firm Savvy, Inc., paid the fees associated with registration and two months of hosting. Using the pseudonym Michael Blessing, Mr. Bailey set up an electronic mail account with the address of cutlerfiles@yahoo.com. Mr. Bailey communicated on behalf of the website using this e-mail address, including with news reporters, the Commission staff, and members of the public.

To develop content for the site, Mr. Bailey mostly relied on the research that had been conducted by JD1 in late 2009 and early 2010, but he purchased three additional news articles in August-September 2010. Mr. Bailey created the topical organization for the website. JD1 contributed some writing for the website, but Mr. Bailey edited all of the content and designed the graphics for the website using software installed on his computer. The modifications that were made to the content of the website during the time it was publicly accessible on the Internet (including the wording changes described herein), were made by Mr. Bailey. All of the expenditures made to design, register, post and maintain the website on the Internet were incurred by Mr. Bailey, through his consulting firm, Savvy, Inc.

The total cost of the website, including the payments made by Mr. Bailey (through Savvy, Inc.) and JD1 to obtain news articles and other documents used to develop the content, as well as the domain registration and web hosting fees, was \$91.38. Even though this amount is below the threshold for reporting as an independent expenditure under 21-A M.R.S.A. § 1019-B, the

Commission does not consider it to be a *de minimis* expenditure. A publicly accessible website such as this can reach a wide audience for a relatively low cost, and there are indications that the Cutler Files website was widely viewed. Based on a website report for www.cutlerfiles.com provided by Mr. Bailey, it appears that during the period of September 18 – October 29, 2010, visitors to the website made more than 30,000 page requests.

The staff's investigation confirmed allegations that, before the website was created, JD1 had attempted to sell his research to another gubernatorial campaign and to a political party for their use, for a much higher value than the cost of gathering the research. No one ever agreed to purchase the research material for any price

The website was created during the time period (August 2010) in which Mr. Bailey was serving as a paid political consultant for independent candidate Shawn Moody. During the investigation, Mr. Bailey stated to the Commission that Mr. Moody did not authorize the creation of the Cutler Files website and did not know anything about the website until it was mentioned in press reports in September 2010. Mr. Moody corroborated his lack of knowledge of, or authorization for, the website. The Commission found no evidence suggesting that any other candidate in the 2010 general election authorized the website.

During its two-month history, the website's homepage contained a misleading description of the persons responsible for the website. From September 9 to October 29, 2010, the description stated:

Who we are: **We are a group of researchers, writers and journalists** who are frustrated that Maine's mainstream media is either unwilling or incapable of adequately investigating the backgrounds of candidates for higher office. **We are not** authorized by or **affiliated with any candidate** or political party, and we have not been compensated in any way for our effort. . . .¹

(Emphasis added.) The statement "We are not . . . affiliated with any candidate" is false. During the summer and fall of 2010, Mr. Bailey was affiliated as a political consultant with a candidate for Governor in the general election, Shawn Moody, even though Mr. Moody did not authorize or pay for Mr. Bailey's work on the website. JD1 was a private citizen unaffiliated with any candidate in the general election.

The statement that "we are a group of researchers, writers, and journalists" implied that the website authors presently worked professionally as researchers, writers, or as journalists. In

¹ Prior to September 9-10, the website's homepage included a similar statement that described the authors as "a group of researchers, writers and journalists" who were "unaffiliated with any candidate."

fact, although Mr. Bailey is a former newspaper reporter, neither JD1 nor Mr. Bailey worked in those professions during the fall of 2010. Nevertheless, the website did not contain any statement that falsely identified another specific person or organization as the party responsible for the website.

The content of the Cutler Files website was entirely dedicated to the single topic of gubernatorial candidate Eliot Cutler. The website existed for a specific and limited time only. It first appeared just prior to the gubernatorial election and was taken down shortly before the election. The Cutler Files website did not have any of the indicia of a periodical publication that may be exempted from the definition of “expenditure” in 21-A M.R.S.A. § 1012(3)(B)(1).²

III. Conclusions of Law

Based on the above findings of fact, and consideration of all legal arguments presented, the Commission concludes that:

A. The Cutler Files website is not a “news story, commentary [or] editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication,” and thus is not exempt from the definition of expenditure under 21-A M.R.S.A. § 1012(3)(B)(1).

B. By making expenditures, through Savvy, Inc., to finance a communication through a publicly accessible site on the Internet that expressly advocated against the election of Eliot Cutler for Governor, and by not including within the website a clear and conspicuous statement of the name and address of the person who paid for the website, Dennis Bailey violated 21-A M.R.S.A. § 1014(2).

C. By making expenditures, through Savvy, Inc., to finance a communication through a publicly accessible site on the Internet that expressly advocated against the election of Eliot Cutler for Governor and, for the period of August 30 to September 9, 2010, by not including within the website a clear and conspicuous statement that it was “NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE,” Dennis Bailey violated 21-A M.R.S.A. § 1014(2).

D. By making expenditures, through Savvy, Inc., to finance a communication through a publicly accessible site on the Internet that named and depicted Eliot Cutler as a clearly identified candidate during the 35 days prior to the general election on November 2,

² “The term expenditure...does not include...[a]ny 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....” (21-A M.R.S.A. § 1012(3)(B)(1))

2010, without stating the name and address of the person who paid for the website, Dennis Bailey also violated 21-A M.R.S.A. § 1014(2-A).

E. Although he did most of the research and wrote some material for Dennis Bailey to use in developing the Cutler Files website, John Doe #1 did not pay the actual costs of posting the material on a publicly accessible site on the Internet, and thus did not make an expenditure to finance a communication within the scope of 21-A M.R.S.A. § 1014 and did not violate that statute.

F. Because the total amount expended for the communication on the Cutler Files website was less than one hundred dollars (\$100.00), no independent expenditure report was required to be filed under 21-A M.R.S.A. § 1019-B.

G. Statements on the Cutler Files website describing the authors as “a group of researchers, writers and journalists...not...affiliated with any candidate” were misleading to the public given that Dennis Bailey was affiliated with a candidate during the entire period this website was publicly available, but there was no misrepresentation of the name or address of the person who made or financed the communication within the meaning of 21-A M.R.S.A. § 1014(4).³

IV. Order

For violating 21-A M.R.S.A. §§ 1014(2) and (2-A), Dennis Bailey is directed to pay a penalty of two hundred dollars (\$200.00).

Dated at Augusta, Maine, this ____ day of January, 2011.

Walter F. McKee, Chair
Commission on Governmental Ethics
and Election Practices

NOTICE OF APPEAL RIGHTS: Any person aggrieved by this final determination has a right to seek judicial review by filing a Petition for Review in Superior Court, within 30 days of receipt of the determination, in accordance with 5 M.R.S.A. §§ 11001 & 11002 and Rule 80C of the Maine Rules of Civil Procedure.

³ The Commission’s conclusions A through F were based on unanimous votes. There was a divided vote on conclusion G, with Commissioners Duchette and Healy voting to find that the website did misrepresent the identity of the sponsor within the meaning of subsection 1014(4).

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January 21, 2011

Walter F. McKee, Esq.

Chairman

Governmental Ethics Commission

Maine Commission on Governmental Ethics and Election Practices

135 State House Station

Augusta, ME 04333

Cutlerfiles Website:

RE: Amended Complaint against Thom Rhoads and Dennis
Bailey and Request for Finding of Fact

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

We are writing to request that the Commission adopt a finding of fact as part of its
decision regarding the Cutlerfiles website that identifies both Thom Rhoads and Dennis
Bailey as the two individuals referred to as John Doe #1 and John Doe #2 at its December
20, 2010 meeting.

The identity of both of these individuals is of great public interest, and now that the
Commission has found that the Cutler Files website was required to contain a disclaimer
under 21-A M.R.S.A 1014(B)(2) and (2-A), the rationale originally advanced for
providing anonymity to the sites creators (that the website could not Constitutionally be
required to contain such a disclaimer) is no longer applicable. The Commission is not
Constitutionally constrained from releasing both names at this point, and it should not
hesitate to do so.

To the extent that the Commission still has concerns about releasing both names, please
consider this letter an amendment of our complaint pursuant to 94 CMR 270, Chapter 1,
Section 4(2)(C) identifying Thom Rhoads and Dennis Bailey as the individuals who
provided the research, writing, editing and graphics for the Cutler Files website and
directing our complaint against them as the two individuals responsible for the website

which lacked the disclaimer required by 21-A MRS §1014(B)(2) and (2-A).¹ There is no Constitutional or statutory right for a named individual against whom a complaint has been filed to receive anonymity from the Commission as part of its investigation or decisions under Chapter 1, Section 4(2)(C). Furthermore it has not been Commission practice to ever provide any named individual with anonymity with regard to complaints filed under Chapter 1, Section 4(2)(C), even where no violation of campaign law is ultimately found. To the contrary, pursuant to 1 MRSA § 1003(2), the Commission is required to issue a public finding of fact on our complaint. In 2007, the Maine Legislature passed “An Act to Promote Transparency and Accountability in Campaigns and Governmental Ethics” 2007 P.L. c. 642. That law deleted former 1 MRSA § 1013(3) which stated the former rule that “all complaints shall be confidential until the investigation is complete” and replaced it with the current 1 MRSA § 1013(3-A) which limits the Commissions ability to keep confidential only to “a complaint alleging a violation of legislative ethics.”²

(1) The Commission should not allow itself to be used to give an official imprimatur to a disinformation campaign made to the public.

By failing to identify both Thom Rhoads and Dennis Bailey, the Commission allows itself to be used as a means of giving official credence to a campaign of disinformation and misrepresentations being waged publicly by those individuals and others with actual knowledge of the circumstances surrounding the Cutlerfiles website. It gives the appearance that the Maine Ethics Commission is actively shielding one of the authors of the unlawful website from public scrutiny and assisting in his efforts to deny and cover up his involvement.

The Morning Sentinel³ quotes Dennis Bailey as having told the paper in October that he was not the “author” of the website. The article goes on:

While Bailey claims he never actually lied to the press and simply found creative ways to hide the truth about his authorship of the Cutler Files, he certainly seems to have lied to the commission staff.

In e-mails, he writes that “I don’t have much to tell you” and “I have limited info” about the site. He now admits that he built the site himself and that he knew every detail of its creation.

¹ This amendment is requested on information and belief based on the fact that Thom Rhoads and Dennis Bailey have been publicly identified by the Portland Press Herald and the Lewiston Sun Journal as the authors of the website, and Dennis Bailey has publicly admitted on his website to being an author of the Cutlerfiles. It is further based on the information previously provided to the Commission with regard to our understanding that Thom Rhoads offered to sell the research published on the site for \$30,000. This amendment is timely because the Commission has not yet made a final agency action with regard to our complaint. *Lindemann v. Commission on Governmental Ethics and Election Practices*, 2008 ME 187, ¶13, 961 A.2d 538, 543 (“The Commission’s final agency action occurred when it voted *and* issued a written enforcement decision on the matter.”) (emphasis added)

² 1 MRSA §§ 1003(2), 1013(3-A) completely distinguishes the Commission’s legislative mandate from that analyzed in *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001) in which the statute mandated the opposite result. Furthermore, under *AFL-CIO*, the names of the parties complained against and the finding that those named parties had not violated the law were made public under the reasoning in that case.

³ Mike Tipping: Online anonymity allows commenters to circumvent rules, *Morning Sentinel* (January 9, 2011)

The Portland Press Herald⁴ quotes Thom Rhoads as saying "I can unequivocally state that I am not the author, owner or creator of the Cutler Files, nor did I post any information on it or any other website." The Press Herald further reports that "Rhoads and Scarcelli denied involvement to the Press Herald in October" and then further quotes Scarcelli citing the Ethics Commission investigation as providing support for that position: "The allegations were fully investigated by the commission and they found no involvement by me or my campaign."

The Commission should not allow itself to be used as part of a disinformation campaign, even if it has decided not to pursue a violation against Thom Rhoads.

(2) Implementation of the Maine Code of Fair Campaign Practices Requires Our Requested Finding of Fact

Given the denials described above, the Commission should issue our requested finding of fact pursuant to its responsibility to implement the Maine Code of Fair Campaign Practices Pledge. *See* Statement of Fact to LD 2158, An Act to Discourage Negative Campaign Practices, (establishing the Maine Code of Fair Campaign Practices, codified at 21-A M.R.S. § 1101 *et seq*):

The purpose of this bill is to provide a mechanism to identify and discourage the use of negative campaign practices which by distorting the truth, unfairly influence the voters and skew the election process.

As a candidate for Governor in this election cycle, Thom Rhoad's spouse, for whom Dennis Bailey was employed as a political consultant, signed a pledge to follow the Maine Code of Fair Campaign Practices, on file with the Commission pursuant to 21-A M.R.S. § 1101, which pledges not to "use or authorize and [to] condemn material relating to my campaign that falsifies, misrepresents, or distorts the facts, including but not limited to malicious or unfounded accusations creating or exploiting doubts as to the morality, patriotism or motivations of any party or candidate." It further pledges "to repudiate any individual or group that resorts ... to methods in violation of the letter or spirit of [the] Code." Rather than repudiate the involvement of Thom Rhoads and her consultant Dennis Bailey, however, she was quoted by the *Portland Press Herald* as saying that Eliot Cutler should "man up."⁵ She was more recently quoted as saying she and her campaign—presumably including Thom Rhoads who was part of her campaign—had been exonerated by the Commission: "The allegations were fully investigated by the commission and they found no involvement by me or my campaign."⁶

The effectiveness of the Maine Fair Campaign Pledge depends entirely on public knowledge of the political activities of those involved in campaigns and on the weight of public opinion against use of unfair campaign practices. If the Commission shields the identity of the members of the

⁴ Susan Cover, Documents reveal Cutler Files probe focused on trio, *The Portland Press Herald* (January 7, 2011)

⁵ *The Portland Press Herald*, Website attacking Cutler still a mystery, October 27, 2010.

⁶ *The Portland Press Herald*, Documents reveal Cutler Files probe focused on trio, by Susan Cover, January 7, 2011.

inner circle of political campaigns who engage in unfair campaign practices, the Commission will defeat the purposes of the Pledge and help to create the type of shame free zone that the Maine Fair Campaign Pledge is designed to prevent.

In order to properly implement the Maine Code of Fair Campaign Practices Pledge, the Commission should identify Thom Rhoads as the individual who conducted and paid for most of the research and contributed some of the writing of the Cutler Files website.

(3) The Commission Should Issue Findings of Facts Sufficient to Explain Why the Commission Determined that Dennis Bailey Violated Section 1014 but That the Second Individual Responsible for the Cutlerfiles Website Did Not.

Jonathan Wayne, in his December report to the Commission stated that both individuals behind the Cutler Files website "contributed writing for the website." The Commission, by a 5-0 vote at the December 20 meeting found that the Cutler Files website was required to contain a disclaimer under 21 M.R.S.A 1014(B)(2) and (2-A) that included "the name and address of the person who made or financed the expenditure for the communication." It did so as part of a vote that found that Dennis Bailey had violated Section 1014(B) but that the other individual responsible for the development of the website had not.

The Commission's vote necessitates that it issue our requested finding of fact. It should be noted that if the Commission had voted not to take action on the complaint with regard to the second individual, then that enforcement decision would not be appealable. *Lindemann v. Commission on Governmental Ethics and Election Practices*, 2008 ME 187, ¶¶17, 961 A.2d 538, 554. However, because the Commission voted instead to find no violation it must provide findings of fact sufficient to explain its decision pursuant to 5 MRSA §9061. As an aggrieved party, we will have the ability to appeal a final agency action that is not properly explained.⁷ Unexplained, the Commission's decision is very unclear as to how one but not both of the individuals involved could have violated the law.⁸

For that reason, we ask that the Commission, as part of its final agency action in this matter, adopt findings of fact which accurately reflect the results of its investigation on this point and provide the basis for its conclusion of law. As we understand the basis for the Commission's decision not to take action against the second individual, a finding of fact along the following lines should be adopted by the Commission:

⁷ In contrast to *Lindemann*, a candidate complaining of a violation of 21-A MRSA 1014 can establish aggrieved party status under the Maine APA because 21-A MRSA 1014(B) expressly applies to statements about such a candidate.

⁸ Dennis Bailey apparently shares our concerns as he stated on his website, "I'm not a lawyer, so I don't really understand how two people can create a website that supposedly violates campaign laws, but only one of them gets fined – just \$200 (John Doe 1, who has chosen to stay anonymous, has been exonerated by the Commission)." Much of the public likely also shares this concern.

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Thom Rhoads conducted and paid for the majority of the research, and contributed some of the writing for the Cutlerfiles website. He did not, however, pay the actual costs of posting the Cutlerfiles website on the Internet and thus, did not make an expenditure for a communication covered by 1014(B).

The Commission's adoption of such a finding of fact would properly inform the public as to who was behind the Cutlerfiles website; it would put an end to the campaign of disinformation that has ensued; and would enable the public to make an informed decision regarding the candidate's compliance with the Commission's Fair Campaign Pledge.

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, and
David M. Kallin
Attorneys for Cutler 2010.

RAS/kmr

cc: Eliot Cutler
Paul Lavin
Jonathan Wayne
Phyllis Gardiner, Esq.
Michael Nelson, Esq.

January 9

MIKE TIPPING: Online anonymity allows commenters to circumvent rules

The Cutler Files website has received a lot more media attention than a \$15 domain name and some web-based political rants probably deserve.

In large part, this is because of the mystery surrounding the site, the coverup of its origins and the continuing crusade by Eliot Cutler's legal team to have the site investigated and the authors punished.

It's also a popular topic because it's an example of a larger debate about online anonymity in politics, something the media has wrestled with since the first political blogs and chain e-mails. The issue has come into its own as wider participation in social media has made online political speech a force to be reckoned with in even the smallest local elections.

Online anonymity has been a major topic of discussion for newspapers as they decide how to regulate their online comments sections. The MaineToday papers and the Lewiston Sun Journal all have overhauled their commenting mechanisms and policies recently in attempts to better regulate online speech and promote more honest online discussion.

In fact, the threat of online political postings by campaign operatives writing anonymously or under pseudonyms was one of the leading reasons why the Sun Journal instituted its new policy of requiring users to register with their full names and phone numbers before they can comment on the news of the day.

"There's mounting evidence that political agents employed to tilt public debate in favor of their candidate or issue have been using anonymous comments on news sites to amplify their message and attack opponents," wrote political reporter Steve Mistler in a column last week.

This became a particular concern for the newspaper after political partisans flooded the comments section of an article revealing that Republican Congressional candidate Jason Levesque had his license suspended for

speeding violations. The volume of comments seems to have been a coordinated, partisan effort to downplay the violations.

While the reliance on phone number-based account verification likely will prevent some of the less-motivated political partisans from abusing the commenting system, it won't stop more sophisticated and less scrupulous operatives. Anyone can think up some fake names, spend a few minutes signing up for online services that provide free phone numbers and use some rudimentary anonymity tools in order to create multiple, pseudonymous accounts that bypass these restrictions.

I'm not sure anyone has an answer for how to create an open, online forum that allows real discussion instead of the flagging of individual agendas. The closest approaches I've seen to achieving this ideal are those websites that focus on creating a real online community through dialogue and a sense of common focus or understanding.

MetaFilter.com is my favorite example and provides some of the web's best commentary. I'm sure charging users a \$5 fee to join the discussion has something to do with its success. Even if newspapers charged a fee to register an account, however, it wouldn't stop political operatives from pushing agendas (although credit card records might make it more difficult for them to do so anonymously).

This specific issue of paid commenters also was raised during the investigation of the Cutler Files. Cutler campaign manager Ted O'Meara noted in an e-mail to Ethics Commission Director Jonathan Wayne that a certain anonymous commenter on the Portland Press Herald's website who was promoting the Cutler Files also had posted comments supporting Rosa Scarcelli and Angus King. Those anonymous posts used language similar to posts found on the personal blog of Dennis Bailey.

The obvious implication was that Bailey, the political operative who worked for both King and Scarcelli and who later admitted to having authored the Cutler Files site, had some involvement in the website and was doing some anonymous online shilling for the Files on a newspaper website.

The e-mail was obtained by the Kennebec Journal through a Freedom of Access request and published online as part of a trove of documents from the Ethics Commission's investigation.

Another interesting revelation from those documents: While Bailey claims he never actually lied to the press and simply found creative ways to hide the truth

about his authorship of the Cutler Files, he certainly seems to have lied to the commission staff.

In e-mails, he writes that “I don’t have much to tell you” and “I have limited info” about the site. He now admits that he built the site himself and that he knew every detail of its creation.

Mike Tipping is a political junkie. He writes the Tipping Point blog on Maine politics at DownEast.com, his own blog at MainePolitics.net and works for the Maine People's Alliance and the Maine People's Resource Center. He's @miketipping on Twitter.

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Cutler Files Authors Face Political Repercussions

Submitted by Mike Topping on Wed 12/29/20 0 - 2 01pm Maine Politics

Now that political operative Dennis Bailey has admitted his role in authoring the Cutler Files, an attack site launched during the campaign against independent gubernatorial candidate Eliot Cutler, and the Lewiston Sun Journal reports that they have confirmed the identity of the second author as Thom Rhoads, husband to former Democratic gubernatorial candidate Rosa Scarcelli, now may be a good time to look back and see what these two and others said about the site over the past few months



While Bailey claims that he "tried very hard not to lie" to the press, he skirted and hid the truth well enough to give reporters the impression that he wasn't responsible for the site.

An October 28th Press Herald article reported that "[Bailey] said he called the commission because a member of Cutler's campaign staff had accused him of being the author of The Cutler Files and he wanted to make it clear that he is not."

An October 14th Associated Press piece noted that Bailey "denies having any knowledge about the site's creator."

Bailey's prevaricating and the fine leveled against him by the Ethics Commission for failing to disclose his authorship of the site may harm his credibility with the media and the public, but the incident is unlikely to have as large an impact on his career as it will on that of Rhoads and his wife, if it's true that he's the second author.

For Rhoads, this may be a case of the old adage that the coverup is worse than the crime. Unlike Bailey, he repeatedly and vehemently denied his involvement in the site

"I can unequivocally state that I am not the author, owner or creator of The Cutler Files, nor did I post any information on it or any other website. I don't know why my name is being brought into this. It's pure rumor," Rhoads wrote in an email to the Press Herald.

Rhoads' wife Scarcelli has taken steps to remain in the political spotlight since her loss in the Democratic primary. She has relaunched and maintained her campaign website, spoken out in favor of the national No Labels political group, and writes a weekly column for the Bangor Daily News, all signs that she may still have designs on high office.

If she does run again, she will now almost certainly face accusations of engaging in dirty politics. Even if she denies involvement in the site, it will be hard for her to distance herself from the actions of her husband and top campaign strategist

It's also interesting to note that the Press Herald apparently had the story right back in October, when the paper published its front-page, uncredited article citing anonymous sources naming Bailey and Rhoads

As late as earlier this week, some were still faulting the Press Herald for this reporting

"Everyone with any connection inside politics except for Rich Connor and the dolts at PPH knows who they are!" wrote WGAN radio talk show host Mike Violette in a blog post on Tuesday. "Knowing who they are makes me truly believe in the old saying that 'politics makes strange bedfellows' because these people get along like cats and dogs, believe me!"

A more complete story of the creation of the site will likely come out over the next few days and weeks, as the Ethics Commission releases more information about their investigation, including responses to freedom of information requests filed by several Maine journalists.

Cutlerfiles Memo Identifies Website's Creators

01/06/2011 Reported By: Susan Sharon

Documents released today by the Maine Ethics Commission raise more questions about an anonymous website that attacked Independent gubernatorial candidate Eliot Cutler during his campaign. Among the documents released in response to a Freedom of Access request by several Maine newspapers and by MPBN, is an October 17th memo from Cutler's attorney to the commission, which names a former candidate's husband and her political strategist as the authors of of the website.

Related Media	
Cutlerfiles Memo Identifies Website's Creators Originally Aired: 1/6/2011 5:30 PM	 Duration: 3:45

The October memo from attorney Richard Spencer to Jonathan Wayne of the Maine Ethics Commission names unsuccessful Democratic candidate Rosa Scarcelli's political strategist and her husband, Thom Rhoads, as the authors of the Cutler files website.

The memo also suggests that Rhoads tried to sell his opposition research file on Cutler to Democrat Libby Mitchell's campaign for \$30,000. The authors had suggested that their work was journalistic in nature and not be worth much financially. But if there had been an attempt by Rhoads to sell it, Spencer says that would suggest there was value to the information.

"My view was that if that were the case, it established that there was substantial street value to the research that was used to put together the character assassination website that was posted," Spencer says.

Spencer says he also wanted the commission to find out whether Scarcelli's political adviser, Dennis Bailey, was paid to work on the website before and after she lost her primary election. Bailey was paid \$27,000 for his consulting work with Scarcelli. He then went on to work for Independent gubernatorial candidate Shawn Moody in the general election.

But Bailey says neither Scarcelli nor Moody knew about the Cutler files. And despite misleading reporters about his role in the website in earlier statements, Bailey recently came clean on his personal blog. He says he manipulated reporters out of loyalty to Moody.

"I said things like: 'I wish I could take full responsibility for it,' or something like that, and the press would paraphrase that often as: 'He said he wasn't involved.' You won't find a direct quote of me saying: 'I didn't do it.' And the reason was I was trying to protect Shawn Moody," Bailey says. "Shawn's a great guy. I have respect for him. He was not involved in it. I didn't want people speculating, thinking that he was."

Spencer's memo also requested that commission staff investigate whether the Scarcelli campaign's \$20,000 expenditure to LinkStrategies in Iowa for research in the summer of 2009 was for opposition research directed at Eliot Cutler as a potential opponent of Scarcelli's in the general election.

Spencer writes that Linkstrategies is described in a Washington Post blog as an "opposition research firm." "The commission staff," Spencer writes, "should determine whether any portion of the \$20,000 LinkStrategies research expenditure should be considered an expenditure on the Cutlerfiles website."

"My goal is to have the commission do its job and carry out the law and that's basically the way I think this should proceed," Spencer says. "So until they do that I really don't want to comment further."

During its investigation of the Cutlerfiles website, the Maine Ethics Commission has referred to the anonymous authors as John Doe #1 and John Doe #2. The Commission found that John Doe #2 violated election law by making expenditures for a website that did not include a disclaimer identifying who paid for it. That person has since identified himself as Dennis Bailey. But because John Doe #1 did not violate election law, the commission has no plans to identify him.

For their part, both Thom Rhoads and Rosa Scarcelli have been quoted as saying they were not involved and did not contribute to the Cutlerfiles. Scarcelli did not return telephone calls to MPBN for this story.

The campaign spokesman for the Mitchell campaign also did not return telephone calls for this story. Jonathan Wayne of the Maine Ethics Commission says the investigation is concluded and there has been "no specific finding with regard to Rosa Scarcelli."

State

Ethics panel denies access to names in Cutler Files case

By Judith Meyer, Managing Editor/days

Published Jan 05, 2011 12:00 am | Last updated Jan 05, 2011 12:00 am

LEWISTON — On Tuesday, the Maine Commission on Governmental Ethics partially denied a series of Freedom of Access Act requests filed by Maine media outlets regarding the Cutler Files hearings before the commission last month.

The Sun Journal, the Kennebec Journal, the Bangor Daily News and the Maine Public Broadcasting Network filed FOAA requests with the commission seeking access to documents relating to the commission's Dec. 20 finding that John Doe 2, so-called, violated Maine's campaign disclosure laws. The documents the commission has agreed to release include about 160 e-mails and 50 other types of documents, according to Paul Lavin, assistant director of the Maine Ethics Commission. The commission has declined to release all paperwork it defines as "investigative working papers," which includes all documents that "provide the identities of John Doe 1 and John Doe 2," according to Lavin.

The commission decided, during its Dec. 20 hearing, to honor the request of the two men behind the Cutler Files' to remain anonymous, at least until the commission meets again on Jan. 27. That decision of blanket anonymity prompted the flurry of FOAA requests from Maine media seeking access to the identities of the men.

One of those men, John Doe 2, is Portland political operative and Saavy Inc. President Dennis Bailey, who went public after the Sun Journal informed him it intended to reveal his identity in a report published Dec. 24.

The second man, known in commission paperwork as John Doe 1, is Thom Rhoads, husband of Democrat gubernatorial candidate Rose Scarcelli of Portland.

Rhoads has declined to claim his identity since the commission's finding against Bailey and, according to commission staff, since the commission did not find that Rhoads had violated state election laws, it did not intend to formally name him as Bailey's partner in editing the online-only Secret File on Eliot Cutler.

October 27, 2010

Website attacking Cutler still a mystery

MaineToday Media experts are trying to identify its creators, and the state ethics commission is investigating.

From staff reports

Somebody is monkeying around with our politics.

With a gubernatorial race marred by complaints about negative advertising and campaigning, it may take a rock 'n' roll trivia buff to get to the bottom of the most talked about dirty trick thus far.

Who is Michael Blessing?

A. A pseudonym for Michael Nesmith, a founding member of the 1960s rock band The Monkees, which also had a hit TV show?

B. A person or persons throwing stones from behind the Internet wall of anonymity?

C. The person or collective persona of those who created and posted the anti-Eliot Cutler website "The Secret File on Eliot Cutler."

The correct answer is all three.

Nesmith, who had a hit song about always "monkeying around," sometimes uses the alias Michael Blessing.

That is also the name used to register a website popularly known as "The Cutler Files," which tears down the independent gubernatorial candidate for everything from his government service to his legal career to his wealth.

Cutler, a Cape Elizabeth lawyer, says the website is defamatory and violates Maine's "expressed advocacy" law regulating messaging that advocates for or against a particular candidate. At his request, cutlerfiles.com is now the focus of a Maine ethics commission investigation, which is expected to wrap up at some

point after voters have elected a winner.

That doesn't matter to Cutler, who says he's pressing the issue to make a point against anonymous insults and a sullyng of the election process. He and his staff argue that they have little to gain by continuing to call public attention to a website that contains only negative information about the candidate.

So who might be behind it?

MaineToday Media has employed two Internet experts to investigate who might be behind the creation of the website. Thus far, they have determined that it is hosted by a private registrar in Scottsdale, Ariz., which serves people who do not want their identities revealed.

Someone calling himself Michael Blessing told MaineToday Media's Susan Cover in an e-mail in late September that several people are behind the site, and that their activities are protected free speech under the First Amendment to the U.S. Constitution.

"Mr. Cutler and his lawyers are simply trying to censor free speech and block the dissemination of accurate, truthful information," the person wrote in the e-mail.

The people behind the site apparently aren't in favor of any particular candidate, they simply want Cutler to lose.

The ethics commission's investigation is focused on how much the website's creators have spent building the site, including research, and whether any party committee or political action committee authorized it.

The commission's executive director, Jonathan Wayne, who is leading the investigation, said Monday that he probably won't report back to the commission until after Tuesday's election.

He said he is requesting various types of information and may issue a subpoena to compel people to give him information. He said the commission has instructed him to proceed confidentially and shield documents from public view when possible.

From a legal standpoint, it appears that the issue before the commission is not the identity of the website's creators, but whether they violated a provision of the state's election law that requires the reporting of independent expenditures of more than \$100.

In a letter to the commission on Oct. 19, Cutler's attorney, Richard Spencer,

focused on the money trail, not the constitutional issues of anonymous speech.

According to an anonymous affidavit filed Oct. 14 by the site's creators, the website had spent a total of only \$92.54, and the money had come from personal funds.

The affidavit said two people are involved in the website, while others provided suggestions that were incorporated into the content. It said that nobody was paid for their work, and that most of the research information was obtained for free on the Internet.

The affidavit said the motivation for the site is "purely personal," and that the idea did not emerge until this summer.

Spencer told the Commission on Governmental Ethics and Election Practices that it should not accept the affidavit at face value and should instead launch an investigation. If the commission finds the website's creators have spent more than \$100, it should require them to file an independent expenditure report, he said.

Spencer said Maine voters have the right to know how much has been spent on the website, who is paying for it and whether they have been acting in concert with a political campaign, political party or political action committee.

More than a month ago, Wayne interviewed Dennis Bailey, president of Portland-based Savvy Inc., about the site. Bailey, a former reporter for The Portland Press Herald and the campaign spokesman for Rosa Scarcelli, a Democratic candidate for governor in the primary, said he was not subpoenaed.

He said he called the commission because a member of Cutler's campaign staff had accused him of being the author of The Cutler Files and he wanted to make it clear that he is not.

Bailey said he was willing to testify under oath, but Wayne never got back to him.

Controversy over the website doesn't help Cutler politically because it gives the site more public attention, Cutler said in an interview Monday. He said he raised the issue with the ethics commission because he wants to protect the integrity of Maine's election laws. Such campaign tactics are "poisoning" the state's political culture, he said.

The website tries to poke holes in Cutler's resume and attacks his character, calling him a "phony and a fraud."

Cutler said it's particularly upsetting that the site holds him responsible for the deaths of 39 people in Georgia in 1977 when a dam collapsed.

While Cutler was working in the Office of Management and Budget in the Carter administration, according to the site, OMB officials delayed the paperwork that was necessary to release the funds to pay for the dam inspection, despite warnings that many of the nation's private dams could fail.

The website details the horrors of the dam collapse, including witnesses' accounts and a video of the destruction.

"It makes me sick that people will do this," Cutler said.

He said he's almost certain who is behind the site, but he would not identify the authors.

"Until I prove it, I am not going to lower myself to that level of integrity," he said.

The Portland Press Herald has been contacted by several people who anonymously identify Bailey, Scarcelli and her husband, Thomas Rhoads, a writer and researcher, as authors of The Cutler Files.

Scarcelli said in an interview that she and her husband have nothing to do with the website and that the rumors of their involvement are offensive. She said she hasn't even seen the site.

"I have absolutely nothing to do with The Cutler Files, and I haven't even looked at the website," she said. "Eliot Cutler is playing the victim, and people in Maine want him to man up."

In an e-mail to the Press Herald on Tuesday, Rhoads said: "I can unequivocally state that I am not the author, owner or creator of The Cutler Files, nor did I post any information on it or any other website. I have not been contacted or interviewed by the ethics commission. I don't know why my name is being brought into this. It's pure rumor."

Anonymous speech is constitutionally protected, said Dan Billings, an attorney who has been hired by The Cutler Files' authors to represent them before the ethics commission. During colonial times and the early decades of the United States, writers often adopted pseudonyms to attack politicians in essays published in pamphlets and newspapers.

In today's world of blogs and anonymous comments on newspaper websites, anonymous speech is even more accepted, he said.

"On the Internet, there is even more of a tradition and expectation that people can speak both freely and anonymously," he said.

Staff Writer Tom Bell contributed to this story.

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January 7

Documents reveal Cutler Files probe focused on trio

An attorney for Eliot Cutler also claimed the Mitchell campaign turned down an offer to buy the research.

By [Susan M. Coverscover@mainetoday.com](mailto:Susan.M.Coverscover@mainetoday.com)
MaineToday Media State House Writer

AUGUSTA - In a memo last fall, an attorney for former independent gubernatorial candidate **Eliot Cutler** said Thom Rhoads, the husband of Rosa Scarcelli, and political consultant Dennis Bailey were behind the Cutler Files website, according to documents released this week.



[click image to enlarge](#)

Dennis Bailey

The Maine Commission on Governmental Ethics and Election Practices have released some 163 e-mails related to the Cutler Files, which are available here.

S/div>

Attorney Richard Spencer, who filed a complaint against the website in September on behalf of Cutler, urged Maine's ethics commission to investigate Scarcelli, Rhoads and Bailey in connection with the site.

Spencer told the commission's executive director, Jonathan Wayne, that Rhoads and Bailey should be questioned under oath about how much money was spent on the site, and whether the site was connected to Scarcelli's campaign for the Democratic gubernatorial nomination.

"The commission staff should investigate to determine who owned the Cutler Files research materials at the end of the primary campaign," Spencer wrote in the undated memo. "Was it the Scarcelli campaign, the candidate, the candidate's spouse, Mr. Bailey as the campaign's political consultant, or someone else?"

The document was one of dozens released this week by the Maine Commission on Governmental Ethics and Election Practices in response to a Freedom of Access Act request by the newspapers of MaineToday Media: the Kennebec Journal, the Morning Sentinel and The Portland Press Herald/Maine Sunday Telegram.

The documents and e-mails show that the investigation initiated by ethics officials in September focused on the three, although others also were interviewed, Wayne said. Other documents, considered confidential, were not released.

Bailey said Spencer's memo contained a lot of speculation that eventually was proven false by the commission.

"Everything in there has been investigated and most of it was baloney," he said.

Spencer's memo reveals another twist in the story. He alleges that Rhoads tried to sell his research on Cutler to the gubernatorial campaign of Democrat Libby

Mitchell for \$30,000.

He said Mitchell's campaign manager, Jesse Connolly, told Cutler's campaign manager, Ted O'Meara, at a candidate forum in Saco in September that Rhoads had offered to sell the information.

The Mitchell campaign, which was using public money for campaign expenses, did not buy it.

Connolly did not return a call seeking comment Thursday. Mitchell said she was not personally approached by Rhoads and referred all questions to Connolly.

The Cutler Files investigation began after Cutler alleged that the website, which was highly critical of Cutler, did not comply with state election laws.

In particular, the state requires campaign communications that advocate for or against an identified candidate to disclose who's behind the information. The Cutler Files did not.

Also, the Cutler campaign alleged that the site likely cost more than \$100, and so would have been required to be reported as a campaign expense.

In December, the commission voted to fine someone identified only as John Doe II \$200 for failing to list the proper disclosure. Later that week, Bailey came forward on his website, savvyspin.com, to admit that he was John Doe II and "one of the creators of the Cutler Files."

The commission did not find evidence to support the claim that the site cost more than \$100.

From the start, those behind the site said they believed they had a First Amendment right to anonymous political speech.

The commission has not identified John Doe I, although the Press Herald and other Maine newspapers have reported that it is Rhoads. Rhoads and Scarcelli denied involvement to the Press Herald in October.

Scarcelli, in a statement issued Thursday, repeated that denial.

"Dick Spencer has been making these allegations since this past fall," Scarcelli said in an e-mail. "The allegations were fully investigated by the commission and they found no involvement by me or my campaign. I continue to stand by my statement that I had no involvement."

Rhoads, a writer and researcher, sent an e-mail to the Press Herald in October that said: "I can unequivocally state that I am not the author, owner or creator of the Cutler Files, nor did I post any information on it or any other website."

In his report to the commission in December, Wayne said one of the two people behind the Cutler Files did most of the research from August 2009 to February 2010, and that both people "contributed writing for the website." The researcher was not paid.

Bailey said in October that he was not the "author" of the site. He later said in his blog that he did not disclose his involvement because he was working for another candidate at the time and wanted to protect him "from any negative fallout."

Bailey said Thursday that Scarcelli, who finished third in the four-way Democratic primary in June, was not involved.

"She was totally in the dark," he said. "She had no knowledge of it."

Bailey said he would not identify John Doe I.

"He's got a right to be anonymous just like the readers on your website," he said. "Two guys put together some information that to this day no one has ever disputed, and that's really it."

Scarcelli paid Bailey \$33,000 from September 2009 through June 2010 for his work as a campaign consultant, according to ethics commission records.

Also released by the ethics commission this week was a commission letter requesting an interview with Scarcelli's campaign manager, Patsy Wiggins, in regard to the Cutler Files. Wayne declined to say Thursday whether that interview happened.

In another document released this week, one of the website's authors tried to explain why they felt it was important to remain anonymous:

"The thought was that if we put our name on it, people would check our party registrations and any past connections and conclude that we are just doing this website on behalf of one of the candidates or parties, and they would lose sight of what we are trying to say: that Eliot Cutler is not who he pretends to be. What we didn't expect was that people, and the press, are assuming it anyway, and they're spending all their time chasing the authors of the website instead of looking at what we're saying. We're (expletive) either way."

On Jan. 27, the ethics commission will meet to formalize its December decision to fine Bailey. Wayne said the commission will not reveal the name of the other John Doe "because commissioners did not find that person violated campaign finance law."

MaineToday Media State House Writer Susan M. Cover can be contacted at 620-7015 or at:

scover@mainetoday.com

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January 24, 2011

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

Re: *In the Matter of the Cutler Files Website*

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

We represent the individual designated by the Commission as John Doe I in the Matter of the Cutler Files Website.

On December 20, 2010, the Commission issued an Order unanimously finding that John Doe I did not violate 21-A M.R.S.A. §1014 or §1019-B in connection with the so-called Cutler Files Website. Further, in recognition of long-standing First Amendment principles protecting anonymous speech, *Watchtower Bible & Track Soc'y v. Vill. of Stratton*, 536 U.S. 150, 160, 166-167 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.'n*, 514 U.S. 333, 342 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960), the Commission in its December 20, 2010 Order and the staff in their proposed Findings of Fact and Conclusions of Law respected John Doe I's Constitutional right to anonymity by not revealing his identity. Indeed, revealing John Doe I's identity would not have furthered any public policy promoting disclosure or otherwise, since he had been unanimously exonerated of any violations of the disclosure requirements contained in 21-A M.R.S.A. §1014 and §1019-B.

In light of the Commission's December 20, 2010 Order and First Amendment principles protecting anonymous speech, one would think that the matter of John Doe I's right to anonymity would be closed. However, the Cutler campaign apparently will not let go. Instead of accepting the Order of the Commission and respecting John Doe I's First Amendment rights, the Cutler campaign has filed yet another document riddled with inaccurate facts and

Jensen Baird
Gardner Henry

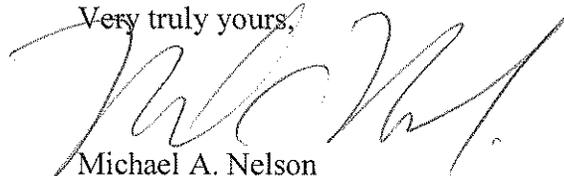
January 24, 2011
Page 2

implications knowing that it will be posted on the Commission's website, in an apparent effort to further litigate this matter in the press. The Commission staff has conducted a thorough investigation of the Cutler Files Website and has prepared detailed Findings of Fact and Conclusions of Law supporting the Commission's decision that John Doe I did not violate any statutory disclosure obligations. We stand by the staff's submission and, except for one particularly egregious inaccuracy which demands a correction, will not attempt to correct the remaining inaccuracies in the Cutler campaign's submission.

That one exception relates to the Cutler campaign's repeated references to Rosa Scarcelli and the Scarcelli campaign in what appears to be a not so subtle effort to connect Ms. Scarcelli with the Cutler Files Website. As the Cutler campaign knows (or should know), neither fact nor logic supports any such connection. Ms. Scarcelli's campaign ended with the primary on June 8, 2010. As the staff states in its proposed Findings of Fact and Conclusions of Law, the Cutler Files Website did not become publicly accessible on the internet until August 30, 2010. Accordingly, there can be no conceivable connection between the Website and the Scarcelli campaign, and the effort by the Cutler campaign to draw that connection casts doubt on the Cutler campaign's good faith in pursuing this matter.

John Doe I respectfully requests that the Commission reject the request of the Cutler campaign and continue to respect his Constitutionally protected right to anonymous speech.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael A. Nelson", written over the typed name below.

Michael A. Nelson

MAN/abc

cc: Jonathan Wayne, Esq.
Phyllis Gardiner, Esq.
Richard A. Spencer, Esq.

Jan. 24, 2011

Jonathan Wayne
Executive Director
Commission on Governmental and Election Practices
135 State House Station
Augusta, ME 04333

Dear Jonathan,

While I don't agree with the Commission Determination regarding The Cutler Files website and reserve my right to appeal the Commission's ultimate decision, I do want to thank you and your staff for your professional and thorough handling of this matter which I realize has raised some unique and difficult issues.

I do wish to make a couple of points.

The Commission determination states that The Cutler Files website contained a "misleading description" of the people responsible for the site by stating that the authors were not "affiliated with any candidate." I disagree. The description perhaps could have been worded better, but the intent was merely to state that The Cutler Files website and the work performed by its authors were in no way authorized or connected to any candidate or political party. While it's true that I was a paid consultant to a candidate (as well as several other clients) at the time the website was launched, this is immaterial to The Cutler Files. If you are suggesting that the website should have disclosed that one of the authors was in fact affiliated with a candidate, then that in itself would have given readers a misleading impression that The Cutler Files *was* the work of a political candidate. And as the investigation has shown, it was not. It's a bit of a Catch 22 to state that we misled readers by stating that the authors were not affiliated with a candidate, when stating that we were affiliated with a candidate would have misled them even more.

It appears that the finding against me hinges on the fact that I was, at the time The Cutler Files was launched, advising another candidate, and because John Doe 1 was not, he was not found to have violated campaign disclosure laws. This is perplexing to me. The First Amendment is in no way less applicable to a political consultant just because he is a political consultant. Just as an attorney is allowed to have political opinions different from his clients, and the First Amendment right to discuss them, so does a political consultant. The Commission clearly found that the candidate I was working for – or any other candidate - had no knowledge, coordination or input in the Cutler Files. It seems likely that disallowing the protections afforded by the First Amendment categorically to a person's profession would not be upheld in the courts absent some evidence of otherwise unlawful behavior.

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I also want to note this finding:

The Cutler Files website is not a “news story, commentary [or] editorial distributed through the facilities of any broadcasting station, , magazine or other periodical publication,” and thus is not exempt from the definition of expenditure under 21-A M.R.S.A. § 1012(3)(B)(1).

This is a badly out-of-date definition for what constitutes journalism in today’s world of websites, blogs and social media. You seem to be suggesting that only traditional media are exempt from campaign expenditure laws. As you know, political blogs and websites are ubiquitous today, and many of them are breaking news and uncovering stories that the traditional media have ignored.

If The Cutler Files cannot be defined as journalism, than what was it exactly? Granted, it may have been advocacy journalism, but so is a newspaper editorial. Despite repeated complaints and accusations from Mr. Cutler and his lawyers, the information on The Cutler Files has never been challenged or disputed (and most of it, in fact the vast majority, was simply reprinted from those traditional news sources that are exempt). Also, The Cutler Files received numerous e-mails from readers (submitted to the Commission) thanking us for our efforts and noting that much of the information we provided had not been found in traditional media sources. Perhaps the readers should be the final judges. You should also be aware that other commentators have noted the recent appearance of other anonymous websites devoted exclusively to political figures (<http://collinswatch.blogspot.com/> for one) that have not attracted anywhere near the attention, or notoriety, of The Cutler Files.

The point is that if you intend to enforce campaign disclosure and finance laws every time a candidate complains of an anonymous website or posting (as this ruling would seem to suggest), you should be prepared to be overwhelmed in the years ahead. Like it or not, information via the web is becoming a leading source of news for most people, and your definition of what constitutes journalism today simply doesn’t match reality. All of these sources have a fundamental First Amendment right to free speech, and the “solution” to free speech should not be more restrictions, but more free speech.

It is not the job or within the jurisdiction of the Ethics Commission to pick and choose in this web based world who is a journalist or who is not. It is also not the job, nor certainly within the Commission's jurisdiction, to say that a person who earns a living as a political consultant loses his First Amendment rights. The job of the Ethics Commission is to ensure that those who are spending more than a *di minimus* amount of money in an election or are acting in coordination with a campaign follow certain rules. In this case, there is no finding that I broke any rules relating to campaign finance spending (my share of the expenses is far less than the \$91.38 cited in the Determination memo) or that I was acting in concert with any political campaign.

Thank you for allowing me to respond to the Determination and for your careful consideration of this matter.

Dennis Bailey
Savvy, Inc.