

We the people of Maine...

THE MAINE HERITAGE POLICY CENTER
Center for Constitutional Government

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July 6, 2012

VIA ELECTRONIC MAIL
AND REGULAR MAIL

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

Re: Comment on Proposed Rules Interpreting 21-M.R.S.A. §§ 1012(3)(B)(1) &
1052(4)(B)(1)

Dear Mr. Wayne:

Thank you for inviting the Maine Heritage Policy Center to comment on the proposed rule concerning reporting exemptions for news organizations. MHPC is a research and educational organization whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited and constitutional government, individual freedom, and traditional American values all for the purpose of providing public policy solutions that benefit the people of Maine.

The proposed rule is of considerable interest to MHPC. We have expressed our concerns regarding campaign finance laws for some time and as you know, I served as local counsel in *Cushing v. McKee, et als.*, which struck down Maine's matching funds statute after the U.S. Supreme Court decided *Bennett/McComish* last summer. While we generally view campaign disclosure in a positive light, MHPC is also concerned that political speech be as free from government burdens as possible. This is why we entered *Cushing v. McKee*: because matching funds were being used by Maine and other states in a vain attempt to equalize candidates. As you know, the Supreme Court in *Bennett/McComish* held that there is no compelling state interest in equalizing outcomes and that the Arizona matching funds statute unduly burdened the non-participating candidate's First Amendment free speech rights. We therefore believe that states should tread very lightly when it comes to electoral contribution and expenditure regulation and indeed all matters that implicate political speech.

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As to the specifics of the proposed rule, I would first observe that 21-M.R.S.A. §§ 1012(3)(B)(1) and 1052(4)(B)(1) embody an obsolescent if not obsolete view of what is news and a news organization. The wrenching technological changes underway scramble older conceptions of what is a “news story”, a “broadcasting station”, a “newspaper” or even the definition of “journalist”. Terrestrial radio and TV and even cable are rapidly migrating to the Internet even as the cost of creating streaming broadcasts has dramatically declined. Average citizens have entered the “news business” – much to the chagrin of traditional media. Courts have recognized the trend. In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), Boston police arrested a man for using his cell phone video camera to film police arresting a man on Boston Common. In the ensuing section 1983 action, Judge Lipez observed:

It is of no significance that the present case . . . involves a private individual, and not a reporter, gathering information about public officials. The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press. *Houchins*, 438 U.S. at 16 (Stewart, J., concurring) (noting that the Constitution “assure[s] the public and the press equal access once government has opened its doors”); *Branzburg*, 408 U.S. at 684 (“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”). . . . *Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.*

Id. at 83-84 (emphasis added). While the court in *Glik* dealt with news gathering, the same cautions doubtless apply to news and editorial dissemination.

Therefore, I would suggest that the Commission is headed for stormy First Amendment weather to the extent it bases any rule on 21-M.R.S.A. §§ 1012(3)(B)(1) and 1052(4)(B)(1) and then tries to parse who or what qualifies as “press”. As you know, MHPC has itself entered the news business, operating its *Maine Wire* service with considerable success. The *Maine Wire* has been derided in some quarters for not being a “real” news organization – a view that is out of step with law and fact.

As to expenditure disclosure aspects of the rule, while MHPC generally supports campaign disclosure, it does so with the continuing caveat that such disclosure not crowd the First Amendment. As the Supreme Court opined in *Buckley v. Valeo*, “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” The Ethics Commission is currently embroiled in a lawsuit concerning disclosure and anonymous political speech. You should know that MHPC supports the plaintiff’s position

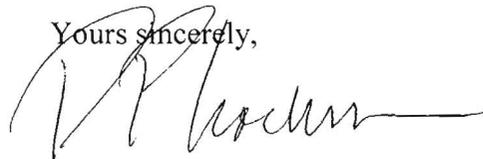
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in this suit. *Any* regulation that implicates political speech should be done with fear and trembling and anonymous political speech should be protected.

With these cautions in mind, I note that the proposed rule in its final paragraph attempts to qualify who or what is a “periodical publication”, a “newspaper” or a “magazine”. We do not think it is government’s place to determine who or what qualifies – whether based on timing or practice. Unless I am misreading the statute and proposed rule, should one not be “qualified”, then any news story or editorial would be a reportable expenditure. This simply takes matters too far. In fact, it is not apparent to me how one would write a rule defining the “press” – or, indeed, whether one should.

In conclusion, MHPC has serious reservations about the proposed rule and believes that it would be ripe for legal challenge were it to be adopted and enforced by the Commission.

Yours sincerely,

A handwritten signature in black ink, appearing to read "D. Crocker", with a long horizontal flourish extending to the right.

David P. Crocker

DPC/mbs

cc: Mr. J. Scott Moody