



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
Benjamin P. Dyer, Political Committee and Lobbyist Registrar
Date: February 16, 2018
Re: Request for Investigation of Maine Examiner and Maine Republican Party

INTRODUCTION

This matter is a request by the Maine Democratic Party (MDP) to investigate whether persons responsible for an anonymous, low-cost website in a news format (www.maineexaminer.com) and/or the Maine Republican Party (MRP) failed to comply with campaign finance disclosure requirements in connection with online postings opposing the Democratic nominee in a December 12, 2017 run-off mayoral election in Lewiston. Shortly before the election, the Maine Examiner website published seven negative stories about the Democratic nominee, Ben Chin. The MRP made eight payments to Facebook to advertise some of the Chin stories on Facebook pages controlled by the MRP (<https://www.facebook.com/realbenchin/> and <https://www.facebook.com/mainevoteguide/>). All three websites are currently operating, and you may wish to examine them as background for your Feb. 22 meeting, along with <https://www.facebook.com/mainegop>, which also contains links to the Maine Examiner.

Some of the potential compliance issues raised in this matter are:

- Was the Maine Examiner required under 21-A M.R.S.A. § 1014(2-A) to include a statement of who made or financed expenditures for the website?
- Was any person required to file an independent expenditure report with the Lewiston City Clerk under 21-A M.R.S.A. § 1019-B?
- Did the MRP timely file complete campaign finance reports with the Lewiston City Clerk and the Commission, as required by 21-A M.R.S.A. § 1017-A?

OFFICE LOCATED AT: 242 STATE STREET, AUGUSTA, MAINE
WEBSITE: WWW.MAINE.GOV/ETHICS

The Executive Director of the MRP, Jason Savage, responds that he was solely responsible for the Maine Examiner and the website was a personal project he undertook on his own time, apart from his employment with the MRP. According to Mr. Savage, the total cost of operating the website has been \$74.00. *See* attached letter from his counsel, Joshua A. Tardy, Esq, (“Tardy Letter”), at 1. The MRP responds that it does not own or control the Maine Examiner and did not authorize its Executive Director to create it. The MRP states that Mr. Savage operates the website in his individual capacity, at his own expense, outside the scope of his employment with the MRP. *See* attached letter from MRP attorney Ann R. Robinson, Esq. (“Robinson Letter”), at 1. The MRP argues that it has filed all required financial reports and made all required online disclosures on its Facebook pages. (Robinson Letter, at 3-5)

The Commission should give serious consideration to Mr. Savage’s assertion of independence from the MRP. Politically engaged individuals who are compensated by PACs, parties, or advocacy organizations sometimes engage in other political activities that should not necessarily be attributed to their employer or client. Nevertheless, the Commission may wish to be cautious about accepting an argument or creating a precedent that could lead to an accountability gap where political organizations can distance themselves from the activities of their paid leaders by asserting that they were acting independently.

RELEVANT LAW

Standards for Initiating Investigations Upon Request

Under the Commission’s investigations statute, any person may make a written request that the Commission undertake an investigation to determine whether a violation of campaign finance law has occurred. (21-A M.R.S.A. § 1003(2)) The Commission “shall” undertake the investigation if “the reasons stated in the request show sufficient grounds for believing that a violation may have occurred.” (21-A M.R.S.A. § 1003(2))

Applicability of Campaign Finance Reporting Laws in Municipal Elections. Maine’s campaign finance disclosure requirements are set out in Title 21-A, Chapter 13. These

requirements apply in candidate elections for state and county office, as well as for ballot question elections.

The disclosure requirements also apply to candidates who are running for municipal office in towns and cities with a population of 15,000 or more (such as Lewiston).¹ (30-A M.R.S.A. § 2502(1) and 21-A M.R.S.A. § 1011 (first sentence)) In these municipal elections, the town or city clerk is responsible for receiving committee registrations and campaign finance reports. (21-A M.R.S.A. §§ 1011(3), 1020-A(3) & 1053-A) The Commission has the discretion to conduct investigations and assess penalties related to municipal elections. (21-A M.R.S.A. § 1011(3)) Subsection 1011(3-A) permits municipal clerks to refer to the Commission potential violations which the clerk considers to be substantial. In addition, when a candidate or party committee files a campaign finance report late in a municipal election, the clerk “shall” send a notice of preliminary penalty to the late filer, and “shall notify” the Commission of the late report. (21-A M.R.S.A. § 1020-A(3)) To the best of the Commission staff’s knowledge, in practice, municipal clerks almost never send penalty notices to late filers or notify the Commission of late reports. (21-A M.R.S.A. § 1020-A(3))

Duty of Party Committees to File Campaign Finance Reports. Party committees are required to file campaign finance reports with the Commission disclosing contributions received and expenditures made. (21-A M.R.S.A. § 1017-A) The committees must report all expenditures made to influence a campaign, including the candidate’s name, and the amount, date and purpose of the expenditure. (§ 1017-A)(2)) The committee must also report operational expenses and other expenditures that are not made to influence a campaign. (§ 1017-A)(2)) State party committees file these reports online using the Commission’s e-filing system.

When a party committee makes an expenditure on behalf of a candidate in a municipal election, it is required to file a copy of a campaign finance report with the clerk in that candidate’s municipality. (21-A M.R.S.A. § 1017-A(8)) In the towns or cities with a

¹ Municipal referendum elections in these larger communities are also subject to Title 21-A, Chapter 13, but are not at issue in this case.

population of 15,000 or more, the Commission staff works with the municipal clerks to prepare paper reporting forms for this purpose.

Independent Expenditure (IE) Reporting. Maine Election Law requires persons (including party committees) spending more than \$250 on a paid communication to voters advocating for or against a candidate to file a one-time financial report with the Commission, if the expenditure was made independently of candidates in the race. The “independent expenditure report” must disclose the candidate supported or opposed, the date, payee, and purpose of the expenditure, and a sworn statement that the expenditure was made independently of the candidate. (21-A M.R.S.A. § 1019-B(4))

An IE is defined as an expenditure for any communication that expressly advocates the election or defeat of a clearly identified candidate. (21-A M.R.S.A. § 1019-B(1)(A)) During certain time periods close to an election, a communication that names or depicts a clearly identified candidate is presumed to be an IE. (21-A M.R.S.A. § 1019-B(1)(B)) These time periods include the 28 days before a primary election, after Labor Day until a general election, or in the 35 days before a special election.

The schedule for filing IEs is set out in the Commission’s rules. (Comm. Rules Ch. 1, § 10(3)) In summary, during the last 60 days before an election, an independent spender must file an IE report within one or two calendar days of incurring a debt or expenditure for the communication.

Due to a 2015 citizen initiative, paid communications in certain media (direct mail, television, *etc.*) that qualify as IEs must now contain the top three funders of the organization financing the communication. (21-A M.R.S.A. § 1014(2-B)) Because websites are not among the media listed in the statute, this top-funder requirement does not seem to apply in this matter.

“Paid for” Disclosure Statement

Under 21-A M.R.S.A. § 1014(1) & (2), paid communications to voters that expressly advocate for the election or defeat of a candidate must include the name and address of the person who made or financed the expenditure for the communication, and whether the candidate authorized the communication. Subsection 2-A of § 1014 (relied upon by the MDP) broadens the coverage of this disclosure requirement during certain time periods close to an election to include any communication that names or depicts a clearly identified candidate. This statute contains an exception for internet activities by one or more individuals acting independently of candidates, political parties, other political organizations who spend less than \$100 on an internet or email communication. (21-A M.R.S.A. § 1014(6)(C))

Press Exemption. The Election Law exempts from the definition of expenditure “any news story, commentary or editorial distributed through the facilities of any broadcasting station, cable television system, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by any political party, political committee, candidate, or spouse or domestic partner of the candidate.” (21-A M.R.S.A. § 1003(3)(B)(1) The Commission has adopted a rule interpreting this exception. (Comm. Rules, Ch. 1, § 7(10)). Among other requirements, to be exempt, the persons who own, control, and operate the broadcasting station or publication must be identified within the publication, or otherwise be made known to the public. (§ 7(10)(A)))

Late-Filing Procedures. If a candidate or party committee is late in filing a required campaign finance report, the Commission (or municipal clerk) must send the late filer a notice of preliminary penalty. The late filer is required to pay the penalty or request a waiver. (21-A M.R.S.A. § 1020-A(6))

SUMMARY OF ARGUMENTS

Request for Investigation by Maine Democratic Party

On January 23, 2018, the MDP filed its initial request for investigation with the Commission, with an additional letter submitted on January 25, 2018. The MDP complains that the Maine Examiner or MRP failed to file IE reports with the City of Lewiston for the series of seven articles published on the Maine Examiner website during December 3-10, 2017. These postings identified Chin as a mayoral candidate, as well as identifying Chin's opponent in the run-off election. MDP argues that the pieces about Chin "made inflammatory claims," and "attempted to disparage his character." *See* Kate Knox's January 25, 2018 letter, at 2-3. The MDP also urges the Commission to investigate whether the website violates 21-A M.R.S.A. § 1014(2-A), because the Chin stories do not state the name and address of the person who made or financed the website stories and whether the website was authorized by any candidate. The MDP argues that the press exception and the disclosure exception for low-cost internet communications do not apply to the Maine Examiner because of the MRP Executive Director's involvement in the website.

Responses by Jason Savage and the Maine Republican Party

Mr. Savage has responded that he is the sole owner and author of the Maine Examiner, which he states that he operates "in his free time and separately and distinctly from his duties as a paid employee of the Maine Republican Party." (Tardy Letter, at 1)

According to Mr. Savage, he does not utilize MRP resources to create web postings for the Maine Examiner. He states that the total cost of operating the Maine Examiner has been \$74.00, which was the fee paid to GoDaddy.com for web domain registration. He argues that the Maine Examiner meets the Commission's regulatory definition of the press exception, because it has published news stories, commentaries, and editorials on a variety of topics to the present day, and because his role as the owner and sole author of the site has now been made public. (Tardy Letter, at 1-2)

The MRP responded that it did not authorize the Maine Examiner website, has not financed it, and does not own or control it. (Robinson Letter, at 1) The MRP argues that by filing campaign finance reports with the Lewiston City Clerk on January 22, 2018, disclosing its

Facebook expenditures in opposition to Mr. Chin, and by filing the quarterly campaign finance report with the Commission on January 16, 2018, it has satisfied its financial reporting requirements with respect to the Lewiston mayoral election. (Robinson Letter, at 4). The MRP also argues that no IE report was required with respect to its Facebook expenditures, because none exceeded the \$250 threshold. (Robinson, Letter, at 5) The MRP notes that its two Facebook pages (<https://www.facebook.com/realbenchin/> and <https://www.facebook.com/mainevoteguide/>) contain the required “paid for” disclosure statement. (Robinson Letter, at 5)

COMMENTS BY COMMISSION STAFF

Under the Commission’s investigation statute, once the Commission receives a request for investigation, it “shall review the application and shall make the investigation if the reasons stated in the request show sufficient grounds for believing that a violation may have occurred.” (21-A M.R.S.A. § 1003(2)) The Commission staff offers the following thoughts in the brief time available on whether to authorize an investigation.

Jason Savage’s Independence from the MRP

The issue of whether Mr. Savage’s activities on the Maine Examiner website can be viewed as a personal project apart from his employment with the MRP bears on the likelihood of whether a violation occurred. Mr. Savage’s independence from the MRP is relevant in two ways:

- First, the MDP may argue that even if the officers and members of the Maine Republican State Committee did not specifically authorize the Maine Examiner website, the Maine Examiner was so intertwined with the MRP’s other activities to oppose Ben Chin that the Maine Examiner must be viewed as part of Mr. Savage’s paid employment, and that a portion of his compensation should be viewed as an “expenditure” by the MRP. This is relevant to whether the MRP made expenditures exceeding the \$250 threshold for IE reporting, or made an expenditure for a communication that would require a “paid for” disclosure statement under 21-A M.R.S.A. § 1014(2-A).

- Second, 21-A M.R.S.A. § 1014(6)(C) contains an exception for internet activities by one or more individuals who are acting independently of candidates, party committees, and other political organizations, and spend less than \$100. If Mr. Savage can be viewed as acting independently of the MRP, the Maine Examiner might be eligible for this exception.

Press Exception

As noted above, under the Commission's Rule interpreting the press exception, the broadcast station or publication must identify the persons or entities who own, control, or operate the news medium, or those persons or entities must otherwise be known to the public. At the time of the communications in question (December 2017), Mr. Savage's control and operation of the website were not identified in the website or made known to the public (to the best of the Commission staff's knowledge). For this reason alone, the press exception seems inapplicable to the Maine Examiner in December 2017.

Financial Reporting Obligations by MRP

On January 22, 2018, the MRP filed a paper campaign finance report with the Lewiston City Clerk that was due 42 days after the December 12, 2017 mayoral run-off election. (The report is attached as Exhibit A to the Robinson Letter.) The report disclosed seven payments to Facebook for digital advertising in opposition to Ben Chin, and one payment to a political consultant for robocalls in support of Republican nominee Shane Bouchard.

In addition, the MRP filed a quarterly campaign finance report with the Commission on January 16, 2018 (covering October to December 2017) using the Commission's e-filing system. The Facebook payments to oppose Mr. Chin were included in the report. Due to the design of the e-filing system, the Commission staff believes that the MRP should *not* be faulted for omitting that these payments were in opposition to Mr. Chin. When PACs and party committees enter expenditures, the e-filing system guides them to identify the candidates supported or opposed, using a drop-down list of candidates registered with the Commission. This list includes only legislative, county and gubernatorial candidates. The e-filing system does not provide filers with an easy way to specify municipal candidates.

According to the MRP, in the course of responding to the MDP's request for investigation, the MRP noticed that it had failed to disclose an eighth expenditure to Facebook (\$50.01) to oppose Ben Chin. It filed an amended report with the Lewiston City Clerk on February 12, 2018. That report is attached to Ms. Robinson's letter as Exhibit A-1.

The MDP has not provided grounds for believing that the MRP's campaign finance reports are incomplete, although an investigation might provide additional relevant information.

"Paid for" Disclosure Statement

In the opinion of the Commission staff, the "paid for" disclosure statement required by 21-A M.R.S.A. § 1014 can provide valuable assistance to voters in understanding who is funding political communications. Nevertheless, in this particular matter, there may be a lack of clarity as to whether the Maine Examiner was legally required to include a "paid for" disclosure statement on its website.

Subsection 2-A of § 1014 (relied upon by the MDP) broadens the requirement to any communication naming or depicting a candidate "during the 21 days before a primary election or 35 days before a general election." The December 12, 2017 run-off election was not a primary election or a general election, as those terms are defined in 21-A M.R.S.A. §§ 1(19) & 1(32).² Consequently, based on a technical reading of the statute, the "paid for" disclosure requirement for non-express advocacy communications in § 1014(2-A) may not apply to off-year municipal elections.

This compliance issue also rests on whether the Commission views paid staff time of Mr. Savage as an expenditure by the MRP in connection with the Maine Examiner. If not, then the Commission may find it plausible that Jason Savage and the MRP made no expenditures that would require a "paid for" statement on the Maine Examiner website.

² In the definitions section of the Election Law (Title 21-A), the term "primary election" is defined as "the regular election for the election of nominees of a party for the general election" § 1(32), and "general election" is defined as "the regular election of state and county officials occurring biennially in November." § 1(19)

Independent Expenditure Reporting

In the MDP's January 23, 2018 letter, the MDP asserts it is likely the amounts expended on the Chin stories and their dissemination exceeded \$250, in light of the amount of research required to write the articles, the work verifying the authenticity of Mr. Chin's emails, the circulation of the stories online, and the level of activity on the Maine Examiner website and Facebook page concerning these stories. (Knox 1/23/2018 letter, at 3) In its cost estimation, the MDP appears to be including compensation paid for labor to create and disseminate the stories.

For your information, when the Commission staff is asked by an organization how to calculate the costs to include in an IE report, we advise that compensation paid by the organization to a political consultant or to the organization's employees to prepare or disseminate an advocacy communication *should be included* as expenditures in the IE report. This is because the definition of expenditure includes:

- (1) A purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for the purpose of influencing the nomination or election of any person to state, county or municipal office ...
- and
- (4) A payment or promise of payment to a person contracted with for the purpose of influencing any campaign as defined in section 1052, subsection 1

(21-A M.R.S.A. § 1012(3)(A)) In practice, we believe it is much more common to see compensation paid to a political consulting firm (such as a mail house, media consultant or robocall firm) in IE reports than payments made by an organization to its employees.

Mr. Savage responds to the MDP request by stating he is the sole owner and author of the Maine Examiner, and the website has no paid staff. The total cost of operating the site, according to Mr. Savage, has been \$74.00. (Tardy Letter, at 1-2) The MRP directly addresses the allegation that it was required to file an IE report by arguing that none of its expenditures relating to the online postings exceeded \$250. (Robinson Letter, at 3) Because Mr. Savage and the MRP state that the Maine Examiner was not authorized by the MRP, they do not contemplate that compensation paid by the MRP to Mr. Savage should be viewed as part of the costs of the Maine Examiner.

Regardless of how the Commission views this issue, it is worth noting that the Chin stories on the Maine Examiner are not lengthy. Most of the stories are in the range of 8-12 sentences of text plus some images of Mr. Chin and his emails. Even if the MRP's compensation to Mr. Savage were counted as a cost of each Maine Examiner story, this compensation may not exceed \$250 per story. For purposes of the \$250 IE threshold, the Commission staff would recommend viewing each Maine Examiner story as a *separate* communication.

Lack of Referral by Lewiston City Clerk

The MRP argues that the Commission has no jurisdiction to consider whether the MRP was late in filing an IE report, because

- the Lewiston City Clerk has not provided any notice to the MRP or the Commission that the MRP was late in filing an IE report (as required 21-A M.R.S.A. § 1020-A(3)), and
- the Commission has not sent any notice to the MRP that it was three days late in filing an IE report (as required 21-A M.R.S.A. § 1020-A(6)).

(Robinson Letter, at 3)

The Commission can only send out the three-day notice of an unfiled report to a candidate or party committee under 21-A M.R.S.A. § 1020-A(6) *when it is known* that the candidate or party committee failed to file a required campaign finance report. The obligation to file an IE report is contingent upon certain factual conditions occurring (*e.g.*, a paid communication to voters containing express advocacy costing more than \$250 made independently of the candidates in the race). Practically speaking, neither the Commission nor the Lewiston City Clerk has any way of monitoring all advertisements, mailings and websites to determine if they require IE reports. In this matter, without conducting an investigation, the Commission would have no way of knowing whether the MRP was late in filing an IE report with the Lewiston City Clerk. Thus, the lack of any three-day notice to the MRP should not bar an investigation of this matter.

Scope of Investigation

In the opinion of the Commission staff, based on the information provided by the MDP it is unclear whether any violation was committed. Nevertheless, it is possible that a violation occurred, depending on factual circumstances that are unverified at this time, and your view of whether 21-A M.R.S.A. § 1014(2-A) applies to an off-year, municipal run-off election and whether compensation paid to Mr. Savage should be considered part of the costs of the Maine Examiner.

The staff of the Commission is ready to conduct whatever investigation the Commission believes is warranted, if it finds that the MDP has provided sufficient grounds for believing a violation may have occurred. An investigation could examine factual questions such as: what communications did Mr. Savage have with others (inside or outside the MRP) concerning the Maine Examiner or posting Facebook items relating to Ben Chin? Was Mr. Savage the MRP employee who made the decision to advertise the Maine Examiner stories on the MRP's Facebook pages? Or did he authorize or direct another MRP employee to do so? As a salaried Executive Director of MRP, can he be deemed to have acted independently in preparing the Maine Examiner stories if he also posted them on the MRP's Facebook pages? If his activities in preparing or posting the Maine Examiner stories are considered a paid activity by the MRP, would this compensation exceed the \$250 threshold for IE reporting?

Thank you for your consideration of this memo.