
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

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Director

June 3, 2010

Cynthia Pepyne
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Northampton, MA 01060

Dear Ms. Pepyne:

We noticed the story in the Daily Hampshire Gazette of May 26, 2010, reporting that five local school committee Chairs had requested that your office provide a legal opinion regarding potential restrictions on bloggers and blogs and other online forums maintained by School Committee Members in light of the state's Open Meeting Law. This matter also was brought to our attention by Amherst Committee Member and blogger, Catherine Sanderson.

Because the questions necessarily raise important First Amendment issues, the American Civil Liberties Union of Massachusetts writes to bring to your attention our concerns.

A preliminary word: Given the upcoming transfer of jurisdiction over the Open Meeting Law enforcement from the State's District Attorneys, St. 2009, c. 28, §§18-20, we understand that your office may well feel that providing an advisory opinion at this time is not appropriate, and/or that the questions posed should be more appropriately addressed or deferred to the Attorney General's office, particularly since the new law addresses the definition of "deliberations" (a matter raised by some of the questions posed). However, if your office should choose to respond substantively to the questions, we urge that the District Attorney's response insure that First Amendment and art. Nine and Sixteen rights are fully protected.

The analysis necessarily must begin with the premise that the web sites and blogging at issue are constitutionally protected political speech deserving the highest level of legal protection.¹ The Supreme Court has been unwavering that expression on public issues rests on the highest rung of First Amendment values, Carey v. Brown, 447 U.S. 455, 467 (1979); that debate on public issues should be uninhibited, robust and wide open, New York Times v. Sullivan, 376 U.S. 254, 270 (1964); and that free discussion of governmental affairs is a major purpose of the First Amendment. Mills v. Alabama, 384 U.S. 214, 218 (1966).

The purpose of the Open Meeting Law is to insure openness in the conduct of public business and eliminate secrecy in the deliberation and deciding of issues on which public policy is based. See discussion in Board of Selectmen of Marion v Labor Relations Commission, 7 Mass App. Ct. 360, 362 (1979), and Ghiglione v School Committee of Southbridge, 376 Mass 70, 74 (1978) (on the executive committee exception). The purpose of the law is not, however, to prevent or restrict public officials from communicating with constituents and others who might wish to communicate with them prior to a meeting governed by that law.

An elected official has the right to express his or her opinions and convictions prior to, and after, a scheduled open meeting. The Massachusetts appellate court decisions are clear that the Open Meeting Law does "not require[] [elected officials] to maintain a vow of silence before a hearing on a hot subject." Randall and Franklin Municipal Law, 18 M.P.S. §8.2; Citywide Parents Council, Inc. v. School Committee of Boston, 27 Mass App. Ct. 739, 742 (1989). Indeed, elected School Committee Members, prior to a vote, may express their convictions on the precise public policy point that will come before the meeting. Id at 742;

¹ A School Committee Member, like all elected officials, has been and may continue to be a candidate for that, or another, political office. Communication between elected officials and their constituents after an election certainly can be as important as communication between a candidate and potential constituents prior to it, which communication is constitutionally highly protected speech.

Communication with constituents has a nexus with the right to vote, a right said to be foundational to, and preservative of, all other rights. The voting right, of course, applies to elected School Committees. See, Kramer v. Union Free School District, 395 U.S. 621 (1969).

Moskow v. Boston Redev. Auth'y, 349 Mass. 553, 565 (1965). School Committee Members are entitled to express and debate their positions beforehand for, as the Supreme Judicial Court has emphasized, "[a]n elected School Committee. . . is essentially a political body." Citywide Parents Council, 27 Mass App. Ct. at 744.

The Open Meeting Law prohibits private deliberative communications not open to the public when engaged in by a quorum of a Board's members.² Thus, as decided in District Attorney for the Northern District v. School Committee of Whalen, 455 Mass 561, 569-572 (2009), keeping private e-mails sent from a School Committee Chair to members of the School Committee requesting written comments about a Superintendent prior to his performance evaluation is at odds with the Open Meeting Law. The basis for that decision is that the e-mails were "an improper attempt to avoid a public discussion... in an open meeting." Id. at 572. In contrast, blogs are completely open to the public for inspection and response. And where there are no secret meetings or deliberations by a quorum, there is no violation of the Open Meeting Law. Pearson v. Board of Selectmen of Longmeadow, 49 Mass App. Ct. 119, 124-125 (2000).

The hypothetical questions posed in the letter seem to be based on the spectre of the possibility of an intentional circumvention of the Open Meeting Law by a majority of members of a school committee. It, of course, goes without saying that it should not be assumed that public officials would utilize blogs surreptitiously, and ostensibly anonymously, in order to intentionally circumvent the letter or spirit of the law. By the same token, neither should it be assumed that Board Members are writing on blogs anonymously, knowing who each other are, for the purpose of skirting the law.

² Section 23B the Open Meeting Law provides that "[N]o quorum of a governmental body shall meet in private for the purposes of deciding or deliberating toward a decision..."

The goals of the Open Meeting Law, we suggest, are enhanced, not jeopardized, by the use of blogs by public officials, who invite public comment and debate and allow an elected official to state his or her views and to invite criticism and comment, much as elected officials regularly do when newspapers ask for, and then report, comments and positions of elected officials on pending issues.³

We believe that government should be conducted in the sunshine, and we support the State Open Meeting Law. We also believe that a paradigm for open government should not be construed so as to infringe upon the fundamental right to freedom of expression.

We note that the Public Records Law, G.L. c. 66, §10, broadly defines public records and includes all documentary materials made or received by public officials in the course of their duties, including e-mails and posts to a blog. This law thus provides a framework for disclosure of public officials' communications if there should be a claim for a violation of the Open Meeting Law, Gen. Elec. Co. v. Dept. of Env'tl. Protection, 429 Mass. 798, 801 (1999); Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co., 414 Mass, 609, 614 (1993).

The law is well settled that the Constitution imposes a strict scrutiny test on the application of any law to First Amendment protected communication and that any such restriction would have to be narrowly tailored to meet that clearly defined compelling state interest. Accordingly, we urge the greatest caution in any formulation of the Open Meeting Law that might tend to compromise the guarantees of the First Amendment.

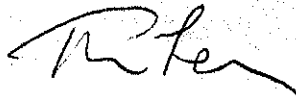
³ Highlighting the public nature of a blog is the fact that blog postings directed at public officials are protected by the state Anti-Slapp Law, G.L. c. 231 §59H. "Petitioning activity" under the Anti-Slapp Law includes writing to government officials statements that are made with the intent to influence, inform, or at the very least reach governmental bodies. North American Expositions Co. v. Corcoran, 452 Mass 852, 861-62 (2009); Global NAPS, Inc. v. Verizon New England, Inc., 63 Mass App. Ct. 600, 605 (2005). Such statements include opinions posted on a web site. MacDonald v. Paton, 57 Mass. App. Ct. 290, 293-94 (2003).

Cynthia Pepyne
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Sincerely,



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