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October 6, 2022

Steve Marchand
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Re: Preserve-Portsmouth.com, Alleged Campaign Finance Violation

Mr. Marchand:

On December 23, 2021, this Office received a multi-part complaint that included an alleged violation of RSA 664:14 by a website—Preserve-Portsmouth.com—that failed to display the identification information required for political advertising under RSA 664:14. The website in question was published in October prior to the November 2, 2021 City Election in Portsmouth.

This Office finds that you were responsible for the website, the website content is the functional equivalent of express advocacy, and it was therefore in violation of RSA 664:14 for failing to provide identification information. However, in light of *McIntyre v. Ohio*, 514 U.S. 334, 355, 357 (U.S. 1995), and its narrowly-crafted protection for the anonymity of political speech when conducted by an individual, this Office will take no further action on this component of the complaint. You are hereby warned against any future violations of RSA 664:14.

FACTUAL BACKGROUND

On December 23, 2021, this Office received a complaint about an “attempted manipulation of the [Portsmouth City Council] Election and the business of the Portsmouth City Council before and after the election” from complainants Rick Becksted, Peter Whelan, Paige Trace, and Esther Kennedy. The complaint alleged that a series of calculated actions by individuals or entities with financial interests in Portsmouth were attempting to influence the election through the use of “fake malicious websites created anonymously” along with anonymous flyers and text messages.

The complaint identified four broad sets of communications:

- (1) “Preserve-Portsmouth.com,” a website that essentially spoofed a “PreservePortsmouth.com” website;

- (2) "beckstedfive.com," another website related to city councilors;
- (3) anonymous flyers; and
- (4) December 15 and 16, 2021, robo-text messages sent to Portsmouth residents with links to a video critical of the complainants.

Relating to Preserve-Portsmouth.com: the website appeared to be largely created from information on PreservePortsmouth.com, which, according to its own materials, is a "non-partisan citizens group," that endorsed a slate for city council that included all the complainants. Preserve-Portsmouth.com, in contrast, kept the visual structure of the original site but modified the endorsement content, including, for example:

- A proud, conservative (faux-populist, Trumpy kind of) record
- Click here to see how they are working to Make Portsmouth Great Again!
- Conservative values – just like Portsmouth!
- The Becksted Five + Greg Mahanna = the most conservative local elected body of any city in New Hampshire.
- The Courage to Raise Taxes – just not so much on the wealthiest!
- A Trumpian Commitment to Ethics!

In addition to the materials submitted by the complainants, this Office subpoenaed materials under RSA 7:6-c, conducted interviews, and reviewed other available information related to the allegations in the complaint. In the Preserve-Portsmouth.com metadata was your email address, listed as a site creator. This Office was also provided with a Facebook exchange in which you appeared to take credit for the website.

On June 21, 2022, Attorney General's Office Investigator Anna Croteau reached out to you by phone and left a voicemail. You and she spoke by phone the following day. When she first asked you about Preserve-Portsmouth.com, you stated that you had heard of the website. You denied you had ever claimed responsibility for the website, but noted that other people had been saying that you were responsible for it. Investigator Croteau advised you that she was looking at a copy of a Facebook correspondence between you and another individual where you claimed responsibility for the website, and then commented that getting information out to Portsmouth voters about the candidates on the site could be "the difference between winning and losing for most of the Becksted Five." You then admitted to Investigator Croteau that you were "involved" with the website but you disclaimed full responsibility for the site. It was only when Investigator Croteau noted that there appeared to be disclosure issues with the site and that she was trying to determine who was responsible that you claimed full responsibility for the site. You stated: "To be very clear, I am the one to create the content." You further provided that you were the only person making editorial changes and other individuals were only involved to bounce ideas off of and to fact check your work. You claimed that Preserve-Portsmouth.com was a spoof website and may have actually helped convince any "Trump supporters" who had seen the website to vote for the "Becksted Five," a moniker you stated was commonly used to refer to the former Portsmouth mayor and a group of city councilors.

Later in the conversation with Investigator Croteau, you clarified that you were also responsible for another website: Beckstedfivetaxpayerszero.com. You stated that you were not involved with or responsible for a "Beckstedfive.com" website or any robo-text messaging efforts. You and Investigator

Croteau discussed documentation from the domain host, GoDaddy, showing that you had paid for the Preserve-Portsmouth.com domain name. On June 23, 2022, you emailed Investigator Croteau those receipts.

This Office sent you a subpoena for materials related to Preserve-Portsmouth.com pursuant to the Attorney General's elections investigation authority under RSA 7:6-c. You responded through counsel, and later provided a set of records for review. From those materials, on October 16, 2021, in correspondence with a second individual, you indicated that you were working on the Preserve-Portsmouth.com website the night before, noting that you hoped the website would "further" "guilt by association" with regard to the Becksted Five. You also noted that you were also working on the Backstedfivetaxpayerszero.com website. Related to that site, you sent correspondence to a third individual entitled, "Final Product," with references to other individuals being "all good" with the site. You subsequently mentioned Preserve-Portsmouth.com.

In an October 26, 2021, correspondence with a fourth individual, you noted that Preserve-Portsmouth.com was a "simple, painful, effective message to get around about exactly these six candidates." You further noted that the website was for "depressing turnout/support among the "Becksted Five" candidates," and "is really meant to help get Democrats who gave Becksted and others a vote in 2019 to really think about what they are doing in 2021."

This Office reviewed additional materials related to Preserve-Portsmouth.com and the related complaints during its investigation.

APPLICABLE LAW

RSA 664:14 requires all political advertising to be signed at the beginning or end with the names and addresses of the candidates, persons, or entity responsible for it. RSA 664:2, VI defines political advertising as any communication, including buttons or printed material attached to motor vehicles, which expressly ~~or implicitly~~ advocates the success or defeat of any party, measure, or person at any election.

With respect to implicit advocacy, as referenced in RSA 664:2 and implemented through RSA 664:14, the United States District Court for New Hampshire held that the term "implicitly" was unconstitutional. Stenson v. McLaughlin, No. CIV. 00-514-JD, 2001 WL 1033614, at *7 (D.N.H. Aug. 24, 2001). As a result, the Court struck the term "implicitly" from RSA 664:2, VI and prohibited its use when enforcing RSA 664:14.

The definition of express advocacy revolves around the concept that, based on the content of the communication alone, the communication has "no other reasonable interpretation" than advocating for support for or opposition against a candidate or measure. See Fed. Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 469-70 (U.S. 2007). Additionally, some "magic words" constitute express advocacy, though communications that do not contain "magic words" may still constitute express advocacy based on the communication content. See Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (U.S. 1986).

The Fed. Election Comm'n v. Wisconsin Right To Life, Inc. Court identified a number of criteria used to determine whether a communication had “no other reasonable interpretation” than advocating for support for or opposition against a candidate or measure. Communication are not the functional equivalent of express advocacy where:

...[the] content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.

Id. at 451. Communications that fail to satisfy these criteria would constitute the functional equivalent of express advocacy and would be subject to RSA 664:14

ANALYSIS

As an initial matter, the form of the political advertising is not here determinative for the purposes of the application of RSA 664:14. Whether structured as a print mailer, a newspaper advertisement, or a website, the *content* of the communication is the subject of analysis for the purposes of satisfying identification requirements under RSA 664:14.

Preserve-Portsmouth.com, based on its content, constitutes the functional equivalent of express advocacy, within the meaning of RSA 664:2, VI, because, under the criteria laid out in Fed. Election Comm'n v. Wisconsin Right To Life, Inc., it is subject to “no other reasonable interpretation” than advocating in support or opposition to candidates in the Portsmouth City Council race. The website content focuses on candidates, not legislative issues. It does not exhort the public to adopt a legislative policy position or urge the public to contact public officials with respect to the matter. The website content contains indicia of express advocacy in that the site explicitly focuses on an election, particular candidates, a political party, and it takes positions on candidates’ character, qualifications, and fitness for office. Your own statements in written correspondences clarify that the purpose of the website was to impact the City Council election by influencing voters. Consequently, the website triggers the identification requirements for political advertising under RSA 664:14.

It may be the case that some potential voters viewing a communication would oppose the candidates because of the content provided, while other potential voters may find the candidates more attractive. The fact that a communication may impact potential voters differently does not matter for the purposes of the communication being the functional equivalent of express advocacy. The test is not whether all or even some fraction of voters may be more or less inclined to vote for the candidates—the test is whether the communication constitutes the functional equivalent of express advocacy regarding the candidates at question. As such, this Office finds that the Preserve-Portsmouth.com website was the functional equivalent of express advocacy and is subject to the identification requirements in RSA 664:14.

However, in 1995, the United States Supreme Court found that a “written election-related document...is often a personally crafted statement of a political viewpoint” and as such, “identification of the author against her will is particularly intrusive.” McIntyre v. Ohio, 514 U.S. 334, 355, 357 (U.S.

1995). The Court held that the First Amendment protects the anonymity of political speech when conducted by an individual. Id. at 357.

In the twenty-six years since McIntyre, many courts—including one within our federal circuit—have narrowed the case’s application and upheld advertising disclosure requirements, even against individuals. See Bailey v. State, 900 F. Supp. 2d 75, 85-87 (D. Me 2011); Citizens United v. FEC, 558 U.S. 310, 366-71 (2009).

Your creation and vetting of Preserve-Portsmouth.com with several other people is distinguishable from the facts of McIntyre. It is clear from your own correspondence and admissions that your intended purpose of the site was to influence the Portsmouth City Council election. While the evidence suggests that you alone created the website content, you coordinated with others to extend the visibility of the site and also requested their thoughts on the content and effectiveness of the site. These actions all undermine eligibility for the narrow exception for individual actors articulated in McIntyre.

CONCLUSION

This correspondence only relates to the original complaint as it pertains to Preserve-Portsmouth.com. This Office is continuing to review the remaining components of the complaint.

RSA 664:14 requires that political advertising shall be signed with the name and address of a person responsible for the advertising or include an Internet address at which a website immediately and prominently displays all the disclaimer information required. Identification disclaimers are required for “express advocacy,” which means communications that expressly advocate—or are the functional equivalent of express advocacy—for or against a candidate or ballot measure at an election. Courts have held that advertising is the functional equivalent of express advocacy if the only reasonable interpretation of the communication is as an appeal to vote for or against a specific candidate, such as where the communication mentions elections, candidates, or political parties.

This Office finds that Preserve-Portsmouth.com was the functional equivalent of express advocacy, and therefore is subject to RSA 664:14’s identification requirements. At the same time, this Office’s review of additional materials did not establish that you coordinated with other individuals in the *creation* of Preserve-Portsmouth.com, even if you did coordinate with others in the *promotion* of the site after creation. As such, in light of the evidence available, we do not reject your claim—the last in your series of explanations—that you alone were responsible for the website. As an individual engaging in the functional equivalent of express advocacy, McIntyre establishes a safe harbor in some narrow circumstances, and informs the enforcement appropriate under the law. However, your actions in corresponding with others for their ideas on the content of Preserve-Portsmouth.com come very close to the type of coordination that would remove this website from the McIntyre exemption.

As the entity responsible for enforcing election and campaign finance laws, this Office keeps in mind the underlying principles at play in public disclosure requirements such as RSA 664:14. Information can be weaponized for the achievement of political ends. A core tenet of New Hampshire’s disclosure laws—but by no means unique to our state—is that transparency in political communications is essential to accountability. While the First Amendment protects the rights of the speaker to communicate most content, the corresponding transparency obligation that applies in many

circumstances related to political speech protects the recipients of such communications, such as the general public, from being misled as to who is doing the speaking. Recipients may then judge for themselves how compelling any particular communication is when the transparency obligation connects the communication with a speaker. This transparency protects our democratic processes. That is why the United States Department of Justice's *Federal Prosecution of Election Offenses*, 8th Edition, catalogs failure to provide identification information as one of its "dirty tricks" along with fraudulent misrepresentation and fraudulent fundraising. Such "dirty tricks" may be employed to impact elections, particularly in the final days before voting, and can have profound consequences on electoral outcomes.

While this Office has no jurisdiction or role in policing the content of political communications—content protected by the First Amendment—disclosure requirements are well within our jurisdiction and are incredibly important to protect as they empower voters by giving them tools to determine the truth of statements that are made regarding candidates or issues. Misinformation (false information) may confuse. Malinformation (true information that can be shared in a way that is intended to cause harm) may be common in public discourse, but providing the identity of the responsible party allows voters to hold that party responsible for the information either favorably or unfavorably. Voters are also armed against disinformation (false information that is intended to cause harm) through identification of the responsible party. Distinguishing amongst mis-, mal-, and disinformation may all occur in the public discourse, but that possibility is greatly diminished when speakers obscure their identities for their own gain. The purpose and function of obligations such as identification requirements foster public discourse by providing transparency.

Acknowledging that the transparency obligation is not all-encompassing, and in light of McIntyre and the narrow exception it describes, this Office will take no further action on this complaint component at this time. You are warned, however, that the coordination with candidate campaigns or other non-campaign individuals are factors, among others, that could bar you from being covered by the McIntyre exception.

You are hereby warned against any future violations of RSA 664:14. This component of the matter is closed.

Sincerely,



Myles Matteson
Deputy General Counsel
Attorney General's Office

CC: Rick Becksted
Peter Whelan
Paige Trace
Esther Kennedy