

MASSACHUSETTS TEACHERS ASSOCIATION

DIVISION OF LEGAL SERVICES

2 HERITAGE DRIVE, 8TH FLOOR
QUINCY, MASSACHUSETTS 02171-2119

GENERAL COUNSEL

IRA C. FADER

DEPUTY GENERAL COUNSEL

SAURABH GUPTA

617.878.8000

1.800.392.6175

FAX: 617.248.6921

STAFF COUNSEL

MATTHEW D. JONES
RICHARD A. MULLANE
LAURIE R. HOULE
QUESIYAH S. ALI
RYAN P. DUNN
ASHLEY F. WALTER
MARK A. HICKERNELL
JONATHAN M. CONTI
JENNIFER L. MACDOUGALL

PARALEGAL

KATHY NAGLE
SARAH B. KELLEY

TO: MTA Board of Directors, MTA Local Affiliate Presidents
cc. Barbara Madeloni, MTA President
Erik Champy, MTA Vice-President
Ann Clarke, Executive Director – Treasurer
FROM: Ira Fader, MTA General Counsel *IF*
DATE: June 28, 2018
RE: **CONFIDENTIAL**: Third-Party Access to MTA Members

The U.S. Supreme Court's decision in *Janus v. AFSCME* has prohibited the collection of "fair share" agency fees from non-member employees. We knew the national right-wing machine would kick into high gear following the decision. Many NEA state affiliates around the country report a flood of anti-union email to our membership – *and that includes Massachusetts*.

MTA members in local affiliates both large and small have reported receiving a slick, misleading drop-membership email at their school addresses. It is part of a national campaign called "My Pay, My Say." Who is funding the campaign? The Mackinac Center from Michigan. And who funds the Mackinac Center? Betsy DeVos and her billionaire family.

What do we do?

1. **Hitting Back at the Mackinac Attack**

The Mackinac Center for Public Policy is a virulently anti-worker and anti-union pressure group funded by the DeVos family, the Koch brothers, and other wealthy ideologues. It was involved in Michigan's disastrous 2012 right-to-work bill, advocates for the privatization of public services, denies climate change, and so on down the extremist agenda.

It has targeted OUR MEMBERS. MTA is preparing a letter to all MTA members for distribution through our locals explaining who sent the email, why it is misleading, and why it is totally inappropriate.

The Mackinac Center is using the school's own email network for its own political agenda. Your school email address was created for a public purpose: for you to communicate with your students, parents, colleagues, administrators, and (if permitted by the Acceptable Use Policy) your union. It was not designed to be clogged with ideological broadsides meant to weaken your local and the MTA by encouraging membership drops.

2. Third Party Access to School Email or School Mailboxes

As a local president, you have the right to demand that the School District address the inappropriate use of teacher and staff email by an outside entity like the Mackinac Center, which seeks to disrupt collective bargaining in your district.

Obviously, Mackinac has already obtained or compiled employee school email addresses for at least some of our districts. Whether your members have received a Mackinac email or not, you can request that the school employer take steps to block emails from such an organization. It is lawful for public employers to block all emails that come from outside organizations having no official business with the school or university/college. By permitting emails of this nature, the employer might actually be opening up its network to all other groups having no relationship or connection to the school.

Can an employer, however, block emails specifically from Mackinac and other anti-union organizations? In *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983), the local association as exclusive representative was granted access to the interschool mail system and teacher mailboxes while access rights were not available to any rival union. A rival union challenged the preferential treatment as unconstitutional. The U.S. Supreme Court rejected the challenge.¹

Applied today, Perry would permit the employer to block an outside organization's emails, not because the employer disagrees with an anti-union view, but because the organization in question is seeking to contact employees *as employees* but does not have any official role in dealing with employees. The preferential treatment is based upon the union's status of the exclusive representative, and not based on any party's viewpoint.

Accordingly, just as a bargaining agreement can limit or eliminate third-party access to the physical mailboxes that many schools still maintain, our locals can demand to bargain over the type of outside email that will be filtered out of the employer's communications network. An employer can grant access to the union as the exclusive representative of employees but deny access to organizations that seek to compete with or eliminate the incumbent union, and it will not violate the outside entity's constitutional rights in doing so.

Mackinac's current round of anti-union emails will surely expand to other districts, and it is likely to continue throughout the summer and into the school year. Now is the time to insist that your district take steps to block this attack, which is an attack on the collective bargaining system itself. For example, one way to block such messages would be to filter and block all messages that include "mypaymysay" "Mackinac" or "right to work." The MTA can supply local leaders

¹ The Court held that: 1) the district could limit the use of its mail facilities as long as the regulation was reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view; 2) denying a rival union access was reasonable because it enabled the exclusive representative to effectively perform its statutory obligations under labor law whereas the rival union had no official responsibility in connection with the district and thus did not need the same rights of access to school mailboxes; and 3) the differential access did not constitute impermissible content discrimination since the district's policy only needed to rationally further a legitimate state purpose, which it did based upon the special responsibilities of an exclusive bargaining representative.

with other words or phrases that are almost certainly to signal that an inappropriate anti-union, political message has been sent.

3. Third Party Access to Employees' Personal Contact Information.

While reports today concerned anti-union messages sent to employees' work email addresses, we expect the same forces will also try to contact members at home -- by email, phone or in person. One way to insulate ourselves from a home-centered drop campaign is to stop any well-financed anti-union group from acquiring employees' personal contact information from the public employer directly.

We are taking steps to achieve this on a state-wide basis. MTA has played a lead role in conversations with both the Office of the Attorney General and the Secretary of State's Office regarding the exemption in the public records law for personal contact info. See, G.L. c. 4, §7(26)(o) and (p) (attached). We also have drafted legislation that has been (or will shortly be) filed.

However, collective bargaining provides the best way to make personal contact information off limits to our enemies. You do not have to reopen your contract or negotiate formally for a new provision. You can create a side letter of understanding or simply reach an agreement that is memorialized even if by email.

What is the mandatory bargaining subject? Exemption (o) in the public records law removes employee contact information maintained by a government employer from the general mandate to disclose public records. It is an open legal question, however, whether the exemptions (o) and (p) remove just the mandate but leave the discretion to disclose. (The Supreme Judicial Court has ruled that personnel and medical records under exemption (c) are absolutely exempt, and MTA maintains that personnel contact information under exemptions (o) and (p) should be treated the same.)

There are three bargaining subjects here. First, if an employer believes it has the right to disclose personnel contact information to third parties, you have the right to demand bargaining over the exercise of that discretion. Second, the release of personal contact information implicates employee safety concerns. And third, the release implicates our members' personal privacy. Public employees should not be subjected to unwanted personal contact from anti-union political groups, news media, parents, students, or any other third party to the employment relationship simply because their employment is public.

A contract provision might say:

The home addresses, personal email addresses, and personal telephone numbers (both cell and landline) of members of the bargaining unit are not subject to mandatory disclosure under the state public records law and shall not be disclosed as a matter of discretion by the employer to any third party requesting such information.