

JUDGE KATHLEEN CARDONE

RECEIVED

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CARL STARR 8 2009

Plaintiff
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
V. BY DEPUTY CLERK

COUNTY OF EL PASO, TEXAS
Defendant.

EP09CV0353

FIRST AMENDMENT CIVIL RIGHTS LAWSUIT

INTRODUCTION

1. This 42 USC 1983 action is brought for violation of Plaintiff's 1st Amendment, and 14th Amendment rights. Declaratory Judgment is asked. No money damages. Bench trial requested.

28 USC 2201 'In a case of actual controversy within its jurisdiction, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.'

I. JURISDICTION AND VENUE

2. This Court has jurisdiction of this action, which involves a federal question, by reason of 28 USC Section 1331, 28 USC 2201.

3. Venue is proper pursuant to 28 U.S.C. Section 1391.

II. PARTIES

4. Plaintiff is an adult who is an El Paso County, Texas, Resident.
5. Defendant County of El Paso is a county within the State of Texas. And can be served at: County Judge Anthony Cobos, Courthouse, El Paso, Texas 79901.

III. FACTS

6. On September 1, 2009 the County of El Paso enacted a Ethics law;[ethicslaw.notlong.com <http://epcounty.com/ca/documents/SB1368Final.pdf>] 'S.B. 1368' including Sec 161.173 [Page 33-] and Sec 161.205. [Page 38-]

Sec. 161.173. CONFIDENTIALITY; OFFENSE. (a) Except as provided by Subsection (b), (c), or (m), proceedings at a preliminary review hearing performed by the commission, a sworn complaint, and documents and any additional evidence relating to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint are confidential and may not be disclosed unless entered into the record of a formal hearing or a judicial proceeding, except that a document or statement that was previously public information remains public information...Commission staff may, for the purpose of investigating a sworn complaint, disclose to the complainant, the respondent, or a witness information that is otherwise confidential and relates to the sworn complaint... (f) A person commits an offense if the person distributes information considered confidential under the terms of this chapter...(g) discloses the confidential information to a person who is not authorized to receive the information. An offense under Subsection (f) or (g) is a misdemeanor punishable by: (1) a fine of not more than \$1,000; (2) confinement in the county jail for not more than six months; or (3) both the fine and confinement.

Sec. 161.205. CIVIL PENALTY FOR FRIVOLOUS OR BAD-FAITH COMPLAINT. (a) The commission may impose a civil penalty of not more than \$4,000 for the filing of a frivolous or bad-faith complaint. In this subsection, "frivolous complaint" means a complaint that is groundless and brought in bad faith or is groundless and brought for the purpose of harassment. (b) In addition to other penalties, the respondent may commence a civil action on the respondent's own behalf against any person who filed a frivolous complaint against the respondent. Any action under this chapter shall be brought in a district court in the county. The court may award costs and attorney's fees.

7. Plaintiff is activist who has filed 2 ethics complaints in recent past and desires to file a ethics complaint but his 1st Amendment rights are chilled by the vague/unconstitutional ethics law.

Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1309 (11th Cir. 2000) (finding that plaintiffs had standing to challenge ordinance because they sought to engage in the kind of speech that the ordinance curbed).
International Society for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979). The "case or controversy" doctrine does not mean that a plaintiff must be arrested or prosecuted before he or she may challenge the constitutionality of a statute. Los Angeles, 461 U.S. 95 A third concept of standing, articulated only in 1st Amendment free speech cases, attributes injury to a plaintiff's allegation that he intends to engage in protected speech that may violate a statute. Relatedly, he may assert he is injured because the existence of the allegedly unconstitutional ordinance deters or chills the exercise of free speech rights and causes either continuing harm or a real and immediate threat of future injury.'

IV. CLAIMS FOR RELIEF

8. Plaintiff incorporates by reference paragraphs 6-7.

Sec 161.173

9. The confidentiality provisions of Sec 161.173 constitute a prior restraint.

Stuart, 427 U.S. 539 'Prior restraints on speech are the most serious and least tolerable infringement on 1st Amendment rights'.

10. The confidentiality provisions of Sec 161.173 are content based.

Turner Broadcasting, 114 S. Ct. at 2459 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.")

Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") Playboy., 529 U.S. 803 (A content-based restriction, must be subjected to strict scrutiny.)

11. The confidentiality provisions of Sec 161.173 are not narrowly tailored to achieve compelling state interests.

Doe, 748 F. Supp 1520 (Rule did not facilitate investigations because even without compelled secrecy 'the complainant remains free not to reveal the fact a complaint has been filed' More importantly, disclosure 'may well prompt witnesses to come forward. Doe, 748 F. Supp 1520 (fear disclosure would add legitimacy not compelling because danger public would overvalue complaint is 'illusory' as general public is aware frivolous complaints are often filed.

Landmark, 435 U.S. 829 (state interest in injury to officials reputations not sufficient to suppress speech that would otherwise be free) *Landmark Communications, Inc.*, 435 U.S. at 841, 98 S.Ct. at 1542 (assuming that confidentiality of proceedings might be a "legitimate" interest, but finding that it did not constitute a compelling interest)

Providence Journal Co. v. Newton, 723 F. Supp. 846 Injury to official reputation [**35] has repeatedly been found by the Supreme Court to be insufficient reason for suppressing political speech. As the Court said in *New York Times Co. v. Sullivan*, 376 U.S. at 273, "Criticism of . . . official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes . . . official reputation." In a related vein, it is a fundamental assumption of our system of government that the public's confidence in its elected officials is best maintained not by shielding them from public criticism but by welcoming it. Mistrust of government, we believe, grows more from enforced silence, with its potential for breeding "resentment, suspicion and contempt," *Bridges*, 314 U.S. at 270-71, than from freewheeling discussion and debate, however "premature." In this context, it is simply not for the government to attempt to shield public officials from whatever self-serving motives the electorate may have in speaking out on public affairs, nor to shield critics of the government from the reputational consequences of their actions. It is in the nature of our system of government that participation in the political process involves all who join [**36] in in the hurly-burly of unfettered exchange, charge and countercharge, point and counter-point. While this Court agrees that much damage can be done when "sensitive" topics are addressed in such an adversarial way, it is simply anathema in our political system for the government to attempt to define what is too "sensitive" for public discussion. Rather than allow the government to engage in such a line-drawing exercise, which common sense teaches is doomed to partisan manipulation, we have never, in over 200 years of democratic self-governance, allowed to begin the process of circumscribing political speech in order to soften the personal or political consequences of the debate. This Court sees no state interest that would justify taking such a step today in the context of discussion of official misconduct, the quintessential example of the kind of speech that the First Amendment was created to protect.¹⁶

12. The confidentiality provisions of Sec 161.173 violate Plaintiffs right to free speech and right to petition under the First and Fourteenth Amendments of the United States Constitution.

Dombrowski v. Pfister, SUPREME COURT OF THE UNITED STATES, 380 U.S. 479 A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e. g., *Smith v. California*, 361 U.S. 147, ^{HN3} When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that [**1121] defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v. Bullitt*, supra, at 379. For "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . ."

13. The confidentiality provisions of Sec 161.173 violate Plaintiffs right to free speech under Art 1 Sec 8 of the Texas Constitution.

FREEDOM OF SPEECH Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.

O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 402 (Tex.1988) ("it is [*368] quite obvious that the Texas Constitution's grant of free speech is more broadly worded than the First Amendment").

14. The confidentiality provisions of Sec 161.173 are facially invalid.

MDK, Inc. v. Vill. of Grafton, 277 F. Supp. 2d 943, 947 (E.D. Wis. 2003) A constitutional challenge may either be facial or [**34] "as-applied." A facial challenge contends that a law or section thereof cannot be constitutionally applied to any set of facts.

15. The confidentiality provisions of Sec 161.173 are vague and overbroad, in violation of Plaintiffs rights under the due process clause of the 14th Amendment of U.S. Constitution.

American Reporter v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996) (holding that if a " statute or regulation purports to limit freedom of speech, its vagueness will 'operate [] to inhibit the exercise' of such freedom and violates the First Amendment"). American Booksellers v. Webb, 919 F.2d 1493 (11th Cir.1990). An ordinance is unconstitutionally overbroad "when lawmakers define the scope of a statute [**14] to reach both unprotected expression as well as, at least potentially, protected speech."

16. The confidentiality provisions of 161.173 violate Plaintiffs privileges and immunities of citizenship under the 14th Amendment of the U.S. Constitution.

17. Confidentiality provisions of 161.173 as applied to Plaintiff violates his constitutional rights.

University of Hawai'i Law Review Summer / Fall, 1996 18 Hawaii L. Rev. 797 Confidentiality Breeds Contempt: A First Amendment Challenge to Confidential Ethics Commission Proceedings The Rules of Procedure punish "any individual" who divulges information concerning the allegation by fine, imprisonment, or both. ⁿ³⁷ ... Public exposure of the Commission's proceedings and its decision-making process would heighten the public's knowledge of ethical violations. Furthermore, the Commission's objective to preserve public confidence is frustrated. The current system of secrecy provides no accountability to the public. The public is unable to hold public officials and employees accountable for their ethical violations. Not only is the public left without any checks and balances on the public officials and employees, but also without any checks and balances on the Commission itself. Thus, public confidence is undermined as the confidentiality actually brings about contempt, mistrust and suspicion of the process. These provisions also violate the fundamental principles of the First Amendment by denying the public the right of access as well as the right of free discussion of governmental affairs. They prohibit the public from gaining knowledge of the existence or the contents of [*806] ethical violations of public officials and employees. They prohibit discussion of ethical violation of public officials and employees. These provisions endanger the objective of open communication of government affairs as guaranteed by the First Amendment... "Without publicity, all other checks are insufficient..." ... The concern of the Ethics Commission of protecting potential complainants and witnesses is a legitimate issue. However, this concern is considerably diminished by the fact that there are already laws in place to provide protection to these individuals...The fear of unwarranted, frivolous attacks on public officials and employees in order to soil one's reputation or to harass them is a genuine concern. It can be assumed that some frivolous complaints as a source of harassment will be made against individuals within the public eye because they are unable to satisfy everyone. n177 However, the Supreme Court has repeatedly found that injury to reputation is an insufficient reason for suppressing political speech. n178 The First [*830] Amendment ensures freedom of speech on public issues, such that it should be, "uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." n179 Criticism of the functioning of government does not lose its constitutional protection merely because it has the potential to cause harm to an individual's reputation. n180 To advance government interests, public employees working on behalf of the people must be prepared to bear an increased level of criticism regarding improprieties. n181...The claim that confidentiality

maintains confidence in the system is based on the assumption that the best way to keep the public's confidence is to keep them uninformed. n189 On the contrary, there are indications that the confidentiality actually undermines public confidence. "Mistrust of government, we believe, grows more from enforced silence, with its potential for breeding resentment, suspicion and contempt,' than from free wheeling discussion and debate, however premature.'" n190 In a system of secrecy, the public is unable to assess whether justice is or is not being served by the Commission's work. The integrity of the Commission and the appearance of justice would be increased by providing access to the proceedings, as the public would be allowed the opportunity to participate in and to serve as a check upon the process. n191 The most desirable way to satisfy the appearance of justice is to allow the people the ability to observe it. n192 Respect for the law is increased as well as the public's confidence, which could never occur in a system of secrecy.

Section 161.205

18. Section 161.205 provisions; 'Frivolous Complaints' violates Plaintiffs First Amendment and 14th Amendment rights as it creates a new 'civil tort remedy statute' [beyond constitutional established tort remedy laws already in place for redress] and imposes \$4,000 civil liability on complainants and also in absence of "Actual Malice" standard.

Stilp v. Contino, 629 F. Supp. 2d 449, 2009 U.S. Dist. LEXIS 54547 (M.D. Pa. 2009) Unrestricted Shepard's Summary No subsequent appellate history... *Sullivan*, 376 U.S. at 273. When an individual [*28] levies charges of ethical improprieties with no other purpose than to harass, a public official must demonstrate that he or she is without civil tort remedies before repression of speech is constitutionally permissible. See generally *id.*; see also *Lind v. Grimmer*, 30 F.3d 1115 (9th Cir. 1994)

New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (doctrine of fair comment requires public official bringing libel action to prove false statements were made with actual malice) *Providence Journal*, 723 F. Supp 846 (rule which serves to black out all public discussion of the existence and contents of a complaint and punishing disclosure is a 'prototypical content based regulation of speech' that 'attempts to apply the test of truth to the public airing of grievances'-'the essence of unconstitutional censorship'.

Dehne v. Avano, 219 F. Supp. 2d 1096, 2001 U.S. Dist. LEXIS 24529 Unrestricted Shepard's Summary: No negative subsequent appellate history. A statute that regulates speech critical of public officials and which implicitly requires the critic to guarantee the truth of every factual assertion made to the Commission on pain of statutorily imposed civil liability (and potential criminal liability) results in self-censorship and discourages public debate. These statutes are not content-neutral laws of general applicability, but are, like the [**20] campaign spending statutes in *Lind v. Grimmer*, "intended to impose direct and significant restrictions on speech." 30 F.3d 1115 at 1118. The underlying principle of the *New York Times* standard is the protection of open public debate critical of official conduct, and it applies with equal force when the legislative branch attempts to regulate citizens' comments through a legislatively-created commission. This court finds that N.R.S. §§ 281.525(1) and 281.551(2)(a) regulate protected speech, and that the *New York Times* standard governs consideration of the constitutionality of the statutes.

V. PRAYER FOR RELIEF

Plaintiff requests this Court assume jurisdiction over this cause and grant Plaintiff Declaratory Judgment relief by declaring that the County of El Paso Ethics Law or sec 161.173 and/or 161.205 thereof is vague/overbroad and violates the First and Fourteenth Amendments and is therefore unconstitutional. Plaintiff requests this Court grant any additional relief as this Court deems just and proper. [Plaintiff reserves the right to seek a injunction if Court rules in Plaintiffs favor in the unlikely event the County of El Paso does not follow any Declaratory Judgment]

Respectfully Submitted, *Carl Starr* 9-28-09 Carl Starr, PO Box 1561 El Paso, TX 79948

carlstarr@hotmail.com

I declare under penalty of perjury that the forgoing is true to the best of my knowledge, information, and belief.

Carl Starr 9-28-09