

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

Lynn District Court
C.A. No. 0913-CV-1464

In Re: 2008 Massachusetts Ballot Question 3)
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**ATTORNEY GENERAL’S OPPOSITION
TO COMPLAINT AND REQUEST FOR AN INQUEST**

The Complaint and Request for an Inquest should be dismissed. The purpose of an inquest is to determine whether any of the laws relating to elections have been violated. *See* G.L. c. 55, § 35. But the complaint fails to allege a prosecutable violation of either of the election laws upon which it is based, G.L. c. 56, § 42 or G.L. c. 56, § 32, and this Court has all the information it needs to determine whether or not criminal proceedings should be instituted against anyone. Therefore, this Court, in its discretion, should dismiss the complaint and deny the request to convene an inquest.¹

PRIOR PROCEEDINGS

On November 4, 2008, Massachusetts voters approved Ballot Question 3 (“Question 3”), the “Greyhound Protection Act,” a measure which bans dog racing where betting or wagering on the speed or ability of dogs occurs. Complaint, ¶ 5. In June 2009,

¹ G.L. c. 55, § 35, provides that upon the filing of a complaint “alleging that reasonable grounds exist for believing that any law relating to . . . elections, or to any matters pertaining thereto, has been violated, such court *may* at once hold an inquest to inquire into such alleged violation of law” (emphasis supplied).

the complainants (John O'Donnell, Albert G. Smith, Jr., Michael B. Curran, and Casey B. O'Neil, are collectively referred to as "the complainants") filed a complaint and request for an inquest pursuant to G.L. c. 55, §§ 35, *et seq.* in the District Court. *Id.* at p. 3. The complainants allege the commission of four crimes.

The first three concern alleged violations of G.L. c. 56, § 42, which prohibits the publication of false statements designed to influence the vote on questions submitted to voters. The complainants allege that before the election, supporters of Question 3: (1) "repeatedly made false statements with regard to the size of the enclosures used by the greyhound racing industry in Massachusetts . . . mischaracter[izing] the enclosures as 'small cages barely large enough for [the dogs] to stand up or turn around,'" complaint ¶ 6; (2) "misrepresented the adoption rate of retired greyhounds in Massachusetts as thirty-one percent," *Id.* ¶ 9; and (3) "repeatedly published video and/or photographs depicting the cruel treatment of greyhounds in other states and countries for the purpose of misleading Massachusetts voters into believing the depicted abuse had occurred or was occurring in Massachusetts." *Id.* ¶ 12.

The fourth allegation asserts a violation of G.L. c. 56, § 32, which prohibits the payment or promise to a voter of any gift or reward to influence his vote. The complainants allege that before the election, the MSPCA, one of the co-sponsors of Question 3, "sent out emails" and "posted on its website an offer of free computer desktop wallpaper to those who took a pledge to vote 'yes' on Question 3." *Id.* ¶¶ 12, 13.

I. THERE IS NO NEED TO CONVENE AN INQUEST BECAUSE THE COMPLAINT DOES NOT ALLEGE A PROSECUTABLE VIOLATION OF G.L. c. 56, § 42.

There is no need to conduct an inquest because the complaint does not allege a prosecutable violation of G.L. c. 56, § 42. “[A] statute [such as G.L. c. 56, § 42] . . . which makes criminal a form of pure speech must be interpreted with the commands of the First Amendment clearly in mind.” *Commonwealth v. Welch*, 444 Mass. 80, 93 (2005), quoting *Watts v. United States*, 394 U.S. 705, 707 (1969). It is generally a question of law for the court to determine whether a published statement falls outside protected speech. *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 85 (1989). If this case were a civil defamation case, a summary judgment-type disposition would be favored. *See Dulgarian v. Stone*, 420 Mass. 842, 846 (1995), citing *King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987), because “[a]llowing a trial to take place in a meritless case ‘would put an unjustified and serious damper on freedom of expression.’” *Id.* Similarly, here, a disposition based upon a conclusion of law is appropriate.

As a matter of law, no person could be properly charged under G.L. c. 56, § 42, based upon the statements upon which the complaint is premised. For a person to violate G.L. c. 56, § 42, the statements would have to meet two criteria. First, they must be false statements, G.L. c. 56, § 42, provable as such, *see Mosee v. Clark*, 453 P. 2d 176, 178 (Or., 1969) (affirming lower court’s dismissal of complaint under the Corrupt [Election] Practices Act where the slogan “return a proven leader” was so ambiguous that either a correct inference of fact could be drawn from it or it was a matter of opinion); *Salvo v.*

Ottaway Newspapers, 57 Mass. App. Ct. 255, 260 (2003) (ordering summary judgment for the media defendant where the article provided substantially correct facts and substantially accurate context regarding the land transactions involved, leaving it up to the readers to draw their own conclusions). Nonactionable opinions are insufficient. *Cole v. Westinghouse Broadcasting*, 386 Mass. 303, 308 (1982) (ordering directed verdict for defendants where the meaning of the statements that the reporter was sloppy and irresponsible was imprecise and open to speculation and therefore, could not be characterized as assertions of fact); *Driscoll v. Bd. of Trustees of Milton Academy*, 70 Mass. 285, 297 (2007) (affirming dismissal of complaint where statements made by the school concerning the plaintiffs' use of coercion were opinions clearly based on disclosed nondefamatory facts).

Second, such statements would have to have been published "knowingly," G.L. c. 56, § 42, that is, with actual malice, *Vanasco v. Schwartz*, 401 F. Supp. 87, 92 (E.D.N.Y. 1976), meaning, made with knowledge that they were false or with reckless disregard of whether they were false or not. *Id.* at 92, citing *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) (ruling that the challenged sections of the New York Fair Campaign Code were unconstitutional on their face because they were not narrowly drawn so as to comply with the *Times* "actual malice" standard).²

² The Commonwealth notes that in the last few years, statutes (or ordinances) that are similar to G.L. c. 56, § 42, have been stricken as constitutionally overbroad. *E.g.*, *State v. Jude*, 554 N.W.2d 750 (Minn. Ct. App. 1995) (Minnesota Court of Appeals determining that the state's false campaign speech statute was facially invalid for failure to meet the *New York Times* "actual malice" standard); *State v. Burgess*, 543 So. 2d 1332 (La. 1989) (Louisiana Supreme Court determining that the state's false campaign speech statute was facially invalid for failure to meet the *New York Times* "actual malice" standard); *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, 957 P. 2d 691 (Wash. 1998) (Washington Supreme Court determining, in the context of initiative to legalize physician-assisted suicide, that state's false political advertising statute, which prohibited any person from sponsoring, with actual malice, a political advertisement containing a false statement of material fact, was facially unconstitutional because it "chills political speech, usurps the rights of the electorate to determine the merits of political initiatives without

Here, as detailed below, the first statement (regarding cage size) that is the subject of the complaint is a nonactionable opinion; the second (regarding adoption rates), even if somehow “false,” was drawn directly from a state agency report and thus not published with actual malice; and the third (supposedly contained in videos containing footage from outside of Massachusetts) was never made.

A. The Statement, “Small cages barely large enough to stand up or turn around,” Was Not a Violation of G.L. c. 56, § 42, Because it is Nonactionable Opinion.

The statement, “small cages barely large enough to stand up or turn around,” complaint, ¶ 6, was not a violation of G.L. c. 56, § 42, because it is a nonactionable opinion. On review of an allegedly false statement, the court reads the statement “reasonably,” *King*, 400 Mass. at 711-12. The phrase “small cages barely large enough to stand up” is not a “false statement” for two reasons: (1) the phrase cannot be proved false; and (2) the phrase was an opinion, and at that, one made in the midst of political discussion.

fear of government sanction, and lacks a compelling state interest in justification”); *Rickert v. State of Washington*, 168 P.3d 826 (Wash. 2007) (Washington Supreme Court determining, in the context of an election for state senator, that state’s false political advertising statute, which was amended after *119 Vote No!*, 957 P. 2d at 691 in an attempt to proscribe sponsoring, with actual malice, of a political advertisement containing a false statement of material fact about a candidate for public office, was facially unconstitutional because the statute allows a government agency to censor political speech); *Dermer v. Miami-Dade County*, 2008 WL 2955152 (S.D. Fla.) (federal district court determining that a Miami ordinance prohibiting any person from intentionally making false statements concerning the contents or effect of any petition for initiative, referendum, or recall to any person who is requested to sign any such petition, was facially unconstitutional because it criminalizes subjective political statements, it reaches a substantial amount of protected speech, it gives police officers unfettered discretion and creates an impermissible risk of suppression of ideas, it is vague because it does not define “false statement” or other key terms, and the state did not meet its burden to show that the public interest is sufficiently compelling); *Ancheta v. Watada*, 135 F.Supp.2d 1114, 1117 (D.Haw.2001) (federal district court determining that the state’s attempts to regulate speech through the Code of Fair Campaign Practices was unconstitutionally overbroad on its face because it had the potential of prohibiting or chilling a substantial range of protected speech); *but see Pestrak v. Ohio Elections Com’n*, 926 F.2d 573, 577 (6th Cir. 1991) (statute prohibiting making of false statements in political campaigns is not unconstitutional on its face because most of the parts of the statute affect only the knowing making of false statements).

The phrase “small cages barely large enough to stand up” cannot be proved false and therefore, is not actionable. Where a statement is too imprecise and vague to be proved false, it is not actionable. *Dulgarian*, 420 Mass. at 847 (assertion that an investigation uncovered an area of “potential abuse,” cannot be proved false and therefore is not actionable); *Cole*, 386 Mass. at 311 (assertion that a reporter was “sloppy” and “irresponsible” cannot be proved false and therefore is not actionable); see *McCabe v. Rattiner*, 814 F.2d 839, 8420-43 (1st Cir. 1987) (word “scam” is not precise enough to convey defamatory meaning and therefore is not actionable); *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 129 (1st Cir. 1997) (word “trashy” is not precise enough to convey defamatory meaning and therefore is not actionable). Here, the words “small” and “barely large enough” are too imprecise and vague to be proved false.

Further, that the statements that the cages were “small” and “barely large enough” constituted matters of opinion is evident from the one of the longer statements made by Question 3 proponents:

Large greyhounds cannot fully stand up in racetrack cages. The minimum dimensions for cages at Wonderland Greyhound Park and Raynham Park are 32 inches wide by 42 inches deep and 34 inches high. According to the American Greyhound Council, greyhounds stand between 23 inches and 30 inches tall at the shoulder, and weigh between 50 and 85 pounds.

By contrast, the runs used for similarly sized dogs at the MSPCA Boston Animal Care and Adoption Center are approximately five times larger than the cages used at local racetracks.

Appendix, p. 1. Given the comparative dimensions of the Wonderland/Raynham cages (32” wide X 42” deep X 34” high); the cages at the MSPCA (approximately five times larger); and the greyhounds themselves (between 23” and 30” tall at the shoulder, weighing between 50 and 85 lbs.), it is plainly a matter of opinion whether the cages were

“small” and “barely large enough,” especially for the larger (30”) greyhounds standing in a Wonderland/Raynham-sized (32”) crate. Any reader could do his own mathematics based upon these facts and form his own opinion whether the cages were “small” and “barely large enough.”

The fact that there were regulations concerning the minimum dimensions of the cages (205 CMR 12.04(4), complaint, ¶ 7, is beside the point. While the regulation may represent the State Racing Commission’s view that a cage meeting the minimum dimensions of 32” X 42” X 34” meets the “ample” or “comfortable” standard, proponents of Question 3 might express a different view without that view being “false.” Surely what is “ample” or “comfortable” are matters of opinion; the government cannot issue a regulation declaring what is “true” and prosecute citizens who think and say otherwise. As an opinion, therefore, “small cages barely large enough to stand up,” was not an actionable “false statement.”

Further, the phrase “small cages barely large enough to turn around” must be considered in the context of where and to whom it was offered. “In a political campaign, the exaggerated character of political discussion is usually intensified.” *Borski v. Kochanowski*, 3 Mass. App. Ct. 269, 272 (1975). A certain amount of sophistication on the part of the public and its ability to sort fact from opinion may be assumed, particularly in the context of political discussion. *See National Association of Government Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 299 (1979) (statement made on a talk show that labor union’s attempt to subvert speech was “communism” was held not actionable). Here, it may be assumed that the public could readily discern that the phrase “small cages barely large enough to turn around” was an

expression of opinion published in the context of political discussion. The “independent protections of freedom of speech which are found in [Massachusetts] common law and in art. 16,” as well as the “doctrines deriving ultimately from the First Amendment as interpreted by the Supreme Court,” *Lyons v. Globe Newspaper Co*, 415 Mass. 258, 268 (1993) lead to the inevitable result that no person can be held responsible for a violation of G.L. c. 56, § 42, for stating the opinion that the greyhounds were confined in “small cages barely large enough to turn around.”

B. The Statement Concerning the Thirty-One Percent Adoption Rate of Retired Greyhounds Was Not a Violation of G.L. c. 56, § 42, Because the Statement was Not Published with “Actual Malice.”

The statement that the adoption rate of retired greyhounds in Massachusetts is thirty-one percent, whether true or false, was not a violation of G.L. c. 56, § 42, because the information was drawn directly from a State Racing Commission report and so it was not published with “actual malice,” i.e., with knowledge of or reckless disregard for its falsity. Indeed, the complainants do not suggest that the statement was published with actual malice. As a matter of First Amendment law, a state may not impose criminal sanctions for “false statements” about political officials or issues of public concern without a showing of actual malice. *Garrison v. Louisiana*, 379 U.S. 64-67, 75 (1964) (called into doubt on other grounds by *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 134, [1967]); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (*New York Times* actual malice standards apply to state regulation of false campaign advertising); *Milkovich v. Lorain Journal*, 497 U.S. 1, 21 (1990) (applying actual malice standard where statement involved a private figure on a matter of public concern); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). See *Vanasco*, 401 F. Supp. at 93 (state regulation of political speech

must be premised on proof and application of a *New York Times* “actual malice” standard). “Actual malice” is defined as “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *Murphy v. Boston Herald*, 449 Mass. 42, 48 (2007); *see King*, 400 Mass. at 719. A finding of “reckless disregard” requires proof that the author “in fact entertained serious doubts as to the truth of his publication.” *St. Amant*, 390 U.S. at 731. Where the source is an official governmental record, the publisher may justifiably rely on the materials contained in the report and therefore, actual malice is not inferable. *DiSalle v. P.G. Pub. Co.*, 544 A. 2d 1345, 1355 (Pa. Super. 1988), citing *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) and *St. Armant*, 390 U.S. at 731. Here, the thirty-one percent adoption rate statistic that was published and is the subject of the complaint, ¶ 9, came from an official government source, and therefore, there was no actual malice in its publication. According to the State Racing Commission’s official published report, the adoption rate for greyhounds is thirty-one percent: a table in the 2007 Massachusetts State Racing Commission Report, under the title “2007 Greyhound Disposition Figures for Wonderland and Raynham/Taunton,” and posted on the official State Racing Commission website, states under the heading “adopt” (referring to the disposition of the greyhounds) the figure “31%.” Massachusetts State Racing Report, Seventy-Third Report (2007), at p. 52, available at: <http://www.mass.gov/Eoca/docs/src/annualreport2007.pdf> . Therefore, it can hardly be said that the statement was published with knowledge that the statement was false, or with reckless disregard of whether it was or not, and no one could be held to have violated G.L. c. 56, § 42, based upon that statement.

The complainants' attack on the statement that the adoption rate was thirty-one percent is apparently based on a claim made by opponents of Question 3 to the effect that "greyhound racing industry in fact achieves a one hundred percent adoption rate for its retired racers that are placed in the adoption program," complaint, ¶ 9. It may be that both statements are true: the proponents' (thirty-one percent adoption rate) and opponents' ("The greyhound racing industry in fact achieves a one hundred percent adoption rate for its retired racers that are placed in the adoption program") statements are true, but the denominators they use are different. The proponents use an overall disposition rate for the denominator ("2007 Greyhound Disposition Figures for Wonderland and Raynham/Taunton"); the greyhound racers use a qualified disposition rate ("retired racers *that are placed in the adoption program*"). Where a statement is ambiguous enough that a correct inference of fact can be drawn from it, it is not false. *See Mosee*, 453 P. 2d at 178 (affirming lower court's dismissal of complaint under the Corrupt [Election] Practices Act where the slogan "return a proven leader" was so ambiguous that either a correct inference of fact could be drawn from it or it was a matter of opinion). Therefore, in addition to the statement not being actionable because it was made without actual malice, it is not actionable because a correct inference of fact could be drawn from it. Therefore, the statement that the adoption rate of the greyhounds was thirty-one percent does not violate G.L. c. 56, § 42.

C. The Publication of "False Statements [. . .] Through and Alongside the Videos Depicting the Cruel Treatment of Greyhounds in Other States and Countries" Did Not Violate G.L. c. 56, § 42, Because No False Statements were Published.

Presumably, the allegation in ¶ 12 of the complaint, that false statements were published "through and alongside the videos depicting the cruel treatment of greyhounds

in other states and countries for the purpose of misleading Massachusetts voters,” refers to three videos that were furnished to the Attorney General by the complainants³. These videos do not state that they depict conditions in Massachusetts, nor do they contain any other statements asserted to be false. Affidavit of Judy Zeprun Kalman (“Kalman Affidavit”), ¶ 3; Appendix, p. 1. Because the videos do not state that they are depicting conditions in Massachusetts nor contain any other statements asserted to be false, their publication did not violate the statute.

The three videos were posted on You Tube. *See* http://www.youtube.com/watch?v=6krOoyEMJ4U&feature=channel_page; http://www.youtube.com/watch?v=wn011O03Bzo&feature=channel_page; and <http://www.youtube.com/user/defygravityalltheway>. *See also* Affidavit of David Papargiris, EnCE (“Papargiris Affidavit”), ¶¶ 4, 5, Appendix, p. 14. The first video (EMJ4U) was posted on YouTube on October 24, 2008 by “Sunnyboy145.” Papargiris Affidavit, ¶ 5, Appendix, p. 14. The second video (11Oo3Bzo) was posted on October 30, 2008 by “sunnyboy145.” Papargiris Affidavit, ¶ 5, Appendix, p. 14. The third video (defygravityalltheway) was posted on October 28, 2008 by “defygravityallthe way.” Papargiris Affidavit, ¶ 5, Appendix, p. 14.

The publication of the videos “depicting the cruel treatment of greyhounds in other states and countries,” complaint, ¶ 11, did not violate G.L. c. 56, § 42, because no “false statement” was published. As a penal statute, G.L. c. 56, § 42, must be “construed narrowly,” *Commonwealth v. Kerr*, 409 Mass. 284, 286 (1991) and “strictly against the Commonwealth.” *Commonwealth v. Gagnon*, 387 Mass. 567, 569 (1982). Any doubt

³ The Attorney General’s Office has downloaded the videos to a DVD and has provided them to the Court. Kalman Affidavit, ¶ 4; Appendix, p.2.

that lingers as to the reach of an ambiguous criminal statute is resolved in favor of the defendant. *Gagnon*, 387 Mass. at 569. Here, “publish . . . any false statement” must be narrowly construed narrowly to reach only a “false statement” that was actually published, not a myriad of arbitrary, possible inferences that could be drawn.

Moreover, because G.L. c. 56, § 42, is capable of affecting First Amendment interests, its parameters must be clear to avoid constitutional issues. “[Where] a statute is capable of affecting First Amendment interests . . . the vagueness doctrine demands even greater precision than in other contexts.” *Commonwealth v. Sefranka*, 382 Mass. 108, 111 (1980) (court ruling that “lewd, wanton and lascivious” language of G.L. c. 272, § 53 was unconstitutional). “Due process requirements also mandate that no statute have such a standardless sweep that arbitrary and discriminatory enforcement by the police and the courts is permitted.” *Commonwealth v. Bohmer*, 374 Mass. 368, 372 (1978). Indeed, at least two courts have held that a person could not be held responsible for violating statutes similar to G.L. c. 56, § 42, based on allegedly “misleading” publications, in effect ruling that only an actual false statement, not an inference drawn, is actionable. In *In re Pirko*, 540 N.E. 2d 329 (Ohio, 1988), the plaintiff alleged that the political campaign pamphlets distributed by the defendant were false statements in that they were “designed to mislead the voting public because they fail to provide the reason for rejection of the proposal which was the lack of funds necessary to employ and pay for said fire inspectors,” and “to prevent voters from examining the records providing the proper answers to the reason for rejection.” *Pirko*, 540 N.E. 2d at 332. The court held that while the “statement was potentially misleading and failed to disclose all relevant facts . . . it was not a ‘false statement’ under [the Unfair Campaign Practices Act].” Similarly, in

Committee of One Thousand to Re-Elect State Senator Walt Brown v. Eivers, 674 P. 2d 1159 (Or. 1983), the plaintiff candidate alleged that the defendant’s campaign brochures were “false” in stating that the plaintiff candidate had introduced legislation which “would have established a statewide property tax,” where a series of additional steps would have been necessary to establish the tax. The court held that the defendant had not violated the Corrupt Practices Act because the statements were “true in one sense and false in another,” and [b]ecause an inference reasonably can be drawn that the statements were not false[.]” *Walt Brown*, 674 P. 2d at 1165. Here, too, the videos and photographs may not have carried a disclaimer that they depicted greyhounds in places other than Massachusetts, but neither did they state that the depictions came from Massachusetts.

Moreover, even if any of the videos had contained any false statement, an inquest would be highly unlikely to assist in identifying who published that video. It does not appear that the person(s) responsible are associated with any of the three main organizational sponsors of Question 3.⁴ Beyond that, on July 2, 2009, an administrative subpoena was served pursuant to G.L. c. 271, § 17B, upon YouTube, LLC, demanding subscriber/registering information and any IP address associated with “sunnyboy145” and “defygravityallthe way” for the period August 2008 to the present. Papargiris Affidavit, ¶¶ 6, 7, Appendix, p. 15. With respect to “sunnyboy145,” the return states: “After a diligent search and reasonable inquiry, we have found no registration information or IP log information for any YouTube account created by a user with the username Sunnyboy145.” Papargiris Affidavit, ¶ 6, Appendix, p. 15. Therefore, an

⁴ Neither “sunnyboy145” nor “defygravityalltheway” are associated with Grey2K USA, the MSPCA, or the Humane Society of the United States, the major supporters of Question 3. Affidavit of Christine Dorchak, ¶3, Appendix, p. 5; Affidavit of Kara Holmquist, ¶ 3, Appendix, p. 7; Affidavit of Roger Kindler, ¶ 4, Appendix, p. 16.

investigation has yielded the name of no person who can be held responsible for the “sunnyboy145” postings.

With respect to “defygravityalltheway,” the return indicates that the associated e mail account is hpfanatic97@comcast.net. Papargiris Affidavit, ¶ 7, Appendix, p.15. On July 23, 2009, an additional administrative subpoena was served pursuant to G.L. c. 271, § 17B, upon Comcast, demanding subscriber/registering information for hpfanatic97@comcast.net. Papargiris Affidavit, ¶ 8, Appendix, p. 15. The return is outstanding.⁵

Because the videos contained no false statements, and because even if they had, there is no reasonable prospect that an inquest would yield any additional information concerning the identification of the person(s) who posted those videos on YouTube, the convening of an inquest regarding the videos is unwarranted.

II. THERE IS NO NEED TO CONVENE AN INQUEST TO INVESTIGATE THE ALLEGATION OF BRIBERY OF VOTERS BECAUSE THE OFFER OF FREE WALLPAPER WAS NOT A GIFT OR REWARD AND, IN ANY CASE, THE IDENTITY OF THE ORGANIZATION WHICH MADE THE OFFER OF FREE WALLPAPER IS KNOWN.

There is no need to convene an inquest to investigate the allegation of bribery of voters in violation of G.L. c. 56, § 32, based on the MSPCA’s offer of the free “greyhound” computer “wallpaper.” The wallpaper was not a “gift or reward” as would be required to show a violation of G.L. c. 56, § 32, because it was already available free from the MSPCA to anyone who provided contact information, whether or not they pledged to vote “Yes on Question 3.” Moreover, even if the facts showed that the MSPCA’s wallpaper offer had violated the statute, the identity of the organization which

⁵ The Attorney General will notify the Court if it receives a name and, upon request, will furnish it to the Court.

made the offer is known, so this Court would not need to convene an inquest to determine whether to institute or recommend the institution of criminal proceedings.

Since January 29, 2007, the MSPCA has offered free promotional items such as wallpaper, e-cards, newsletters, and a toolbar (and recently, cell phone ringtones) to the public. Holmquist Affidavit, ¶ 6, Appendix, p. 7. *See* <http://www.mspca.org/site/PageServer?pagename=freestuff>. Free wallpaper has been available (eighteen different wallpaper options, including the “greyhound” wallpaper) since October 22, 2008. Holmquist Affidavit, ¶ 6, Appendix, p. 7. For wallpaper downloads depicting dogs, cats, and other animals that are currently available, *see* [http://www.mspca.org/site/Survey?SURVEY_ID=4041&ACTION_REQUIRED=URI ACTION_USER_REQUESTS](http://www.mspca.org/site/Survey?SURVEY_ID=4041&ACTION_REQUIRED=URI_ACTION_USER_REQUESTS).

On October 28, 2008, the webeditor for the MSPCA sent out an e mail concerning Question 3. Holmquist Affidavit, ¶ 7, Appendix, pp. 7-8, 12. At the end of the e mail, the following sentence was added:

Take the pledge below to vote YES on Question 3 and send this email to at least 10 friends, acquaintances and others. Everyone who takes the pledge will get free Greyhound desktop wallpaper to show their support.

Id. Under this sentence was a “Sign the Pledge” button. *Id.* After the person clicked on the pledge button, he was redirected to:

[https://www.mspca.org/site/Survey?SURVEY_id=4061&ACTION_REQUIRED=URL ACTION_USER_REQUESTS](https://www.mspca.org/site/Survey?SURVEY_id=4061&ACTION_REQUIRED=URL_ACTION_USER_REQUESTS). *Id.* Once the person filled in his or her contact information on that page, the person was sent a “thank you” e mail. *Id.* at 5, 6, 11. The “thank you” e mail contained a link to this image of a greyhound:

<https://www.mspca.org/images/content/pagebuilder/27007.jpg>. *Id.* The “greyhound”

image was the same free wallpaper that was also available directly from the website, whether or not the person pledged to vote “yes” on Question 3. Holmquist Affidavit, ¶ 8, Appendix, p. 8. Therefore, there was no “gift” or “reward” and there was no violation of G.L. c. 56, § 32.

In any case, there is no reason to convene an inquest to inquire into an alleged violation of G.L. c. 56, § 32. Even without a hearing, the Court has all the information it needs to determine whether it should recommend that public resources be spent prosecuting a criminal complaint against an organization for offering free computer wallpaper to individuals who pledged to vote “yes” on Question 3 where the wallpaper was readily and otherwise available for free from that organization.

CONCLUSION

For the reasons stated above, the Complaint and Request for an Inquest should be dismissed and the Court, in its discretion, should deny the request to convene an inquest.

Respectfully submitted,
THE COMMONWEALTH

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