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VIA ELECTRONIC MAIL

Board of Education
Evanston Township High School District 202
1600 Dodge Avenue
Evanston, IL 60201

Dear Board of Education members:

It has come to our attention that the Board has enacted a new policy that designates certain communications as "confidential" and restricts Board members from disclosing them. The ACLU of Illinois believes that this policy diminishes government transparency and raises serious constitutional issues. We urge you to withdraw or revise the policy.

Under the policy, school board members "shall" treat as confidential any written communications from the superintendent or Board president exclusively to the Board or administrators, unless the communication states otherwise. Board members "shall" also "maintain the confidentiality of the communication" absent consent from the author to disclose it "to a specific third party," unless "extraordinary circumstances exist," in which case the member "shall . . . first seek guidance and/or inform the Board president, superintendent, or Board attorney prior to sharing the communications with a third party."

The Supreme Court has recognized that "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966). Accordingly, the First Amendment does not authorize a state legislature to remove one of its members based on speech that would have been protected when uttered by a private person. *Id.*

Citing *Bond*, lower courts have invalidated restrictions on the free speech rights of local governing bodies, when those restrictions would be unconstitutional if applied to private individuals. *Rangra v. Brown*, 566 F.3d 515, 525 (5th Cir. 2009), *dismissed as moot,* 584 F.3d 206 (5th Cir. 2009); *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 534 (1st Cir. 1989).

A few courts have afforded somewhat more limited free speech rights to elected officials, essentially treating them like public employees. *See Dyer v. Maryland State Bd. of Educ*., 187 F. Supp. 3d 599, 620-22 (D. Md. 2016), *aff'd*, 685 Fed. Appx. 261 (4th Cir. 2017); *but see*

Nordstrom v. Town of Stettin, 16-CV-616-JDP, 2017 WL 2116718, at *3 (W.D. Wis. May 15, 2017) (noting that most courts to consider the issue have rejected this view).

The new policy likely fails to meet constitutional standards even if the First Amendment rights of elected officials are no broader than the rights of public employees. A public employee has a right to speak "as a citizen , . . upon matters of public concern." *Connick v. Myers*, 461 U.S. 138, 140 (1983). Courts balance this right against the government's interest "in promoting the efficiency of the public services it performs through its employees." *Id.* When the government enacts a rule that prohibits speech in advance and thereby "chills potential speech before it happens," the government "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) (citation and internal quotation marks omitted).

In this case, the Board has enacted a rule that prohibits members from disclosing a broad range of government communications without the consent of the author or, in "extraordinary circumstances" prior consultation with the Board president, superintendent, or Board attorney. Even under the First Amendment standards that govern public employees, the free speech rights of present and future Board members, and the interests of the public in hearing that speech, outweigh any legitimate interests of the Board.

To be sure, the Board has an interest in keeping certain information confidential, including personnel decisions, personal information about students, and privileged attorney-client communications. But the Board's interest in privacy is sharply circumscribed by the Illinois Freedom of Information Act (FOIA), 5 ILCS 140/1, *et seq.*, which requires the Board to disclose any documents that do not fall within defined exemptions. The Board does not have any legitimate interest in maintaining the privacy of documents that are public under FOIA. The General Assembly has already determined that the public interest in government transparency outweighs any interest the Board may have in keeping such records private.

While the Board may have a legitimate interest in maintaining the confidentiality of communications that are exempt under FOIA, that interest does not justify the broad rule imposed here. Under the Board's policy, communications from the superintendent or Board president are *presumptively* confidential. The Board could reverse this presumption and still protect its interests in confidentiality. For example, the Board could put the onus on the sender to designate a communication as confidential by citing the particular FOIA exemption that justifies such a designation. A Board member who wants to disclose the document could challenge that designation under an appropriate procedure.

Finally, I note that the policy repeatedly uses the word "shall," indicating that the policy is mandatory and suggesting that some discipline may be imposed on Board members who violate it, though it does not specify a particular sanction. Even if the Board does not intend to impose such discipline, this mandatory language may have a chilling effect on the speech of members. If the Board intends the policy merely to reflect the opinion of the majority of Board

about how members should voluntarily conduct themselves, the policy should make that clear, and it should not include language suggesting that the rule is mandatory or implying that sanctions may be imposed for violations.

For all of these reasons, we urge the Board to revoke or amend its confidentiality policy. Doing so would demonstrate its commitment to open government and to its members' First Amendment rights.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me at (312) 201-9740 ext. 316 or rglenberg@aclu-il.org.

Sincerely,

Rebecca K. Glenberg
Senior Staff Counsel