STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION

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DECLARATORY ORDER NO. 14

SCHOOL DISTRICT ACTIVITIES RELATING TO SUPPORT OF OR OPPOSITION TO INITIATIVES TO THE LEGISLATURE (RCW 42.17.130 and RCW 42.17.190) An analysis of when and to what extent RCW 42.17.130 and RCW 42.17.190 affect a school district's ability to engage in activities relating to the support of or opposition to initiatives to the legislature.

James J. Dionne, Attorney at Law
Dionne Rorick
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Seattle, WA 98104

Dear Mr. Dionne:

You petitioned, on behalf of a number of school districts across the State of Washington, for a declaratory order pursuant to RCW 34.05.240 and WAC 390-12-250. The petition asks for a ruling regarding the application of RCW 42.17.130 and RCW 42.17.190 to school district activities in regard to initiatives to the legislature. At a regular meeting of the Public Disclosure Commission (PDC or Commission), we decided to issue this binding written declaratory order so as to provide guidance to the school districts you represent and all other school districts similarly situated and therefore faced with similar issues.

You specifically asked the following questions:

1) Does RCW 42.17.130, prohibiting the use of public facilities to support or oppose any ballot proposition, apply to initiatives to the legislature at any of the following times:

   (a) while initiative supporters are gathering signatures to place the proposal before the legislature;

(b) after the initiative has gained sufficient signatures and the proposal is pending before the legislature; or
(c) after the legislature has declined to act, or has passed an alternative, placing the proposal before the voters?

2) Is RCW 42.17.190(4), prohibiting the use of public facilities to support or oppose an initiative to the legislature, applicable at the following times:

(a) while initiative supporters are gathering signatures to place the proposal before the legislature;
(b) after the initiative has gained sufficient signatures and the proposal is pending before the legislature; or
(c) after the legislature has declined to act, or has passed an alternative, placing the proposal before the voters?

3) Is communicating with the legislature pursuant to RCW 42.17.190(2) or lobbying, as authorized by RCW 42.17.190(3), with respect to an initiative to the legislature permissible for school districts under RCW 42.17.190(4)(c)?

4) May school board members or school administrators draft and/or submit substitutes to initiatives to the legislature while the initiative is pending before the legislature?

5) What are "proper official channels" for officers or employees of a school district to request legislative action or appropriations as permitted by RCW 42.17.190(2)? (i.e., in-person verbal requests to legislative staff members; letters or phone discussions with local legislators; the Superintendent of Public Instruction; the Washington State School Directors Association; the Washington Association of School Administrators?)

6) How does a school district establish "the official position or interests of the agency" for the purposes of lobbying as authorized by RCW 42.17.190(3)? Does the official position have to be formally adopted by resolution in an open public meeting of the board of directors? Can the interests of the district be formulated by more informal communications between members of the board and district staff?

FACTUAL BACKGROUND

In your request for the declaratory ruling, you stated that several school reform initiatives have been filed which would have a substantial impact on the future of school districts in this state, citing for example Initiative 173 and Initiative 177. In addition, you believe that other proposals may be introduced in the legislature as alternatives to these proposals. Although there is considerable guidance on the interpretation of RCW 42.17.130 as it affects campaigns for and against ballot proposition, you believe that it is unclear as to

the effect of RCW 42.17.190, which deals with lobbying of the state legislature by elected officials and public employees. Therefore, by the questions posed, you seek additional guidance.

ISSUES

The questions you posed have been paraphrased and answered as follows:

1) To What Extent Does RCW 42.17.130 Apply to Initiatives to the Legislature?

RCW 42.17.130 states, in part, that:

> *"No elected official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition."* (Emphasis added)

Further, according to RCW 42.17.020(3),

> *"Ballot proposition" means any "measure" as defined by RCW 29.01.110, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency prior to its circulation for signatures.* (Emphasis added)

The Commission concludes from these two provisions that were an initiative to the legislature placed before the voters, because it was not acted upon by the legislature, it was rejected by the legislature, or the legislature proposed an alternative, the prohibition in RCW 42.17.130 would be applicable when the measure ceases to be an initiative to the legislature and the Secretary of State has the constitutional duty to submit the measure to the voters at the next general election.

Were an initiative to the legislature to become a ballot proposition, the exceptions specified in subsections .130(1)-(3) would also be relevant and the prohibition in section .130 would not apply to the following activities:

> *(1) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;*

(2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are part of the normal and regular conduct of the office or agency.

RCW 42.17.130 does not define the phrase "normal and regular conduct". It has been the subject of court decisions and Attorney General opinions. These interpretations have been adopted by the Commission and set forth in rule. WAC 390-05-273 defines this phrase to mean conduct that is *"lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use."*

As previously stated in Declaratory Order No. 10, the policy reflected in these rules is relatively strict. Under the rule, the activity must satisfy two tests. First, the activity must be "lawful", that is, specifically authorized by a constitutional, charter, or statutory provision separately authorizing such use. An example is the publication of the voters pamphlet by the Secretary of State. This activity is authorized by Chapter 29.81 RCW. Therefore, although candidates are entitled to include their own statement in the pamphlet, presumably assisting the candidate's campaign, it is normal and regular conduct for the Secretary of State because of the specific statutory authorization to publish the pamphlet.

The second test for normal and regular conduct is that the activity must be "usual". The agency or official must show that the activity is not a one time occurrence during an election campaign but is part of a course of conduct which is usual and customary for that official or agency.

School district boards of directors have statutory authority in RCW 28A.320.090 to spend public funds to explain the district's instructional program, operation and maintenance to the general public. Therefore, such conduct undertaken pursuant to this statutory authority would be considered "normal". If a school district board exercised this authority, it would been seen as usual, as long as a district comments on the anticipated effects of such a pending ballot measure in a routine and customary manner. Therefore, the Commission believes it is permissible for a district to provide factual, objective and balanced information concerning the effects of a ballot measure on its operational and maintenance activities as well as instructional programs.

However, the Commission also expects the information provided by a district to be reliable. For example, if a district said an initiative's adoption would result in the closure of three elementary schools, and the initiative is approved by the voters, the expectation is that three elementary schools will be closed, absent a relevant change in circumstances that

reasonably could not have been foreseen at the time the information was provided. The information given should be factual, not speculative, and should not be for the purpose of "scaring" the public. If the information were not factual and balanced, then the Commission does not believe it would be allowable under RCW 42.17.130(3).

In summary, while the use of public facilities prohibition in RCW 42.17.130 does apply to school district officials and other personnel with respect to an initiative to the legislature if and when it becomes a ballot proposition, the exceptions set out in section .130 would also be applicable. The "normal and regular conduct" provision in subsection (3) allows school district officials and employees to provide factual and balanced information concerning ballot measures, but not to support or oppose ballot measures with public facilities. Under RCW 42.17.130(1) and (2), elected school board members do have some very limited authority to support or oppose a ballot measure while using public facilities.

2) To What Extent Does RCW 42.17.190(4) Apply to Initiatives to the Legislature?

RCW 42.17.190(4) states, in part, that:

"No elective official or any employee of his or her office or any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, in any effort to support or oppose an initiative to the legislature."

Although chapter 42.17 RCW does not specify when a measure becomes an initiative to the legislature, recognizing the intent of this provision, the Commission finds that RCW 42.17.190 should be interpreted consistently with the definition in RCW 42.17.020(3) so as to be effective in preventing governmental interference in a matter concerning the people of the state and their elected representatives. That statute provides that initiative measures are "ballot propositions" from the time they are first submitted to the Secretary of State prior to their circulation for signatures. See Washington State Constitution, Amendment 72.

To conclude that a measure first becomes an initiative to the legislature after the signatures have been collected and it has been certified by the Secretary of State, would likely permit public resources to be used to promote or oppose the critical signature gathering phase of the process, including having public employees actually collect voter signatures on an initiative petition during working hours. Since such a conclusion would be contrary to the best interests of the public and have the effect of limiting the reach of a statute without any indication that the limitations are warranted or were intended, it is insupportable.

Therefore, in the Commission's opinion, the prohibition in RCW 42.17.190(4) applies during the signature gathering phase as well as the time during which the initiative is pending before the legislature. (As indicated above, RCW 42.17.130 is applicable to an initiative to the legislature that has been placed before the voters.)

The application of RCW 42.17.190(4) to both the signature gathering and legislative consideration phases means that the exemptions found in RCW 42.17.190(4)(a)-(d) are relevant as well. As such, the prohibition against using or authorizing the use of public facilities to support or oppose an initiative to the legislature during the period of time in which it is being circulated for signatures or considered by the legislature does not apply to the following activities:

> *(a) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose an initiative to the legislature so long as (i) any required notice of the meeting includes the title and number of the initiative to the legislature, and (ii) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;*
>
> *(b) A statement by an elected official in support of or in opposition to any initiative to the legislature at an open press conference or in response to a specific inquiry;*
>
> *(c) Activities which are part of the normal and regular conduct of the office or agency;*
>
> *(d) Activities conducted regarding an initiative to the legislature that would be permitted under RCW 42.17.130 and 42.52.180 if conducted regarding other ballot measures.*

Applying the normal and regular conduct tests of "lawful and usual" found in WAC 390-05-273 quoted in the first answer above, unless a school district has statutory authority to engage in or otherwise support signature gathering for initiatives to the legislature, or such a conclusion is necessarily implied by general statutory authority, the Commission determines that this activity is prohibited. To date it has neither been demonstrated nor argued that such statutory authority exists.

However, during the signature gathering phase, a school district could prepare a factual, objective analysis about the impact of an initiative if the passage of the initiative would affect the instructional program, operation or maintenance of the school. RCW 28A.320.090 provides the basis for that activity. Further, this analysis could appear, for example, in the district's regularly scheduled newsletter which is sent to all parents because this method of communication is customary and usual and the information being supplied is lawful as provided in WAC 390-05-273.

With respect to initiatives to the legislature that have been certified by the Secretary of State and are pending before the Legislature, the Commission determined in November of 1991 that lobbying by public agencies in support of or opposition to the passage of such initiatives does constitute normal and regular conduct since public agencies have specific

statutory authority to lobby, and is permissible so long as the lobbying activities are limited to those allowed by RCW 42.17.190(2) and (3). See the response to question #3 below for further information.

3) Is Communicating with the Legislature or Lobbying With Respect to Initiatives to the Legislature Permitted?

In November of 1991, the Commission interpreted RCW 42.17.190(4)(c) as allowing public agencies to use their facilities to engage in lobbying activities with respect to initiatives to the legislature, noting that while they make their way through the legislative process, initiatives are subject to the same legislative rules and procedures as any other piece of legislation introduced. See November 17, 1991 Minutes of the Public Disclosure Commission's Monthly Meeting.

The question now arises as to what types of communications or lobbying are permitted by law. According to RCW 42.17.190(2):

> *"Unless authorized by subsection (3) of this section or otherwise expressly authorized by law, no public funds may be used directly or indirectly for lobbying: PROVIDED, This does not prevent officers or employees of an agency from communicating with a member of the legislature on the request of that member; or communicating to the legislature, through the proper official channels, requests for legislative action or appropriations which are deemed necessary for the efficient conduct of the public business or actually made in the proper performance of their official duties . . ."*

In addition, RCW 42.17.190(3) says, in part,

> *"Any agency, not otherwise expressly authorized by law, may expend public funds for lobbying, but such lobbying activity shall be limited to (a) providing information or communicating on matters pertaining to official agency business to any elected official or officer or employee of any agency or (b) advocating the official position or interests of the agency to any elected official or officer or employee of any agency . . ."*

Pursuant to RCW 42.17.020(27),

> *"Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the state of Washington, . . ."*

and RCW 42.17.020(26) says

> *"Legislation" means bills, resolutions, motions, amendments, nominations, and other matters pending or proposed in either house of the state legislature, and includes any other matter that may be the subject of action by either house or any committee of the legislature and all bills and resolutions that, having passed both houses, are pending approval by the governor."*

Reading these sections of law together, the Commission determines that a school district may only use public facilities to:

a) at the request of a legislator, respond to that legislator regarding any legislation before the legislature;

b) while using its proper official channels, initiate communications with the legislature concerning requests for legislative action or appropriations relating to the proper performance of the district's duties or other official agency business (including action regarding an initiative to the legislature that deals with the instructional program or operation or maintenance of the school district);

c) attempt to influence legislation, in addition to the types of communications specified in items a) and b) above, by providing information about official agency business or advocating the district's official position or interests to state or local elected officials or employees.

Except as enumerated above, a school district may not directly or indirectly use public funds in an attempt to influence the outcome of legislation, including an initiative to the legislature while it is pending before the legislature. As such, school districts are banned from using public resources to undertake grass roots lobbying efforts. Based on the description of grass roots lobbying in RCW 42.17.200 and for purposes of this context, grass roots lobbying is interpreted to mean communicating with members or segments of the general public in a manner intended, designed or calculated to mobilize the general public to influence legislation. Generally, grass roots lobbying efforts encourage citizens to contact their legislators about matters that are or may be before the legislature.[1]

4) <u>May School District Personnel Draft or Otherwise Provide Substitutes to Initiatives Pending Before the Legislature?</u>

Under the criteria described above, it is permissible, as normal and regular conduct, for school districts to use public funds to engage in certain lobbying activities in support of

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[1] In addition, school districts are prohibited from using public funds to purchase gifts for legislators or to make contributions to legislators. RCW 42.17.190(3).

or opposition to an initiative to the legislature while it is before the legislature.

Although RCW 42.17.190(2) prohibits the use of public funds to be used directly or indirectly to lobby, it does set forth certain activities which are lawful. This prohibition does not prevent school district officials from communicating with a member of the legislature at the request of that member. In addition, it does not prevent school district officials from communicating to the legislature, through the proper official channels, requests for legislative action or appropriations which are deemed necessary for the efficient conduct of the schools or actually made in the proper performance of the official's official duties. RCW 42.17.190(3) permits agencies to communicate with elected officials about official agency business and to advocate the official position of the agency.

In the Commissioners' view, to the extent the questioned activities meet the criteria set forth in RCW 42.17.190(2) or (3), it would be permissible for a school district to draft or otherwise provide substitutes to initiatives pending before the legislature which reflect the school district's official position relating to the operation, maintenance or instructional program of public schools on a pending initiative while it is before the legislature.

5&6) What Are the "Proper Official Channels" Referenced in Subsection .190(2) and How Does a School District Establish an "Official Position" as Referenced in .190(3)?

The Commission concurs with the assertion in your letter of December 29, 1995, that the use of the terms "proper official channels," "official agency business" and "official position or interests" are included for the purpose of prohibiting individuals from using public facilities to pursue personal agendas or a position that differs from the agency's leadership. The Commission also believes that the language is intended to make public agencies designate specific persons to serve as legislative contacts or liaisons, thus eliminating duplication of effort and reducing the number of different persons carrying the same message to the legislature. The leader(s) of each state or local agency, including school districts, would determine how its official position is reached and how this message is properly channeled to the legislature. For school districts, that would mean the school board unless that function has been delegated to the Superintendent or other staff.

CONCLUSION

By a vote of 4-0, this written, binding Declaratory Order was adopted at the regular meeting of the Public Disclosure Commission held on May 28, 1996, in Olympia, Washington.

Jim Whitaker

Chair

Jocelyn K. Marchisio

Commissioner

Donald H. Brazier

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Attest:

Roselyn Marcus

Assistant Attorney General

Title