

Washington State Public Disclosure Commission
711 Capitol Way, Room 206
Olympia, Washington 98504

Dear Members of the Public Disclosure Commission:

Please accept this public comment for the upcoming January 26 meeting; specifically, with regard to the request for a Declaratory Order regarding the fundraising freeze established in RCW 42.17A.560. As an attorney who, for many years, has advised clients on compliance with RCW 42.17A,¹ I urge the Commission to clarify the issue posed in Blue Wave's petition. Specifically, as set out below, the Commission should clarify that state employees are not subject to legislative freeze restrictions except to the extent they are also employed by or otherwise acting "on behalf of a state official or state legislature."²

RCW 42.17A.560 sets out legislative freeze restrictions as follows:

During the period beginning on the thirtieth day before the date a regular legislative session convenes and continuing through the date of final adjournment, and during the period beginning on the date a special legislative session convenes and continuing through the date that session adjourns, no state official or a person employed by or acting on behalf of a state official or state legislator may solicit or accept contributions to a public office fund, to a candidate or authorized committee, or to retire a campaign debt. Contributions received through the mail after the thirtieth day before a regular legislative session may be accepted if the contribution is postmarked prior to the thirtieth day before the session.

¹ To be clear, I write on my own behalf, and not on behalf of any client, individual or entity.

² Commission staff have provided the Commission with a memorandum that, among other things, suggests that the Petition may present an "advisory opinion." The Commission should, of course, determine the most appropriate vehicle to address the issue presented by the Petition. That said, it appears from Mr. Petterson's January 3 submission that, in the course of his business, he advises state employees on whether legislative freeze restrictions apply to them when pursuing their own bid for office. The staff memorandum indicates that staff have advised that at least some state employees are subject to such restrictions. It thus does appear that Mr. Petterson's question concerns an actual controversy within the meaning of RCW 34.05.240, and not merely an abstract hypothetical.

In relevant part, then, state legislators and other state officials are forbidden from soliciting or accepting contributions during certain periods around the legislative session. So, too, are employees of the state official or others acting on such an official's behalf. A "state official" is "a person who holds a state office." RCW 42.17A.005(50). "State office" is also a term of art, defined as "state legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer." RCW 42.17A.005(49).

The legislative freeze provision thus appears designed to combat a very particular problem—corruption of the legislative process. The legislative freeze does so by preventing state officials—or those acting on their behalf—from soliciting or accepting political contributions. This, in turn, prevents the perception—or reality—that state officials are accepting or demanding political contributions to advance or oppose legislation during the session.

The law serves an important function, but a limited one. On its face, the legislative freeze provision does *not* apply generally to employees *of the State of Washington*. To the contrary, the plain language of the statute states that the legislative freeze applies to employees *of a state official*. As the Petition notes, an employee of a state agency is employed by the State of Washington, and not by the state official *personally*.

This makes good sense given the purpose of the legislative freeze. The law is directed at the campaign activities of state legislators and other state officials. It thus applies the freeze to the individual actions of such officials, those who are directly employed by such officials (such as campaign staff), and those who are otherwise working on behalf of such officials (such as campaign volunteers).

To be sure, the prohibition may sweep in state employees depending on the facts presented. For example, a state official cannot suborn a state employee working in their agency to solicit a contribution during the legislative session. But this is because the person in this example would be "acting on behalf" of the state official, not merely because the person is a state employee.

The fact that state employees are not in all instances subject to the legislative freeze does not mean that their actions are unregulated. The Petition notes the

applicability of state ethics laws. In addition, Washington's campaign finance law contains various provisions to promote transparency and ensure the integrity of our state's political processes. For example, any person soliciting contributions must promptly register a political campaign and duly report the contributions they receive and who made those contributions. *See* RCW 42.17A.205, .225. Thus, any state employee who is not subject to the legislative freeze provision and who engages in political activity during legislative session must report that activity. The public can "follow the money" and the media can ask pertinent questions.

An outright ban on political contributions from a particular actor or during a particular period of time is the most stringent regulation available, as it necessarily prevents political activity typically protected by the First Amendment (at least as the United States Supreme Court has interpreted it in recent years). A legislative freeze targeted to state legislators and state officials directly involved in the legislative process reflects an attempt to narrowly tailor a flat prohibition on contributions to the compelling justification of avoiding quid pro quos or other corruption of the legislative process. Interpreting RCW 42.17A.560 to apply to *any* state employee who has no role in pending legislation and who may, say, be running for a local office, would raise significantly different questions.

In sum, the Petition raises an important question. It seems apparent from the initial Petition and Commission staff's memorandum that there is disagreement, or differing views, over the intended scope of RCW 42.17A.560. I would respectfully submit that this warrants the Commission offering clarification through the appropriate means. I would further submit that adopting the interpretation offered in the Petition best reflects the plain language of the statute, is most consonant with its intended purpose, appropriately protects the integrity of the legislative process, and helps avoid potentially thorny First Amendment issues.

Sincerely,

Ben Stafford

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