

January 27, 2017

Linda Dalton  
Office of Attorney General of Washington  
Campaign Finance Unit  
PO Box 40100  
Olympia, WA 98504-0100

Dear Linda,

Pursuant to your request dated January 12, 2017, Freedom Foundation hereby responds to the citizen action complaint filed by Andrew Biviano. As stated more fully below, the Foundation denies that it is a political committee and that it failed to properly file C-6 reports as alleged in the citizen action complaint.

For your convenience, I have attached a timeline of the events in this matter as the last page to this response.

**I. The Freedom Foundation is not a political committee.**

The citizen action complaint submitted by the Northwest Accountability Project (“NAP”) fails to support the claim that Freedom Foundation (“Foundation”) is a political committee.

NAP’s entire complaint merely addresses the Freedom Foundation’s *philosophical* opposition to income taxes, generally, and the intention to continue that work as part of its ongoing, statewide free speech expression of opposition to the injustice of targeted income taxes. It is not a campaign finance violation to hold views with which NAP disagrees.

Likewise, NAP’s complaint focuses upon the Foundation’s communications with the Olympia City Council as the Council undertook its normal, governing decision-making process—specifically as to whether the Council would introduce an income tax city ordinance that it could adopt apart from local initiative process.

The Fair Campaign Practices Act (“FCPA”), ch. 42.17A RCW, defines a political committee as:

any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

RCW 42.17A.005(37). “[A]n entity can meet the definition of a ‘political committee’ under either the ‘receiving contributions’ or ‘making expenditures’ portion of the statutory definition[.]” *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 416 (2015). NAP claims that the Foundation

is and should have registered as a political committee pursuant to the “receiver of contributions” prong. Under the contribution prong, a court “asks whether an organization ‘expects to receive or receives contributions toward electoral goals.’” *Id.*

In arguing that the Foundation is a political committee under the “receiver of contributions” prong, NAP relies exclusively upon Attachment 1 to its complaint. Attachment 1 is a letter dated August 19, 2016 from the Foundation to its existing supporters generally requesting funding (for the Foundation, not a campaign).

On its face, Attachment 1 nowhere says or suggests that the Foundation was expecting to receive contributions with which it will make electoral expenditures opposing Initiative 1. The only activity the Foundation says it will engage in related to Initiative 1 is contained on page 7 of the fundraising letter:

**The Freedom Foundation has stepped up to lead the fight. We are rallying Olympia Freedom Foundation members, and we’ve persuaded the City Council to oppose this awful tax. And we will keep exposing the abuse of union members who have been required to fund this injustice, and working to free those employees from the unions’ grip. And we will be scrutinizing the electioneering effort for violations of the Public Disclosure Act.**

**I can promise you this: On the day this ballot measure is approved—if, that is, the people of Olympia are conned into passing it—the Freedom Foundation will immediately challenge its constitutionality in court.**

Seeking to procure contributions for these activities do not qualify the Foundation as a political committee.

The Foundation activities described in the letter are as follows:

- A Foundation staffer wrote an opinion editorial that was published on May 26, 2016 in *The Olympian*. Signatures supporting Initiative 1’s submission to the city ballot were not submitted to the city until July 6 so there was no “ballot proposition” at the time. The op-ed generally discussed to prospect of a city income tax.
- The Foundation has always informed the general public of the public policy disadvantages of imposing of any income taxes in Washington.
- The Foundation mobilized and would continue to mobilize concerned citizens in Olympia to accept the City Council’s invitation to citizens to attend public hearings and provide feedback to the Council on the city income tax issue.
- The Foundation has educated and will continue to educate the public about this issue.
- The Foundation indicated that it would marshal legal resources to invalidate Initiative 1 as an unconstitutional law only if and after Initiative 1 became law.
- The Foundation stands up for all communities—particularly poorer communities who would be adversely affected by the imposition of income taxes.

- The Foundation urged its supporters in Olympia to voice their opinions on the topic of income taxes to their City Council.
- The Foundation exposed and would continue to expose how union members were forced to fund the campaign to gather signatures and then support Initiative 1.
- The Foundation helped and would continue to help union members who unwittingly and unwillingly funded the campaign to learn of their constitutional rights to decline to pay for electioneering.
- The Foundation scrutinized and would continue scrutinizing the funding of the pro-Initiative 1's campaign effort.

Again, none of these actions or activities suggests that funds the Foundation expected to receive in response to Attachment 1 were going to be used to oppose Initiative 1 in any electioneering sense. The letter explicitly describes the Foundation's intention to initiate a post-election legal action (if necessary), the Foundation's local and statewide informational efforts, and the Foundation's encouragement for citizen engagement with their elected officials at public forums. This is quintessential First-Amendment protected speech.

The August 19 letter was sent after the Olympia City Council had voted to keep Initiative 1 *off* the ballot; there was no "ballot proposition" on August 19. Further, the Foundation's activities described in the letter are not regulated activities under the FCPA. The Public Disclosure Commission has explicitly stated it does not regulate policy communications with local governments nor does it accept filings which report the same. Nothing in the letter "directly or indirectly" appeals "for votes or for financial or other support or opposition in any election campaign." *See* RCW 42.17A.005(36). Finally, the letter was not directed at voters (but rather existing Foundation supporters), and the letter did not urge recipients to vote "no" on Initiative 1, which, again was not on the ballot then.

## **II. The Foundation was not required under RCW 42.17A.255 to file a Form C-6.**

NAP next argues that the Foundation failed to report as independent expenditures various staff time it expended to discuss an Olympia income tax. However, the suggestion that the Foundation has an obligation to report independent expenditures presumes that it is engaging in political advertising. This presumption is unwarranted.

RCW 42.17A.255 defines an independent expenditure as "any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17A.220, 42.17A.235, and 42.17A.240." Because independent expenditures are communications that convey political advertising, *see* RCW 42.17A.005(26), the definition of "political advertising" is helpful to determine what type behavior can be characterized as a regulable independent expenditure. Political advertising:

includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, **used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.**

RCW 42.17A.005(36) (emphasis added). None of the Foundation activities NAP complains of directly or indirectly appeal for votes or for financial or other opposition to Initiative 1. The Foundation took a public policy position on the imposition of an income tax at any level of Washington government; this is far different than “campaigning” for or against an idea that was not on the ballot.

On September 2, 2016 – long after the August 19 letter at issue – the Court of Appeals put Initiative 1 on the ballot. That is, there was only a “ballot proposition” after September 2. During the period from September 2 to the November 8 election, the Foundation took no action or even suggested action during the active campaign on the ballot measure. (Nor did the Foundation do any of these things before September 2.) The Foundation opposed the proposed income tax as an issue of policy concern, but it never advocated that voters vote for or against Initiative 1. Never.

For these reasons, the Foundation did not make independent expenditures and thus was not required to complete Forms C-6.

**A. July 11, 2016 email message from Jami Lund (NAP Attachment 2)**

On July 11, the day Jami Lund from the Foundation sent the email included in Attachment 2, there was no “Initiative 1,” because the Olympia City Council had not made a decision about whether to adopt its own resolution regarding an income tax. No ballot proposition existed.

No testimony to the city council could be construed to be an appeal for citizen votes or a solicitation of funds before a ballot proposition existed or a campaign had begun. The emailed invitation to speak to the Council sent to pre-existing Foundation supporters was not a campaign expenditure because there was no ballot measure upon which to campaign. Neither public commentary nor requests for political commentary submitted to a policy-making body is political advertising or a campaign expenditure. No one was paid for their effort to share thoughts with Olympia City Council at 7:00 on July 12, 2016. The cost of sending an email message to roughly 200-300 local residents was de minimis.

Further, NAP’s suggestion that “it is likely that this email was part of a larger campaign” is entirely speculative and untrue. If NAP were able to obtain the July 11 email sent to a small list of Olympia-area Foundation supporters—individuals who gave their email addresses to the

Foundation—then surely NAP should be able to find some evidence of a “larger campaign to reach out to the public.” They cannot, because no such evidence exists.

### **1. Blog posts, podcasts, and related website and print communications (NAP Attachments 3-9)**

Like the Lund email described above, none of the Foundation’s blog posts, podcasts, or related website and print communications in NAP’s Attachments 3-9 show the existence of independent expenditures. None of these communications appeal for a vote against or for Initiative 1 or seek funds for such a campaign. Many were communicated before Initiative 1 was a ballot measure, and some were communicated after the election. Obviously, these were not independent expenditures. It is not an independent expenditure for an organization to publicly state that it believes a particular idea is a bad one.

### **2. Press outreach and preparation of and Olympian Op-Ed (NAP Attachments 10-11)**

NAP’s allegation that the evidence supports an “active press outreach program” is baseless. The cited “evidence” includes one comment by Jami Lund in one news story that was solicited by *The Olympian* (Attachment 10) and an op-ed authored by the Foundation’s economic analyst (Attachment 11).

Mr. Lund was interviewed at a time before the September 2 Court of Appeals order to put Initiative 1 on the ballot. Thus, it occurred at a time when the idea of an Olympia income tax was not a ballot proposition. Further, the comments do not invite readers to vote any particular way (there was no ballot proposition on which to vote), but rather raise questions about city priorities and existing higher education programs – matters of public policy. The suggestion that answering a phone call from a reporter is an “independent expenditure” produces an absurd and free-speech chilling result.

The Foundation’s May 26 op-ed in *The Olympian* addressed the legality of an income tax long before signatures supporting the Olympia income tax were collected and submitted to the City, and months before what eventually became Initiative 1 was a ballot proposition. Like the other activities or communications described above, nothing in the op-ed appeals for votes or financial opposition to Initiative 1 (that did not exist at the time). Expressing that a particular idea is not good policy and may be illegal is not electoral activity.

### **3. Communicating with Olympia city staff**

As an initial matter, NAP refers to a “Washington Freedom of Information Act,” but, of course there is no such thing. Presumably, NAP meant to say that it obtained records via the Public Records Act, ch. 42.56 RCW. This level of shoddiness pervades NAP’s allegations.

To characterize the emails in Attachment 12 as independent expenditures is absurd. These emails are (1) communications between a Foundation attorney and an Olympia city attorney about the dates and times of court hearings in the City’s lawsuit against Initiative 1’s sponsors; and (2) a question Mr. Lund submitted to the City for clarification of a City statement reported in the news. For the same reasons articulated above, these are clearly not independent expenditures.

#### **4. Testifying about the Freedom Foundation’s intent to file post-election lawsuit**

Addressing City policymakers during public comment about an issue they are making decision on (but is not a ballot proposition) is not an independent expenditure. Mr. Lund testified that any non-uniform income tax—like the one proposed in Initiative 1 and the alternative income tax proposed by the City Council—is unconstitutional and that the Foundation would likely engage legally to have the tax invalidated if it became law. For the same reasons articulated above, these are clearly not independent expenditures.

#### **5. The Foundation’s amicus brief (NAP Attachment 13)**

The Foundation submitted a very short (three-page) amicus brief to Thurston County Superior Court supporting the City’s *legal position* regarding Initiative 1. The brief did not appeal for votes or financial opposition to what later became Initiative 1 (but was not a ballot proposition at the time of the brief). It merely explained the constitutional history of non-uniform income taxes in Washington. This was not an independent expenditure.

### III. Conclusion

For all of these reasons, the Foundation did not conduct an independent expenditure and did not violate the FCPA.

Please notify me if you have additional questions. Thank you.

Respectfully,



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**Relevant Timeline** (all dates in 2016):

- March 29 - Opportunity for Olympia files its first PAC report with the PDC;
- April 5 - Opportunity for Olympia begins signature gathering;
- May 7 - Freedom Foundation records a podcast discussing income taxes and the prior legal rulings related to them with former Supreme Court Justice Jim Johnson and Amber Gunn;
- May 17 - City Council votes to draft a city tax ordinance with a progressive income tax;
- May 26 - Amber Gunn writes an opinion editorial in *The Olympian* about the harms of an income tax and alerting readers to the effort in Olympia;
- July 6 - petition signatures are turned in;
- July 11 - Freedom Foundation sends an email about the City Council open invitation to citizens to testify to some of the Foundation's pre-existing supporters in the Olympia area who have provided email addresses to the Freedom Foundation (Attachment 2);
- July 12 - City Council invites public comment on an ordinance and the petition;
- July 14 - Freedom Foundation writes a blog post about the history and philosophy of income taxes (Attachment 3);
- August 9 - Freedom Foundation offers an amicus brief about constitutional issues with income taxes in the City of Olympia's lawsuit;
- August 9 - Freedom Foundation issues news release about the filing of a brief noting the unconstitutional nature of income taxes;
- August 19 - Freedom Foundation letter about willingness to oppose an income tax in court if passed in Olympia (Attachment 1);
- August 24 - Judge rules initiative is beyond the proper scope of city authority;
- September 2 - Appellate court stayed the August 24 ruling and effectively ordered Initiative 1 to be placed on the ballot;
- September 14 - Superior court judge rewrites the title and orders the clerk to file it.
- November 8 – election