**Draft** Advisory Opinion 2015 – NO. 2

Campaign Site Access to Legislative Documents

Options for Discussion

The Board has received an advisory request from Representative Graham Hunt, who has waived confidentiality.

QUESTION

Visitors to legislative websites may choose to select a connection, described in the request as a hyperlink or an RSS feed, which enables the visitor to receive notices of new documents added to a legislative site. This notice contains a description of the document and the date the document, or a link to it, was added to the legislative site. The visitor may click on this notice, which has been characterized as similar to a notice of new email, and is then taken directly to the document. According to the request, the advantages of this type of connection include not having to search for new material and gaining timely access to new legislative-related information.

Representative Hunt acknowledges Board opinions which permit a campaign page to link to an official legislative site, but restrict the placing or posting of legislative documents on a campaign site.

His question is whether he may add this legislative connection, or RSS feed, to his campaign site for the benefit of those who visit that site.

OPINION – OPTIONS

1. The answer is no. Using this connection provided by the Legislature to allow a campaign website to directly access legislative documents which in some cases are discretionary documents which feature the legislator/candidate, and which are identified by subject matter, would violate RCW 42.52.180 which prohibits the direct or indirect use of public resources to assist a campaign.
2. The answer is yes. Although the proposed RSS feed would be to documents, these documents are available on caucus and member web sites and have been placed there only after a determination they are appropriate and related to legislative issues. There is no material difference between what is proposed in this advisory request and the present practice of campaign links to legislative sites, which this Board has determined does not violate RCW 42.52.180.

Option A

Campaign access to legislative sites is an issue which has evolved over time, and which is guided by the legislative policy expressed in .180, and the Board’s interpretation of that statute – there is no deminimis exception to the prohibition on the use of public resources to assist a campaign (citations omitted).

In AO 2000 – NO. 2, which followed a report by a Board subcommittee, it was determined that RCW 42.52.180 would not be violated if an incumbent legislator’s campaign website contained a single hyperlink to an official legislative homepage. Additionally, after June 30 in an election year certain discretionary materials must be removed from legislative websites. This 2000 advisory opinion relied to a great extent on AO 1997 – NO. 3, which dealt with mailing issues but is helpful to the analysis involved in the present request because it illustrates the Board’s sensitivity to a blurring of the lines between campaigns and the use of public resources. In pertinent parts, the 1997 opinion states:

*“…placement of materials on a website does not constitute a mailing…because websites in general are passive means of communication…by contrast, legislative mailings via the post, email and fax, are active means of communication. However, a legislative website containing discretionary material like individual member newsletters, press releases, and video clips, loses its ‘passivity’ as a communication medium for purposes of the ethics law when such a website is linked from a legislator’s campaign site.”*

and

*“With a hyperlink, the legislative website has lost its character as a passive medium for purposes of the mailing statute. Since there are no effective means to control linkages from third party sites, we establish that after June 30 of an election year, those members up for election must have discretionary materials removed from the legislative website.”*

The 2000 advisory also recognized the difficulty involved in deciding questions related to public documents. The question of links from campaign to legislative sites involved, said the Board, a question of two competing public policies; ensuring that public resources are not used for campaign purposes, and providing liberal access to public records. The Board expressed concern that these links would create confusion about the proper use of public resource under .180. Because, said the Board, *the site containing the proposed link would be created for an explicit campaign purpose, the use of legislative materials in such a context does not fairly fit any of the statutory exceptions in .180, including the ‘normal and regular exception’ (emphasis added).*

In the present request we find the same concerns. The site which would contain the RSS feed has been created for campaign purposes.

The 2000 advisory compromise which permitted a link but removed discretionary material in an election year prevailed until 2009. In that year another subcommittee reported to the Board on links from campaign sites. AO 2009 – No. 1 followed and it rejected the one-link limitation in favor of multiple links to legislative websites. However, the requirement that materials be removed in an election year remained. The Board reasoned that since these materials, which often featured the legislator/candidate were no longer on the site during the election cycle, the issue of single or multiple links made no difference in a .180 context.

The issue of removal of discretionary materials during an election year was decided by the Legislature in 2010. .180 was amended so that materials could remain on “official legislative websites throughout the year, regardless of pending elections.”

CONCLUSION

Since all documents now approved for use on legislative websites remain on those websites regardless of the election cycle, the public records are always available. In essence, the present request is not about providing access to public documents but rather it is about what use a campaign may make of public records. Anyone who visits a legislative site may presently choose the RSS function so we must ask if it is consistent with .180 to allow, or assign, the role of providing additional sites for directed legislative updates to campaigns. We conclude this would not be consistent with the legislative intent expressed in .180.

A campaign site is established in support of a campaign. We believe that visitors to campaign sites expect to obtain information about the campaign.

While it is true that some of the documents on a legislative site may be outside news articles, for instance, the issue of discretionary, legislative produced materials is still with us. These may be newsletters or press releases or video presentations but they share common elements: they are paid for by the public; they are created with the permission or at the direction of a legislator; and they remain on public sites during the campaign cycle.

We decide today that it would violate .180 for a legislator’s campaign site to permit visitors, through the use of an RSS feed provided by the Legislature, to directly access legislative documents, many of which we may presume would be supportive of the legislator/candidate or otherwise they wouldn’t be approved for posting by the legislator/candidate. In addition, we view the proposed RSS function as more than a link. In the present proposal, the visitor would apparently find a rather detailed description of a document which, in many cases, may be viewed as promotional during an election cycle.

Option B

Questions surrounding the appropriate use of legislative materials by campaigns have evolved over time. Significant factors in this evolution include changes in technology and the expectations of the public with regard to access to legislative information. Our opinions recognize there is a meaningful distinction, in an ethics sense, between distributing legislative news releases produced at public expense at a campaign rally, and providing access to these public documents through official legislative sites to anyone who seeks that access (citations omitted).

The issue presented by this advisory request may be stated as follows: Is the proposed RSS feed a link and, if so, may the link be directed to a legislative document or must it be directed to an official legislative website?

First, we conclude that the proposed feed is more in the nature of a link than a posting of a document. A visitor must choose, by clicking on the notice provided on the campaign site, to visit a document in order to read it. A brief description of the topic of the new material, free from editorial comment, was presented to the Board as an example of how the notice would be presented. We view this approach as an aide to visitors who are interested in access to public documents and not a publication of the document itself. A publication, or posting of the document on a campaign site is not allowed pursuant to the Board’s interpretations of RCW 42.51.180. See, most recently, Complaint Opinions 2008 – No. 4 and 2012 – No. 3.

Second, we believe that until modified or overruled by the Board, CO 2010 – No. 3 (Marr) is determinative of the question whether a link from a campaign site is restricted to a legislative site. Senator Marr provided a link from his campaign site to a legislative video found on the Senate Democratic Caucus website. The video was clearly a public resource and had been approved for inclusion on that website, presumably after it had met the criteria for compliance with the Ethics Act and applicable Senate policies. That opinion concluded that; “*There are no provisions in the Act nor opinions of the Board interpreting the Act which prohibit Respondent from linking his personal sites* (including his campaign site) *to legislative sites or legislative materials ...*(emphasis added). In the context of the present advisory request we see no material distinction between a legislative video and, for instance, a legislative news release or newsletter. Furthermore, the opinion also stands for the proposition that the Board did not view the access to the video as a “posting.” It could not be viewed by merely visiting the campaign site. A visitor would see that a legislative video was available but it would have to be accessed by clicking on a type of notice, which seems to be very similar to the procedure Representative Hunt is proposing through the use of the RSS feed.

In conclusion, we determine that notice of new legislative material which may be found on official legislative websites may be provided to visitors to campaign websites, and the notice may contain a brief, factual description of the material together with a link that takes the visitor directly to the material. We believe that this process, coupled with the Legislature’s action in 2010 which prohibits new material to be added to legislative sites after June 30 for legislators facing reelection, and the continued oversight of materials proposed to be added to legislative sites regardless of the election cycle, strikes a reasonable balance between the prohibition on campaign use of public resources and access to public records.