

May 20, 2004

**Advisory Opinion 2004 - No. 1
Use of Public Resources**

QUESTION

The Board has received the following hypothetical question regarding the use of public resources:

May a legislator obtain electronic copies of public records consisting of various audio /visual materials prepared for the legislator by legislative staff, and place those materials, or portions of them, on a private, non-campaign web site?

ANSWER

Yes. Public records are available to any person, including a legislator, who requests them. The contemplated use of these records prior to June 30 in a legislator's election year would not be a violation of the Ethics Act.

FACTS

Employees of the House of Representatives prepare, at the direction of and/or with the approval of the Representatives, audio/visual materials which are placed on legislative web sites. Examples of these materials include, but are not necessarily limited to, news conferences, votes on bills and legislative floor speeches, committee activity, interviews for member's local television stations, individual videos for the legislators on selected legislative issues and weekly updates during the legislative session. Approximately two-thirds of the House members provide weekly, three minute updates during the legislative session to thirty five television markets. Content guidelines established by the House are consistent with the mailing guidelines and include prohibitions on impugning the motives of another member, campaigning, or choosing sides on a pending ballot measure. In accord with Ethics Board opinions legislators who are facing election have these materials removed from legislative web sites prior to the election. Some members who maintain private, non-campaign web sites may seek to place these materials on those sites.

ANALYSIS

1. *Public records are available to all and the purpose of the request is not grounds for denial.*

RCW 42.17.020 - Definitions - Public Records Act

(42) Writing means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information maybe obtained or translated.

RCW 42.17.270 - Facilities for copying - Availability of public records

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.17.260(5) or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.

The hypothetical states that the audio/visual materials are public records. This Board has expressed its opinion in *CO 2003 - No. 2*, that it would exercise limited jurisdiction in the area of public records. For the purposes of this hypothetical we will view the request for an advisory opinion as stipulating that these audio/visual materials are public records and for the purposes of this hypothetical conclude that it would follow from the plain reading of .270 that the House may not distinguish between legislators and other individuals who request these records, nor may the House require information from legislators as to the purpose of the use of the records.

2. The use of public resources to directly or indirectly assist a campaign is prohibited by the Ethics Act. Proximity to an election is one important factor in the analysis. Both Houses of the Legislature and the opinions of this Board have recognized June 30 in an election year as a reasonable cut-off date for some uses of public resources.

RCW 52.52.180 - Use of public resources

(1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public facilities in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not

limited to, use of stationary, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

(2) This section shall not apply to the following activities:

- a. . . .
- b. . . .
- c. Activities that are part of the normal and regular conduct of the office or agency;
- d. . . .

The Ethics Act (Act) does not define "normal and regular conduct" and the Board has had to define the term on a case-by-case basis.

In *AO 1996 - No. 11*, the Board recognized House and Senate Standards of Conduct as (a) a means of providing guidance in resolving ambiguities between appropriate legislative conduct and prohibited campaign activity and (b) creating a process for heightened institutional review of proposed legislative conduct after June 30 in an election year. The Board concluded that "normal and regular conduct" with regard to a responsive press release involves a five pronged inquiry; timeliness, proximity to the election, relevance to a legislative issue, source of the initial statement, and the tone and tenor of the response.

Issues surrounding a caucus internet page were presented to the Board in *CO 1996 - No. 10*. The Board employed the five prong inquiry identified in *AO 1996 - No. 11* and concluded that this inquiry was applicable to all materials published or distributed at public expense, including electronic materials.

In *AO 1997 - No. 2*, the Board distinguished "passive" communications from "affirmative" communications, for purposes of analyzing the election year mailing restrictions, and concluded that the mere act of making legislative materials available on the internet was passive and was not a mailing. However, the Board noted that ". . . materials that directly support a campaign, are campaign-oriented or are designed to assist a campaign purpose in any other way, will be deemed to violate the prohibition against the use of public resources for campaign purposes, regardless of the timing of their publication or distribution" (page 3).

The issue before the Board in *AO 1997 - No. 7*, was when, if ever, is it "normal and regular conduct" for a legislator to doorbell constituents on legislative business and deliver a document produced at public expense. The Board resolved the timing issue by referring to the June 30, election year cut off date established in the legislature's Standards of Conduct and concluded that in an election year, whether or not the legislator was facing election, June 30 was the last day

to pursue this activity. The Board provided the following guideline to assist in determining whether proposed conduct satisfies the "normal and regular conduct" exception:

Contact with constituents, using state resources, which is in response to their requests for legislative information and/or assistance is generally permitted. Contact with constituents which is initiated by members or staff is subject to time, place, content and method restrictions. (page 3)

The question of whether a legislator's campaign web site could link to a legislative Internet homepage was presented to the Board in *AO 2000 - No. 2*. The facts presented in that opinion request are similar to the facts in this case.

Posted on most of the individual legislators' pages are documents prepared by staff for legislative purposes, including copies of newsletters that were previously distributed via mail, press releases on legislative issues, an official photo, a biography, etc. The Senate Caucus homepages also contain video and audio clips with excerpts from legislators' speeches made in their official legislative capacity. (page 1)

The Board reasoned that the question involved the balancing of two competing public policies, both approved by the voters. Namely, (1) ensuring that public resources are not used for campaign purposes as set forth in RCW 42.52.180; and (2) providing liberal access to public records under the Public Records Act, RCW 42.17.270 et seq. The Board concluded there was no way to effectively control links from campaign web sites to a legislative site containing public documents but that after June 30 in an election year for those legislators facing election, their materials, referred to as "discretionary" by the Board, must be removed from the legislative site. Implicit in this opinion is the idea that these "discretionary" materials, most if not all of which relate to past events, are more likely to be perceived as being used in support of the legislators' candidacy as the election nears, especially when they are just "one click away" when individuals contact the campaign site for campaign information.

The Board concluded there was a second reason for removing these "discretionary" materials from the legislative site and that was the election year mailing statute, RCW 42.52.185. This statute restricts mailings in an election year and a violation of the statute constitutes use of public facilities for the purpose of a campaign under RCW 42.52.180. (see RCW 42.52.185(3)). In *AO 1997 - No.2*, previously referred to in this opinion, the Board had distinguished between the "passive" act of placing a document on the Internet and the "affirmative" act of mailing the document. However, the board concluded the "discretionary" materials ". . . 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." (page 4)

CONCLUSION

This opinion does not purport to extend the Board's jurisdiction over the physical, private, non-campaign web sites employed by some legislators. However, the Legislature has clearly directed, by statute, that the Board enforce the law against the use of public resources, which includes these discretionary materials. Therefore, it is the use of these materials and not the establishment of the private sites which forms the basis of this opinion. These materials are available to all as public documents but they cannot be used by the legislator on these non-legislative, non-campaign web sites after June 30 in an election year as that use would constitute a violation of RCW 42.52.180. It is equally clear that the legislators campaign web site may not post these discretionary materials at any time as that use would constitute a direct use of public resources in support of a political campaign.