Advisory Opinion 2000 - No. 4

Legislative Press Releases

The Board has received a request for an advisory opinion from Tim Martin, co-Chief Clerk of the House of Representatives. Mr. Martin has waived confidentiality.

The Board declines to issue an opinion to the questions as presented (**Board Rule 1K(2)**). The request places the proposed release in the context of having been approved by the Chief Clerk pursuant to House Standards of Conduct which suggests that this fact might somehow affect this opinion. The Legislative Ethics Board has no authority to enforce the policies and procedures of either house of the Legislature (**Complaint 96 - No. 7 and Complaints 98 - No's. 4, and 5**).

However, so that the Board can provide additional guidance to legislators and legislative staff, the Board presents the following related questions:

Question 1:

May the House or Senate Standards of Conduct be less restrictive than the opinions and precedents of this Board in its interpretation of the State Ethics Act (Act)?

Opinion

No. The Act establishes minimum standards of compliance. Standards of Conduct may impose conditions which exceed the restrictions found in the Act. In **AO 1997 - No. 8**, the Board stated that it would continue to rely on the Senate and House to ". . . enforce their own restrictive policies" and again in **AO 1997 - No. 9**, the Board concluded, in analyzing legislative hearings on ballot issues under the Act, that "The Senate and House of Representatives may choose to adopt more restrictive policies."

Question 2:

Is a legislator prohibited by the Act from using public facilities to issue a responsive press release to anyone's press release other than the Governor?

Opinion

No. The Act does not prohibit every response except a response to the Governor. To decide otherwise would result in muting the voice of a co-equal branch of government without any consideration as to the substance of the proposed release. The Legislature must be able to respond in a timely fashion to an urgent legislative issue. In **AO 1997 - No. 9**, this Board was asked to establish minimum standards for legislative hearings on ballot measures. In analyzing the "normal and regular conduct" exception to **RCW 42.52.180**, which in part prohibits the use of state facilities to promote or oppose ballot issues, the opinion recognized that "(T)he Legislature must be able to respond to **changing and urgent circumstances**" (at pages 4-5, emphasis added). There will be occasions when a proposed release, whether initiated by a legislator or whether responsive in

RETIRED JULY 2022. See Advisory Opinion 2021 - No. 1

nature, is necessary and appropriate because of the substance and urgency of the issue. In practice, it may be that legislative press releases will more often meet the test discussed below when actions of the Governor are involved (**AO 1996 - No. 11**) but actions or decisions of other officials, agencies or the courts may also call for legislative involvement using public facilities.

Question 3

What is the test for determining whether a press release is prohibited by the Act? **Opinion**

The test for determining whether the Act prohibits a release was enunciated in **AO 1996 - No. 11**. In that opinion the question was whether the Act prohibited the use of public resources to respond to statements made by the Governor in either a press conference or through a press release in which he stated his opinion on a public policy issue in an attempt to influence public debate. We said "no" in that case but determined that whether or not a particular response would violate the prohibition on the use of public resources for campaign purposes, or was part of the "normal and regular conduct of the office" (**RCW 42.52.180**) would require consideration of five factors: timeliness; proximity to election; relevance; source of initial statement (if a responsive release); and tone and tenor.

We take this opportunity to restate and extend our thoughts on each of these factors.

"Timeliness" relates to the period of time which passes between the action which would trigger the legislative press release and the press release itself. "The further a response is from the initial statement, the less newsworthy it is and the more likely a campaign purpose may be inferred." (**AO 1996 - No. 11**).

"Proximity to election" is self-explanatory as a concept but not always easy to apply. We have found that some legislative activities performed with the use of public facilities would be prohibited after June 30 in an election year because of "proximity to election." In **AO 1997 - No. 7,** we were asked if it is within the "normal and regular conduct of the office" for a legislator to doorbell constituents and deliver a document prepared through the use of legislative facilities. The opinion discusses the limited circumstances under which such door belling might occur without violating the Act. "Timing" (proximity to an election) was found to be a problem in an election year because as the election approaches the perception is that such a contact with a constituent appears to be a campaign contact. Therefore, the Board found that any use of legislative material in door belling after June 30 of the year a member is up for election would be a violation of **RCW 42.52.180**. June 30 was chosen because it coincided with the date established by the House and Senate, in the Legislatures's Standards of Conduct, as marking the beginning of the time when use of legislative facilities by members up for election would be prohibited by the Legislature except for very limited situations. In **AO 2000 - No. 2**, the Board found June 30 in an election year to be a reasonable date in terms of removing certain materials prepared with the use of legislative facilities from a legislator's web site. The opinion expressed concern with the proximity issue and concluded that ". . . after June 30th of an election year, for those legislators up for re-election, discretionary materials prepared specifically for them (e.g., newsletters, press releases, audio clips, and video clips, must be removed from legislative Websites" or **.180** would be violated.

This Board does not find that legislators must cease all press release activity after June 30 in an election year**.** We do find that press releases may be distinguished from door belling and the web site use of public resources . Doorbelling is commonly understood as primarily a campaign

RETIRED JULY 2022. See Advisory Opinion 2021 - No. 1

activity and the web site opinion involved the question of linking campaign computers to legislative web sites and the impression that certain discretionary materials prepared at public expense would be of assistance to a campaign. However, events beyond the control of legislator's may dictate a need to use public facilities after June 30 in an election year and press releases are an example. Nevertheless, June 30 in an election year, having been found by the Board and the Legislature as an appropriate date to prohibit most uses of legislative facilities less there be a violation of **.180**, is an appropriate date to establish as the beginning of that period of time before an election when a legislative press release is normally prohibited.

"Relevance" is required before any legislative press release may issue, regardless of the issue of "proximity to election." **AO 96 - No. 11** was explicit on this point and stated, on page 4 in pertinent part:

> Finally, we offer three notes on the applicability of this opinion. First, we note that the Ethics Act applies to all members and employees of the Legislature and, therefore, our opinion similarly applies to all members and employees, including members who are not candidates for election or reelection.

The opinion discusses, broadly, statements which might have the appropriate level of relevance and applies two tests. The initial consideration is whether the outside statement has some relevance to a pending or past legislative issue or to an issue which could be considered by the legislature in the future**.** Secondly, even if the outside statement was "relevant," if the responsive statement ". . . is unnecessary for the purpose of responding to the initial statement, the responsive statement would not appear to be permitted under the Act" (page 4 of the opinion). No examples of "unnecessary" or, conversely, of "necessary," are given in that opinion. "Necessary" is part of the "normal and regular conduct" analysis of **.180** and this Board has on many occasions interpreted the "normal and regular conduct" exemption to that statute. This Board has recognized that it is important that legislators not be prohibited from performing their important legislative tasks. Their legislative duties and responsibilities do not end while they are engaged in a re-election campaign, but their use of legislative facilities is moderated somewhat by the law as well as internal legislative standards.

Since every press release must be "relevant" and also "necessary," we believe the Legislature and the designated ethics advisers would benefit from examples which are not found in the earlier opinion (**AO 96 - 11**). It is apparent from a reading of the Act, the opinions of the Board, and the Legislature's internal standards, that higher degrees of relevancy and necessity, are required when an election approaches. What type of issues would meet the relevancy and necessity requirements during that period after June 30 in an election year? A Governor's call for an immediate special session would certainly trigger legislative action which would encompass press release activity. The Act would not prohibit a legislator from responding or commenting with the use of public facilities when some natural catastrophe struck his or her district such as flooding, landslides, or eruptions of mountains**.** We must ask what is it about the underlying issue or issues which clearly shows that a press release prepared with the use of public facilities simply cannot wait until after the election? What is the relevance and the necessity of the proposed release? Absent some emergent issue which cannot be left unaddressed, or doesn't call on the legislature to take some immediate action, there is none**.** A determination that a particular press release fails the test does not mean that legislativerelated activity ceases. Discussing issues with constituents; responding to questions from the public and news media; engaging in constituent services; **sending press release on any subject whatsoever without the use of public facilities** (emphasis supplied at the

RETIRED July 2022 See Advisory Opinion 2021 - No. 1

direction of the Board); responding swiftly to relevant and necessary issues; allow the legislators to perform their important legislative duties without violating **.180**.

As is the case with all applications of the Act, if there are questions concerning the tests for press releases, designated ethics advisers are authorized to give informal advice based on Board precedent and a formal opinion of the Board may always be requested.

"Source of the Initial Statement" is another factor identified in **AO 96 - No. 11**. The Governor was the source of the original statement in that opinion and the Board's discussion acknowledged the importance of that office in shaping public opinion and the importance of the legislative response to the challenges laid down by the executive to the legislative branch. The opinion did not address other sources of statements which might allow a response except to say that responses to lobbyists and citizen-groups were not addressed by the opinion. The opinion does suggest that other statewide elected officials are also important in shaping public opinion. The opinion should not be read as limiting responses to the Governor. In that case the Governor's position on the property tax, announced in a press conference on July 25, 1996, was that those legislators who were of a different view were "fiscally irresponsible." Some of the legislators sought to respond by way of a press release and the question before the Board was whether the Act permitted such a response. The Governor's statements struck at the heart of a legitimate, partisan debate over taxation and were viewed as a personal attack on the integrity of legislators who differed with the Governor over tax policy. In this narrow context a response was deemed appropriate because it was the Governor, and not some lobbyist or citizen group. The requirements for a response were satisfied because of the perceived emergent nature of the issue which was at least as much about the integrity or motives of those who opposed the Governor as it was about an ongoing tax debate. "Source" was closely tied to the issue of "relevance" and neither that opinion nor this one should be viewed as authority for the expansive proposition that press releases with the use of public facilities are permissible whenever anyone attacks the credibility of legislators.

"Tone and tenor" requirements recognize that debate can be partisan without being disrespectful. The importance of the "tone and tenor" requirement is seen in **Complaint 1998 - No. 3**, where the Board found (among other things) that "issues" debate became ballot advocacy when legislators accused, in a document prepared with public facilities, opponents of a ballot measure as involved in a, or the, "big lie." The Board said, on page 4 in pertinent part:

> To the extent that the language used in legislative responses ventures into objectionable tone and tenor, such responses will appear to be less for legitimate legislative purposes and more for personal and campaign purposes.

and later, on the same page:

> Language in a particular response that is pejorative in its references to other members and groups of members will be scrutinized and given some weight in balance with the other factors. Language that specifically references "candidates" or "campaigns" would almost certainly be considered a violation of the statute.

RETIRED JULY 2022 See Advisory Opinion 2021 - No. 1

Question 4

Does the Act differentiate between legislators who are candidates for re-election when the issue is whether one might issue a particular press release and another might not, because of party leadership or committee leadership status?

Opinion

No. RCW 42.52.320 (1) defines the personal jurisdiction of the Legislative Ethics Board.

> The legislative ethics board shall enforce this chapter and rules adopted under it with respect to members and employees of the legislature.

RCW 42.52.010(18) provides, in pertinent part:

> "State Officer" includes . . . members of the legislature together with the secretary of the senate, and the chief clerk of the house of representatives ...

There are approximately sixteen substantive sections of the Act which identify prohibited activity and each states, at or near the beginning of those sections, that "No state officer or state employee . . ." may do the following, or words to that effect.

There is nothing within the Act which suggests that this Board may grant more authority to some legislators than others, simply on the basis of party, caucus or committee leadership.

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