

May 20, 2004

**Advisory Opinion 2004 - No. 2
Use of Public Resources**

QUESTION

Senator Karen Keiser, who is not a candidate for public office in this year's general election, seeks advice on whether a mailing of voter registration forms to her constituents is permitted under the Ethics Act. The proposed mailing would include a cover letter from the Senator urging constituents to complete the form, check the ongoing absentee ballot request, and return the form to the Secretary of State (materials attached).

ANSWER

1. A legislator may mail a voter registration form absent any comment on how to vote, which includes urging absentee status, to an individual constituent who requests the form.
2. A legislator may provide the address for state and local election officials and sites where constituents may register to vote in a district guide and on a legislative web site, without comment.
3. A legislator may make voter registration forms available at a legislative town hall meeting, a legislative district office and the legislator's Olympia office, without comment on how to vote, which includes urging absentee status.
4. A legislator may not use public resources to solicit constituents to register to vote, to advise on how to vote, or to solicit constituents to request a voter registration form. This prohibition would include the use of public resources to advertise a non-legislative web site or other point of contact which would be utilized for any of these practices.

ANALYSIS

The use of public resources to directly or indirectly assist a campaign is prohibited by the Ethics Act. Legislators have greater flexibility under the Act to respond to a constituent than to initiate the communication. Exceptions to the prohibition on the use of public resources are strictly construed.

RCW 42.52.180 - 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 an 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 does not define the "normal and regular conduct" exception to the prohibition on the use of public resources so the Board has analyzed the exception on a case-by-case basis.

In *AO 1996 - No. 11*, we concluded that it was "normal and regular conduct" for a legislator to issue a press release in response to a press release from the Governor, provided certain content, relevancy and timing issues were satisfied, notwithstanding the fact the legislator was facing a somewhat imminent election. We noted at that time that self-initiated press releases were subject to a higher scrutiny than responsive press releases for purposes of analyzing the .180 exception and that legislators are always free to speak or write on any issue so long as they do not use public facilities for campaign purposes.

Later, in *AO 1997 - No. 7*, we were asked by a legislator if it would be "normal and regular conduct" for him to doorbell his district on legislative business using legislative newsletters originally prepared for mailing. We concluded that in most cases such an activity would not be "normal and regular conduct" and would violate .180. The opinion noted that doorbelling is perceived by most to be a campaign tool and certain conditions, most of which are not germane to the question before us, would have to be met before such activity took place. In relation to the present case, however, the opinion states, on pages 2 and 3:

The Board finds that the statutory exception for "normal and regular conduct" prevents the creation of a bright-line ruling that would say all doorbelling is automatically a violation of the statute. *The Board is not seeking to discourage member communication with constituents, which is one of the fundamental aspects of representative government. However, the Board cautions members that the use of legislative materials in the doorbelling context is likely to create confusion about the proper use of public resources.* (emphasis added)

And on page 4 of the opinion:

In addition to the definition and examples set forth in prior opinions, the Board adds the following guidelines to assist legislators and staff in determining whether their conduct fits the 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 and staff is subject to time place, content, and method restrictions. For example, it is not normal and regular to initiate communication at state expense which urges particular electoral activity by the constituents.* (emphasis added)

The question raised in this opinion request, together with the written statement offered in support for the mailing of the registration forms (attached as an exhibit), suggest there may be three ancillary issues which might be viewed as important in our consideration of a response. However, these points have been made and decided in earlier Board opinions and we see no reason to revisit those at this

time. First, the issue of whether a legislator is subject to the election year mailing restrictions or not does not answer the Senator's question. Legislators who are not subject to these restrictions may still violate RCW 42.52.180 by mailing certain legislative documents, depending on timing and content (see *AO 1997 - No. 12*, and cases cited therein). Second, the exceptions to .180 are narrowly construed but that does not prevent any member from expressing their views on the importance of registering to vote or registering as an absentee voter. 180 does not silence legislators but does restrict their use of public resources in certain areas and at certain times (*CO 1998 - No. 3*). Third, it is "normal and regular conduct" for legislators to limit the mailing of their legislative newsletters to constituents who have voted in the past (*CO 1999 - No. 4*).

Finally, in *AO 2000 - No. 2*, we were asked whether the Act allowed a campaign site to link to the public legislative web page. In that opinion the Board drew an analogy to the doorbelling opinion in that once again here was a commingling of public documents and perceived campaign activity. That opinion balanced those concerns by directing that certain discretionary materials be removed from the legislative site at a specific time before their election. This opinion presents another example of how materials produced at public expense may be appropriate to use in one context or during some period of time, but not be appropriate under other circumstances, particularly when those circumstances involve an analysis of the strictly construed exceptions to 180.

CONCLUSION

With the exception of officials who have direct statutory responsibilities associated with voter registration, and civic groups such as the League of Women Voters for example, who have traditionally been active in encouraging voter participation, voter registration efforts have become increasingly associated with partisan or issue politics. The political parties and other interest groups have their particular political interests in mind when they mount efforts to register certain people in an effort to achieve a particular electoral outcome. The perception that voter registration efforts are often associated with campaigns in a "get out the vote effort" is similar to the perceptions surrounding our doorbelling and campaign web site "linkage" cases. In addition, it is difficult for the Board to imagine a mailing program by legislators which would reach all unregistered voters in every legislative district. Anything less would seem to be even more suspect as a campaign tool yet we know of no law or requirement which would mandate that each legislator conduct such an effort.

While members remain free to voice their views on electoral participation, the use of public resources to solicit constituents to register to vote, or to solicit requests from constituents for voter registration forms, or to advise on how to vote, is not "normal and regular conduct" for a legislative office and would violate RCW 42.52.180.