Legislative Ethics Board

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ADVISORY OPINION 2020 – NO. 1

ETHICAL RESTRAINTS RELATED TO PRESS RELEASES, TALKING POINTS AND SPEECHES, CAUCUS POSTINGS ON SOCIAL MEDIA, FACEBOOK POSTINGS ON MEMBERS' PRIVATE SOCIAL MEDIA ACCOUNTS THAT APPEAR OFFICIAL AND THE THRESHOLD FOR TRIGGERING CIRCUMSTANCES

September 2020

The Board has received an advisory opinion request from Bernard Dean, the Chief Clerk of the House who has waived confidentiality. The request contains seven questions. Each will be answered separately.

I. INTRODUCTION

A. Background

In May 1992, the Public Disclosure Commission (PDC) directed its staff to investigate the Legislature for possible violations of RCW 42.17.130 which prohibited the use of state resources to directly or indirectly assist a campaign (the jurisdiction over this issue now resides with the Board pursuant to RCW 42.52.180). As a result of the PDC's investigation finding that the statute had been violated, the PDC and the four caucuses entered into a Stipulated Agreement (Stipulation) which acknowledged, among other things, that the House and Senate had adopted Standards of Conduct Regarding the Use of Public Facilities. Pursuant to the Stipulation, these Standards, "[were] the first comprehensive attempt to address the many 'gray areas' shading electoral and legislative activities. They address areas of conduct such as policy research, speech-writing, newsletters, video/radio taping, press releases and press conferences, polls and questionnaires, fundraising, voting record research, recruiting candidates, travel and scheduling. They also provide a process for guidance and approval or disapproval of ambiguous activities." *Stipulation* at p. 5-6.

These standards were adopted to provide guidance in areas of ambiguity between appropriate legislative activity and prohibited campaign activity and to create a process, beginning on July 1 of election years (it is now the first day of candidacy filing) in which the Chief Clerk of the House and the Secretary of the Senate would review all press releases as well as a number of other activities. This process is intended to provide a check on the use of legislative resources during the election season so as to avoid the use of resources for campaign purposes. *Advisory Opinion* 1996 – No. 11. The Standards have evolved into what is now known as the Election Year Activity (EYA) approval process.

Pursuant to Chapter 14 of the House's *Policy & Procedure Manual*, in order to use any public resources during the election year freeze,[1] staff and members are required to submit an EYA Request form when working on the following activities:

- Press releases;
- Press conferences;
- Editorials;
- Letters to the editor;
- Speeches and speech notes;
- Any other activity intended to be convened by or presented to the media;
- Town hall or other large-scale constituent meetings; or
- Use of photographic, video, or voice recording equipment.

According to the House's Standards of Conduct (Standards), in analyzing EYA requests, decisions to approve or deny the request turn on the factors that make up the context for the requested activity. The following are some of the factors considered:

- Triggering event. Is the requested activity in response to the occurrence of some event dealing with legislative business?
- Timeliness. Is the requested activity in response to a recent event?
- Legislative business. Does the requested activity relate to legislative business or to an issue that has been or will likely be the subject of legislative business?
- Connections with the issue. Does the legislator have a relationship to the subject matter of the requested activity that differs from the relationship of all other legislators?
- Normal and regular conduct of legislative office. Would the activity requested be considered a part of the conduct of a legislative office? Is the requested activity one with historical precedent? Is the activity ongoing and, if so, for what length of time?
- Newsworthiness. The less an activity is generally understood to be newsworthy, the greater the likelihood the activity will be challenged as unrelated to legislative business.

B. Statutory Provision

The relevant statutory provision in the questions posed in this Advisory Opinion request is RCW 42.52.180. This provision provides in pertinent part as follows:

> *(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 or opposition to a ballet proposition. . . . Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employee 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:*
>
> . . . .
>
> *(c) Activities that are part of the normal and regular conduct of the office or agency.*

[1] "Election year freeze" refers to the period between the first day of candidacy filing (usually in May) through the date of the certification of the general election in November.

The Ethics in Public Service Act (Act) does not define the "normal and regular conduct" exception to the prohibition on use of public resources so the Board has had to analyze the exception over the years on a case-by-case basis. As a result, the Board has determined the following regarding whether the activities constitute "normal and regular conduct":

- Issuing a press release in response to one issued by the Governor is normal and regular conduct. *Advisory Opinion* 1996 – No. 11;
- Doorbelling district on legislative issues not normal and regular conduct. *Advisory Opinion* 1997 – No. 07.
- Contact with constituents using state resources in response to the constituent's request for information or assistance generally considered normal and regular conduct. *In re Sommers & Silver*, 1996 – No. 3.
- Use of public resources to solicit constituents to register to vote or advise how to vote not normal and regular conduct. *In re Schmidt & Huff*, 1998 – No. 3.
- Responding to specific inquiries from the media, constituents and others about ballot proposition using legislative staff or equipment is considered normal and regular conduct. *Advisory Opinion* 1995 – No. 18.
- Editorial which is an advocacy piece or includes direct appeal for votes or campaign assistance not considered normal and regular. *Advisory Opinion* 1998 – No. 3.

C. Use of State Resources[2]

In this opinion, the Board is responding to whether the use of state resources to accomplish the task asked in the question is appropriate under RCW 42.52.180. The Board reiterates that members are generally free to accomplish the tasks mentioned in this opinion provided no state resources are used.

II. PRESS RELEASES

A. Background

After the first day of candidacy filing under RCW 29A.24.050, outreach[3] that is usually presumed to be part of the normal and regular conduct for a legislator faces a heightened level of scrutiny under EYA restrictions to ensure that public resources will not be used to assist in any campaign effort.

Because of the significant challenges facing the state from COVID-19, the number and complexity of requests for press releases has been higher than usual. In deciding whether initial permission should be given, the factors set out in the House *Policy and Procedure Manual* are consulted.

In *Advisory Opinion* 2000 – No. 4, the Board determined that press releases are to be evaluated using the following five factors: 1) timeliness; 2) proximity to an election; 3) relevance to a legislative issue; 4) source of the initial statement if a responsive press release; and 5) tone and tenor of the proposed release.

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[2] "Facilities of an agency" (also called state or public resources) includes, but is not limited to, use of stationery, 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. RCW 42.52.180(1).

[3] The term "outreach" is used to describe the activities listed in Chapter 14 of the House Policy and Procedure Manual This term is used because it seems to most closely sum up the activities that are restricted during the election freeze period. Any activity or product that is intended to reach constituents or the media especially without them initiating the contact or soliciting the materials is closely scrutinized during the freeze period.

B. Question No. 1

Are there additional criteria beyond those articulated in Advisory Opinion 2000 – No. 4 that should be considered when reviewing a press release request during an election year freeze?

C. Analysis

The Board first addressed the use of public resources to issue a press release in *Advisory Opinion* 1996 – No.11. In this matter, then Governor Lowry held a press conference and distributed a press release in which he denounced proposals for across-the-board property tax cuts. The question presented in this opinion was whether a legislative press release in response to the Governor's press release violated the prohibition on the use of public facilities for campaign purposes under RCW 42.52.180. This general prohibition does not apply to "[a]ctivities that are part of the normal and regular conduct of the office or agency." RCW 42.52.180(2)(c). The Board determined that a legislator may respond to issues raised and statements made by the governor, or any other state-wide elected official, unless such response is determined to be for the purpose of assisting a campaign and is not part of the normal and regular conduct of the office.

The Board further stated that in determining whether a particular response, using state resources, goes beyond what is appropriate under the statute, it will consider the following five factors: 1) timeliness of the response; 2) proximity of the response to an election; 3) relevance of the response to a legislative issue and to the initial outside statement; 4) the source of the initial outside statement; and 5) the tone and tenor of the response.

In *Advisory Opinion* 2000 – No. 4, the Board was again asked to weigh in on the appropriateness of legislators responding to a statement by issuing a press release. The Board stated that the Act does not prohibit every response except a response to the governor or other statewide official. "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 *Advisory Opinion* 1997 – No. 9, the 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, the Board recognized that "the legislature must be able to respond to changing and urgent circumstances." *Id.* at 4-5. The Board stated that there will be circumstances when a proposed release, whether **initiated by a legislator[4] or whether responsive in nature** is necessary and appropriate because of the substance and urgency of the issue. (emphasis added). The Board then reiterated the 5 factors first laid out in *Advisory Opinion* 1996 – No. 11 and expanded its discussion of them.

The question we are asked in this opinion is whether this 5-factor test is still the appropriate test with which to determine whether the use of state resources in issuing a press release during the election year freeze is permitted under the Act. While the Board believes the 5-factor test established a good basis upon which to decide whether the use of state resources in issuing a press release was appropriate, we believe additional clarification of the factors and the inclusion of two additional factors is needed. Those two factors are as follows: triggering circumstances and personal nexus. Both will be further explained below.

[4] Self-initiated press releases from legislators, using public resources, are very different from responses to outside sources and deserve a higher level of scrutiny. *Advisory Opinion* 1996 – No. 11 at pg. 4.

Triggering Circumstances – In past opinions on the appropriateness of issuing a press release, the general question has been whether the legislator can respond to a statement made by the Governor or another statewide official about an issue of importance to the legislature. Also, in past opinions, the Board has distinguished between press releases made in response to an outside statement or a press release initiated by a legislator. The Board has stated previously that self-initiated press releases from a legislator using public resources are very different from responses to outside statements and deserve a higher level of scrutiny. *Advisory Opinion* 1996 – No. 11, at pg. 4. The Board believes that a legislator may initiate a press release with the use of state resources in response to a triggering circumstance provided that the other six factors are met. If all seven factors are considered and met, then a press release initiated by a legislator would not be found to be in violation of the Act.

What constitutes a triggering circumstance? We believe a triggering circumstance allowing the use of state resources to initiate a response is an urgent or emergency situation. An "urgent" situation is defined as one requiring immediate action or attention. *New Oxford Dictionary*. An "emergency" is defined as a serious, unexpected, and often dangerous situation requiring immediate action. *New Oxford Dictionary*. Clearly, natural disasters like mudslides, earthquakes or volcanic eruptions would be considered emergencies permitting a legislative response with the use of state resources. Emergencies would also clearly include situations in which a recent revenue forecast is significantly lower than the previous forecast or the issuance of a court opinion that significantly impacts the legislature in some fashion.

Personal Nexus - the Board does not believe it appropriate that every legislator initiate a response to these situations, which is why the Board is adding a seventh factor that must be met before state resources can be used to issue a press release. The Board believes the matter about which a press release is issued must be relevant and there must be a sufficient personal nexus between the content of the press release and the legislator who issued it. The question to be answered is whether the legislator has a special connection to the legislative issue which is the subject of the press release and if so, would the public expect to hear from that legislator about the issue? For example, the public would expect to hear from a budget committee chair or ranking member about a decline in revenue or from the chair or ranking member of the education committee about a court decision impacting education in the state.

Timeliness – the response must be offered reasonably close in time to the initial outside statement or triggering circumstances addressed by the press release. Any response that is delayed and particularly one that is delayed until close to election day will be suspect. The further a response is from the date the initial statement was made or triggering circumstance occurred, the less newsworthy it is and the more likely a campaign purpose will be inferred. Furthermore, a press release that is timely the first time it is issued becomes less so and more likely a campaign purpose inferred when it is repeated absent a new statement or triggering circumstance.

Proximity to Election – responses made near the date of an election may imply that the main purpose of the response is to persuade or attempt to persuade persons to vote one way or another. Although the House and Senate have established a date for EYA activities, that does not mean that a press release issued in response to an outside statement or as the result of a triggering circumstance after that time is automatically considered a violation of the Act. Further, the Board has previously determined that legislators do not have to cease all press release activity after the candidacy filing date in an election year (*Advisory Opinion* 2000 – No. 4) because events (statement or triggering

circumstances) beyond the control of a legislator may dictate a need to use public facilities after the candidacy filing date in an election year and press releases are an example. However, a press release issued in response to a statement or initiated by a legislator as the result of a triggering circumstance during the period between the primary and the general election will receive greater scrutiny by the Board.

Relevance – the substance of the initial outside statement to which the response is made or the triggering circumstance must have some relevance to legitimate legislative issues that are either currently pending before the legislature, have been considered by the legislature in the past or could be considered by the legislature in the future. In addition, even if the outside statement or triggering circumstance was relevant, if the responsive or legislatively initiated statement is unnecessary for the purpose of responding to the initial statement or triggering circumstance, the press release or statement would not appear to be permitted under the Act. The question that must be answered is what is it about the underlying issue which clearly shows that a press release prepared with the use of state resources cannot wait until after the election? Even if the press release fails this test that does not mean legislative activity ceases. The member can still discuss the issue with constituents, respond to questions from the public and news media, and personally prepare and send press releases on any subject whatsoever without the use of public resources.

Source of Initial Statement – this factor applies only to statements responding directly to outside statements. In determining whether a responsive statement by a legislator is appropriate, the person making the initial statement and the position they occupy will be considered. Certain statewide officials and especially the governor carry a much more prominent role in framing public policy than others. Although responses to statements made by lobbyists or citizen groups are not addressed in *Advisory Opinion* 1996 – No. 11, they are not automatically prohibited under the Act but would be subject to very close scrutiny by the Board. Source is closely tied to the issue of relevance and neither *Advisory Opinion* 1996 – No. 11 nor *Advisory Opinion* 2000 – No. 4 should be viewed as authority for the expansive proposition that press releases with the use of public resources are permissible whenever anyone attacks the credibility of legislators.

Tone and Tenor – language used in a press release need only be that necessary to adequately respond to the substance of the initial statement or the triggering circumstance. The tone and tenor of the response should be respectful and should not impugn the character of another legislator or elected official.

It is possible that issuing a press release after the election freeze would not violate the Act but would nevertheless not be permitted under EYA scrutiny. The chambers are free to be more restrictive of their members' activities during the election year freeze than the Act would require.

III. TALKING POINTS AND SPEECHES

A. Background

Legislators routinely receive requests to speak at public and private events. During the election freeze period, when receiving an EYA request for staff to work on talking points or speeches, the House examines the triggering event, timeliness, legislative business, member connection to the issue, whether the activity is part of the normal and regular conduct of the legislative office and newsworthiness.

B. Question 2

What criteria should be used in evaluating whether public resources may be used to draft talking points and speeches during the election year freeze?

C. Analysis

Generally, the purpose of the election year restrictions in RCW 42.52.180 and 42.52.185 are to reduce the advantage in elections that incumbent legislators might enjoy because of their access to public resources, including staff and materials previously prepared by staff.

The Board believes that the seven factors laid out in this opinion should be the criteria used to determine, under the Act, whether public resources (generally staff) can be used to draft talking points and speeches during the election year freeze.

The Board has previously applied the former five factor test to other situations not involving press releases. In *In re Spanel, Loveland, Sheldon, Wojahn & Snyder*, 1996 – No. 10, in determining whether postings on the caucus website violated the mailing statute, the Board held that the former five factor test should be applied to all materials published and distributed for public consumption during the election year freeze, including those published and distributed by electronic means, and not just to responsive press releases. Similarly, the Board has previously applied the former five factor test to determine whether a mailing during the election year freeze by the Joint Committee on Pension Policy was appropriate under the Act. *Advisory Opinion* 1997 – No. 12. The Board believes the seven-factor test as established in this opinion to be the appropriate test to determine whether state resources should be used in drafting talking points or speeches.

Again, the House and Senate administrations, when analyzing EYA requests, are free to apply a stricter standard than the seven-factor test used to determine whether RCW 42.52.180 has been violated.

III. CAUCUS POSTINGS ON SOCIAL MEDIA

A. Background

Under RCW 42.52.180(2)(c), a legislator who is running for reelection or election to a different office cannot alter his or her official website from the candidacy filing period through the certification of the general election. Over the years, all four caucuses have established their own web sites and social media sites. During an election year, since the caucus sites are not member specific, they have continued to post new content as long as they followed certain rules, such as not posting anything that references the members who are up for election. However, during the last few years, the caucuses have started to post statements that encompass current events, legislation that was passed in past sessions, and future legislative actions that may be taken. In 2018, the two House caucuses together developed Social Media Posting Guidelines for caucus postings.

B. Questions

1. Number 3 - *Are the social media posting guidelines sufficient for ensuring compliance with the Ethics Act? Are there different or additional criteria that should be used?*
2. Number 4 – *Given RCW 42.52.180(2)(c), what criteria should be considered when staff post content to caucus social media sites during the election year freeze? For example, what types of limits, if any, apply to caucus websites and social media sites? What are the ethical boundaries of caucus posts that are not attributed to a specific member but discuss such things as past or future legislation?*
3. Number 5 – *Are the standards set out in Advisory Opinion 2000 – No. 4 discussed above for individual member press releases also the standard in judging caucus web site postings?*

C. Analysis

1. Question 3

The Social Media Posting Guidelines (Guidelines) provide as follows:

Social Media Posting Guidelines

For all social media posts year round
Have a legislative nexus?
Refrain from discussing or linking to candidate or ballot issue political campaign?
Refrain from impugning other members or their motives?
Refrain from linking to third party content that impugns other members or their motives
Refrain from disclosing private or confidential information?
Comply with LEG-TECH information security requirements?
Comply with social media platform's Terns of Service Requirements?

Additional Considerations (if applicable)
If the content contains facts, are the facts verifiable?
If the content contains a third-party direct quote or opinion, does the post clearly identify the third party as the holder of the quote or opinion by using proper quotation marks and attribution?

Additional considerations during EYA. Does the post:
Refrain from mentioning or linking to third party content that mentions specific elected official(s) up for reelection by name?

The Board has reviewed the Guidelines only from the perspective of whether they meet the election freeze requirements of the Act. The Board believes, to the extent they are not already included, that the addition of all seven factors as outlined in this opinion should be added to the criteria under the heading of "Additional considerations during EYA."

2. Question 4

The Board believes six of the factors should be used to make this determination. The factor – personal nexus – does not apply to social media caucus posts. As stated in *In re Spanel et al.*, the former five-factor test applied to all materials published and distributed for public consumption, including those published and distributed by electronic means. Electronic means includes official websites and all official social media

pages or accounts. The caucus postings are materials published and distributed for public consumption so it appears fitting that six of the factors should be used to determine whether a posting during the election year freeze violates the Act. Further, during an election year beginning on the first day of filing week, the official websites and social media accounts for members up for re-election are frozen; the caucus websites are not frozen. However, caucuses cannot post on their websites or social media pages material that directly mentions or supports members who are up for re-election. To allow anything further is to allow the ethics rules to be circumvented.

The members who are not up for election are still free to use state resources, including staff time, to post to their own official websites and social media accounts, but the caucus accounts should not be used under the guise of supporting and communicating on behalf of only these members who are up for election. The caucus social media accounts are generally much further reaching when it comes to subscribers than the individual member accounts, and it is inappropriate to post material that directly mentions or links to members who are up for re-election in an election year.

The Board does believe that the individual chambers could require caucuses to receive approved EYA requests before making social media posts. It seems appropriate that the rules that require members to submit EYA requests could also apply to the individual caucuses.

3. Question 5

The Board addressed this question in its answer to Question 4.

IV. MEMBER FACEBOOK SITES

A. Background

Legislators may have several types of Facebook pages as follows:

- Official legislative Facebook sites managed by caucus communications staff;
- Private Facebook sites which display just the member's name without the accompanying legislative title (for example, "John Doe");
- Campaign Facebook sites (for example, "John Doe for State Representative"); and
- Private Facebook sites that include the member's title (for example, "State Representative John Doe").

B. Question 6

Is there guidance on what may be posted on private Facebook sites that may appear to others as official legislative Facebook sites? As they are currently configured, it may be confusing to members of the public whether the private site in which the member's title is used is an official legislative site or not? Should the site have a disclaimer?

C. Analysis

Members are free to establish personal social media sites provided they do not use legislative staff to create or maintain them. As stated in *In re Stambaugh*, 2016 – No. 8 & 13, any social media site that

contains campaign material becomes a campaign site even if that site is not the member's official campaign site.

The Board has no authority over the name members assign to their personal social media sites. However, to avoid public confusion, and perhaps future ethics complaints when members use their title in the name of their sites, the Board recommends that they add a disclaimer to the site stating that the site is not the member's official legislative site.

IV. TRIGGERING EVENTS AND ELECTION YEAR FREEZES

A. Background

One of the factors considered by the House in determining whether to approve an EYA request is the "triggering event" (aka emergent issue) that requires a response during the election year freeze. Historically, a triggering event has been treated as something relatively unpredictable such as the Oso mudslide, eastern Washington wildfires, the *McCleary* education funding decision and caseload forecasts.

During the initial corona virus outbreak, legislative ethics advisers indicated that while the pandemic outbreak was initially a triggering event, the whole period of the pandemic did not constitute a triggering event. However, the House has received many inquiries regarding the scope of the triggering event during the duration of an extended emergency. Examples given have included unemployment fraud at the Employment Security Department, the Governor's COVID-19 proclamations, and caucus leaders refusing to extend proclamations. These questions have also been raised regarding recent police misconduct and the subsequent protests and civil disturbances.

B. Question 7

To what extent does the Ethics in Public Service Act require a triggering event and what kinds of situations constitute triggering events? Additionally, how are extended situations to be treated when analyzing requests? For instance, how should the House evaluate triggering events and timeliness in a period of ongoing challenge, such as presented by the COVID-19 pandemic?

C. Analysis

The Board has responded to this question in its discussion of Question 1.

V. PROSPECTIVE APPLICATION ONLY

Understanding that this opinion contains additional criteria and interpretation than what current practice is, this opinion applies prospectively only.

On behalf of the Legislative Ethics Board, this opinion is signed on the 16 day of September 2020.

Eugene Green

Eugene Green, Chair