

Legislative Ethics Board

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ADVISORY OPINION 2021 – No. 2

Clarification on the Use of Photographs Depicting Legislators January 2022

I. INTRODUCTION

In June 2021, the Board issued its opinion in *In re Claire Wilson*, 2021 – No. 5. The complaint alleged that Sen. Wilson had violated the Ethics in Public Service Act (Act) because of the inclusion on the caucus website of a photograph of the Senator taken at a rally in which the words, “*I stand with Planned Parenthood*” were clearly visible at the lectern at which the Senator was speaking. Under the circumstances, we held that the photo of the legislator clearly promoted Planned Parenthood contrary to the statute (RCW 42.52.160) which prohibits the use of public resources for the gain of another. We also held that the actions of the Senate Democratic caucus staff in posting the photo also violated the Act.

In September 2021, the House caucus communications directors jointly requested an advisory opinion clarifying the Board’s position in *In re Wilson*. They waived confidentiality in making this request.

The request essentially takes the form of five questions with accompanying photos (which the requesters call hypotheticals) describing fact patterns on which they request guidance from the Board.¹ However, the fact patterns are without the context involving the photo’s use which the Board believes to be the critical component in determining whether a photo violates the Act. Accordingly, the Board

¹ Question 1. Is simply having a photo taken, which shows the name of the organization, a violation of RCW 42.52.160? Or, as the Board held in *Advisory Opinion 2019 – No. 2* in which it stated that simply standing behind a lectern is not extolling the organization’s virtues? Does it matter that the group’s name may also contain more than just the group’s name, like in *Wilson* where the lectern poster stated “I stand with Planned Parenthood”? Photo examples – one legislator standing behind a lectern with an NCSL logo and a second with a legislator standing behind a lectern with a Seattle Public Schools logo.

Question 2. Hypothetical 2: Members are often asked to have their pictures taken with groups, usually groups visiting the Legislature during session. Some of the groups may be holding signs with the group’s name or containing slogans. Is being in a photo, where a slogan or motto is incidental to the picture, a violation of .160? Alternatively, if it is a violation of .160, would blurring a name or logo suffice if they present a problem? Photo example – a legislator standing with a group holding a “Mockingbird Society” banner.

Question 3. Assume the facts of Hypothetical 2, but the signs feature issues – such as preventing gun violence. Would pictures of members that do not contain the name of an organization, but contain a position on an issue, be held to the same standard as those signs with slogans or mottos? Alternatively, if it is a violation of .160, would blurring a name or logo suffice if the name or logo presents a problem? Photo example – member standing with a group of individuals who are holding a banner that states “Gun violence is preventable.”

Question 4. Some backgrounds in pictures may include both issues and the names of organizations. Is being in a photo, where an issue and a name of an organization are displayed, a violation of .160? Does it depend on whether the message extols the organization? Alternatively, if it is a violation of .160, would blurring a name or logo suffice if the name or logo presents a problem? What occurs in situations where it is not practical to blur the image of the names? Photo example – legislator standing in front of background that states “eliminating racism, empowering women – YWCA.”

Question 5. Individual persons also have their pictures taken with members. Often, they may be wearing attire or apparel with their group’s names, slogans, mottos, or issues. Is being photographed with someone wearing their group’s apparel considered support of, or extolling, the group? Photo example - Photo example – legislator standing with a person wearing a hat and jacket that states “Resident Action Project.”

declines to respond to these specific questions, preferring to provide guidance of more general applicability that is useful to legislators and staff in a wider array of situations.

II. BACKGROUND

Legislators are frequently photographed in a variety of settings while performing legislative duties. *In re Wilson* involved a typical fact pattern: Senator Wilson was photographed while speaking at a rally in a public area of the capital campus. It is usual for a group sponsoring such a rally to provide a lectern with the organization's name, or information about its issues or perhaps a slogan visible; that was the case in *Wilson*. But legislators are typically photographed in many places with members of groups or organizations, including individuals who may be wearing clothing or holding signs that convey information about the group or organization, their issues or perhaps a slogan. These sort of meetings may take place almost anywhere.

These events are often photographed by a legislative employee, frequently, (but not always) by photographers employed by Legislative Support Services (LSS). The caucuses have used images taken by LSS in various legislative communications and those images have portrayed legislators in settings in which the names of organizations and/or causes are visible. These communications include, but are not limited to, caucus websites, email updates, news releases, videos, and social media posts. LSS photos are placed in an electronic gallery to which caucus communications staff have access. In most of these instances, staff, on behalf of the member,² has chosen the image from the LSS photography gallery.

III. ANALYSIS

RCW 42.52.160 prohibits the use of persons, property or money (public resources) under a legislator's official control or direction, or in his or her official custody, for the private benefit of self or another unless that use is part of the legislator's official duties.³ *In re Schmidt*, 2006 – No. 4. Whether legislative materials were properly created at public expense in the first place is not determinative. Rather it is the use to which the materials are later put that determines whether the Act has been violated. *In re Hargrove*, 2012 – No. 1.

Because legislative staff are considered a “facility of an agency” or a public resource, it follows that the photos taken by these staff would also be considered a public resource. *See* RCW 42.52.180(1) (definition of “facility of an agency”); *In re Sawyer*, 2018 – No. 4. As a result, the photos can be used in official publications or social media only if there is a substantial or tangible legislative nexus.⁴ *In re Roach*, 2008 – No. 6; *In re Schmidt*, 2006 – No. 4; *Advisory Opinion* 2006 – No. 1. The Board reiterates that it is not the taking of the photos by legislative staff or the actual photos themselves that may violate .160; rather, it is the use to which those photos are later put that determines whether the Act has been violated.

² It is important for the staff choosing the photo to make sure that the member for whom they are choosing the photo approves that photo because members are responsible for their publications whether they have approved them or not.

³ “Official duty” is defined as “those duties within the specific scope of employment of the state officer or state employee as defined by the officer's or employee's agency or by statute or the state constitution. RCW 42.52.010 (12).

⁴ The Board has been clear, when applying RCW 42.52.160 in previous opinions, that there must be a substantial or tangible legislative nexus in the use of public resources before they can be used. If the nexus exists, the next question is whether the use of the public resources is being used to benefit another. If the resources are being used to benefit another, the use potentially violates .160.

In determining whether the use of the photo meets the requirements of the Act, the Board will review the context in which the photo is presented. By context, the Board means the words that accompany or explain the photo. A photo absent an explanation is a photo without context. The lack of context accompanying the member's photo was the issue in *In re Wilson*. A person looking at her photo displayed on the caucus website would not know why she was speaking to Planned Parenthood, or when, or what she said because there was no explanation with the photo; it was just a photo identifying her as a member of the Senate Democratic Caucus.

It is also the context accompanying the photo that can establish the legislative nexus. If the photo is accompanied by words explaining that the member is shown at a legislative committee hearing, is meeting with constituents or bill supporters in her office, or speaking at a rally held on the capitol steps – essentially depicting the member acting in his or her official capacity – this explanation is the context that establishes the legislative nexus. A photo in an official publication of a member promoting an electric car or a restaurant in his or her district accompanied by an explanation has context but lacks legislative nexus. However, a photo of a member at a business in his or her district with an accompanying explanation that the member is discussing the impact on constituents of legislation passed the previous session meets the substantial legislative nexus requirement. As the Board has previously stated, constituents are entitled to know what their elected officials are supporting or not supporting during session. *In re Darneille, Jinkins & Fey*, 2017 – No. 43; *In re Sommers & Silver*, 1996 – No. 3.

V. QUESTIONS

In determining whether the inclusion of a photo in an official publication is appropriate under the Act, the following are some questions that may assist in making that determination.

1. Does the photo and accompanying explanation of the photo depict the legislator acting in his or her official capacity meeting with constituents, organizations, bill supporters, speaking on the floor or in a committee hearing or at a rally on the capitol steps? If the answer is yes, then the photo and explanation probably are appropriate under the Act.
2. Does the photo and accompanying explanation of the photo depict the legislator discussing past or future legislation and its potential impact with constituents in his or her district? If the answer is yes, then the photo and explanation probably are appropriate under the Act.
3. What is the message being conveyed by the photo and its accompanying explanation? If the message is to show the recipients of the publication that the legislator is meeting with interested parties during session, speaking about a bill on the floor or in committee, speaking at a rally about legislation that legislator supports or doesn't support, or meeting with constituents in the district about legislative issues that impact them, then the photo and explanation probably are appropriate under the Act.

V. CONCLUSION

It is not the photo itself or the act of taking the photo that may violate the Act. Rather, it is the use to which the photo is put that determines whether the Act has been violated. In determining whether the use of a photo depicting a legislator violates the Act, the Board will closely examine the context in which

the photo is presented. If there is a sufficient legislative nexus with the use of the photo, as determined by the context, then the use of the photo in an official publication will not violate the Act.

ON BEHALF OF THE LEGISLATIVE ETHICS BOARD, this opinion is signed on the 7 day of February, 2022.



Judge Terry Lukens, ret., Chair