

To: Seattle Elected Officials: Mayor Norm Rice,  
City Attorney Mark Sidran,  
City Council President Jim Street,  
City Councilmembers: Martha Choe, Cheryl Chow,  
Jan Drago, Sue Donaldson,  
Sherry Harris, Jane Noland,  
Margaret Pageler and Tom Weeks

From: Seattle Ethics and Elections Commission

Date: February 10, 1994

No. 94-1E

Re: Request For Advisory Opinion No. 94-2A-0107-1 Comment On  
Proposed Ballot Issue

Recently, we were asked to advise whether City Councilmembers could provide to Hands Off Washington, a group organized to oppose a proposed ballot issue that would repeal a City ordinance, a statement in opposition to the proposed measure. Hands Off Washington planned to use the statements in a press release. The brief answer is that the Elections Code does not prohibit City elected officials from using City funds and facilities to make a statement in response to a specific request for an opinion regarding a ballot issue.

We will also take this opportunity to advise that the Elections Code does not prohibit City Councilmembers from passing a resolution or adopting a motion that favors or opposes a ballot issue, so long as notice of the action is given and opposing views of Councilmembers or the public can be heard.

Likewise, the Code does not prohibit City elected officials or City employees from providing information about the subject of a ballot issue, so long as the information is provided without comment and providing such information is within the normal and regular conduct of the office or department.

**The Elections Code, however, prohibits City employees and appointed and elected officials (except as provided in the exceptions discussed) from using City facilities (equipment, supplies, buildings, etc.) and City paid time to assist a campaign for or against a ballot issue. Even officers or employees of a City department that was established to promote or oppose the subject of a ballot issue, may not use City funds or facilities to promote or oppose a ballot issue, unless there is express authority in the department's enabling ordinance to use City funds for that purpose, as a routine matter.**

## STATEMENT OF FACTS

Individuals were organizing to submit a ballot title to the Washington State Secretary of State for a ballot issue that would prohibit laws that bar discrimination on the basis of sexual orientation. Seattle has such an ordinance that would be repealed, if the initiative were successful.

Hands Off Washington is a group of individuals who have organized to oppose the proposed initiative. Recently, Hands Off Washington staff contacted each Seattle City Councilmember and asked for a statement that Hands Off Washington could use in a press release. The question asked is whether the state or Seattle Elections Code provision that prohibits the use of public facilities to promote or oppose a ballot issue prevents the Councilmembers from using public facilities to respond to Hands Off Washington.

## ANALYSIS

### **1. The Code provision prohibiting the use of City facilities to promote or oppose a ballot issue does not apply to elected officials issuing a statement in response to a specific inquiry.**

The Seattle Elections Code prohibits the use of public facilities to assist a candidate or to promote or oppose a ballot issue. SMC 2.04.300 provides:

No elected official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include but are not limited to use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the officer or agency: provided, that the foregoing provisions of this section shall not apply to those activities that are part of the normal and regular conduct of the office or agency.

This provision prohibits City officers and employees from using City paid time or City facilities (equipment, supplies, buildings, etc.) to promote or oppose a ballot issue. Those officers and employees who wish to conduct such activity must do so on their own time and using their own facilities. There are, however, exceptions to this prohibition.

The language of the Seattle law is exactly the same as the state law. The state law, however, includes additional language that provides specific exemptions for elected officials. The provision that begins with "provided" in the City Code reads as follows in the state law:

Provided, That the foregoing provisions of this section shall not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are part of the normal and regular conduct of the office or agency.

RCW 42.17.130 (emphasis added). Thus, under the state law, RCW 42.17.130(2), elected officials may use public facilities to make a statement favoring or opposing a ballot issue in response to a specific inquiry. While the City ordinance does not include the language of (1) and (2) above, we find that the exception expressed in the City Code for "normal and regular conduct of the office or agency" provides such an exemption to elected officials. In addition, we will be proposing a revision to the Seattle Elections Code that includes the language of RCW 42.17.130(1) and (2), to unambiguously state these exemptions for elected officials. Consequently, we interpret the City Code to also allow City elected officials to use City facilities to make a statement in response to a specific inquiry, even if it is to promote or oppose a ballot issue. Hands Off Washington made a specific inquiry to each Councilmember, any Councilmember who sent a statement in response to that specific inquiry could have done so using City paid time, equipment and employees.

## **2. The proposal to prohibit any laws that bar discrimination on the basis of sexual orientation was not a ballot issue at the time that Hands Off Washington made the request.**

An issue of interest does not become a ballot issue, under the law, until some paperwork is in progress to perfect certification. An issue of interest becomes a ballot issue when the first step is taken for certification: for a state ballot issue, when a proposed ballot title is submitted to the Secretary of State; for a County-wide ballot issue, when a ballot title is submitted to the County Auditor. See RCW 29.27.060 and RCW 29.79.010. The first step for certifying a City ballot issue, however, is either: (1) the collection of signatures for citizen initiated initiative, referendum or Charter amendment; or (2) passage of a Council resolution for a levy election or Council initiated Charter amendment. See Seattle City Charter Article IV and Article XX (1992).

RCW 42.17.130 and SMC 2.04.300 only prohibit use of facilities to promote or oppose a ballot issue, not an issue of interest that has not yet become a ballot issue. Since no ballot title had been submitted to the Secretary of State for a state initiative and no signature gathering had begun to certify a City initiative to prohibit legislation that bars discrimination based on sexual orientation when Hands Off Washington made the request, the issue of interest was not a ballot issue. Therefore, even if the Code did not include an exemption for public officials in this case, using City facilities to oppose the issue of interest would not have violated the state or City law.

**3. City Councilmembers may also use City facilities to adopt resolutions or motions promoting or opposing ballot issues, so long as notice and an opportunity for opponents to be heard are given.**

As discussed above, RCW 42.17.130 (1) provides to legislative bodies an exception from the prohibition against a use of public facilities to promote or oppose ballot issues. Under that exception, the City Council may adopt resolutions in favor of or in opposition to ballot issues, so long as the action is taken at an open public meeting for which the ballot proposition was named as a subject of discussion and legislators or members of the public with an opposing view have an approximately equal opportunity to be heard. For the reasons discussed in 1. above, we find that the City Elections Code also affords the same exception.

**4. City officers and employees may provide, without comment, requested information on the subject of a ballot issue, if providing information is within the normal and regular conduct of their office or employing departments.**

SMC 2.04.300 prohibits the use of public facilities to assist a candidate or to promote or oppose a ballot issue, unless such conduct is the normal and regular conduct of the office or agency.

provided, that the foregoing provisions of this section shall not apply to those activities that are part of the normal and regular conduct of the office or agency.

SMC 2.04.300 in relevant part. Since we have never interpreted the terms "normal and regular conduct," we look to state law for guidance. Normal and regular conduct is defined in rules adopted by the State Public Disclosure Commission as lawful and usual conduct. WAC 390-05-273 provides in relevant part:

Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17.130, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner.

If a City officer or employee is asked to provide the kind of information that his or her office or department usually provides to the public on request, the officer or employee may provide the information, even though the information may concern an issue of interest that has become a ballot issue. The information must be provided, however, without comment about its relevance to

the ballot issue and without comment about the accuracy or inaccuracy of information provided by proponents or opponents of the ballot issue.

**5. City officers and employees of departments whose enabling ordinance authorizes promotion of certain interests may not use City funds or facilities to promote or oppose ballot issues, unless the department's enabling ordinance expressly authorizes such use, as normal and regular conduct of the department.**

Some departments were established to promote certain interests. For example, the Arts Commission enabling ordinance requires it to initiate, sponsor or conduct public programs to further the development of the performing arts. In Op Sea Ethics & Elects Comm'n 2E (1993), we advised that SMC 2.04.300 does not prohibit the Arts Commission from promoting the idea of a concert hall or advising the City Council to put a measure on the ballot to raise funds to construct a concert hall. In Op Sea Ethics & Elects Comm'n 7E (1993), we further advised that once funding a concert hall becomes a ballot issue, the Code prohibits the employees or members of the Arts Commission from using City funds and facilities to promote the concert hall, because there is no express authorization in the Arts Commission enabling ordinance to use funds and facilities to promote ballot issues.

**6. City officers and employees of offices or departments whose normal and regular conduct includes making facilities available to the public or making presentations on ballot issue topics, must provide equal access and unbiased presentations.**

The state rule defining normal and regular conduct, discussed in 4. above, also provides that if the normal and regular conduct of the agency is to make facilities available to the public or to make presentations of facts about ballot issue topics, the agency must provide equal access to facilities and make balanced presentations. WAC 390-05-271(2) provides:

RCW 42.17.130 does not prevent a public office or agency from (a) making facilities available on a nondiscriminatory, equal access basis for political uses or (b) making an objective and fair presentation of facts relevant to a ballot proposition, if such action is part of the normal and regular conduct of the office or agency.

An example of equal access is the use of meeting rooms. Some City departments have meeting rooms available for public use. If a proponent of a ballot issue requests use of a meeting room, the department may grant the request, so long as it offers the same opportunity to the opponents of the ballot issue.

An example of unbiased presentations is discussion in department newsletters. Some City departments regularly distribute information through newsletters. If the subject of a ballot issue is a topic that would normally be discussed in a department's newsletter, the department may discuss the ballot issue in the newsletter, only if both sides of the issue are presented.

## **CONCLUSION**

The Seattle Elections Code prohibits City officers and employees from using City funds or facilities to promote or oppose ballot issues. Therefore, if they wish to do so, they must use their own personal time and their own funds, supplies, equipment and facilities. The Code provides an exemption, however, for elected officials, under certain circumstances.

Elected officials may use City facilities to submit a statement promoting or opposing a ballot issue, in response to a specific inquiry. Therefore, the City Councilmembers asked to submit a statement to Hands Off Washington for distribution to the press could have used City facilities to do so. Since a ballot title had not yet been submitted for the proposed state initiative and no signature gathering had begun for a possible City initiative, the proposal was not yet a ballot issue. Therefore, even without the exemption, the elected officials could have used City facilities to respond to the request.

The following summarizes the other aspects of the law on use of facilities to promote or oppose a ballot issue:

City Councilmembers are not prohibited from using City facilities to pass a resolution or motion in favor of or in opposition to a ballot issue, so long as notice of the action is provided and opposing views of Councilmembers or the public can be heard.

City officers and employees may provide, without comment, requested information about the subject of a ballot issue, if the normal and regular conduct of their office or employing department is to provide such information.

City officers and employees of departments authorized to promote or oppose issues may not use City funds and facilities to promote or oppose those issues once they become ballot issues, unless the enabling ordinance for the department expressly authorizes such use of City resources.

City officers and employees may allow the use of City facilities by a group promoting or opposing a ballot issue, so long as the facilities are available to the public and the proponents and opponents of the ballot issue have equal access.

City officers and employees may use City funds and facilities to distribute information regarding the subject of a ballot issue, so long as the distribution of such information is part of the office's or department's normal and regular conduct and so long as both sides of the issue are presented.

The Commission's advisory opinion is based upon the facts as stated above. Please be aware that modification or change of the facts might cause the Commission to reach a different conclusion.

**FOR THE SEATTLE ETHICS AND ELECTIONS COMMISSION**

Carolyn M. Van Noy,  
Executive Director

This action was reviewed by the Commission at its regular meeting of February 2, 1994. The Commission members agreeing to adopt this opinion with the enclosed modifications were:

Timothy Burgess, Chair  
William L. Fleming, Vice Chair  
Lue Rachelle Brim-Donahoe  
Candy S. Marshall  
Dr. Edward Palmason  
Jeri A. Rowe

Not in attendance but confirmed  
approval after the meeting:  
Emilia R. Castillo