City of Seattle

Ethics and Elections Commission

August 21, 2009

Seattle, Washington

Re: Your TunnelFacts.com – Independent Expenditure Complaint

Dear

On July 26, 2009, the Seattle Ethics and Elections Commission (SEEC) received your written complaint regarding the website TunnelFacts.com. Normally the SEEC Executive Director would be writing to you. However, SEEC Executive Director, Wayne Barnett, disclosed to the Commission chair that he and his family have a personal friendship with Mr. Dan Bertolet, creator of Hugeasscity blog and a signator to TunnelFacts.com. After consideration by the SEEC Chair, Mr. Barnett was asked to recuse himself from review of your complaint.

The SEEC staff has completed our preliminary inquiry into your concerns. We find no violation of the Election Campaign Contribution ordinance, SMC 2.04, by either TunnelFacts.com or the "McGinn for Mayor" political committee.

Findings:

Under SMC 2.04.070(C), the complaint is being dismissed on the following grounds:

- TunnelFacts.com is not a political committee as defined by SMC 2.04.010(24) primarily because the site was developed without "the expectation of receiving contributions or making expenditures in support or opposition to" any candidate. SMC 2.04.010(24).
- The creators of TunneFacts.com did not operate in conjunction with the McGinn for Mayor political committee and therefore the McGinn political committee has no disclosure obligations under SMC 2.04.
- The development and maintenance of TunnelFacts.com is not an independent expenditure as defined by SMC 2.04.010(21).
- TunnelFacts.com, even if ruled to be an independent expenditure by the full Commission, does not meet the $100 reporting threshold of SMC 2.04.070(2).

Facts:

TunnelFacts.com is an issue based website. It advocates dispensing with the plan to construct a deep bore tunnel to replace the Alaska Street Viaduct. The website does not ask for contributions, or offer links to a political party or individual candidate(s) websites. The site does not advocate on behalf of a particular candidate for City office and is not advocating for a current City of Seattle ballot proposition.

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The website offers a historical account of the political decisions and negotiated agreements between the federal government, the State of Washington, the City of Seattle and Seattle voters. TunnelFacts.com urges citizens to educate themselves on the history, plan and construction costs associated with the tunnel project.

The site editorializes and is critical of the role played by public officials, including incumbent mayoral candidate Greg Nickels, past County Executive Ron Sims, and current Governor Christine Gregoire. Visitors are asked to seek out and vote for current City candidates who oppose the deep bore tunnel and call or communicate their opposition to the tunnel to those serving as elected officials.[1] TunnelFacts.com provides links to a variety of resources including proponents of the deep bore tunnel.[2]

SEEC staff spoke with mayoral candidate Mr. Mike McGinn. He was aware that campaign volunteers had been involved in the creation of the website. He told SEEC staff that these volunteers do not have a policy or tactical decision making role in his mayoral campaign, adding that most notably the volunteers were organizing the campaign phone bank, and maintaining both the campaign's database and Facebook page.

Mr. McGinn had some knowledge of the development and launch of the website and volunteered that in discussions with members of his volunteer staff, two campaign volunteers informed him of the site and asked if he'd like to participate. Mr. McGinn told SEEC staff that he made it clear that he "didn't have time," and "the campaign would not take it on." When SEEC staff contacted Mr. Derrick Farmer, one of the website developers, his independent recollection of the conversation was similar, telling SEEC staff, "he [McGinn] wasn't interested so we did it on our own."[3]

Discussion:

TunnelFacts.com is not a "political committee" as defined in SMC 2.04.010(24) and therefore is not required to register under SMC 2.04.

SMC 2.04.010(24) reads:

> "Political Committee" means any person (expect a candidate or an individual dealing with his own funds or property) having the expectation of receiving contributions or making expenditures in support of or opposition to, any candidate or any ballot proposition."

There is no evidence that TunnelFacts.com solicits or collects contributions or makes expenditures on behalf of any candidate or ballot proposition.[4] Absent this, we cannot find that TunnelFact.com is a political committee and subject to the City election ordinance SMC 2.04.

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[1] On August 13, 2009, five days before the primary election, TunnelFacts.com posted a "TunnelFacts Candidate Guide." The guide listed all candidates running for City-wide office and identified each candidates' position on the deep bore tunnel plan.

[2] http://www.seattlechamber.com/pls/ahome/keyissues_portlet.read_pdf?v_id=7827

[3] TunnelFacts.com was created on June 26, 2009 and is hosted by BLUEHOST.com. Mr. Farmer told SEEC staff that construction and posting of the site cost, "about $40.00 out of pocket."

[4] Of the 33 persons listed on the website, 15 have given no recorded contributions in the 2009 election cycle; 8 have contributed solely to the McGinn campaign; 1 solely to Mayor Nichols; 1 solely to the Green Bag campaign; 1 solely to Council candidate O'Brien, and 7 have contributed to multiple campaigns including the McGinn campaign. There is one contribution over $300 to the McGinn campaign.

Volunteering with a campaign committee alone, does not transform the developers of TunnelFacts.com into an "officer of a political committee," which would require the McGinn for Mayor political committee to report under provisions of SMC 2.04.

There are no facts which support a finding that the McGinn for Mayor campaign collaborated or was involved in the TunnelFacts.com site. We acknowledge that the candidate and those connected with the site share the same opinion of the deep bore tunnel and that volunteers with the campaign were involved in the development of the website. What is dispositive in our inquiry is that those involved in the website are not officers of the campaign or involved in strategic planning or decision making on behalf of the McGinn for Mayor Committee.

The development of TunnelFacts.com is not an independent expenditure as defined in SMC 2.04.010(21), and even if the Commission were to disagree, the expenditure falls short of $100 threshold for disclosure under SMC 2.04.270(2).

An independent expenditure is defined as one made *"on behalf of, or opposing the election of, any candidate."* SMC 2.04.010(21). At issue is whether the expenditure to set up a website which uses facts to broadly educate the public on a political issue in a campaign season, qualifies as an independent expenditure. Clearly, when an incumbent is running boundaries are blurred as the policies of the incumbent may be called into question. This mention of a candidate or criticism of an incumbent candidate however, will not transform what is essentially an issue based site, airing one side of a public debate, into a website campaigning for or against a particular candidate.

Even if we assume that TunnelFacts.com meets the definition of SMC 2.04.010(22), reporting the expenditure is not mandated under SMC 2.04.270(2) as it does not equal the threshold requirement of costing "$100 or more."

In closing, we recognize that technology is rapidly changing the terrain of political campaigns. We will continue to balance these changes with the values of affording open discussion of political issues, insuring transparency and disclosure in campaign finance and recognizing "the unique and evolving nature of the Internet ...that .. often offers no-cost or low-cost opportunities for ..... participat[ion] in the political process."[5]

The SEEC appreciates your interest in maintaining a fair and transparent election process. You may appeal this staff determination before the full Commission. If you decide to pursue a hearing you must, within 21 days of receiving this determination, follow the procedure outlined in SEEC Administrative Rule 4 found at http://www.seattle.gov/ethics/etpub/AdminRules.pdf

Please feel free to call either myself or Polly Grow, 206-615-1248, if needed.

Kate Flack
SEEC Advisor - 206-684-8578 (direct)

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[5] The Washington State Public Disclosure Commission has interpreted similar provisions in State law and found that websites and blogging, absent payment, are not subject to disclosure.
http://www.pdc.wa.gov/archive/guide/pdf/07-04.pdf