

1 should be in writing and should explain all the pertinent facts and
2 circumstances. Advisory opinions are intended to assist the person
3 seeking advice and to guide future conduct. The Commission retains
4 sole discretion to determine in which cases it will issue an advisory
5 opinion. Factors the Commission may consider when determining
6 whether to issue an opinion include, but are not limited to, whether
7 the issue presented is one of general application, one that has not
8 recently been addressed by the Commission, or one that is likely to
9 be the subject of controversy or dispute. Abstracts of Commission
10 opinions or the full text of Commission opinions are available on the
11 Commission's web site.

B. The Commission shall consider draft Commission opinions prepared
by the Executive Director as soon as is practicable. The Commission
may decline to issue the advisory opinion or, by vote, approve or
modify the opinion.

C. Advisory opinions issued by the Commission shall be designated as
follows: Advisory Opinion [year - number].

I am subject to the City ordinance prohibiting the use of public
resources in promoting ballot measures because I serve on a City
advisory committee (the Lake Union District Council). I am also
affected by the ordinance because as a voter I want my own information
about ballot measures and that provided to other voters to be free of
illegal influence by City agencies; and because as a taxpayer I want
the election result to be free of the illegal use of City resources and
facilities.

In my July 3, 2012 complaint about campaign practices by the City
Library regarding the 2012 Library Levy, and in other documents filed
with the commission and oral comments made to the Commission, I
requested that the Ethics and Elections Commission develop an advisory
opinion about the campaign practices of City agencies and officials
regarding ballot measures. To my knowledge, the Commission has never
discussed my request. Perhaps it was my mistake in not couching my

Requesting a Commission advisory
opinion on agency and official
activities regarding ballot measures

Chris Leman
2370 Yale Avenue East
Seattle, WA 98102-3310
(206) 322-5463 cleman@oo.net

1 request in the context of the Commission's administrative rule 5, but I
2 am now renewing my request, this time under that rule.

3 **II. REASONS WHY A NEW ADVISORY OPINION IS NEEDED**

4 I suggest several reasons for the Commission to adopt an advisory
5 ruling on agency and officials' activities regarding ballot measures.
6 First, existing guidance in the form of laws, rules, and rulings is
7 somewhat confusing and contradictory. Second, ballot measure are
8 frequent and becoming more frequent, especially that propose the
9 raising of additional revenues. Third, ballot measures for revenues
10 are particularly tempting to agencies and officials to skirt or violate
11 the state and Seattle laws against use of public resources to influence
12 the voters; but the guidance on this topic from a 2006 Commission
13 advisory opinion is particularly wanting.

14 Without the requested advisory opinion, the Commission, agencies
15 and officials, and the public are forced to rely on the 2006
16 supplemental advisory opinion that the Commission issued in the case of
17 Mayor Nickels. This advisory opinion was a valuable effort by the
18 Commission to navigate the somewhat confusing and contradictory laws,
19 rules, and rulings regarding what an incumbent elected official can and
20 cannot do with City resources on behalf of his or her re-election.
21 However, that advisory opinion confines itself to issues raised by an
22 incumbent candidacy. It is of real but also of quite limited value in
23 addressing the issues posed for agencies and officials in what is and
24 is not permitted in their use of public resources regarding a ballot
25 measure (especially one that seeks to raise revenues).

Requesting a Commission advisory
opinion on agency and official
activities regarding ballot measures

- 3 -

Chris Leman
2370 Yale Avenue East
Seattle, WA 98102-3310
(206) 322-5463 cleman@oo.net

1 An example of an important topic about ballot measures that is
2 inherently missing from the 2006 advisory opinion, given its focus on
3 an incumbent candidate, is how, during a ballot measure campaign, to
4 address advocacy information that the agency developed in the period
5 prior to the decision to place the ballot measure before the voters.
6 The legal restrictions on agency advocacy and honesty are much less
7 before a ballot measure is proposed to the voters than they are after
8 the decision has been made to put it on the ballot. Agency advocacy
9 and dishonest agency claims that are clearly illegal during a campaign
10 may legally be developed in the run-up to putting the ballot measure on
11 the ballot. But the Ethics and Elections Commission has issued no
12 guidance on what to do with this earlier produced material once a
13 decision has been made to place the measure on the ballot.

14 By default (lacking an advisory opinion), the Commission seems to
15 be tolerating virtually all of this prior produced material being used
16 during the campaign to influence the voters, as it is kept prominently
17 on agency web sites and/or in agency facilities frequented by the
18 public. As a result, agencies have every incentive, prior to the
19 decision to put a measure before the voters, to spend large resources
20 develop marketing materials clearly designed to influence those voters
21 during the eventual campaign. Indeed, during the campaign these
22 sophisticated materials are influencing voters (apparently from the
23 Commission's inaction legally so) even though they would have been
24 illegal to produce during the campaign. It is long past time for the
25 Ethics and Elections Commission to engage the public in developing a

1 more reasonable policy on this topic that better serves the laws of
2 Seattle and the state. The best place to do that is as part of an
3 advisory opinion on agencies' and officials' activities regarding
4 ballot measures.

5 There is a further reason why the 2006 supplementary advisory
6 opinion in the Nickels case is of limited value regarding ballot
7 measure campaigns, namely that it unfortunately adopted one policy that
8 I suggest was an error that the Commission should revisit and, I hope
9 correct. This error is the position capsulized in the following
10 sentence (pp. 3-4), quoting:

11 The key question is whether, to a reasonable person, the activity
12 or document appears PRIMARILY designed to influence the outcome of
13 an election, or PRIMARILY designed to be informational with only
14 an incidental effect of assisting a candidate's campaign for
15 election.

16 The problem with that sentence in the Commission's 2006 supplementary
17 advisory opinion is that it would countenance agency activity that, in
18 violation of City and law, is designed to influence the outcome of the
19 election. Contrary to that sentence, the Commission must find that
20 even if it believes that an agency's mentions of a ballot measure are
21 "primarily informational," any use by that agency of public resources
22 to influence the voters is plainly illegal. For the Commission to rule
23 otherwise would give agencies a blank check to use public resources to
24 influence voters on how to vote on a ballot measure simply by
25 surrounding these efforts with a higher volume of non-advocacy
information. The Commission must depart from the above-mentioned
sentence in its 2006 advisory opinion that justifies clear efforts,

1 otherwise prohibited by state and Seattle law, by an agency to promote
2 a ballot measure.

3 WAC 390-05-271(2) requires that any agency's effort to communicate
4 to the public about a ballot measure must ensure an "objective and fair
5 presentation of facts." But contrary to that clear requirement, with
6 the earlier quoted sentence still out there in the 2006 supplementary
7 advisory opinion in the Nickels case, the Commission is in a position
8 of countenancing efforts by agencies and officials to engage in less
9 than an "objective and fair presentation of facts" to influence ballot
10 measure campaigns. The need for correction of this small but serious
11 flaw in the 2006 supplementary advisory opinion is a particularly
12 important and urgent reason for the Commission to develop an advisory
13 opinion specifically about agencies' and officials' activities
14 regarding ballot measures.

15 **III. REQUEST THAT THE COMMISSION INSTRUCT ITS STAFF TO AUDIO RECORD**
16 **AND ARCHIVE ITS CONFERENCES WITH AGENCIES ABOUT BALLOT MEASURES, AND**
17 **TO PERMANENTLY ARCHIVE WRITTEN COMMUNICATIONS ON THAT TOPIC**

18 As an interim improvement, I suggest that the Ethics and Elections
19 Commission instruct its staff to audio record and archive its meetings
20 and telephone conferences with City agencies and officials regarding
21 ballot measures both before and campaigns; and to permanently archive
22 its written communications with City agencies and officials regarding
23 ballot measures both before and during campaigns.

24 Too often, guidance given by the Commission staff is being cited
25 by agencies as a rationale for their engaging in some questionable
activities, but the public learns about these activities too late to

1 file a complaint that, if the Commission were to agree with the
2 complaint, could have had a meaningful impact in preventing the abuse.
3 Also, the Commission staff naturally become personally invested in a
4 particular interpretation of the law if they have already told it to an
5 agency or official. As the Commission's complaint process gives
6 substantial weight to the Executive Director's finding, it is more
7 difficult for the public to obtain a reasonable ruling from the
8 Commission later in the process than if the staff interpretation had
9 been made known to the public and to the Commission earlier in the
10 process so that it could be addressed before the staff position became
11 entrenched. The public and the Commission alike deserve to know how
12 the authority of the Commission is being used by staff to justify
13 certain practices that may be worthy of being the subject of a
14 complaint to, or ruling or advisory opinion by the Commission.

15 Written messages exchanged between the inquiring agencies and the
16 Commission staff are public records, but unfortunately the City of
17 Seattle policy is to automatically delete e-mails after 60 days unless
18 they are expressly archived. E-mails between agencies and Commission
19 staff about potential agency misuse of public resources in a ballot
20 campaign are too important not to be saved permanently, or at least for
21 several years. In the public interest, the Commission should direct
22 that such e-mails be archived.

23 **IV. CONCLUSION**

24 I appreciated the chance to speak to the Commission about at least
25 some of the above topics in 2012 and again all too briefly at the

1 Commission's May 7, 2014 meeting. I request that the Commission
2 discuss these requests at a meeting soon, and that it do all it can to
3 improve its processes for addressing agency and official activities
4 regarding ballot measures. I regret that two years have been lost in
5 making these necessary reforms, as serious abuses are again emerging,
6 this time in the run-up to the August 5 vote on Proposition One. These
7 abuses could have been prevented or reduced if the current disarray in
8 guidance were better addressed. Without prompt and forthright action
9 by the Commission, such agency behavior is only encouraged and made
10 more likely in the future. Thank you for your consideration.

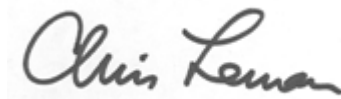
11

12 I declare under penalty of perjury of the laws of the State of
13 Washington that I am a registered voter of the City of Seattle, and
14 that the information in the above complaint, and the exhibits provided,
15 are true and correct.

16

Dated this May 22, 2014

17



18

19

Chris Leman

20

21

22

23

24

25