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M E M O R A N D U M

DATE: March 28, 2019

TO: INTERESTED PARTIES

FROM: CALLIE A. CASTILLO
Deputy Solicitor General

SUBJECT: **Use of Public Funds/Facilities for Election Campaigns**

Like other Washingtonians, state employees often take an interest in ballot measures or candidates running for office. This can raise issues concerning the extent to which state officers and employees may be involved with signature gathering or election campaigns and the extent to which public property and facilities may be used for campaign purposes.

State agencies with questions should consult with the Executive Ethics Board or their own assigned legal counsel.

Attachment

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DATE: March 28, 2019

TO: BOB FERGUSON, Attorney General
CORE LEADERSHIP TEAM
LEADERSHIP TEAM
SOLICITOR GENERAL TEAM

FROM: CALLIE A. CASTILLO
Deputy Solicitor General

SUBJECT: **Restrictions on Use of Public Funds and Property to Support or Oppose Candidates or Ballot Measures**

I. INTRODUCTION

Washington statutes prohibit the use of public funds and public property and facilities to support or oppose candidates or ballot propositions.

II. STATUTORY PROHIBITION AGAINST USE OF PUBLIC FACILITIES TO SUPPORT OR OPPOSE CANDIDATES OR BALLOT PROPOSITIONS

State agencies and employees are governed by the state ethics law, codified at RCW 42.52. RCW 42.52.010 defines "state officer" and "state employee" broadly, and together these terms cover all branches of state government, including judges and excluding only employees of the superior courts. RCW 42.52.010(18), (19). RCW 42.52 governs the extent to which state agencies, officers, and employees can use public facilities in connection with political campaigns, including campaigns on ballot propositions. RCW 42.52.180.

RCW 42.52.180(1) generally prohibits state officers and state employees from using or authorizing the use of agency facilities, directly or indirectly, "for the purpose of assisting a

campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition." In addition, "[k]nowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section." RCW 42.52.180(1). The evident purpose of this sentence is to create imputed liability for supervisors and others who "knowingly acquiesce" in a violation by a subordinate employee. "Facilities of an agency include, but are 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).

RCW 42.52.180(2) provides five types of exceptions to the general prohibition. The first relates to action taken by the members of an elected legislative body to express a collective decision supporting or opposing a ballot proposition. RCW 42.52.180(2)(a). Note that the only elected legislative body at the state level is the Legislature. Executive Ethics Board, Advisory Opinion No. 99-01[1]; AGO 2005 No. 4.

The second exception allows an elected official to make a statement in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry. It is not a violation of this exception for an elected official to respond to an inquiry, make incidental remarks in an official communication, or otherwise comment on a ballot proposition so long as there is no "actual, measurable expenditure of public funds." RCW 42.52.180(2)(b).

The third addresses official legislative web sites. RCW 42.52.180(2)(c). It allows maintenance of official legislative web sites throughout the year, regardless of pending elections. Legislative web sites may contain material specifically prepared for the legislator in the course of his or her duties. The official legislative web sites of legislators seeking reelection or election to another office, however, may not be altered beginning on the first day of the declaration of candidacy filing period (*see* RCW 29A.24.050) through the date of certification of the general election (*see* RCW 29A.60.190), except during a special legislative session. Official legislative web sites cannot be used for campaign purposes.

The fourth exception covers "[a]ctivities that are part of the normal and regular conduct of the office or agency[.]" RCW 42.52.180(2)(d).

The fifth exception permits "[d]e minimis use of public facilities by statewide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that

[1] Board Advisory Opinions can be found at https://ethics.wa.gov/advisories/advisory-opinions.

foreseeably may affect a matter that falls within their constitutional or statutory responsibilities." RCW 42.52.180(2)(e).

III. EXECUTIVE ETHICS BOARD REGULATIONS AND ADVISORY OPINIONS

The Executive Ethics Board has adopted rules interpreting RCW 42.52.180.

WAC 292-110-020 explains that nothing prohibits a state officer or state employee from assisting a campaign during non-working hours, but even then, the officer or employee cannot use any facilities of an agency. Conversely, the definition of "facilities of an agency" in RCW 42.52.180(1) includes "employees of the agency during working hours." The regulation provides a detailed discussion of what constitutes "working hours" for various types of employees. *Any state officer or state employee working on a campaign or supporting or opposing a ballot measure should review this regulation*. Notably, officials who are elected to a term of office do not have working hours and may engage in activity that would fall under RCW 42.52.180(1) at any time, but they may not make use of any facilities of an agency, including staff time, unless a statutory exception applies.

WAC 292-110-030 defines "measurable expenditure" for purposes of RCW 42.52.180(2)(b) to mean "any separately identifiable cost or specific portion of a cost that is beyond the normal and regular costs incurred by the agency in responding directly to a specific inquiry from the media, a constituent, or any other person."

The Executive Ethics Board has issued several advisory opinions on the use of public facilities for campaign purposes, providing valuable guidance. In many cases, these opinions address specific circumstances applicable to officials, officers, or employees of particular state entities. Any elected official, state officer, or state employee working on an election campaign, or supporting or opposing a ballot proposition should review these advisory opinions.

One opinion, Advisory Opinion No. 00-08, concerns the use of a state officer's or state employee's title in connection with an election campaign. The opinion concludes that a state title for a non-elected employee or officer is a "facility of the state" and therefore cannot be used to promote or support the election of a person or a ballot initiative without a disclaimer that the officer or employee is not speaking for their agency.[2]

Another opinion, Advisory Opinion No. 04-01, allows a state agency to maintain a link on its website to a page on a non-governmental website, so long as the linked web page does not contain political advocacy, even if other pages on the non-governmental website do contain

[2] A superior court has held that a government employee's title is not "property of the state" under RCW 42.52.160. *See Samples v. Richardson*, No. 13-2-02025-1 (Thurston Sup. Ct. Nov. 21, 2014). That ruling does not necessarily affect whether a title is a "facilit[y] of an agency" under RCW 42.52.180(1), however.

advocacy. State agencies should initially verify that the page they are linking to does not contain advocacy, and they should establish a reporting mechanism or agreement that will allow the agency to suspend the link if content of the linked page changes.

Finally, Advisory Opinion No. 02-02A addresses several questions regarding the use of state resources, including whether an employee who wears a political campaign button at work, hangs a political sign in their workspace, or displays political signs on their personal vehicle violates state ethics rules. The opinion explains that while RCW 42.52 prohibits a state officer or state employee from using state facilities to support or oppose political campaigns, and "facilities" is broadly defined to include agency office space and working hours, personal clothing and personal vehicles would *not* be considered an agency facility. "Therefore, the Ethics Act would not absolutely prohibit an agency policy that permits wearing typical political buttons on an individual's clothing or affixing a political bumper sticker to a personal vehicle." The opinion cautions, however, that "[c]losely related activity in the state workplace, such as wearing political buttons while interacting with the public or displaying political signs in public areas, could result in prohibited campaigning or violate agency policy. In determining if certain activity violates the Ethics Act the [Executive Ethics] Board would determine if the conduct would lead a reasonable person to believe that the state officer or [state] employee was making a political endorsement." Advisory Opinion No. 02-02A.

IV. CASES AND ATTORNEY GENERAL OPINIONS

Before the enactment of the current ethics code for state officers and state employees, state agencies were governed by former RCW 42.17.130. The former statute is now codified at RCW 42.17A.555, which governs local elected officials and local government employees. Because the language of RCW 42.52.180 is similar to RCW 42.17A.555 and former RCW 42.17.130, the case law and opinions construing these statutes may still be relevant in construing RCW 42.52.180.

There are only a few reported cases construing former RCW 42.17.130 and none construing RCW 42.52.180. Even fewer are relevant to state government.

In *Washington Education Association v. Public Disclosure Commission*, 150 Wn.2d 612, 80 P.3d 608 (2003), the WEA challenged PDC guidelines discussing former RCW 42.17.130's limits on the use of school district facilities in campaigns. The Supreme Court held that there was no justiciable controversy over nonbinding guidelines.

Then in 2006, the Court of Appeals concluded that two public school teachers violated former RCW 42.17.130 when they used their school district email accounts and school mail boxes to solicit signatures for a ballot petition. *Herbert v. Pub. Disclosure Comm'n*, 136 Wn. App. 249, 148 P.3d 1102 (2006). The *Herbert* court applied a forum analysis to hold that this application of the statute did not violate the First Amendment. The school email and mail systems were

nonpublic forums, and former RCW 42.17.130's restriction was reasonable and viewpoint neutral. "The statute was enacted to ensure that public resources are not used to provide advantages to a particular candidate or ballot measure, and the restriction on the use of school systems furthers that purpose." *Id.* at 264.

There are several formal Attorney General Opinions construing former RCW 42.17 generally, including former RCW 42.17.130. Attorneys trying to interpret the current act should read these, but they should also check the analysis carefully against subsequent changes in the statutes interpreted. Two opinions may be particularly helpful because of their broad applicability:

- RCW 42.52.180's prohibition against using public facilities to support political campaigns or support or oppose ballot measures does not apply to "[a]ctivities that are part of the normal and regular conduct of the office or agency." AGO 1975 No. 23 construes the same language in former RCW 42.17.130 in the context of examining to what extent legislators and statewide elected officials could use office facilities to inform constituents about ballot measures. While statutory updates and subsequent Ethics Advisory Opinions clarify the law in this respect, they are substantially in harmony with the analysis contained in AGO 1975 No. 23.

- AGO 1979 No. 3, construing former RCW 42.17.130, concluded that the use of college or university facilities for political conventions, meetings, and candidates' forums did not violate the statute. Prohibitions, such as former RCW 42.17.130, were not intended to cover "neutral public forum" uses of public property, such as the use of publicly owned facilities on a nondiscriminatory basis for political activities. Since the basic prohibition in RCW 42.52.180 is similar to that contained in former RCW 42.17.130, this opinion is probably of continuing validity in interpreting the new statute. Moreover, although AGO 1979 No. 3 does not explicitly discuss it, some public property constitutes traditional "public forum" areas in which citizens have a constitutional right to assemble and speak. The ethics statute was not intended to prohibit political rallies on the state capitol steps or parades on public streets.

AG Opinions are available at http://www.atg.wa.gov/ago-opinions. The Public Disclosure Commission's interpretation of RCW 42.17A.555 and former RCW 42.17.130 can be found at https://www.pdc.wa.gov/sites/default/files/04-02Revised052213.rev_.pdf.

V. ADDITIONAL COMMENTS ABOUT THE USE OF PUBLIC FACILITIES

This section of the memorandum is intended to draw together informal advice from a variety of sources (primarily generated in response to ballot measures in previous years), and to point to

sources available for help in answering new questions which may arise. Although these answers are intended to be cautious and noncontroversial, the ethics laws are subject to interpretation like all legislation, and reasonable minds might differ on some details. This memo does not represent the official position of the Office of the Attorney General. Attorneys who are asked for advice about specific situations should check these answers against the current language of the statute, together with any current regulations and any existing or future interpretations of the statute by the agencies with jurisdiction.[3] Where there is disagreement, we should engage in further dialogue with an eye toward giving consistent advice.

As noted above, the Executive Ethics Board has adopted some interpretive rules concerning RCW 42.52.180. Given the language of the statute itself, and factoring in cases and opinions interpreting the older statute (former RCW 42.17.130) to some extent, it is possible to make some general statements about political activities under RCW 42.52.180. The following activities are prohibited by RCW 42.52.180:

1. Using work hours to solicit signatures for ballot propositions, to raise funds for or against such propositions, or to organize campaigns for or against such propositions. The prohibition similarly bars the use of work time to campaign for or against a candidate for public office.

2. Using public property to campaign for or against a candidate or ballot proposition, except that "neutral forum" public property otherwise open to public use may be used for campaigning, so long as scheduling its use occurs without favoritism.

3. Using public facilities—including, but not limited to, office space, computers, email, copying facilities, paper, supplies, client lists, databases, and any other publicly owned property—for campaigns for or against a ballot proposition, or for or against a candidate, whether during or after work hours. This includes accessing databases (like Law Manager or Westlaw), or client or employee contact lists for campaign purposes.

4. Displaying political material in or on publicly owned vehicles.

5. Displaying or distributing campaign material on publicly owned or operated premises (other than "neutral open forum" property or "personal space" property as discussed below).

[3] Executive branch agencies must designate an ethics advisor to assist employees to understand their obligations under the Ethics in Public Service Act. RCW 42.52.365. The law also contemplates individual agency rules on ethics matters. RCW 42.52.200. Many agencies, including the Attorney General's Office, have existing rules or policies that could be relevant to a particular inquiry.

6. Using public supplies, equipment, client or contact lists, or facilities to print, mail, or otherwise produce or distribute materials supporting or opposing any candidate or ballot proposition.

7. Using publicly owned facilities to instruct or urge public employees to campaign for or against a candidate or ballot proposition on their own time, or stating or implying that their job performance might be judged according to their willingness to use their own time on a campaign.

8. Using public time and/or facilities to draft or pass a resolution by an *appointed* committee, board, or commission taking an official position for or against a pending ballot proposition, or endorsing or opposing a candidate for public office.

Turning to the other side, the following appear to be conduct that is *not* prohibited by RCW 42.52.180:

1. *An elected legislative body* may collectively endorse or oppose a ballot measure if it meets the procedural requirements of RCW 42.52.180(2)(a). *See also* AGO 2005 No. 4.

2. *An elected official* may make a statement in support of, or in opposition to, a ballot proposition at an open press conference, or in response to a specific inquiry, or may make incidental remarks concerning a ballot proposition in an official communication, so long as there is no actual, measurable expenditure of public funds. Again, note that this exception is limited to elected officials and does not, by its terms, extend to such "support" activity as using staff time or state facilities to prepare or distribute such a statement, at least if any "measurable expenditure" of public funds is involved.

3. *Statewide elected officials and legislators* may make de minimis use of public facilities to prepare or deliver communications giving their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities. Note that this exception is limited, again, to elected officials, and that it is related to the scope of each officer's official duties. Thus, the governor and the members of the Legislature may have authority to make statements on more issues than, say, the superintendent of public instruction or the insurance commissioner, whose scope of operation is more narrowly defined.

4. Unless it is inconsistent with some other applicable law or regulation, a public employee is not prohibited from campaigning for or against a ballot proposition

on the employee's personal time.[4] It should be clear that the activity is the individual's personal choice and is not tied to job performance in any way. For state employees,[5] the term "personal time" would ordinarily only include: (1) time outside the employee's normal work day; (2) time when the employee is on vacation leave status or is using leave properly and lawfully accumulated and consistent with applicable statutes and personnel regulations; or (3) time when the employee is on unpaid leave status. Employees campaigning on their own personal time should not state or imply that they are campaigning on behalf of the state or a state agency. As noted earlier, the Executive Ethics Board has interpreted "working hours" in WAC 292-110-020.

5. Public employees may contact fellow employees, *away from the office*, to circulate petitions or to solicit one another for funds, volunteers, and other activity for or against a ballot proposition or a candidate for public office, but only under circumstances that strictly avoid the use of office time and public property. Officers and employees would be wise to avoid soliciting subordinate employees because, under those circumstances, the subordinate employees may feel (no matter how carefully the campaign is conducted or the inquiry is phrased) that the superior is using improper influence.

6. Where public space is available on a nonrestricted basis to post signs, petitions, and advertisements, or to make speeches and hold meetings, public employees may use these "neutral public forum" spaces to express their own views, including their views on pending ballot propositions, assuming they are not otherwise violating RCW 42.52.180. However, it might well be a violation of the statute for public employees to use their positions to gain special advantage in the use of such "neutral public forum" spaces, such as by signing up all the time for the use of a public auditorium before nonemployees have had an equal opportunity to seek use of the same space, or by using their access to a public bulletin board to occupy the entire space with favored campaign material and leaving no space available for opposing material (or material relating to other matters).

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[4] Some state employees whose work is funded with federal funds may be subject to the restrictions of the Hatch Act, a federal statute which is quite different in scope from the state ethics law. Certain employees who work jointly for more than one entity, or who work on contracts for other governments, might be subject to another jurisdiction's restrictions. It is beyond the scope of this memorandum to analyze federal law or restrictions enacted by local governments or other states.

[5] Statewide elected officials do not have working hours as such, and it is up to each elected officer to allocate time between campaigning and other activities. WAC 292-110-020(8). However, elected officials are still prohibited from using, or allowing the use of, staff time or office facilities for campaign purposes. WAC 292-110--020(8).

7. Public agencies may conduct research into the likely results of the passage of a ballot proposition. Indeed, where the passage of the proposition would directly affect the agency's duties, an agency might be remiss for *not* conducting such research activity. However, it must be clear that the research is being conducted with the purpose of gathering the facts, is directly related to the ordinary conduct of the agency's business, and is not designed to support or oppose a candidate or ballot measure.[6] Agencies should probably avoid conducting research or assembling statistical data, which they expect to be requested for use in connection with a campaign, unless they are satisfied that they would have undertaken the same research or statistical efforts for independent reasons, such as planning for contingencies.

8. Public agencies and public employees must supply public records in response to requests made by the supporters or opponents of candidates or ballot propositions. An agency should treat all campaigns fairly and equitably in responding to requests for public records. This is especially sensitive and important, of course, in agencies headed by elected officers who are up for reelection in the near future.

9. Where two or more measures relate to the same subject, agencies may publish factual information showing the comparative effects of the measures, just as they could publish factual information showing the expected effect of a single measure. However, the agency may not use public facilities or property to favor one proposition over the other, any more than it could urge passage or defeat of both measures.

VI. SOME HYPOTHETICAL QUESTIONS ABOUT CAMPAIGN ISSUES, AND SOME SUGGESTIONS ABOUT THE ANSWERS

Following are some hypothetical questions which might be asked about the ethics laws and some comments in response. Assistant attorneys general should remember that their role is to advise state agencies and not individual officers and employees. AAGs can tell individuals what the position of the Attorney General and the agency might be on an issue, but they should remind employees that our office does not provide personal advice and that our office would represent the agency and the public interest in any litigation. If there were a complaint filed with the Executive Ethics Board against a state employee, the employee should expect to secure personal counsel on the matter or appear without counsel. Employees have to make their own personal

[6] The Public Disclosure Commission has wrestled with similar questions for many years and its interpretive statement discussing RCW 42.17A.555 should be consulted. https://www.pdc.wa.gov/sites/default/files/04-02Revised052213.rev_.pdf.

decisions concerning ethics law compliance. In questionable cases, they should think about conferring with private counsel.

1. *I serve by appointment on a commission which governs a state agency. I serve part time and receive no compensation except for attending commission meetings. The other day, I attended a fund raiser in support of an initiative measure which would, if approved, put the commission on a much more solid financial footing. I attended at my own expense and made a contribution to the campaign, which was properly reported. During the announcements, the announcer, specifically against my request, introduced me to the crowd as "Vice Chair of the X Commission." I quickly pointed out that I was attending as a private citizen. Was the use of my title a use of a "public facility or property"?*

As noted earlier, Advisory Opinion No. 00-08 concludes that any employee's use of a title must be accompanied by a "disclaimer that the . . . employee is not speaking for the agency." It would be prudent to avoid using a position or title, primarily to avoid any implication that the agency or its officers are "officially" supporting a particular candidate or proposition. While the mere identification of a person by stating his or her title or position in an introduction may not constitute "use" in support of the ballot measure, it was prudent to point out that you were attending in your private capacity in order to prevent any misunderstanding on that point.

2. *The head of my agency, Q, is an elected executive officer who is a candidate for public office again this year. A close friend wants to support Q, both with financial contributions and volunteering time. I do not know the address or telephone number of Q's campaign office. Would it be all right to send an office voice-mail or e-mail to Q, passing along my friend's name and suggesting that Q forward this information to the campaign?*

Remember that voicemail and email are both office property and facilities. While forwarding the information to Q seems a small thing, it involves both you and Q (Q involuntarily) in the use of office facilities for campaign activity. On your own time, take the steps to find out how to put your friend directly in touch with the campaign without using office facilities. If you don't want to be involved even that much, suggest that your friend contact the campaign directly.

3. *Everyone in my work unit is a strong opponent of Ballot Measure B. We have all been involved in the anti-B campaign, and we have been careful not to use either our state time or any agency facilities, such as paper, computers, or copy machines, in our campaign work. We need to have a campaign meeting next weekend, and the organizers are having trouble finding a place for the meeting. Our agency has a large conference room which is not ordinarily open to the public, but which will not be in use during the weekend. Can we offer the use of the room for the campaign meeting?*

Although office space is not "consumed" when used for a meeting (small amounts of heat and light notwithstanding), the use of a space not ordinarily available to the public leaves the definite impression that the campaign is benefiting from its use of a public space. The fact that your work unit is all involved in the campaign reinforces this unfortunate impression. Using this particular space may violate RCW 42.52.180. If the conference room is generally open to the public, however, and is scheduled for the campaign on the same basis as anyone else could schedule it, the answer might be different. It still might be prudent to have the meeting somewhere else, just to avoid any question about misuse of public facilities.

4. *I am the regional office manager for a state agency and I supervise about 50 employees. My close friend D is running for state senator. May I invite all my office to a Saturday morning event at my home where they can meet D and will have the opportunity to contribute to the campaign?*

First, avoid the use of office space, office paper, email, voicemail, or any other office facility for the invitations. Employee mailing lists are also public facilities that should not be used for campaign purposes. Perhaps you know the phone numbers and addresses by heart, or can use publicly available sources, such as telephone and email directories, to get the necessary information.

Even then, remember that you supervise all of these employees. Will one or more misunderstand why they are invited to a campaign fund raiser at your home? Will they conclude, no matter how you protest otherwise, that they stand to gain your favor if they support D, or to lose your favor if they don't? Even if this is not strictly a violation of RCW 42.52.180, do you want to raise these issues?

5. *My coworker and I have strongly different political philosophies. During the last presidential election campaign, she wore a large button promoting a candidate I find repugnant, and she placed the candidate's picture in her workstation next to the pictures of her husband and her cat. Would it be appropriate for me to ask our supervisor to ban such overt displays this year?*

Ethical and policy considerations must always be considered in light of free speech rights and the legitimate interest of a government employee in expressing her views on issues of public concern. Some agencies have policies that restrict the information that may be displayed in individual work stations. Advisory Opinion No. 02-02A, discussed above, provides some guidance indicating that employees who wear buttons or display political signs in personal work spaces do not necessarily violate RCW 42.52, but employees should also check their agency policies, especially if they have regular contact with the public.

6. *Initiative J would, if approved by the people, repeal the tax that supports 90% of my agency's activities. The Legislature might replace some of the money if the tax were*

> *repealed, but it is virtually certain that our agency's budget would be severely reduced. Can we use staff time and agency resources to assemble and publish a sheet that would just "show the facts"—that is, that enactment of Initiative J would effectively end all of the popular programs my agency is involved with?*

As noted earlier, agencies can anticipate ballot measures by preparing contingency plans or by researching the possible effects of a measure for planning purposes. However, your predicted outcome of the legislative session, should the initiative be approved, may be speculation, rather than "fact." Where the Legislature is legally free to replace the agency's funding, no matter how unlikely that outcome is, it is not certain that the agency's programs would be eliminated. Perhaps the agency could publish a true "fact sheet" which, for instance, lists the current programs administered by the agency with their current budget. Perhaps the material also could point out the current source of the agency's budget without speculating what would happen if that funding source disappeared.

VII. CONCLUSION

It is important to remember that the public is generally very sensitive to the use of public facilities or property on ballot propositions and takes accusations of violations very seriously. Public employees should walk a careful line to ensure that the public is fully and adequately informed about the consequences of voting on a particular measure, without making unlawful use of public money or property to influence the result of the vote. State agencies and state officers should consult closely with legal counsel on all activities relating to matters before the voters, and they should use utmost skill and care in expressing any comments on such matters.

Violations of RCW 42.52 by executive branch employees are within the jurisdiction of the Executive Ethics Board. State employees with questions in this area should consult the Executive Ethics Board's website at https://ethics.wa.gov/.

CAC/kdj