

ADVISORY OPINION

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REFERENCES: RCW 42.52.010, RCW 42.52.160,
RCW 42.52.180, WAC 292-110-010

SUMMARY OF CHANGES: No changes.

Use of State Facilities, Including Electronic Mail, to Distribute Newspaper Articles and Editorial Opinions.

QUESTIONS

1. May a state agency use state resources to collect and distribute newspaper articles or editorial opinions to agency employees and individuals and groups outside the state agency via e-mail who have expressed an interest in receiving the material?
2. If the answer to 1 is yes, may the agency distribute the newspaper articles or editorial opinions if they discuss a candidate for public office, a ballot initiative, or a referendum?
3. If the answer to 1 is yes, may the agency distribute newspaper articles or editorial opinions that discuss commercial companies or products that are related to the agency mission?

ANSWERS

1. Yes, collecting and distributing newspaper articles or editorial opinions that are related to an agency's mission or to agency employee development to agency employees and individuals and groups outside the state agency who have expressed an interest in receiving the material would not violate the Ethics in Public Service Act.
2. Notwithstanding 1 above, RCW 42.52.180 strictly limits the use of state resources to promote or oppose candidates for public office or to promote or oppose passage of ballot initiatives and referendums. Therefore, while an election or initiative is pending before the voters a state agency may only distribute newspaper articles that do not tend to support, or oppose, a candidate for public office, or a ballot initiative, or referendum.

3. So long as the newspaper articles that mention commercial products address issues that are related to the agency's mission and do not promote that product, distributing such newspaper links to agency employees or to individuals and groups outside the state agency would not violate the Ethics in Public Service Act.

ANALYSIS

The Washington State Department of Transportation (WSDOT) On-Line News Clips is a collection of newspaper articles and editorial opinions that can be distributed by e-mail to WSDOT employees or the general public. WSDOT employees who work in the agency's public relations division collect and distribute the articles to public information officers and executive level staff via e-mail. The newspaper articles and editorial opinions provided in the On-Line News Clips are either related to transportation issues or to DOT employee development. WSDOT management has determined that it is reasonably related to the official duties of the agency to compile the On-Line News Clips and distribute them to WSDOT employees. Recently, some WSDOT executive staff forwarded the On-Line News Clips to individuals and groups outside WSDOT, including Legislators, politicians, ballot issue interest groups and transportation-related advocacy groups.

WSDOT asks the Board several questions related to the content of the On-Line News Clips. Specifically,

- Can we use articles or editorials about politicians who are running for election/re-election, if they have a major role in transportation, and/or WSDOT employees?
- Can we use articles or editorials about ballot issues that will affect transportation, and/or WSDOT employees or about campaign debates, if they include transportation issues?
- Can we use press releases and policy papers from interest groups, advocacy groups, think tanks and associations, either from the group's web site or from PR Newswire, on transportation-related issues?
- Can we use articles about private sector businesses that have a major impact on transportation, such as Ford Motor Company, Firestone, and Freightliner?

RCW 47.01.071 provides a basic statutory charter for the Transportation Commission, of which the WSDOT Secretary is a non-voting member. WSDOT is headed by a Secretary who is authorized to conduct the WSDOT duties (*See* RCW 47.01.101). The following are among the specifically enumerated powers of the Transportation Commission:

- To propose policies to be adopted by the governor and the legislature designed to assure the development and maintenance of a comprehensive and balanced state-wide transportation system which will meet the needs of the people of this state for safe and efficient transportation services.

- To [d]evelop transportation policies, which are based on the policies, goals and objectives expressed and inherent in existing state laws.
- To provide for the effective coordination of state transportation planning with national transportation policy, state and local land use policies, and local and regional transportation plans and programs.
- To provide for public involvement in transportation designed to elicit the public's views both with respect to adequate transportation services and appropriate means of minimizing adverse social, economic, environmental and energy impacts of transportation programs.
- To propose to the governor and the legislature prior to the convening of each regular session held during an odd-numbered year a recommended budget for the operation of the commission.

The Ethics in Public Service Act prohibits the use of state resources for private benefit or gain, except in the course of official duties, and allows the Board to adopt de minimis use rules. RCW 42.52.160 provides that:

- (1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.
- (2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.
- (3) The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

As noted previously, the WSDOT On-Line News Clips is a collection of newspaper articles and editorial opinions that are either related to transportation issues or to WSDOT employee development and can be distributed by e-mail to WSDOT employees or the general public. In addition, WSDOT management has determined that distributing this information among all agency employees is reasonably related to those WSDOT employee's official duties. Therefore, such conduct would not violate RCW 42.52.160.

1. WSDOT may use state resources to distribute newspaper articles or editorial opinions that are related to transportation or WSDOT employee development to agency employees and individuals and groups who request them.

As noted above, RCW 42.52.160(2) does not prohibit the use of state resources to benefit others as part of a state officer's or state employee's official duties. RCW 42.52.010(12) provides that:

"Official duty" means 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.

As previously stated, WSDOT, at its discretion, uses the On-Line News Clips to communicate with WSDOT employees about transportation issues or issues related to employee development. In addition, WSDOT management has determined that its official mission and duties include external communication and public outreach regarding transportation services and planning. Therefore, distributing the On-Line News Clips to individuals and groups outside WSDOT who may be interested in receiving the information related to transportation or WSDOT employee development would be reasonably related to WSDOT's official duties.

2. The Ethics in Public Service Act strictly limits WSDOT's use of state resources to collect and distribute newspaper articles, editorial opinions, press releases, or position papers, which support or oppose political campaigns¹.

The Ethics Act strictly prohibits the use of state resources to support or oppose political campaigns. RCW 42.52.180 provides, in relevant part:

(1) No state officer or state employee may use or authorize the use of facilities of an agency, 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. Knowing 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. 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.

(2) This section shall not apply to the following activities:

- a. ...
- b. ...
- c. Activities that are part of the normal and regular conduct of the office or agency; and
- d. ...(Emphasis added)

Prior to 1995, the political use restrictions provided in RCW 42.52.180 were included in RCW 42.17.130² which is enforced by the Public Disclosure Commission (PDC). RCW 42.17.130

¹ The Board notes that the WSDOT On-line News Clips may be a public record under chapter 42.56RCW. The Public Records Act (RCW 42.56 et seq.) generally requires an agency to disclose properly requested public records. Therefore, this opinion would not prevent WSDOT from providing a copy of the On-Line News Clips to individuals and groups who have requested the information.

² RCW 42.17.130 was recodified as RCW 42.17A.555 pursuant to 2010 c 204 § 1102, effective January 1, 2012.

continues to apply to local governments. To maintain consistency when applying these statutes, the Board may refer to relevant PDC opinions, declaratory rulings, or court cases when considering issues of first impression. The Board notes that in PDC Declaratory Ruling No. 4 (April 27, 1980), the PDC reaffirmed a decision made in an enforcement setting that the use of a local agency's internal mailing systems for candidate endorsements would violate RCW 42.17.130. Accordingly, the Board advises that WSDOT may not use an internal mail distribution system, such as the On-line News Clips, to distribute candidate endorsements or to distribute endorsements of a public referendum or initiative.

The next question concerns the distribution of newspaper articles or editorials that discuss candidates for public office or ballot measures. The Board notes that RCW 42.52.180 prohibits the indirect use of state facilities to support political activities. While newspaper articles and editorial opinions may not reflect WSDOT positions, they can and often do reflect the opinions of the newspaper or that of an outside individual or group. Therefore, using WSDOT facilities to distribute newspaper articles and editorial opinions that discuss public office candidates or ballot measures could result in an indirect use of facilities to support political activity.

As discussed above, RCW 42.52.180 exempts activities that are part of the normal and regular conduct of the agency. In EEB advisory opinion 99-01, the Board advised that the WSSDA Board may provide general, factual information to its members on the possible impact of education-related ballot propositions. The Board based its advice on a finding that this activity was part of the normal and regular conduct of that agency.

In WAC 390-05-273, the PDC defines normal and regular conduct of an agency as:

[C]onduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not affected or authorized in or by some extraordinary means or manner.

As discussed above, communication with agency employees and the public about transportation issues is authorized under the Transportation Commission and WSDOT's enabling statutes. Therefore, such activities would be considered part of the lawful or normal conduct of the agency. The PDC has noted that the question of whether the distribution of certain materials at public expense is considered regular or usual depends on the "tone, tenor, and timing" of the distribution.

In light of the tone, tenor, and timing considerations, the Board advises that distributing newspaper articles and editorial opinions that tend to support or oppose candidates for public office or ballot measures during an election or ballot measure certification period, would not be considered a regular or usual WSDOT activity. Accordingly, using the On-line News Clips to distribute newspaper articles and editorial opinions that tend to support or oppose candidates for public office or ballot measures during an election or certification period would violate RCW 42.52.180 and WAC 292-110-010.

To determine if a violation has occurred, the Board would review the tone and tenor of the newspaper article or editorial opinion. Distributing articles and editorial opinions that provide more than general, factual information about a ballot proposition or candidate for public office, i.e., the date of an election, the location of polling places, or a listing of all candidates, would receive increased scrutiny and most likely would result in a violation³.

3. So long as the newspaper articles that mention commercial products address issues that are related to the agency's mission and do not promote that product, distributing such newspaper links to agency employees or to non-state individuals or groups would not violate the Ethics in Public Service Act.

WAC 292-110-010 allows for de minimis use as long as the use is not for the purpose of conducting an outside business, among other things. As noted previously, WSDOT's official mission and duties include communication and public outreach regarding transportation services and planning. Therefore, providing links to newspaper articles and editorial opinions that address issues related to transportation or WSDOT employee development would be reasonably related to WSDOT's official duties. The Board cautions, however, that the articles should also address issues related to transportation and should not promote the product or company. Therefore, broad distribution of newspaper articles and editorial opinions about private companies or commercial products that do not also address related transportation issues could violate RCW 42.52.160(1) or WAC 292-110-010(3).

The Board's advisory opinion is based on the general facts as stated above. The Board does not investigate the facts. Please be aware that modification of the facts, or knowledge of more specific facts or circumstances, might cause the Board to reach a different conclusion. In addition, Board advisory opinions are narrowly drawn to interpret the Ethics in Public Service Act. They do not address whether the proposed action is prudent, good public policy or effective management practice.

³ Violations are more likely to occur in an election period. An election period for public office candidates begins no later than the final deadline to file an official declaration of candidacy with the Secretary of State or an appropriate local jurisdiction. (See Chapter 29A.24 RCW) Prior to that date, the tone and tenor of the article would determine the appropriateness of its distribution. An election period for a public office candidate ends with the election or defeat of that candidate in a primary or general election, whichever is later. A certification or election period for a ballot proposition begins when a petition, which initiates the signature gathering phase, is filed with the Secretary of State or other appropriate local jurisdiction or when a ballot proposition is adopted by the legislature or a local legislative body. (See RCW 29A.72.010-.020; 35.17.260-.360) An election period for a ballot proposition ends with the defeat or passage of the ballot proposition in a primary or general election, whichever is later.