

## ADVISORY OPINION

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REFERENCES: RCW 42.52.180

SUMMARY OF CHANGES: Amended to update statutory references.

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### Use of Employee Mailing List by Agency Elected Officer

#### QUESTION

Is it a violation of RCW 42.52.180(1) for a state-wide elected official, who is running for reelection, to use the agency's list of employee home addresses to send agency employees a letter, paid for with campaign funds, explaining the elected official's policies in response to a letter to agency employees from another candidate for the same office?

#### ANSWER

No, such conduct would not be a violation of RCW 42.52.180(1), because it would fall under the normal and regular conduct of the agency exception.<sup>1</sup>

#### ANALYSIS

The opinion arises in the context of an election campaign. A state-wide elected official is a candidate for re-election. Another candidate for the same office, who was a high level manager in the elected official's agency, sends a letter to agency employees at their homes. The letter makes statements about the elected official's policies which the candidate claims were expressed in management meetings. The letter raises the prospect that these policies will have an adverse effect on the employees' jobs. The letter asks the employees for support and campaign contributions. The elected official believes that the letter misstates and distorts the official's policies and that this is interfering with the operation of the agency.

The question is whether the official can send a letter to agency employees at their homes explaining his or her policies without violating RCW 42.52.180(1) which provides in part:

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<sup>1</sup> For the purpose of this opinion, we assume that the letter to employees of the elected official's agency would not violate RCW 42.17A.565, which prohibits elected officials from soliciting campaign contributions from their employees. The interpretation of RCW 42.17A.565 appears to fall within the jurisdiction of the Public Disclosure Commission rather than the Executive Ethics Board.

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.

(Emphasis added.)

The answer to this question turns on three issues.

First, would a letter sent to employees at their homes make use of any of the facilities of the agency? The term “facilities of an agency” is broadly defined to include “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). In the context of this request, we understand that the elected official does not intend to make use of any agency stationery, postage, equipment, or employees to produce the letter. All of this would be done outside the agency—paid for with campaign or other funds. However, the elected official would make use of the agency's mailing list of employee home addresses. The question is whether this list is a facility of the agency.

In our judgment, an agency list of employee home addresses is a facility of the agency. We reach this conclusion for two reasons. First, the definition of “facilities of the agency” is broad and specifically includes an example of a list of names (“clientele lists of persons served by the agency”). Although the definition does not specifically include employee mailing lists, the items listed in the definition are not exclusive. The definition states that facilities of an agency “include, but are not limited to,” the items listed. Second, the list of employee home addresses is not generally available to the public. This is because such a list is exempt from disclosure under the public disclosure law, Chapter 42.56 RCW. RCW 42.56.250(4) exempts from the requirement of public inspection and copying:

Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses...

Thus, a member of the public would not have the right to inspect and copy an employee mailing list.<sup>2</sup> Such a list of employee addresses maintained by the agency would only be used for agency purposes. It follows that the list is a facility of the agency.

The second issue is whether a letter from the elected official to his or her employees would assist a campaign for election to an office. Since agency employees are also potential voters and contributors, the answer to this issue is yes. The opponent's letter to agency employees raises questions about the elected official's policies and asks for support and contributions. Based on this letter some agency employees may support the opponent (certainly that is the purpose of the letter). If the elected official writes to agency employees and responds to the statements in the opponent's letter which the official believes are inaccurate or distort the official's position, these employees may decide not to support the opponent.

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<sup>2</sup> The fact that an employee mailing list is exempt from disclosure does not mean that an agency is prohibited from disclosing the list and an agency could make a policy decision to make such lists available to the public. If someone (including an elected official) obtained an employee mailing list as a result of a public disclosure request, the list would be a public record rather than a facility of the agency.

Based on our reading of the opinion request, the elected official does not intend the letter to agency employees to be part of the official's political campaign. Rather, the letter is intended to correct what the official perceives as a management problem. Nevertheless, a letter to agency employees addressing management issues will also likely assist the official's campaign for office.

Since a letter to agency employees uses the facilities of the agency and will assist a campaign for the election of a person to office, it falls within the prohibition in RCW 42.52.180(1). However, this is not the end of the inquiry. RCW 42.52.180(2)(d)<sup>3</sup> excludes from the prohibition in RCW 42.52.180(1): “Activities that are part of the normal and regular conduct of the office or agency[.]” The third issue is whether this exception would permit the elected official to write to agency employees explaining the official's policies.

At the outset, it is clear that communicating policy to agency employees is part of the normal and regular conduct of an office or agency. Indeed, it is hard to imagine how an agency could function if such communication did not take place. This also includes explaining policy in the face of criticism. For example, if it was not an election year and an agency employee wrote an “open letter” to other employees of the agency criticizing the policies of the elected official, we have no doubt that the elected official could use the facilities of the agency to respond to the criticism and explain his or her policies.

However, this opinion arises in the context of criticism by a person campaigning for the same office in an election year. Accordingly, the exception in RCW 42.52.180(2)(d) should be narrowly construed to prevent the facilities of an agency from being used for campaign purposes.

Therefore, a letter to agency employees, limited to explaining policies related to the management of the agency, falls within the exception in RCW 42.52.180(2)(d). We emphasize that the application of the exception in RCW 42.52.180(2)(d) is based on the fact that this opinion involves a response to a letter to agency employees written by an opponent campaigning for the office held by the elected official. Such a targeted letter may raise management problems that require a response by the elected official to his or her employees. The exception in RCW 42.52.180(2)(d) would not be available to respond to a more general political attack. For example, if a political opponent sent a letter to all registered voters which included agency employees among others, it would not be appropriate for the elected official to use the facilities of the agency to respond to the attack.

Based on this narrow construction, the elected official may send a letter to agency employees, but the letter must be limited to explaining the policies of the elected official that are related to the management of the agency. It would be improper to use the letter as a vehicle for touting the successes of the agency under the leadership of the elected official; explaining why the elected official should be reelected; attacking the opponent; or otherwise seeking support or contributions from agency employees. The intent of the Board is to insure that the elected official may specifically address management problems, not to expand the exception in RCW 42.52.180(2)(d).

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<sup>3</sup> RCW 42.52.180(2) contains several exceptions to the general prohibition in RCW 42.52.180(1). The exceptions in RCW 42.52.180(2)(a), (b), and (e) do not apply because they are limited to activities or communications related to a ballot proposition.