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January 18, 2017

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Reply to Olympia office

Re: Jim Cooper Campaign for Thurston County Commissioner (2016 Election)

Ladies and Gentlemen:

Our clients, Jim Cooper and Friends of Jim Cooper, have received numerous requests from your offices for information related to the recent campaign for Thurston County Commissioner. We propose a meeting to discuss how we can collectively proceed in the most efficient manner to investigate and/or resolve the pending matter(s) given we are trying to operate in accordance with a statutory scheme that is less than optimal. Several of our concerns are addressed below, and attached hereto is a proposed agenda for the meeting, which we would like to schedule for either January 26 or 27, 2017. Please feel free to offer changes and/or additions to the agenda as well as provide different dates if next week does not work with your schedules. We can host the meeting at our office near the Thurston County Courthouse, but would also be happy to meet on government property.

Timeline of Events Re: Complaints

- 10/17/16 at 11:23 a.m.: Glen Morgan files a complaint with the PDC alleging essentially four violations; however, the first alleged violation is broken down by Mr. Morgan into forty-seven subparts. This complaint is assigned a PDC "Ticket Number" of 8928.
 - We do not have complete records, particularly with regard to communications involving the Attorney General's Office. Based on the Complaint filed by the Attorney General's Office, our understanding is that Mr. Morgan also sent his complaint to the Thurston County Prosecutor and Attorney General. The Attorney General's Office calls the complaint "Notice No. 1."
- 10/17/16 at 1:24 p.m.: PDC forwards complaint 8928 to Jim Cooper and requests responses to subparts/issues forty-nine and fifty.
- 10/17/16 afternoon: Jim Cooper met with PDC staff regarding complaint 8928.

- 10/17/16 at 4:06 p.m.: PDC e-mails Jim Cooper to follow up on meeting and describe additional requests for information.
- 10/18/16 at 9:02 a.m.: Jim Cooper e-mails PDC with responses to complaint 8928 subparts forty-nine and fifty.
- 11/11/16 at 10:43 a.m.: Glen Morgan files a complaint with the PDC alleging four violations. This complaint is assigned Ticket Number 9772.
 - Here again, we do not have complete documentation, but believe this complaint was forwarded to the Attorney General's Office and is referred to by the Attorney General's Office as Notice No. 2.
- 11/16/16 at 10:21 a.m.: PDC forwards complaint 9772 to Jim Cooper and requests responses to the allegations.
- 11/20/16 at 8:51 p.m.: Jim Cooper e-mails PDC with responses to complaint 9772.
- 11/28/16 at 12:05 p.m.: Glen Morgan files complaint with PDC alleging one violation. This complaint is assigned Ticket Number 10009.
- 11/30/16 at 12:01 p.m.: PDC forwards complaint 10009 to Jim Cooper and requests response to allegation.
- 12/6/16 at 8:53 a.m.: Jim Cooper e-mails PDC with response to complaint 10009.
- 12/7/16 at 11:24 p.m.: Glen Morgan files complaint with PDC alleging two violations. This complaint is assigned Ticket Number 10471.
- 12/7/16 – 12/8/16: Jim Cooper and PDC staff continue to communicate with respect to complaint 8928/Notice No. 1. Also, Jim Cooper is notified of a complaint filed by Glen Morgan alleging two violations, which is assigned PDC Ticket Number 10257.
 - PDC requested via letter that Jim Cooper respond to complaint 10257, but this complaint appears to have been treated differently than others. For example, it is not associated with Jim Cooper through an online search of PDC complaints. Jim Cooper did not respond. The allegations are without merit.
- 12/14/16 at 8:38 a.m.: PDC forwards complaint 10471 to Jim Cooper and requests responses to the allegations.
- 12/15/16 at 10:55 a.m.: Glen Morgan files a complaint with the PDC alleging six violations. This complaint is assigned Ticket Number 11392.
- 12/15/16 at 11:00 a.m.: Glen Morgan e-mails complaint 11392 to the Attorney General's Office and Thurston County Prosecutor. The Attorney General's Office designates the complaint Notice No. 3.
- 12/16/16: PDC sends letter to Mr. Morgan regarding the PDC's findings and analysis with respect to complaint 8928. PDC sends Jim Cooper a formal written warning. Mr. Cooper informs the PDC via e-mail that he denies legal violations, but is interested in resolving the matter(s) in complaint 8928 given the PDC has characterized them as minor and/or technical issues. Also, Jim Cooper responds to complaint 10471.
- 12/19/16: Attorney General's Office files suit based on complaint 8928/Notice No. 1 subpart fifty; Thurston County Superior Court Case No. 16-2-04960-34. Attorney General's Office separately sends letter to Jim Cooper regarding Notice No. 2 and/or 3. Attorney General's Office requests that Jim Cooper respond to letter by 1/6/17.

- 12/20/16: Counsel for Jim Cooper contacts Attorney General's Office.
- 12/22/16: Notice of Appearance filed by BGWP in Case No. 16-2-04960-34.
- 12/28/16: Attorney General's Office directly contacts Jim Cooper via letter regarding Notice No. 3.
- 12/30/16: PDC forwards complaint 11392 to Jim Cooper and requests responses to allegations by 1/9/17.
 - At this point, with respect to complaint 11392, Jim Cooper is being requested to respond to two different agencies by two different dates with respect to the same complaint—on top of the other matters as outlined above.
- 1/6/17: Answer to Complaint is filed in Case No. 16-2-04960-34. Also, counsel for Jim Cooper sends letter to PDC regarding pending litigation involving allegations from complaint 8928.
- 1/10/17: Attorney General's Office e-mails letter to Jim Cooper's counsel regarding information/analysis requested pertaining to Notice Nos. 2-3.
- 1/12/17: Counsel for Jim Cooper sends letter to PDC in response to PDC's request for information concerning complaint 11392.

Our office did not become involved in this matter until approximately December 20, 2016, and we may not have all of the relevant correspondence in this matter. The information we do have indicates there are multiple state agencies investigating the same set of alleged facts and ostensibly applying the same laws. The dual investigation and the apparent possibility of different results/opinions arising from the multiple investigations is not efficient. Moreover it is confusing.

At the present time, our understanding is that the following complaints/issues may be unresolved:

- Complaint 8928 subpart fifty: The PDC appears to have reached a decision as to this issue, but the Attorney General's Office has filed suit.
- Complaint 9772 subpart four: The Attorney General's Office appears to still be investigating/analyzing this issue.
- Complaint 11392: This is the most recent complaint and our understanding is that both the PDC and Attorney General's Office are still in the process of analyzing the alleged facts and law.

Our assumption based on correspondence in our file and/or the passage of time is that all other complaints and their subparts alleged by Mr. Morgan have been deemed to lack merit.

Procedural and Legal Analysis Questions

The current scenario raises a number of questions, including:

- WAC 390-37-063 allows for the PDC to issue subpoenas in certain circumstances. RCW 42.17A.765 provides the Attorney General's Office with similar authority. But is that authority now subject to the Civil Rules of Court for discovery given that a lawsuit has been filed dealing with Jim Cooper's campaign?
- Is the Attorney General's Office estopped from making arguments that differ from the PDC's analysis and vice versa?
- Is the Attorney General's Office estopped from seeking relief different from the PDC and vice versa?
- Can a lawsuit go forward if there has been no administrative hearing in a situation such as here where identical complaints/notices were sent to the PDC and Attorney General's Office?
- What is Jim Cooper's incentive to provide information going forward except pursuant to discovery requests and/or a subpoena issued in the pending lawsuit?
 - Jim Cooper is entitled to recover costs and may be awarded attorneys' fees if the defense prevails in a filed lawsuit, so it could benefit Jim Cooper's position in the pending lawsuit to allow claims to be added that we are confident the defense will prevail on. On the flip side, the Attorney General's Office has shown through its prior actions that it will file suit if Jim Cooper provides information the Attorney General's Office construes as a legal violation. Providing information to the Attorney General's Office is a no-win scenario for Jim Cooper now that a lawsuit has been filed and avoiding formal litigation is no longer an incentive.
- Given that Glen Morgan has consistently forwarded his complaints to the local prosecutor and based on RCW 42.17A.750(2), does Jim Cooper have a Constitutional right to remain silent that should stay all pending matters until such time as the criminal statute of limitations period expires?
- RCW 42.17A.765(4) allows a person (*e.g.*, Mr. Morgan) to potentially bring a lawsuit in the name of the state with less than sixty days' notice to the Attorney General's Office—and if the person prevails in the citizen action they can require the state to reimburse the person's costs of litigation, including attorneys' fees. But the Attorney General's Office may not have time within sixty days to reasonably investigate the facts and analyze the law to make a decision as to the merits of a potential lawsuit—putting CR 11 aside, a losing lawsuit could subject the state to paying the defendant's costs and attorneys' fees. In light of the above, does RCW 42.17A.765 set the state up to make legal decisions with incomplete information that could make the state liable to either the complaining person or the defendant?
- If a candidate is sued either pursuant to a citizen action or by the Attorney General's Office, must all claims against that candidate arising from the same campaign be consolidated in a single lawsuit based on principles of judicial economy, claim preclusion, and/or issue preclusion?

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The Big Picture

Jim Cooper denies legal violations. But even if every single one of the issues and subparts complained of by Mr. Morgan were, in fact, legal violations, including the complaints that have already been determined to lack merit, there is no evidence that anyone has been damaged and there is no evidence of bad intent. The complaints against Jim Cooper involve, at most, honest mistakes. Administrative errors and/or potentially incorrect interpretations (made in good faith) of technical language contained in various laws were not intended to be punished. It would go against public policy to discourage citizens from seeking public office because potential candidates might fear a lawsuit if they made an innocent mistake in their paperwork.

RCW 42.17A.750(1), which provides for civil remedies arising from PDC violations, allows the courts to impose fines, but the court is not required to impose a fine. Additionally, an award of costs and fees to the Attorney General's Office is merely discretionary even if the state prevails in a PDC lawsuit. RCW 42.17A.765(5). This is the type of case where a court is likely to fine the defendant just \$1.00 and decline to award fees even if the plaintiff prevails. It would be a gross misuse of resources for everyone involved to litigate this matter given there is nothing really to gain.

The PDC laws were intended to "assure continuing public confidence of fairness of elections and governmental processes..." RCW 42.17A.001. And specifically, the PDC laws, "shall be enforced so as to insure that the information disclosed will not be misused for arbitrary and capricious purposes and to insure that all persons reporting under this chapter will be protected from harassment and unfounded allegations based on information they have freely disclosed." *Id.* We understand the conundrum that the Attorney General's Office is facing due to the language of various relevant statutes, particularly RCW 42.17A.765(4), but the complaints against Jim Cooper and the pending litigation point more towards harassment than assurance of fair processes. We look forward to discussing with you how litigation against Jim Cooper regarding his past campaign can be fully and finally resolved in a reasonable and efficient manner.

Yours very truly,

BEAN, GENTRY, WHEELER & PETERNELL, PLLC


Cheryl L. Duryea
Attorney at Law


John A. Kesler III
Attorney at Law

CLD/JAK/pra
Enclosures
cc: Jim Cooper

Meeting Agenda [Proposed]

Re:

Glen Morgan Complaints Concerning Jim Cooper; and Interplay Between PDC and AG

- Introduction of Meeting Attendees
- Review of Complaints/Notices and Discussion of Which Complaints/Notices Remain Pending
- Discussion of RCWs and WACs Relating to Pending Complaints/Notices
 - WAC 390-16-307 through 309-16-310 and RCW 42.17A.405
 - Is the potential violation related to amount(s) received or to due diligence?
 - How much due diligence is reasonably necessary?
 - What if a candidate researches the potential relationship between entities and concludes they are not related, but later information (e.g. obtained during discovery in a lawsuit) indicates the previous conclusion was incorrect?
 - If there is a violation, is it by the candidate or the donor?
 - WAC 390-18-010, WAC 390-18-015, WAC 390-18-030, and RCW 42.17A.320
 - Is there a difference between what is required by WAC 390-18-015(6) and WAC 390-18-030(3)? If there is no difference, then are the two codes redundant? If there is a difference, then is there a conflict?
 - RCW's identified in filed lawsuit (42.17A.430, 435, 445, and 470)
 - What does the State believe is the legally correct way for a candidate to sponsor tables at an event, which sponsorship includes a donation and comes with tickets to the event?
- Discussion of Interaction Between RCWs, WACs, Civil Rules of Court, and Case Law Regarding Multiple Investigations and/or Lawsuits Involving a Finished Campaign and that Campaign's Completed Filings
 - Is there a right to remain silent?
 - Can a candidate involved in a filed lawsuit be compelled to respond to requests for information outside of the rules of discovery that control in the lawsuit?
 - What is a candidate's incentive to cooperate with investigations once a lawsuit has been filed?
 - What if the pending lawsuit is resolved? Can citizens continue to file complaints and threaten citizen actions or does the resolution of a lawsuit involving the campaign preclude later lawsuits?
 - At what point is it enough already? For example, Glen Morgan's last complaint contained his speculation over Jim Cooper's snacking habits. That complaint was completely frivolous. Is a candidate really expected to answer every frivolous claim that is alleged by a citizen?
- What Do the Parties Want? What Are the Parties Willing to Live With? Can We Fully and Finally Resolve the Complaints/Notices Without Additional Legal Expense?
 - What is the intent of the Campaign Disclosure and Contribution laws?