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VIA EMAIL

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Lead Political Finance Investigator
State of Washington
Public Disclosure Commission
PO Box 40908
Olympia, WA 98504-0908

RE: Case 6628 - Tacoma-Pierce County Chamber Response to Complaint

Dear Mr. Lemp:

I represent the Tacoma-Pierce County Chamber ("Chamber"). This letter is the Chamber's response to the letter from the Public Disclosure Commission ("PDC") dated July 14, 2016, regarding the complaint referenced above ("Complaint").

OBJECTION TO PARTICIPATION IN FORMAL INVESTIGATION

The Chamber assumes that the PDC opened a "formal investigation" based on an determination by the Executive Director of the Public Disclosure Commission, Evelyn Lopez, that a material violation of RCW 42.17A may have occurred.[1] If that is inaccurate, please advise immediately. If the Chamber's assumption is accurate, the Chamber objects to participating in this investigation because it has information which raises questions about Ms. Lopez' ability to fairly make such an initial determination. The Chamber requests that this investigation be suspended until the full Commission can determine whether it should proceed based on Ms. Lopez' initial determination. As will be more fully set out in documents to be filed shortly, Ms.

[1]WAC 390-37-060(d) states: "the director shall initiate a formal investigation whenever an initial review of the complaint indicates that a material violation of chapter 42.17A RCW may have occurred.

Lopez should recuse herself or be disqualified from this case (and related cases 6627 and 6626) based on personal bias with respect to the subject matter of the complaint. The Executive Director has on multiple occasions publicly voiced support for proponents of the STW Initiatives (as defined below) and related actions by a small group of citizens in the City of Tacoma. Related to these issues, Ms. Lopez has referred to the Chamber and the Port of Tacoma as "venal and irresponsible." At a minimum, her conduct raises the appearance that she cannot be fair in the handling of this case. The Executive Director has additional duties related to the ultimate resolution of the Complaint, as set out in WAC 390-37-060, without limitation. The Chamber objects to any participation by Evelyn Lopez in this matter, and further requests that the Commission investigate her conduct with regard to the Complaint to date.

Without waiver and reserving all rights to challenge any determination by the Commission, including without limitation, the validity of the Executive Director's initial determination that a "formal investigation" was warranted, the Chamber submits the following response to the PDC's request for information.

FACTS

On March 7, 2016, a citizens' group called Save Tacoma Water filed two initiatives (the "SWT Initiatives") with the Tacoma City Clerk. The STW initiatives were flagrantly and facially illegal, at least in part, because, by their own language, they asserted that they were superior to the Federal and Washington State Constitutions and to Washington State law. They further stated that no state or federal court could determine they were illegal.

The Chamber, with other plaintiffs, brought a declaratory judgment action in the Superior Court of Pierce County to determine whether the STW Initiatives exceeded the scope of local initiative power. The City of Tacoma, named as a defendant, agreed with the plaintiffs that the STW Initiatives could never become part of the Tacoma City Code and City Charter, because they were facially illegal in that they exceeded the scope of any authority the City of Tacoma has. The Court agreed with the plaintiffs and the City. It determined that, in fact, the STW Initiatives were illegal, and permanently enjoined their placement on the ballot.

SUMMARY OF RESPONSE

The complaint asserts the Chamber violated Washington's Fair Campaign Practices Act (FCPA)[2] by failing to register as a political committee and report contributions and expenditures related to the lawsuit testing the STW Initiatives. The complaint should be dismissed because

[2] RCW Ch. 42.17A

the Chamber is not a public agency, filing a lawsuit to determine whether an initiative is legal is not political activity contemplated by the FCPA, and the STW Initiatives were not "ballot propositions" as defined by the FCPA.

A. The Chamber cannot violate RCW 42.17A.555, which by its terms applies only to "elective officials," public agencies, their employees and public resources.

In relevant part, RCW 42.17A.555 prohibits elected officials or public employees from using public facilities and resources to promote or oppose any ballot proposition. The Chamber is a private, not public, organization, and thus it cannot have violated the statute.

The Chamber is Washington non-profit corporation. It's President and Board of Directors are not elected by a public vote, but rather are selected by process outlined in its duly adopted bylaws. Its resources are not public resources, but are rather private in nature, consisting of membership dues, event admission fees, etc. As a result, the PDC must dismiss the complaint asserting that the Chamber has violated this statute.

The complaint either misapprehends the legal status of the Chamber or erroneously believes that filing a lawsuit as a plaintiff with other entities converts the Chamber to a "public agency." This is facially absurd. No legal authority can be cited in support of such a proposition.

B. The Chamber did not otherwise violate the FCPA.

The complaint also alleges the Chamber violated RCW 42.17A.205, 235, and 240 by failing to register as a political committee and report its campaign contributions and expenditures. The Chamber is not a "political committee" as defined by the FCPA, and the STW Initiatives are not "ballot propositions" as defined by the FCPA.

1. The Chamber is not a political committee and as a result, cannot violate RCW 42.17A.205, and .235.

By their plain language, RCW 42.17A.205 and .235 apply only to "political committees" as defined at RCW 42.17A.005(37):

> Political committee means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

The Chamber does not meet the definition of a political committee with respect to the STW Initiatives for at least two reasons. First, it was not acting (receiving contributions or

making expenditures) "in support of, or opposition to" political activity as contemplated by the FCPA. Second, the STW Initiatives were not "ballot propositions" as defined by the FCPA.

a. The Chamber was not acting "in support of, or opposition to" political activity as contemplated by the FCPA.

Providing further definition of the term "political committee," the Washington Court of Appeals has held that "an organization is considered a political committee under the FCPA by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to ***further electoral political goals***." *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n,* 111 Wn. App. 586, 599, 49 P.3d 894 (2002) (Emphasis added). Notably, the organization must have as "its primary or one of the primary purposes" to affect governmental decision making "by supporting or opposing candidates or ballot propositions." *Id.* at 599.

The Chamber filed a lawsuit not to "further electoral political goals," but rather to obtain a neutral judicial determination as to whether the STW Initiatives were lawful. Simply, the Chamber engaged in "legal activity," not "political activity" or "campaign activity." Nothing in the language of the FCPA requires reporting costs or contributions related to filing a legal challenge to an illegal ballot measure. If the legislature had intended to make legal activity subject to the public disclosure laws, it would have included language to that effect. No reported Washington case has held that seeking a judicial determination of the validity of a ballot measure is "political" activity" or constitutes "promoting an electoral political goal." In this case, the Pierce County Superior Court followed a recent decision of the Washington Supreme Court and found the STW Initiatives exceeded the scope of local initiative power and were thus illegal.

In *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 488, 166 P.3d 1174 (2007), the Washington State Supreme Court upheld the FCPA in the face of a vagueness challenge. In doing so, the court held that a person of ordinary intelligence would have a reasonable opportunity to understand the meaning of "in support of, or opposition to" in the definition of in the "political committee." In reaching this conclusion, the Court relied upon a decision of the United States Supreme Court[3] which defined the terms "oppose" and "support" in terms of *communications* that refer to a candidate and promote or attack that candidate. *Id.* at 488 n.9. In other words, as the Court acknowledged, the statute is only constitutional insofar as a reasonable person would understand what "oppose" and "support" mean, and a reasonable person would understand those terms to refer to *communications or advertisements* in support of

[3] *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

or opposing a candidate or ballot measure. Filing a lawsuit does not fit within this definition, no reasonable person would understand these terms to so mean, and the term would render the statute unconstitutional if so interpreted.

The purpose of the FCPA is to ensure that the financing of *political campaigns and lobbying* are fully disclosed to the public. RCW 42.17A.001. The FCPA only applies to organizations that have a "primary purpose" of campaigning, lobbying, or electioneering in favor or against a candidate or ballot proposition. The law is designed to let the voters know who is trying to sway their vote.[4] Filing a lawsuit to determine the legality of a local initiative is not advertising, communicating with voters, campaigning, lobbying or electioneering.

Because the Chamber engaged in legal activity – seeking a neutral, judicial decision of a Washington State Judicial Officer – rather than attempting to sway voters or promote or oppose an issue electorally, the PDC should dismiss the Complaint.

b. Even if the Chamber was engaging in support of or opposition to the STW Initiatives (it was not), it would still not meet the definition of a "political committee" because the STW Initiatives are not "ballot propositions" as defined in the FCPA.

As the Ninth Circuit held in *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), the FCPA is constitutional because it is narrow, and its requirements are substantially related to an important government interest. The *Brumsickle* court explained that the FCPA only applies to "expenditures and advertisements made in conjunction with *an ongoing election or vote*. . . . By definition, disclosure obligations do not apply *absent a pending election or ballot initiative campaign.*" *Id.* at 1018 (emphasis added).[5] Here, any purported expenditures were made prior to any ballot initiative campaign, and were in fact related to challenging the initiation of such a campaign on the grounds that the ordinance was facially unconstitutional and beyond the scope of the local initiative power. There was no "ballot initiative campaign," because the measure was never submitted to the voters because it was unconstitutional and beyond the scope of the local initiative power. *See, e.g.,* RCW 29A.04.091 (defining "Measure" as "any proposition or question ***submitted to the voters***") (emphasis added).

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[4] *Voters Educ. Comm., supra*

[5] Moreover, if a proposed local initiative is facially beyond the local initiative power and unconstitutional, it can logically never become part of a legitimate "ballot initiative campaign." *See also id.* at 1019 ("An organization engaging in issue advocacy like Human Life may avoid disclosure requirements any time that the issue about which it is speaking is not the subject of a ballot initiative or other public vote. Once the issue becomes the subject of a ballot initiative campaign, Human Life may continue to advocate all it wants; the only difference is that it must provide certain disclosures at times tied to the date of the vote.").

This precise issue was addressed by a Washington court, and in *State of Washington v. Evergreen Freedom Foundation*, No 15-2-01936 (Thurston Cnty. Sup. Ct. 2015),[6] the court dismissed an FCPA suit premised on legal expenditures related to challenged proposed ballot initiatives.[7] As the court explained in dismissing the suit, "unless there is clear and unambiguous guidance in the statutes, that people cannot be held to have violated these regulations." In *Evergreen,* the court held that the FCPA does not clearly encompass legal expenditures "before the matter ever went to any kind of vote." The same result should be reached here. *Order Granting Defendant's Motion to Dismiss, State of Washington v. Evergreen Freedom Foundation*, No. 15-2-01936-4 (filed May 17, 2016) (attached).

FURTHER RESERVATION OF RIGHTS

Although the statutory process for responding to a citizen complaint provides 45 days for a determination to be made as to whether legal action will be taken, the Chamber was required to respond to the complaint within five business days. The Chamber objects to the minimal time provided by the Commission, and reserves the right to provide additional authority with respect to all issues involved.

As a second reservation of rights, the Chamber believes that, as a matter of law, it is not required to disclose to the Commission 1.) whether it paid for legal services with respect to the declaratory judgment action and 2) if it did pay for legal services, how much was spent. It respectfully declines to answer those questions at this time. The Chamber also believes that it is not required to respond to the remainder of the questions at the top of page two of your letter dated July 14, 2016. The Chamber voluntarily, however, responds that any work related to the declaratory judgment action referenced herein was taken to determine the legal validity of facially and flagrantly unconstitutional local ballot initiatives, and for no other purpose. The Chamber voluntarily responds that it denies working with the Port of Tacoma and the Economic Development Board of Tacoma-Pierce County as a political committee to oppose the STW Initiatives.

With respect to its objection to the Executive Director's participation in this matter, the Chamber will file additional information or join in filings by other respondents within the near future.

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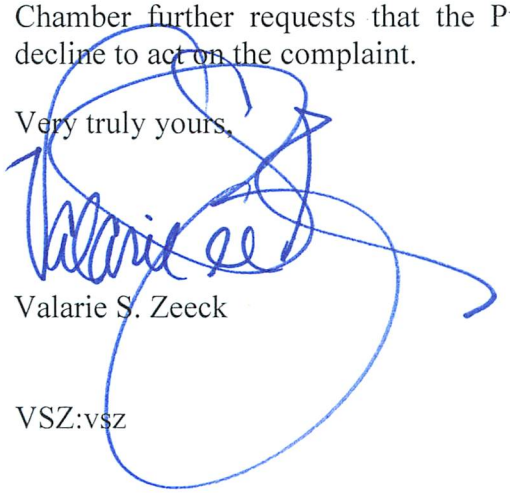
[6] *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248, 178 P.3d 981 (2008) ("Insofar as the analysis in another trial judge's decision might be helpful, there is no rule or precedent that bars its consideration by a trial judge. Further, trial judges can be presumed to know that other trial court rulings are not precedential.").

[7] *See* Defendant's Motion to Dismiss, *State of Washington v. Evergreen Freedom Foundation*, No 15-2-01936 (Filed April 4, 2016) (attached).

CONCLUSION

For the reasons stated herein, the Chamber denies that it was or is required to register as a political committee and disclose contributions and expenditures related to filing a lawsuit in which the STW Initiatives were found to be illegal as in excess of local initiative power. The Chamber further requests that the Public Disclosure Commission and the Attorney General decline to act on the complaint.

Very truly yours,



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