DANIEL T. SATTERBERG
PROSECUTING ATTORNEY

King County

Office of the Prosecuting Attorney
CIVIL DIVISION
900 King County Administration Building
500 Fourth Avenue
Seattle, Washington 98104
(206) 296-0430
FAX (206) 205-0447

December 20, 2019

Fox Blackhorn
Compliance Coordinator 2
Public Disclosure Commission
711 Capital Way S., No. 206
Olympia, Washington 98504-0908

Re: Complaint by Glen Morgan, PDC Case No. 60963

Dear Mx. Blackhorn:

Thank you for the opportunity to respond to the issues raised in Glen Morgan's complaint to the Public Disclosure Commission dated December 6, 2019. The complaint alleges that King County violated the state Fair Campaign Practices Act (FCPA), chapter 42.17A RCW, by preparing a legal challenge to I-976 before November 5, the date of the General Election, and by filing a lawsuit challenging the legality of I-976 on November 13, prior to I-976's December 5 effective date. Mr. Morgan's complaint lacks merit, both legally and factually. For the reasons stated below, the complaint should be dismissed.

Mr. Morgan's complaint is based on the holdings in two recent cases involving litigation expenditures related to local ballot measures. In *State v. Economic Development Board for Tacoma-Pierce Cty.*, 9 Wn.App. 1 (2019), defendants incurred litigation expenditures for a pre-election challenge seeking to enjoin an initiative on land use requirements from being placed on the ballot. And in *State v. Evergreen Freedom Foundation*, 192 Wn.2d 782 (2019), defendants incurred expenditures on litigation against municipalities that refused to adopt or place proposed ordinances drafted by defendants on the ballot.

In these cases, the courts held that where litigation was employed to either block an initiative from the ballot or to force one onto the ballot, the finances enabling such support or opposition were independent expenditures that must be reported under RCW 42.17A.255. The courts further held that such expenditures fell within the RCW 42.17A.555 prohibitions on the use of public facilities to support or oppose a ballot proposition. *Evergreen*, 192 Wn.2d at 795. The outcomes in these cases were dependent on a set of facts not present here; the expenditures were made pre-election for the purpose of filing a pre-election lawsuit either promoting or preventing a measure from reaching the ballot.

1. The County did not incur litigation expenses for the purpose of opposing the ballot proposition.

In *Tacoma-Pierce Cty.*, the court found RCW 42.17A.255 and .555 applicable not simply because the defendants had incurred pre-election litigation expenditures. The court held the statutes applied because those expenditures were for the purpose of a lawsuit to prevent the measure from reaching the ballot. The court clearly tied "the opposition" as referenced in both statutes to the attempt to block the measure from the ballot, stating "[t]he defendants' actions opposed the propositions insofar as they intended to prevent ballot propositions from reaching the ballot or becoming law." *Tacoma-Pierce Cty.* at 14-15 (citing *Evergreen* at 795).

Contrary to the premise in Mr. Morgan's complaint, nowhere in the opinion did the court indicate that pre-election litigation expenditures on their own would be enough to trigger the statutes. Instead, the statutes applied because of the combination of expenditures and the pre-election filing of a lawsuit opposing a ballot proposition.

> . . . the statutory language 'any expenditure that is made ... in opposition to ... a ballot proposition,' includes pre-election expenditures for legal services to block a ballot proposition from reaching the voters. Not only did the defendants challenge the STW ballot propositions as beyond the scope of the initiative power, but they succeeded in blocking the STW ballot propositions from reaching the voters. The declaratory judgment action was clearly 'in opposition to' the ballot proposals.
>
> Litigation expenses incurred to seek a judicial directive regarding whether measures may be placed on the ballot are reportable under RCW 42.17A.255. And RCW 42.17A.255 unambiguously defines "in opposition to" to include pre-election litigation expenditures on legal services to block an initiative. Thus, expenditures on legal services to block an initiative are necessarily independent expenditures subject to the statute's reporting requirements.

Tacoma-Pierce Cty. at 15 (citing *Save Tacoma Water*, 4 Wash. App.2d 562 (2018) and *Evergreen* at 787)(internal citations omitted).

Similarly, in *Evergreen* the Court's application of campaign finance requirements was based on both expenditures and the attempt to get a measure adopted or placed on the ballot.

> . . . where litigation is being employed as a tool to block adoption of an initiative or to force an initiative onto the ballot, as was attempted here, the finances enabling such support (or opposition) would indeed appear to fall within the 'any expenditure,' triggering the reporting obligation noted above.

Evergreen at 795.

The Court also discussed the intent of the statutory disclosure provisions to inform voters about the financing of campaigns so voters could consider it when casting their votes.

> [D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office.

Id. at 799.

Both *Evergreen* and *Tacoma-Pierce Cty.* are consistent with this long-held purpose of the FCPA "to ferret out ... those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the act in the interest of public information." *Voters Education Committee v. Washington State Public Disclosure Comm'n*, 161 Wn.2d 470, 480 (1972) (citing *State v. Dan J. Evans Campaign Comm.*, 86 Wash.2d 503, 508 (1976)).

The facts in *Tacoma-Pierce Cty.* and *Evergreen* are distinguished from those at issue in this complaint. The courts in those two cases found the FCPA applicable not simply because of pre-election expenditures. It was applicable because those expenditures were incurred for the purpose of filing a pre-election lawsuit to promote or prevent a measure from reaching the ballot.

In the present case, there is no allegation that the County incurred litigation expenditures for the purpose of blocking I-976 from the ballot and the FCPA therefore does not apply.

2. <u>There were no pre-election litigation expenditures.</u>

As discussed above, incurring pre-election litigation expenditures is not enough to trigger the FCPA requirements, but even if it was, the requirements would still not apply here.

The activities of which Mr. Morgan complains are the litigation expenditures related to the lawsuit challenging the constitutionality of I-976. Though as explained above, the County could have incurred these expenditures pre-election so long as they were not for the purpose of blocking I-976 from the ballot, it chose not to. County attorneys did not begin drafting the complaint until November 6, the day after the election. Mr. Morgan apparently believes that is too soon.

Mr. Morgan's complaint is premised on a definition of "election" that would include not just election day, but the entire canvass and certification period, which for a general election is thirty days. Under this theory, government agencies would be prohibited from incurring any litigation expenditures on even the most legally flawed measure not just until after the votes are in, but until the law goes into effect. The theory is without merit.

Mr. Morgan's overly expansive definition of what constitutes an election is contrary to the intent of RCW 42.17A.555 which is to prohibit the use of public resources to influence an election with support or opposition to a ballot proposition. When election day is over, there is no influence to be had. There is no longer a ballot proposition before the voters, even if not all the ballots have been counted.

Interpreting "election" to include canvass and certification is also contrary to state election law. RCW 29A.04.321 sets the date for statewide general elections and provides that such elections "shall be held on the first Tuesday after the first Monday of November of each year." That statute and RCW 29A.04.330 also set the dates for local elections, stating that such elections "shall be held on one of the following dates . . ." The dates that follow are each single election days.[1]

Even the statute that defines the canvass period for statewide measures makes it clear that the election is a one-day event even though canvassing continues for thirty days.

> . . . The secretary of state shall, in the presence of the governor, within thirty days after the election, canvass the votes upon each question and certify to the governor the result. The governor shall forthwith issue a proclamation giving the whole number of votes cast in the state for and against such measure and declaring the result. If the vote cast upon an initiative or referendum measure is equal to less than one-third of the total vote cast at the election, the governor shall proclaim the measure to have failed.

RCW 29A.60.260 (emphasis added).

Moreover, Mr. Morgan's assertion that for purposes of the FCPA an election runs long after the votes are cast is contrary to RCW 42.17A.255 and .005(4) which define "ballot proposition" for purposes of the independent expenditure requirement. Ballot proposition is defined to include " . . . any initiative . . . proposed to be submitted to the voters." This definition fits with the purpose of the statute to prohibit use of public funds in campaigns for or against a measure that is to be submitted to and considered by the voters. This situation no longer exists after election day.

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[1] There are numerous other state statutes that refer to an election as *the day* of the election. RCW 29A.40.091 ("The voter must be instructed to either return the ballot to the county auditor no later than 8:00 p.m. the day of the election or primary, or mail the ballot to the county auditor with a postmark no later than the day of the election or primary."); RCW 29A.40.110(1)("The tabulation of absentee ballots must not commence until after 8:00 p.m. on the day of the primary or election."); RCW 29A.40.160(1)("The voting center shall be open during business hours during the voting period, which begins eighteen days before, and ends at 8:00 p.m. on the day of, the primary, special election, or general election."); RCW 29A.40.170(1)("All ballot drop boxes must be secured at 8:00 p.m. on the day of the primary, special election, or general election.")

The activities for which Mr. Morgan complains, all of which occurred after the General Election day, must be analyzed for what they are, post-election litigation expenses to which the campaign finance prohibitions do not apply.

3. Advising on I-976 was normal and regular conduct.

Though outside the scope of the complaint, it is worth noting that the Prosecutor's Office engaged in privileged discussions with its clients concerning I-976 prior to November 5, 2019. As legal advisor to all County officers, these attorneys had a statutory duty to respond to requests for advice from their County clients. *See* RCW 36.27.020. Deputy prosecuting attorneys provided legal advice regarding I-976 so that County agencies could assess the proposed law's impacts on County programs, projects and services. Attorneys also provided advice regarding I-976 for purposes of preparing the County's bond offering documents.[2] These activities are within the Prosecutor's normal and regular conduct and were required by RCW 36.27.020, among other authority. The RCW 42.17A.555 prohibitions therefore do not apply.[3] Mr. Morgan does not appear to allege otherwise as these activities are not addressed in his complaint.

As explained above, the statues and cases on which the complaint is based do not apply here. While the County incurred litigation expenditures related to I-976, those expenditures were not pre-election expenditures with a purpose of blocking a proposition from the ballot. Moreover, the

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[2] In compliance with County procedures and federal law (specifically Section 17 of the Securities Act of 1933 and Section 10(b)), the County's bond offering documents provided to prospective bondholders must not contain any material misstatements and must not omit material information necessary to provide investors a materially complete description of the bonds and the County's financial condition. In preparing the offering documents, the County reviews initiatives that may have a material financial impact on the County. The County recently sold its Limited Tax General Obligation Refunding Bonds, 2019 Series C for debt service savings, with bond offering documents dated December 4, 2019. Prior to that offering, the County sold its Limited Tax General Obligation Bonds (Payable for Sewer Revenues), 2019, with bond offering documents dated October 8, 2019. To prepare this disclosure language, the County reviewed I-976 and its potential impact on the County. The County included information on I-976 in these offering documents to provide information to bond investors regarding the potential financial impact of I-976 on the County.

[3] The RCW 42.17A.555 prohibitions do not apply to activities which are part of the normal and regular conduct of an office or agency. *See* RCW 42.17A.555. WAC 390-05-273 defines the exclusion:

> Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17A.555, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

County's litigation expenditures were actually incurred post-election. For these reasons, the County respectfully requests the complaint be dismissed.

Thank you for your consideration. We would be pleased to provide you with any additional information you may require.

Sincerely,

For DANIEL T. SATTERBERG
King County Prosecuting Attorney

Janine Joly

Janine Joly
Senior Deputy Prosecuting Attorney