IN RE ROACH

Complaint 2003 - NO. 2

August 21, 2003

JURISDICTION DETERMINATION - ORDER OF DISMISSAL

I. Nature of the Complaint

The complainant alleges that Senator Pam Roach violated the Ethics in Public Service Act by viewing the complainant's personal e-mail after the complainant left the Senator's employment but was still employed by the Senate, and disclosing the contents of those e-mails to the press.

II. Procedural History

Complaint 2003 - No. 2 was received by the Board on February 21, 2003. The Board considered the matter on March 20, May 15, June 26, and July 17, 2003. An investigation was conducted pursuant to RCW 42.52.420.

III. Issue

Under what circumstances will the Legislative Ethics Board (Board) assert jurisdiction over a complaint alleging that a legislator or legislative employee has improperly disclosed or used a "confidential record"?

IV. Answer

The Act confers jurisdiction on the Board to punish certain activity related to the use or disclosure of "confidential information," and defines that term in relation to the Public Records Act, RCW 42.17.250 *et seq*. The Public Records Act is replete with exceptions and has been at issue in numerous court cases. In order to provide guidance to legislators and legislative employees in the future, we establish the following criteria: The Board will exercise jurisdiction only in those cases (1) where the Board determines that the Public Records Act either clearly identifies the record as available to the general public on request, or the record is clearly not available to the public on request as established by a specific exemption; or (2) where a Washington court has rendered a decision on the particular record in question. Neither of these requirements are met in this case. The Board does not view its authority as supplanting the authority of the courts of the State of Washington which have been established by law as the forum for determining whether a record is a "public" record and whether any of the numerous exemptions are applicable.

V. Facts

1. The complainant, Tabitha Wells, quit her position as Legislative Assistant to Senator Pam Roach on January 13, 2003. Wells remained a Senate employee, hired in another capacity. Wells told Milt Doumit, Secretary of the Senate, that her reason for leaving the Senator's employment was due to a hostile work environment created by the Senator. Dan Honkomp, another legislative assistant to Senator Roach, also quit his job as Legislative Assistant to Senator Roach on January 13 and left legislative employment.

2. On January 14, Senator Roach hired Kelly Hinton as her new Legislative Assistant to replace Wells

and Honkomp.

3. On January 28, Hinton was granted access to former employee Honkomp's computer directories by the Legislative Service Center (LSC). LSC was created by the Legislature to manage and operate the Legislature's computing and telecommunications environment and provides information technology services to primarily the House of Representatives, the Senate, and legislative subagencies. Hinton told LSC he needed to look for unfinished constituent work.

4. Hinton also accessed Wells' e-mail accounts using the universal default password given him by LSC for the Honkomp accounts. As a result of this access, Hinton was able to view and copy Wells' e-mails generated in her new office on her new account. There was no constituent work for the Senator being performed by Wells in this new account.

5. Hinton stated he found what he considered inappropriate e-mails in the new account, copied the e-mails, gave them to Senator Roach, and received direction from her to expand the review of the e-mail accounts in question for any additional evidence to provide to the appropriate authorities.

6. Hinton was later disciplined by the Senate for accessing Wells' e-mails. The Senate maintained that he acted beyond the authority granted him by LSC to access only former employee Honkomp's account.

7. The Senate's Internet and Electronic Mail Policy allows some personal use of e-mail and represents to Senate employees that the Senate will not monitor e-mail absent evidence of transgressions (*Senate Policy and Personnel Reference Manual, 2003 Edition*, pages 36-37).

8. On January 29, Senator Roach presented a set of e-mails she had obtained from Hinton to Mike Hoover, Senate Counsel. Hoover stated he advised the Senator not to copy or disseminate any e-mails because of his concerns about access to employees' accounts. Hoover stated that the Senator said she would disseminate the e-mails to the press to "protect herself." Hoover stated he assumed the statement was a reference to Wells making the hostile work environment allegation against the Senator, which was under investigation by a bi-partisan committee of Senate leadership which exercises final administrative authority over most aspects of internal Senate business, the Senate Facilities and Operations Committee (F&O).

9. On January 30, Seattle Post-Intelligencer reporter Steven Friederich received the set of e-mails from Senator Roach's office and attempted to confront Wells in her new office. Wells declined to speak with him. According to Hinton, Friederich returned the e-mails to him and asked that Hinton give the e-mails to Senator Roach. Hinton denies providing the e-mails to Friedrich.

10. Later that day, January 30, Senator Roach together with news reporters headed for Wells' office to confront Wells about an anonymous e-mail regarding an alleged gun incident. Wells refused to make herself available to the media. The e-mail accused the Senator of brandishing a gun at Wells at the Senator's residence during the previous years campaign season . The e-mail was sent to the media on January 30, after Hinton commenced looking at Wells' e-mails.

11. The Board's investigation has determined that it is most likely that this "gun e-mail" was not sent using the state e-mail system, but was sent from an unknown person's private AOL e-mail account.

12. On February 11, 2003, the Board received a letter from Secretary of the Senate, Milt Doumit, "on behalf of the Senate Facilities and Operations Committee," referring a question of alleged improper access or disclosure of senate employee's e-mail. The letter alleged that personal e-mails of employees were accessed through the office of Senator Pam Roach.

13. On February 17, the F&O Committee issued a reprimand to Senator Roach, declaring that she had retaliated against former Legislative Assistant Tabitha Wells. F&O cited the January 30 incident when the Senator led the reporters to confront Wells over the "gun e-mail" as one of the reasons for the reprimand.

14. On February 18, a number of newspaper articles reported that Senator Roach had either provided the media with copies of the e-mails or at least had allowed the media to look at the e-mails. The articles suggest that the author's names had been deleted or blacked out.

15. A February 21, Steven Friedrich article in the Seattle Post-Intelligencer referenced the e-mails by saying, "Copies of the e-mails shown to the Seattle Post-Intelligencer by Roach, R-Auburn, showed that Wells and Joe Anderson, a legislative aid to Rep. Dan Roach, R-Bonney Lake, were involved in personal e-mail correspondence. Wells and Anderson are engaged."

16. Later that day Wells filed this complaint with the Board together with an attachment explaining why she felt Senator Roach violated the Act. Tabitha Wells alleges that the Friedrich article proves that Senator Roach shared Well's personal e-mails with the press and she states, "I find this statement to be a complete violation of my privacy."

V. Analysis

1. *The Ethics Act contains a definition of "confidential information" which relates, with some lack of clarity, to the provisions of the Public Records Act.*

> **RCW 42.52.050 - Confidential information - Improperly concealed records**
>
> (1) No state officer or state employee may accept employment or engage in any business or professional activity that the officer or employee might reasonably expect would require or induce him or her to make an unauthorized disclosure of confidential information acquired by the official or employee by reason of the official's or employee's official position.
>
> (2) No state officer or state employee may make a disclosure of confidential information gained by reason of the officer's or employee's official position or otherwise use the information for his or her personal gain or benefit or the gain or benefit of another, unless the disclosure has been authorized by statute or by the terms of a contract involving (a) the state officer's or state employee's agency and (b) the person or persons who have authority to waive the confidentiality of the information.
>
> (3) No state officer or state employee may disclose confidential information to any person not entitled or authorized to receive the information.
>
> (4) No state officer or state employee may intentionally conceal a record if the officer or employee knew the record was required to be released under chapter 42.17 RCW, was under a personal obligation to release the record, and failed to do so. This subsection does not apply where the decision to withhold the record was made in good faith.
>
> **RCW 42.52.010 - Definitions**
>
> . . .
>
> (6) "Confidential information" means (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made

confidential by law.

It is the role of the Board to implement the legislative purpose of the Act. It is in the practical application that problems arise. It is apparent that the law intends the Board will have jurisdiction at some point over the question of mis-use or disclosure of "confidential information." However, the Board is not aware of any statutory framework, other than the Public Records Act, which establishes a process for evaluating a denial of a request for public access to information.

2. *The Public Records Act confers jurisdiction on the superior courts to adjudicate disputes stemming from agency decisions to deny or limit access to records, including decisions made by the Secretary of the Senate and the Chief Clerk of the House of Representatives.*

RCW 42.17.340 - Judicial review of agency actions

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.

RCW 42.17.341 - Application of RCW 42.17.340

The procedures in RCW 42.17.340 govern denials of an opportunity to inspect or copy a public record by the office of the secretary of the senate or the office of the chief clerk of the house of representatives.

These statutes are not ambiguous. The courts are the forum to which a person may appeal a decision of the Secretary of the Senate or the Chief Clerk of the House of Representatives relative to denial of a records request.

3. *When there has been no judicial determination of the fundamental question of whether a record is a public record available to the general public on request, and the Board is asked to judge someone's use of that record, the Board is in effect being asked to supplant the court's role because the fundamental question must first be answered - is the record a discoverable public record under the Public Records Act?*

This somewhat incongruent relationship between the jurisdiction of the courts and the jurisdiction of the Board leads the Board to believe that the better approach is to limit the Board's intervention into public record disputes to those instances where the only issue is improper use or disclosure and, where there is little or no doubt that the record or records in controversy are clearly available to the public on request under the Public Records Act or clearly are not available, because there is little or no doubt they qualify as a specific exemption. Accordingly, we believe certain conditions must be satisfied before this Board will interject itself into public records disputes.

VI. Conclusions

We conclude as follows:

1. The Board will only exercise jurisdiction in cases involving "confidential information" when it is alleged that such information was used or disclosed improperly.

2. The Board's jurisdiction in such cases is further limited when, as here, it is asked to decide whether a record is a public record, a decision normally left to the courts on appeal from agency action.

3. Whether jurisdiction will be invoked by the Board is dependent upon the Board's determination that either of two requirements have been met:

> (i) The record at issue is clearly identified as available to the public, or clearly exempted, pursuant to specific statutory language; or
>
> (ii) The courts have ruled that the record at issue is available, or not, to the general public on request.

4. Neither requirement is satisfied. The Board will not, generally, entertain claims of violation of "rights to privacy" because that concept, while present in the Public Records Act, is best suited for the courts and their long history of interpreting this contentious issue. Exemptions from the Public Records Act, based on broad privacy claims, are not the type of objectively stated exemptions which we require under (i) above. The courts have not ruled on the e-mails at issue.

VII. Order

Complaint 2003 - No. 2 is dismissed for lack of jurisdiction.

_____
James A. Andersen, Chair