

## **Complaint 2003 – No. 10**

### **DETERMINATION OF NO REASONABLE CAUSE**

#### **I. NATURE OF THE COMPLAINT**

The complaint makes allegations against Representative Geoff Simpson. As drafted by the complainant, the allegations are lengthy, but can be paraphrased as follows.

The first allegation is that Rep. Simpson gained access to and used a confidential list of email addresses, in violation of RCW 42.52.050.

The second allegation is that Rep. Simpson violated RCW 42.52.180 by using state resources to send an email regarding Tim Eyman, which the complainant alleges is a use of public resources for a political campaign.

The third allegation is that Rep. Simpson harassed the persons on the list of email addresses by requesting that recipients of his email use the "Reply All" button. It is alleged that this was intended to disrupt a political campaign to qualify Initiative 807 for the ballot.

#### **II. PROCEDURAL HISTORY**

Complaint 2003 - No. 10 was received by Board counsel on about May 27, 2003. (A copy of the Complaint is Exhibit 1 to the Investigation Report of Darryl W. Roosendaal dated October 13, 2003). On July 14, 2003, the Complaint was transmitted to the Office of the Attorney General for investigation pursuant to RCW 42.52.450, because it alleged a violation of RCW 42.52.180 by a legislator. An investigation was conducted pursuant to RCW 42.52.420. The results of the investigation were submitted to the Board in a written investigation report dated October 13, 2003, and at the Board's October 23, 2003 meeting.

#### **III. DETERMINATION OF ALLEGATIONS OF FACT**

1. Rep. Geoff Simpson received hundreds of email messages from Tim Eyman and his supporters during the 2003 legislative session. On an estimated ten or fifteen occasions during the 2003 session, Mr. Eyman sent an email to all members of the Senate and House of Representatives, as well as members of the media. Rep. Simpson's understanding is that a long list of Eyman supporters received a blind cc of these emails. The blind ccs contained a request for the supporters to respond to the email by using "reply all." Using "reply all" resulted in the email being resent to the original recipients of the email, i.e. all members of the Senate and House of Representatives. Thus, many of the emails sent by Mr. Eyman were received multiple times by Rep. Simpson and other members. Rep. Simpson estimates he received 1,000 such emails during the 2003 session.

2. When Rep. Simpson received an email from an Eyman supporter after the supporter hit "reply all" on an Eyman email, the full list of supporters who had received a copy of Eyman's email was visible to Rep. Simpson. Rep. Simpson used this list to create a list of email

addresses. Rep. Simpson compiled this list, and stored it on his legislative computer, without any assistance from legislative staff.

3. Rep. Simpson personally composed and typed the email that is the subject of this complaint. He did not receive assistance from legislative staff. The email consists of the following five paragraphs:

Neil Modie of the Seattle PI provides an in depth look at that modern snake oil salesman, Tim Eyman. How many people has he victimized with his deception? How many people has he defrauded by claiming that their campaign contributions would be used for anti-tax initiatives, while all the while they were supporting Tim's opulent lifestyle?

Hypocrisy? Tim has no shame. Apparently while he rants like a crazy person about government living within its means, he is having a little trouble doing it himself. He wants you, his "thousands" of supporters to send him a "gift" so he can make the Lexus payment.

Hit "REPLY ALL" to this email and tell Tim and each other that you are appalled that he wants a massive personal bailout from struggling working families. Tell him you're tired of sending him money for one thing and having it get used for his country club dues. TELL TIM TO GET A REAL JOB! Tim Eyman thinks he can get away with embezzling your hard earned money. Express your extreme displeasure and tell him to GET OFF HIS ASS AND GET A JOB.

If your computer won't allow REPLY ALL, then send your message to Tim to me and I'll forward it on for you. He won't hear you if you don't tell him NO to his request for a "gift."

Tim already read what I wrote. Hit "REPLY ALL" and tell Tim how YOU feel. Give him hell!

Rep. Simpson stated that this text was patterned on an email that Mr. Eyman sent to legislators.

4. Rep. Simpson's email incorporated a copy of a newspaper article that reported on a request by Tim Eyman for donations to "Tim Eyman, Taxpayer Advocate." The article mentions an Eyman supported initiative, Initiative 807, but states that Eyman's request for donations is not for the committee supporting an initiative. The article's discussion of Initiative 807 relates to the pro-Initiative 807 fundraising campaign, and how the pro-Initiative 807 campaign was obtaining signatures. The discussion of Initiative 807 in the article does not include a statement in opposition to Initiative 807. Initiative 807 would have created supermajority voting requirements for tax and fee increases.

5. Rep. Simpson sent his email to the list of email addresses he made from the Eyman generated emails. Rep. Simpson's email is dated May 16, 2003. Rep. Simpson states he sent the email "to throw some of it back to Tim Eyman." In Rep. Simpson's view, Mr. Eyman criticizes government for not living within its means, and Rep. Simpson sent out the email to give an example of how Tim Eyman was not living within his means. Rep. Simpson states that he did not send the email to influence a ballot measure campaign.

6. Rep. Simpson provided a copy of the email he received from Mr. Eyman, which was used

as a model for Rep. Simpson's email. In the email, Mr. Eyman made statements in opposition to Senate Bill 5659 because it would allow for tax increases, and encouraged email recipients to hit "REPLY ALL" and tell legislators to "KILL" SB 5659. Mr. Eyman's email, like Rep. Simpson's, contains the phrases "struggling working families" and "Give 'em hell!" This email is dated May 10, 2003, six days before Rep. Simpson sent his email.

7. The complainant states that, as a result of Rep. Simpson's email, he received hundreds of duplicates of Rep. Simpson's email, and that it took at least a month for the volume of emails to die down.

8. House Counsel Timothy Sekerek provided a copy of the House of Representatives Personnel Policy and Procedure Manual. (Exhibit 2 to Investigation Report of Darryl W. Roosendaal contains selected pages from the Manual). The Manual does not contain any prohibition on disclosure of addresses received by members during the course of their duties. Mr. Sekerek was not aware of any policy, written or unwritten, that would prohibit a member from using or disclosing constituents' addresses, including email addresses.

9. Rep. Simpson provided copies of several emails he had received from Tim Eyman during the legislative session. (Exhibit 3 to Investigation Report of Darryl W. Roosendaal). In summary, these emails urge members to oppose bills relating to taxes or amendments to the initiative process; and encourage supporters to use "reply all" to express their views to legislators.

#### **IV. DETERMINATIONS OF LAW**

1. Analysis of Allegation 1 -- Use and disclosure of email addresses.

RCW 42.52.050 provides in pertinent part:

(2) No state officer . . . may make a disclosure of confidential information gained by reason of the officer'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 the state or by the terms of a contract . . .

(3) No state officer may disclose confidential information to any person not entitled or authorized to receive the information. . . .

In Complaint No. 2003 No.2, Jurisdiction Determination -- Order of Dismissal, the Board considered whether a Senator violated RCW 42.52.050 when, allegedly, she disclosed to the press copies of emails exchanged between two legislative employees. The Board dismissed the Complaint, because it could not reach a definitive conclusion about whether the emails were disclosable public records under the public disclosure law (RCW 42.17), and that the courts have primary jurisdiction to interpret that law.

There is no statute or House of Representatives policy that makes confidential the email address of a citizen who sends an email, or is cc'd on an email, received by a legislator. There is therefore no basis to conclude that the email addresses used by Rep. Simpson were confidential. Rep. Simpson therefore did not violate RCW 42.52.050 by compiling the list of email addresses and sending the May 16, 2003 email to the addresses on the list.

2. Analysis of Allegation 2 -- Was the email use of state resources for campaign purposes?

RCW 42.52.180 prohibits the use of state resources for the purpose of assisting a campaign for election. For purposes of this complaint, the pertinent portion of RCW 42.52.180 provides as follows:

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 .

..

This section shall not apply to the following activities . . .

(c) Activities that are part of the normal and regular conduct of the office or agency; and

(d) De minimis use of public facilities by state-wide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities.

In Advisory Opinion 1995 No. 18, page 4, the Board concluded that RCW 42.52.180 prohibits use of state resources to make direct appeals to voters to vote a certain way on a ballot measure.

The context for Rep. Simpson's email is that Rep. Simpson had received perhaps as many as one thousand emails, either from Tim Eyman or from others (as a result of Mr. Eyman's encouragement), urging members to oppose bills pending in the Legislature relating to taxes or the initiative process. The email's message is a criticism of Tim Eyman, but these criticisms are directed at Mr. Eyman because he was soliciting donations for his personal use. Rep. Simpson's email did not criticize or discuss the merits of Initiative 807.

Given the context in which Rep. Simpson sent his email (Rep. Simpson's receipt of voluminous emails urging him to oppose legislation), and the lack of any discussion opposing Initiative 807 in the email, Rep. Simpson's statement that he did not send the email for the purpose of opposing Initiative 807 is reasonable. Rep. Simpson's email does not constitute use of legislative facilities for the purpose of opposing Initiative 807 in violation of RCW 42.52.180(1).

The Ethics In Public Service Act does not prohibit legislators from mentioning ballot measures, as subsection (2) of RCW 42.52.180 makes evident. Rep. Simpson's email was, at least for some recipients, a response to emails they had sent, urging legislators to oppose bills pending in the Legislature. Responding to correspondence, including emails, is "normal and regular conduct" for a legislator.

Moreover, the Board has advised that legislators may initiate communications that express a view on a ballot measure, with certain bounds. In Advisory Opinion 1995 No. 18, page 5, the Board advised that a legislative newsletter may reference a ballot measure, so long as it does not contain extensive direct comment on the merits of the measure and the ballot measure relates to a matter before the Legislature. The Board considered this to be "normal and regular conduct" of the Legislature, and permissible pursuant to subsection (2)(c) of RCW 42.52.180.

Moreover, the Board concluded that under RCW 42.52.180(2)(d), a legislator may make de minimis use of public resources to initiate a written communication containing his/her views on ballot measures if the measure relates to the legislator's action or position on legislation. Therefore, a communication initiated by a legislator may contain an incidental reference to a ballot measure, or even contain a short statement of a legislator's views on a ballot measure, if the subject of the measure is also before the Legislature.

Tax increases were a subject of both a bill pending in the Legislature and Initiative 807. Even though Rep. Simpson initiated communication with some of the recipients of his email, the email's reference to Initiative 807 was incidental, does not contain a direct message opposing Initiative 807, and was sent after Rep. Simpson received voluminous emails urging him to oppose new taxes or amendments to the initiative process. In summary, the email's incidental references to Initiative 807 are, in the context of the political debate that was occurring in the Legislature, permissible under either (2)(c) or (2)(d) of RCW 42.52.180.

3. Analysis of Allegation 3 -- Harassment allegation

The complaint alleges Rep. Simpson harassed the recipients of his email for a political purpose. The appropriateness of the suggestion to use "reply all," Rep. Simpson's choice of words, and the negative views of Mr. Eyman expressed in the email, are matters better addressed, if at all, by the policies of the House. The Board's jurisdiction is limited to enforcing RCW 42.52, and Rep. Simpson's email did not violate RCW 42.52.180, as explained above.

#### IV. CONCLUSION AND ORDER

Based on a review of the Complaint and the Board's investigation, the Board concludes as follows.

Allegation 1: There is not reasonable cause to believe Rep. Simpson disclosed and used email addresses in violation of RCW 42.52.050.

Allegation 2: There is not reasonable cause to believe Rep. Simpson used legislative resources for campaign purposes in violation of RCW 42.52.180.

Allegation 3: There is not reasonable cause to believe Rep. Simpson's email constitutes harassment in violation of RCW 42.52.180.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2003

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James A. Anderson, Chair