

COMPLAINT 2006 – NO. 5

In Re Nixon

STIPULATION AND ORDER

December, 2006

I. Nature of the Complaint

The Complaint alleges that Representative Toby Nixon (Respondent) violated the Ethics Act (Act) by placing or “posting” legislative press releases on his campaign web site. The statute in question is RCW 42.52.180 and it states in pertinent part:

- (1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purposes of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office e space, publications of the agency, and clientele lists of persons served by the agency.
- (2) This section shall not apply to the following activities:
 - (a)...
 - (b)...
 - (c) Activities that are part of the normal and regular conduct of the office or agency; and
 - (d)...

II. Jurisdiction

The Board has both personal and subject-matter jurisdiction.

III. Procedural History

The Complaint was received by the Board on August 17, 2006 and an investigation was conducted pursuant to RCW 42.52.420. The Board discussed the Complaint at regularly scheduled board meetings on September 21 and October 26.

The investigation involved interviews with the Respondent and staff of the House of Representatives together with a review of Respondent’s campaign web site. Respondent,

upon notification of this Complaint, removed the legislative press releases from that web site.

IV. Conclusion

The posting of certain documents and materials, prepared and/or distributed in whole or in part with the use of the facilities of an agency (public resources), by a legislator on his or her campaign web site, is a violation of RCW 42.52.180.

V. Determinations of Fact

The parties agree there are no material facts in dispute.

1. Respondent was sworn in as a state representative from the 45th Legislative District in January, 2002. Respondent believes he was advised, in response to his inquiry, by some one on the house staff that his legislative press releases could be posted on his personal or campaign web site as there was no clear prohibition to the contrary in the Act. Respondent has searched his records and has been unable to find documentation surrounding this advice.
2. Respondent has openly posted these documents, totaling just over one-hundred in number, on a personal and/or campaign web site since 2002 and they remained there until removed upon notification of this complaint.
3. Respondent states that he initiates and authors most of his legislative press releases and receives some limited “clean-up” and formatting assistance from legislative staff. Most if not all of the releases are prepared on a computer provided by the House of Representatives.
4. Respondent states he was unaware of a 2004 advisory opinion which concluded that posting these legislative press releases on his campaign web site would violate RCW 42.52.180.
5. The 2004 advisory opinion referred to above was referenced in the 2005 Legislative Ethics Manual under the section “WHAT IS NEW.” The Board provided copies of this manual to the House and Senate for distribution to all legislators and legislative staff and the advisory opinion was published, and remains, on the Board’s web site.

VI. Determinations of Law

Advisory Opinion 2004 – No. 1 concluded that the Act is violated when legislators post certain discretionary documents prepared at public expense on their campaign web sites. Respondent agrees that is what the opinion says but he disagrees with the opinion. Respondent does feel there was a lack of communication in that he was unaware of this opinion but regardless he would not interpret RCW 42.52.180 as prohibiting the

campaign web site posting of legislative press releases and has urged the Board to reconsider its position on this issue.

Since we conclude today that in our view Advisory Opinion 2004 – No. 1 was correctly decided, we feel it would be helpful to revisit portions of the advisory so that legislators and staff might again be informed of the rational and reasoning in support of that opinion.

Analysis

The Act does not define “normal and regular conduct,” which is one exception to RCW 42.52.180, and the Board has had to define that term on a case-by-case basis.

In Advisory Opinion (AO) 1996 – No. 11, the Board recognized House and Senate Standards of Conduct as (a) a means of providing guidance in resolving ambiguities between appropriate legislative conduct and prohibited campaign activity and (b) creating a process for heightened institutional review of proposed legislative conduct after June 30 in an election year. In this opinion the Board concluded that “normal and regular conduct” with regard to responsive press releases was determined by looking at a variety of factors and the Board identified those factors as timeliness, proximity to the election, relevance to a legislative issue, source of the initial statement, and the tone and tenor of the response

Issues surrounding a caucus internet page were presented to the Board in Complaint Opinion (CO) 1996 – No. 10. The Board employed the five prong test identified in AO96-II and concluded that this inquiry was applicable to all materials published or distributed at public expense, including electronic materials.

In AO 1997 – No.2 the Board distinguished “passive” communications from “affirmative” communications for purposes of analyzing the election year mailing restrictions and concluded that the mere act of making legislative materials available on the internet was passive and was not a mailing. However, the Board noted that “...materials that directly support a campaign, are campaign-oriented or are designed to assist a campaign purpose in any other way, will be deemed to violate the prohibition against the use of public resources for campaign purposes, regardless of the timing of their publication or distribution” (page 3 of the opinion).

The question of whether a legislator’s campaign web site could link to a legislative Internet homepage was present to the Board in AO 2000 – No. 2. The facts presented in this opinion request were as follows:

Posted on most of the individual legislators’ pages are documents prepared by staff for legislative purposes, including copies of newsletters that were previously distributed via mail, press releases on legislative issues, an official photo, a biography, etc. The Senate Caucus homepages also contain video and audio clips

with excerpts from legislators' speeches made in their official legislative capacity (page 1 of the opinion).

The Board reasoned that the question involved the balancing of two competing public policies, both approved by the voters. Namely, (1) ensuring that public resources are not used for campaign purposes as set forth in RCW 42.52.180 and (2) providing liberal access to public records under the public Records Act, RCW 42.17. 270 et seq. The Board concluded there was no way to effectively control links from campaign web sites to a legislative site containing public documents but that after June 30 in an election year for those legislators facing election, their materials, referred to as "discretionary" by the Board, must be removed from the legislative site.

Implicit in this opinion is the idea that these "discretionary" materials, most if not all which relate to past events, are more likely to be perceived as being used in support of the legislators' candidacy as the election nears, especially when they are just "one click away" when individuals contact the campaign site for campaign information.

The Board concluded there was a second reason for removing these "discretionary" materials from the legislative site and that was the election year mailing statute, RCW 42.52.185. This statute restricts mailings in an election year and a violation of the statute constitutes use of public facilities for the purpose of a campaign under RCW 42.52.180. In AO 1997 – No. 2, referred to previously, the Board had distinguished between the "passive" act of placing a document on the Internet and the "affirmative" act of mailing the document. However, the board concluded the "discretionary" materials "...like individual member newsletters, press releases, and video clips, lose its passivity as a communication medium for purposes of the ethics law when such a Website is linked from a legislator's campaign site" (page 4 of the opinion).

Later, in AO 2004 – No. 1, the Board was asked if a legislator could obtain electronic copies of various audio/visual materials prepared for the legislator by legislative staff, and place those materials, or portions of them, on a private, non-campaign web site. The Board concluded that these records are available to all who request them and posting them on a private, non-campaign web site prior to June 30 in a legislator's election year would not violate the Act. The Board said, in conclusion at page 4 of that opinion:

This opinion does not purport to extend the Board's jurisdiction over the physical, private, non-campaign web sites employed by some legislators. However, the Legislature has clearly directed, by statute, that the Board enforce the law against the use of public resources, which includes these "discretionary" materials. Therefore, it is the use of these materials and not the establishment of the private sites which forms the basis of this opinion. These materials are available to all as public documents but they cannot be used by the legislator on these non-legislative, non-campaign web sites after June 30 in an election year as that use would constitute a violation of RCW 42.52.180. It is equally clear that the legislator's campaign web site may not post these discretionary materials at any

time as that use would constitute a direct use of public resources in support of a political campaign (emphasis added).

VII. Summary and Order

The Board accepts the Respondent's stipulation to the fact that he posted legislative newsletters on his campaign web site. The Board notes that the Respondent's actions were done openly and consistently since 2002, and while it is apparent to the Board that his representation that he was unaware of the prohibition is credible, the advisory opinion in question was singled out for special attention in the ethics manual and published on the Board's web site. The Board will continue to look for ways to improve communication with legislators and legislative staff.

It appearing from the stipulation, the investigation and the conclusions of the Board that Respondent did use the facilities of an agency, in the form of materials prepared in whole or in part by legislative staff and/or with the use of legislative equipment, when he posted these materials on his campaign web site;

Now, Therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Respondent has violated RCW 42.52.180 and shall be penalized by a Letter of Instruction and this order shall serve as the Letter of Instruction.

Wayne Ehlers, Chair

Date:

I, Toby Nixon, have had the option of reviewing this Stipulation and Order with legal counsel, or have actually reviewed it with legal counsel and understand its legal significance.

While I admit to the fact that I posted these documents on my campaign web site I respectfully disagree with the Board's interpretation of the law. In my view, these documents are public records, historical in nature, and were appropriate and legal when initially prepared and distributed. Nevertheless, I acknowledge that it is the Board's responsibility to interpret and enforce the Act and that the Board views this question of law differently than me. I voluntarily sign this Stipulation and Order to effectuate a resolution of this matter.

Toby Nixon

Date: