

Legislative Ethics Board



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COMPLAINT 2019 – No. 9

In re Morgan
December 26, 2019

ORDER OF DISMISSAL: LACK OF REASONABLE CAUSE

I. Nature of Complaint

The complaint was received by the Board on October 16, 2019 and was discussed by the Board at its regularly scheduled meeting on December 2, 2019. The complaint alleges that Respondent revealed confidential information about the Complainant on Respondent's campaign Facebook page. While the Complaint does not cite a specific statute in the Ethics in Public Service Act (Act), the Board analyzed the allegations under RCW 42.52.050 (confidential information). The Complaint also alleges that Respondent blocked Complainant from seeing the comments posted on her (Respondent's) Facebook page contrary to a recent federal court ruling.

II. Jurisdiction

The Board has personal and subject matter jurisdiction. RCW 42.52.320. See Section IV. A. for a discussion about subject matter jurisdiction in this matter.

III. Findings of Fact

There is reasonable cause to believe the following are the pertinent facts of the case.

1. Respondent is a member of the Washington State House of Representatives representing the 29th Legislative District (LD). She was first elected to this position in November 2018.
2. Complainant is a former resident of the 29th LD, had served as a Precinct Committee Officer (PCO) for the district at one time and remained very involved in the 29th LD activities.
3. In February 2018, Complainant's apartment manager threatened to evict her son and her. Complainant was a PCO with the 29th LD at the time this occurred and was encouraged by several people to speak publicly about this issue at the 29th LD convention.
4. After Complainant spoke to the convention attendees about her threatened eviction, Respondent, who was in the audience at the time Complainant spoke, approached

Complainant, indicated that she was a housing advocate and offered to assist her with her possible eviction.

5. Complainant accepted the offer and the two met several days later to discuss the situation. Respondent suggested that Complainant make an appointment with her landlord/apartment manager and she (Respondent) would accompany Complainant to the meeting.
6. At the meeting, Respondent explained to the assistant apartment manager (the apartment manager was unavailable) that she (assistant apartment manager) was required by law, to provide Complainant with additional time to find a place to relocate because Complainant was disabled.
7. Complainant was not evicted and two months after the meeting with the assistant apartment manager, Complainant moved to a new apartment in Puyallup.
8. Sometime during the summer of 2019, Respondent endorsed a candidate for the Tacoma City Council. That candidate was not endorsed by the 29th LD.
9. On July 26, 2019, the acting chair of the 29th LD, posted on the LD Facebook page that, as a constituent, she was frustrated with elected officials who did not follow the wishes of their constituents.
10. In addition, around that same time, several people in the 29th LD had requested that Respondent withdraw her endorsement of the city council candidate because the LD preferred a different candidate.
11. Respondent refused to change her endorsement and on August 13, 2019 posted on her campaign Facebook page that she was upset about being asked to rescind her endorsement. She stated in the post that she felt pressured to change her endorsement and stated that she “was called names and treated in a manner that mirror[ed] decades of racist rhetoric” in an effort to convince her to change her endorsement.
12. Complainant responded to Respondent’s August 13th post in which she criticized Respondent for not listening to the 29th LD members about their desire to endorse a different candidate and for a variety of other reasons, not the least of which was that they had worked hard to get her (Respondent) elected.
13. There were a number of responses to Complainant’s post, one of which was from Respondent who posted the following statement: “I was surely listening to you when you and your son were about to be evicted last year. Remember when I went out of my way from campaigning to work things out with your landlord. Remember I told you to be strong, that you would not be homeless.”
14. A reader of these posts posted the following comment: “that’s leadership ... lol ... talking about someone’s personal issues ... wow.” To which Complainant responded: “Melanie was a housing advocate and she was trying to keep my son and I from being homeless, but you’re right that this was not the place to mention it.”

15. In a later post on the same string, Complainant responded to Respondent's comment (number 13 above) stating: "I do remember that. I also remember you telling the property manager that I have a mental illness that I do not have..." to which Respondent posted "pay attention to my post. Never said anything about a mental health issue."

16. Respondent admitted that she did block Complainant from her personal Facebook page.

IV. Analysis and Conclusions of Law

A. Subject Matter Jurisdiction

In *In re Roach*, 2003 – No. 2, the Board held that the Board "will only exercise jurisdiction in cases involving confidential information when it is alleged that such information was used or disclosed improperly." Whether Respondent improperly discussed alleged confidential information is the basis of this Complaint. Therefore, the Board has subject matter jurisdiction in this matter.

B. Disclosure of Confidential Information

RCW 42.52.050 provides in pertinent part as follows:

(2) No state officer¹ or state employee may make a disclosure of confidential information² 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.

The first question to be decided is whether the information regarding Complainant's previous eviction constituted "confidential information" under the Act. Although the information about the eviction is specific rather than general and, arguably not available to the public, it would seem that Complainant waived any right she may have had to keep that information confidential by revealing it to multiple people when she spoke about it at the 29th LD convention.

There are no prior Board opinions in which the Board has had to determine whether information disclosed was confidential without also analyzing the interplay of the Public Disclosure Act (PDA), RCW 42.17, in answering the question. In this matter, the PDA is not involved and is of no assistance in answering the question about whether the information disclosed by Respondent was confidential. The most similar statute to assist us in answering this question is the state Privacy Act.³

¹ "State officer" means every person holding a position of public trust in or under an executive, legislative or judicial office of the state... [including] ... members of the legislature ... RCW 42.52.010(19).

² "Confidential information" is defined as (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law. RCW 42.52.010(5).

³ RCW 9.73 et seq. This Act criminalizes the opening, intercepting or recording of confidential or privileged information, documents, or correspondence.

In analyzing the Privacy Act, the Washington Supreme Court has stated that “a communication is private (1) when parties manifest a subjective intention that it [the communication] be private and (2) where that expectation is reasonable.” *State v. Modica*, 164 Wn.2d 83, 88 (2008). *See also State v. Townsend*, 147 Wn.2d 666 (2002). It can hardly be said that Complainant wanted to keep the eviction information private when she divulged it to the audience at the 29th LD conference. In that situation, the expectation that that information should remain confidential would not be reasonable.

The information about Complainant’s alleged mental illness or disability is probably confidential by virtue of various federal and state laws. Nevertheless, in the Facebook posts, Respondent did not mention Complainant’s alleged mental illness; the Complainant did. Complainant’s actions in raising the issue on a public Facebook page and then expecting that information to remain private is not reasonable in light of the circumstances by which it was divulged.

Assuming, *arguendo*, that the information about the eviction and the mental illness is confidential, under RCW 42.52.050(2), Respondent would be prohibited from disclosing such information if it was gained by reason of her official position. However, Respondent obtained this information in 2018, before she was elected to office. Therefore, Respondent did not “gain this information by reason of her official position” as she had not yet been elected, and, as a result, there is no reasonable cause to believe she violated RCW 42.52.050(2) in this matter.

Furthermore, there is no reason to believe Respondent violated RCW 42.52.050(3) because the information about Complainant’s eviction that Respondent posted was not confidential under the Act since Complainant waived whatever right she may have had to keep the information private by first discussing this information with the attendees of the 29th LD conference.

C. Blocking Complainant from Facebook

The Complaint also alleges that Respondent violated the court ruling issued by the 4th Circuit Court of Appeals in *Davison v. Randall*, 912 F.3d 666 (2019). In that case, the court ruled that public officials cannot block critical comments on digital platforms used to conduct official government business and communicate with constituents. According to the Court, the block imposed by the Plaintiff operated to suppress speech critical of members’ conduct of their official duties or fitness for public office.

By her own admission, Respondent blocked Complainant from seeing her personal Facebook page. Respondent does not conduct official government business on this account. Furthermore, as the Board stated in *In re Shewmake*, 2019 – No. 4, “a legislator’s personal Facebook page is not a public resource . . . because it is not an account that was established because the person is a member of the legislature. A personal Facebook account is not subject to the policies of the House or Senate.” The Board concluded in *Shewmake* it is not a violation of the Act for a legislator to block a constituent from seeing his or her personal Facebook page. Respondent, in blocking complainant from seeing her personal Facebook page, has not violated the Act.

V. ORDER

IT IS HEREBY ORDERED that Complaint 2019-No. 9 is dismissed.

Eugene Green
Eugene Green, Chair

Date: 12-20-2019