

MEMORANDUM

March 31, 2004

TO: President's Cabinet
Washington State University

CONFIDENTIAL AND PRIVILEGED:
WORK PRODUCT AND/OR
ATTORNEY-CLIENT COMMUNICATION

FROM: Antoinette M. Ursich, Senior Assistant Attorney General
Washington State University Division

SUBJECT: **Summary of Restrictions on Use of Public Funds and/or Facilities
for Campaign Activities**

I. INTRODUCTION

2004 is a major election year. Matters on the ballot will include the offices of President, U.S. Senator, U.S. Representative, the Washington Governor, the Washington Attorney General, and likely an initiative measure. In view of these issues and concerns regarding the use of public properties and facilities for campaign purposes, I have updated the summary provided to Provost's Council during the last major election year. I have again taken the liberty of summarizing the work of Senior Assistant Attorney General James K. Pharris. You may view his memorandum at: <http://www.wa.gov/ethics/files/Publicfundmemo2003.doc>

II. PUBLIC FACILITIES MAY NOT BE USED TO SUPPORT OR OPPOSE BALLOT PROPOSITIONS OR CANDIDATES FOR PUBLIC OFFICE

The Ethics Act prohibits state officers and employees from using or authorizing the use of state facilities 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 proposition¹.

Facilities of an agency are defined to include, but are not limited to, the use of stationery, postage, machines, equipment, state employees during working hours, vehicles, office space, agency publications, and agency client lists. RCW 42.52.180. Facilities of an agency include agency funds, whether acquired by appropriation or gift, or locally generated. Thus, WSU's 17A funds are a WSU facility.

¹ For the remainder of this memorandum, whenever the term "ballot proposition" is used, it includes candidates for public office.

Importantly, the Ethics Act provides that “knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using state resources in violation of this section” also is a violation of the law. RCW 42.52.180.

The penalties that an individual employee may incur for violating the Ethics Act include: a civil penalty of up to \$5,000 per violation, or three times the economic value of anything received or sought in violation of the Act²; costs, including reasonable investigative costs; and any damages sustained by the state, RCW 42.52.490. The employee also is subject to discipline for violating the Act. RCW 42.52.520.

A. Examples of Prohibited Activity. The Office of the Attorney General and/or the Executive Ethics Board have opined that the following activities are prohibited by RCW 42.52.180:

1. Using work hours to solicit signatures for ballot propositions, to raise funds for or against such propositions, or to organize campaigns for or against such propositions.
2. Using public property to campaign for or against a ballot proposition, except that “neutral forum” public property otherwise open to public use also may be used for campaigning.

For example, the Terrell Mall is a neutral forum public property where candidates may come and speak on the same basis as any other user of the Mall. WSU employees or officers could also use the Terrell Mall to campaign, provided that they are doing so on their own time and provided that they are not given preferential treatment in reserving space on the Mall.

3. Using public facilities—office space, electronic mail and data processing equipment, telephones, word processing and copying facilities, paper, supplies, and any other publicly owned property—for campaigns for or against a ballot proposition, whether during or after work hours.
4. Displaying political material in or on publicly owned vehicles.
5. Displaying or distributing campaign material on publicly owned or operated premises, other than on “neutral open forum” property (addressed in example A.2 above) or “personal space” property (addressed in example B.5 below).

² Examples of items received in the context of a political campaign might include, for example: the cost of mailings made using state resources (e.g., copy toner, electricity, paper, postage); the cost of driving a state vehicle to a campaign event; etc.

6. Using public supplies, equipment, or facilities to print, mail, or otherwise produce or distribute material supporting or opposing any candidate or ballot proposition.
7. Using publicly owned facilities to instruct or urge public employees to campaign for or against a candidate or ballot proposition on their own time, or stating or implying that their job performance might be judged according to their willingness to use their own time on a campaign.
8. Using public time and/or facilities to draft or pass a resolution by an appointed committee, board, or commission taking an official position for or against a pending ballot proposition.
9. Distribution of news articles or editorials: the University is ordinarily free to distribute press clippings that relate to its mission. However, while an election is pending or an initiative is being circulated for signature, the University may distribute only those newspaper articles and editorials that do not tend to support or oppose a candidate for public office, or a ballot initiative, or referendum while an election or initiative is pending before the voters. EEB Advisory Opinion 02-04.

B. Examples of Activity that is not Prohibited by RCW 42.52.180. The following conduct does not appear to be prohibited by the Ethics Act.

1. Unless it is inconsistent with some other applicable law or regulation, a public employee is not prohibited from campaigning for or against a ballot proposition on the employee's personal time. It should be clear that the activity is the individual's personal choice and is not tied to job performance in any way. For state employees, the term "personal time" would ordinarily include only:
 - a) time outside the employee's normal work day; or
 - b) time when the employee is on vacation leave status or is using leave properly and lawfully accumulated and consistent with applicable statutes and personnel regulations; or
 - c) time on unpaid leave status.
2. Public employees may contact fellow employees away from the office to circulate petitions or to solicit one another for funds, volunteers, and other activity for and against a ballot proposition, but only under circumstances that strictly avoid the use of office time and public property. **NOTE:** The AGO has advised that officers and employees may be well advised to avoid soliciting subordinate employees, because the subordinate employees may feel that the superior is using improper influence, no matter how carefully the campaign is conducted or the inquiry is phrased.

3. An employee's title is not a "tangible facility of an agency." EEB 00-08. As such, state employees may use their titles when supporting or opposing ballot propositions. However, the Executive Ethics Board requires any use of title to "be accompanied by a disclaimer that the officers or employees are speaking only for themselves and not for their agencies."
4. Where public space is available on a non-restricted basis to post signs, petitions, and advertisements, or to make speeches and hold meetings, public employees may use these "neutral public forum" spaces to express their own views, including their views on pending ballot propositions, assuming they are not otherwise violating RCW 42.52.180 (e.g., they cannot make such use of public forum hours during their work hours). However, it might well be a violation of the statute for public employees to use their positions to gain special advantage in the use of such "public forum" spaces, such as by signing up all the time for the use of a public auditorium before non-employees have had an equal opportunity to seek use of the same space, or by using their access to a public bulletin board to occupy the entire space with favored campaign material and leaving no space available for opposing material or material relating to other matters.
5. Wearing campaign buttons on clothing is a personal expression and does not violate the Ethics Act. The use of personal assigned space at a workstation probably meets the same requirement. The answer might be different if an employee were using publicly visible space, such as a wall or reception desk, which could leave the impression that the agency supports a campaign.
6. Public agencies may conduct research into the likely results of the passage of a ballot proposition. Indeed, where the passage of the proposition would directly affect the agency's duties, an agency might be remiss for not conducting such research activity. However, it must be clear that the research is being conducted with the purpose of gathering the facts, is directly related to the ordinary conduct of the agency's business, and is not designed to support or oppose a candidate or ballot measure.
7. Public agencies and public employees may supply public records in response to requests made by the supporters or opponents of candidates or ballot propositions. An agency should treat all campaigns fairly and equitably in responding to requests for public records.
8. Where two or more measures relate to the same subject, agencies may publish factual information showing the comparative effects of the measures, just as they could publish factual information showing the expected effect of a single measure. However, the agency may not use public facilities or property to favor one proposition over the other, any more than it could urge passage or defeat of both measures.

III. OTHER POLITICAL ACTIVITIES: LOBBYING

The Ethics Act does not prohibit an agency or its employees from engaging in “activities that are part of the normal and regular conduct of the office or agency.” RCW 42.52.180(2)(c). Activities that are part of the regular and normal conduct of the agency:

- Include researching the possible effects of a measure for planning purposes;
- Likely include the preparation of an agency “fact sheet” and the provision of such a fact sheet to those who ask questions about the ballot measure as it may impact the agency. The agency should **not** send out such a fact sheet unsolicited; doing so may be found to be impermissible grass roots lobbying;
- Include permissible lobbying of elected officials on a matter while the matter is pending before the legislature (i.e., the agency (via its agents) may advocate the official position or interest of the agency to any elected official or employee of any agency); and
- Include the provision of information or communication on matters pertaining to official agency business to any elected official or officer or employee of any agency; but
- Do **not** include grass roots lobbying. Thus, an agency may not write to all of its alumni or students, or voters in a district, and encourage them to vote a certain way or encourage them to contact their legislators regarding an agency concern. Public Disclosure Commission Declaration Order No. 14.

WSU has issued guidelines that address employee contacts with state officials. In summary, that policy:

- Encourages employees to have good professional relationships with state elected officials and to be responsive to their requests for information;
- Reminds employees that contact with an elected official may be considered official “lobbying” on behalf of the University and asks that contacts be discussed with WSU Government Relations personnel to ensure that accurate and timely information is provided to the official, and that WSU complies with its duty to report all lobbying;
- Prohibits WSU employees from using University time or resources to lobby for or against legislation unless authorized by the University to represent these issues.

Questions about contacts with legislators should be directed to WSU's Government Relations personnel. Additionally, that Office can provide a current copy of the WSU Guidelines for Contact with State Officials.

IV. CONCLUSION

The public is sensitive to the use of public facilities or property to support or oppose candidates for public office or ballot propositions. State agencies and employees walk a careful line to assure that the public is fully and accurately informed about the consequences of voting on a particular measure, without making unlawful use of public funds or property. My office is available to provide assistance on University activities, including the activities of its colleges and departments, relating to matters before voters. Please contact us should you question whether any proposed activity constitutes permissible University activity.

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