

**BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON**

In re the Matter of a Petition for a
Declaratory Order by:

THE INSTITUTE FOR FREE
SPEECH

DECLARATORY ORDER NO. 18

I. INTRODUCTION

The Institute for Free Speech (IFS) submitted a “Verified Petition for Expedited Declaratory Order” (Petition) on April 21, 2021. The Petition requested that the Public Disclosure Commission (PDC or Commission) resolve whether IFS’s proposed provision of *pro bono* legal services to Tim Eyman, or his bankruptcy estate, would require IFS to register with or report to the PDC pursuant to the Fair Campaign Practices Act (FCPA), Chapter 42.17A RCW. IFS provides *pro bono* legal representation in legal cases that it determines impact free speech rights. Mr. Eyman was recently found in violation of the FCPA in Thurston County Superior Court, No. 17-2-01546-34, for various campaign-related activities that occurred over multiple years. IFS is proposing to provide *pro bono* legal services on appeal of the trial court’s order and judgment in that matter.

The Commission considered the petition on May 27, 2021, at its regular meeting by audio and online streaming. The hearing was held pursuant to Chapter 34.05 RCW, Chapter 42.17A RCW, and Chapter 390-12 WAC. Commissioners present both telephonically and online were Fred Jarrett, Commission Chair (presiding), Nancy Isserlis, Commission Vice-Chair, and Commissioners William Downing, and Russell Lehman. Also present both telephonically and

online were Assistant Attorney General John S. Meader representing the Commission; Assistant Attorney General Chad Standifer representing PDC staff; and Sean Flynn, General Counsel, for PDC Staff. Del Kolde, attorney for the Petitioner, also appeared telephonically and online. The proceeding was open to the public as limited by Governor’s Order 20-28 *et seq.* and recorded.

The Commissioners had before them the following materials: The Petition for a Declaratory Order from the Institute for Free Speech (including exhibits); and the proposed declaratory order presented by PDC staff. The Commission also considered the oral argument and information provided by PDC staff and Mr. Kolde at the May 27, 2021, hearing.

II. STANDARD FOR COMMISSION REVIEW

Washington State agencies are authorized to issue declaratory orders pursuant to RCW 34.05.240. The decision whether to issue a declaratory order that answers the Petitioner’s question is discretionary. RCW 34.05.240(5)(d); WAC 390-12-250(5); WAC 10-08-252. The purpose of declaratory orders is to provide reliable advice to Petitioners in the public interest. RCW 34.05.240(2). The declaratory order process can provide answers more quickly and avoid needless litigation between the participants. However, it may not be workable with uncertain or complicated facts, or when matters are in controversy.¹ State agencies should interpret statutory requirements consistently, but that does “...not apply to determination of appropriate remedies, which is a matter of administrative competence and discretion.” *Stahl v. University of Washington*, 39 Wn App. 50, 55, 691 P.2d 972 (1984).

RCW 34.05.240(1) requires that, for a petition to be heard by a state agency, the Petitioner must show:

¹ See: Prof. Arthur Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law*, 60 Iowa L. Rev. at 805-807 (1975); RCW 34.05.240(1)(d); RCW 34.05.240(7).

- a) That uncertainty necessitating resolution exists;
- b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- c) That the uncertainty adversely affects the petitioner;
- d) That the adverse effect of uncertainty...outweighs any adverse effects on others or the general public...; and
- e) That the petition complies with any additional requirements...of this section.

The Commission may not enter an order that substantially prejudices a necessary party without their consent. RCW 34.05.240(7). Declaratory orders issued by the Commission may be binding or nonbinding depending on the circumstances of the matter. WAC 390-12-250(5). Orders are also not a substitute for a compliance action and are prospective in effect. WAC 390-12-250(8). The Commission will decline to consider a petition for a declaratory order or to issue an order when the petition requests advice regarding a factual situation which has taken place. WAC 390-12-250(9)(a).

III. QUESTIONS PRESENTED

1. Would IFS's proposed provision of *pro bono* legal services to Tim Eyman, or his bankruptcy estate, require IFS to file any reports under the FCPA?

2. Would IFS's proposed provision of *pro bono* legal services to Tim Eyman, or his bankruptcy estate, require IFS to disclose the identity of its donors, the value of its services, its cost of providing services, or any other information?

IV. FINDINGS OF FACT

1. IFS is a charitable nonprofit organization with the stated mission of “promot[ing] and defend[ing] the First Amendment rights to freely speak, assemble, publish, and petition the government through strategic litigation, communication, activism, training, research, and education.”²

2. Following an investigation and referral by the Commission to the Attorney General’s Office, the State of Washington filed a lawsuit against Tim Eyman in March 2017, in Thurston County Superior Court, No. 17-2-01546-34, alleging multiple violations of the FCPA relating to Mr. Eyman’s activities sponsoring and supporting various ballot proposition campaigns. Based on these findings, the Court concluded that Mr. Eyman is a continuing political committee, as defined in RCW 42.17A.005,³ and further enjoined Mr. Eyman from engaging in certain campaign financing activities. Specifically, the Court, in pertinent part, ordered Mr. Eyman to report, in compliance with the FCPA, “any gifts, donations, or any other funds” Mr. Eyman receives “directly or indirectly unless the funds are ...segregated and used only to pay for legal defense...”⁴

3. The Court entered a judgment against Tim Eyman on April 16, 2021, including penalties and injunctive relief sought by the State.⁵ The Court maintained jurisdiction of the matter and authorized the Office of the Attorney General to conduct limited discovery in order to monitor compliance with the terms of the judgment.⁶

² Institute for Free Speech at www.ifs.org, last visited May 27, 2021.

³ Thurston County Superior Court, Case No. 17-2-01546-34, *Court’s Findings of Fact and Conclusions of Law and Injunction*, Conclusion of Law 3.6, February 10, 2021.

⁴ *Id.* Injunction at ¶ 3.

⁵ Thurston County Superior Court, *Judgment Against Tim Eyman, and Tim Eyman WatchDog for Taxpayers, LLC*, April 16, 2021. The Commission takes judicially cognizable notice of the Judgment which is publically available pursuant to RCW 34.05.452(5)(a).

⁶ *Id.* Enforcement at ¶ 1.

4. As of the date of the May 27, 2021, Commission hearing, IFS informs the Commission that a notice of appeal may be contemplated by Mr. Eyman but has not been filed. Both PDC staff and IFS informed the Commission a Motion for Reconsideration was filed with Thurston County Superior Court on April 26, 2021, by current legal counsel for Mr. Eyman, and is under consideration by the Superior Court. IFS represented to the Commission it intends to file a notice of appeal on behalf of Mr. Eyman and represent him *pro bono* during the appeal. IFS has not been formally engaged to represent Mr. Eyman or otherwise provide legal services to him as of the date of the May 27, 2021, hearing.

V. CONCLUSIONS OF LAW

1. IFS petitions the Commission for clarification on whether its provision of *pro bono* legal services to Tim Eyman would require IFS to register or file any reports under the FCPA, or require it to disclose the identity of its donors, or the value and costs of its services. Its Petition further asserts that there is uncertainty whether the *pro bono* legal services proposed here would constitute a reportable in-kind contribution under the FCPA. The Commission reviews the questions presented as they apply to IFS only and does not in this Declaratory Order address the issue of Mr. Eyman's status as a continuing political committee or his personal reporting obligations under the FCPA or the Superior Court's order.

2. When determining reporting obligations, the threshold question is whether the provider of such services itself must report to the PDC. Only after that determination does the PDC reach the question of whether specific services, such as *pro bono* legal services, are

reportable as an in-kind contribution.⁷ Providing legal services to a continuing political committee generally does not independently trigger any registration requirements under the FCPA by the provider of such services. Other conditions must first be met to require registration under the FCPA. IFS would have to itself qualify as either an incidental committee⁸ or political committee⁹ in order to invoke any registration requirement. The facts necessary to resolve these questions are not before the Commission. Similarly, providing legal services to a continuing political committee generally does not require the provider to file any reports with the PDC regarding such activity, unless the provider is already required to report as political committee or incidental committee.¹⁰

3. A reporting requirement for in-kind contributions made by the provider of legal defense services only attaches from a requirement to register with the PDC. Whether those services constitute an in-kind contribution is relevant to the extent that it could be factor into whether registration with the PDC is required.¹¹

A contribution includes “[s]ervices or property or rights furnished at less than their fair market value for the purpose of assisting any candidate or political committee. . . .” RCW 42.17A.005(15). Such an in-kind (non-monetary) contribution may include “professional

⁷ A continuing political committee must register with the PDC and must disclose the contributions it receives as well as its expenditure activity in accordance within certain reporting intervals, as set forth under RCW 42.17A.225, .235, .240, and generally under the FCPA.

⁸ See RCW 42.17A.207. An incidental committee must register if it is a nonprofit organization that expects to make expenditures (including contributions to a political committee) of \$25,000 or more in a year, and has received at least \$10,000 from a single source in a year.

⁹ See RCW 42.17A.205. Expenditure activity may trigger registration as a political committee if sufficient to meet the “Primary Purpose” test. See PDC Interpretation 07-02, available at <https://www.pdc.wa.gov/learn/index-of-interpretations-by-subject/primary-purpose-test-guidelines>.

¹⁰ See RCW 42.17A.240 (requiring registered committees to report expenditure activity). A person not otherwise required to report as a political committee or incidental committee may be required to file reports of independent expenditure activity, but such requirements would not apply to services provided directly to a political committee. RCW 42.17A.255.

¹¹ For example, one criteria for registration as an incidental committee includes whether an entity made expenditures, including contributions to a political committee of \$25,000 or more in a single year. RCW 42.17A.207.

services” for less than full consideration, which are reportable at the fair market value of services. *Id.* Legal services provided *pro bono* for the purpose of supporting or opposing a ballot proposition have been held to be reportable campaign activity. *See State v. Evergreen Freedom Foundation*, 192 Wn.2d 782, 795 (2019) (holding that litigation costs to force an initiative to the ballot constitute a reportable independent expenditure and noting “[t]he contention that litigation support does not qualify as a reportable independent expenditure ignores the express purpose of the FCPA in the context of modern politics.”).

4. IFS states its intent to provide Mr. Eyman legal defense services to defend only Mr. Eyman’s prior alleged misconduct, as found by Thurston County Superior Court, No. 17-2-01546-34. Such services, provided only to Mr. Eyman in his individual capacity on appeal, would not support or oppose any ongoing or prospective election campaign. Consequently, such services would not be reportable as an in-kind contribution by IFS, and would not trigger any registration or reporting requirement for IFS.

5. Legal services provided to Mr. Eyman outside of the appeal of the order and judgment by Thurston County Superior Court, No. 17-2-01546-34, are not contemplated by this Declaratory Order and are not intended to be addressed herein.

6. Legal services provided for the purpose of assisting any continuing political committee registered, or required to be registered by Mr. Eyman, are not contemplated by this Declaratory Order and are not intended to be addressed herein.

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VI. ORDER

Based upon the presentation and submissions of PDC staff and IFS, and upon its own Findings of Fact and Conclusions of Law, the Commission finds the criteria for issuing a declaratory order have been met and at its discretion issues this binding Declaratory Order as follows:

1. *Pro bono* legal services provided prospectively by IFS to Mr. Eyman individually or to his bankruptcy estate, for the limited purpose of pursuing an appeal of the court order and judgment against Mr. Eyman in Thurston County Superior Court, No. 17-2-01546-34, does not require IFS to register or report the identity of its donors, the value of its services, its cost of providing services, or any other information to the PDC under the FCPA for those legal services.

2. The Superior Court has designated Mr. Eyman as a continuing political committee. Whether *Pro bono* legal services provided prospectively to Mr. Eyman in his role as a continuing political committee must be reported is a question reserved for the ongoing jurisdiction of the Superior Court. The Commission declines to interpret the Superior Court's order or to reach issues that remain before the court in active litigation. Whether IFS must register or report may also require additional analysis under RCW 42.17A.205, RCW 42.17A.207, and RCW 42.17A.240; that information is not before the Commission. Under these circumstances, the Commission is unable to issue a binding Declaratory Order absolving IFS from any and all future FCPA registration or reporting requirements in relation to representing Mr. Eyman in his role as a continuing political committee.

3. Mr. Eyman is not a party to this Petition and this Order should not be construed to address in any way his personal responsibility to report campaign contributions as required by the Superior Court or the FCPA.

4. This Order is effective prospectively from the date issued.

WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION

FOR THE COMMISSION:



Fred Jarrett,
Chair, Public Disclosure Commission

Copy of this Order mailed and/or emailed to:

Del Kolde, Attorney, Institute for Free Speech; (dkolde@ifs.org)

Sean Flynn, General Counsel (sean.flynn@pdc.wa.gov);

Chad Standifer, Assistant Attorney General, Counsel for PDC Staff (ChadS@atg.wa.gov).

I, Jana Greer, AO, certify that I mailed and/or emailed a copy of this order to the
Petitioner at his/her respective address postage pre-paid on the date stated herein.

Jana Greer 06/09/21

NOTICE: RECONSIDERATION

Pursuant to the provisions of RCW 34.05.240(8) and WAC 390-37-150, you may file a Petition for Reconsideration with the PDC within ten (10) days from the date this Declaratory Order is served upon you. Any Request for reconsideration must state the specific grounds for the relief requested. Petitions must be electronically mailed to the Washington State Public Disclosure Commission, 711 Capitol Way, Room 206, Box 40908, Olympia WA 98504-0908, pdc@pdc.wa.gov.

NOTICE: PETITION FOR JUDICIAL REVIEW

You have the right to appeal this Declaratory Order to Superior Court, pursuant to the Petition for Judicial Review provisions of RCW 34.05.542. Any Petition for Judicial Review of this Declaratory Order must be filed with the court and also served upon both the Commission and the

Office of the Attorney general within thirty (30) days after the date this Declaratory Order is served upon you.