Public Disclosure Commission
711 Capital Way
Room 206
Olympia, WA 98504

May 8, 2023

Dear Commissioners:

The Commission is currently considering the changes to the agency guidance on the use of surplus campaign money received for an office other than the one currently sought. The Commission is specifically considering whether or not the transfers, where require approval from the persons who gave the original contribution, are subject to individual contribution limits and disclosure rules, or if they can be transferred as a lump sum.

The Commission has invited public comment on two options. Option 1, the current guidance, permits lump sum transfers without attribution to sources. Option 2 would require attribution to sources, thus subjecting the transferred funds to disclosure rules and contribution limits.

For the reasons outlined below and previously in my petition for a declaratory order regarding this issue, the Commission should adopt Option 2. I would ask the Commission to take quick action on the issue as candidates have begun declaring for office and will likely continue to do so; these candidates deserve clarity and Washington voters deserve transparency. Both can be achieve if, during the May 11, 2023 special meeting, the Commission adopts Option 2 and directs Commission staff to draft new guidance.

Washington voters intentionally put in place a transparent campaign finance structure in 1972. As it relates to candidates for public office, the structure includes two interrelated requirements. First, it requires that candidates disclose the source and amount of contributions they receive. Second, it places limits on the amount any single contributor can contribute to any given candidate campaign.

These two requirements work in tandem. Without the disclosure rules, it would be difficult or impossible for voters to learn about candidates' funding. Without the contribution limits, voters may be left without a meaningful way to financially support candidates they like (or oppose candidates they dislike).

Together, these two requirments form the foundation of Washington's strong, and typically effective, campaign finance structure.

During electoral campaigns, candidates sometimes collect more contributions than necessary for the purposes of that campaign. RCW 42.17A.430 permits candidates and committees to dispose of and use these surplus campaign funds in certain ways. Candidates can give the funds to charitable organizations, political parties and caucus political committees, or the state. The can be used to reimburse certain candidate expenses. They can also be held for use in a future campaign for the same office. The statute describing the use of surplus funds does not permit candidates to use those funds for campaigns for a different office

RCW 42.17A.490, titled as a "prohibition on use of contributions for a different office," describes the process candidates must use if they wish to apply surplus funds from a past campaign to a new campaign for a different office. The requires that candidates get approval from the persons who contributed to the first campaign prior to transferring the funds to the second campaign. This approval must be in writing. As a result of these written approvals, candidates know and have records of the exact contributors who have approved transfers and the amounts of their contributions. Without the approval of the contributor, the candidate may not use the funds and the funds must be disposed of pursuant to RCW 42.17A.430.

The reasoning underlying the approval requirement is sound and supports voter intent. Without it, a candidate could transfer funds with or without the contributors knowledge or approval. Absent knowledge and approval, some unreasonable situations could arise. For example, without the approval requirement sitting legislator running against an incumbent for Insurance Commissioner (or any other state office) could use surplus funds from past legislative campaigns in the new campaign, even where an individual contributor is a long-time supporter and contributor to the incumbent. In a more ridiculous hypothetical, a current elected official running for an open office could use surplus funds from their past campaigns in the campaign for that open office, even if the contributor of those surplus funds is also running for the open office. The approval requirement ensures that these outcomes do not occur while still allowing candidates to apply funds collected during past campaigns to their new efforts.

While the reasons for the approval requirement exists are sound, the current guidance about these approvals does not mesh well with the rest of the campaign finance structure. The guidance currently permits these contributor-approved surplus funds transfers to take place through a lump sum transfer. That is, candidates can transfer all the funds in a single transaction, without identifying the known true source and amount of the contributions.

These lump sum transfers are analogous to a shell contribution. The known true source is hidden, and the known true amount is hidden. Voters seeking information are entirely unable to learn the actual source of a candidate's funding.

Importantly, the lump sum transfers also allow contributors to skirt or avoid contribution limits and make it all but impossible to determine if and when that has occurred. A contributor could, for example, approve the transfer of a contribution to a campaign for one office and then make a maximum contribution to the new campaign. Because the portion of the lump sum transfer that contributor was responsible for was not apportioned to the contributor, the maximum contribution would still be permitted and the contributor would have effectively contributed more than would otherwise be allowed to the new campaign.

The structure permitted by the current guidance does not comport with the intent of Washington's campaign finance laws. It keeps important information from Washington voters. Much like the refusal by certain commercial advertisers to disclose information about campaign activities, the structure permitted by the current guidance makes it unreasonably difficult or impossible for voters to gather true information. The information kept from voters is core campaign finance information and the same kinds of information Washington voters demanded access to in 1972. Voter and regulator access to that information, and full disclosure of it, is a key part of core campaign finance disclosure goals, like rooting out and discouraging corrupt and malfeasant practices.

As I described in public comments on this issue on April 27, 2023, the issue is not hypothetical. In April, I described the possibility of candidates declaring for different offices in the coming days and weeks. Since then, Governor Inslee has announced that he will not seek reelection and at least one current statewide office-holder has formed and announced an exploratory committee. Others will

presumably follow. Other offices may open up and challengers may declare their intent within the coming weeks.

Candidates for many of these offices are likely to have access to surplus funds from past races for other offices. There is more than $5 million currently in surplus fund accounts, and more than one dozen individuals have greater than $100,000 in surplus fund accounts. More than one hundred individuals have greater than $10,000 in surplus fund accounts.

These funds could, at any time, be moved to new campaigns without the disclosure requirments and contribution limits Washingtonians have demanded and put in place. They could be moved without meaningful transparency Washington voters deserve. And they could be moved without being subject to the contribution limits generally applicable in campaigns. If those funds are moved under the current guidance, it would undermine the structure and intent of Washington's campaign finance system.

I ask that the Commission take quick action to remedy the situation as quickly possible. I ask that the Commission, at the May 11, 2023 special meeting, adopt Option 2 and direct Commission staff to draft new guidance.

While I recognize that my related petition for a declaratory order will not be considered at the May 11, 2023 special meeting, I have attached it to these comments because I believe the legal analysis therein may be valuable to the Commission while considering the issue.

Thank you,

Tallman Trask

PETITION FOR DECLARATORY ORDER

I, Tallman Trask, write seeking a declaratory order to clarify or modify the PDC's interpretation of RCW 42.17A.490, which regulates the use of contributions solicited by a candidate for one campaign in a subsequent campaign for a different office. The PDC has published guidelines on its website related to RCW 42.17A.490 that conflict with the applicable statutes and permit candidates and contributors to circumvent both transparency requirements and contribution limits. *See PDC Guidelines & Restrictions – Using Contributions for a Different Office*, available at https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/using-contributions-different-office. The conflict between the PDC's published guidance and the statutes that guidance purports to interpret contributes to uncertainty about the applicable campaign finance rules. Petitioner seeks clarity on this issue through this petition.

ARGUMENT

RCW 42.17A.490 governs how a candidate may repurpose contributions received in a campaign for one office for use in a campaign for a different office. The PDC's published guidelines misinterpret this statute to allow candidates and their contributors to circumvent campaign reporting requirements and contribution limits. *See PDC Guidelines & Restrictions – Using Contributions for a Different Office.* As those guidelines correctly note, a candidate may not use contributions solicited in a campaign for one office "to seek a different office without first obtaining written approval from the persons or entities who donated the contributions." *Id.*, citing RCW 42.17A.490. When a candidate decides to run for a different office before election day and transfers contributions to the new campaign with donor approval, the PDC recognizes that the transferred campaign contributions each "count against the contributor's limit for the office now being sought." *Id.* But the PDC's guidelines err with respect to contributions transferred to a campaign for a different office in a later election cycle:

> When a candidate transfers contributions left over from a previously completed election campaign to a new campaign for a different office, those contributions . . . are NOT attributed to their sources, nor do they count against the contributor's limit for the new campaign.

Id. (emphasis in original).

This interpretation conflicts with the PDC's reporting requirements and the campaign contribution limits in RCW 42.17A.405(1) and (2) and is not supported by the relevant statutory framework.

I. The PDC's interpretation directly conflicts with the campaign contribution limits in RCW 42.17A.405 and the generally applicable requirements related to the reporting of contributions.

Under RCW 42.17A.405(2), "[n]o person . . . may make contributions to a candidate" that exceed specified limits "for each election in which the candidate is on the ballot or appears as a write-in candidate." This expressly limits how much a person may contribute to any given candidate in each election. The term "contribution" has an expansive meaning under Washington campaign finance law and includes, among other things, "a loan, gift, deposit, subscription,

forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds, or anything of value, including personal and professional services for less than full consideration." RCW 42.17A.005(15)(a).

When a former contributor to a candidate's prior campaign provides the written approval required by RCW 42.17A.490 to transfer their contribution to the candidate's campaign for a different office, that contributor makes a contribution within the meaning of RCW 42.17A.005(15)(a). The contributor's written approval is undoubtedly something "of value," in that absent the written approval of this transfer, the candidate would be unable to use the surplus funds in their new campaign. And the contributor provides this written approval for "less that full consideration," given that they do so without receiving anything in return.

Nevertheless, the PDC interprets RCW 42.17A.490 to allow a candidate and the candidate's contributors to transfer surplus contributions from prior campaigns to the candidate's new campaign without counting those contributions against applicable contribution limits. The PDC also apparently interprets RCW 42.17A.490 to allow campaigns to not report these newly authorized contributions.

II. The PDC interpretation rests on two independent errors of statutory construction.

The PDC apparently bases its interpretation on language in RCW 42.17A.430, the section that sets out the general framework for disposing of surplus funds. The relevant language indicates that "[t]he disposal of surplus funds under this section shall not be considered a contribution for purposes of this chapter." RCW 42.17A.430. The PDC mistakenly construes this language to apply to the transfer and use of surplus contributions solicited in one campaign for a subsequent campaign for a different office under RCW 42.17A.490.

This interpretation rests on two independent errors. First, the transfer of surplus contributions to a candidate's subsequent campaign—whether for the same or a different office—is not "the disposal of surplus funds" under the plain meaning of RCW 42.17A.430. Second, the transfer of those prior surplus contributions to a campaign for a different office is governed by RCW 42.17A.490, not RCW 42.17A.430, and thus cannot qualify as the disposal of funds "under this section."

A. The transfer of funds to a subsequent campaign is not the "disposal of funds"

RCW 42.17A.430 lists several options for disposing of campaign funds. Relevant here, RCW 42.17A.430(6) allows a candidate or candidate committee to:

> Hold the surplus in the depository or depositories designated in accordance with RCW 42.17A.215 for possible use in a future election campaign for the same office last sought by the candidate and report any such disposition in accordance with RCW 42.17A.240.

The disposal of funds referred to in this provision is simply the act of holding surplus contributions for possible future use in a surplus funds account, not the later transfer of those funds to a subsequent campaign. Any doubt around this meaning is foreclosed by the use of the phrase "any such disposition" in reference to the act of holding those surplus funds for future use. Accordingly,

the subsequent transfer and use of surplus contributions in a later campaign does not qualify as the disposal of funds and thus is not subject to the mandate that the funds "not be considered a contribution" under campaign finance rules.[1]

The remaining language in RCW 42.17A.430(6) further indicates that surplus contributions used for a future campaign should be considered contributions to that future campaign. In connection with the use of these surplus contributions, the provision requires a candidate who announces or files for office to report "appropriate information. . . to the commission in accordance with RCW 42.17A.205 through 42.17A.240." By referring here to the several statutes that govern campaign finance reporting, the legislature intended to ensure that any surplus contributions repurposed for the new campaign would be reported as contributions under those statutes. This reference to the broader campaign finance reporting statutes contrasts with the provision's preceding reference requiring that when a candidate decides to hold surplus contributions for possible future use, the candidate must report this disposition under just RCW 42.17A.240. That section describes the required contents of campaign finance reports and calls for reports to include "[t]he disposition made in accordance with RCW 42.17A.430 of any surplus funds. . ." RCW 42.17A.240(11).

The legislature thus distinguished between the simple report of the disposition of any surplus contributions required when a candidate elects to hold them for possible future use and the broader report of "appropriate information" under Washington's campaign finance reporting regime when a candidate announces or files for office and seeks to use those surplus contributions. Among other things, the appropriate information under Washington campaign finance reporting requirements would include "a report of all contributions received," RCW 42.17A.235 (1)(a), along with "the name and address of each person who has made one or more contributions in the reporting period." RCW 42.17A.240. By requiring this more extensive reporting in connection with the subsequent use of surplus contributions the legislature signaled its intent that such contributions be reported by candidates and tracked by the PDC both for the purposes of transparency and to ensure that contributors do not exceed contribution limits.

B. The transfer of surplus contributions to a campaign for a different office is governed by RCW 42.17A.490, not RCW 42.17A.430.

The PDC compounds its misreading of RCW 42.17A.430 by extending it to exempt contributions transferred to a candidate's later campaign for a different office under RCW 42.17A.490 from contribution limits.

That is because RCW 42.17A.430 simply does not apply to this situation. In fact, RCW 42.17A.430 would bar this use of surplus funds. The relevant language in subsection 6 limits the

[1]While not the only possible interpretation of the statute, the use of surplus funds in a future campaign for the *same office* could reasonably be construed to not count against campaign contribution limits applicable to the new campaign because—unlike RCW 42.17A.490—RCW 42.17A.430 does not require any affirmative act by the former contributor to allow the use of past contributions. Under RCW 42.17A.405(2), a contributor may make contributions up to the limit "for each election in which the candidate is on the ballot." Because a former contributor need not take any action to allow the use of a prior contribution in a future campaign for the *same* office, that contributor does not make a contribution to the new campaign under RCW 42.17A.405(2). Indeed, that former contributor will likely not be aware that their contribution went unused in the prior campaign and would have no notice that the contribution was later repurposed for a subsequent campaign for the same office.

use of surplus funds in future campaigns to the candidate's campaign for the *same* office. If RCW 42.17A.430 were the only statute that discussed the use of surplus funds, a candidate simply could not use those funds in a campaign for a different office.

Instead, the use of surplus funds for a different office is governed by RCW 42.17A.490. As noted, this section expressly allows a candidate to use contributions—surplus or not—to further the candidate's campaign for a different office "with the written approval of the contributor." Nothing in RCW 42.17A.490 suggests that funds repurposed for a new campaign with a contributor's written approval should be exempted from campaign contribution limits. The legislature did not include RCW 42.17A.430's exemption from contribution limits in RCW 42.17A.490.

In short, there is no basis for extending RCW 42.17A.430's exemption from contribution limits and reporting requirements for the disposal of surplus funds under that section to cover a use of the funds that the section does not even contemplate.

III. The PDC's interpretation undermines the purposes of the Fair Campaign Practices Act (FCPA).

The FCPA aims "'to ferret out . . . those whose purpose is to influence the political process and subject them to reporting and disclosure requirements of the act in the interest of public information.'" *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wash.2d 470, 480, 166 P.3d 1174 (2007) (alteration in original) (quoting *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wash.2d 503, 508, 546 P.2d 75 (1976)).

RCW 42.17A.001 sets out the animating public policy concerns underlying the FCPA, including:

> (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.
> ....
> (10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

RCW 42.17A.001 further states that "[t]he provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying."

The PDC's strained interpretation of RCW 42.17A.490 runs directly counter to these purposes by concealing the sources of campaign funds that are transferred as surplus from a prior campaign to a new campaign for a different office. According to the PDC's guidelines, "those contributions that are moved to the new campaign are NOT attributed to their sources. . . The funds are simply moved as a lump sum of surplus funds to the new account." *PDC Guidelines & Restrictions – Using Contributions for a Different Office*. The PDC acknowledges that "[t]here might be a succession of transfers to the new account, depending on when the campaign receives the written permission" from the individual contributors. *Id.* In connection with such transfers, the

PDC instructs candidates or candidate committees to limit the information they provide. The PDC directs the candidate to simply note on the C-3 report "that surplus funds from a previous campaign are being deposited into the account with permission from the donors" and instructs candidates to "not send copies of [the permission notices] to the PDC" unless specifically requested. *Id.*

The PDC's treatment of these contributions as simply a lump sum transfer of surplus funds frustrates the fundamental purposes of the FCPA by hiding the sources of these contributions from the public and by allowing candidates and their contributors to circumvent the FCPA's campaign contribution limits. As discussed in detail above, this interpretation of RCW 42.17A.490 is also contrary to the plain meaning of the statute and the broader statutory framework.

IV. A declaratory order to clarify the PDC's interpretation of RCW 42.17A.490 is appropriate here.

Under RCW 34.05.240, a petitioner may seek a declaratory order by showing that: (a) uncertainty necessitating resolution exists; (b) there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion; (c) the uncertainty adversely affects the petitioner; (d) the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and (e) the petition complies with any additional requirements established by the agency.

The Public Disclosure Commission's (PDC) regulations call for a petition for a declaratory order to clearly state the question and provide a statement of the facts which raise the question. See WAC 390-12-250.

A. Uncertainty Necessitating Resolution Exists.

As this petition has laid out in detail, the PDC's published guidance on RCW 42.17A.490 directly conflicts with the relevant statutes. This guidance does not appear to be the product of any formal rulemaking process. The clear conflict between this guidance and the relevant statutory language creates substantial uncertainty about whether contributions transferred from a candidate's prior campaign to a subsequent campaign for a different office with the contributor's written approval count against that contributor's contribution limit for that campaign.

B. There is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion.

As described throughout this petition, there is a clear conflict between the available PDC guidance and the statutory requirements of RCW 42.17A. The conflict creates uncertainty about how the law will be applied. The impacts of this uncertainty are not merely hypothetical, and there is an actual controversy.

Each cycle, Washington candidates use surplus funds gathered while running for one office to fund a campaign for another office. It will occur in 2024. For example, it is widely expected that Attorney General Bob Ferguson and Commissioner of Public Lands Hilary Franz would enter an open gubernatorial contest. Attorney General Ferguson currently has $2,832,430.96 in his surplus funds account. Commissioner of Public Lands Franz has a surplus funds account balance

of $28,568.44. The entirety of these funds were collected while Ferguson and Franz were running for the offices they currently hold. If they enter the gubernatorial race, the current PDC guidelines would allow them to transfer their surplus funds to that race. And it would allow them to do so without directly disclosing the actual source of those funds.

If either Attorney General Ferguson or Commissioner of Public Lands Franz runs for governor, they would almost immediately be able to deposit tens of thousands of dollars in contributions into their new campaign account (or, in the case of Attorney General Ferguson, millions of dollars). They would not have to disclose who has authorized them to use their past contributions for the new campaign. They would not have to disclose the amounts of those past contributions. Their past contributors would not be limited by the generally applicable legal thresholds and, even if they were, there would be no way to identify possible violations.

At the same time, other current elected officials have significant surplus funds accounts that they may, at anytime, chose to apply to a new campaign for a new office. For example, State Representative J.T. Wilcox currently has more than $160,000 in his surplus funds account. More than one dozen current elected officials have over $100,000 in their surplus funds account. More than 100 elected officials each have in excess of $10,000 in their surplus funds accounts. If any of those elected officials were to announce a run for a different office than the one they currently hold, current PDC guidelines would allow them to transfer the entirety of those funds to the new campaign, without full disclosure of the contributors and without any of the contribution limits otherwise applicable.

Rectifying the disagreement between the PDC's guidance and the statutory requirements would clarify the requirements Commissioner of Public Lands Franz, Attorney General Ferguson and other potential candidates face. It would also allow Washington candidates to make decisions without uncertainty about the applicability of the statute and guidance.

C. The uncertainty adversely affects the petitioner.

The uncertainty surrounding the guidance and statutory requirements has an adverse effect on me personally and the public at large. I have previously made campaign contributions in Washington and will make further contributions in the future. I have contributed to candidates with surplus fund accounts and has contributed to candidates who have run for multiple offices. Should any of those candidates whom I have previously contributed to choose to run for another office, the uncertainty described in this petition prevents me from determining the correct contribution thresholds.

The existent PDC guidance may also unreasonably restrict my ability to access accurate campaign finance disclosures. As evidenced by my past appearances before the Commission and efforts to ensure the public has clear, unambiguous access to commercial advertiser data (particularly to the degree that data can be used as a "check" on candidate and committee disclosures), I have an extensive interest in exercising my statutory right to access accurate disclosure data and in publicizing that information to ensure that the public is fully informed about the flow of money within Washington's campaigns and political universe.

D. The adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested.

The effect of the uncertainty on the petitioner outweighs the potential of any adverse effects. The uncertainty prevents petitioner, and others in the same circumstances, from accurately determining their own contribution limits. It makes it difficult or impossible for campaigns, after transferring surplus funds, to determine the size of contributions they can accept. It also makes it impossible to access full and complete contribution data.

The potential adverse effects on others and the general public are, however, limited. Those effects are no more extensive than the impacts of campaign finance disclosure requirements and contribution limits in general.

A declaratory order resolving the uncertainty could *benefit* the general public. The public could more effectively "ferret out" over-the-limit contributions concealed by surplus fund transfers. Full disclosure, including of surplus fund contributors, benefits the public by supporting their "right to know of the financing of political campaigns." The current uncertainty may prevent members of the public from accessing the information they have a right to access. That interest "far outweighs any right that these matters remain secret and private."

The general public in Washington has a right to access accurate disclosures of campaign contributions and financial information. The current surplus funds guidance may prevent the public from accessing the full scope of information, even the full scope of information known to candidates and contributors. The ability to hide contributor information and side-step contribution limits through surplus fund transfers undermines the goals of Washington's campaign finance structure. It limits the voter-approved and demanded transparency, transparency which is a necessary component of public trust in campaigns and the political system. The transparent disclosures we require for advertisers and generally require for candidates should not be limited in circumstances of surplus fund transfers. To do so permits a closed, hidden structure long disallowed in Washington politics.

E. The petition complies with the PDC's requirements.

This petition has provided a clear statement of the question and the facts that raise the question as WAC 390-12-250 requires.

For the foregoing reasons, petitioner requests that the PDC issue a declaratory order clarifying that contributions transferred from a candidate's prior campaign to a subsequent campaign for a different office under RCW 42.17A.490 count against the contributor's contribution limits for that subsequent campaign, and must be reported as new contributions to that campaign. This clarification is necessary to ensure that the PDC's guidance on RCW 42.17A.490 comports with the relevant statutory language and furthers the purposes of the FCPA.