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

9 In re the Matter of Enforcement Action
10 Against:

11 FEDEX CORPORATION,

12 Respondent.

PDC CASE No. 60811

PDC STAFF'S PENALTY BRIEF

13 **I. INTRODUCTION**

14 The Public Disclosure Commission Staff (PDC Staff), through their undersigned counsel,
15 files this brief on the penalty to be issued in this matter. As found in the Order on Summary
16 Judgment issued on January 31, 2022 (Order), FedEx, a commercial advertiser, failed to
17 promptly respond to a citizen's request for information as required by relevant statutes and
18 regulations. With respect to three requests, FedEx's responses came 34, 26 and 155 days after
19 the requests were made, and required significant intervention by PDC Staff. Based on the facts
20 of this matter, including the applicable aggravating and mitigating factors discussed herein,
21 PDC Staff respectfully request that the Commission order FedEx to pay a penalty of up to
22 \$30,000 for FedEx's violations of Washington law.

23 **II. LEGAL AUTHORITY AND ARGUMENT**

24 **A. FedEx Should Be Ordered to Pay a Penalty of Up to \$10,000 Per Violation**

25 Pursuant to RCW 42.17A.755(3)(b), the Commission may impose a penalty of up to
26 \$10,000 per violation. In determining an appropriate penalty, the Commission may look to the

1 penalty factors set forth in WAC 390-37-182. First-time violators of RCW 42.17A.345 and
2 WAC 390-18-050 may be penalized up to \$600 per violation. *See* WAC 390-37-182. Such a
3 penalty, however, may be increased up to the statutory maximum of \$10,000 per violation, based
4 on the aggravating factors set forth in rule. WAC 390-37-182(5).

5 It is an aggravating factor that FedEx is a sophisticated and well-financed company with
6 ample resources to ensure compliance with Washington law. WAC 390-37-182(3)(c). Likewise,
7 it is an aggravating factor that the public was deprived of timely information during a time-
8 sensitive period, specifically the period leading up to the November 2019 general election. WAC
9 390-37-182(3)(b). Notably, FedEx continues to promote itself to the public as selling printing
10 and direct mailing services; in fact, it specifically markets these services to be used *for the*
11 *purpose of political advertising*.¹ It has every right to offer such services. But FedEx’s refusal to
12 acknowledge its corresponding obligations under RCW 42.17A may lead to future citizen
13 complaints, should it continue to evade or equivocate concerning its legal obligations. Further,
14 FedEx has not shown a “demonstrated wish to acknowledge and take responsibility for the
15 violation”, which would be a mitigating factor. WAC 390-37-182(3)(n). In fact, their conduct
16 has indicated the opposite inclination.

17 It may be a mitigating factor that Respondent has not previously been found to have
18 violated RCW 42.17A or WAC 390. *See* WAC 390-37-182(3)(a) (discussing the
19 “[s]ophistication of respondent or the financing, staffing, or size of the respondent's campaign
20 or organization”). As discussed in the Order, it may likewise be a mitigating factor that, during
21 the delay in producing the documents requested, FedEx was engaged in a dialogue with
22 PDC Staff concerning its responsibilities as a commercial advertiser, and appears to have been
23 at least attempting to locate the requested documents. *See* WAC 390-37-182(3)(n) (discussing a
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25 ¹ On its website, FedEx prominently displays that one may use its printing and mailing services to “build
26 community support for your candidate with an eye-catching yard sign, printed flyers, posters, and targeted direct
mail.” *See* <https://www.fedex.com/en-us/printing/online-printing/campaign-signs-posters.html> (last viewed on
February 16, 2022).

Respondent's good faith efforts to comply, "including consultation with PDC Staff prior to initiation of enforcement action . . ."). Nevertheless, it is apparent that FedEx had not put in place any policies or procedures allowing for it to promptly respond to citizen requests for information. This may indicate "systematic or ongoing problems" with FedEx, an aggravating factor under WAC 390-37-182(3)(a). Given FedEx's sophistication and the fact that the commercial advertiser provisions have codified in law for fifty years, FedEx's oversight may also factor into the Commission's penalty determination.

In summary, three separate citizen requests for information were made, each of which was not responded to in a timely fashion, as detailed above. Conservatively, FedEx's failure to timely respond amounts to at least three separate violations of RCW 42.17A.345 and WAC 390-18-050. Therefore, based on the aggravating factors discussed herein, PDC Staff recommend that FedEx be penalized up to \$10,000 for each of these violations. RCW 42.17A.755(3)(c) authorizes the Commission to suspend a portion of a civil penalty contingent upon future compliance. Such suspended penalty may serve as a deterrent against future violations of the law, but are entirely within the Commission's discretion.

B. There Are No Factually Similar Cases to the Present Case

The Commission may consider "[p]enalties imposed in factually similar cases." WAC 390-37-182(3)(o). Since complaints against commercial advertisers are infrequent, PDC Staff were unable to locate a factually similar matter to the present case. However, during oral argument on PDC Staff's summary judgment motion, FedEx counsel referenced a prior enforcement matter relating to the Olympian, a small local newspaper based in Olympia, Washington.² While that matter involved the Olympian's responsibilities as a commercial advertiser, that is where its similarities with the present case end.

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² See <https://www.theolympian.com>.

1 In PDC Case No. 47514, PDC Staff found that the Olympian published political
2 advertisements for the campaign of Linda Oosterman (a candidate for Public Utility Commission
3 in Thurston County) in October of 2018. The complainant made a single request for records to
4 the Olympian relating to those ads, but failed to fully identify the records sought prior to
5 February 12, 2019, well after the election had taken place. Importantly, the Olympian *accepted*
6 *its obligations* as a commercial advertiser and provided the requested records on April 22, 2019.
7 The complaint related to a single request, and ultimately information was provided for three
8 expenditures totaling only \$1,920. PDC Staff dismissed PDC Case No. 47514, while issuing a
9 reminder to the Olympian concerning the importance of making commercial advertiser
10 documents and books of account open for public inspection. *See*
11 <https://www.pdc.wa.gov/browse/cases/47514>.

12 PDC Case No. 47514 offers no guidance here. In marked contrast to the facts in the
13 Olympian matter, FedEx, a large, sophisticated, international corporation, has failed to
14 acknowledge its responsibilities under the Fair Campaign Practices Act, and failed to promptly
15 respond to *multiple* requests. Moreover, FedEx's responses on average were far less timely than
16 the Olympian's response, and ultimately FedEx responded only at the prompting of PDC Staff.
17 Given the factual dissimilarity with PDC Case No. 47514, it is entirely appropriate for FedEx to
18 be penalized for its multiple violations of Washington law.

19 III. CONCLUSION

20 Based on facts established in Order on Summary Judgment, FedEx was a commercial
21 advertiser, and violated RCW 42.17A.345 and WAC 390-18-050 by failing to promptly respond

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1 to a citizen's lawful requests. For the reasons discussed herein, PDC Staff respectfully request
2 that FedEx be ordered to pay a penalty up to \$10,000 per violation.

3 DATED this 18th day of February, 2022.

4 ROBERT W. FERGUSON
5 Attorney General

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1 **PROOF OF SERVICE**

2 I certify that I arranged for service a true and correct copy of this document for delivery
3 on all parties or their counsel of record on the date below as follows:

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9 I declare under penalty of perjury under the laws of the state of Washington that the
10 foregoing is true and correct.

11 DATED this 18th day of February, 2022, at Olympia, Washington.

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13 Shayla Staggers
14 SHAYLA STAGGERS
15 Legal Assistant
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