

January 20, 2021

Alice Fiman
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504-0908

Via email

PDC Case No. 82523
Freedom Foundation response to complaint

Ms. Fiman,

The Freedom Foundation (“the Foundation”) is in receipt of the December 11, 2020 complaint submitted to the Public Disclosure Commission (PDC) by Peter Starzynski of the Northwest Accountability Project (NAP) alleging the Foundation has violated several provisions of Washington’s Fair Campaign Practices Act (FCPA), Chapter 42.17A RCW. Pursuant to your email of December 29, 2020, the Freedom Foundation submits the following reply to these allegations.

Allegation 1: Political committee

NAP’s complaint is now the fourth time the Freedom Foundation has been baselessly accused of operating as a political committee without reporting as one to the PDC. In each prior case, the PDC and/or Attorney General’s Office (AGO) determined the Freedom Foundation did not qualify as a political committee, and the PDC should conclude the same again.

- In response to a February 2015 complaint against the Foundation by the “Committee for Transparency in Elections,” the AGO concluded that the Foundation’s activity “did not create a registration and reporting responsibility” as a political committee.¹
- In August 2016, the “Campaign to Prevent Fraud and Protect Seniors” alleged the Foundation should be considered a political committee due to its opposition to I-1501, but the PDC staff’s investigation concluded that the “Foundation’s goals are essentially non-electoral in nature” and recommended “that the Commission recommend no action by the Attorney General concerning the allegation that the Freedom Foundation failed to register and report as a political committee...”²

¹ Linda Dalton. Letter to Dmitri Iglitzin and Mark Lamb. Attorney General of Washington. October 14, 2015. https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2015/Letter-20151014-CitActionNot%20%282%29.pdf

² Executive Summary and Staff Analysis. PDC Case No. 8336. <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1659/Freedom%20Foundation%20Executive%20Summary%208336.pdf>

- In January 2017, NAP filed its first complaint alleging the Foundation had violated the FCPA by not registering as a political committee, but the PDC’s staff investigation found “there is no apparent violation concerning the allegation that the Freedom Foundation failed to register and report as a political committee...”³

NAP’s renewed allegations in the present complaint are similarly baseless.

The Foundation is a nonprofit organized under 26 U.S.C. § 501(c)(3). As such, it is statutorily prohibited from “participat[ing] in, or interven[ing] in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office,” and it does not do so. However, the statute does permit 501(c)(3) nonprofits to attempt to “influence legislation,” provided such attempts do not constitute a “substantial part” of the organization’s activities.

RCW 42.17A.005(41) defines “political committee” as,

“...any person (except a candidate or an individual dealing with the candidate's or individual's own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.”

Thus, the definition creates two prongs under which a person can become a political committee: the receiver of contributions prong and the maker of expenditures prong.

While NAP’s discussion of the caselaw surrounding and interpreting the FCPA’s definition of “political committee” is both generally sound and eerily familiar,⁴ NAP’s complaint furnishes no evidence that the Foundation received *any* contributions or made *any* expenditures in support of or in opposition to candidates for state or local office or state or local ballot measures in Washington.

Receiver of contributions

The Foundation categorically does not receive “contributions” for the purposes of the FCPA. A contribution must be “in support of, or opposition to, any candidate” before an entity becomes a political committee.⁵ As a 501(c)(3) non-profit, the Foundation does not solicit donations for the purpose of electoral political activity, and donors to non-profits like the Foundation know that nothing will be spent for or against candidates on penalty of losing tax-exempt (and tax deductible) status.

³ Phil Stutzman. Memorandum re: 45-Day Citizen Action Complaint, The Freedom Foundation. Public Disclosure Commission. Case No. 14633. <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1482/Freedom%20Foundation%2014633%20Combined%20File.pdf>

⁴ See PDC Case No. 43940. <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/2065/43940%20Amalgamated%20Transit%20Union%20Legislative%20Council%20of%20WA%20Complaint.pdf>

⁵ See RCW 42.17A.005(41).

NAP cites several pieces of Foundation fundraising materials⁶ to support its contention that “any contributions [the Foundation] receives are being made in expectation of furthering the organization’s stated political goals,” but this is an incorrect summary of the Foundation’s purpose.⁷

Since its founding in 1991, the Foundation’s mission has been to “promote individual liberty, free enterprise, and limited, accountable government.” This mission statement appears on the Foundation’s website,⁸ on its tax returns⁹ and even on the Foundation’s publications and materials referenced by NAP as Exhibits A, E and G. Within the scope of this broad mission statement, the Foundation has focused its efforts on various policy areas over the course of its existence.

The fundraising materials cited by NAP highlight the Foundation’s main priority in recent years, namely, reforming and holding public-sector unions accountable through projects like conducting educational outreach to public employees about their right to cease the deduction of union dues from their wages and public interest litigation to defend the rights of public employees and taxpayers from unions.

Nothing in any of the fundraising materials cited by NAP states or suggests that contributions to the Foundation will be used to make expenditures in support of or opposition to candidates or ballot propositions. To the extent the materials include any passing references to elections, they are to the presidential election, which is outside the jurisdiction of the FCPA and the PDC.¹⁰ And even then, the materials do not even reference specific candidates or political parties.

Maker of expenditures

The Freedom Foundation does not make expenditures, as defined by RCW 42.17A.005(22), involving candidates and has not made expenditures in support of or opposition to a ballot measure since 2016. Unlike many of NAP’s union funders, which actually expend tens of thousands of dollars on direct political contributions to candidates, the Foundation has never in its 30-year history contributed one penny as a direct contribution to a political candidate. To be a political committee under the expenditures prong, the entity must have spent at least *something* in support of or opposition to a political candidate. The Foundation simply never has.

Nonetheless, NAP asserts without justification or explanation that the mere fact that some Foundation materials include generically political language means that “the stated goals and mission of Freedom Foundation would be substantially achieved by a favorable outcome in an upcoming election.” This would fall far short of establishing the Foundation’s status as a political committee even if the Foundation actually supported or opposed political candidates, which it does not.

⁶ See Exhibits A, B, C, D and E of NAP’s complaint.

⁷ Even if the Foundation’s purpose could be described as “political,” that is different from actually advocating for or against political candidates.

⁸ See <https://www.freedomfoundation.com/about/>

⁹ See https://apps.irs.gov/pub/epostcard/cor/943136961_201812_990_2020013117093344.pdf

¹⁰ RCW 42.17A.200 provides, “The provisions of this chapter relating to the financing of election campaigns shall apply in all election campaigns other than... for a federal elective office...”

Washington courts have held that a person can only become a political committee under the maker of expenditures prong of the definition of “political committee” if affecting, “directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions” is one of their primary purposes. *See State of Washington v. Dan J. Evans Campaign Committee*, 86 Wn.2d 503, 546 P.2d 75 (1976), *Utter ex rel. State of Washington v. Building Industry Ass’ of Washington*, 182 Wn.2d 398, 341 P.3d 953 (2015), and *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass’n*, 111 Wn. App. 586 (2002).

The PDC has distilled and elaborated on this “primary purpose” case law in Interpretation No. 07-02, which explains that, when evaluating whether “an organization’s expenditure activity rises to the level of becoming a political committee,” the PDC will seek to “[measure] the campaign spending activity of the organization in relation to its other priorities.” For an organization seeking to “[evaluate] whether their election spending activities require registration as a political committee,” the interpretation advises that the organization “assess whether it uses over 30 percent of its general treasury budget or resources on spending in election campaigns as an initial indication whether the election activity may be a primary purpose of the organization.”¹¹

The 30 percent threshold is admittedly more of a guideline than an ironclad rule; an organization can become a political committee at both lower and higher thresholds. For instance, WAC 390-16-049(2)(b)(ii) provides that an out-of-state political committee with limited reporting requirements becomes a full-fledged political committee with full reporting obligations if more than 20 percent of its expenditures at any point in a calendar year are for supporting or opposing candidates or ballot measures in Washington state. On the other hand, in one recent case the PDC determined that a union which spent tens of thousands of dollars and *nearly half* of its annual budget supporting and opposing Washington candidates and ballot measures in some years was, nevertheless, *not* a political committee.¹²

In this case, NAP has not shown that even a single dime of the Foundation’s multi-million-dollar annual budget has been spent on electoral political activity. It simply cannot be concluded that the Foundation is a political committee.

Allegation 2: Electioneering communications

NAP accuses the Foundation of failing to disclose four specific communications¹³ in violation of RCW 42.17A.305, which requires that payments for “electioneering communications” be reported to the PDC “within twenty-four hours of, or on the first working day after, the date the electioneering communication is broadcast, transmitted, mailed, erected, distributed, digitally or otherwise, or otherwise published.”

However, none of the examples cited by NAP qualify as “electioneering communications,” defined by RCW 42.17A.005(21) as:

¹¹ Public Disclosure Commission Interpretation No. 07-02. Revised July 23, 2020.

<https://www.pdc.wa.gov/learn/index-of-interpretations-by-subject/primary-purpose-test-guidelines>

¹² PDC Case No. 43940. <https://www.pdc.wa.gov/browse/cases/43940>

¹³ *See* Exhibits F, G, H and I of NAP’s complaint.

“(a) ... any broadcast, cable, or satellite television, radio transmission, digital communication, United States postal service mailing, billboard, newspaper, or periodical that:

- (i) Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate’s name;
- (ii) Is broadcast, transmitted electronically or by other means, mailed, erected, distributed, or otherwise published within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election; and
- (iii) Either alone, or in combination with one or more communications identifying the candidate by the same sponsor during the sixty days before an election, has a fair market value or cost of one thousand dollars or more.”

One of the examples does not even mention any political candidate. Two others are taken from the Foundation’s regularly scheduled *Living Liberty* publication, and thus exempt by definition. The only conceivable example is a Foundation fundraising letter to existing supporters, which at most mentions the governor in the context of a time-sensitive issue, namely, the state’s response to COVID-19.

In alleging the Foundation communications at issue were “electioneering communications,” NAP’s analysis is too narrow. The definition does not exist in isolation and must be interpreted in the context of the whole purposes of the FCPA.

A more holistic analysis of the FCPA suggests that, to be considered an “electioneering communication,” a communication must advocate for or against a candidate or ballot measure.

While the FCPA defines “electioneering communications” and “political advertising” separately, the statute suggests that “electioneering communications” are or can be a type of “political advertising.”

RCW 42.17A.005(40) defines “political advertising” as “any... means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.”

RCW 42.17A.320(2) refers specifically to, “political advertising undertaken as an... electioneering communication,” recognizing specifically that, at least in some instances, electioneering communication is a subtype of political advertisement.

Further, RCW 42.17A.005(10) defines “commercial advertiser” as,

“...any person that sells the service of communicating messages or producing material for broadcast or distribution to the general public or segments of the general public whether through brochures, fliers, newspapers, magazines, television, radio, billboards, direct mail advertising, printing, paid internet or digital communications, or any other means of mass communications used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign.”

RCW 42.17A.345 further requires “[e]ach commercial advertiser who has accepted or provided political advertising *or electioneering communications*” to “maintain current books of account and related materials...” The most plausible reading of this statute is that a person can become a “commercial advertiser” merely on the basis of accepting or providing electioneering communications and, since a person by definition can only become a “commercial advertiser” by selling or producing material seeking “votes or... financial or other support” in an election, electioneering communications must also involve “appealing for votes” or “financial or other support” in an election.

Finally, electioneering communications are to be disclosed to the PDC on Forms C-6.¹⁴ Item No. 3 on the PDC’s C-6 form requires the filer to provide the “list of candidate(s) or ballot proposition(s) identified in the advertising” and to indicate whether the electioneering communication was to “support” or “oppose” the candidate or ballot proposition.

In this case, however, the Foundation documents cited by NAP do not “support” or “oppose” any candidate. While Gov. Jay Inslee is referenced in some of the documents, they only discuss certain of his actions and various policies of his administration. Nowhere do the documents urge the public to “support” or “oppose” his candidacy, which is nowhere referenced.

Were the definition of “electioneering communications” *not* limited by the inclusion of some kind of a support or oppose message, absurdity would result.

Without such a limitation, any communication merely mentioning a candidate’s name in the context of a neutral, fact-based context within 60 days of an election could be considered an “electioneering communication.” For instance, relying singularly on the definition in RCW 42.17A.005(21), a legal brief would be considered an “electioneering communication” if it was served on the parties via email (making it a “digital communication” that was “transmitted electronically”), named Gov. Jay Inslee as a party or even mentioned him in the text (thus “clearly identifying” him), and cost more than \$1,000 worth of an attorney’s time to prepare.

Once designated as an “electioneering communication,” the first page of the offending brief would then be obligated by RCW 42.17A.320 to, in text of “at least ten-point type” “set apart from any other printed matter,” “clearly identify” the governor’s political party preference and include the statement, “No candidate authorized this ad. It is paid for by (name, address, city, state).”

Applied to the Foundation’s documents at issue here, which do not support or oppose the governor’s candidacy, inclusion of these mandatory statements would have the rather ironic effect of making the documents falsely appear as though they were intended to promote a particular electoral result.

The Foundation’s communications were directed internally to its supporters, not distributed to the general public.

RCW 42.17A.005(21)(b)(vii) excludes from the definition of “electioneering communication,”

¹⁴ See WAC 390-16-060.

“[a]n internal political communication primarily limited to the members of or contributors to a political party organization or political or incidental committee, or to the officers, management staff, or stockholders of a corporation or similar enterprise, or to the members of a labor organization or other membership organization...”

The exemption suggests the Legislature’s intent in requiring disclosure of electioneering communications was to capture communications directed to the general public, not to ensnare internal communications directed by a group like the Foundation to its supporters.

The Foundation does not appear to fit squarely within the exemption’s terms as it is not a political party, political committee, corporation, labor organization, or membership organization,¹⁵ and a fair reading of the exhibits in NAP’s complaint shows none are “political communications.” It would make little sense to exempt from any and all disclosure requirements explicitly political communications containing organizational endorsements, for instance, while holding that non-political communications containing only passing references to a single government official must be subject to the disclaimer and disclosure requirements of “electioneering communications.”

Exhibit F

The first “communication” cited by NAP is a ticketed, livestream event held for Foundation supporters on October 9, 2020 featuring Sarah Huckabee-Sanders. The only “broadcast” of the event is a short excerpt on the Foundation’s website which does not mention any candidate.¹⁶ Given the COVID-19 restrictions, the Foundation had to permit its supporters to attend virtually. Doing so did not convert an event into an electioneering communication. In addition, while various speakers and certain video clips shown during the approximately 47-minute livestream referenced Gov. Inslee, they did not support or oppose his candidacy. Video of the event was broadcast only to Foundation supporters who purchased tickets; it was not posted online or distributed to the general public.

Exhibit G

NAP cites as an alleged electioneering communication a September 2020 Foundation fundraising letter asking for donations. It contained several references to Gov. Jay Inslee, who was not the subject of the letter; references to him were incidental. The letter did not mention that Gov. Inslee was a candidate for re-election, did not include a picture of Inslee, did not mention Inslee’s political opponent, and did not suggest that people support or oppose his campaign. Of the more than 1,700 words in the letter, only eight (0.5%) were references to Gov. Inslee.

The main point of the letter was that Gov. Inslee’s administration was attributing certain deaths to COVID-19 that had nothing to do with the virus, such as victims of gunshot wounds. The Foundation’s non-profit mission statement to advance “limited, accountable government”

¹⁵ Supporters of the Foundation contribute as they see fit; they do not pay dues.

¹⁶ See Ashley Varner. “Freedom Foundation shares special evening with Sarah Huckabee Sanders.” The Freedom Foundation. October 14, 2020. <https://www.freedomfoundation.com/events/freedom-foundation-shares-special-evening-with-sarah-huckabee-sanders/>

squarely includes state actions. The timing of the letter was not related to any election, but to the ever-changing state government response to COVID-19. Including these types of communications within the statute as “electioneering communications” would be vastly overbroad.

No entity in Washington State should have to be so aware of campaign election law that it should know that *any* mention of an elected official within 60 days of an election, even directed to persons wholly disinterested in an election and lacking any mention of an election or candidacy, could trigger reporting of the communication and disclosure of its value. Such communications in the non-political arena are numerous, and the FCPA was not intended, and should not be interpreted, to apply so broadly.

Exhibits H and I

In addition to the letter above, NAP alleges that two articles in *Living Liberty* qualify as electioneering communications. This is incorrect, as both articles are statutorily exempted from the definition of “electioneering communication.”

Living Liberty is a newspaper-style publication of the Foundation that has been in circulation for most, if not all, of the Foundation’s 30-year history. The publication includes news and commentary about current events related to the Foundation’s work and mission. It is sent to any person who contributes at least \$25 per year to the Foundation.

Because *Living Liberty* is a “regularly scheduled news medium” that is “of interest to the public,” part of the Foundation’s “business”, and not controlled by a candidate or political committee, the articles from the September and November 2020 editions of *Living Liberty* identified by NAP as Exhibits H and I qualify for the exception from “electioneering communications” specified in RCW 42.17A.005(21)(b)(iii). Further, the November 2020 edition was mailed on November 4, 2020, one day after the 2020 general election, and not “published within sixty days before any election” as required by the definition of “electioneering communication.”¹⁷

It is also worth pointing out that, while NAP states the article labeled Exhibit I in its complaint “elaborates on Freedom Foundation’s claim that Governor Inslee’s order to shut down waterparks, but not state parks, was politically motivated and hypocritical,” in fact it does nothing of the kind. It contains no discussion of waterparks, or even of COVID-19, at all. A single, offhand reference to “Inslee” appears once in the article and is but one of 903 words (0.1 %) on that particular page of the 12-page publication.

Even if the Foundation distributed electioneering communications, which it did not, it would not have to disclose its top five contributors.

NAP’s complaint alleges that the Foundation’s purported electioneering communications violated RCW 42.17A.320(2)(b) by failing to list the Foundation’s top five contributors. However, the requirement to disclose the sponsor’s top five contributors on an electioneering

¹⁷ RCW 42.17A.005(21).

communication only applies if the sponsor is a political committee. As explained above, the non-profit Foundation is not a political committee under the FCPA. Accordingly, even if the PDC concludes that some of the Foundation's communications were "electioneering communications," the Foundation would have had no obligation to identify its top five contributors on the communications.

The PDC should dismiss NAP's complaint or, in the alternative, resolve it with a warning letter.

For the reasons stated above, the Foundation believes the most appropriate resolution of NAP's complaint is dismissal by the PDC as "obviously unfounded or frivolous" under WAC 390-37-060(1)(a).

If, however, the PDC concludes that some violation occurred, the Foundation believes it would constitute at most a "minor violation," defined by WAC 390-37-061(2) as one that occurs, "[w]hen required information is not timely disclosed, but the public is not deprived of critical information" or "[w]hen any other violation of chapter 42.17A RCW has occurred that does not materially affect the public interest."

Each of the Foundation communications alleged by NAP to be "electioneering communications" clearly and abundantly identified the Foundation as the sender, and each was paid for using the Foundation's general treasury funds. Accordingly, even if these communications qualified as "electioneering communications," under RCW 42.17A.305(1)(b)(i) the Foundation would have merely had to disclose that it paid for the communications, a fact that would have been quite obvious to the recipients and anyone else exposed to the communications.

Further, in the 2020 gubernatorial election, Gov. Inslee received \$8.2 million¹⁸ in campaign support and his opponent, Loren Culp, received \$3.3 million.¹⁹ Gov. Inslee bested Mr. Culp by 13.4 percentage points and 545,000 votes.²⁰ The effect of a failure to disclose the alleged electioneering communications — which were minimally distributed at very little cost, did not support or oppose either candidate, and were unmistakably sponsored by the Foundation — would have been immeasurably infinitesimal.

Under no circumstances can it reasonably be concluded that the Foundation deprived the public of critical information or otherwise affected the public interest in any material way. Accordingly, in the event the PDC concludes a minor violation occurred, the Foundation requests that the PDC resolve the matter with a "formal written warning" pursuant to WAC 390-37-060(1)(d).

Sincerely,



¹⁸ See https://www.pdc.wa.gov/browse/campaign-explorer/candidate?filer_id=INSLJ%20%20110&election_year=2020

¹⁹ See https://www.pdc.wa.gov/browse/campaign-explorer/candidate?filer_id=CULPL--166&election_year=2020

²⁰ See <https://results.vote.wa.gov/results/20201103/governor.html>

Maxford Nelsen
Director of Labor Policy
Freedom Foundation
P.O. Box 552, Olympia, WA 98507
(360) 956-3482
MNelsen@FreedomFoundation.com