

BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

In re:
INSTITUTE FOR FREE SPEECH,
Petitioner.

No: _____

VERIFIED PETITION FOR
EXPEDITED DECLARATORY
ORDER

The Institute for Free Speech (“IFS”), a nonprofit, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code, petitions the Public Disclosure Commission (“Commission” or “PDC”) for a binding declaratory order, under RCW 34.05.240 and WAC 390-12-250, to resolve present uncertainty regarding application of Washington’s Fair Campaign Practices Act (FCPA) to the provision of *pro bono* legal services. IFS proposes to provide *pro bono* legal services on appeal to tax-activist Tim Eyman, who is currently involved in litigation with the State of Washington (“State”) over allegations that he violated the FCPA. That litigation, which has been pending in Thurston County Superior Court, is drawing to a close at the trial-court level. IFS intends to represent Mr. Eyman on appeal. To date, IFS has not represented Mr. Eyman, so the petition for declaratory order is prospective in nature.

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?

REQUESTED DECLARATORY ORDER

Specifically, IFS requests a declaratory order that its provision of *pro bono* legal services to Mr. Eyman would not require IFS to (1) make any registration under the FCPA; (2) file any reports under the FCPA; or (3) disclose the identity of its donors, the value of its services, its cost of providing services, or any other information.

INTRODUCTION

The Commission has on some prior occasions, taken the position that the provision of *pro bono* legal services was an in-kind contribution subject to both reporting under the FCPA and contribution limits. In another lawsuit, the trial court held that the *pro bono* legal services in a recall matter could not trigger filing requirements or contribution limits. The Commission did not appeal the trial court decision. The Commission also previously stipulated (in earlier, related proceedings) that *pro bono* legal services on appeal are not a contribution under Ch. 42.17A RCW. In other contexts, Washington's Supreme Court held that *pro bono* legal services regarding potential ballot measures constituted reportable contributions, distinguishing the Ninth Circuit decision in *Farris v. Seabrook* on its facts.

IFS wishes to avoid potential violation of the FCPA's disclosure and contribution limitation provisions if it represents Mr. Eyman during his appeal. In the event that the PDC determines that IFS's *pro bono* legal assistance is subject to the FCPA, IFS wishes to ascertain the extent of its own FCPA compliance requirements, including whether it must publicly disclose some or all of its own donors.

Expedited consideration by the Commission is necessary because Mr. Eyman's time to appeal the Thurston County Superior Court's judgment has either been triggered or is likely to be triggered soon, time is of the essence, and this petition is regarding an active controversy. Under WAC 390-12-250(3), the Commission's executive director is to present the petition at the first meeting at which it is practical to do so. The regulation does not restrict presentation to regular meetings.

Undersigned counsel for IFS recently contacted counsel from the Attorney General's Office by email regarding the potential Eyman representation. The Attorney General's office encouraged IFS to seek guidance from the PDC.

BACKGROUND OF PETITION AND RELEVANT FACTS

Identity and Mission of the Petitioner: The Institute for Free Speech promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government through strategic litigation, communication, activism, training, research, and education. The Institute for Free Speech is a nonprofit, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

As such, IFS takes on legal cases that impact free speech rights. IFS only takes cases on a *pro bono* basis.¹

We believe that the State of Washington's litigation against Mr. Eyman raises many important legal issues relevant to our mission of defending free speech.

The State's litigation against Tim Eyman: Tim Eyman is no doubt well-known to the PDC. He has been a fixture on the political scene in this state for over two decades. In 2015, the PDC completed an investigation into Eyman and referred

¹ The *pro bono* nature of IFS's work does not prevent IFS from requesting or receiving attorneys' fees awards for successful challenges to government action that violates rights protected under the federal Constitution, where applicable, and nothing in this petition is intended to waive such an award.

the matter to the Washington Attorney General (“AGO”) who filed an enforcement action against Eyman in Thurston County Superior Court. That action bears Cause Number 17-2-01546-34 (“enforcement action”) and is also likely well-known to the PDC and its staff. The Commission may take “judicial” notice of its own actions and the content of publicly filed matters in the superior court proceedings.

On February 21, 2021, the court in that action entered the COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND INJUNCTION, true and correct copies of which are attached as Exhibit A to this petition. Among other things, the findings and conclusions designate Eyman to be a “continuing political committee” and restrict his rights to be involved in the political process in his home state. Ex. A at 20-21, 30-32. In addition, the court’s injunction requires that “Eyman shall report, in compliance with the FCPA, any gifts, donations, or any other funds Defendant Eyman receives directly or indirectly unless the funds are (1) segregated and used only to pay for legal defense[.]” Ex. A at 30:17-21. The findings do not explicitly mention *pro bono* legal services, nor do they address any potential FCPA obligations on the part of those who donate legal defense funds or provide *pro bono* legal services to Eyman.

On April 16, 2021, the Thurston County Superior Court entered final judgment against Eyman, which ordinarily starts the clock on his right to file a notice of appeal, pending resolution of any motions to reconsider. RAP 5.2.

IFS’s interest in handling Eyman’s appeal: Given the restrictions imposed on Mr. Eyman’s ability to participate in the political process in Washington state, as well as the fines, IFS has an interest in representing him in the appeal of the enforcement action. It is part of IFS’s mission to represent individuals whose rights under the U.S. Constitution are violated by government laws or actions, especially

in the area of political speech. We have not represented Mr. Eyman² to-date, but would offer to represent him in an appeal if the FCPA does not apply to provision of *pro bono* legal services of the kind that would be provided in this litigation. If we represent him in an appeal, we expect that the fair market value of our *pro bono* services would exceed \$20,000 per year, while the appeal or possible remands continue.

The PDC's history of aggressive interpretation of the FCPA as to *pro bono* legal services: In an action involving the Institute for Justice (IJ) representing a recall campaign in Washington state, the PDC asserted that the provision of *pro bono* legal services was a reportable in-kind contribution, essentially making IJ's legal services subject to the FCPA and characterizing IJ as a contributor to the campaign. See [Washington Recall 2: Lawyer Free Speech - Institute for Justice \(ij.org\)](#) (last visited April 15, 2021). That litigation resulted in the Pierce County Superior Court ruling in favor of IJ and finding that the State's treatment of free legal assistance to a political committee in a federal civil rights lawsuit as a "contribution," as that term is defined in RCW 42.17A.005(13), is unconstitutional under the U.S. Constitution. Defendants are permanently enjoined from applying any cap on the amount of free legal services a political committee may receive in a federal civil rights case. Defendants are also permanently enjoined from requiring Recall Dale Washam or any other political committee to report free legal services provided by the Institute for Justice, Oldfield & Helsdon PLLC, or any other attorney in a federal civil rights lawsuit as a campaign contribution.

ORDER GRANTING PL. MSJ, a true and correct copy of which is attached as Exhibit B to this petition.

The State did not appeal this order, and, to our knowledge, the Commission has not published any guidance indicating that it agrees with that court's interpretation.

² Mr. Eyman is presently in bankruptcy, so any references in this petition to representing him on appeal necessarily include representing his bankruptcy estate.

In *Farris v. Seabrook*, 2011 WL 13121696, *4 (W.D. Wash. 2011), the Commission stipulated that, “pro bono legal services [. . .] with regard to assisting [a person] with the Supreme Court appeal . . . do not constitute a contribution as defined in RCW § 42.17.020(15)(c).” In 2020, Washington’s Supreme Court distinguished *Farris* in connection with pre-filing, *pro bono* legal services in connection with local ballot measures. *State v. Evergreen Freedom Foundation*, 192 Wash.2d 782, 795, n.11 (2020).

IFS’s counsel’s communications with the AGO: In order to avoid similar collateral litigation that befell IJ in the recall case, undersigned counsel recently emailed the AGO’s counsel of record in the enforcement action, requesting clarification as to the State’s position on whether IFS handling Eyman’s case on appeal would constitute an in-kind contribution to a political committee or in any way make IFS subject to the FCPA. *See* Email thread between Del Kolde and Eric Newman, a true and correct copy of which is attached as Exhibit C to this Petition. The AGO’s counsel of record declined to offer any clarification and instead referred IFS to the PDC. Ex. C. (Newman: “I would encourage you to seek guidance from the PDC.”). The AGO also declined to delay entry of judgment in the enforcement action.

This petition follows.

ISSUES PRESENTED FOR DECLARATORY RULING

IFS seeks a binding declaratory order that representing Tim Eyman or his bankruptcy estate in the appeal of the enforcement action on a *pro bono* basis will not constitute a reportable in-kind contribution under the FCPA, or in any other way make IFS subject to the FCPA. Specifically, IFS seeks a declaration that a representation of Eyman in this matter would not require IFS to register under the

FCPA; file any reports under the FCPA; or disclose the identity of its donors, the value of its services, its cost of providing services, or any other information.

In the alternative, if the PDC deems IFS's provision of *pro bono* legal services to be a reportable contribution, IFS seeks a declaration of the exact nature of the registration, reporting, and disclosure required, including who must report what and whether IFS must reveal its own donors.

ANALYSIS

Jurisdiction: The Public Disclosure Commission has jurisdiction over this Petition for declaratory order under RCW 34.05.240 and WAC 390-12-250.

Reasons a declaratory order is appropriate: There is uncertainty as to whether the PDC considers *pro bono* legal representation to citizens such as Mr. Eyman (or their bankruptcy estates) in an enforcement action to constitute an in-kind contribution that must be reported under the FCPA or would in any way make IFS, as the legal service provider, subject to the FCPA. The PDC and State have previously sought to apply the FCPA to *pro bono* legal services. *See* Ex. B; [Washington Recall 2: Lawyer Free Speech - Institute for Justice \(ij.org\)](#) (last visited April 15, 2021) (“In an unprecedented attempt to inoculate itself from lawsuits for violating constitutional rights, the PDC now claims that the free legal services provided to a campaign in order to vindicate First Amendment rights constitutes a ‘political contribution’ that can be regulated and restricted by the government under campaign finance laws.”).³

The PDC has referred, and the State pursued, claims of violation of the FCPA for provision of *pro bono* legal services in other contexts. While the *Evergreen Freedom*

³ The IJ case also involved a question of the supremacy of the federal civil rights statute, 42 U.S.C. § 1983, making it a little different from the case presented today, which does not implicate that statute directly.

Foundation (“*EFF*”) decision is distinguishable on its facts, the risk of application of the FCPA and prosecution is real. However, when contacted by IFS, the AGO’s lead counsel on the enforcement action declined to provide clarification of the State’s position on this issue and referred IFS to the PDC, even though the AGO is working hand-in-hand with the PDC on the Eyman enforcement action.

Notably, the superior court’s injunction provides that “Defendant Eyman *shall report*, in compliance with the FCPA, *any gifts*, donations, or any other funds Defendant Eyman receives directly or indirectly *unless the funds* are segregated and used only to pay for legal defense,” which creates implicit legal support for the proposition that legal services to Eyman are different from other gifts, donations or funds received by him. *See* Ex. A at 30:17-21 (emphasis added). Arguably, IFS’s provision of *pro bono* legal services is a “gift” in accordance with the court’s injunction, although no funds would be transmitted to Eyman by IFS.

But if this is also the State’s reading of the court’s injunction, the AGO has declined to share its views on this critical issue. The AGO’s response only increased uncertainty as to the FCPA’s scope and application, and presents a barrier to IFS’s representation of Eyman’s appeal, which faces imminent court deadlines.

The present uncertainty is exacerbated by the aggressive position taken by the AGO in the enforcement action – specifically, the assertion that Tim Eyman is a “continuing political committee” under the FCPA and that therefore all contributions to him are reportable. At the State’s urging, this position was incorporated into the court’s findings. Ex. A at 20-21. It will be up to the appellate courts to sort out whether this finding was correct under the law, but to make the arguments on his behalf that it was not legal, Mr. Eyman is entitled to the benefit of legal counsel on appeal. Moreover, IFS enjoys its own First Amendment rights to access the courts to represent and advocate for clients on such matters that may affect the political landscape in Washington for years to come.

In addition, the definition of “contribution” in the FCPA is vague in the context of the facts presented by this case. The term “contribution” is defined to include “gifts” of professional services (although certain professional services are also characterized as “not gifts”),⁴ and “contribution” is also defined to include “expenditures” made on behalf of a political committee. RCW 42.17A.005(15)(a)(i)-(ii) and (b)(viii). “Expenditure, in turn, is defined to include “anything of value” that benefits a “public official or candidate” or assists “*in furthering or opposing any election campaign.*” RCW 42.17A.005(22) (emphasis added). IFS’s services would neither further nor oppose any election campaign as the actions in the litigation are not related to any election campaign in the future.

Under the statute’s scope, language, and intent they should not be considered contributions or expenditures. The “liberal construction” directive of RCW 42.17A.001 is inapplicable because IFS’s legal services do not implicate “the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates.”

Assuming, *arguendo*, that Eyman is an “ongoing political committee,” as found by the superior court, he is not a public official, candidate for office, or presently involved in any political campaign.⁵ What IFS is proposing is to represent him, on a *pro bono* basis, in the appeal of an enforcement action, which pertains to past events. That appeal raises potential statutory and constitutional legal issues and arises in a legal-defense posture, not an active political campaign. Moreover, even if the PDC interprets the term “contribution” to encompass the *pro bono* legal services IFS proposes to provide, it is doubtful that such an interpretation would further any

⁴ It is also not clear why the provision of legal services to a “political party” or “caucus political committee” should not be a gift, while it is a gift to everyone else, especially someone the State has designated to be an “ongoing political committee.” See RCW 42.17A.005(15)(b)(viii)(A).

⁵ To Petitioner’s knowledge, Eyman is not presently involved in any active political campaign; even if that changes in the future, IFS would only represent him as to past activity in a legal-defense posture.

of the professed policy goals of the FCPA, but would rather serve to hamstring a government critic and deprive him of legal representation. Under both the Superior Court decision in *Institute for Justice v. State* and the federal court decisions in *Farris v. Seabrook*, the disclosure and limitation provisions of Ch. 42.17A should not apply to IFS's proposed provision of legal services. Even *EFF* would not support application of the FCPA to IFS on these facts, because *EFF* did not involve an enforcement action in a defense posture.

Given the language of the FCPA, the PDC's prior enforcement, the AGO's silence, and the superior court's finding that Tim Eyman is an "ongoing political committee," there is presently an actual controversy arising from uncertainty about whether IFS's provision of *pro bono* legal services to Eyman would constitute an in-kind contribution or in any other way make IFS subject to the FCPA.

A binding declaratory order would resolve these issues and would have the same effect as an adjudicative proceeding before the Commission. RCW 34.05.240(8). Such an order would resolve uncertainty about the PDC's treatment of *pro bono* legal services and would protect petitioners from action by the Commission or by political opponents of Mr. Eyman (of which there are many) who might file complaints to the Commission or possibly bring a "private attorney general" action against petitioners, either of which could be expensive and time-consuming to defend and would be collateral to the merits of Mr. Eyman's appeal. The specter of an enforcement action itself has a chilling effect on the rights to speak, publish, peaceably assemble, or petition for redress of grievances where the statutory boundaries are uncertain.

Under the present circumstances, issuing a declaratory order would have no adverse effect on others or the general public. On the contrary, it would clarify the reach of the FCPA, and provide useful guidance to all Washingtonians throughout the entire political and ideological spectrum, including those who

completely reject Eyman's positions, but may themselves require *pro bono* legal services in the future.

ADDITIONAL MATERIALS

The Petitioner may submit additional materials in support of this Petition, if requested. WAC 390-12-250(4).

ABSENCE OF PENDING INVESTIGATION OR ENFORCEMENT ACTION

To my knowledge there is no pending investigation or enforcement action involving the questions presented. WAC 390-12-250(9).

CONCLUSION

For the foregoing reasons, the Commission should enter a binding declaratory order that IFS's provision of *pro bono* legal services to Mr. Eyman, or his bankruptcy estate, in the appeal of the enforcement action:

1. Would not constitute a reportable in-kind contribution under RCW 42.17A.005(15) or any other provision of the FCPA; and
2. Would not in any other way make IFS subject to the FCPA, including, that it would not require IFS to make any registration under the FCPA; file any reports under the FCPA; or disclose the identity of its donors, the value of its services, its cost of providing services, or any other information.

In the alternative, if the PDC concludes that IFS's provision of *pro bono* legal services to Mr. Eyman, or his bankruptcy estate, on appeal would be a reportable in-kind contribution, then it should issue an order specifying:

3. The nature and extent of the reporting required, who must report, and whether and to what extent IFS must publicly disclose its own donors.

DATE: April 21, 2021



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VERIFICATION

I declare under the penalty of perjury under the laws of the state of Washington that I have reviewed this Petition and that the facts recited herein are true and correct, to the best of my knowledge.

Signed on April 21, 2021 in Montgomery County, Maryland.



David Keating
President
Institute for Free Speech

*Admitted in Washington State. Not admitted to practice in the District of Columbia. Currently supervised by a D.C. licensed attorney.