

1 BEFORE THE CITY OF SEATTLE
2 ETHICS AND ELECTIONS COMMISSION

3 IN THE MATTER OF) APPEAL OF DISMISSAL OF CASE NO. 14-2-
4 COMPLIANCE WITH) 0527, THAT THE DEPARTMENT OF
SMC 2.04.300) INFORMATION TECHNOLOGY AND THREE CITY
5 CITY OF SEATTLE) COUNCLMEMBERS ILLEGALLY USED PUBLIC
6) FACILITIES AND RESOURCES TO PROMOTE
PROPOSITION 1, REGARDING A
METROPOLITAN PARK DISTRICT

7 I. INTRODUCTION

8 This appeal submits that, contrary to a June 25 dismissal by the
9 Seattle Ethics and Elections Commission (SEEC) executive director
10 (henceforth "the director") of a May 22, 2014 complaint, the
11 Department of Information Technology and three City Councilmembers
12 used public facilities and resources in contravention of Seattle
13 Municipal Code 2.04.300 to promote Proposition 1 (creating a
14 Metropolitan Park District). This appeal asks the Commission to
15 reverse the dismissal and to instruct the Director to negotiate a
16 settlement agreement with DoIt as already drafted by Commission staff.
17 This appeal also asks the Commission to find that additional
18 violations unnecessarily occurred after I called the director's
19 attention to the issue by a voice mail, and after I filed the May 22
20 complaint; and I ask the Commission to instruct the director in future
21 cases to act swiftly to stop similar abuses from continuing after a
22 telephone or written complaint has been lodged.

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24 II. FACTS OF THIS CASE AND THE COMPLAINT AND DISMISSAL
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1 Seattle Channel is administered by the Seattle Dept. of
2 Information Technology (DoIT). In the channel's May 13, 2014 program
3 "City Inside Out," DoIT contractor Brian Callahan and City
4 Councilmembers Bagshaw, Burgess, and Sawant in an eight minute, 37
5 second segment discussed Proposition 1, a measure creating a
6 Metropolitan Park District which the City Council had placed on the
7 ballot April 28. The show can be found on the City web site at
8 <http://www.seattlechannel.org/videos/video.asp?ID=3341405>; the segment
9 about Proposition One is times between 13:49 and 22:16. Publicity for
10 the video that is on the web site includes the tag line, "Are
11 taxpayers ready to support a Metropolitan Parks District to fix the
12 City's parks?" However, as alleged in the complaint and confirmed by
13 the SEEC investigation, Callahan's questions and the comments by the
14 City Councilmembers did not address predictions about how taxpayers
15 would vote, but rather strayed into advocacy, as the SEEC director
16 concluded in his June 25 letter, where he states (p. 2): "I believe
17 that a reasonable person viewing the eight-minute segment on the MPD
18 would conclude that, viewed in its totality, the segment promoted the
19 ballot proposition."

20 Unfortunately, this conclusion came too late to prevent a
21 compounding of the illegal behavior I had called to the attention of
22 the SEEC. In fact, as soon as I became aware of the program (sometime
23 between May 13 and May 18), I left a voice mail message for the SEC
24 director about the program's misuse to promote Proposition 1. When I
25 didn't hear back from him, I left an additional voice mail asking for

1 a response. On May 20 he replied in an e-mail, stating "I had a
2 chance to watch the segment today and I'm not prepared to say without
3 further examination whether I believe it violates the Elections Code
4 or not... If you're inclined, please do send us a complaint." I sent
5 in a detailed written complaint two days later, on May 22. The
6 complaint stated that DoIT, Callahan, and the City Councilmembers had
7 discussed the ballot measure in a way that "was not the 'objective and
8 fair presentation of the facts' that SMC 2.04.300 requires when City
9 resources are used for commenting on an upcoming ballot measure.
10 Immediate remedies are needed and proposed below." The requested
11 remedies included that "the Commission's Executive Director should
12 instruct the Department of Information Technology not to broadcast the
13 referenced City Inside/Out show further."

14 On June 25, more than one month after I had filed the written
15 complaint, the director issued a letter dismissal of the complaint.
16 The SEEC investigative file (obtained through my public records
17 request) reveals that during the period after SEEC received my written
18 complaint, the Seattle Channel had broadcast the offending program
19 twelve times. Also between my earlier phone complaint and the written
20 complaint, the Seattle Channel had broadcast the program numerous
21 additional times. There is no evidence in the file that during his
22 investigation the Executive Director made any effort to discourage the
23 ongoing broadcast of the program, which eventually was broadcast and
24 thus made available to all Seattle cable subscribers 27 times.

1 SMC 2.04.300, "Prohibition against use of public office
2 facilities in campaigns", prescribes as follows:

3 No elected official nor any employee of his or her office nor any
4 person appointed to or employed by any public office or agency may
5 use or authorize the use of any of the facilities of a public office
6 or agency, directly or indirectly, for the purpose of assisting a
7 campaign for election of any person to any office or for the
8 promotion of or opposition to any ballot proposition. Facilities of
9 public office or agency include but are not limited to use of
10 stationery, postage, machines, and equipment, use of employees of
11 the office or agency during working hours, vehicles, office space,
12 publications of the office or agency, and clientele lists of persons
13 served by the officer or agency; provided, that the foregoing
14 provisions of this section shall not apply to the following
15 activities:

16 A. Action taken at an open public meeting by the City Council to
17 express a collective decision or to actually vote upon a motion,
18 proposal, resolution, order or ordinance, or to support or oppose a
19 ballot proposition so long as (1) any required notice of the meeting
20 includes the title and number of the ballot proposition, and (2)
21 members of the City Council or members of the public are afforded an
22 approximate equal opportunity for the expression of an opposing
23 view;

24 B. A statement by an elected official in support of or in
25 opposition to any ballot proposition at an open press conference or
in response to a specific inquiry; and

C. Activities that are part of the normal and regular conduct of
the office or agency.

III. DIRECTOR IS IN ERROR IN EXCULPATING CITY COUNCILMEMBERS
AND THEIR STAFFS; THE "SPECIFIC INQUIRY" EXEMPTION DOES NOT APPLY

The Commission must overrule the Director's dismissal of the
case against the City Councilmembers, and refer it back to him for
further investigation and action, including not just for their
comments, but also for the efforts by City Councilmembers and their
staffs in arranging for the so called "specific inquiry" that
seemingly justified the violative comments. The director is grossly
in error in stating that

1 The promotional remarks of the three elected officials all fit
2 into the exception under SMC 2.04.300.B for "statement[s] by an
3 elected official in support of or in opposition to any ballot
4 proposition...in response to a specific inquiry." All three asked
5 specific questions about the MPD, and all three answered those
6 questions.

7 For the following reasons, the Director's attempted exculpation
8 of the City Councilmembers based on this exemption cannot apply in
9 this case, and they should be sanctioned for violation of the law:

10 (1) The director is in error and at odds with the actual findings
11 of his own investigative staff in excusing the City Councilmembers'
12 rank advocacy as having responded to a "specific inquiry." Their
13 violation of the election code must not be countenanced because they
14 helped arrange for Callahan to pose the "specific inquiry" to
15 themselves. What the director erroneously regards as an exempt
16 "specific inquiry" actually stemmed from a mutual arrangement between
17 DoIT and the City Council. The director evidently is unaware that
18 his SEEC investigators obtained the draft script for Callahan's
19 comments and discovered that previous to the recording of the show,
20 Callahan and Seattle Channel station manager John Giamberso provided
21 this draft script to the City Councilmembers and their staffs
22 (including not only personal staffs but also the Council's
23 Communications Director); and that they discussed the questions with
24 them in person, by phone, and/or by e-mail. The practiced responses
25 during the show by the City Councilmembers can now be understood for
what they were: not spontaneous responses that are allowed by law,
but well-rehearsed presentations that appeared to be responding to a
"specific inquiry" which was actually prearranged and approved by them

1 as part of the secret script. Such behavior must be deemed by the
2 Commission as a violation of elections law; otherwise, elected
3 officials can at will, by arranging for scripted questions from City
4 employees or contractors that are passed off as spontaneous "specific
5 inquiries," abuse their access to the City television station and
6 other City facilities to influence voters about an existing ballot
7 measure. Since commercial and public television stations have
8 dramatically reduced their campaign coverage in recent decades, the
9 misuse of City television facilities is an increasingly serious
10 matter."

11 (3) The violation of law in this case is deeper than just what
12 Callahan and the Councilmembers stated on the TV program. The SEEC
13 investigation unveiled deliberate coordination by them and by the
14 Seattle Channel director and by City Council staff to prepare for the
15 violative acts. City Councilmembers are responsible not only for what
16 they say on a TV program, but for not encouraging beforehand the
17 misuse of their own staffs and misuse of the Seattle Channel for
18 illegal promotion of a ballot measure. Their staffs, so, are
19 prohibited by the Elections Code from engaging in such behavior. And
20 the City Councilmembers and their staffs are not only are prohibited
21 from engaging in such preparatory efforts; they are also required to
22 report such illegal preparatory efforts if they are aware of them.
23 Unfortunately, in this case the City Councilmembers and their staffs
24 were themselves deeply engaged in the preparatory efforts, which were
25 uncovered by the SEEC investigation triggered by my complaint.

1 (4) Because the Councilmembers cannot hide behind the exemption
2 for a "specific inquiry," they are bound by the requirements of City
3 and State law that their comments about the ballot measure be an
4 "objective and fair presentation of facts." The SEEC Director's own
5 dismissal letter admits that their comments were promotional, and so I
6 do not need to rehearse here the reasons shown in my complaint, in his
7 dismissal letter, and in the SEEC investigative files that the
8 comments made by the Councilmembers, especially by Bagshaw," did not
9 in any come near to being the allowable "objective and fair
10 presentation of facts."

11 IV. THE DEPARTMENT OF INFORMATION TECHNOLOGY MUST BE SANCTIONED
12 FOR ITS VIOLATIONS OF LAW, PREFERABLY BY THE SETTLEMENT AGREEMENT
13 PREPARED FOR THE DIRECTOR BY THE SEEC INVESTIGATIVE STAFF

14 The Commission must overrule the SEEC director's failure to
15 sanction the clear violations in this case. He is fundamentally
16 mistaken in stating (p. 3) that "This case does not lend itself to the
17 Commission's enforcement powers." On the contrary, failure by the
18 Commission to impose sanctions in this case will create an attitude of
19 impunity in the Department of Information Technology and throughout
20 City government.

21 Instead of engaging the Commission's enforcement powers, the
22 director only (p. 3) has "advised the Seattle Channel to put a
23 moratorium on discussions of the many state and local ballot
24 propositions that will be on the ballot this year until the Commission
25 can provide guidance on compliance with the Elections Code." On the
same page, the director's dismissal letter also states that "I am

1 asking the Commission to provide binding advice on what, if anything,
2 hosts, or guests may say on the Seattle Channel about ballot
3 propositions or candidacies without running afoul of the Elections
4 Code's bar on using City facilities to promote or oppose ballot
5 measures." The director's statements fly in the face of the clear
6 evidence of elections code violations in this case; they are difficult
7 to square with his statements just days later during the Commission's
8 July 2 consideration of my request that the Commission develop an
9 advisory opinion to guide agency behavior regarding ballot measures.
10 On July 2, the Executive Director argued the opposite (as he had done
11 for two years, since I first proposed such an advisory opinion to the
12 Commission); he argued then that an advisory opinion regarding agency
13 behavior regarding ballot measures is not needed because the rules are
14 already clear.

15 The SEEC director is seriously in error in his claim (p. 3) that
16 "Brian Callahan's questions didn't promote the ballot measure. He
17 counterbalanced the promotional comments of the elected officials with
18 questions about governance and tax fatigue." The director's error can
19 clearly be seen in the actual Callahan questions that the director's
20 own staff summarized (p. 2) in their proposed draft settlement
21 agreement with DoIT, a proposed agreement that he chose to ignore:

22 What 'do we get if we pass it.'
23 Where 'does the money go' and 'what does the money pay for.'
24 How would you answer critics of the current MDP governance
25 structure?
What do you "say to people" who are concerned about "getting a lot
of taxes at once."

1 These questions are certainly not "counterbalanced"; they are
2 promotional softballs without research or follow-up by which the
3 Department of Information Technology used the City-owned television
4 facilities in its care to influence voters to favor Proposition 1 in
5 clear violation of city and state election laws.

6 The SEEC director goes even further (p. 3) to excuse the
7 Department of Information Technology's clear transgressions: "even if
8 I assume *arguendo* that his [Callahan's] questions did promote the
9 ballot proposition, Callahan is a contractor—not an appointee or an
10 employee—and therefore not subject to SMC 2.04.300." This position is
11 questionable. Whether a person is an employee, a contractor, or has no
12 economic relation to the City, their use of City resources to
13 influence votes on a ballot measure is a serious matter that the SEEC
14 director and Commission have leverage over. To hold otherwise would
15 allow continuing violations of the City Elections Code without prompt
16 and effective recourse.

17 The SEEC director is also clearly in error in stating that
18 besides Callahan "the leadership of the Seattle Channel—General
19 Manager John Giamberso—as the only other actor who could reasonably be
20 charged with a violation of SMC 2.04.300." The director claims that
21 Giamberso was only the "captain of the ship" who "did not stand to
22 benefit in any way from the alleged violation," and that Giamberso had
23 not "behaved inappropriately in some way." Again, the SEEC director
24 appears not to be aware of what his own investigators discovered,
25 namely that Giamberso worked in tandem with Callahan to provide the

1 script beforehand to the City Councilmembers and their staffs. He was
2 completely aware of the illegal interaction, and in fact had much to
3 gain for his station and personal position by ingratiating himself
4 with the City Councilmembers who determine his budget.

5 To make matters worse, the SEEC director attempts to excuse the
6 abuses by a baseless claim that the Seattle Channel is somehow not a
7 City agency. Despite the fact that my complaint was lodged against the
8 Department of Information Technology, the SEEC Director essentially
9 excuses (although discouraging it in the future) and leaves
10 unsanctioned the violative behavior by portraying the Seattle Channel
11 as a quasi-independent entity. But it is not meaningfully
12 independent. Just the fact that Brian Callahan and his supervisor
13 John Giamberso shared the interview questions beforehand with the City
14 Councilmembers and their staffs—a practice regarded as unethical in
15 the journalism profession, especially when viewers are not told it had
16 occurred-- indicates that this is not a media organization, but a
17 government entity.

18 The SEEC investigative staff understood the situation correctly,
19 and developed for the SEEC director a proposed settlement agreement
20 under which the DoIT director would "acknowledge the violation of the
21 Seattle Elections Code when the Seattle4 Channel aired a program
22 indirectly or directly supporting an August 2014 ballot measure."
23 This settlement agreement is excellent. The Commission should
24 instruct the director to pursue negotiations with DoIT to conclude
25 such a settlement agreement.

1 V. THE COMMISSION SHOULD ESTABLISH PROCEDURES TO REQUIRE PROMPT
2 RESPONSE TO COMPLAINTS DURING A BALLOT MEASURE CAMPAIGN

3 The May 22 complaint warned (p. 5):

4 The August 5 election is fast approaching, and mailed ballots will
5 begin to arrive bare[ly] more than two months from now. The Ethics
6 and Elections Commission must act quickly to sanction the Department
7 of Information Technology and these City Councilmembers for using
8 City resources to influence a "yes" vote on Proposition One.

9 Nevertheless, the Executive Director took until June 25 (more than a
10 month, and just six weeks before the Aug. 5 election) to act on the
11 May 22 complaint. Truly in this case, justice delayed was justice
12 denied. The Commission must ascertain and fix the sources of this
13 dilatory performance, and ensure much prompter action during a ballot
14 measure campaign.

15 V. CONCLUSION

16 The actions by the Department of Information Technology and the
17 City Councilmembers alleged in my May 22 complaint are in fact
18 violations of election law. Moreover, the SEEC investigation has
19 found additional violations by the City Councilmembers and also by
20 City Council staff because in addition to what was said on the City's
21 TV broadcast, the Councilmembers and staff members coordinated with an
22 executive and a contractor in the Department of Information to
23 facilitate the illegal behavior, and moreover did not report these
24 efforts by themselves and others to the Ethics and Elections
25 Commission so that the Commission could discourage such efforts or
terminate the illegal broadcast. The Commission must either remand
this matter to the Director for an expanded investigation; or the

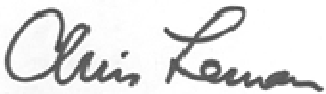
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Commission must itself find and sanction that serious violations of law have occurred.

The laws that restrict how public officials and agencies can comment on ballot measures are there for a reason. The incentives are too great for them to dissemble and to displace democracy with the people's own money and power. The Department of Information Technology and the City Councilmembers and their staffs understand fully well that the resources they control can influence voters, and in this case they have used these powers in a way that did contravene City and state elections laws to promote Proposition 1.

I declare under penalty of perjury of the laws of the State of Washington that I am a registered voter of the City of Seattle, and that the information in the above complaint, and the exhibits provided, are true and correct.

Dated this July 16, 2014



Chris Leman