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No. 53889-0-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,

Appellant/Plaintiff,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, and
SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL
EDUCATION & ACTION FUND,

Appellees/Defendants.

**APPELLANT/PLAINTIFF, FREEDOM
FOUNDATION'S, PETITION FOR DISCRETIONARY REVIEW
BY WASHINGTON STATE SUPREME COURT**

Robert A. Bouvatte, Jr., WSBA # 50220
Eric R. Stahlfeld, WSBA # 22002
c/o Freedom Foundation
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
Rbouvatte@freedomfoundation.com
ESTahlfeld@freedomfoundation.com

Petitioner/Plaintiff, Freedom Foundation (“Petitioner” or the “Foundation”), seeks discretionary review of the unpublished opinion of the Washington State Court of Appeals, Division II, dated February 9, 2021, affirming the trial court’s dismissal of the Foundation’s Petition for Judicial Review under the Administrative Procedures Act, RCW ch. 34.05 (“APA”). For the reasons set forth below, this case should be accepted for discretionary review pursuant to RAP 13.4(b)(1), (b)(2), and (b)(4).

The Freedom Foundation’s core mission is to inform public employees they do not have to subsidize union speech with which they disagree, that is, they can “opt out” of membership so their dues no longer support adverse political causes. SEIU’s political action committee deliberately refused to disclose that employee dues funded its millions of dollars in direct political contributions, thereby thwarting the Foundation ability to let members know how the union spent their dues.

The trial court erroneously ruled that the Foundation lacked standing to challenge the Washington State Public Disclosure Commission’s (“PDC”) failure to enforce the Fair Campaign Practices Act (“FCPA”). No avenue will exist for a court to rule the government “may be wrong” unless this Court, in this case and another currently pending direct review, reverses the lower courts’ rulings on standing. The Court should not cede unlimited discretion to the PDC to ignore violations of the FCPA.

I. NATURE OF CASE AND DECISION.

The matter below was a Petition for Judicial Review, under the APA. **Appendix A**, p. 002. The trial court, Hon. J. Skinder, granted the CR 12(b)(6) motion to dismiss filed by the PDC, apparently on the grounds argued, that: (i) that the Foundation did not have standing under the APA to seek judicial review of the dismissal of its administrative complaint by the PDC, because it was not a “party” to the PDC proceedings; (ii) that the Foundation did not have APA standing arising from injury to its competitive interests as a result of the PDC’s dismissal; and (iii) that the Foundation did not have associational standing, for the foregoing reasons. **Appendix B**, p. 024; **Appendix C**, p. 040.

The Foundation timely filed its notice of appeal, on October 1, 2019, the matter was fully briefed by the parties, and the Court of Appeals, Division II, issued its unpublished opinion affirming Judge Skinder’s dismissal, on February 9, 2021. **Appendix D**, p. 044. In so doing, Division II of the Court of Appeals relied heavily upon its decision in *Bethel*. *See id.*, at pp. 045, 049-050.

II. ISSUES PRESENTED FOR DISCRETIONARY REVIEW.

1. Whether the trial court erred in ruling that the Foundation lacked standing to seek APA review of the PDC’s dismissal, because it was not a “party” as defined by the APA, even where it filed the initial administrative complaint, provided additional information responding to SEIU PEAFF’s contentions, received notice of the PDC’s decision, and was otherwise treated as a party throughout the brief proceedings?

2. Whether the trial court erred in ruling that the Foundation lacked standing to seek APA review of the PDC's dismissal, because it did not suffer an "injury in fact" to its competitive interests, even though SEIU PEAFF's untimely disclosure of millions of dollars in contributions thwarted the Foundation's core mission to advance individual liberty by letting SEIU members know of the contributions to candidates that they may oppose, and prevented the Foundation's analysis, research, and reporting on that political activity?

3. Whether the trial court erred in ruling that the Foundation lacked associational standing to seek APA review of the PDC's dismissal, even where the SEIU PEAFF's deliberate decision to delay disclosure of extensive contributions was an injury suffered by the Foundation's supporters across the State of Washington, the correction of which is germane to the Foundation's mission?

III. GROUNDS FOR DISCRETIONARY REVIEW.

This case should be accepted for discretionary review pursuant RAP 13.4(b)(1), (b)(2), and (b)(4). The matters addressed herein involve fundamental and urgent issues of broad public import, and the trial court's dismissal conflicts with the understanding of "party" status under the APA, as it has previously been understood in the appellate courts of this State. Prompt and ultimate determination by this Court will advance an ultimate determination of this action, as well as another presenting the same issues (*see infra*, at **Section III.A**). Discretionary review at this juncture will serve judicial economy, because the Foundation intends to seek consolidation of

this matter with that separate pending matter where the Foundation has requested direct review in the Supreme Court, *i.e.*, the matter styled *Freedom Foundation v. Washington State Public Disclosure Commission, Amalgamated Transit Union Legislative Council of Washington State*, Supreme Court No. 99281-9 (the “ATU Legislative Council Matter”). Moreover, review in the Supreme Court will permit expeditious resolution of these cases – on their merits, if the Foundation is correct; for lack of standing, if the Foundation is incorrect.

Under the Rules of Appellate Procedure, the grounds for discretionary review by this Court are narrowly confined. *See generally* RAP 13.4(b). It is axiomatic, however, that discretionary review should be accepted where the opinion at issue presents a conflict with the published decisions of the Court of Appeals or the Supreme Court. *See* RAP 13.4(b)(1), (b)(2). Another well-recognized basis for discretionary review is where “...the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). This court has often found the similar standard for direct review under RAP 4.2(a)(4) (requiring a “fundamental and urgent issue of broad public import”) to be met where the dispute requires interpretation of governing statutory or other textual authorities. *See Cooper v. AlSCO, Inc.*, 186 Wn.2d 357, 361-62 (2016) (considering applicability of retail & service exemptions in RCW 49.46.130(3)); *McCleary v. State*, 173 Wn.2d 477, 512-13 (2012) (interpreting constitutional questions in the context of State’s duty to fund school system); *Washington Public Ports Association v. State, Dept. of*

Revenue, 148 Wn. 2d 637, 640-42 (2003) (considering scope of DOR’s authority under RCW 82.29A.050).

Even aside from the public questions presented, however, discretionary review is warranted upon each of the foregoing grounds under Rule 13.4(b). In addition to presenting issues of substantial public import that deserve a definitive resolution by the Supreme Court, the Court of Appeals’ decision here conflicts with published decisions of both the Supreme Court and the Court of Appeals, requiring an opinion by this Court to settle the conflict.

The Foundation enjoyed standing to seek review of the PDC’s dismissal of its administrative complaint because the Union’s unredressed failure to disclose extensive political contributions prevented (and prevents) the Foundation’s employees from carrying out the daily activities of its organization – informing union-represented public employees about the ways in which their union spends the fees that are deducted from their wages, thereby allowing such employees to decide whether or not they wish to continue subsidizing such efforts. Yet the trial court and Court of Appeals accepted the position that no one may seek review of the PDC’s decisions unless he or she is on the receiving end of some enforcement action by the agency, which is incorrect as a matter of the longstanding doctrine of this State and of the United States Supreme Court.

Discretionary review is warranted as to the availability of judicial review under the APA, because the trial court’s erroneous analysis of “party” status under that statute leaves no meaningful avenue for citizens of

the State of Washington to subject the PDC's decisions to scrutiny – even where the PDC clearly “may be wrong.” See *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn. 2d 398, 411 (2015) (“*Utter*”). In combination with currently prevailing interpretations of the citizen's action provisions of the Fair Campaign Practices Act, RCW ch. 42.17A (“FCPA”),¹ unavailability of judicial review for decisions of this sort would insulate essentially *all* of the PDC's non-enforcement decisions from any independent check, and render it wholly impossible for “...citizens to expose the violation.” *Utter*, 182 Wn.2d at 411. The Court should accept review to prevent this patently erroneous result, which is out of step with both the language and policy of the relevant statutes, from becoming law.

In this case, the PDC's non-enforcement decision (which the PDC insists no one has the right to review, here and in another related matter, *see infra*) was to ignore admitted violations of the FCPA by SEIU PEAFF – an out-of-state entity registered with the PDC that claims to be a “political organization” for purposes of 26 U.S.C. Section 527, and thereby avoids the required disclosures at the federal level. Yet even in Washington State, SEIU PEAFF chose not to disclose \$2.5 million in contributions from out-of-state donors, which the PDC felt represented nothing more than “minor violations,” and warranted nothing more than a milquetoast warning about “...the importance of timely and accurate filing C-5 reports.”

¹ The Court of Appeals appears to believe that the 2018 FCPA amendments so fundamentally changed the principles on which the citizen's action provision was passed, that the mere action of informing the parties it will take no action is sufficient to prevent the citizen complainant from proceeding. See *Freedom Foundation v. Bethel Sch. Dist., Public Disclosure Commission*, 14 Wn. App. 2d 75, 83-85 (2020) (“*Bethel*”).

SEIU PEAFF's reports were not merely untimely, however; the entity simply made no effort to disclose any of this information until the Freedom Foundation brought its failure to do so to the attention of the PDC, *i.e.*, when its failure was apparent and requiring immediate correction. Facts like these make clear why the PDC should not be able to unilaterally decide to forego enforcement, particularly for *admitted* violations, and why this Court should undertake to determine whether any check remains in Washington law for similar decisions by the PDC.

Interpretation of the APA's definition of "party" is itself a substantially important public question, however, upon which the trial court's dismissal conflicts with other decisions of the Court of Appeals. The trial court's ruling also unduly restricts the notion of "competitive harm," contrary to decisions of the Washington State Supreme Court and the Court of Appeals – indeed, as well as decisions of the United States Supreme Court, which supply Washington law here. The dismissal below presents not only important public questions, but conflicts with the decisional law of this State. Discretionary review should be accepted.

A. Another Pending Matter Also Involves the Same Questions of Standing Under the APA.

In addition to this matter, the very same arguments concerning standing have arisen in the ATU Legislative Council Matter, described above. In that case, the Foundation filed a Petition for APA Review on May 7, 2020. The matter there is similarly an appeal from Judge Skinder's

dismissal of an APA Petition, wherein the Foundation had argued to the PDC and then alleged in the review proceedings that the ATU Legislative Council violated the FCPA by failing to register as a political committee and thereby not disclosing the source of hundreds of thousands of dollars spent on political activity, including within Washington State. *See Appendix E*, p. 055.

There, like here, Judge Skinder granted dismissal upon a motion submitted by the PDC (the motion was filed on August 20, 2020, and granted November 3, 2020), arguing that (i) the Foundation lacked standing because it was not a “party” to the PDC’s dismissal, within the meaning of the APA, and (ii) that the Foundation suffered no competitive harm for purposes of the “injury-in-fact” inquiry required for APA standing. *See Appendix F*, p. 130; *Appendix G*, p. 146. The Foundation filed a Petition for Direct Review in the ATU Legislative Council matter on December 1, 2020, and timely filed its Statement of Grounds in Support of Direct Review in that matter on December 15, 2020. *See Appendix H* (without exhibits), p. 150. That Petition for Direct Review remains pending.

In dismissing the APA Petition here and in the ATU Legislative Council matter, Judge Skinder appears to have agreed with the PDC’s argument that the PDC “exercised no coercive power over Freedom Foundation,” and so it was not a “party” within the meaning of the APA. *See Appendix B*, p. 031; *see also* RCW 34.05.010(12) (*Appendix I*, p. 167). In light of the abbreviated proceedings transpiring before the PDC,

that understanding of what constitutes a “party” to an “agency proceeding” within the meaning of RCW 34.05.010(12)(a) erroneously conflates that concept with an “adjudicative proceeding,” which is separately defined in subsection (1) of the APA’s definitions.² But the definition of “party” in subsection (12) uses the notably broader phrasing of “agency proceeding,” and therefore must be interpreted to import a different meaning than “adjudicative proceeding.” *See Seeber v. Washington State Public Disclosure Commission*, 96 Wn.2d 135, 139 (1981);³ *see also* RCW 34.05.010(12) (Appendix I).⁴

B. Just As In the ATU Legislative Council Matter, Defining the Scope of Who May Seek Judicial Review is Critical to the Public Interest.

1. The Order of Dismissal Was an “Agency Action” “Specifically Directed” to the Foundation.

The PDC unquestionably issued an order, which represented the “agency action” at issue here. *See* RCW 34.05.010(11)(a) (“‘Order,’ without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.”). It is obvious that the PDC’s administrative dismissal qualifies as an “agency action.” The above-quoted definition does not require a directive to the

² “‘Adjudicative proceeding’ means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.” RCW 34.05.010(1).

³ “It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent.”

⁴ “‘Party to agency proceedings,’ or ‘party’ in a context so indicating, means: (a) A person to whom the agency action is specifically directed; or (b) A person named as a party to the agency proceeding or allowed to intervene or participate in the agency proceeding.”

Foundation for it to do anything; it only requires that someone's legal rights or obligations be determined or impacted, which the PDC's dismissal accomplished as to SEIU PEAFF, in holding that no enforcement action would be brought.

2. *The Foundation Was Permitted to Participate "As a Party" in the "Agency Proceedings."*

Separately and independently, it is clear that the Foundation participated "as a party" in the "agency proceedings" that resulted from the filing of its PDC complaint, as necessary to satisfy RCW 34.05.010(12)(b). Decisional law going back over twenty (20) years has established that nothing more is required for "party" status than an entity being treated as a party would otherwise be treated in more formal "proceedings" – having its submissions accepted, considered by the agency and responded to by the other party, receiving notice of documents and of a decision, and being apprised of the basis of that decision – *i.e.*, receiving the basic indicia of due process. *See Technical Employees Ass'n. v. Publ. Empl. Rel. Comm'n*, 105 Wn. App. 434, 439-40 (2001); *see also Yanisch v. Western Wash. Growth Mgmt. Hearings Bd.*, 120 Wn. App. 1033, at *2 (Mar. 2, 2004) (unpublished) ("party of record" status coextensive with "party to agency proceedings" and requirement for service of documents, *citing Technical Employees Ass'n.*, 105 Wn. App. at 438).⁵ It appears that the looseness of

⁵ Pursuant to GR 14.1, *Yanisch* is only cited for its persuasive value; the Foundation does not submit that the opinion presents any conflict with the appellate court's affirmance, for purposes of accepting discretionary review.

these requirements was specifically to allow for the informal “proceedings” that transpired here, and to make sure that participants in such proceedings receive due process. *See Den Beste v. State, Pollution Cont. Hrgs. Bd.*, 81 Wn. App. 330, 339-40 (1996).⁶ The statutory standard for who is considered a “party” certainly does not contemplate an entity who *has* been provided notice and an opportunity to participate, and otherwise been consistently treated as a party, nonetheless being foreclosed from bringing any challenge to the PDC’s disposition of non-enforcement.

Accordingly, the Court should accept discretionary review and vindicate the Legislature’s obvious intent to cast “party” status broadly. This also speaks to the importance of the public questions presented, because the Foundation asks this Court to prevent the PDC from staking out a position here that would allow it to entirely insulate from judicial review its future decisions of this sort. Not only does the trial court’s dismissal implicate the important public questions of when APA review is available and by whom (for purposes of RAP 13.4(b)(4)), it conflicts with the Court of Appeals’ decisions in *Den Beste* and *Technical Employees Association*. Thus, discretionary review is independently warranted under RAP 13.4(b)(2).

⁶ “Further, as stated by applicants, because the Department is prohibited...from conducting adjudicative proceedings on water rights applications, it is not possible for anyone, except perhaps an applicant, to become a ‘party’ to these proceedings in the traditional sense. Finally, as the PCHB noted, the APA defines a party to include persons allowed to ‘participate as a party in the agency proceeding.’[...] We agree with the PCHB that, given its degree of participation, the Yakima Indian Nation was entitled to timely notice of the Department’s decision.” (emphasis added).

C. The Opinion Conflicts With Numerous Published Decisions of the Supreme Court & Court of Appeals.

With respect to the “injury-in-fact” requirement, the trial court and Court of Appeals appear to have also accepted the argument that “Freedom Foundation has suffered no injury here sufficient to establish standing. There is no allegation that the conduct in question directly affected Freedom Foundation.” *See Appendix B*, p. 030. This was incorrect, as a matter of well-established precedent.

First, it is black letter law that the prejudice sufficient for an “injury-in-fact” need not be economic in nature. *See Association of Data Processing Svc. Orgs. v. Camp*, 397 U.S. 150, 154 (1970); *U.S. v. Students Challenging Regulatory Agency Procedures (“SCRAP”)*, 412 U.S. 669, 687 (1973). Financial competition, while sufficient, is not required; the Foundation and entities that violate the FCPA need only (and undoubtedly do) have that “...concrete adverseness which sharpens the presentation of issues.” *See Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Seattle Bldg. & Const. Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 793, n.1 (1996) (“As our reliance on federal case law in [*St. Joseph Hospital*] indicates, we will look to federal cases addressing standing.”); *see also* RCW 34.05.001. The Court of Appeals, however, believed that the Foundation must show a “direct economic effect” to support an injury-in-fact, which was simply incorrect. *See App. D*, at p. 051.

Second, while the “direct economic effect” may be intangible, it is nonetheless real: the ability gained by FCPA violators to cite the PDC’s decision under review here, to courts, the agency, or to the Foundation itself,

in the context of future actions – and the Foundation’s inability to cite a favorable decision arising from the same matter. The accumulation of such decisions allows unions and their affiliated entities to entirely circumvent accountability for their expenditures in Washington state politics, which is uniquely prejudicial to the Foundation’s ability to carry out its daily activities of informing others about those expenditures. The “perceptible harm” that results directly to the Foundation’s efforts from being unable to communicate with public employees concerning SEIU PEA’s political expenditures, as well as that resulting from unfavorable administrative and/or judicial decisions, is too obvious to be denied.

Indeed, the Court of Appeals has previously recognized similar, non-economic harms as sufficient to confer standing. *See Snohomish Cty. Publ. Transp. Benefit Area v. State Public Employment Relations Commission*, 173 Wn. App. 504, 514 (2013) (“This loss of leverage is a ‘sufficient likelihood of economic injury.’”). The decision below presents a direct conflict with the previous Supreme Court and intermediate appellate decisions of this State, for purposes of RAP 13.4(b)(1) and (b)(2).

Because its supporters and employees throughout the State of Washington suffered a cognizable injury-in-fact, and because redressing that injury is germane to the Foundation’s purpose as an organization, it also had associational standing for the APA Petition below. *See International Association of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14 (2002). The widespread nature of the harm here distinguishes *Freedom Foundation v. Bethel School District*, 14 Wn. App. 2d. 75 (2020),

because in that case, the allegations were concerned with FCPA violations taking place only within the confines of the Bethel School District. *See Bethel*, 14 Wn. App. 2d at 79 (“Freedom Foundation alleged that the District improperly used public facilities in violation of RCW 42.17A.555 to process employee payroll contributions to WEA-PAC and NEA-FCPE.”); *see also App. D*, at p. 048 (“In [*Bethel*], the Foundation filed a PDC complaint against a school district regarding its processing of payroll deductions.”). As such, it was difficult for the Foundation, who is not situated in Bethel School District, to support a competitive injury from the alleged violations.⁷

The injury is of an obviously different nature when a union’s political arm fails to disclose information and thereby prevents an entity such as the Foundation from communicating that information to represented union members, to give them information they may use to decide whether to continue supporting their union. Moreover, the harm is one that strikes directly at the interests protected by the FCPA, because it effectively conceals from voters across Washington State information they can use when deciding which candidates to support, based on the donors who have given them contributions. The Foundation’s injury is not merely to an

⁷ This is an injury that affects everyone in Washington State, but whether or not the average taxpaying resident makes it part of their mission to remedy such violations is irrelevant to the specific injury alleged by the Foundation. *See SCRAP*, 412 U.S. at 687-89 (“But we have already made it clear that standing is not to be denied simply because many people suffer the same injury...we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.”).

abstract interest in having others comply with the law, as the Court of Appeals misapprehended. *See App. D*, at p. 052.⁸

Third, the Opinion is in direct conflict with the Supreme Court’s decisions in *Seattle Bldg. & Const. Trades Council*, 129 Wn.2d 787 (1996) and *St. Joseph Hospital and Healthcare Center v. Department of Health*, 125 Wn.2d 733 (1995). Both of those published opinions recognized that competitive harm can exist even where a competitive injury is not “direct.” *See Seattle Bldg. & Const. Trades Council*, 129 Wn.2d at 795; *St. Joseph Hospital & Healthcare Center*, 125 Wn.2d at 742. The issues bound up with the trial court’s dismissal have great and lasting public importance (not merely “substantial public interest”), as they affect the scope of individuals and/or entities who may seek APA review of *all* agency decisions.

Furthermore, the fact that the Court of Appeals held in *Bethel* that the Foundation could not bring a citizen’s action under the FCPA and lacked standing only heightens the need for this Court’s consideration of the weighty issues identified in this Petition. *See, e.g., State v. Watson*, 155

⁸ In so holding, the Court of Appeals relied upon an argument that neither of the Respondents had advanced in their briefing for that matter. And it appears to have misunderstood the nature of the injury alleged by the Foundation. *See App. D*, at p. 052 (“The Foundation vaguely asserts that all of its supporters were harmed by the PDC’s decision not to punish SEIU PEAFF’s illegal activities. At the same time, the Foundation argues that the PDC’s dismissal of its complaint against SEIU PEAFF affects everyone who participates in representative democracy in Washington.”). While any resident of Washington state may have an interest in others complying with the law, only organizations like the Foundation, who concern themselves with unions’ compliance with FCPA law on a daily basis, as an integral part of their mission, can claim a specific injury to themselves. This distinguishes the cases relied upon by the Court of Appeals. *See Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662-63 (2016) (“But it does not allege any specific injury to Thompson or his property.”) (*citing Chelan County v. Nykreim*, 146 Wn.2d 904, 935 (2002)).

Wn.2d 574, 578 (2005) (“Given the sweeping implications of the Court of Appeals decision, we review the definition of ‘ex parte communication’ and application thereof, both questions of law, de novo.”). Prior to 2018, a citizen who wanted to challenge some action by the PDC had two (2) potent options for seeking scrutiny from an independent decisionmaker: (i) to bring a citizen’s action under the FCPA, or (ii) to bring a petition for judicial review of the PDC’s determination under the APA. If review is not granted here, such a citizen may have *zero* options for that, going forward.

In light of the interpretation of the FCPA set forth in *Bethel*, an administrative decision of dismissal (or the PDC’s *declining* to take action), is apparently itself sufficient to foreclose any citizen’s action, however erroneous, biased (or even self-interested) the PDC’s decision not to enforce the law. Without some check on the PDC’s discretion through the citizen’s action – as the voters of this State expressly intended – judicial review through the APA must be afforded to ensure that the PDC is not conferred total discretion to decide whether or not it will enforce the FCPA, *i.e.*, *the law whose enforcement is the sole reason for the PDC’s existence*. See *Utter*, 182 Wn.2d at 412 (“We hold that RCW 42.17A.765 precludes a citizen suit only where the AG or local prosecuting authorities bring a suit themselves, and it does not preclude a citizen suit where the AG declines to sue.”). Without citizen’s actions *or* APA review when the agency “declines to sue,” the PDC exercises a discretionary power greater than that of the courts, the Legislature, or the executive: an immunity from review of any

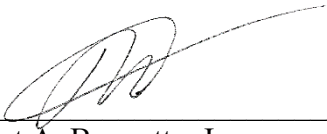
type. Such a result should be avoided at all costs, as a clear infringement of due process.

IV. CONCLUSION.

To allow the decision below to stand will mark a dark new era in the campaign finance law of Washington State, one which the residents who enacted the Citizen's Action by way of ballot initiative, in 1972, could scarcely have imagined. Collectively speaking, the decisions below will allow the PDC *carte blanche* to 'look the other way' and decline to enforce the law against favored entities, according such decisions the last word with respect to complaints under the FCPA and even foreclosing any avenue for judicial review under the APA. A citizen believing that the PDC has ignored a clear violation of law will have nowhere to turn for a remedy vindicating the rights that the FCPA purports to create, and the lofty goals of the FCPA for government accountability will amount to less than the paper they are written on. This perverse result should not be countenanced.

The Foundation respectfully submits that the Court should correct the errors below by accepting discretionary review, vacating the orders of the trial court, remanding to the trial court for further proceedings pursuant to the Court's disposition, and awarding costs on appeal to the Foundation.

RESPECTFULLY SUBMITTED, this 11th day of March, 2021.

By: 
Robert A. Bouvatte, Jr.
WSBA #50220

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on March 11, 2021, I delivered a copy of the foregoing Petition for Discretionary Review, by email pursuant to agreement to:

Dmitri Iglitzin
Benjamin Berger
Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
P: (206) 257-6003
iglitzin@workerlaw.com
berger@workerlaw.com
Attorneys for ATULC

Chad C. Standifer
John Meader
Assistant Attorneys General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504
ChadS@atg.wa.gov
JohnM@atg.wa.gov
Attorneys for Washington PDC

Dated this 11th day of March, 2021, at Olympia, Washington.

By:



Jennifer Matheson

**FILED
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FREEDOM FOUNDATION,

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WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, and
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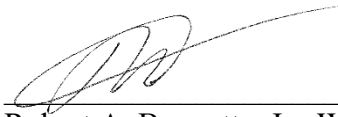
**PETITIONER, FREEDOM FOUNDATION'S,
APPENDIX TO PETITION FOR DISCRETIONARY REVIEW
BY WASHINGTON STATE SUPREME COURT**

Robert A. Bouvatte, Jr., WSBA # 50220
Eric R. Stahlfeld, WSBA # 22002
c/o Freedom Foundation
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
Rbouvatte@freedomfoundation.com
ESTahlfeld@freedomfoundation.com

APPENDIX ITEM	PAGE NUMBER	DESCRIPTION
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D	043	Unpublished Opinion of Court of Appeals, Div. II, in matter No. 53889-0-II
E	054	Petition for Review Pursuant to the Administrative Procedures Act, Chapter 34.05 RCW (ATU Legislative Council Matter)
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G	145	Order Granting Respondent Washington State Public Disclosure Commission's Motion to Dismiss and Denying Motion for Leave to Conduct Discovery (ATU Legislative Council Matter)

H	149	Petitioner, Freedom Foundation's, Statement of Grounds for Direct Review (ATU Legislative Council Matter)
I	166	RCW 34.05.010

RESPECTFULLY SUBMITTED on March 11, 2021.



Robert A. Bouvate, Jr., WSBA No. 50220
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
RBouvatte@freedomfoundation.com

Attorney for Petitioner

APPENDIX A

- ☐ Expedite
☐ No hearing set
☐ Hearing is set

Date:

Time:

Judge/Calendar:

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

FREEDOM FOUNDATION, a Washington
nonprofit organization,

Petitioner,

v.

WASHINGTON STATE PUBLIC DISCLOSURE
COMMISSION, a State of Washington
government agency, and SERVICE EMPLOYEES
INTERNATIONAL UNION POLITICAL
EDUCATION & ACTION FUND, an IRS 527
political committee,

Respondents.

No.

**PETITION FOR REVIEW PURSUANT
TO THE ADMINISTRATIVE
PROCEDURES ACT, RCW 34.05.510, *et*
*seq.***

I. INTRODUCTION.

1. This is an Administrative Procedures Act (“APA”) petition to review the staff decision of the Washington State Public Disclosure Commission (“PDC”), resolving the Freedom Foundation’s complaint and finding that the SERVICE EMPLOYEES INTERNATIONAL UNION, POLITICAL EDUCATION & FUND (the “SEIU PEA”) did not commit any violation of Washington campaign finance law worthy of further enforcement proceedings by the PDC.

2. In brief, the SEIU PEAFF has violated the Fair Campaign Practices Act (“FCPA”), RCW 42.17A.250, in numerous respects including, but not limited to, failing to disclose its purpose on required Forms C5, filing such forms late thereby delaying the disclosure of its contributions and expenditures, and failing to disclose millions of dollars in political contributions received from persons residing outside Washington State.

3. As set forth in more detail below, the PDC erred by issuing a staff determination, which purported to resolve an administrative complaint filed by the Freedom Foundation by claiming the alleged violations of the FCPA were not “actual violations warranting further investigation” and issuing a mere warning letter to SEIU PEAFF. The PDC further erred by categorizing these violations as “minor violations,” which is contrary to the permitted classifications the legislature authorized in enacting FCPA amendments in 2018.

II. PARTIES.

4. Petitioner, the FREEDOM FOUNDATION (“Petitioner” or the “Foundation”), is a Washington nonprofit organization.

5. Respondent, the WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION (“PDC” or the “Commission”), is a government agency of the State of Washington, organized pursuant to RCW 42.17A.100, *et seq.*

6. Respondent, SEIU PEAFF, is a “political organization” under 26 USC § 527 for the purposes of federal tax law.

7. SEIU PEAFF received \$12.3 million in contributions in 2018.

8. SEIU PEAFF is operated by the professional staff of the SEIU national headquarters in Washington, D.C. SEIU is one of the largest labor unions in the county.

9. The national SEIU had total annual receipts of over \$340 million in 2018 and a paid staff

1 of nearly five hundred (500) individuals, according to its LM-2 filed with the U.S. Department of
2 Labor for the calendar year 2018.

3 **III. JURISDICTION AND VENUE.**

4 10. This Court has jurisdiction pursuant to RCW 34.05.510.

5 11. Venue is proper under the APA, pursuant to RCW 34.05.514(1).

6 12. Venue is proper in this Court pursuant to RCW 4.12.020, because some part of the cause
7 of action arose in Thurston County.

8 **IV. STATEMENT OF FACTS.**

9 13. The Foundation notified the PDC of the SEIU PEAFF's numerous violations of the FCPA
10 in great detail, by way of an administrative complaint dated February 18, 2019. The complaint was
11 assigned Case No. 47303.

12 14. The violations described in the Foundation's complaint were ongoing and systematic in
13 nature, and involved millions of dollars that SEIU PEAFF either disclosed late or simply failed to
14 disclose at all (until after the Foundation's aforementioned complaint to the PDC was filed in
15 February, 2019).

16 15. The Defendant, SEIU PEAFF, did not even dispute many of the Foundation's allegations of
17 its FCPA violations, instead merely characterizing them as "trivial." Indeed, it admitted many of
18 the factual allegations asserted by the Foundation.

19 16. SEIU PEAFF admits that on at least four (4) occasions, it failed to disclose funds that were
20 received by SEIU PEAFF for political activity due to an "inadvertent error."¹

21 _____
22 ¹ In its response to the PDC, SEIU PEAFF describes four (4) contributions that it received and deposited into accounts
23 other than the one it uses for political activity in Washington (its proffered explanation for the "inadvertent error"). It
24 implied that, in all four (4) cases, these contributions were not disclosed to the PDC. However, its amended forms C5
only disclosed three (3) additional contributions, Plaintiff's comparison of SEIU PEAFF's forms 8872 and forms C5
only came up with three (3) contributions not reported to the PDC. That suggests that either (i) the reference to "four"
contributions in SEIU PEAFF's response is in error, or (ii) one of the four (4) contributions deposited in non-WA
accounts was reported to the PDC, thus undermining SEIU PEAFF's stated explanation for its lack of disclosure.

1 17. SEIU PEAFF suggested the error resulted because “these funds were not deposited into the
2 particular bank account that SEIU PEAFF uses for its Washington State expenditures.”

3 18. SEIU PEAFF admitted that these contributions “should have been reported by SEIU PEAFF
4 on its C-5 filings.”

5 19. Nearly a month *after* the administrative complaint was submitted, SEIU PEAFF filed
6 amended C-5 forms with the PDC disclosing the contributions. SEIU PEAFF did not file any
7 amended reports prior to the date of the administrative complaint.

8 20. SEIU PEAFF also admitted that it does not state its purpose on its Forms C5.

9 21. SEIU PEAFF claims that this failure was not “meaningful” because the purpose of the entity
10 was apparent from the face of the Form C5 itself.

11 22. SEIU PEAFF stated that although it checked the “yes” box on item 10 of its February 2018,
12 Form C5, and stated under penalty of perjury that this information was correct, that the “no” box
13 should have been checked.

14 23. SEIU PEAFF claims that this was the result of a scrivener’s error, which it categorizes as
15 “equally insignificant” to the other violations discussed herein.

16 24. SEIU PEAFF admitted that its Form C5 covering May 2018, was filed seven (7) days late,
17 thus delaying disclosure of contributions of over \$3.5 million received from SEIU International.

18 25. SEIU PEAFF claims that this violation was “regrettable, but essentially trivial” for the stated
19 reason that it did not occur near the timeframe of an election.

20 26. SEIU PEAFF admitted that its Form C5 for May 2018, contained a “mathematical mistake”
21 of Ten Dollars (\$10.00).

22 27. SEIU PEAFF stated, however, that this error was “regrettable, but de minimis.”

23 28. SEIU PEAFF admitted that its Form C5 covering July 2018, was filed three (3) days late.
24

1 29. SEIU PEAFF stated, however, that this was a “trivial administrative error” on the part of
2 SEIU PEAFF’s compliance team.

3 30. SEIU PEAFF admitted that its Form C5 for June 2018, was filed one (1) day late.

4 31. SEIU PEAFF claims that this was a “trivial administrative error” on the part of SEIU PEAFF’s
5 compliance team.

6 32. On March 20, 2019, the Foundation submitted supplemental correspondence reminding the
7 PDC that it had previously issued a warning letter to SEIU PEAFF with respect to its failure to
8 timely report information contained within its Forms C3 and C4, for the year 2016, in response to
9 a complaint not filed by the Foundation.

10 33. The Foundation also filed a citizen’s action complaint against SEIU PEAFF in April 2018,
11 concerning some of the same practices that were raised to the PDC in Case No. 47303.

12 34. Notwithstanding each of these instances of being advised that its actions violated the law,
13 SEIU PEAFF did not go back and amend its forms, did not correct its reporting errors and therefore
14 continued to violate the FCPA, until after the administrative complaint forming the basis of this
15 appeal was submitted to the PDC.

16 35. SEIU PEAFF’s failure to timely file its 2018 PDC reports occurred over the course of a
17 major election year, and as a result, the public was deprived of timely and accurate information
18 concerning the financing of state elections.

19 36. The amended Form C5 reports, which the SEIU PEAFF filed on March 12, 2019 (the day
20 prior to its response to the PDC), disclosed a total of \$2,770,463 in additional political
21 contributions that the SEIU PEAFF received from the national SEIU in Washington, D.C., which
22 were not initially disclosed.

23 37. Of the contributions received by the SEIU PEAFF, a total of \$747,983 was expended in
24

1 Washington State through contributions to other SEIU political committees within the State of
2 Washington.

3 38. In dismissing the Foundation’s administrative complaint, the PDC misstated the amount of
4 the contributions that the SEIU PEAFF failed to disclose prior to the Foundation’s complaint, stating
5 it to be only \$1,534,947.00 instead of \$2,575,503.91. *See* correspondence dated May 7, 2019, a
6 true and correct copy of which is attached hereto as **Exhibit A**.

7 39. The PDC acknowledged, however, that even the lesser amount was a “significant” amount
8 to fail to report. *See Ex. A*.

9 40. The PDC inexplicably determined, however, that the facts alleged by the Foundation (and
10 admitted by SEIU PEAFF) did “...not amount to a finding of an actual violation warranting further
11 investigation.” *Id.*

12 41. As such, the PDC resolved the administrative complaint without any further proceedings,
13 investigation or enforcement action.

14 42. The PDC also issued another formal warning letter to SEIU PEAFF concerning the
15 importance of timely and accurately complying with the FCPA.

16 43. SEIU PEAFF can demonstrate no mitigating circumstances to explain its consistent and
17 significant non-compliance with disclosure obligations under the FCPA.

18 44. SEIU PEAFF’s violations did not stem from a good-faith misunderstanding of the relevant
19 FCPA provisions.

20 45. On May 15, 2019, the Foundation submitted a request to the PDC to re-open Case No.
21 47303, detailing the myriad failings with the initial determination by the PDC, as set forth above,
22 and its resolution of that case. That correspondence expressly advised the PDC that its
23 determination was “inconsistent with the Fair Campaign Practices Act and/or PDC regulations.”
24

1 46. On May 20, 2019, the PDC responded to the Foundation's request, clarifying that Case
2 No. 47303 had been dismissed with a warning to SEIU PEAFF, pursuant to WAC 390-37-
3 060(1)(d).² See electronic correspondence dated May 20, 2019, attached hereto as **Exhibit B**.

4 47. PDC staff did not further articulate its reasoning in support of its determination, however,
5 stating only that "[t]he PDC exercises discretion in the deployment of finite resources." *Id.*

6 V. CLAIM.

7 Petition for Review Pursuant to RCW 34.05.570

8 48. The Foundation hereby incorporates the allegations in paragraphs 1-47 above, as if
9 fully set forth herein.

10 49. SEIU PEAFF's violations as set forth above are "actual" FCPA violations, *i.e.*, they
11 are neither "remedial violations" nor "technical corrections" created by the 2018 FCPA
12 amendments. See RCW 42.17A.755.

13 50. Indeed, the PDC's correspondence of May 20, 2019, clarified that the PDC had *not*
14 dismissed the Foundation's complaint pursuant to WAC 390-37-060(1)(b), the regulation
15 applicable to "technical corrections."

16 51. As it exists today, the FCPA requires the PDC to take one of several actions when
17 it receives a complaint. It "must": (1) "Dismiss the complaint or otherwise resolve the matter" as
18 a "complaint[]" of remedial violations or request[] for technical corrections"; (2) "Initiate an
19 investigation to determine whether an actual violation has occurred, conduct hearings, and issue
20 and enforce an appropriate order..."; or (3) "Refer the matter to the attorney general..." See RCW
21 42.17A.755(1). Under the FCPA as it exists today, the enforcement protocol is that, upon receiving
22 a complaint, the PDC must conduct a preliminary review to determine (i) whether the alleged
23

24 ² The PDC claimed that its initial staff determination had erroneously cited WAC 390-37-060(1)(b) as the basis for the dismissal.

1 violations are an “actual violation” of the “FCPA,” or (ii) whether the complaint seeks merely a
2 “technical correction” or alleges a “remedial violation.” *See id.*

3 52. If the latter, then the PDC has the authority to “dismiss the complaint or otherwise
4 resolve the matter in accordance with subsection (2),” which grants the PDC’s executive director
5 discretion in resolving “technical corrections” and “remedial violations,” provided that “the
6 executive director consistently applies such authority.” *See* RCW 42.17A.755(2).

7 53. If an alleged violation is an “actual violation,” however, the PDC must then either
8 “[i]nitiate an investigation to determine whether an actual violation occurred, conduct hearings,
9 and issue and enforce an appropriate order ... or ... [r]efer the matter to the attorney general, in
10 accordance with subsection (4)...”. *See* RCW 42.17A.755(1)(b), (1)(c).

11 54. Section 755, as it exists after the 2018 amendments, provides no discretion for the
12 PDC to merely resolve a complaint by issuing a warning letter, particularly when all parties agree
13 “actual violations” of the FCPA took place.

14 55. Yet the PDC staff summarily dismissed the Foundation’s complaint upon a finding
15 that the alleged violations constituted “minor violations,” as defined by PDC regulations. *See*
16 WAC 390-37-061(2).

17 56. The Rule upon which the PDC relied in so doing, WAC 390-37-060, predated the
18 2018 amendments to the FCPA. Any former ability the PDC may have had to categorize alleged
19 violations as “minor violations” – rather than “actual violations,” “remedial violations,” or
20 “technical corrections” – and resolve them via a warning letter did not survive those legislative
21 amendments.

22 57. Although the FCPA defines both “remedial violations” and “technical corrections,”
23 it does not define or otherwise recognize a category for “minor violations.” *See* RCW
24

1 42.17A.755(46), (52).

2 58. The PDC's reliance on its former procedure was therefore contrary to the plain
3 language of the FCPA, RCW 42.17A.755, and not procedurally authorized, because the 2018
4 amendments to the FCPA removed any ability to categorize an alleged violation as a "minor
5 violation" resolvable via a warning letter (assuming, *arguendo*, that the PDC's regulation under
6 WAC 390-37-060 had properly effectuated the FCPA, prior to the 2018 amendments).

7 59. The Freedom Foundation petitions this court for review of a decision by the staff
8 of the PDC pursuant to the APA, to determine whether the PDC erred in its application of the
9 amended enforcement provisions of the FCPA, *see* RCW 42.17A.755.

10 a. Name and mailing address of the petitioner: The Freedom Foundation's
11 principal place of business is 2403 Pacific Ave. SE, Olympia, WA 98501, and
12 its mailing address is P.O. Box 552, Olympia, WA 98507.

13 b. Name and address of petitioner's attorneys: The Foundation is represented by
14 Eric Stahlfeld and Robert A. Bouvatte, Jr., c/o Freedom Foundation, P.O. Box
15 552, Olympia, WA, 98501.

16 c. Name and mailing address of the agency whose action is at issue: Review is
17 being sought from a decision by staff of the Public Disclosure Commission of
18 the State of Washington, 711 Capitol Way, Room 206, P.O. Box 40908,
19 Olympia, WA, 98504-0908.

20 d. Agency action at issue, together with a duplicate copy: At issue is the
21 determination in PDC Case No. 47303, dated May 7, 2019, made in response
22 to the Foundation's complaint against the SEIU PEAFF, delivered electronically
23 on February 18, 2019 (a copy is at **Exhibit A**); also at issue is the PDC's refusal
24

to re-open Case No. 47303, dated May 20, 2019, in response to the Foundation’s request, delivered electronically on May 15, 2019 (a copy is at **Exhibit B**).

e. Identification of persons who were parties to the PDC Decision: The parties to the PDC proceeding were the Foundation, which filed the complaint and is Petitioner herein, and the SEIU PEAFF, which submitted a response to the Foundation’s complaint on March 13, 2019.

f. Facts demonstrating the Foundation is entitled to obtain judicial review: Facts demonstrating that the Foundation has standing to be entitled to obtain judicial review are the PDC decision, which prejudices the Foundation in that it permits the national SEIU and its political committee, SEIU PEAFF, to conceal its political activities and to unduly influence the election of friendly officials throughout the State of Washington; that the Foundation was a party to the PDC proceeding below, and the PDC was required to consider its interests in reaching a decision; and that the Court’s ruling that the PDC’s decision is in error would eliminate and redress the prejudice caused by PDC’s decision.

g. Reasons relief should be granted: The PDC erred below to the extent it concluded that: (i) it had the discretion to categorize alleged “actual violations” of the FCPA as “minor violations,” and to resolve such complaints with only a warning; and (ii) the SEIU PEAFF’s alleged violations were “minor violations,” which could be addressed in this manner. The PDC erroneously interpreted or applied the law; the order is outside the PDC’s statutory authority/jurisdiction under the FCPA; the PDC decision is not supported by substantial evidence, to the extent there are findings, or, to the extent findings, if any, merely recite what

SEIU PEAFF's counsel wrote the PDC, the decision is not supported by sufficient findings and is arbitrary and capricious; the PDC has not decided all issues requiring its resolution; the PDC has engaged in an unlawful procedure and/or decision-making process, and the PDC failed to follow a prescribed procedure. *See* RCW 34.05.570(3)(b)-(f), (i); *see also* RCW 34.05.570(04) (providing for judicial review of other agency action).

VII. REQUESTED RELIEF.

WHEREFORE, Plaintiff requests the following forms of relief:

1. An order, as authorized by RCW 34.05.574:

a. for declaratory judgment that the PDC was incorrect in concluding that it had the discretion to categorize alleged violations of the FCPA as "minor violations," and to resolve such complaints with only a warning, and in concluding that the SEIU PEAFF's alleged violations were "minor violations," which could be addressed in this manner;

b. setting aside the PDC's decision resolving Case No. 47303 with only a warning letter to the SEIU PEAFF;

c. if the Court will not impose remedies directly on the SEIU PEAFF as requested below, remanding this matter to the PDC and ordering the PDC to impose penalties on SEIU PEAFF for its FCPA violations;

2. An order reversing the PDC decision below and ruling that the SEIU PEAFF is liable for its violations of the FCPA, as detailed herein;

3. Preliminary and permanent injunctive relief against SEIU PEAFF, prohibiting it from further violating the FCPA, as detailed herein;

4. For such remedies against the SEIU PEAFF as the Court deems appropriate under RCW

34.05.574(3) and RCW 42.17A.750, including:

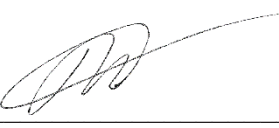
- a. a Ten Thousand Dollar (\$10,000.00) penalty pursuant to RCW 42.17A.750(1)(c) for each of the SEIU PEAFF's violations of RCW 42.17A.250, in an amount to be determined at trial;
- b. a penalty equivalent to the amount of contributions SEIU PEAFF failed to report to the PDC as required by RCW 42.17A.250, pursuant to RCW 42.17A.750(1)(g);
- c. a Ten Dollar (\$10.00) penalty for each day SEIU PEAFF failed to file forms C5 within the time required by RCW 42.17A.250, pursuant to RCW 42.17A.750(1)(e);
- d. a finding that the SEIU PEAFF's violations were intentional and trebling the amount of judgment, which for this purpose shall include costs, as authorized by RCW 42.17A.780; and
- e. any other penalty the Court deems appropriate under RCW 42.17A.750.

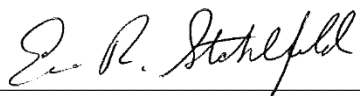
5. All costs of investigation and trial, including reasonable attorneys' fees, as authorized by RCW 42.17A.775(5).

6. All such other relief the Court deems appropriate.

Dated this 5th day of June, 2019.


FREEDOM FOUNDATION

By: 
Robert A. Bouvate, Jr., WSBA #50220
PO Box 552, Olympia, WA 98507
PH: 360.956.3482 | F: 360.352.1874
RBouvate@freedomfoundation.com

By: 
Eric R. Stahlfeld, WSBA #22002
PO Box 552, Olympia, WA 98507
PH: 360.956.3482 | F: 360.352.1874
ESTahlfeld@freedomfoundation.com

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Peter Lavallee, Executive Director
Washington State Public Disclosure Commission
711 Capitol Way, Rm. 206,
Olympia, WA 98501

By: 
Jennifer Matheson

Freedom Foundation

v

SEIU PEAF (APA)

Exhibit A



STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112

Toll Free 1-877-601-2828 • E-mail: pdcc@pdcc.wa.gov • Website: www.pdca.wa.gov

May 7, 2019

Delivered electronically to Maxford Nelson with the Freedom Foundation

Subject: Complaint regarding the Service Employees International Union Political Education & Action Fund PAC, PDC Case 47303

Dear Mr. Nelson:

The Public Disclosure Commission (PDC) has completed its initial review of the complaint you filed against the Service Employees International Union Political Education & Action Fund (SEIU PEAFF) on February 18, 2019. The complaint alleged that the SEIU PEAFF, a federal political committee, may have violated: (1) RCW 42.17A.250 by failing to timely and accurately file Out-of-State Political Committee reports (C-5 reports) as an out-of-state committee; (2) RCW 42.17.405 by failing to receive \$10 from ten registered voters in Washington State prior to making contributions to candidates; and (3) RCW 42.17A.442 by failing to received \$10 from ten registered voters in Washington State prior to making contributions to another political committee.

PDC staff reviewed the allegations listed in the complaint you filed, the statutes, rules and reporting requirements for an out-of-state committee, queried the PDC contribution and expenditure database for SEIU PEAFF activities, reviewed the Out-of-State Political Committee reports (C-5 reports) and amended C-5 reports filed by the SEIU PEAFF, and the response and attached exhibits provided by Dmitri Iglitzin, an attorney with Schwerin Campbell Barnard Iglitzin & Lavitt LLP on behalf of his client SEIU PEAFF. As a result of staff's review, we found the following:

- SEIU PEAFF PAC has been filing C-5 reports with the PDC dating back to August of 2004.
- For 2018 SEIU PEAFF filed five C-5 reports disclosing contribution and expenditure activities undertaken in Washington State in 2018. The C-5 reports listed a Washington DC mailing address, included a statement on line #3 SEIU PEAFF "is the IRS Section 527 account connected to the Service Employees International Union, identified Mary Kay Henry as Chairperson and Gerald Hudson, as Treasurer, and stated that the committee was registered as a PAC in California, Nevada, New York and Ohio
- The C-5 reports disclosed that SEIU PEAFF made \$747,983 in total expenditures in Washington state during calendar year 2018 for contributions to Washington State political committees registered with the PDC. In addition, the C-5 reports disclosed that SEIU PEAFF received a total of \$6,593,275 in contributions from SEIU, and included the following:

February 2018: On March 7, 2018, the SEIU PEAFF timely filed a C-5 report for February of 2018 disclosing a \$139,849.02 contribution was made to SEIU 775 Quality Care Committee, and the receipt of three contributions from SEIU in Washington, DC, totaling \$247,315.

May 2018: On June 18, 2018, the SEIU PEAFF filed a C-5 report for May of 2018 disclosing a \$206,562 contribution was made to SEIU 775 Quality Care Committee, and the receipt of eight contributions from SEIU in Washington, DC, totaling \$1,864,835.

June 2018: On July 11, 2018, the SEIU PEAFF filed a C-5 report for June of 2018 disclosing a \$148,073 contribution was made to SEIU 775 Quality Care Committee, and the receipt of two contributions from SEIU in Washington, DC, totaling \$328,073.

July 2018: On August 13, 2018, the SEIU PEAFF filed a C-5 report for July of 2018 disclosing a \$203,499 contribution was made to SEIU Local 925 Public Service PAC, and the receipt of one contribution from SEIU in Washington, DC, totaling \$203,499.

September 2018: On October 10, 2018, the SEIU PEAFF timely filed a C-5 report for September of 2018 disclosing a \$50,000 contribution was made to New Directions PAC, and the receipt of nine contributions from SEIU in Washington, DC, totaling \$2,534,249

- Mr. Iglitzin acknowledged that there were discrepancies between SEIU PEAFF's "Form 8872's that were filed with Internal Revenue Service and the C-5 reports filed by SEIU PEAFF with the PDC." He stated that there were four instances in which SEIU PEAFF received contributions from SEIU's general fund account that were designated for political activities in other states for the 2018 election cycle.
- Mr. Iglitzin stated that due to an inadvertent error, SEIU funds were not "deposited into the particular bank account that SEIU PEAFF uses for its Washington State expenditures." He stated the SEIU PEAFF compliance staff did not include those contributions on the C-5 reports "either as amounts received from SEIU International on a particular date or as part of the aggregate YTD [year-to-date] amount received from that source."
- Mr. Iglitzin stated that none of the SEIU contributions were spent on "electoral political activity in Washington State" but noted that "it is correct that both the receipt of this money, and the expenditures from the non-Washington State bank accounts, should have been reported by SEIU PEAFF on its C-5 filings. SEIU PEAFF has already filed amended C-5 reports that correct this mistake."
- On March 12, 2019, the SEIU PEAFF filed five amended C-5 reports, disclosing the same \$747,983 in total expenditures made in Washington state in 2018 for contributions to SEIU Washington state political committees. However, the amended C-5 reports disclosed that SEIU PEAFF received an additional \$1,534,947 in contributions received from SEIU in Washington, DC during 2018 for an aggregate total of \$8,128,222.
- Of the \$8,128,222 in total contributions received in 2018 by SEIU PEAFF from SEIU in Washington, DC, only \$747,983 was spent in Washington state as contributions to other SEIU political committees which represented only 9.2 percent of the committee's total political activities. The remaining \$7,380,239 in contributions received by SEIU PEAFF from SEIU in Washington, DC in 2018, were used for contributions made to political committees registered in other states, or for candidate activities in other states and at the federal level.

- Mr. Iglitzin stated that the allegations concerning violations of RCW 42.17A.405 and RCW 42.17A.442 by SEIU PEAFF for failing to receive \$10 from 10 registered voters in Washington state is not accurate since the C-5 report does not require contributions of \$25 or less to be itemized on the report, “that SEIU PEAFF has, in fact, received \$10 from 10 Washington voters.” In addition, he noted that RCW 42.17A.442 was found unconstitutional by Judge Schaller based on a Thurston County Superior Court case involving the State of Washington vs. Grocery Manufacturers Association.

As noted above, SEIU PEAFF failed to timely report \$1,534,947 in contributions received from SEIU in Washington, DC for the 2018 elections, and that information was not disclosed until March 12, 2019 when the amended C-5 reports were filed. While the amount of late reported contributions was significant, there were several mitigating factors considered by staff that included SEIU PEAFF: (1) disclosed no additional expenditures as having been made in 2018 on the amended C-5 reports; (2) timely disclosed the \$747,983 in expenditures made as contributions to political committees in Washington state and registered with the PDC on the initial C-5 reports; (3) did not spend any of the \$1,534,947 in late reported contributions received from SEIU in Washington state; and (4) received a total of \$8,128,222 in aggregate contributions from SEIU in Washington, DC, so the \$747,983 spent in Washington state in 2018 by SEIU PEAFF, represented 9.2% of total expenditure activities.

Based on the findings and the information listed above, PDC staff has determined that the facts in this instance do not amount to a finding of an actual violation warranting further investigation. However, pursuant to WAC 390-37-060(1)(b), PDC staff will be formally warning SEIU PEAFF concerning the importance of timely and accurately filing C-5 reports disclosing contribution and expenditure activities undertaken by an out-of-state political committee as required by PDC laws and rules.

This formal written warning conveys staff’s expectation that SEIU PEAFF will fully comply with the C-5 reporting requirements in the future, should the committee make additional contributions to candidates or political committees registered with the PDC in Washington State. The Commission will consider this formal written warning if there are any future PDC law or rule violations by SEIU PEAFF.

Based on this information, PDC staff is dismissing the remaining allegations in this matter against the Service Employees International Union Political Education & Action Fund PAC in accordance with RCW 42.17A.755(1). If you have questions, you may contact me at (360) 664-8854, toll-free at 1-877-601-2828, or by e-mail at kurt.young@pdc.wa.gov.

Sincerely,

Endorsed by:

s/ _____
Kurt Young, Compliance Officer

s/ _____
Peter Lavalley, Executive Director

cc: Dmitri Iglitzin, on behalf of SEIU PEAFF PAC



Freedom Foundation

v

SEIU PEAF (APA)

Exhibit B

From: [Peter Lavallee](#)
To: [Maxford Nelsen](#)
Subject: RE: Request to re-open PDC Case No. 47303
Date: Monday, May 20, 2019 3:17:09 PM

Dear Max,

Thanks again for reaching out with your thoughts on PDC Case 47303 regarding SEIU PEA. In general, PDC case resolutions of this nature are not subject to "appeal" to the Executive Director or Commission. I did, however, review the matter, and I can provide the following additional information.

The matter was dismissed with a warning pursuant to WAC 390-37-060(1)(d). Our correspondence resolving the case inadvertently cited WAC 390-37-060(1)(b), which had contained the warning provision of that rule prior to the latest revisions, effective 12/31/2018. I appreciate this opportunity to clarify that authority with you.

With that clarification, my review affirmed that this matter was resolved properly on the evidence and applicable law.

The PDC exercises discretion in the deployment of finite resources across the several hundred cases it considers each year. Respectfully, following the agency's careful review, assessment and investigation of such matters, the agency cannot re-review each one upon request, although I am happy to provide this courtesy reply in the present instance.

Regards,

Peter

--

Peter Lavallee
Executive Director
Public Disclosure Commission
peter.lavallee@pdc.wa.gov
360-664-2735

From: Peter Lavallee
Sent: Wednesday, May 15, 2019 4:55 PM
To: 'Maxford Nelsen' <MNelsen@freedomfoundation.com>
Subject: RE: Request to re-open PDC Case No. 47303

Hi Max,

Thanks for your note. As you know, dismissals of complaints by the Executive Director of the PDC are final decisions under WAC 390-37 (subject to the outcome of pending litigation, of course, of which I know you are aware).

That said, as I courtesy, I will review your letter in detail and get back to you with further thoughts.

Because this involves an enforcement matter—albeit one that has been resolved, but which nevertheless, under the terms of your request, could theoretically come before the Commission in some form—I have left the Commissioners off this correspondence, so as to maintain their independence from the PDC staff side of a potential enforcement matter. I did, however, let them know that I would be responding to you directly, so that they know I closed the loop.

Thanks for reaching out, and I appreciate your continued willingness to work cooperatively and professionally with the PDC on our shared interest in campaign-finance transparency.

I look forward to seeing you again soon.

Kind regards,

Peter

--

Peter Lavallee
Executive Director
Public Disclosure Commission
peter.lavallee@pdc.wa.gov
360-664-2735

From: Maxford Nelsen <MNelsen@freedomfoundation.com>

Sent: Wednesday, May 15, 2019 1:21 PM

To: Peter Lavallee <peter.lavallee@pdc.wa.gov>

Cc: Anne Levinson <anne.levinson@pdc.wa.gov>; David Ammons <david.ammons@pdc.wa.gov>; Bill Downing <bill.downing@pdc.wa.gov>; Russell Lehman <russell.lehman@pdc.wa.gov>; Fred Jarrett <fred.jarrett@pdc.wa.gov>

Subject: Request to re-open PDC Case No. 47303

Mr. Lavallee,

Please see the attached letter regarding the PDC's recent resolution of [Case No. 47303](#) involving a complaint submitted by the Freedom Foundation against the Service Employees International Union's Political Education and Action Fund.

After a thorough review, I believe the PDC's handling and resolution of the complaint to be inconsistent with the Fair Campaign Practices Act and/or PDC regulations. Accordingly, after reviewing the attached, I would respectfully request that the PDC either provide further explanation for its actions in writing or re-open Case No. 47303 for appropriate processing and resolution.

I realize this request may be somewhat out of the ordinary and am open to the possibility that I may

be missing some important factor or element that would justify the PDC's actions in this case. Nonetheless, I thought it important to bring these concerns to the Commission's attention.

Please do not hesitate to contact me with any questions you may have or to clarify any of the concerns outlined in the attached. I look forward to hearing from you.

Sincerely,

Maxford Nelsen

Director of Labor Policy | Freedom Foundation

MNelsen@FreedomFoundation.com

360.956.3482 | PO Box 552 Olympia, WA 98507

FreedomFoundation.com

APPENDIX B

Hearing Date: September 27, 2019
Hearing Time: 9:00 a.m.
Judge/Calendar: Skinder/Dispositive Motion

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

FREEDOM FOUNDATION, a Washington
nonprofit organization, in the name of the
STATE OF WASHINGTON,

Petitioner,

v.

WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION, a State of
Washington government agency, and
SERVICE EMPLOYEES
INTERNATIONAL UNION POLITICAL
EDUCATION & ACTION FUND, an IRS
527 political committee,

Respondents.

NO. 19-2-02843-34

DEFENDANT WASHINGTON
STATE PUBLIC DISCLOSURE
COMMISSION'S MOTION TO
DISMISS

I. INTRODUCTION AND RELIEF REQUESTED

The Washington State Public Disclosure Commission (Commission), by and through its attorneys, ROBERT W. FERGUSON, Attorney General, and CHAD C. STANDIFER, Assistant Attorney General, moves for an order dismissing Plaintiff Freedom Foundation's Petition for Review (Petition) pursuant to the Administrative Procedure Act, RCW 34.05.510 *et seq.* (APA), for its failure to state a claim on which relief can be granted pursuant to CR 12(b)(6). The Petition asks this court to review the Commission's decision to issue a warning letter and dismiss a complaint alleging violations of the Fair Campaign Practices Act, RCW 42.17A (hereinafter

1 RCW 42.17A). Freedom Foundation lacks standing to obtain judicial review under the APA, as
2 it has failed to meet its burden of showing any particularized injury.

3 II. STATEMENT OF FACTS

4 On or about February 18, 2019, the Commission received a complaint from
5 Freedom Foundation concerning the Service Employees International Union Political Education
6 and Action Fund (SEIU PEAFF), along with supporting documentation concerning the complaint.
7 FFv.SEIU¹ 0001-0048. The complaint alleged a potential violation of RCW 42.17A by
8 contributing funds to political committees in Washington without first receiving the requisite
9 contributions from registered voters in Washington. Additionally, Freedom Foundation alleged
10 SEIU PEAFF violated RCW 42.17A.250 by failing to state its purpose on forms C5, filing forms
11 C5 late, and failing to report contributions received from persons residing outside Washington
12 state. *Id.* On or about March 13, 2019, a response to the complaint was received by the
13 Commission from SEIU PEAFF. FFv.SEIU 0049-0051. On or about March 20, 2019,
14 Freedom Foundation provided the Commission with supplemental information regarding its
15 complaint. FFv.SEIU 0052-0058.

16 The Commission reviewed the documents submitted and assessed the factual and legal
17 arguments provided. On May 7, 2019, the Commission dismissed the complaint and issued a
18 formal warning to SEIU PEAFF. FFv.SEIU 0059-0062. The Commission determined that SEIU
19 PEAFF failed to timely report contributions received from SEIU in Washington, DC for the 2018
20 elections, and that information was not disclosed until March 12, 2019 when the amended C-5
21 reports were filed.² *Id.* While the amount of late reported contributions was significant, staff
22 considered several mitigating factors, including that SEIU PEAFF: (1) disclosed no additional
23 expenditures as having been made in 2018 on the amended C-5 reports; (2) timely disclosed the

24 ¹ "FFv.SEIU" refers to the certified agency record filed by the Commission in this case.

25 ² The warning letter stated that SEIU PEAFF failed to timely report contributions it received totaling
26 \$1,534,947. In fact, it appears SEIU failed to timely report \$2,770,463.30 in contributions received, all of which
came from SEIU. That discrepancy had no bearing on the Commission's decision to dismiss the complaint, as the
amount that was expended in Washington state remains \$747,983.

1 \$747,983 in expenditures made as contributions to political committees in Washington state and
2 registered with the PDC on the initial C-5 reports; (3) did not spend any of the late reported
3 contributions received from SEIU in Washington state; and (4) received a total of \$8,128,222 in
4 aggregate contributions from SEIU in Washington, DC, so the \$747,983 spent in Washington
5 state in 2018 by SEIU PEAFF, represented 9.2% of total expenditure activities. *Id.* Through the
6 warning letter, the Commission conveyed the importance of timely and accurately filing C-5
7 reports disclosing contribution and expenditure activities undertaken by an out-of-state political
8 committee. *Id.* This warning letter is available to the public, and is posted on the Commission's
9 website.³

10 III. STATEMENT OF ISSUE

11 Should the Petition be dismissed because Freedom Foundation lacks standing because it
12 suffered no injury in fact?

13 IV. STANDARD OF REVIEW

14 A court may grant a motion to dismiss pursuant to CR 12(b)(6) if "it appears beyond
15 doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would
16 entitle the plaintiff to relief." *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147
17 (1995). For purposes of deciding the defendant's motion, all of the factual allegations in the
18 complaint are accepted as true. *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson &*
19 *Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001). The motion will be granted only if it
20 appears beyond doubt that the plaintiff cannot prove any set of facts which would justify
21 recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

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25 ³ The warning letter is available at: <https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/2109/SEIU%20PEAF%20Complaint%20Return%20with%20Warning%20%28Nelson%20complaint%29%20PDC%20Case%2047303.pdf>. (Last visited on July 23, 2019).

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V. ARGUMENT

A. Background Regarding The Commission's Discretionary Authority To Enforce RCW 42.17A

1. The history of RCW 42.17A

In 1972, Washington voters adopted Initiative 276, designed, in part, to give the public complete access to information about who funds election campaigns. I-276 § 1. The Commission was established to enforce I-276, which became RCW 42.17A. *See* RCW 42.17A.105. RCW 42.17A encompasses laws that “seek to ferret out those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the act in the interest of public information.” *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976). RCW 42.17A is “liberally construed” to “promote complete disclosure of all information respecting the financing of political campaigns.” RCW 42.17A.001. The “requirements do not restrict political speech – they merely ensure that the public receives accurate information about who is doing the speaking.” *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 498, 166 P.3d 1174 (2007).

2. The Commission has the authority to dismiss complaints

The Commission may investigate apparent violations of RCW 42.17A upon receipt of a complaint. RCW 42.17A.105; RCW 42.17A.755(1). If a complaint is filed with the Commission, the Commission must:

(a) **Dismiss the complaint** or otherwise resolve the matter in accordance with subsection (2) of this section, **as appropriate under the circumstances after conducting a preliminary review**;

(b) Initiate an investigation to determine whether an actual violation has occurred, conduct hearings, and issue and enforce an appropriate order, in accordance with chapter 34.05 RCW and subsection (3) of this section; **or**

(c) Refer the matter to the attorney general, in accordance with subsection (4) of this section.

RCW 42.17A.755(1) (emphasis added). Thus, the Legislature authorized the Commission to dispose of complaints in several ways. Here, the Commission dismissed the complaint, in

1 accordance with RCW 42.17A.755(1)(a), prompting the filing of the Petition by
2 Freedom Foundation.

3 When a person files a complaint with the Commission, Commission staff give notice to
4 the complainant of any open commission hearings on the matter, and the complainant “may” be
5 called as a witness in any enforcement hearing or investigative proceeding. WAC 390-37-030(1).
6 Neither the complainant nor any other person, however, “shall have special standing to
7 participate or intervene in the any investigation or consideration of the complaint by the
8 commission or its staff.” *Id.*

9 **B. Freedom Foundation Lacks Standing To Seek Judicial Review Under The APA**

10 A person must have standing to obtain judicial review of agency action under the APA.
11 RCW 34.05.530. A purpose of the law of standing is to determine *who* may bring a case before
12 the court to contest agency action. *See* William R. Andersen, *The 1988 Washington*
13 *Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 823-26 (1989). To have
14 standing, a “person” must be “aggrieved or adversely affected by the agency action.” *Id.* A
15 person is aggrieved or adversely affected within the meaning of this section only when the
16 following conditions are present:

- 17 (1) The agency action has prejudiced or is likely to prejudice that person;
18 (2) That person's asserted interests are among those that the agency was required
19 to consider when it engaged in the agency action challenged; **and**
(3) A judgment in favor of that person would substantially eliminate or redress
the prejudice to that person caused or likely to be caused by the agency action.

20 RCW 34.05.530 (emphasis added). All three of these tests must be met to establish standing.
21 The first and third prongs are generally called “injury-in-fact” requirements, while the second is
22 called the “zone of interest” prong.” *Allan v. University of Wash.*, 140 Wn.2d 323, 327,
23 997 P.2d 360 (2000).

24 The person challenging the action has the burden to prove standing. *Snohomish Ct. Pub.*
25 *Trans. Benefit Area v. State*, 173 Wn. App. 504, 512, 294 P.3d 803 (2013);
26 *Patterson v. Segale*, 171 Wn. App. 251, 259, 289 P.3d 657 (2012);

1 *KS Tacoma Holdings LLC v. Shoreline Hearings Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876
2 (2012). Freedom Foundation has failed to meet its burden of establishing standing to challenge
3 the Commission's dismissal of the complaint.⁴

4 **1. Freedom Foundation was not prejudiced by any action taken by the**
5 **Commission**

6 Freedom Foundation has shown no prejudice that separates it from the interested public
7 at large. In order to satisfy the prejudice requirement, RCW 34.05.530(1), "a person must allege
8 facts demonstrating that he or she is 'specifically and perceptibly harmed' by the agency
9 decision." *Patterson v. Segale*, 171 Wn. App. 251, 259, 289 P.3d 657 (2012) (quoting
10 *Trepanier v. City of Everett*, 64 Wn. App. 380, 382–83, 824 P.2d 524 (1992)). "When a person
11 alleges a threatened injury, as opposed to an existing injury, the person must demonstrate an
12 'immediate, concrete, and specific injury to him or herself.' " *Id.* If the agency action does not
13 specifically harm or injure the petitioner, the petitioner cannot establish the "prejudice"
14 requirement of standing. *See Allan*, 140 Wn.2d at 331–32 (wife of university professor lacked
15 standing to challenge the validity of the university's rules of procedure used in disciplinary
16 proceeding because, among other things, she did not share her husband's interest in university
17 employment); *State v. McKenzie*, 114 Wn. App. 687, 700–01, 60 P.3d 607 (2002) ("One who is
18 not adversely affected by a rule or statute does not have standing to contest its validity");
19 *Pac. Wire Works v. Dep't of Labor & Indus.*, 49 Wn. App. 229, 236–37, 742 P.2d 168 (1987)
20 (employer who challenged a rule that did not actually affect its employees was denied standing
21 to challenge the rule); *see also Sierra Club v. Morton*, 405 U.S. 727, 734–36, 92 S. Ct. 1361,
22 31 L. Ed. 2d 636 (1972) (environmental organization that did not allege harm to its members
23 lacked standing to challenge governmental authorization to develop a ski resort);

24
25 ⁴ Thurston County Superior Court Judge Carol Murphy recently dismissed a similar petition for review
26 filed by Freedom Foundation on the basis that Freedom Foundation lacked standing to seek review under the APA.
Freedom Foundation v. Bethel School District, No. 18-2-05084-34 (April 19, 2019). As in this matter,
Freedom Foundation filed a complaint with the Commission, and then sought judicial review of the Commission's
decision. An appeal is pending in that matter with the Court of Appeals, No. 53415-1-II.

1 *KS Tacoma Holdings*, 166 Wn. App. at 128-138 (no injury to landowner from environmental
2 regulation); *Newman v. Veterinary Bd. Of Governors*, 156 Wn. App. 132, 143-44, 231 P.3d 840
3 (2010) (no injury resulting from agency decision not to bring licensing action against a
4 veterinarian).

5 Neither RCW 42.17A nor the Commission's rules confer special status upon a
6 complainant based upon the simple act of filing a complaint.⁵ In fact, a complainant has no ability
7 to participate in any proceeding, unless requested by the Commission. WAC 390-37-030(1). In
8 summary, there is no legal authority establishing that a complainant has any continuing right to
9 participate in, challenge, or seek judicial review of the Commission's handling of a complaint.

10 Freedom Foundation has suffered no injury here sufficient to establish standing. There is
11 no allegation that the conduct in question directly affected Freedom Foundation. Rather,
12 Freedom Foundation simply believes that the action taken by the Commission was not severe
13 enough, and wants this Court to order the Commission to penalize SEIU PEAFF. Such an interest
14 is no different from any other citizen who may have an interest in desiring that a statute be
15 enforced in a particular manner.

16 The United States Supreme Court has recognized, "that an agency's decision not to
17 prosecute or enforce, whether through civil or criminal process, is a decision generally
18 committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831,
19 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). The Court reasoned that, "... when an agency refuses
20 to act it generally does not exercise its *coercive* power over an individual's liberty or property
21 rights, and thus does not infringe upon areas that courts often are called upon to protect."
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23 ⁵ RCW 42.17A.775(1) provides that a person may bring a citizen's action in court "in the name of the
24 state" upon meeting certain perquisites found in RCW 42.17A.775(2). Such an action is precluded if the
25 Commission has taken action on the complaint in a timely manner, as was the case here. RCW 42.17A.755(2). This
26 statutory authority confers no special status upon complainants such as Freedom Foundation as citizen actions
constitutes state action, and do not benefit the person filing suit. The APA "establishes the exclusive means of
judicial review of agency action..." except for limited circumstances that do not apply here. RCW 34.05.510.

1 *Heckler*, 470 U.S. at 832 (Emphasis in original).⁶ Here, the Commission exercised its discretion
2 in issuing a warning letter to SEIU PEAFF. It exercised no coercive power over
3 Freedom Foundation. In short, Freedom Foundation has not been harmed by the Commission's
4 action, and there is no basis for authorizing judicial review here.

5 **2. The Commission was not required to consider Freedom Foundation's**
6 **interests in determining whether to dismiss the complaint**

7 The second requirement for standing is whether the petitioner's "asserted interests are
8 among those that the agency was required to consider when it engaged in the agency action
9 challenged." RCW 34.05.530(2). This is called the "zone of interest" requirement. The test is
10 not "especially demanding." *KS Tacoma Holdings, LLC v. Shoreline Hearings Bd.*,
11 166 Wn. App. 117, 128, 272 P.3d 876 (2012). While this test is generally not difficult to meet,
12 it was not met here.

13 The issues before the Commission were whether SEIU PEAFF had violated RCW 42.17A,
14 and if so, what action, if any, should be taken regarding such violations. The Commission is
15 tasked with reviewing potential violations of RCW 42.17A irrespective of the particular
16 viewpoint of a complainant. RCW 42.17A does not authorize any person or group of persons to
17 influence the Commission's ultimate decision regarding what action it will take on a complaint.

18 In *Newman*, the Court of Appeals examined whether dog owners Kenneth and
19 Nonna Newman had standing⁷ to challenge a decision by the Veterinary Board of Governors to
20 decline to pursue charges against veterinarians that had treated their dog. The Court found that
21 the applicable statute, the Uniform Disciplinary Act (RCW 18.130), did not provide the
22 Newmans with the right to compel action against the veterinarians' licenses by virtue of having

23 ⁶ *Chaney* interpreted the federal APA, 5 U.S.C. § 701(a)(2), which bars judicial review of agency action
24 "committed to agency discretion by law." Here, RCW 42.17A grants to the Commission absolute discretion with
25 regard the dismissal of complaints. RCW 42.17A.755(1)(a).

26 ⁷ The court in *Newman* was analyzing standing under the Newmans' constitutional writ of certiorari, as the
Newmans had failed to perfect any potential APA claim. *See Newman*, 156 Wn. App. at 142, 146-50.

1 filed a complaint, as that decision was vested with the Veterinary Board. *Newman*, 156 Wn. App.
2 at 144. Similarly here, Freedom Foundation has no right under RCW 42.17A to compel any
3 particular action by the Commission. Such decisions rest exclusively with the Commission.
4 RCW 42.17A.755.⁸

5 Allowing complainants such as Freedom Foundation to challenge every action taken by
6 the Commission would render void the Commission's discretionary authority to enforce
7 RCW 42.17A. Virtually any decision made by the Commission could be subject to later court
8 scrutiny. "The court must also avoid constructions that yield unlikely, absurd or strained
9 consequences." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

10 The Commission is cognizant that certain actions it takes may be subject to judicial
11 review by those who can establish standing. For example, those subject to enforcement action
12 by the Commission have a right to seek judicial review following the issuance of a final order
13 by the Commission. *See* RCW 34.05.542(2). The Commission, however, processes hundreds of
14 citizen complaints annually. To allow citizens to challenge every complaint disposition would
15 open the judicial floodgates to those who simply wish to second-guess decisions made by the
16 Commission. Neither the APA nor RCW 42.17A compels such an absurd result.

17 In sum, the general policy interests of complainants are not within the "zone of interests"
18 agencies such as the Commission must take into account when making decisions. Agencies such
19 as the Commission must make such decisions based on the facts and the law, even if contrary to
20 a particular viewpoint. Freedom Foundation cannot establish standing under the second prong
21 of RCW 34.05.530.

22 **3. A judgment in favor of Freedom Foundation would provide no remedy**
23 **absent a showing of prejudice**

24 The third APA standing requirement is that a judgment in favor of the petitioner "would
25 substantially eliminate or redress the prejudice to that person caused or likely to be caused by

26 ⁸ The Attorney General may also take action upon referral by the Commission. RCW 42.17A.755.

1 the agency action.” RCW 34.05.530(3). In other words, standing is denied if the harm alleged
2 would not be remedied by a favorable judgment. Together with the requirement that the agency
3 action prejudice the petitioner, this requirement constitutes the “injury-in-fact” element of
4 standing. *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*,
5 129 Wn.2d 787, 793–94, 920 P.2d 581 (1996).

6 As discussed previously, there is no prejudice to Freedom Foundation by virtue of the
7 dismissal of the complaint. Freedom Foundation is dissatisfied by the Commission’s action, but
8 such “dissatisfaction is not sufficient to establish injury-in-fact.” *Newman*, 156 Wn. App. at 144.
9 The third prong of the standing requirement can not be satisfied here.

10 **4. Freedom Foundation’s mission does not itself establish standing**

11 The Commission anticipates that Freedom Foundation may argue that its mission as a
12 non-profit organization confers upon it a unique status that establishes it is prejudiced by the
13 Commission’s dismissal. Such an argument fails. An organization’s mission is not sufficient to
14 establish standing, absent a showing of particularized injury or harm to that organization.

15 In *Sierra Club v. Morton*, the United States Supreme Court discussed the standing of the
16 Sierra Club to challenge the construction of a proposed ski resort and recreation area in a national
17 game refuge. In finding the Sierra Club lacked standing, the Court opined as follows:

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1 But a mere 'interest in a problem,' no matter how longstanding the interest and
2 no matter how qualified the organization is in evaluating the problem, is not
3 sufficient by itself to render the organization 'adversely affected' or 'aggrieved'
4 within the meaning of the APA. The Sierra Club is a large and long-established
5 organization, with a historic commitment to the cause of protecting our Nation's
6 natural heritage from man's depredations. **But if a 'special interest' in this
7 subject were enough to entitle the Sierra Club to commence this litigation,
8 there would appear to be no objective basis upon which to disallow a suit by
9 any other bona fide 'special interest' organization however small or short-
10 lived.** And if any group with a bona fide 'special interest' could initiate such
11 litigation, it is difficult to perceive why any individual citizen with the same bona
12 fide special interest would not also be entitled to do so.

13 *Sierra Club*, 405 U.S. at 739 (emphasis added).⁹ "[T]he 'injury in fact' test requires *more* than
14 an injury to a cognizable interest. It requires that the party seeking review be . . . among the
15 injured." *Allan*, 140 Wn.2d at 328 (quoting *Sierra Club*, 405 U.S. at 734-35). Whatever interest
16 Freedom Foundation has in the outcome here, it suffered no direct injury.

17 Freedom Foundation may demonstrate it has a long-standing mission relating to
18 scrutinizing unions. But, as *Sierra Club* makes clear, however well established or sincere an
19 interest may be in a particular subject matter or outcome, it does not confer standing upon an
20 organization. To confer standing under these circumstances is to open the door to any group with
21 a bona fide special interest in a particular subject matter to challenge *any* agency action it deems
22 improper. To do so would render the standing requirement meaningless.

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26 ⁹ The Court in *Sierra Club* was interpreting the federal Administrative Procedure Act (APA), 5 U.S.C. § 702, which
provided:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by
agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

This federal standard is *broader* than the standard under our state's current APA. In fact, the federal standard is
similar to language that was included in an earlier version of our state's APA, and which was removed by the
Legislature in favor of a more limited standing requirement. *See Andersen*, 64 Wash. L. Rev. at 823.

1 **C. The Petition is devoid of merit because the Commission has the authority to issue**
2 **warnings based on minor violations of RCW 42.17A**

3 Pursuant to WAC 390-37-060(1)(d), the Commission may resolve any complaint that
4 alleges minor violations of chapter 42.17A by issuing a formal written warning. The Commission
5 dismissed the complaint against SEIU PEAFF pursuant to that authority.¹⁰ As that action resolved
6 the complaint, the complaint was dismissed. This Court need not address the propriety of the
7 Commission's action because Freedom Foundation lacks standing to seek judicial review, as
8 discussed previously. Nevertheless, Freedom Foundation's argument on the merits is
9 misguided.¹¹

10 Freedom Foundation argues that the Commission lacked the authority to conclude that
11 SEIU PEAFF engaged in "minor" violations of the statute. The Commission has a rule explicitly
12 authorizing complaint dismissals in these circumstances. WAC 390-37-060(1)(d).
13 Freedom Foundation argues the 2018 statutory amendments to RCW 42.17A eliminated the
14 Commission's authority to issue warning letters for minor violations. It is wrong.
15 WAC 390-37-060 was amended by the Commission following the passage of the 2018
16 amendments, effective December 31, 2018. Those amendments include the ability to issue
17 warning letters based on minor violations of RCW 42.17A. WAC 390-37-060(1)(d). That rule
18 is consistent with the broad authority granted by the Legislature to enforce RCW 42.17A and
19 dispose of complaints as appropriate.

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¹⁰ As discussed in Freedom Foundation's Petition, the Commission inadvertently cited to
24 WAC 390-37-060(1)(b), in its warning letter, but was relying on the authority found in WAC 390-37-060(1)(d) as
discussed herein. Petition at 7.

25 ¹¹ The Commission is not suggesting that the Court is required to review the Petition's merits. Nevertheless,
26 some discussion of the Petition's merits is provided herein in the event the Court maintains some evaluation of the
merits is necessary prior to deciding the standing issue.

1 A warning letter was the appropriate resolution of this matter based on the minor
2 violations committed by SEIU PEAFF. A minor violation is an actual violation that occurs:

- 3 (a) When required information is not timely disclosed, but the public is not
4 deprived of critical information; or
5 (b) When incomplete information is disclosed, but a good faith effort to comply
6 with disclosure is made, and the public is not deprived of critical information.
7 (c) When any other violation of chapter 42.17A RCW has occurred that does not
8 materially affect the public interest.

9 WAC 390-37-061(2). Here, while some information was not timely disclosed, the public was
10 not deprived of critical information. First, while some contributions were not timely disclosed,
11 those contributions were all from one source, SEIU, based in Washington D.C., a source of
12 contributions that had been disclosed on the initial reports filed. None of the contributions that
13 were untimely disclosed came from Washington residents. Most significantly, SEIU PEAFF
14 timely disclosed the \$747,983 in expenditures made as contributions to Washington state
15 political committees on the initial C-5 reports. In other words, SEIU PEAFF timely disclosed all
16 campaign expenditures made in Washington state. As a result, Washingtonians were not
17 deprived of material information regarding spending on Washington state campaigns.

18 Freedom Foundation views this matter as an avenue to seek a sanction against SEIU
19 PEAFF, including a civil penalty of \$10,000 per violation. *See* Petition at 12. No such relief is
20 available under the APA. *See* RCW 34.05.574(1) ("In reviewing matters within agency
21 discretion, the court shall limit its function to assuring that the agency has exercised its discretion
22 in accordance with law, and shall not itself undertake to exercise the discretion that the legislature
23 has placed in the agency."). RCW 42.17A.755(1) requires the Commission to take certain actions
24 within 90 days of the filing of complaint, as was done here. There is, however, no authority in
25 RCW 42.17A requiring the Commission take a particular action against any Respondent deemed
26 to have violated any provision of the statute. Rather, the Commission has been granted the
discretion to enforce RCW 42.17A and did so here. A court "will not set aside a discretionary
decision of an agency absent a clear showing of abuse." *ARCO Prods. Co. v. Washington Utils.*


1 & *Trans. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995) (quoting *Jensen v. Dep't of*
2 *Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984)). The Commission's decision to issue a
3 warning letter should not be disturbed, even if this Court deems a review of the merits necessary.

4 **VI. CONCLUSION**

5 Based on the above, the Plaintiff lacks standing to seek review of the Commission's
6 discretionary decision to issue a warning letter in this matter. The Commission respectfully
7 requests that the Petition be dismissed with prejudice.

8 DATED this 26th day of July, 2019.

9 ROBERT W. FERGUSON
10 Attorney General

11 
12 CHAD C. STANDIFER, WSBA #29724
13 Assistant Attorney General
14 Attorneys for the State of Washington
15 Public Disclosure Commission
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19
20
21
22
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26

1 **PROOF OF SERVICE**

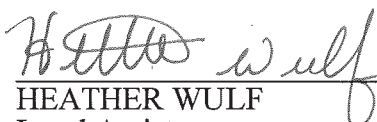
2 I certify that I served a true and correct copy of this document on all parties or their
3 counsel of record on the date below as follows:

4 ROBERT A. BOUVATTE, JR.
5 ERIC R. STAHLFELD
6 FREEDOM FOUNDATION
7 PO BOX 552
8 OLYMPIA, WA 98507

- ☒ U.S. mail via state Consolidated Mail
Service (with proper postage affixed)
☐ courtesy copy via facsimile:
☒ Courtesy copy via electronic mail
RBouvatte@freedomfoundation.com
ESTahlfeld@freedomfoundation.com
☐ ABC/Legal Messenger

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 26 day of July, 2019, at Olympia, Washington.

12 
13 HEATHER WULF
14 Legal Assistant

APPENDIX C

3

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2019 SEP 27 AM 11:32

Linda Myhre Enlow
Thurston County Clerk

☐ Expedite
☐ No hearing set
☒ Hearing is set
Date: September 27, 2019
Time: 9:00 a.m.
Judge/Calendar: Hon. Skinder –
Dispositive Motions

19-2-02843-34
ORDSMWP 19
Order of Dismissal With Prejudice
6647727



**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

FREEDOM FOUNDATION, a Washington
nonprofit organization,

Petitioner,

v.

WASHINGTON STATE PUBLIC DISCLOSURE
COMMISSION, a State of Washington
government agency, and SERVICE EMPLOYEES
INTERNATIONAL UNION POLITICAL
EDUCATION & ACTION FUND, an IRS 527
political committee,

Respondents.

No. 19-2-02843-34

~~[Proposed]~~ **ORDER DENYING**
WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION'S, CR
12(b)(6) MOTION TO DISMISS

GRANTING

RAB
COA
BB

This matter came before the Court on the date below, pursuant to Respondent, Washington State Public Disclosure Commission's, Motion to Dismiss. Plaintiff, Freedom Foundation was represented by Robert A. Bouvatte, Jr. The State of Washington Public Disclosure Commission was represented by Assistant Attorney General Chad C. Standifer. SEIU PEAFF was represented by Dmitri Iglitzin.

Benjamin Berger.

~~[Proposed]~~ **ORDER DENYING PDC'S**
MOTION TO DISMISS
No. 19-2-02843-34

The Court having considered the following:

1. Washington State Public Disclosure Commission's Motion to Dismiss;
2. Plaintiff, Freedom Foundation's, Response;
3. Washington State Public Disclosure Commission's Reply to Plaintiff Freedom Foundation's Response;
4. _____;
5. _____;

and the argument herein, and the court being otherwise being fully advised on the matter herein, now, therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED that Washington State Public Disclosure Commission's Motion should be and hereby is ~~DENIED~~ ^{GRANTED}, and the case is therefore dismissed with prejudice as to all parties.

DONE IN OPEN COURT this 27th day of September 2019.


Presented by:

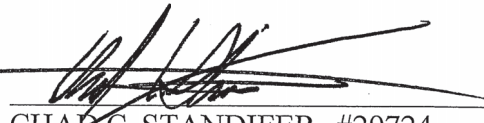
Robert Bouvatte, WSBA #50220
P.O. Box 552, Olympia, WA 98507
PH: 360.956.3482 | F: 360.352.1874
RBouvatte@freedomfoundation.com
Counsel for Freedom Foundation

THE HONORABLE JOHN C. SKINDER
SUPERIOR COURT JUDGE

1 Approved as to Form by:

Approved as to Form by:

2 
3 ~~DMITRI IGLITZIN, #17673~~
4 Ben Berger #52909
Counsel for SEIU PEA


CHAD C. STANDIFER, #29724
Counsel for the State

5 **DECLARATION OF SERVICE**

6 I, Jennifer Matheson, hereby declare under penalty of perjury under the laws of the State of
7 Washington that on September 27, 2019, I caused the foregoing Brief in Opposition to Motion to Dismiss
8 to be filed with the clerk, and caused a true and correct copy of the same to be delivered via USPS and
9 email to the following:

10 Chad C. Standifer
11 John Meader
Assistant Attorneys General
1125 Washington Street SE
12 P.O. Box 40100
Olympia, WA 98504
13 ChadS@atg.wa.gov
JohnM@atg.wa.gov

14 *Attorneys for Washington PDC*

15 Dmitri Iglitzin
16 Benjamin Berger
Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Suite 400
17 Seattle, WA 98119
P: (206) 257-6003
18 F: (206) 257-6038
iglitzin@workerlaw.com
19 berger@workerlaw.com
woodward@workerlaw.com
20 *Attorneys for SEIU 775*

21 Dated: September 27, 2019.

22 By: 
Jennifer Matheson

APPENDIX D

February 9, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FREEDOM FOUNDATION, a Washington
nonprofit organization,

Appellant ,

v.

WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION, a State of
Washington government agency, and
SERVICE EMPLOYEES INTERNATIONAL
UNION POLITICAL EDUCATION &
ACTION FUND, an IRS 527 political
committee,

Respondent.

No. 53889-0-II

UNPUBLISHED OPINION

MAXA, J. – The Freedom Foundation (Foundation) filed an administrative complaint with the Washington State Public Disclosure Commission (PDC), alleging that Service Employees International Union Political Education and Action Fund (SEIU PEAFF) had violated the Fair Campaign Practices Act (FCPA), chapter 42.17A RCW. The PDC dismissed the Foundation’s complaint and issued a warning letter to SEIU PEAFF.

The Foundation filed a petition for judicial review under the Administrative Procedures Act (APA), chapter 34.05 RCW, challenging the PDC’s dismissal of its complaint regarding SEIU PEAFF. The superior court dismissed the Foundation’s petition under CR 12(b)(6) based on a lack of standing. The Foundation appeals the superior court’s dismissal of its petition.

We follow this court's recent decision in *Freedom Foundation v. Bethel School District*, 14 Wn. App. 2d 75, 469 P.3d 364 (2020), *review denied*, 478 P.3d 83 (2021), which addressed the same standing issue and concluded that the Foundation did not have standing to seek judicial review of the PDC's dismissal of its complaint to the PDC. Accordingly, we affirm the superior court's order dismissing the Foundation's petition for judicial review.

FACTS

SEIU PEAFF is registered as an out-of-state political committee with the PDC. Since August 2004, SEIU PEAFF has filed form C5 reports with the PDC to report contributions or expenditures to or on behalf of Washington candidates or political committees.

In February 2019, the Foundation filed a complaint with the PDC alleging that SEIU PEAFF had failed to timely and accurately file its C5 reports in violation of an FCPA provision, RCW 42.17A.250. RCW 42.17A.250 sets forth the campaign finance requirements for out-of-state political committees. SEIU PEAFF responded to the allegations against it, conceding inadvertent errors on at least four occasions regarding its C5 reports.

The PDC reviewed the complaint, the PDC contribution and expenditure database for SEIU PEAFF activities, the C5 forms and amended C5 forms filed by SEIU PEAFF, and the response to the complaint filed by SEIU PEAFF.

In May, the PDC sent a letter to the Foundation responding to the Foundation's complaint regarding SEIU PEAFF. The letter outlined the PDC's findings regarding the Foundation's allegation, and stated that the facts did not amount to an actual violation warranting further investigation. The letter further stated that the PDC would be formally warning SEIU PEAFF regarding the importance of filing timely and accurate C-5 reports. The letter concluded by stating that the PDC was dismissing the Foundation's remaining allegations against SEIU PEAFF.

The Foundation filed a petition for judicial review of the PDC's decision to dismiss the Foundation's complaint to the PDC regarding SEIU PEAFF's conduct. The PDC filed a motion to dismiss under CR 12(b)(6), arguing that the Foundation lacked standing to seek judicial review under the APA. The superior court granted the PDC's motion to dismiss.

The Foundation appeals the superior court's order dismissing the petition for judicial review.

ANALYSIS

A. STANDARD OF REVIEW – CR 12(b)(6)

We review *de novo* a trial court's ruling on a CR 12(b)(6) motion to dismiss. *Wash. Trucking Ass'n v. Emp't Sec. Dep't*, 188 Wn.2d 198, 207, 393 P.3d 761 (2017). Dismissal is appropriate where it appears beyond doubt that a plaintiff will be unable to prove any set of facts that would justify recovery. *Id.* We assume the truth of the allegations in the plaintiff's complaint and may consider hypothetical facts not included in the record. *Id.*

B. STANDING FOR JUDICIAL REVIEW UNDER THE APA

The Foundation argues that it can seek judicial review under the APA based on both (1) individual standing and (2) associational standing on behalf of its members. We disagree.

1. Legal Principles

We review standing *de novo*. *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 861, 351 P.3d 875 (2015). A person has standing to obtain judicial review of an agency action under the APA if that person is aggrieved or adversely affected by the agency action. RCW 34.05.530. A person is aggrieved or adversely affected only when three conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;

- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530. The first and third conditions together are the “injury-in-fact” requirements, and the second condition is the “zone of interest” requirement. *Freedom Foundation*, 14 Wn. App. 2d at 86. All three conditions must be present for a person to have standing. *Id.* The person challenging the agency action has the burden to prove standing. *Id.*

The “injury in fact” element requires the petitioner to show that the agency decision caused some specific and perceptible harm. *Id.* There must be an invasion of a legally protected interest. *Snohomish County Pub. Transp. Benefit Area v. Public Emp't Relations Comm'n*, 173 Wn. App. 504, 513, 294 P.3d 803 (2013). And “[c]onjectural or hypothetical injuries are insufficient to confer standing.” *Freedom Foundation*, 14 Wn. App. 2d at 86. Finally, the petitioner must show that a favorable decision likely – not merely speculatively – will redress the injury. *Patterson v. Segale*, 171 Wn. App. 251, 259, 289 P.3d 657 (2012).

The “zone of interest” requirement “limits judicial review of an agency action to litigants with a viable interest at stake, rather than individuals with only an attenuated interest in the agency action.” *City of Burlington*, 187 Wn. App. at 862. This requirement asks whether the legislature intended the agency to consider the petitioner's interests when taking the challenged action. *Id.* at 863.

An organization that otherwise does not have individual standing may have associational standing on behalf of its members. Associational standing is established when (1) the members of the organization otherwise would have standing to sue in their own right, (2) the interests that the organization seeks to protect are germane to its purpose, and (3) neither the claim nor the

relief requires the participation of the organization's individual members. *Wash. State Nurses Ass'n v. Cmty. Health Sys., Inc.*, 196 Wn.2d 409, 415, 469 P.3d 300 (2020). The first two prongs are constitutional, but the third prong is judicially created for administrative convenience and efficiency. *Id.*

2. Individual Standing – Injury-in-Fact Requirement

The Foundation argues that the PDC's dismissal of its complaint against SEIU PEAFF caused injury-in-fact because (1) it was a party to the PDC complaint; and (2) it suffered a competitive harm to its interests as a result of SEIU PEAFF's FCPA violations. We disagree.¹

a. The Foundation's Complainant Status

The Foundation argues that the PDC's dismissal of its complaint against SEIU PEAFF necessarily caused prejudice because it was a party to that complaint. This court rejected an identical argument in *Freedom Foundation*, 14 Wn. App. 2d at 87-88. We follow *Freedom Foundation*.

In *Freedom Foundation*, the Foundation filed a PDC complaint against a school district regarding its processing of payroll deductions. *Id.* at 79. The PDC found that the evidence did not support a violation and closed the matter. *Id.* The Foundation sought judicial review under the APA. *Id.* The Foundation argued that it had standing to seek judicial review because it was a party to the PDC complaint. *Id.* at 85.

First, the court referenced WAC 390-37-030(1), which states, "When a complaint is filed with the PDC other than by PDC staff pursuant to WAC 390-37-040, neither the complainant nor any other person shall have special standing to participate or intervene in any investigation or

¹ Because we hold that the Foundation cannot satisfy the injury-in-fact requirement, we do not address the zone of interest requirement.

consideration of the complaint by the commission or its staff.” The court stated, “The FCPA does not confer standing on a complainant, and a complainant does not have the ability to participate in any proceeding unless requested by the PDC.” *Freedom Foundation*, 14 Wn. App. 2d at 87.

Second, the court referenced RCW 34.05.010(12), which states that under the APA, a party to an agency proceeding is “(a) A person to whom the agency action is specifically directed; or (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.” RCW 34.05.010(12). The court stated:

Freedom Foundation was not a party to the PDC complaint. The PDC action was not specifically directed toward Freedom Foundation, and it was not named or allowed to intervene as a party in any PDC proceeding. Rather, Freedom Foundation retained the status of a complainant and submitted documentary evidence to the PDC during its preliminary investigation. Because Freedom Foundation was not a party to the complaint, it fails to show how its complainant status resulted in a specific and perceptible harm when the PDC denied its complaint.

Freedom Foundation at 87-88.

The Foundation relies on this court’s unpublished decision in *Automotive United Trades Organization v. Washington Public Disclosure Commission*, No. 50652-1-II, (unpublished) (Wash. Ct. App. May, 14, 2019) [*AUTO*], <http://www.courts.wa.gov/opinions/pdf/D2%2050652-1-II%20Unpublished%20Opinion.pdf>. In that case, the PDC declined to take action on AUTO’s citizen action notice and issue a decision letter. *Id.* at 1. AUTO filed a petition for judicial review more than 30 days after the PDC’s decision, which was beyond the APA’s appeal deadline. *Id.* at 3. However, AUTO argued that the deadline was extended because it did not realize that the decision would result in prejudice until later and therefore it did not have standing to seek judicial review until that time. *Id.* at 4. This court rejected this argument because AUTO

should have known that the decision letter would cause it “specific and perceptible harm,” and therefore held that AUTO’s petition for review was untimely. *Id.* at 5.

The Foundation argues that *AUTO* is directly on point, and stands for the proposition that a complainant suffers specific and perceptible harm when the PDC dismisses a complaint. But this court rejected this argument in *Freedom Foundation*:

But in *AUTO* we did not consider whether a complainant had standing to petition for review. Rather, we held that the complainant failed to timely file its petition for review, thus, the complainant was time-barred from filing the action. *AUTO* did not consider the question presented in this case.

14 Wn. App. 2d at 88.

Accordingly, we reject the Foundation’s first argument regarding injury-in-fact and conclude that the Foundation’s status as a complainant does not confer standing.

b. Competitive Harm

The Foundation argues that it can satisfy the injury-in-fact requirement because it suffered “competitive harm” in that SEIU PEAFF’s FCPA violations frustrated the Foundation’s interest in assuring enforcement of the FCPA’s policies. The Foundation also claims that competitive harm will result because in the future union-affiliated entities who the Foundation routinely opposes will be able to cite to the PDC’s decision.

This court in *Freedom Foundation* rejected the same argument. 14 Wn. App. 2d at 88-89. The court stated:

Here, Freedom Foundation cannot show an economic or competitive injury. Freedom Foundation identifies no direct economic effect or material adverse injury from the PDC’s denial of the complaint. Further, Freedom Foundation fails to show any specific or perceptible harm. *The mere fact that an unfavorable result could become precedent to Freedom Foundation’s potential future litigation is not a harm under RCW 34.05.530.*

Id. at 89 (emphasis added). We follow *Freedom Foundation*.

The Foundation cites to *Snohomish County Public Transportation*, 173 Wn. App. 504. In that case, a public transportation agency sought judicial review of a decision by the Public Employment Relations Committee (PERC). *Id.* at 508-09. PERC's decision concerned an unfair labor practice complaint which had the effect of withholding the benefit of a rule affecting the transportation agency's negotiation with employee unions. *Id.* at 514.

This court held that the transportation agency had standing based on an economic injury because the decision adversely affected the agency's ability to negotiate with the unions. *Id.* at 513-14. Therefore, the transportation agency was able to demonstrate a direct economic effect of losing this bargaining leverage. *Id.* at 514. But here, unlike the transportation agency in *Snohomish County Public Transportation*, Freedom Foundation cannot demonstrate a direct economic effect stemming from the PDC's decision.

The Foundation also cites to *Seattle Building and Construction Trades Council v. The Apprenticeship and Training Council*, 129 Wn.2d 787, 920 P.2d 581 (1996). In that case, the Trades Council sought judicial review of a decision by the state Apprenticeship Council. *Id.* at 790. The Apprenticeship Council's decision involved approving the standards for and registration of a competing apprenticeship program over the protest of the Trades Council without an adjudicatory hearing, which would likely alter competitive conditions for existing, approved programs. *Id.* at 796. Specifically, the evidence showed that the entry of additional programs into the apprenticeship market would mean more competition for attracting qualified apprentices among existing, approved programs. *Id.*

The Supreme Court held that the Trades Council had standing based on a probable economic injury. *Id.* But here, unlike the petition in *Trades Council*, the Foundation does not

demonstrate an immediate or probable economic or competitive injury resulting from the PDC's dismissal of the complaint.

Accordingly, we reject the Foundation's second argument regarding injury-in-fact and conclude that the Foundation fails to show that it suffered competitive harm.

3. Associational Standing Analysis

The Foundation argues that it has associational standing because the Foundation has members who were harmed by the PDC's failure to address SEIU PEAFF's FCPA violations. We disagree.

The Foundation vaguely asserts that all of its supporters were harmed by the PDC's decision not to punish SEIU PEAFF's illegal activities. At the same time, the Foundation argues that the PDC's dismissal of its complaint against SEIU PEAFF affects everyone who participates in representative democracy in Washington.

However, as stated above, to obtain standing a petitioner must show that the agency decision caused some specific and perceptible harm, not some conjectural or hypothetical injury. *Freedom Foundation*, 14 Wn. App. 2d at 86. And "a petitioner's interest 'must be more than simply the abstract interest of the general public in having others comply with the law.' " *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 663, 375 P.3d 681 (2016) (quoting *Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002)). The Foundation's vague assertions fail to show how any of its members were specifically and perceptibly harmed by the PDC's decision or why they have more than an abstract interest in enforcement of the FCPA.

Accordingly, we hold that the Foundation fails to show that it has associational standing.

4. Summary

The Foundation cannot show it has individual standing or associational standing to seek judicial review of the PDC's dismissal of its complaint regarding SEIU PEAFF. Therefore, we hold that the trial court did not err when granting the PDC's motion to dismiss the Foundation's petition based on lack of standing. Because the Foundation lacks standing, we do not address the Foundation's argument that the PDC lacked statutory authority to dismiss its complaint.


CONCLUSION

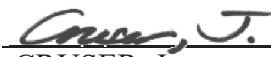
We affirm the superior court's order dismissing the Foundation's petition for judicial review.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


MAXA, J.

We concur:


SUTTON, A.C.J.


CRUSER, J.

APPENDIX E

- ☐ Expedite
☐ No hearing set
☐ Hearing is set

Date:

Time:

Judge/Calendar:

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

FREEDOM FOUNDATION, a Washington
nonprofit organization,

Petitioner,

v.

WASHINGTON STATE PUBLIC DISCLOSURE
COMMISSION, a State of Washington
government agency, and AMALGAMATED
TRANSIT UNION LEGISLATIVE COUNCIL
OF WASHINGTON STATE, an IRS 527 political
organization,

Respondents.

No.

**PETITION FOR REVIEW PURSUANT
TO THE ADMINISTRATIVE
PROCEDURES ACT, *Chapter 34.05*
*RCW***

I. INTRODUCTION

1. Pursuant to the Administrative Procedures Act (“APA”), the Freedom Foundation (“Foundation”) petitions for review of the dismissal, by staff of the Washington State Public Disclosure Commission (“PDC”), of its complaint alleging violations of the Fair Campaign Practices Act (“FCPA”) by the Amalgamated Transit Union Legislative Council of Washington

1 State (“ATULC”).

2 2. In brief, the ATULC is a non-disclosing political committee which contributed over
3 \$110,000 in the years 2014-18 to political candidates and committees (at least twenty percent
4 (20%) of its annual expenditures, during this period, and as much as 45% during election years)
5 and falsely stated under penalty of perjury to the Internal Revenue Service (IRS) that it discloses
6 these political expenditures in Washington State, thereby avoiding IRS disclosure requirements.

7 3. PDC staff ignored *its own records* showing that ATULC actually made far more political
8 expenditures than its lawyer claimed, and that, for at least one whole year, such expenditures were
9 necessarily and mathematically one of its primary purposes. Further, PDC staff ignored the
10 explicitly political description of its purpose ATULC provided to the IRS when claiming tax status
11 as a “political organization,” and publicly repeated elsewhere, in favor of the nonpolitical
12 description of its purpose provided by ATULC’s attorney. Finally, the PDC also accepted
13 ATULC’s incorrect argument that “intermediate bodies”¹ such as itself cannot be a political
14 committee simply because they do not receive dues from individual union members.

15 4. ATULC violated the Fair Campaign Practices Act (“FCPA”) by failing to register as a
16 political committee and failing to disclose contributions received and expenditures made.

17 5. Consequently, the PDC erred when its staff dismissed the Foundation’s complaint insofar
18 as it erroneously applied the law to require intermediate bodies like ATULC to receive dues from
19 unions members, and acted arbitrarily and capriciously to make “findings” without, and contrary
20 to, substantial evidentiary support in the record – and indeed, which contradicted the evidence
21 available in the PDC’s own records.

22
23
24 ¹ Affiliates of a national labor union that exist between the national union headquarters its local affiliates that actually represent its members.

II. PARTIES

6. Petitioner, the FREEDOM FOUNDATION (“Petitioner” or the “Foundation”), is a Washington nonprofit organization, which filed the Complaint at issue.

7. Respondent, the WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION (“PDC” or the “Commission”), is a government agency of the State of Washington, organized pursuant to RCW 42.17A.100, *et seq.*

8. Respondent, ATULC, has self-determined to be a “political organization” under 26 USC § 527, and has filed an IRS Form 8871, to claim the tax benefits accordant to that designation under federal law. A true and correct copy of ATULC’s Form 8871, dated May 29, 2007, is attached hereto as **Exhibit A**.

9. ATULC is an intermediate body (internally called a “joint conference board”) of local chapters of the Amalgamated Transit Union (“ATU”), under the Constitution and General Laws of the ATU. As a joint conference board, ATULC has no full-time staff, nor does it claim to have any members.

III. JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to RCW 34.05.510.

11. Venue is proper under the APA, pursuant to RCW 34.05.514(1).

12. Venue is proper in this Court pursuant to RCW 4.12.020, because some part of the cause of action arose in Thurston County.

IV. STATEMENT OF FACTS

13. The Foundation notified the PDC of the ATULC’s violations of the FCPA in great detail, by way of an administrative complaint dated December 11, 2018. The complaint was assigned Case No. 43940. A true and correct copy of the Freedom Foundation’s complaint, dated December

11, 2018 (without Appendix documents), is attached hereto as **Exhibit B**.

14. Subsequently, on April 15, 2019, the Foundation supplemented its initial Complaint to the PDC, with additional information concerning ATULC's required disclosures under the Labor Management Reporting and Disclosure Act for the year 2018. A true and correct copy of the supplement to the Foundation's Complaint, dated April 15, 2019 (without Appendix documents), is attached hereto as **Exhibit C**.

15. The violations described in the Foundation's Complaint spanned multiple years, as ATULC has met the definition of a "political committee" either continuously or intermittently since at least 2014 but has never registered as a "political committee" under the FCPA.

Political purpose

16. As set forth in its IRS Form 8871 claiming status as a political organization under 26 U.S.C. §527, ATULC's purpose is "[t]o promote legislation and candidates supportive for Amalgamated Transit Union member[s] in the State of Washington." *See Ex. A* (emphasis added). This is in fact the ATULC's sole purpose.

17. A "political organization" is "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. §527(e)(1). An "exempt function" includes the function of influencing or attempting to influence the election of any individual to any federal, state, or local public office. 26 U.S.C. §527(e)(2).

18. Political organizations must disclose on IRS Forms 8872 the amount, date, and purpose of expenditures exceeding \$500 annually and the name and address of all contributors exceeding \$200 annually. 26 U.S.C. §527(j)(3).

1 19. However, a political organization need not disclose its contributions or expenditures to the
2 IRS if it is a “qualified State or local political organization.” 26 U.S.C. §527(j)(5)(c).

3 20. To be a “qualified State or local political organization” requires, among other things, that
4 the organization be “subject to State law that requires the organization to report (and it so reports)”
5 information regarding each separate expenditure from and contribution to the organization, and
6 the person who makes or receives it. 26 U.S.C. §527(e)(5)(A).

7 21. ATULC, on its 2007 Form 8871, specifically checked the box claiming exemption from
8 disclosing its contributions and expenditures to the IRS on Forms 8872 as a qualified State or local
9 political organization filing reports in Washington. *See Ex. A.* ATULC checked that box knowing
10 it was *not* filing reports in Washington, and did not intend to.

11 22. ATULC does not file Forms 8872 with the IRS under 26 U.S.C. §527(j) and, contrary to
12 its representation, does not file reports with the State of Washington, either.

13 23. This is a serious violation of federal law. But if the IRS ever wondered whether ATULC
14 should be filing Forms 8872, it would see the “reason” they do not on the Form 8871, never expect
15 such a direct lie, and presumably would not discover the deception without further investigation
16 outside its own resources.

17 24. ATULC, notwithstanding these specific facts brought to its attention, has neither filed an
18 amended Form 8871 nor begun filing reports with the IRS on Form 8872.

19 25. ATULC’s website also describes its purposes in overtly political terms. For instance, the
20 website states that its purposes are:

- 21 a. “To protect the rights of the members of the Amalgamated Transit Union at the
22 level of political activity that can be generated by the combined efforts of this
23 Legislative Council composed of the Local Unions embodied within the State of
24

Washington.”

- b. “To promote and support new legislation before the government bodies of our State by lobbying effectively with the elected officials who have the authority and responsibility of representing the citizens of Washington State.”
- c. “To cooperate with our Local Unions, and to form a stronger political bond of cohesion with the Washington State Labor Council, and other Labor Councils in the cities where our transit Locals are centered.”
- d. “To encourage our memberships to be politically alert on matters that affect their livelihood, and create a more favorable public sentiment towards the Transportation Industry.” (emphasis added).

See http://www.atulcwa.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=510298.

Political expenditures

26. Because it has no paid staff, ATULC is run by a board of unpaid volunteers, comprised of union officials from ATU locals in the State of Washington. As a result, very little, if any, of ATULC’s functions are *not* directed to influencing politics in some capacity, either through the making of political expenditures to candidates and political committees or through the purchase of professional lobbying services.

27. ATULC’s annual expenditures from the period of 2014-2018 make clear that it has been a political committee continuously throughout this period, or alternatively, that it was a political committee at least during election years, when its expenditures on electoral political activity comprised a particularly large percentage of its total expenditures.

28. For instance, the PDC believed that, of \$80,507 total expenditures in the 2014 calendar year, \$18,745 (23%) was spent on monetary contributions to candidates for public office. See

1 Complainant Return Letter for Case No. 43940, dated April 8, 2020, a true and correct copy of
2 which is attached hereto as **Exhibit D**, at p. 2. At least 23% of ATULC's 2014 expenditures went
3 directly to candidates for public office.

4 29. The PDC also believed that, of ATULC's \$101,443 in total expenditures in the 2016
5 calendar year, \$35,451 (35%) was spent on monetary contributions to candidates for public office.
6 *See id.* At least 35% of ATULC's 2016 expenditures went directly to candidates for public office.

7 30. The PDC also believed that of \$104,227 total expenditures in the 2018 calendar year,
8 \$31,367 (30%) was spent on monetary contributions to candidates for public office. *See id.*, at p.
9 3. At least 30% of ATULC's 2018 expenditures went directly to candidates for public office.

10 31. The PDC accepted, based solely on the claims of ATULC's counsel, that the ATULC spent
11 22.6% of its total expenditures from 2014 through 2018 on electoral political activity. *See id.*

12 32. These large percentages of spending mean that, in at least 2016, contributing directly to
13 political candidates mathematically must have been one of the top **two (2)** purposes of the ATULC.
14 For that year, if not **the** primary purpose, electoral political activity must at least be considered
15 one of the primary purposes, which is all that is required to be a political committee under
16 applicable precedent.

17 33. The PDC believed that, "[a]lthough the ATULC made expenditures in support of
18 candidates, the totality of the evidence does not suggest that ATULC is a political committee,
19 because the making of those expenditures was not its primary purpose, or even one of its primary
20 purposes." *See id.*

21 34. The PDC inexplicably concluded that it "found no evidence of a material violation that
22 would require conducting a more formal investigation into your complaint or pursuing
23 enforcement action in this instance concerning ATULC being a political committee." *See id.*

35. As such, the PDC dismissed the Foundation’s complaint pursuant to RCW 42.17A.755(1).
See id., at p. 4.

36. The factual predicates for the PDC’s findings are set forth in greater detail in its Report of Investigation, a true and correct copy of which is attached hereto as **Exhibit E**.

37. As noted in the Report of Investigation, the PDC purported to apply PDC Interpretation 07-02, which distills case law and other sources of legal guidance concerning the definition of “political committee” under the FCPA. *See Ex. E*, at p. 2.

38. As set forth in Washington law, an organization is a “political committee” if it “[has] the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” *See* RCW 42.17A.005.

39. Accordingly, an organization may become a political committee under Washington law under the “maker of expenditures prong” and/or under the “receiver of contributions prong.” *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 111 Wn. App. 586, 598, 49 P.3d 894 (2002) (“WEA”).

40. PDC Interpretation 07-02 states that “a person is a political committee if that person becomes a ‘receiver of contributions’ to support or oppose candidates or ballot propositions, or if expenditures to support or oppose candidates or ballot propositions become one of the person’s primary purposes.” *See id.*

41. Based on the figures articulated in its dismissal letter and its Report of Investigation, it appears that the PDC accepted ATULC’s representations of its expenditures for each of the years at issue, the amounts spent on electoral political activity, and the resulting percentages for each of the calendar years 2014-2018. *See supra*, at ¶¶27-31.

42. To accept ATULC’s representations in this regard at face value was erroneous, however,

1 as well as arbitrary and capricious, because its representations conflicted with information
2 available to the PDC *in its own records*.

3 43. To wit, C3 reports filed with the PDC by recipients of ATULC expenditures and in L3c
4 reports filed by ATULC, which are contained in the PDC's own database, show that ATULC's
5 total expenditures on electoral political activity were at least \$24,650 for the year 2014, \$45,550
6 for the year 2016 and \$32,150 for the year 2018, accounting for 31%, 45%, and 31% of its total
7 annual expenditures in those respective years, not 23%, 35% and 30% as ATULC claimed and the
8 PDC accepted.

9 44. When initially asked by the PDC in March, 2019, to provide information showing its
10 political expenditures, the ATULC deferred to the information contained within the PDC's
11 database as the "best record" of its expenditures, since the recipients would have reported receipt
12 of the contributions. This method of tabulating ATULC's expenditures is, incidentally, the same
13 method used by the Foundation in its complaint. *See Ex. B*, at p. 3 ("Tracking ATULC's political
14 expenditures in disclosures filed with the PDC is difficult. Since ATULC has not registered as a
15 political committee, the only records of its expenditures are those filed by recipients of ATULC
16 funds.").

17 45. However, when pressed by the PDC to provide its total political expenditures, on March
18 15, 2019, ATULC presented figures substantially lower than the information contained in the
19 PDC's database, without any evidentiary support for the figures.

20 46. It is these figures that appear in the PDC's Report of Investigation (*see Ex. E*) and
21 Complainant Return Letter (*see Ex. D*), leading to the inference that the PDC arbitrarily and
22 capriciously accepted the ATULC's representations, without even cross-referencing them to the
23 information appearing in its own database and documented in the Foundation's complaint.

1 47. In dismissing the Complaint, the PDC also appears to have accepted the ATULC's
2 argument that it could not be a "political committee" under the "receiver of contributions" prong,
3 because ATULC does not receive dues payments from individual union members, but instead
4 receives its revenue from local transit unions. *See Ex. D*, at p. 2.

5 48. This is an erroneous interpretation of prevailing law on the subject, because if that were
6 the law, then groups similar to ATULC would never have to disclose anything, while significantly
7 affecting Washington State politics.

8 49. Even if the law for groups like ATULC requires that the makers of the contributions have
9 actual or constructive knowledge that their contributions will be used for electoral political
10 activity, the persons in charge of the locals clearly knew of the political purposes of the
11 contributions.

12 50. On these specific facts, because ATULC has no "members" and because local ATU
13 chapters are the ones contributing to ATULC, the relevant question is whether local ATU chapter
14 officials have actual or constructive knowledge that the contributions will be used by ATULC for
15 electoral political activity.

16 51. Further, because the officials comprising ATULC's board are the same officials who make
17 contributions to ATULC on behalf of the ATU local chapters, these officials cannot deny having
18 actual notice, or at least constructive notice, of the extensive electoral political activity to which
19 ATULC puts these contributions. *See* correspondence dated January 31, 2019, Exhibit 2 to PDC's
20 Report of Investigation, at p. 2, and web citations contained therein (**Ex. E** hereto).

21 52. Although the stated goals of an organization are one of the factors the PDC may look to
22 when determining "political committee" status, in this case it appears that the PDC uncritically
23 accepted the characterizations of ATULC's counsel concerning the organization's stated goals and
24

1 the efforts it uses to achieve them, discounting ATULC's own statements to the contrary.

2 53. For instance, the PDC appears to have accepted ATULC's argument that it "devotes its
3 efforts to functioning as a forum for Washington ATU locals and providing educational training
4 for those locals and their members, as well as to support substantial lobbying efforts at ATULC's
5 expense." *See id.*, at p. 1. ATULC provided no evidence in support of this characterization of its
6 purposes.

7 54. It is not apparent from the PDC's determination that it gave any consideration whatsoever
8 to ATULC's description of its purpose in explicitly political terms as set forth under penalty of
9 perjury in its Form 8871, nor that ATULC falsely claimed to be reporting contributions at the state
10 level. **Ex. A.**

11 55. On April 16, 2020, the Foundation brought these errors to the attention of the PDC, by way
12 of a request for reconsideration of its April 8 dismissal. A true and correct copy of this
13 correspondence, dated April 16, 2020, is attached hereto as **Exhibit F**.

14 56. The PDC denied the Foundation's request for reconsideration, however, on May 1, 2020.
15 *See* WAC 390-37-150(7). A true and correct copy of this correspondence, dated May 1, 2020, is
16 attached hereto as **Exhibit G**. As such, the PDC's dismissal of April 8 is final and ripe for this
17 Court's review under RCW 34.05.570.

18 V. CLAIM

19 Petition for Review Pursuant to RCW 34.05.570

20 57. The Foundation hereby incorporates the allegations in paragraphs 1-56 above, as if
21 fully set forth herein.

22 58. ATULC's violations throughout each of the calendar years 2014-2018, as set forth
23 above, are "actual violations," *i.e.*, they are neither "remediable violations" nor "technical
24

1 corrections” under the 2018 FCPA amendments. *See* RCW 42.17A.755.

2 59. Based upon the foregoing facts, the ATULC was a “political committee”
3 continuously for the time period of 2014-2018.

4 60. Alternatively, based upon the foregoing facts, the ATULC was a “political
5 committee” in calendar years 2014, 2016, and 2018, when its annual expenditures for electoral
6 political activity represented over twenty percent (20%) of its total annual expenditures in each of
7 those calendar years.² Even ATULC’s reported expenditures for strictly electoral political activity,
8 vis-à-vis its total annual expenditures, beg the question of where and to whom money characterized
9 as office and administrative expenses (*e.g.*, 35% in 2017 for an organization *with no staff*) went,
10 and whether these expenditures were proper, or reflected ATULC’s living large off the backs of
11 its members.

12 61. Alternatively, ATULC was a political committee under the receiver of
13 contributions prong because, as an intermediate body, it is a “person” under RCW 42.17A.005(38)
14 with the expectation of receiving transfers of funds from local unions for political purposes,
15 thereby becoming a political committee under RCW 42.17A.005(40), irrespective of whether it
16 receives dues payments from individual union members.

17 62. The Freedom Foundation petitions this Court for review of a decision by PDC staff,
18 pursuant to the APA, to determine whether: (i) the PDC erred in its application of the definition of
19 “political committee” under Washington law to ATULC; (ii) the PDC erred by failing to analyze
20 the evidence in the administrative record and making findings without substantial evidentiary
21

22
23 ² While the PDC has not established a universal threshold for determining when an entity makes sufficient political
24 expenditures to satisfy the primary purpose test and become a political committee, its regulations require out-of-state
political committees with limited reporting obligations to file a statement of organization as political committees with
full reporting obligations if more than 20 percent (20%) of their total expenditures are for electoral political activity
in Washington at any point in any calendar year. *See* WAC 390-16-049.

1 support; and (iii) the PDC acted arbitrarily and/or capriciously in ignoring evidence within its own
2 records concerning the actual amount of ATULC political contributions, in its handling of the
3 Foundation's Complaint.

4 a. Name and mailing address of the petitioner: The Freedom Foundation's
5 principal place of business is 2403 Pacific Ave. SE, Olympia, WA 98501, and
6 its mailing address is P.O. Box 552, Olympia, WA 98507.

7 b. Name and address of petitioner's attorneys: The Foundation is represented by
8 Eric Stahlfeld and Robert A. Bouvatte, Jr., c/o Freedom Foundation, P.O. Box
9 552, Olympia, WA, 98501.

10 c. Name and mailing address of the agency whose action is at issue: Review is
11 being sought as to a decision by staff of the Public Disclosure Commission of
12 the State of Washington, 711 Capitol Way, Room 206, P.O. Box 40908,
13 Olympia, WA, 98504-0908.

14 d. Agency action at issue, together with a duplicate copy: At issue is the PDC's
15 dismissal on April 8, 2020 of the Freedom Foundation's complaint against the
16 ATULC, delivered electronically on December 11, 2018 and assigned PDC
17 Case No. 43940 (a copy is at **Exhibit D**); also at issue is the PDC's denial of
18 reconsideration with respect to Case No. 43940, entered May 1, 2020, as to the
19 Foundation's request, delivered electronically on April 16, 2020 (copies are at
20 **Exhibits F & G**).

21 e. Identification of persons who were parties to the PDC Decision: The parties to
22 the PDC proceeding were the Foundation, who filed the complaint and is
23 Petitioner herein, and the ATULC, which submitted its first response to the
24

Foundation's complaint on January 17, 2019.

f. Facts demonstrating the Foundation is entitled to obtain judicial review: Facts demonstrating that the Foundation has standing to obtain judicial review, individually and in a representative capacity, are the PDC decision, which prejudices the Foundation by permitting the ATULC to conceal its political activities and to unduly influence the election of friendly officials throughout the State of Washington, where the Foundation has Board members and supporters; that the Foundation was a party to the PDC proceeding below, and the PDC was required to consider its interests in reaching a decision; and that the Court's ruling that the PDC's decision is in error would eliminate and redress the prejudice caused by PDC's decision.

g. Reasons relief should be granted: The PDC erred below to the extent it concluded that: (i) there was no evidence of a material violation by ATULC justifying further investigation or enforcement action pursuant to RCW 42.17A.755, despite ignoring the evidence in its own database contradicting the figures presented by ATULC; (ii) the ATULC's admitted expenditures for electoral political activity did not make it a "political committee," because such expenditures were not one of its primary purposes; and (iii) creating a rule of law that an intermediate body of a labor union cannot be a political committee as a "receiver of contributions" where it receives money from local unions rather than from individual members. The PDC erroneously interpreted or applied the law; the order is outside the PDC's statutory authority/jurisdiction under the FCPA; the PDC decision is not supported by substantial evidence, to

1 the extent there are findings, or, to the extent findings, if any, merely recite what
2 ATULC's counsel wrote the PDC, the decision is not supported by sufficient
3 findings and/or is arbitrary and capricious; the PDC has not decided all issues
4 requiring its resolution; the PDC has engaged in an unlawful procedure and/or
5 decision-making process, and the PDC failed to follow a prescribed procedure.
6 *See* RCW 34.05.570(3)(b)-(f), (i); *see also* RCW 34.05.570(04) (providing for
7 judicial review of other agency action).

8 **VII. REQUESTED RELIEF**

9 **WHEREFORE**, Plaintiff requests the following forms of relief:

10 1. An order, as authorized by RCW 34.05.574:

11 a. for declaratory judgment that the PDC was incorrect in concluding (i) that there
12 was no evidence of a material violation by ATULC that would require further investigation or
13 enforcement action pursuant to RCW 42.17A.755, and (ii) that the totality of evidence
14 suggested that ATULC was not a political committee;

15 b. setting aside the PDC's decision resolving Case No. 43940 with a dismissal of the
16 complaint against ATULC pursuant to RCW 42.17A.755(1);

17 c. if the Court will not impose remedies directly on the ATULC as requested below,
18 remanding this matter to the PDC and ordering the PDC to impose penalties on ATULC for its
19 numerous FCPA violations;

20 2. An order reversing the PDC decision below and ruling that the ATULC is liable for its
21 violations of the FCPA, as detailed herein;

22 3. Preliminary and permanent injunctive relief against ATULC, requiring it to register as a
23 political committee pursuant to RCW 42.17A.205 by filing a Statement of Organization pursuant
24

1 thereto, and to file the required reports for all years in which it should have been registered as a
2 political committee, pursuant to RCW 42.17A.235 and RCW 42.17A.240, and prohibiting it from
3 further violating the FCPA, as detailed herein;

4 4. For such remedies against the ATULC as the Court deems appropriate under RCW
5 34.05.574(3) and RCW 42.17A.750, including:

- 6 a. a Ten Thousand Dollar (\$10,000.00) penalty pursuant to RCW 42.17A.750(1)(c)
7 for each of the ATULC's violations of RCW 42.17A.205, RCW 42.17A.235 and
8 RCW 42.17A.240, in an amount to be determined at trial;
- 9 b. a penalty equivalent to the amount of contributions ATULC failed to report to the
10 PDC as required by RCW 42.17A.235 and RCW 42.17A.240, pursuant to RCW
11 42.17A.750(1)(g);
- 12 c. a Ten Dollar (\$10.00) penalty for each day ATULC failed to file its Statement of
13 Organization within the time required by RCW 42.17A.205, pursuant to RCW
14 42.17A.750(1)(e);
- 15 d. a Ten Dollar (\$10.00) penalty for each day ATULC failed to file its Monetary
16 Contributions (C-3) Reports and Summary Full Campaign Contribution &
17 Expenditure (C-4) Reports, within the time required by RCW 42.17A.235 and
18 RCW 42.17A.240, pursuant to RCW 42.17A.750(1)(e);
- 19 e. a finding that the ATULC's violations were intentional and trebling the amount of
20 judgment, which for this purpose shall include costs, as authorized by RCW
21 42.17A.780; and
- 22 f. any other penalty the Court deems appropriate under RCW 42.17A.750.
- 23 g. All costs of investigation and trial, including reasonable attorneys' fees, as
24

1 authorized by RCW 42.17A.775(5).

2 5. All such other relief the Court deems appropriate.

3
4 Dated this 7th day of May, 2020.

5 FREEDOM FOUNDATION

6 

7 By: _____

Robert A. Bouvate, Jr., WSBA #50220

Eric R. Stahlfeld, WSBA #22002

8 PO Box 552, Olympia, WA 98507

PH: 360.956.3482 | F: 360.352.1874

9 RBouvatte@freedomfoundation.com

ESTahlfeld@freedomfoundation.com

10 *Attorneys for Plaintiff, Freedom Foundation*

1 **DECLARATION OF SERVICE**

2 I, Jennifer Matheson, hereby declare under penalty of perjury under the laws of the State
3 of Washington that on May 7, 2020, I caused the foregoing Freedom Foundation's Petition for
4 Review Pursuant to the Administrative Procedures Act, RCW 34.05.510 *et seq.*, to be filed with
5 the clerk, and caused a true and correct copy of the same to be delivered via legal messenger to
6 the following:

7 Peter Lavalley, Executive Director
Washington State Public Disclosure Commission
8 711 Capitol Way, Rm. 206,
Olympia, WA 98501

9 Rick Swartz, President
10 Amalgamated Transit Union Legislative Council
1308 Meador Ave #C-1
11 Bellingham WA 98229

12 Dated: May 7, 2020.


13
14 By: 
15 Jennifer Matheson

EXHIBIT A

**Political Organization
Notice of Section 527 Status**

Part I General Information

1 Name of organization

Amalgamated Transit Union Legislative Council

Employer identification number

91 - 2064706

2 Mailing address (P.O. box or number, street, and room or suite number)

509 12th Ave SE, Ste 10

City or town, state, and ZIP code

Olympia, WA 98501 -

3 Check applicable box: ☒ Initial notice ☐ Amended notice ☐ Final notice

4a Date established

04/17/2007

4b Date of material change

5 E-mail address of organization

kdstites@yahoo.com

6a Name of custodian of records

Karen Stites

6b Custodian's address

509 12th Ave SE, Ste 10

Olympia, WA 98501 -

7a Name of contact person

Karen Stites

7b Contact person's address

509 12th Ave SE, Ste 10

Olympia, WA 98501 -

8 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number

509 12th Ave SE, Ste 10

City or town, state, and ZIP code

Olympia, WA 98501 -

9a Election authority

NONE

9b Election authority identification number

Part II Notification of Claim of Exemption From Filing Certain Forms (see instructions)

10a Is this organization claiming exemption from filing Form 8872, Political Organization Report of Contributions and Expenditures, as a qualified state or local political organization? Yes ☒ No ☐

10b If 'Yes,' list the state where the organization files reports: WA

11 Is this organization claiming exemption from filing Form 990 (or 990-EZ), Return of Organization Exempt from Income Tax, as a caucus or associations of state or local officials? Yes ☒ No ☐

Part III Purpose**12 Describe the purpose of the organization**

A QSLOP - To promote legislation and candidates supportive for Amalgamated Transit Union member in the State of Washington

Part IV List of All Related Entities (see instructions)

13 Check if the organization has no related entities

..... ✓

14a Name of related entity	14b Relationship	14c Address
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Part V List of All Officers, Directors, and Highly Compensated Employees (see instructions)

15a Name	15b Title	15c Address
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Dennis Antonellis	President	1226 N. Howard St. Spokane, WA 99201 - 2410
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Rick Sepolen	Vice President	2815 2nd Ave Ste 230 Seattle, WA 98121 - 1261
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Karen Stites	Secretary/Treasurer	509 12th Ave SE, Ste 10 Olympia, WA 98501 -
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Under penalties of perjury, I declare that the organization named in Part I is to be treated as a tax-exempt organization described in section 527 of the Internal Revenue Code, and that I have examined this notice, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. I further declare that I am the official authorized to sign this report, and I am signing by entering my name below.

Karen Stites

05/29/2007

**Sign
Here**

Name of authorized official



Date

EXHIBIT B

December 11, 2018

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

Public Disclosure Commission Staff,

Pursuant to RCW 42.17A.775, I write to report violations of the Fair Campaign Practices Act (“FCPA”), Chapter 42.17A RCW, by the Amalgamated Transit Union Legislative Council of Washington State (“ATULC”).¹

In brief, ATULC has operated as a political committee for years without filing a statement of organization with the Public Disclosure Commission (“PDC”) as required by RCW 42.17A.205. As an unregistered political committee, ATULC has also failed to comply with the other provisions of Chapter 42.17A RCW governing the conduct and reporting requirements of political committees.

ATULC not only describes its purpose in explicitly political terms, but it receives contributions from ATU locals around Washington with the understanding the funds will be used to advance electoral political activity. In election years, ATULC spending on political activity increases dramatically, to half or more of its total expenditures. ATULC has no full-time staff and, beyond what appear to be basic administrative costs, has little-to-no expenses other than political contributions. Accordingly, it satisfies both the “receiver of contributions” and “maker of expenditures” prongs of the definition of “political committee” as recognized by the courts and should be held to account for its lack of disclosure.

Factual background

Section 40.2 of the Amalgamated Transit Union (“ATU”) Constitution and General Laws allows local unions in a state to form a statewide entity for the purpose of coordinating political activity, providing:

“Where a majority of the LUs [local unions] in a state or province, with the approval of the IU [international union], enact to form a joint conference board for mutual aid and protection, exchange of information, the furthering of organizing and organizing campaigns, legislative and political action, and community action programs, in accordance with the charters or directions issued by the IU, then, in that event, all LUs within that state or province shall be obligated to affiliate and support the work of such

¹ 1308 Meador Ave C-1, Bellingham, WA 98229. (360) 738-3299. President: Randal Son, atulcpres@gmail.com. Vice president: Rick Swartz, atu883finsec@comcast.net. Secretary-treasurer: AJ Wolcott, atulc.fst@gmail.com

joint conference board. The conference board shall establish monthly per capita tax through the bylaws of such conference board as approved by the IP [international president].”²

See Appendix page 171.

The ATULC is such a “joint conference board” for ATU locals in Washington. Its website describes its purpose as follows:

“The Washington State Legislative Council exists under the authorization of the Amalgamated Transit Union International Constitution and General By-Laws.

To protect the rights of the members of the Amalgamated Transit Union at the level of political activity that can be generated by the combined efforts of this Legislative Council composed of the Local Unions embodied within the State of Washington.

To promote and support new legislation before the government bodies of our State by lobbying effectively with the elected officials who have the authority and responsibility of representing the citizens of Washington State.

To cooperate with our Local Unions, and to form a stronger political bond of cohesion with the Washington State Labor Council, and other Labor Councils in the cities where our transit Locals are centered.

To encourage our memberships to be politically alert on matters that affect their livelihood, and create a more favorable public sentiment towards the Transportation Industry.”³

See App. 206.

The ATULC filed a form 8871, notice of Section 527 status, with the Internal Revenue Service (“IRS”) in 2007, claiming the tax benefits of a “political organization” under federal law. *See App. 207.* 26 U.S.C. § 527(e)(1) defines “political organization” as:

“...a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”

“Exempt function” is defined by subsection (e)(2) as:

“...the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office...”

ATULC describes its purpose on its form 8871 as, “promot[ing] legislation and candidates

² A copy of the ATU Constitution is available online at: https://www.atu.org/atu-pdfs/CGL2016_FINAL.pdf

³ Available online at: http://www.atulcwa.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=510298

supportive for Amalgamated Transit Union member in the State of Washington” (errors in original). *See App. 207.*

According to financial disclosure forms LM-3 ATULC files with the U.S. Department of Labor’s Office of Labor Management Standards (“OLMS”) in accordance with the federal Labor Management Reporting and Disclosure Act of 1959, ATULC has no paid staff and is run by a board of unpaid volunteers comprised of union officials from ATU locals in Washington. *See App. 236.*

Its forms LM-3 divide ATULC’s annual expenditures into four categories: (1) Office and administrative expense⁴; (2) professional fees⁵; (3) contributions, gifts and grants⁶; and (4) other.⁷ *See App. 213, 217, 222, 227, 232, and 237.*

Year	Total Receipts	Total Disbursements	Office and Administrative Expense		Professional Fees		Contributions, gifts and grants		PDC Contributions		
			Amount	% of Disbursements	Amount	% of Disbursements	Amount	% of Disbursements	PDC Contributions	% of Disbursements	% of Receipts
2012	\$55,770	\$73,447	\$4,990	6.8%	\$2,000	2.7%	\$66,457	90.5%	\$61,265	83.4%	109.9%
2013	\$81,659	\$45,619	\$7,355	16.1%	\$3,014	6.6%	\$35,250	77.3%	\$12,000	26.3%	14.7%
2014	\$89,954	\$80,506	\$11,688	14.5%	\$32,224	40.0%	\$36,594	45.5%	\$24,650	30.6%	27.4%
2015	\$85,714	\$61,378	\$15,118	24.6%	\$35,860	58.4%	\$10,400	16.9%	\$4,900	8.0%	5.7%
2016	\$85,408	\$101,442	\$21,549	21.2%	\$29,410	29.0%	\$49,500	48.8%	\$43,050	42.4%	50.4%
2017	\$92,753	\$67,153	\$23,568	35.1%	\$33,885	50.5%	\$9,700	14.4%	\$3,950	5.9%	4.3%
Total	\$491,258	\$429,545	\$84,268	19.6%	\$136,393	31.8%	\$207,901	48.4%	\$149,815	34.9%	30.5%

Beyond the basic administrative costs necessary to exist, ATULC’s only expenditures are for “contributions, gifts and grants.” On average, this category accounts for half of ATULC’s expenditures, a proportion that consistently spikes during election years.

Most, if not all, of the expenditures in the “contributions, gifts and grants” category are for political contributions to candidates, ballot measures and political committees.

For instance, on its forms LM-3 for 2014 and 2015, ATULC itemized its political contributions under item 56, reporting \$29,150 in contributions in 2014 (out of \$36,594 total contributions, gifts and grants) and \$10,400 in 2013 (exactly the same as the amount of reported contributions, gifts and grants). *See App. 223 and 228.*

Tracking ATULC’s political expenditures in disclosures filed with the PDC is difficult. Since ATULC has not registered as a political committee, the only records of its expenditures are those filed by recipients of ATULC funds. Recipients use multiple different titles/labels to describe ATULC.

Records the Freedom Foundation has been able to identify appear to indicate that ATULC made political expenditures totaling at least \$61,265 in 2012, \$12,000 in 2013, \$24,650 in 2014,

⁴ See Statement B, item 48 of the forms LM-3.

⁵ See Statement B, item 49 of the forms LM-3.

⁶ See Statement B, item 51 of the forms LM-3.

⁷ See Statement B, item 54 of the forms LM-3. There are no expenses listed in this category for 2012-15 or 2017. There are \$983 worth of “other” expenses recorded on the 2016 form LM-3.

\$4,900 in 2015, \$43,050 in 2016, \$3,950 in 2017, and \$30,000 in 2018. *See App. 239-245.*

Violations of the FCPA

RCW 42.17A.205 requires every “political committee” to “file a statement of organization” with the PDC “within two weeks after organization or within two weeks after the date the committee first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier.”

RCW 42.17A.005(40) defines “political committee” as:

“...any person... having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.”

Three Washington court decisions have clarified and interpreted this definition.

In *State of Washington v. Dan J. Evans Campaign Committee*, 86 Wn.2d 503 (1976), the State Supreme Court determined that an entity satisfies the 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 “the primary or one of the primary purposes” of the entity.

In *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398 (2015), the Washington State Supreme Court confirmed that an organization may be considered a “political committee” if *one* of its primary purposes is to engage in electoral political activity; electoral political activity need not be *the* primary purpose of the entity for it to fulfill the definition of “political committee.”

Lastly, in *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. 586 (2002), the court of appeals interpreted the definition of “political committee” to mean,

“...a person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals.”

ATULC fulfills both the “receiver of contributions” and “maker of expenditures” prongs of the definition of “political committee.”

The per capita payments ATULC receives from ATU locals in Washington are contributions made in expectation of furthering electoral political goals. Because the bylaws of the national ATU requires ATU locals to pay per capita taxes to ATULC as a “joint conference board,” ATULC has an expectation of receiving and does receive the per capita payments to use as political contributions.

This alone is sufficient to qualify ATULC as a political committee under the “receiver of contributions” prong. However, ATULC also fulfills the “expenditures prong” of the definition

of “political committee.”

In *EFF v. WEA*, the appeals court expounded on the primary purpose test established by the State Supreme Court in *State of Washington v. Dan Evans*, including the following observations:

“...an appropriate framework for determining whether electoral political activity is one of an organization's primary purposes should include an examination of the stated goals and mission of the organization and whether electoral political activity was a primary means of achieving the stated goals and mission during the period in question. Under this analysis, a nonexclusive list of analytical tools a court may use when evaluating the evidence includes: (1) the content of the stated goals and mission of the organization; (2) whether the organization's actions further its stated goals and mission; (3) whether the stated goals and mission of the organization would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether the organization uses means other than electoral political activity to achieve its stated goals and mission.”

ATULC repeatedly describes its own purpose as engaging in “political activity” and “promoting candidates.”

Additionally, the organization’s actions clearly line up with its stated goals. Indeed, an analysis of ATULC’s finances indicates that it performs no substantive function that is not political. Other than administrative expenses, ATULC appears to have few expenses other than the making of political contributions. With no staff and little other measurable activity to speak of, it does not appear that ATULC “uses means other than electoral political activity to achieve its stated [political] goals and mission.”

To be considered a “political committee” under the expenditures prong for the purposes of the FCPA, ATULC need only have as *one* of its primary purposes the influencing of electoral political activity. It meets this threshold without question.

Lastly, it is worth noting that, in a situation with almost identical facts, the Washington State Attorney General’s Office is currently prosecuting the SEIU Washington State Council for its failure to register and report to the PDC as a political committee.⁸ Like ATULC, the SEIU Washington State Council is an entity created under the national SEIU bylaws that collects a per capita tax from all SEIU locals in Washington for the purposes of engaging in and coordinating SEIU’s electoral political activity in Washington.

Conclusion

ATULC’s failure to register and report as a political committee as required by the FCPA has tangibly negative implications for the transparency of Washington elections. For example, political contributions made by ATULC are labeled differently by various recipients of ATULC funds, making it difficult to know the true source of the contributions and to track ATULC’s

⁸ Washington State Office of the Attorney General. “AGO files campaign finance complaint against SEIU Washington State Council.” July 11, 2017. <https://www.atg.wa.gov/news/news-releases/ago-files-campaign-finance-complaint-against-seiu-washington-state-council>

political activity.

Further, the reporting regime required by the law requires both the contributing political committee and the receiving political committee or candidate to report the transaction to the PDC. This dual reporting promotes transparency, as both the contributor and recipient would have to fail to report the transfer of funds for it to go unnoticed. ATULC's failure to properly register as a political committee thwarts this system of accountability. Since ATULC already does not report its contributions, the transfer of funds would be invisible to the public if only the recipients of ATULC funds neglected to report as required.

We respectfully request that the PDC perform an investigation into these allegations and take appropriate enforcement action. Please do not hesitate to contact me if I can be of assistance.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Maxford Nelsen', with a stylized, cursive script.

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

EXHIBIT C

April 15, 2019

Kurt Young
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504

Re: Case No. 43940

Mr. Young,

Additional information has come to my attention that is relevant to the Public Disclosure Commission's ("PDC") ongoing investigation into the alleged violations of the Fair Campaign Practices Act ("FCPA") by the Amalgamated Transit Union Legislative Council ("ATULC").

As you know, my original complaint examined ATULC's political activity from 2012 through 2017 and contended that it should have registered with the PDC as a political committee. However, reports recently made publicly available suggest ATULC continued to function as an unregistered political committee throughout calendar year 2018.

As discussed in the original complaint, ATULC is required by the Labor Management Reporting and Disclosure Act of 1959 to annually file financial disclosure forms LM-3 with the U.S. Department of Labor's Office of Labor Management Standards ("OLMS"). ATULC's form LM-3 for calendar year 2018 was recently filed with OLMS. **See Appendix pages 2-6.**

ATULC's forms LM-3 generally divide its annual expenditures into four categories: (1) Office and administrative expense¹; (2) professional fees²; (3) contributions, gifts and grants³; and (4) other.⁴ ATULC recorded paying its officers and staff for the first time on its 2018 LM-3.⁵ For the purposes of the chart below, the amount paid to ATULC's officers is included as part of "office and administrative expenses."

The LM-3 indicated ATULC had total revenue of \$82,245 and made \$104,295 in disbursements in 2018. Over the same period, C3 and C4 reports filed with the PDC by recipients of ATULC contributions indicate it made at least \$30,250 in reportable political expenditures in 2018. **See App. 7.** Thus, *at least* 29% of ATULC's disbursements and 36.8% of its revenue went towards reportable political expenditures in 2018.

¹ See Statement B, item 48 of the forms LM-3.

² See Statement B, item 49 of the forms LM-3.

³ See Statement B, item 51 of the forms LM-3.

⁴ See Statement B, item 54 of the forms LM-3.

⁵ See Statement B, item 45 of the forms LM-3.

Year	Total Receipts	Total Disbursements	Office and Administrative Expense		Professional Fees		Contributions, gifts and grants		PDC Contributions		
			Amount	% of Disbursements	Amount	% of Disbursements	Amount	% of Disbursements	PDC Contributions	% of Disbursements	% of Receipts
2012	\$55,770	\$73,447	\$4,990	6.8%	\$2,000	2.7%	\$66,457	90.5%	\$61,265	83.4%	109.9%
2013	\$81,659	\$45,619	\$7,355	16.1%	\$3,014	6.6%	\$35,250	77.3%	\$12,000	26.3%	14.7%
2014	\$89,954	\$80,506	\$11,688	14.5%	\$32,224	40.0%	\$36,594	45.5%	\$24,650	30.6%	27.4%
2015	\$85,714	\$61,378	\$15,118	24.6%	\$35,860	58.4%	\$10,400	16.9%	\$4,900	8.0%	5.7%
2016	\$85,408	\$101,442	\$21,549	21.2%	\$29,410	29.0%	\$49,500	48.8%	\$43,050	42.4%	50.4%
2017	\$92,753	\$67,153	\$23,568	35.1%	\$33,885	50.5%	\$9,700	14.4%	\$3,950	5.9%	4.3%
2018	\$82,245	\$104,295	\$27,113	26.0%	\$42,282	40.5%	\$34,900	33.5%	\$30,250	29.0%	36.8%
Total	\$573,503	\$533,840	\$111,381	20.9%	\$178,675	33.5%	\$242,801	45.5%	\$180,065	33.7%	31.4%

The amount spent by ATULC on reportable political activity in 2018 is sufficient to establish that electoral political activity continues to be one of its primary purposes, lobbying being the only other noteworthy purpose as reflected both by the union's own description of its mission and its actual expenditures.

I hope this information proves useful to your investigation. Please do not hesitate to let me know if you have any questions or if I can be of any further assistance in this matter.

Sincerely,



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

EXHIBIT D



STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112

Toll Free 1-877-601-2828 • E-mail: pdcc@pdcc.wa.gov • Website: www.pdca.wa.gov

April 8, 2020

Delivered electronically to Maxford Nelson with the Freedom Foundation

Subject: Complaint regarding the Amalgamated Transit Union Legislative Council of Washington State, PDC Case 43940

Dear Mr. Nelson:

The Public Disclosure Commission (PDC) has completed its investigation of the complaint you filed against the Amalgamated Transit Union Legislative Council of Washington State (ATULC). The complaint alleged that the ATULC may have violated RCW 42.17A.205 by failing to register as a political committee by completing a Committee Registration (C-1pc report), and RCW 42.17A.235 and .240 by failing to timely file Monetary Contributions reports (C-3 reports) and Summary Full Campaign Contribution and Expenditure reports (C-4 reports) disclosing contribution and expenditure activities undertaken during calendar years 2014 through 2018.

PDC staff reviewed the allegations listed in the complaint you filed, the statutes, rules and reporting requirements, queried the PDC contribution and expenditure database for ATULC activities, reviewed the Annual Report of Lobbyist Employers (L-3 reports) and the Monthly Lobbyist Employer Contributions report (L-3c reports) filed by the ATULC, and the response and attached exhibits to the complaint provided by Dmitri Iglitzin, an attorney on behalf of Schwerin Campbell Barnard Iglitzin & Lavitt LLP on behalf of ATULC.

- ATULC has been registered with the PDC as a Lobbyist Employer dating back to at least 1996, filing L-3 and L-3c reports disclosing expenditures made to hire a contract lobbyist to lobby, and contributions made to candidates and political committees.
- The Commission had adopted **PDC Interpretation 07-02, Primary Purpose Test Guidelines**, which distills relevant case law and other legal guidance (AGO 1973 no. 14, *State v. Dan Evans Committee*, and *Evergreen Freedom Foundation v. Washington Education Association*) concerning the definition of “political committee” in RCW 42.17.020(39). As discussed in the Interpretation, a person is a political committee if that person becomes a “receiver of contributions” to support or oppose candidates or ballot propositions, or if expenditures to support or oppose candidates or ballot propositions become one of the person’s primary purposes.
- Mr. Iglitzin stated the ATULC “*devotes its efforts to functioning as a forum for Washington State ATU locals and providing educational training for those locals and their members, as well as to support substantial lobbying efforts at ATULC’s expense.*”

- Mr. Iglitzin acknowledged ATULC made expenditures in support of candidates or election initiatives during the period covered in the complaint, however *“electoral political activity is not one of ATULC’s primary purposes.”* He stated that ATULC’s goals and *“its actions to further those goals, the impact of a favorable election on those goals, and the means which ATULC uses to achieve those goals all establish that the organization does not qualify as a political committee under the expenditures prong.”*
- Mr. Iglitzin stated that ATULC’s own website explains that its purposes are to: (1) *“Protect the rights of the members of the Amalgamated Transit Union at the level of political activity that can be generated by the combined efforts of this Legislative Council composed of the Local unions embodied within the State of Washington; (2) Promote and support new legislation before the government bodies of our State by lobbying effectively with the elected officials who have the authority and responsibility of representing the citizens of Washington State; (3) Cooperate with our Local Unions, and to form a stronger political bond of cohesion with the Washington State Labor Council, and other Labor Councils in the cities where our transit Locals are centered; and (4) Encourage our memberships to be politically alert on matters that affect their livelihood and create a more favorable public sentiment towards the Transportation Industry.”*
- Mr. Iglitzin stated ATULC does not receive dues payments from individual union members, but receives lump sum transfers from local transit unions, and does not qualify as a political committee under the “receiver of contributions.” In addition, he stated ATULC does not qualify as a political committee under the “maker of expenditures” found in RCW 42.17A.005(41) which *“not only have made or expected to make expenditures in support of a candidate or election initiative, it must also have had as one of its primary purposes supporting election candidates or initiatives.”* He provided information in response to staffs request concerning ATULC expenditure activities for calendar years 2014, 2016, and 2018 and staff reviewed filing information covering 2014-2018, that included the following:

2014 calendar year: Mr. Iglitzin stated ATULC made \$80,507 in total expenditures that included \$18,745 in monetary contributions made to 2014 candidates for public office. He stated that the percentage of expenditures for contributions made to total contributions represented 23%.

2015 calendar year: Staff’s review found that ATULC filed two L-3c reports disclosing five monetary contributions totaling \$3,900 were made to two 2015 candidates for public office, one caucus political committee, one legislative district party committee, and one caucus related political committee.

2016 calendar year: Mr. Iglitzin stated ATULC made \$101,443 in total expenditures that included \$35,451 in monetary contributions made to 2016 candidates for public office. He stated that ATULC’s percentage of expenditures for contributions made to total contributions represented 35% for calendar year 2016.

Staff’s review of the L-3 report filed by the ATULC disclosed that Johnson Arledge Strategies, a contract lobbying firm, received a total of \$25,200 in compensation to lobby during calendar year 2016. The L-3 report for 2016 was required to have been filed the last day of February 2017 and was filed almost one year late on January 31, 2018.

In addition, staff’s review found the L-3c reports filed by ATULC for calendar year 2016 were timely filed disclosing 41 monetary contributions totaling \$34,500 except for one contribution disclosed one day late.

2017 calendar year: Staff's review found that ATULC filed two L-3c reports disclosing six monetary contributions totaling \$3,250 that were made to 2017 candidates for public office.

2018 calendar year: Mr. Iglitzin stated ATULC made \$104,227 in total expenditures that included \$31,367 in monetary contributions made to 2018 candidates for public office. He stated that ATULC's percentage of expenditures for contributions made to total contributions represented 30% in calendar year 2018.

Staff's review of the L-3 report filed by the ATULC disclosed that the Arledge Group, a contract lobbying firm, received a total of \$33,096 in compensation to lobby during calendar year 2018. The L-3 report for 2018 was required to have been filed the last day of February 2019 and was timely filed on February 28, 2019.

- Mr. Iglitzin stated that ATULC devotes its efforts, time and resources in three main areas that includes supporting "*substantial lobbying efforts at ATULC's expense*" at the state level; providing educational training for Amalgamated Transit Union (ATU) locals and their members; and providing a forum for information to ATU locals and their members. He stated one of ATULC purposes is to support legislation through lobbying efforts and added "*while ATULC participates in elections by making contributions that support candidates, or that support or oppose ballot measures, it is not one of ATULC's primary purposes.*"
- Mr. Iglitzin stated that an analysis of ATULC's average spending indicated that only 22.6% of its expenditures over the past five years has been dedicated to electoral political activity, but by contrast, ATULC spent just shy of that – 22.3% of its expenditures over five years – on office and administrative expenses alone. He added that ATULC spent roughly the same amount of money supporting (or opposing) candidates and ballot initiatives for 2014 through 2018 as it spent on overhead, which does not indicate it's one of ATULC's primary purposes.

ATULC is a Lobbyist Employer registered and reporting with the PDC and one of its primary purposes is to support legislation through lobbying efforts, to which ATULC devotes significant resources and time on. ATULC also spends resources for ATU local members and membership services, transportation and transit issues, and overhead, and ATULC's stated goals and mission extend beyond making contributions to candidates for public office and political committees.

PDC staff found no evidence of a material violation that would require conducting a more formal investigation into your complaint or pursuing enforcement action in this instance concerning ATULC being a political committee. Based on our review of the facts, the majority of ATULC activities do not involve making contributions to candidates for public office, and do not appear to involve electoral political activity at all. ATULC's percentage of expenditures for monetary contributions to candidates and political committees was 35% in 2016, and 30% in 2018, respectively, however staff noted that 33 of the 41 contributions made in 2016, were made on two dates, June 3, 2016 (21 contributions), and September 16, 2016 (11 contributions).

Staff noted that more than 80% of the ATULC contributions made to candidates for public office in 2016, were made over the course of two days, whereas its lobbying and membership outreach and services were pretty much ongoing throughout the calendar year. Although the ATULC made expenditures in support of candidates, the totality of the evidence does not suggest that ATULC is a political committee, because the making of those expenditures was not its primary purpose, or even one of its primary purposes.

On April 2, 2020, ATULC completed a Statement of Understanding (SOU) and paid a \$150 civil penalty in accordance with WAC 390-37-143 (Brief Enforcement Penalty Schedule), acknowledging a violation of RCW 42.17A.630 for failing to timely file the Annual Report of Lobbyist Employers (L-3 reports) for calendar year 2016.

The \$150 penalty assessed in this matter resolves the issue of the late filed L-3 report for 2016.

Based on this information, PDC staff is dismissing this matter against the Amalgamated Transit Union Legislative Council of Washington State in accordance with RCW 42.17A.755(1). If you have questions, you may contact me at (360) 664-8854, toll-free at 1-877-601-2828, or by e-mail at kurt.young@pdc.wa.gov.

Sincerely,

Endorsed by,

/s _____
Electronically Signed, Kurt Young
Compliance Officer

/s _____
Electronically Signed BG Sandahl, Deputy Director
for Peter Lavalley, Executive Director

cc: Dmitri Iglitzin, on behalf of the ATULC



EXHIBIT E



State of Washington

PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908

(360) 753-1111 • FAX (360) 753-1112

Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

In RE COMPLIANCE WITH
RCW 42.17A

Amalgamated Transit Union
Legislative Council of Washington
State

Respondent.

PDC Case 43940

Report of Investigation

I.

Background, Complaint and Allegations

- The Amalgamated Transit Union Legislative Council of Washington State has been registered with the PDC as a Lobbyist Employer dating back to at least 1996, filing L-3 and L-3c reports disclosing expenditures made to hire a contract lobbyist to lobby, and contributions made to candidates and political committees.
- On December 11, 2018, the Public Disclosure Commission (PDC) received a complaint filed by Maxford Nelson with the Freedom Foundation against the Amalgamated Transit Union Legislative Council of Washington State (ATULC), alleging that the ATULC may have violated: (1) RCW 42.17A.205 by failing to register as a political committee by filing a Committee Registration (C-1pc report); and (2) RCW 42.17A.235 and .240 by failing to timely file Monetary Contributions reports (C-3 reports) and Summary Full Campaign Contribution and Expenditure reports (C-4 reports) disclosing contribution and expenditure activities undertaken during calendar years 2014 through 2018. **Exhibit #1.**
- On January 31, 2019, Mr. Nelson on behalf of the Freedom Foundation, submitted a supplemental letter in response to the letter submitted by Mr. Iglitzin. **Exhibit #2.**
- On March 7, 2019, the PDC opened a formal investigation into the Committee concerning the allegations listed in the complaint filed against the ATULC and held an Initial Hearing (Case Status Review Hearing) pursuant to RCW 42.17A.755 and WACs 390-37-060 and 390-37-071.

II.

Findings

- As a Lobbyist Employer registered and reporting with the PDC, ATULC has as one of its primary purposes is to support legislation through lobbying efforts, to which ATULC devoted significant resources and time on based on staff's review. ATULC also spends resources for ATU local members and membership services, transportation and transit issues, and overhead, and ATULC's stated goals and mission extend beyond making contributions to candidates for public office and political committees.
- The Commission had adopted **PDC Interpretation 07-02, Primary Purpose Test Guidelines**, which distills relevant case law and other legal guidance (AGO 1973 no. 14, *State v. Dan Evans Committee*, and *Evergreen Freedom Foundation v. Washington Education Association*) concerning the definition of "political committee" in RCW 42.17.020(39). The Interpretation goes on to state the following:

"The trial court here adopted the broad standard "*one of the* primary purposes" and applied it in formulating its own rule: **An organization is a political committee if one of its primary purposes is to affect governmental decision making by supporting or opposing candidates or ballot propositions, and it makes or expects to make contributions in support of or in opposition to a candidate or ballot measure.**"

The Interpretation begins its analysis by noting that the trial court "correctly formulated this rule, and as the only mandatory authority on this issue, *Evans* controls interpretations of the "maker of expenditures" prong." In addition, the declaration of policy at the beginning of the Public Disclosure Act states that its "provisions are to be liberally construed "to promote complete disclosure of ... political campaigns...." RCW 42.17.010(11). The Interpretation states: "a person is a political committee if that person becomes a "receiver of contributions" to support or oppose candidates or ballot propositions, or if expenditures to support or oppose candidates or ballot propositions become one of the person's primary purposes."

The Interpretation also discusses "**a nonexclusive list of analytical tools** a court may use when evaluating the evidence includes: (1) the content of the stated goals and mission of the organization; (2) whether the organization's actions further its stated goals and mission; (3) whether the stated goals and mission of the organization would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether the organization uses means other than electoral political activity to achieve its stated goals and mission."

- Staff's review of the response from Dmitri Iglitzin, an attorney on behalf of Schwerin Campbell Barnard Iglitzin & Lavitt LLP on behalf of Amalgamated Transit Union Legislative Council of Washington State (ATULC), and the lobbying activities undertaken by the ATULC for calendar years 2014 through 2018, including contributions made to candidates and political committees, found the following as detailed below.

2014 calendar year:

- ATULC made \$80,507 in total expenditures that included \$18,745 in monetary contributions made to 2014 candidates for public office. He stated that the percentage of expenditures for contributions made to total contributions represented 23%.

- Staff's review of the L-3 report filed by the ATULC for calendar year 2014 disclosed Cody Arledge, a contract lobbyist, received a total of \$31,999 in compensation to lobby. The L-3 report for 2014 was required to have been filed the last day of February 2015 and was filed almost one year late on February 22, 2016.

2015 calendar year:

- Staff's review found that ATULC filed two L-3c reports disclosing five monetary contributions totaling \$3,900 were made to two 2015 candidates for public office, one caucus political committee, one legislative district party committee, and one caucus related political committee.
- The review also found that ATULC filed the L-3 report disclosing Cody Arledge, a contract lobbyist, received a total of \$35,600 in compensation to lobby during calendar year 2015. The L-3 report for calendar year 2015 was required to have been filed by ATULC by the last day of February 2016 and was timely filed on February 22, 2016.

2016 calendar year:

- ATULC made \$101,443 in total expenditures that included \$35,451 in monetary contributions made to 2016 candidates for public office. He stated that ATULC's percentage of expenditures for contributions made to total contributions represented 35% for calendar year 2016.
- Staff's review of the L-3 report filed by the ATULC disclosed that Johnson Arledge Strategies, a contract lobbying firm, received a total of \$25,200 in compensation to lobby during calendar year 2016. The L-3 report for 2016 was required to have been filed the last day of February 2017 and was filed almost one year late on January 31, 2018. Staff's review found the L-3c reports filed by ATULC for calendar year 2016 timely disclosed 41 monetary contributions totaling \$34,500 except for one contribution disclosed one day late as follows:

Contribution Date	Date Due	Date Filed	# of contributions	Amount	Days Late
2/11/2016	3/15/2016	2/24/2016	1 to Dime PAC	\$ 1,500	0
4/22/2016	5/16/2016	5/17/2016	1 to Dime PAC	\$ 8,500	1
5/20/2016	6/15/2016	5/25/2016	2 to local Candidates	\$ 2,000	0
6/3/2016	7/15/2016	7/2/2016	21 to Leg Candidates	\$ 8,500	0
7/20/2016	8/15/2016	8/2/2016	3 to 2 Leg and 1 Local Candidate	\$ 1,500	0
8/29/2016	9/15/2016	9/3/2016	1 local candidate	\$ 1,000	0
9/16/2016	10/15/2016	10/12/2016	11 to 9 Leg and 2 Local Candidate	\$ 11,000	0
10/6/2016	11/15/2016	11/1/2016	1 to Leg Candidate	\$ 500	0
Totals			41 total contributions	\$ 34,500	

2017 calendar year:

- Staff's review found that ATULC filed two L-3c reports disclosing six monetary contributions totaling \$3,250 were made to 2017 candidates for public office.

- The L-3 report filed by the ATULC disclosed that Johnson Arledge Strategies, a contract lobbying firm, received a total of \$31,976 in compensation to lobby during calendar year 2017. The L-3 report for 2017 was required to have been filed the last day of February 2018 and was timely filed on January 31, 2018.

2018 calendar year:

- ATULC made \$104,227 in total expenditures that included \$31,367 in monetary contributions made to 2018 candidates for public office. He stated that ATULC's percentage of expenditures for contributions made to total contributions represented 30% in calendar year 2018.
- Staff's review of the L-3 report filed by the ATULC disclosed that the Arledge Group, a contract lobbying firm, received a total of \$33,096 in compensation to lobby during calendar year 2018. The L-3 report for 2018 was required to have been filed the last day of February 2019 and was timely filed on February 28, 2019.

Responses from Dmitri Iglitzin:

- Mr. Iglitzin submitted a total of three responses on behalf of ATULC that included the initial response received by the PDC on January 19, 2019 (**Exhibit #3**); a supplemental response to PDC staff's questions that was received on March 11, 2019 (**Exhibit #4**); and additional information as a follow-up to the March 11th response that was received on March 15, 2019 (**Exhibit #5**).
- Mr. Iglitzin stated that ATULC devotes its efforts, time and resources in three main areas that includes supporting "*substantial lobbying efforts at ATULC's expense*" at the state level; providing educational training for Amalgamated Transit Union (ATU) locals and their members; and providing a forum for information to ATU locals and their members. As noted above, ATULC has been registered and reporting as a Lobbyist Employer for at least 25 years and lobbying activities are where the majority of ATULC funds are spent.
- Mr. Iglitzin stated that one of ATULC purposes is to support legislation through lobbying efforts and added "*while ATULC participates in elections by making contributions that support candidates, or that support or oppose ballot measures, it is not one of ATULC's primary purposes.*" He stated that an analysis of ATULC's average spending indicates only 22.6% of its expenditures over the past five years has been dedicated to electoral political activity. He stated by contrast, ATULC spent just shy of that – 22.3% of its expenditures over five years – on office and administrative expenses alone, and added ATULC spent roughly the same amount of money supporting/opposing candidates and ballot measures for the three year period as it spent on overhead, which does not indicate it's one of ATULC's primary purposes.
- Mr. Iglitzin stated the ATULC "*devotes its efforts to functioning as a forum for Washington State ATU locals and providing educational training for those locals and their members, as well as to support substantial lobbying efforts at ATULC's expense.*" He acknowledged ATULC made expenditures in support of candidates or election initiatives during the period covered in the complaint, however "*electoral political activity is not one of ATULC's primary purposes.*"

- Mr. Iglitzin stated that *“An assessment of whether electoral activity is one of an organization’s primary goals looks to, among other things, the stated goals and mission of the organization, whether the organization’s actions further its stated goals and mission, whether the stated goals and mission would be substantially achieved by a favorable outcome in an upcoming election, and whether the organization uses means other than electoral activity to achieve those goals... The stated goals of ATULC, its actions to further those goals, the impact of a favorable election on those goals, and the means which ATULC uses to achieve those goals all establish that the organization does not qualify as a political committee under the expenditures prong.”*
- Mr. Iglitzin stated that ATULC’s own website explains that its purposes are to: (1) *“Protect the rights of the members of the Amalgamated Transit Union at the level of political activity that can be generated by the combined efforts of this Legislative Council composed of the Local unions embodied within the State of Washington; (2) Promote and support new legislation before the government bodies of our State by lobbying effectively with the elected officials who have the authority and responsibility of representing the citizens of Washington State; (3) Cooperate with our Local Unions, and to form a stronger political bond of cohesion with the Washington State Labor Council, and other Labor Councils in the cities where our transit Locals are centered; and (4) Encourage our memberships to be politically alert on matters that affect their livelihood and create a more favorable public sentiment towards the Transportation Industry.”*
- Mr. Iglitzin stated ATULC does not receive dues payments from individual union members, and instead receives lump sum transfers from local transit unions, with those lump sum transfers to ATULC from the locals being the only funds received. He stated individual members’ dues payments are not segregated into a fund for political purposes even at the local level, much less by ATULC and instead the ATU locals transmit money to ATULC on a per capita basis based on the number of dues paying members for each local unit.
- Mr. Iglitzin stated that ATULC does not qualify as a political committee under the “maker of expenditures” found in RCW 42.17A.005(41) which *“not only have made or expected to make expenditures in support of a candidate or election initiative, it must also have had as one of its primary purposes supporting election candidates or initiatives.”* He provided information in response to staffs request concerning ATULC expenditure activities for calendar years 2014, 2016, and 2018 and staff reviewed filing information covering 2014-2018.

Staff Analysis, Summary and late filed L-3 report:

- ATULC’s percentage of expenditures for monetary contributions to candidates and political committees was 35% in 2016, and 30% in 2018, respectively. Staff, however, noted that 33 of the 41 contributions made by ATULC in 2016 contributions were expenditures made on two dates: June 3, 2016 (21 contributions); and September 16, 2016 (11 contributions).
- Staff noted that more than 80% of the ATULC contributions made to candidates for public office in 2016 were made over the course of two days. In contrast, its lobbying and membership outreach and services were ongoing throughout the calendar year. Although ATULC made expenditures in support of candidates, the totality of the evidence does not suggest that ATULC is a political committee, because the making of those expenditures was not its primary purpose, or even one of its primary purposes.

- On January 31, 2018, ATULC filed the L-3 report for calendar year 2016 disclosing that Johnson Arledge Strategies, a contract lobbying firm, provided lobbying services during the 2016 Legislative Session and the remainder of calendar year 2016. The L-3 report disclosed that ATULC made payments totaling \$25,200 to Johnson Arledge Strategies as compensation for lobbying services.
- The L-3 report for calendar year 2016 was required to have been filed by ATULC no later than the last day of February 2017. While not listed as an allegation in the complaint filed against the ATULC, the L-3 report was filed 337 days late by ATULC on January 31, 2018.
- On April 2, 2020, ATULC completed a Statement of Understanding (SOU) and paid a \$150 civil penalty in accordance with WAC 390-37-143 (Brief Enforcement Penalty Schedule), acknowledging a violation of RCW 42.17A.630 for failing to timely file the Annual Report of Lobbyist Employers (L-3 reports) for calendar year 2016.
- The \$150 penalty assessed and paid by ATULC in this matter resolves the issue of the late filed L-3 report for 2016.

III. **Scope**

3.1 PDC staff reviewed the following documents:

- On December 11, 2018, a complaint with exhibits was filed by Maxford Nelson with the Freedom Foundation against the Amalgamated Transit Union Legislative Council of Washington State.
- On February 1, 2019, Mr. Nelson on behalf of the Freedom Foundation, submitted a supplemental letter in response to the letter submitted by Mr. Iglitzin.
- On April 15, 2019, Mr. Nelson on behalf of the Freedom Foundation submitted supplemental complaint information against the ATULC that included federal Department of Labor LM-3 reports filed for calendar years 2012 through 2018.
Exhibit #6.
- Annual Report of Lobbyist Employers (L-3 reports) and the Monthly Lobbyist Employer Contributions report (L-3c reports) filed by the Amalgamated Transit Union Legislative Council of Washington State.
- Responses and email exchanges between PDC staff and Dmitri Iglitzin, legal counsel with Schwerin Campbell Barnard Iglitzin & Lavitt LLP on behalf of Amalgamated Transit Union Legislative Council of Washington State.

3.2 PDC staff queried the PDC Contribution and Expenditure database for Amalgamated Transit Union Legislative Council of Washington State for contribution information covering calendar years 2014 through 2018.

IV.
Statutes and Rules

- 4.1 **RCW 42.17A.205** requires every entity and organization to register as political committee within two weeks after the organization or entity first has the expectation of receiving contributions or making expenditures in any election campaign.
- 4.2 **RCW 42.17A.235 and 240** requires political committees under the Full Reporting Option to file timely, accurate C-3 and C-4 reports disclosing contribution and expenditure activities undertaken by the committee. Under the full reporting option, until five months before the general election, C-4 reports are required monthly when contributions or expenditures exceed \$200 since the last report.
- Beginning June 1st for every political committees participating in an election, C-4 reports are required 21 and 7 days before each election in which the committee receives contributions or makes expenditures, and in the month following the election. Monetary contributions are reported weekly during this same time and are required to be disclosed on a C-3 report filed every Monday for monetary contributions deposited into the committee bank account the previous five business days.
- 4.3 **RCW 42.17A.630** requires employers of a lobbyist to file an Annual Lobbyist Employer's Report (L-3 report) by the last day of February disclosing lobbying activities undertaken during the previous calendar year.
- 4.4 **PDC Interpretation 07-02, *Primary Purpose Test Guidelines*** for a Political Committee.

Respectfully submitted this 6th day of April 2020.

s/_____
Electronically Signed by Kurt Young
PDC Compliance Officer

List of Exhibits

- Exhibit #1** December 11, 2018, complaint filed by Maxford Nelson with the Freedom Foundation against the Amalgamated Transit Union Legislative Council of Washington State (ATULC). (Note – this exhibit only includes the complaint and letter without attached exhibits).
- Exhibit #2** January 31, 2019, supplementary complaint information provided by Freedom Foundation.
- Exhibit #3** January 19, 2019, initial response received from Dmitri Iglitzin, an attorney on behalf of ATULC.
- Exhibit #4** March 11, 2019, supplemental response received from Mr. Iglitzin on behalf of ATULC to PDC staff questions.
- Exhibit #5** March 15, 2019, additional information provided by Mr. Iglitzin on behalf of ATULC.
- Exhibit #6** April 15, 2019, letter from the Freedom Foundation providing supplemental complaint information against the ATULC.

Complaint Description
<p><u>Maxford Nelsen</u> reported an issue (Tue, 11 Dec 2018 at 5:28 PM)</p> <p>See attached.</p>
What impact does the alleged violation(s) have on the public?
See attached.
List of attached evidence or contact information where evidence may be found.
See attached.
List of potential witnesses with contact information to reach them.
See attached.
Complaint Certification:
I certify (or declare) under penalty of perjury under the laws of the State of Washington that information provided with this complaint is true and correct to the best of my knowledge and belief.

December 11, 2018

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

Public Disclosure Commission Staff,

Pursuant to RCW 42.17A.775, I write to report violations of the Fair Campaign Practices Act (“FCPA”), Chapter 42.17A RCW, by the Amalgamated Transit Union Legislative Council of Washington State (“ATULC”).¹

In brief, ATULC has operated as a political committee for years without filing a statement of organization with the Public Disclosure Commission (“PDC”) as required by RCW 42.17A.205. As an unregistered political committee, ATULC has also failed to comply with the other provisions of Chapter 42.17A RCW governing the conduct and reporting requirements of political committees.

ATULC not only describes its purpose in explicitly political terms, but it receives contributions from ATU locals around Washington with the understanding the funds will be used to advance electoral political activity. In election years, ATULC spending on political activity increases dramatically, to half or more of its total expenditures. ATULC has no full-time staff and, beyond what appear to be basic administrative costs, has little-to-no expenses other than political contributions. Accordingly, it satisfies both the “receiver of contributions” and “maker of expenditures” prongs of the definition of “political committee” as recognized by the courts and should be held to account for its lack of disclosure.

Factual background

Section 40.2 of the Amalgamated Transit Union (“ATU”) Constitution and General Laws allows local unions in a state to form a statewide entity for the purpose of coordinating political activity, providing:

“Where a majority of the LUs [local unions] in a state or province, with the approval of the IU [international union], enact to form a joint conference board for mutual aid and protection, exchange of information, the furthering of organizing and organizing campaigns, legislative and political action, and community action programs, in accordance with the charters or directions issued by the IU, then, in that event, all LUs within that state or province shall be obligated to affiliate and support the work of such

¹ 1308 Meador Ave C-1, Bellingham, WA 98229. (360) 738-3299. President: Randal Son, atulcpres@gmail.com. Vice president: Rick Swartz, atu883finsec@comcast.net. Secretary-treasurer: AJ Wolcott, atulc.fst@gmail.com

joint conference board. The conference board shall establish monthly per capita tax through the bylaws of such conference board as approved by the IP [international president].”²

See Appendix page 171.

The ATULC is such a “joint conference board” for ATU locals in Washington. Its website describes its purpose as follows:

“The Washington State Legislative Council exists under the authorization of the Amalgamated Transit Union International Constitution and General By-Laws.

To protect the rights of the members of the Amalgamated Transit Union at the level of political activity that can be generated by the combined efforts of this Legislative Council composed of the Local Unions embodied within the State of Washington.

To promote and support new legislation before the government bodies of our State by lobbying effectively with the elected officials who have the authority and responsibility of representing the citizens of Washington State.

To cooperate with our Local Unions, and to form a stronger political bond of cohesion with the Washington State Labor Council, and other Labor Councils in the cities where our transit Locals are centered.

To encourage our memberships to be politically alert on matters that affect their livelihood, and create a more favorable public sentiment towards the Transportation Industry.”³

See App. 206.

The ATULC filed a form 8871, notice of Section 527 status, with the Internal Revenue Service (“IRS”) in 2007, claiming the tax benefits of a “political organization” under federal law. *See App. 207.* 26 U.S.C. § 527(e)(1) defines “political organization” as:

“...a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”

“Exempt function” is defined by subsection (e)(2) as:

“...the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office...”

ATULC describes its purpose on its form 8871 as, “promot[ing] legislation and candidates

² A copy of the ATU Constitution is available online at: https://www.atu.org/atu-pdfs/CGL2016_FINAL.pdf

³ Available online at: http://www.atulcwa.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=510298

supportive for Amalgamated Transit Union member in the State of Washington” (errors in original). *See App. 207.*

According to financial disclosure forms LM-3 ATULC files with the U.S. Department of Labor’s Office of Labor Management Standards (“OLMS”) in accordance with the federal Labor Management Reporting and Disclosure Act of 1959, ATULC has no paid staff and is run by a board of unpaid volunteers comprised of union officials from ATU locals in Washington. *See App. 236.*

Its forms LM-3 divide ATULC’s annual expenditures into four categories: (1) Office and administrative expense⁴; (2) professional fees⁵; (3) contributions, gifts and grants⁶; and (4) other.⁷ *See App. 213, 217, 222, 227, 232, and 237.*

Year	Total Receipts	Total Disbursements	Office and Administrative Expense		Professional Fees		Contributions, gifts and grants		PDC Contributions		
			Amount	% of Disbursements	Amount	% of Disbursements	Amount	% of Disbursements	PDC Contributions	% of Disbursements	% of Receipts
2012	\$55,770	\$73,447	\$4,990	6.8%	\$2,000	2.7%	\$66,457	90.5%	\$61,265	83.4%	109.9%
2013	\$81,659	\$45,619	\$7,355	16.1%	\$3,014	6.6%	\$35,250	77.3%	\$12,000	26.3%	14.7%
2014	\$89,954	\$80,506	\$11,688	14.5%	\$32,224	40.0%	\$36,594	45.5%	\$24,650	30.6%	27.4%
2015	\$85,714	\$61,378	\$15,118	24.6%	\$35,860	58.4%	\$10,400	16.9%	\$4,900	8.0%	5.7%
2016	\$85,408	\$101,442	\$21,549	21.2%	\$29,410	29.0%	\$49,500	48.8%	\$43,050	42.4%	50.4%
2017	\$92,753	\$67,153	\$23,568	35.1%	\$33,885	50.5%	\$9,700	14.4%	\$3,950	5.9%	4.3%
Total	\$491,258	\$429,545	\$84,268	19.6%	\$136,393	31.8%	\$207,901	48.4%	\$149,815	34.9%	30.5%

Beyond the basic administrative costs necessary to exist, ATULC’s only expenditures are for “contributions, gifts and grants.” On average, this category accounts for half of ATULC’s expenditures, a proportion that consistently spikes during election years.

Most, if not all, of the expenditures in the “contributions, gifts and grants” category are for political contributions to candidates, ballot measures and political committees.

For instance, on its forms LM-3 for 2014 and 2015, ATULC itemized its political contributions under item 56, reporting \$29,150 in contributions in 2014 (out of \$36,594 total contributions, gifts and grants) and \$10,400 in 2013 (exactly the same as the amount of reported contributions, gifts and grants). *See App. 223 and 228.*

Tracking ATULC’s political expenditures in disclosures filed with the PDC is difficult. Since ATULC has not registered as a political committee, the only records of its expenditures are those filed by recipients of ATULC funds. Recipients use multiple different titles/labels to describe ATULC.

Records the Freedom Foundation has been able to identify appear to indicate that ATULC made political expenditures totaling at least \$61,265 in 2012, \$12,000 in 2013, \$24,650 in 2014,

⁴ See Statement B, item 48 of the forms LM-3.

⁵ See Statement B, item 49 of the forms LM-3.

⁶ See Statement B, item 51 of the forms LM-3.

⁷ See Statement B, item 54 of the forms LM-3. There are no expenses listed in this category for 2012-15 or 2017. There are \$983 worth of “other” expenses recorded on the 2016 form LM-3.

\$4,900 in 2015, \$43,050 in 2016, \$3,950 in 2017, and \$30,000 in 2018. *See App. 239-245.*

Violations of the FCPA

RCW 42.17A.205 requires every “political committee” to “file a statement of organization” with the PDC “within two weeks after organization or within two weeks after the date the committee first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier.”

RCW 42.17A.005(40) defines “political committee” as:

“...any person... having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.”

Three Washington court decisions have clarified and interpreted this definition.

In *State of Washington v. Dan J. Evans Campaign Committee*, 86 Wn.2d 503 (1976), the State Supreme Court determined that an entity satisfies the 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 “the primary or one of the primary purposes” of the entity.

In *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398 (2015), the Washington State Supreme Court confirmed that an organization may be considered a “political committee” if *one* of its primary purposes is to engage in electoral political activity; electoral political activity need not be *the* primary purpose of the entity for it to fulfill the definition of “political committee.”

Lastly, in *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. 586 (2002), the court of appeals interpreted the definition of “political committee” to mean,

“...a person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals.”

ATULC fulfills both the “receiver of contributions” and “maker of expenditures” prongs of the definition of “political committee.”

The per capita payments ATULC receives from ATU locals in Washington are contributions made in expectation of furthering electoral political goals. Because the bylaws of the national ATU requires ATU locals to pay per capita taxes to ATULC as a “joint conference board,” ATULC has an expectation of receiving and does receive the per capita payments to use as political contributions.

This alone is sufficient to qualify ATULC as a political committee under the “receiver of contributions” prong. However, ATULC also fulfills the “expenditures prong” of the definition

of “political committee.”

In *EFF v. WEA*, the appeals court expounded on the primary purpose test established by the State Supreme Court in *State of Washington v. Dan Evans*, including the following observations:

“...an appropriate framework for determining whether electoral political activity is one of an organization's primary purposes should include an examination of the stated goals and mission of the organization and whether electoral political activity was a primary means of achieving the stated goals and mission during the period in question. Under this analysis, a nonexclusive list of analytical tools a court may use when evaluating the evidence includes: (1) the content of the stated goals and mission of the organization; (2) whether the organization's actions further its stated goals and mission; (3) whether the stated goals and mission of the organization would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether the organization uses means other than electoral political activity to achieve its stated goals and mission.”

ATULC repeatedly describes its own purpose as engaging in “political activity” and “promoting candidates.”

Additionally, the organization’s actions clearly line up with its stated goals. Indeed, an analysis of ATULC’s finances indicates that it performs no substantive function that is not political. Other than administrative expenses, ATULC appears to have few expenses other than the making of political contributions. With no staff and little other measurable activity to speak of, it does not appear that ATULC “uses means other than electoral political activity to achieve its stated [political] goals and mission.”

To be considered a “political committee” under the expenditures prong for the purposes of the FCPA, ATULC need only have as *one* of its primary purposes the influencing of electoral political activity. It meets this threshold without question.

Lastly, it is worth noting that, in a situation with almost identical facts, the Washington State Attorney General’s Office is currently prosecuting the SEIU Washington State Council for its failure to register and report to the PDC as a political committee.⁸ Like ATULC, the SEIU Washington State Council is an entity created under the national SEIU bylaws that collects a per capita tax from all SEIU locals in Washington for the purposes of engaging in and coordinating SEIU’s electoral political activity in Washington.

Conclusion

ATULC’s failure to register and report as a political committee as required by the FCPA has tangibly negative implications for the transparency of Washington elections. For example, political contributions made by ATULC are labeled differently by various recipients of ATULC funds, making it difficult to know the true source of the contributions and to track ATULC’s

⁸ Washington State Office of the Attorney General. “AGO files campaign finance complaint against SEIU Washington State Council.” July 11, 2017. <https://www.atg.wa.gov/news/news-releases/ago-files-campaign-finance-complaint-against-seiu-washington-state-council>

political activity.

Further, the reporting regime required by the law requires both the contributing political committee and the receiving political committee or candidate to report the transaction to the PDC. This dual reporting promotes transparency, as both the contributor and recipient would have to fail to report the transfer of funds for it to go unnoticed. ATULC's failure to properly register as a political committee thwarts this system of accountability. Since ATULC already does not report its contributions, the transfer of funds would be invisible to the public if only the recipients of ATULC funds neglected to report as required.

We respectfully request that the PDC perform an investigation into these allegations and take appropriate enforcement action. Please do not hesitate to contact me if I can be of assistance.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Maxford Nelsen', with a stylized, cursive script.

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

January 31, 2019

Tabatha Blacksmith
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504

Re: Case No. 43940

Ms. Blacksmith,

I have reviewed the Amalgamated Transit Union Legislative Council's ("ATULC") January 17, 2019 response to my citizen action complaint filed December 11, 2018 and would like to address several issues.

First, ATULC's response to the contention that it is a "political committee" under the "receiver of contributions" consists primarily of diversionary arguments designed to confuse the issue.

The first two paragraphs of the union's response discuss the criteria used by the Court of Appeals in *Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 602 (2002) to evaluate whether the Washington Education Association was a political committee. As noted by ATULC, the court held that, if an organization is funded by members, it is not a "political committee" unless "members' payments are segregated into a fund for political purposes and members know or should know about that segregation..."

That analysis would be relevant if the complaint alleged that a specific ATU local was itself a political committee because some of the funds it collects from its members were being set aside for political use.

However, beyond its discussion of the "receiver of contributions" and "maker of expenditures" prongs, *WEA* is inapplicable to the case at hand because, as ATULC admits, it "does not receive dues from union members at all." The form LM-3 ATULC filed with the U.S. Department of Labor for calendar year 2017 also indicated the union had zero members. *See original Appendix page 235.*

Instead, as pointed out in the original complaint and confirmed by the ATULC in its response, it is funded by per capita payments made by ATU local unions in Washington. Accordingly, the question is whether the leadership, not the membership, of these local unions is aware the payments their local unions make to ATULC are for political expenditures.

ATULC president Roy Jennings is also "a member of the Executive Board of the Amalgamated

Transit Union Local 757” in Portland.¹ ATULC vice president Richard “Rick” Swartz is also secretary-treasurer for ATU Local 883 in Everett.² And ATULC secretary-treasurer Albert Walcott is also the president of ATU Local 843 in Bellingham.³

Given that each of ATULC’s officers are also officials for ATU locals in Washington, it is inconceivable that they and their unions are unaware that the funds paid to ATULC are intended for electoral political activity.

Even ATULC effectively concedes that ATU locals know some of the money paid to ATULC will be used for political expenditures, contending instead, “There is no way that ATU locals can know in advance *what proportion* of the per capita payments they provide to ATULC will be spent by ATULC on electoral political activity.” (Emphasis added)

But ATU locals undoubtedly know, given their involvement with ATULC and its mission to engage in political activity, that a substantial portion — if not a majority — of the funds they direct to ATULC will be used on electoral political activity. They need not know in advance the exact proportion that will be used for political expenditures. The fact that ATU bylaws require ATU locals to transfer the funds to ATULC means it has an expectation of receiving and does receive contributions from ATU locals for electoral political activity and, accordingly, it satisfies the definition of “political committee” under the “receiver of contributions” prong.

Second, ATULC contends it is not a political committee under the “maker of expenditures prong” because “electoral political activity is not one of ATULC’s primary purposes.” Here again, ATULC’s response misconstrues the original complaint and tries to redefine its previously stated purpose in nonpolitical terms in an attempt to muddy the waters.

In its response, ATULC describes its mission and purpose in the following ways:

- “[F]urthering ATU locals’ members’ interests through legislation, cooperation, and coalition building throughout the transportation industry.”
- “[F]unctioning as a forum for Washington State ATU locals and providing educational training for those locals and their members, as well as to support substantial lobbying efforts at ATULC’s expense.”

Such creative revisions of ATULC’s previously stated purposes smack of desperation.

As noted in the original complaint and entirely ignored by ATULC in its response, ATULC has informed the IRS that its purpose is to “promote legislation and candidates supportive for Amalgamated Transit Union member in the State of Washington.” *See* original **App. 207**.

And the stated mission of the ATULC posted on its website — to engage in “political activity,” “promote and support new legislation,” “form a stronger political bond of cohesion” with other unions, and encourage ATU members to “be politically alert,” in that order — speaks for itself,

¹ <http://wstc.wa.gov/AboutUs/Commissioners/default.htm>

² <https://www.atu.org/members/groups/conferences-and-councils>

³ Albert Walcott Jr., President/Business Agent

despite the union's present attempt at revisionist history.

In light of such clarity, ATULC's accusation that the original complaint "twists" and "misrepresents" its stated purpose with "wholly concocted language" is just plain wrong.

ATULC emphasizes heavily in its response that lobbying is *one* of its primary purposes. That may be the case; its mission statements clearly suggest as much. But equally clear is that electoral political activity is its *other* primary purpose.

Just existing involves a certain baseline level of administrative expenses. As a small organization, these administrative expenses constitute a respectable percentage of ATULC's overall budget. But since merely existing as a legal entity is not a primary purpose, we must examine the rest of ATULC's expenses to determine its purpose(s). During election years, political expenditures can constitute half or more of ATULC's receipts/expenditures. Presumably, if ATULC's claims are correct, much of the rest goes towards lobbying activities.

Based on these numbers — which ATULC has not contested — there is simply no disputing that electoral political activity constitutes one of ATULC's two primary purposes. That is more than sufficient to qualify it as a political committee.

ATULC even admits that, "in some years ATULC *did* spend a substantial amount of money in support of or in opposition to candidates and ballot measures." Citing *WEA*, however, ATULC claims it only made such expenditures "to achieve its legitimate broad nonpolitical goals, and its admission that it engages in such activity to that end does not make that activity one of its primary purposes."

Yet the court in *WEA* also noted, "If the activities of an organization reveal that a majority of its efforts are put toward electoral political activity, the fact finder may disregard the organization's stated goals to the contrary." In 2016, over half of the funds (at least) received by ATULC were expended on electoral political activity.

At any rate, in this case, both ATULC's stated goals and actions are in alignment: It proclaims electoral political activity to be one of its primary purposes and expends its funds accordingly. The only conclusion that can be reached is that ATULC is an unregistered political committee.

Sincerely,



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

*Via U.S. Mail
And via email to pdcc@pdcc.wa.gov*

January 17, 2019

Peter Lavallee
Executive Director
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504-0908

Re: Complaint from The Freedom Foundation
PDC Case No. 43940
BIL File No. 3327-002

Dear Mr. Lavallee:

We write to you on behalf of our client, the Amalgamated Transit Union Legislative Council of Washington State (“ATULC”), in response to the e-mail we received from you on December 13, 2018, regarding a 45-day Citizen Action Letter filed by The Freedom Foundation (“Freedom Foundation”) with the Washington Attorney General’s Office on December 11, 2018 (“Complaint”).

Respectfully, we believe the allegations made by Freedom Foundation are without merit. As noted in its complaint, under RCW 42.17A.005(41), “‘Political committee’ means any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” Elaborating on that definition, the state Supreme Court has noted that “the legislature provided a skeletal outline of the salient characteristics of a political committee. The definition, though, was not drafted to ensnare indiscriminately all persons seeking to influence governmental decision-making by their contributions given in support of or opposition to candidates or ballot propositions.” *State v. 1972 Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508 (1976).

Taking into account the statutory definition prescribed by the state legislature and the applicable case law, ATULC is not an unregistered political committee under either the “receiver of contributions” or “maker of expenditures” prongs of the statute. Accordingly, it has not violated any of the reporting requirements that otherwise would have been applicable to it.

ATULC is not an unregistered political committee under the “receiver of contributions” prong.

ATULC does not qualify as an unregistered political committee under the “receiver of contributions” prong of RCW 42.17A.005(41). In interpreting RCW 42.17.010(33) (since recodified as RCW 42.17A.005(41)), the Court of Appeals affirmed the trial court’s adoption of a 1973 Attorney General Letter Opinion noting that, “[w]hen an organization is funded primarily by membership dues, it is a ‘receiver of contributions’ if the members are called upon to make payments that are segregated for political purposes and the members know, or reasonably should know, of this political purpose.” *Evergreen Freedom Found. v. Washington Educ. Ass’n*, 111 Wn. App. 586, 602 (2002) (“*WEA*”), (quoting 1973 Lett. Op. Att’y Gen. No 114, at 4). In that letter opinion, the Attorney General stated that “if the only source of revenue of [an] organization is use or assessments to fund general operations, and the membership has no actual or constructive knowledge that the organization is setting aside funds to support or oppose a ballot proposition, then the organization is not a political committee under the ‘receiver of contributions’ prong.” *WEA*, 111 Wn. App. at 602.

However, if members’ payments are segregated into a fund for political purposes and members know or should know about that segregation, those payments are contributions, qualifying the organization as a receiver of contributions and a political committee. *Id.* at 602-03. Applying that reasoning, the *WEA* found that the WEA was not a receiver of contributions, because members paid dues into a general fund which was not segregated in any manner for political expenditures; accordingly, the members had no actual or constructive knowledge that their dues would be used for electoral political activity. The dues, therefore, were not contributions, and WEA did not qualify as a political committee under the receiver of contributions prong. *Id.* at 603.

Here, ATULC does not receive dues from union members at all. Instead, it receives dues from Amalgamated Transit Union locals. The locals transmit money to ATULC from the moneys they receive from their members. Individual union members’ dues payments are *not* segregated into a fund for political purposes even at the local level, much less by ATULC. Instead, the locals transmit money to ATULC on a per capita basis based on the number of dues-paying members each local has.

The Freedom Foundation’s argument that these per capita payments to ATULC from ATU locals none-the-less qualify as contributions lacks merit. There is no way that ATU locals can know in advance what proportion of the per capita payments they provide to ATULC will be spent by ATULC on electoral political activity. Much less could any members of those locals have any idea what that proportion might be. All money received by ATULC is spent as ATULC deems appropriate, after due consideration, in pursuit of ATULC’s goal of furthering ATU locals’ members’ interests through legislation, cooperation, and coalition building throughout the transportation industry. None of the money it receives is earmarked at the time of receipt for any particular use. Accordingly, Freedom Foundation’s assertion that ATULC is a receiver of contributions under RCW 42.17A.005(41) is without merit.

ATULC is not an unregistered political committee under the “maker of expenditures” prong.

ATULC also does not qualify under the “maker of expenditures” prong of RCW 42.17A.005(41). To qualify as a political committee under the expenditure prong an organization must not only have made or expected to make expenditures in support of a candidate or election initiative, it must also have had as one of its primary purposes supporting election candidates or initiatives. *Utter v. Bldg. Indus. Ass’n. of Washington*, 182 Wn.2d 398, 419 (2015). While ATULC has made some expenditures in support of candidates or election initiatives, electoral political activity is not one of ATULC’s primary purposes. Instead, ATULC devotes its efforts to functioning as a forum for Washington State ATU locals and providing educational training for those locals and their members, as well as to support substantial lobbying efforts at ATULC’s expense.

When the primary purpose or one of the primary purposes of a person making a contribution is to affect, directly or indirectly, governmental decision-making by supporting or opposing candidates or ballot propositions, that person becomes a political committee and is subject to disclosure requirements under Washington law. 1972 *Dan J. Evans Campaign Comm.*, 86 Wn.2d at 509. Put another way, an organization is not considered a political committee under the expenditure prong “unless it also has the support of a political candidate or initiative as the primary [purpose] or one of the primary purposes.” *Utter*, 182 Wn.2d at 415. In contrast, “if electoral political activity is merely *one* means the organization uses to achieve its legitimate broad nonpolitical goals,” the organization does not qualify under the expenditure prong because “electoral political activity cannot be said to be one of the organization’s primary purposes.” *WEA*, 111 Wn. App. at 600 (emphasis added).

An assessment of whether electoral activity is one of an organization’s primary goals looks to, among other things, the stated goals and mission of the organization, whether the organization’s actions further its stated goals and mission, whether the stated goals and mission would be substantially achieved by a favorable outcome in an upcoming election, and whether the organization uses means other than electoral activity to achieve those goals. *Id.* at 599-600.

The stated goals of ATULC, its actions to further those goals, the impact of a favorable election on those goals, and the means which ATULC uses to achieve those goals all establish that the organization does not qualify as a political committee under the expenditures prong.

As noted both on ATULC’s website and in Freedom Foundation’s own complaint, ATULC explains that its purposes are:

To protect the rights of the members of the Amalgamated Transit Union at the level of political activity that can be generated by the combined efforts of this Legislative Council composed of the Local unions embodied within the State of Washington.

To promote and support new legislation before the government bodies of our State by lobbying effectively with the elected officials who have the authority and responsibility of representing the citizens of Washington State.

To cooperate with our Local Unions, and to form a stronger political bond of cohesion with the Washington State Labor Council, and other Labor Councils in the cities where our transit Locals are centered.

To encourage our memberships to be politically alert on matters that affect their livelihood, and create a more favorable public sentiment towards the Transportation Industry.

Our Purpose, Amalgamated Transit Union Legislative Council (January 14, 2019, 5:11 PM), http://www.atulcwa.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=510298.

Though ATULC does not hide that its purposes include supporting legislation through lobbying efforts, which is in fact what it spends the bulk of its money on, it does *not* state that participating in elections through support or opposition of either candidates or ballot measures is one of its primary purposes. Though Freedom Foundation alleges that “ATULC repeatedly describes its own purpose as ‘engaging in political activity’ and ‘promoting candidates,’” it either twists ATULC’s purpose statement so far as to misrepresent it or wholly concocts language to suit its purposes. The phrase “engaging in political activity” and “promoting candidates” do not appear in ATULC’s mission statement. Supporting legislation through direct lobbying of elected officials is *not* the same as promoting (or opposing) candidates or ballot measures.

Likewise, ATULC’s actions serve to further its stated goals and mission, and the portion of its expenditures dedicated to electoral political activity reflect that political activity in and of itself is not one ATULC’s primary purposes. Even adopting the figures Freedom Foundation asserts in its complaint, analysis of ATULC’s average spending indicates only 22.6% of its expenditures over the past five years has been dedicated to electoral political activity. In contrast, it spent just shy of that – 22.3% of its expenditures over five years – on office and administrative expenses alone. That ATULC spent roughly the same amount of money supporting (or opposing) candidates and ballot initiatives as it does on overhead militates against the conclusion that the former is one of ATULC’s primary purposes.

Nor does the fact that in some years ATULC *did* spend a substantial amount of money in support of or in opposition to candidates and ballot measures justify a different conclusion. As in *WEA*, ATULC engages in electoral political activity to achieve its legitimate broad nonpolitical goals, and its admission that it engages in such activity to that end does not make that activity one of its primary purposes. *WEA*, 111 Wn. App. at 600. No evidence has been suggested, for example, indicating that favorable candidate or ballot measure election results would substantially further ATULC’s goals, much less render further activity by ATULC unnecessary; the absence of such evidence confirms that there is no basis on which to conclude that obtaining such election results is one of ATULC’s primary purposes.

Conclusion

For the foregoing reasons, ATULC is not an unregistered political committee under either

Peter Lavallee
January 17, 2019
Page 5 of 5

the receiver of contributions prong or maker of expenditures prong of RCW 42.17A.005(41). Accordingly, Freedom Foundation's complaint is without merit.

If you have any questions or concerns please feel free to contact me at 206-257-6003 or via e-mail at iglitzin@workerlaw.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Dmitri Iglitzin".

Dmitri Iglitzin
*Counsel for Amalgamated Transit Union
Legislative Council*

cc: Randal Son, ATULC



**BARNARD
IGLITZIN &
LAVITT LLP**

18 West Mercer Street, Suite 400
Seattle WA, 98119
TEL (800) 238.4231
FAX (206) 378.4132

DMITRI IGLITZIN
Senior Partner
DIR (206) 257.6003
iglitzin@workerlaw.com

*Via U.S. Mail
And via email to kurt.young@pdc.wa.gov*

March 11, 2019

Kurt Young
Compliance Officer
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504-0908

RECEIVED

MAR 13 2019

Public Disclosure Commission

Re: Complaint from the Freedom Foundation
PDC Case No. 43940
BIL File No. 3327-002

Dear Mr. Young:

We write to you on behalf of our client, the Amalgamated Transit Union Legislative Council of Washington State ("ATULC"), in response to your February 26, 2019, letter regarding the Freedom Foundation's complaint against our client.

ATULC has compiled information in response to your request for further information regarding the years 2014 to 2018.

- ***What were ATULC's annual total receipts and expenditures?***
 - In 2014, ATULC's receipts totaled \$89,954.51 and its expenditures totaled \$80,507.30.
 - In 2015, ATULC's receipts totaled \$85,714.84 and its expenditures totaled \$61,369.03.
 - In 2016, ATULC's receipts totaled \$85,409.73 and its expenditures totaled \$101,443.04.
 - In 2017, ATULC's receipts totaled \$92,973.32 and its expenditures totaled \$67,153.61.
 - In 2018, ATULC's receipts totaled \$82,226.81 and its expenditures totaled \$104,227.26.

We need to note again here, however, that the Freedom Foundation's focus on the relationship between electoral political expenditures in a given year and the spending entity's total receipts that year is conceptually misguided. Instead, ATULC's political expenditures must be viewed in relation to, and in the context of, ATULC's *overall expenditures*.

In its complaint, Freedom Foundation appears to allege that an organization's purpose may be established as political by comparing its annual receipts to its expenditures on electoral political activity. However, such a standard would be both over- and under-inclusive.

First, this standard would lead to the misclassification of organizations that, in a given year, make expenditures *predominately* on electoral political activity, where those expenditures happen to represent only a modest fraction of the organization's receipts that year. That would clearly be a legal error.

Second, such a standard could lead to the conclusion that an organization, like ATULC, that happens to have a big year on the expenditure side relative to its receipts, has a primary purpose of electoral political activity, even if its expenditures for electoral political activity fall well below a majority of its total expenditures during that calendar year (or campaign season), merely because those expenditures are large relative to the organization's receipts.

The appropriate standard, in contrast, and the one that should be applied here, compares an organization's overall expenditures during the relevant time period to the expenditures it has made for electoral political activity. Applying that standard here, as we noted previously, it is clear that between 2014 and 2018 ATULC expended far less than a majority of its efforts on electoral political activity and such activity was not one of its primary purposes. Whether money expended on all of these activities was raised in one year or another is simply irrelevant to this analysis.

- ***What were the amounts of expenditures by category, using the same categories used by Mr. Nelson on Page 3 of his complaint?***
 - In 2014, ATULC spent \$11,380.27 on office and administrative expenses; \$32,224 on professional fees; \$36,594 on contributions, gifts, and grants; and \$308.53 on other expenses.
 - In 2015, ATULC spent \$14,648.05 on office and administrative expenses; \$35,860 on professional fees; \$10,400 on contributions, gifts, and grants; and \$234.32 on other expenses.
 - In 2016, ATULC spent \$21,117.62 on office and administrative expenses; \$29,410.38 on professional fees; \$49,500 on contributions, gifts, and grants; and \$432.14 on other expenses.
 - In 2017, ATULC spent \$22,976.58 on office and administrative expenses; \$33,885.40 on professional fees; \$9,700 on contributions, gifts, and grants; and \$449.96 on other expenses.
 - In 2018, ATULC spent \$25,514.88 on office and administrative expenses; \$42,282.92 on professional fees; \$34,900 on contributions, gifts, and grants; and \$1,579.46 on other expenses.

Please note, however, that the ATULC's definition of "contributions, gifts, and grants" is in no way coextensive with the FCPA's definition of electoral political activity. Thus, the sums set forth above as having been spent on "contributions, gifts, and grants" are much larger than

the amount of money ATULC spent on electoral political activity and should not be misunderstood as representing that sum.

- ***What were ATULC's PDC contributions supporting or opposing a candidate, ballot proposition, or political committee, including but not limited to expenditures for political committee fundraising and electioneering communications as defined by RCW 42.17A.005(22)(a)?***

ATULC, not being a political committee, and being a totally volunteer-run organization, has not had any reason to retain separate records relating to its contributions supporting or opposing candidates or ballot measures or to political committees, as opposed to the other charitable expenditures it has made and other organizations (not political committees) that it has supported (i.e., all of its other "contributions, gifts, and grants"). However, we can tell you that ATULC has not separately fundraised or engaged in electioneering communications as defined by RCW 42.17A.005(22)(a). The best accounting of ATULC's "PDC contributions," as defined above, will be found in the PDC's database, as all of those contributions would have been reported by the recipients.

- ***What were ATULC's expenditures made to or in support of employees, directors, leaders, or contractors, including lobbyists, for work related to candidate, ballot proposition, or political committee support or opposition?***

The best record of what ATULC spent on lobbyists will be found in ATULC's L-3 reports, and in the monthly L-2 reports filed by our lobbyist(s), all of which the PDC has in its possession. Without having reviewed those forms in detail, however, ATULC believes that none of that lobbying related to candidates, ballot propositions, or political committee support or opposition.

Regarding financial support of persons *other* than lobbyists, ATULC does not believe that it made any expenditures to support work related to candidates, ballot propositions, or political committee support or opposition.

- ***What were ATULC's PDC expenditures for anyone who lobbied for ATULC?***

The best record of what ATULC spent on lobbyists will be found in ATULC's L-3 reports, and in the monthly L-2 reports filed by our lobbyist(s), all of which the PDC has in its possession.

Finally, ATULC has timely submitted annual L-3 reports and, where necessary, timely filed L-3c reports, as an employer of lobbyists, reporting to the PDC all of the contributions to political committees that a lobbyist employer is required to report.

Kurt Young
March 11, 2019
Page 4 of 4

If you have any questions or concerns regarding this matter, please feel free to contact me at 206-257-6003 or via e-mail at iglitzin@workerlaw.com.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dmitri Iglitzin".

Dmitri Iglitzin
*Counsel for Amalgamated Transit Union
Legislative Council*

cc: Randal Son, ATULC



18 West Mercer Street, Suite 400
Seattle WA, 98119
TEL (800) 238.4231
FAX (206) 378.4132

DMITRI IGLITZIN
Senior Partner
DIR (206) 257.6003
iglitzin@workerlaw.com

RECEIVED

MAR 18 2019

Public Disclosure Commission

Via U.S. Mail
And via email to kurt.young@pdc.wa.gov

March 15, 2019

Kurt Young
Compliance Officer
Public Disclosure Commission
P.O. Box 40908
Olympia, WA 98504-0908

Re: Complaint from the Freedom Foundation
PDC Case No. 43940
BIL File No. 3327-002

Dear Kurt:

Per your request, I have taken a look at ATULC's own records and have determined what portion of the amount it spent on "contributions, gifts, and grants" (as previously described to you) actually went to PDC contributions, i.e., to support or oppose candidates or ballot measures.

Based on our research, we can now advise you as follows:

- In 2014, ATULC had total expenditures of \$80,507.30, of which \$18,745.00, or 23%, was spent on PDC contributions.
- In 2016, ATULC had total expenditures of \$101,443.04, of which \$35,451.10, or 35%, was spent on PDC contributions.
- In 2018, ATULC had total expenditures of \$104,227.26, of which \$31,367.00, or 30%, was spent on PDC contributions.

If you have any further questions regarding this, please let me know.

Sincerely,


Dmitri Iglitzin
Counsel for ATULC

cc: Randal Son, ATULC

workerlaw.com

April 15, 2019

Kurt Young
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504

Re: Case No. 43940

Mr. Young,

Additional information has come to my attention that is relevant to the Public Disclosure Commission's ("PDC") ongoing investigation into the alleged violations of the Fair Campaign Practices Act ("FCPA") by the Amalgamated Transit Union Legislative Council ("ATULC").

As you know, my original complaint examined ATULC's political activity from 2012 through 2017 and contended that it should have registered with the PDC as a political committee. However, reports recently made publicly available suggest ATULC continued to function as an unregistered political committee throughout calendar year 2018.

As discussed in the original complaint, ATULC is required by the Labor Management Reporting and Disclosure Act of 1959 to annually file financial disclosure forms LM-3 with the U.S. Department of Labor's Office of Labor Management Standards ("OLMS"). ATULC's form LM-3 for calendar year 2018 was recently filed with OLMS. **See Appendix pages 2-6.**

ATULC's forms LM-3 generally divide its annual expenditures into four categories: (1) Office and administrative expense¹; (2) professional fees²; (3) contributions, gifts and grants³; and (4) other.⁴ ATULC recorded paying its officers and staff for the first time on its 2018 LM-3.⁵ For the purposes of the chart below, the amount paid to ATULC's officers is included as part of "office and administrative expenses."

The LM-3 indicated ATULC had total revenue of \$82,245 and made \$104,295 in disbursements in 2018. Over the same period, C3 and C4 reports filed with the PDC by recipients of ATULC contributions indicate it made at least \$30,250 in reportable political expenditures in 2018. **See App. 7.** Thus, *at least* 29% of ATULC's disbursements and 36.8% of its revenue went towards reportable political expenditures in 2018.

¹ See Statement B, item 48 of the forms LM-3.

² See Statement B, item 49 of the forms LM-3.

³ See Statement B, item 51 of the forms LM-3.

⁴ See Statement B, item 54 of the forms LM-3.

⁵ See Statement B, item 45 of the forms LM-3.

Year	Total Receipts	Total Disbursements	Office and Administrative Expense		Professional Fees		Contributions, gifts and grants		PDC Contributions		
			Amount	% of Disbursements	Amount	% of Disbursements	Amount	% of Disbursements	PDC Contributions	% of Disbursements	% of Receipts
2012	\$55,770	\$73,447	\$4,990	6.8%	\$2,000	2.7%	\$66,457	90.5%	\$61,265	83.4%	109.9%
2013	\$81,659	\$45,619	\$7,355	16.1%	\$3,014	6.6%	\$35,250	77.3%	\$12,000	26.3%	14.7%
2014	\$89,954	\$80,506	\$11,688	14.5%	\$32,224	40.0%	\$36,594	45.5%	\$24,650	30.6%	27.4%
2015	\$85,714	\$61,378	\$15,118	24.6%	\$35,860	58.4%	\$10,400	16.9%	\$4,900	8.0%	5.7%
2016	\$85,408	\$101,442	\$21,549	21.2%	\$29,410	29.0%	\$49,500	48.8%	\$43,050	42.4%	50.4%
2017	\$92,753	\$67,153	\$23,568	35.1%	\$33,885	50.5%	\$9,700	14.4%	\$3,950	5.9%	4.3%
2018	\$82,245	\$104,295	\$27,113	26.0%	\$42,282	40.5%	\$34,900	33.5%	\$30,250	29.0%	36.8%
Total	\$573,503	\$533,840	\$111,381	20.9%	\$178,675	33.5%	\$242,801	45.5%	\$180,065	33.7%	31.4%

The amount spent by ATULC on reportable political activity in 2018 is sufficient to establish that electoral political activity continues to be one of its primary purposes, lobbying being the only other noteworthy purpose as reflected both by the union's own description of its mission and its actual expenditures.

I hope this information proves useful to your investigation. Please do not hesitate to let me know if you have any questions or if I can be of any further assistance in this matter.

Sincerely,



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

EXHIBIT F

April 16, 2020

Peter Lavalley, Executive Director
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504

Re: PDC Case No. 43940

Mr. Lavalley,

I recently received the Public Disclosure Commission's (PDC) complaint return letter¹ and report of investigation² dismissing the Freedom Foundation's December 11, 2018 complaint alleging the Amalgamated Transit Union of Washington Legislative Council (ATULC) violated the Fair Campaign Practices Act (FCPA) by failing to register and report as a political committee.

After reviewing these documents, the Freedom Foundation has concluded that the PDC's assessment of the facts in Case No. 43940 was inaccurate, its conclusions legally flawed, and its dismissal of the complaint arbitrary and capricious. The following is a non-exhaustive list of concerns and errors we have identified in the PDC's resolution of the complaint.

1. The PDC ignored ATULC's own statements about its primary purposes.

In the complaint, the Freedom Foundation documented that the ATULC describes political activity as one of its primary purposes. Specifically, the ATULC filed a Form 8871 with the Internal Revenue Service claiming status as a "political organization" under 26 USC § 527 and describing its purpose as "[promoting] legislation and candidates" favorable to ATULC. Neither ATULC nor PDC staff addressed or even acknowledged this fact.

ATULC claimed the description of its purposes on its website — three of which are explicitly political, with "lobbying" being the fourth — did not suggest that political activity was even a primary purpose of the ATULC. Incomprehensibly, the PDC apparently agreed.

2. The PDC undercounted the amount of ATULC's reportable political expenditures.

Citing PDC filings in which political candidates and committees reported receiving funds

¹ Available online at: <https://go.aws/2V6Xn3i>

² Available online at: <https://go.aws/3emnQBv>

from the ATULC, the Freedom Foundation’s complaint alleged that ATULC made \$24,650 in political expenditures in calendar year 2014, comprising 31 percent of its total annual expenditures. However, the ATULC told the PDC — without any supporting documentation — that it spent only \$18,745 on reportable expenditures, or 23 percent of its 2014 expenditures.³

PDC staff apparently accepted ATULC’s representation without question, disregarding the reports in the PDC’s own database showing the union expended substantially more on political activity than it claimed.⁴

Similarly, ATULC claimed without documentation that it spent only \$35,451, or 35 percent, of its total annual budget on reportable expenditures in calendar year 2016. The Freedom Foundation’s complaint, however, cited PDC reports filed by recipients of ATULC contributions indicating that \$43,050, or 42 percent, of the union’s total 2016 expenditures went toward reportable political activity.

3. The PDC did not explain why ATULC is not a political committee despite spending more than 20 or 30 percent of its budget on reportable political activity.

Under WAC 390-16-049, an out-of-state political committee becomes a regular political committee with full reporting obligations if, at any point during a calendar year, more than 20 percent of its aggregate expenditures are for electoral political activity in Washington. Even counting only the incomplete expenditures claimed by ATULC and accepted by the PDC, the ATULC exceeded this threshold in 2014, 2016 and 2018.

Recently proposed, but not yet adopted, revisions to PDC interpretation 07-02 would implement a guiding threshold of 30 percent of an organization’s expenditures when determining whether a primary purpose of an entity is electoral political activity.⁵ Again, even relying on the underestimates of ATULC political expenditures, the union exceeded this threshold in 2016 and 2018.

The ATULC contended, and the PDC appeared to accept, that lobbying is the primary purpose of the union, claiming a “majority” of its expenditures are for this purpose. But in 2016, for instance, ATULC admitted making \$35,451 in expenditures to candidates and political committees (the Freedom Foundation’s complaint documented at least \$43,050 in such expenditures, or 42 percent of its annual expenditures) and spent only \$25,200 lobbying.

³ ATULC’s first response to the PDC regarding the amount of its reportable political expenditures in its letter of March 11, 2019, was that, “The best accounting of ATULC’s ‘PDC contributions,’ as defined above, will be found in the PDC’s database, as all of those contributions would have been reported by the recipients.” This is precisely the method the Freedom Foundation used to document ATULC’s political expenditures in its original complaint.

⁴ After reviewing ATULC’s L3c reports referenced in the PDC’s report of investigation, the Freedom Foundation identified thousands of dollars in additional political expenditures not documented in the original complaint because they were not disclosed by the recipients. Including these transactions brings ATULC’s total annual political expenditures to \$45,550 for 2016 and \$32,150 for 2018, accounting for 45 and 31 percent of its total annual expenditures, respectively.

⁵ The Freedom Foundation believes this threshold is too high, as it explained in recent comments to the PDC.

In light of the foregoing facts, it is utterly mystifying that the PDC can recognize lobbying as a primary purpose of the ATULC but find that electoral political activity is *not* a primary purpose of the union — at least during most election years.

Since the PDC consolidated control over FCPA enforcement in 2018, the Freedom Foundation has gone to great lengths to engage with the PDC in good faith. The complaints we file are consistently substantive and well-documented, and involve the most egregious kinds of FCPA violations, such as failure to disclose substantial sums in political contributions and expenditures, improper use of public facilities for political purposes, and illegal deduction of political contributions from employees' wages. When we come across additional information relevant to a complaint we've filed, we provide it to the PDC even if it is unfavorable to our original allegations. When the PDC has erred in handling one of our complaints, we outline the problems and provide the PDC an opportunity to correct them. While we do not hesitate to pursue legal action against the PDC when necessary, this course of action is reserved as a last resort.

It is in that same spirit of good faith that we again bring our concerns to your attention and request that the commission reconsider its dismissal of this complaint. However, should the PDC fail to promptly remedy the improper resolution of Case No. 43940, we will have no choice but to take additional actions to ensure that the FCPA is consistently and appropriately enforced.

Please do not hesitate to contact me for additional information about the concerns set forth herein, or if you wish to discuss the matter further.

Respectfully,



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

Copied:

David Ammons, Chair, Public Disclosure Commission
Russell Lehman, Vice Chair, Public Disclosure Commission
William Downing, Member, Public Disclosure Commission
Fred Jarrett, Member, Public Disclosure Commission
Nancy Isserlis, Member, Public Disclosure Commission

EXHIBIT G



STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112
Toll Free 1-877-601-2828 • E-mail: pdcc@pdcc.wa.gov • Website: www.pdca.wa.gov

Maxford Nelsen
Director of Labor Policy
Freedom Foundation
PO Box 552; Olympia, WA 98507

May 1, 2020

Dear Mr. Nelsen:

This letter responds to your letter dated April 16, 2020 regarding [PDC Case No. 43940](#), in which you expressed concerns about staff's resolution of the case. As a reminder, neither the complainant nor any other person has standing to participate or intervene in any investigation or consideration of a complaint by staff. [WAC 390-37-030](#). Nevertheless, staff provides this response as a courtesy to you.

As you know, staff disposed of this matter by having ATULC complete a [Statement of Understanding \(SOU\)](#) and paying a \$150 penalty acknowledging a violation of [RCW 42.17A.630](#) for failing to timely file the Annual Report of Lobbyist Employers (L-3) for the calendar year 2016. Staff did not, however, conclude that ATULC violated [RCW 42.17A](#) by failing to register as a political committee. After reviewing the information provided in your April 16th letter, staff did not find a basis to disturb the resolution of [PDC Case No. 43940](#).

Separate from the disposition of this particular matter, staff appreciate the information you have shared about ATULC's activities and seeks to ensure all legally required information has been disclosed to the PDC.

Thank you for your letter, as well as your continued efforts to work cooperatively and professionally with the PDC.

Regards,

/s/
Sean Flynn
General Counsel

cc: Peter Lavalley, Executive Director

APPENDIX F

Hearing Date: October 23, 2020
Hearing Time: 9:00 a.m.
Judge/Calendar: The Honorable Judge John C. Skinder/
Dispositive Motion

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

FREEDOM FOUNDATION, a Washington
nonprofit organization,

Petitioner,

v.

WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION, a State of
Washington government agency, and
AMALGAMATED TRANSIT UNION
LEGISLATIVE COUNCIL OF
WASHINGTON STATE, an IRS 527
political committee,

Respondents.

NO. 20-2-01470-34

DEFENDANT WASHINGTON
STATE PUBLIC DISCLOSURE
COMMISSION'S MOTION TO
DISMISS

I. INTRODUCTION AND RELIEF REQUESTED

The Washington State Public Disclosure Commission (Commission), by and through its attorneys, ROBERT W. FERGUSON, Attorney General, and CHAD C. STANDIFER, Assistant Attorney General, moves for an order dismissing Plaintiff Freedom Foundation's Petition for Review (Petition) pursuant to the Administrative Procedure Act, RCW 34.05.510 *et seq.* (APA), for its failure to state a claim on which relief can be granted pursuant to CR 12(b)(6). The Petition asks this court to review the Commission's decision to dismiss a complaint alleging violations of the Fair Campaign Practices Act, RCW 42.17A (hereinafter the FCPA). Freedom Foundation lacks standing to obtain judicial review under the APA, as it has failed to meet its burden of showing any particularized injury.

II. STATEMENT OF FACTS

On December 11, 2018, the Commission received a complaint from Freedom Foundation concerning Amalgamated Transit Union Legislative Council (ATULC), along with supporting documentation concerning the complaint. FF v. PDC ATULC¹ 0001-252. The complaint alleged a potential violation of the FCPA by the Amalgamated Transit Union Legislative Council (ATULC) for failing to register as a political committee, and failing to file contribution and expenditure reports with the Commission. *Id.* On January 17, 2019, a response to the complaint was received by the Commission from ATULC. FF v. PDC ATULC 0253-57. On March 6, 2019, notice was sent to ATULC informing it that the PDC had opened a formal investigation concerning the complaint. FF v. PDC ATULC 0261. On April 15, 2019, supplemental information was received from Freedom Foundation regarding their complaint. FF v. PDC ATULC 0262-70.

The Commission reviewed the documents submitted and assessed the factual and legal arguments provided. On April 6, 2020, the Commission issued a Report of Investigation concerning the matter. FF v. PDC ATULC 0271-300. The Commission found the majority of ATULC activities did not involve making contributions to candidates for public office, and did not appear to involve electoral political activity at all. *Id.* The Commission concluded that the totality of the evidence did not suggest that ATULC was acting as a political committee as defined by the FCPA. *Id.* On March 31, 2020, a Statement of Understanding was agreed to by ATULC concerning its failure to timely file an annual report of lobbyist employers for the calendar year 2016, an issue not raised by Freedom Foundation that was discovered during the course of the Commission's investigation. FF v. PDC ATULC 0259-60. ATULC paid a \$150 penalty in connection with the Statement of Understanding for having violated RCW 42.17A.630. FF v. PDC ATULC 0259-60. On April 8, 2020, the Commission issued a letter dismissing the allegations raised by Freedom Foundation. FF v. PDC ATULC 0301-05.

¹ "FF v. PDC ATULC" refers to the certified agency record filed by the Commission in this case.

1 **III. STATEMENT OF ISSUE**

2 Should the Petition be dismissed because Freedom Foundation lacks standing because it
3 suffered no injury in fact?

4 **IV. STANDARD OF REVIEW**

5 A court may grant a motion to dismiss pursuant to CR 12(b)(6) if “it appears beyond
6 doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would
7 entitle the plaintiff to relief.” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147
8 (1995). For purposes of deciding the defendant's motion, all of the factual allegations in the
9 complaint are accepted as true. *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson &*
10 *Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001). The motion will be granted only if it
11 appears beyond doubt that the plaintiff cannot prove any set of facts which would justify
12 recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

13 **V. ARGUMENT**

14 **A. Background Regarding The Commission’s Discretionary Authority To Enforce the**
15 **FCPA**

16 **1. The history of the FCPA**

17 In 1972, Washington voters adopted Initiative 276, designed, in part, to give the public
18 complete access to information about who funds election campaigns. I-276 § 1. The Commission
19 was established to enforce I-276, which became the FCPA. *See* RCW 42.17A.105. The FCPA
20 encompasses laws that “seek to ferret out those whose purpose is to influence the political
21 process and subject them to the reporting and disclosure requirements of the act in the interest
22 of public information.” *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508,
23 546 P.2d 75 (1976). The FCPA is “liberally construed” to “promote complete disclosure of all
24 information respecting the financing of political campaigns.” RCW 42.17A.001. The
25 “requirements do not restrict political speech – they merely ensure that the public receives
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1 accurate information about who is doing the speaking.” *Voters Educ. Comm. v. Pub. Disclosure*
2 *Comm’n*, 161 Wn.2d 470, 498, 166 P.3d 1174 (2007).

3 **2. The Commission has the authority to dismiss complaints**

4 The Commission may investigate apparent violations of the FCPA upon receipt of a
5 complaint. RCW 42.17A.105; RCW 42.17A.755(1). If a complaint is filed with the Commission,
6 the Commission must:

- 7 (a) Dismiss the complaint or otherwise resolve the matter in accordance with
8 subsection (2) of this section, as appropriate under the circumstances after
9 conducting a preliminary review;
10 (b) Initiate an investigation to determine whether an actual violation has occurred,
11 conduct hearings, and issue and enforce an appropriate order, in accordance with
chapter 34.05 RCW and subsection (3) of this section; or
(c) Refer the matter to the attorney general, in accordance with subsection (4) of
this section.

12 RCW 42.17A.755(1). Thus, the Legislature authorized the Commission to dispose of complaints
13 in several ways. Here, the Commission initiated an investigation and later dismissed the
14 complaint, in accordance with RCW 42.17A.755(1)(a)-(b), prompting the filing of the Petition
15 by Freedom Foundation.

16 When a person files a complaint with the Commission, staff give notice to the
17 complainant of any open commission hearings on the matter, and the complainant “may” be
18 called as a witness in any enforcement hearing or investigative proceeding. WAC 390-37-030(1).
19 Neither the complainant nor any other person, however, “shall have special standing to
20 participate or intervene in the any investigation or consideration of the complaint by the
21 commission or its staff.” *Id.*

22 **B. Freedom Foundation Lacks Standing To Seek Judicial Review Under the APA**

23 A person must have standing to obtain judicial review of agency action under the APA.
24 RCW 34.05.530. A purpose of the law of standing is to determine *who* may bring a case before
25 the court to contest agency action. *See* William R. Andersen, *The 1988 Washington*
26 *Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 823-26 (1989). To have

1 standing, a “person” must be “aggrieved or adversely affected by the agency action.” *Id.*

2 A person is aggrieved or adversely affected within the meaning of this section only when the
3 following conditions are present:

- 4 (1) The agency action has prejudiced or is likely to prejudice that person;
5 (2) That person’s asserted interests are among those that the agency was required
6 to consider when it engaged in the agency action challenged; **and**
7 (3) A judgment in favor of that person would substantially eliminate or redress
8 the prejudice to that person caused or likely to be caused by the agency action.

7 RCW 34.05.530 (emphasis added). All three of these tests must be met to establish standing.

8 The first and third prongs are generally called “injury-in-fact” requirements, while the second is
9 called the “zone of interest” prong.” *Allan v. University of Wash.*, 140 Wn.2d 323, 327,
10 997 P.2d 360 (2000).

11 The person challenging the action has the burden to prove standing. *Snohomish Ct. Pub.*
12 *Trans. Benefit Area v. State*, 173 Wn. App. 504, 512, 294 P.3d 803 (2013); *Patterson v. Segale*,
13 171 Wn. App. 251, 259, 289 P.3d 657 (2012); *KS Tacoma Holdings LLC v. Shoreline Hearings*
14 *Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876 (2012). Freedom Foundation has failed to meet its
15 burden of establishing standing to challenge the Commission’s dismissal of the complaint.

16 **1. Complainants do not have standing to seek judicial review under the FCPA.**

17 The Court of Appeals recently issued a decision affirming that complainants such as
18 Freedom Foundation lack standing to seek judicial review of Commission on the basis that their
19 complaint was dismissed. Freedom Foundation sought review of the Commission’s dismissal of
20 a complaint filed in 2018 against the Bethel School District, alleging the district violated the
21 FCPA by processing payroll deductions to political committees. *Freedom Foundation v. Bethel*
22 *School District*, No. 53430-4-II, 2020 WL 4528497 (August 4, 2020). The court held that
23 Freedom Foundation lacked standing to challenge the dismissal because it was not a party to the
24 underlying administrative complaint, and “because it did not suffer specific and perceptible
25 harm.” *Freedom Foundation*, 2020 WL 4528497, at *6. For the reasons articulated by the Court
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1 of Appeals in *Freedom Foundation*, Freedom Foundation’s latest petition for judicial review in
2 this matter should likewise be dismissed.²

3 **2. Freedom Foundation was not prejudiced by any action taken by the**
4 **Commission**

5 Freedom Foundation has shown no prejudice that separates it from the interested public
6 at large. In order to satisfy the prejudice requirement, RCW 34.05.530(1), “a person must allege
7 facts demonstrating that he or she is ‘specifically and perceptibly harmed’ by the agency
8 decision.” *Patterson v. Segale*, 171 Wn. App. 251, 259, 289 P.3d 657 (2012) (quoting
9 *Trepanier v. City of Everett*, 64 Wn. App. 380, 382–83, 824 P.2d 524 (1992)). “When a person
10 alleges a threatened injury, as opposed to an existing injury, the person must demonstrate an
11 ‘immediate, concrete, and specific injury to him or herself.’ ” *Id.* If the agency action does not
12 specifically harm or injure the petitioner, the petitioner cannot establish the “prejudice”
13 requirement of standing. *See Allan*, 140 Wn.2d at 331–32 (wife of university professor lacked
14 standing to challenge the validity of the university’s rules of procedure used in disciplinary
15 proceeding because, among other things, she did not share her husband’s interest in university
16 employment); *State v. McKenzie*, 114 Wn. App. 687, 700–01, 60 P.3d 607 (2002) (“One who is
17 not adversely affected by a rule or statute does not have standing to contest its validity”);
18 *Pac. Wire Works v. Dep’t of Labor & Indus.*, 49 Wn. App. 229, 236–37, 742 P.2d 168 (1987)
19 (employer who challenged a rule that did not actually affect its employees was denied standing
20 to challenge the rule); *see also Sierra Club v. Morton*, 405 U.S. 727, 734–36, 92 S. Ct. 1361,
21 31 L. Ed. 2d 636 (1972) (environmental organization that did not allege harm to its members
22 lacked standing to challenge governmental authorization to develop a ski resort);

23 ² This court dismissed a second petition for review filed by Freedom Foundation on the basis that it lacked
24 standing. *Freedom Foundation v. Washington State Public Disclosure Commission and Service Employees*
25 *International Union Political Education & Action Fund*, No. 19-2-02843-34 (September 27, 2019). As was the case
26 in the Bethel School District matter and in the present matter, Freedom Foundation filed a complaint with the
Commission, then sought judicial review after the dismissal of that complaint. An appeal is pending in that matter
with the Court of Appeals, No. 53889-0-II. Thus, the present matter represents a third attempt in the past two years
by Freedom Foundation to seek judicial review of a Commission action where it lacks standing to do so.

1 *KS Tacoma Holdings*, 166 Wn. App. at 128-138 (no injury to landowner from environmental
2 regulation); *Newman v. Veterinary Bd. Of Governors*, 156 Wn. App. 132, 143-44, 231 P.3d 840
3 (2010) (no injury resulting from agency decision not to bring licensing action against a
4 veterinarian). Conjectural or hypothetical injuries are insufficient to confer standing. *Trepanier*
5 *v. City of Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 524 (1992). Freedom Foundation must
6 show an invasion of a legally protected interest. *Snohomish Ct. Pub. Trans. Benefit Area*,
7 173 Wn. App. at 513.

8 Neither the FCPA nor the Commission's rules confer special status to a complainant
9 based upon the simple act of filing a complaint.³ In fact, a complainant has no ability to
10 participate in any proceeding, unless requested by the Commission. WAC 390-37-030(1);
11 Freedom Foundation, 2020 WL 4528497, at *5. In summary, there is no legal authority
12 establishing that a complainant has any continuing right to participate in, challenge, or seek
13 judicial review of the Commission's handling of a complaint.

14 Freedom Foundation has suffered no injury here sufficient to establish standing. There is
15 no allegation that the conduct in question directly affected Freedom Foundation. Rather,
16 Freedom Foundation disagrees with the conclusion drawn by the Commission, and contends that
17 violations of the FCPA were committed by ATULC and that enforcement action is warranted.
18 Such an interest is no different from any other citizen who may have an interest in desiring that
19 a statute be enforced in a particular manner.

20 The United States Supreme Court has recognized, "that an agency's decision not to
21 prosecute or enforce, whether through civil or criminal process, is a decision generally
22 committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831,

23 ³ RCW 42.17A.775(1) provides that a person may bring a citizen's action in court "in the name of the
24 state" upon meeting certain prerequisites found in RCW 42.17A.775(2). Such an action is precluded if the
25 Commission has taken action on the complaint in a timely manner, as was the case here. RCW 42.17A.755(2). This
26 statutory authority confers no special status upon complainants such as Freedom Foundation as citizen actions
constitutes state action, and do not benefit the person filing suit. The APA "establishes the exclusive means of
judicial review of agency action..." except for limited circumstances that do not apply here. RCW 34.05.510.

1 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). The Court reasoned that, “. . . when an agency refuses
2 to act it generally does not exercise its *coercive* power over an individual's liberty or property
3 rights, and thus does not infringe upon areas that courts often are called upon to protect.”
4 *Heckler*, 470 U.S. at 832 (Emphasis in original).⁴ Here, the Commission found ATULC had not
5 acted as an unregistered political committee, and therefore had not violated the FCPA. It
6 exercised no coercive power over Freedom Foundation. Freedom Foundation has not been
7 harmed by the Commission’s action, and there is no basis for granting judicial review of that
8 action.

9 **3. The Commission was not required to consider Freedom Foundation’s**
10 **interests in determining whether to dismiss the complaint**

11 The second requirement for standing is whether the petitioner’s “asserted interests are
12 among those that the agency was required to consider when it engaged in the agency action
13 challenged.” RCW 34.05.530(2). This is called the “zone of interest” requirement. The test is
14 not “especially demanding.” *KS Tacoma Holdings, LLC v. Shoreline Hearings Bd.*,
15 166 Wn. App. 117, 128, 272 P.3d 876 (2012). While this test is generally not difficult to meet,
16 it was not met here.

17 The issues before the Commission were whether ATULC had violated the FCPA, and if
18 so, what action, if any, should be taken regarding such violations. The Commission is tasked
19 with reviewing potential violations of the FCPA irrespective of the particular viewpoint of a
20 complainant. The FCPA does not authorize any person or group of persons to influence the
21 Commission’s ultimate decision regarding what action it will take on a complaint.

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24 ⁴ *Chaney* interpreted the federal APA, 5 U.S.C. § 701(a)(2), which bars judicial review of agency action
25 “committed to agency discretion by law.” Here, RCW 42.17A grants to the Commission absolute discretion with
26 regard the dismissal of complaints. RCW 42.17A.755(1)(a).

1 In *Newman*, the Court of Appeals examined whether dog owners Kenneth and
2 Nonna Newman had standing⁵ to challenge a decision by the Veterinary Board of Governors to
3 decline to pursue charges against veterinarians that had treated their dog. The Court found that
4 the applicable statute, the Uniform Disciplinary Act (RCW 18.130), did not provide the
5 Newmans with the right to compel action against the veterinarians' licenses by virtue of having
6 filed a complaint, as that decision was vested with the Veterinary Board. *Newman*, 156 Wn. App.
7 at 144. Similarly here, Freedom Foundation has no right under the FCPA to compel any
8 particular action by the Commission. Such decisions rest exclusively with the Commission.
9 RCW 42.17A.755.⁶

10 Allowing complainants such as Freedom Foundation to challenge every action taken by
11 the Commission would render void the Commission's discretionary authority to enforce the
12 FCPA. Virtually any decision made by the Commission could be subject to later court scrutiny.
13 "The court must also avoid constructions that yield unlikely, absurd or strained consequences."
14 *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

15 The Commission is cognizant that certain actions it takes may be subject to judicial
16 review by those who can establish standing. For example, those subject to enforcement action
17 by the Commission have a right to seek judicial review following the issuance of a final order
18 by the Commission. *See* RCW 34.05.542(2). But there is no statutory basis to extend that right
19 to complainants. The Commission processes hundreds of citizen complaints annually. Granting
20 judicial review at the request of every dissatisfied complainant effectively eliminates the standing
21 requirement.

22 In sum, the general policy interests of complainants are not within the "zone of interests"
23 agencies such as the Commission must take into account when making decisions. Agencies such
24 as the Commission must make such decisions based on the facts and the law, even if contrary to

25 ⁵ The court in *Newman* was analyzing standing under the Newmans' constitutional writ of certiorari, as the
26 Newmans had failed to perfect any potential APA claim. *See Newman*, 156 Wn. App. at 142, 146-50.

⁶ The Attorney General may also take action upon referral by the Commission. RCW 42.17A.755.

1 a particular viewpoint. Freedom Foundation cannot establish standing under the second prong
2 of RCW 34.05.530.

3 **4. A judgment in favor of Freedom Foundation would provide no remedy**
4 **absent a showing of prejudice**

5 The third APA standing requirement is that a judgment in favor of the petitioner “would
6 substantially eliminate or redress the prejudice to that person caused or likely to be caused by
7 the agency action.” RCW 34.05.530(3). In other words, standing is denied if the harm alleged
8 would not be remedied by a favorable judgment. Together with the requirement that the agency
9 action prejudice the petitioner, this requirement constitutes the “injury-in-fact” element of
10 standing. *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*,
11 129 Wn.2d 787, 793–94, 920 P.2d 581 (1996).

12 As discussed previously, there is no prejudice to Freedom Foundation by virtue of the
13 dismissal of the complaint. Freedom Foundation is dissatisfied by the Commission’s action, but
14 such “dissatisfaction is not sufficient to establish injury-in-fact.” *Newman*, 156 Wn. App. at 144.
15 The third prong of the standing requirement is not satisfied here.

16 **5. Freedom Foundation’s mission does not itself establish standing**

17 The Commission anticipates that Freedom Foundation may argue that its mission as a
18 non-profit organization confers upon it a unique status that establishes it is prejudiced by the
19 Commission’s dismissal. Such an argument fails. An organization’s mission is not sufficient to
20 establish standing, absent a showing of particularized injury or harm to that organization.
21 Freedom Foundation, 2020 WL 4528497, at *12.

22 In *Sierra Club v. Morton*, the United States Supreme Court discussed the standing of the
23 Sierra Club to challenge the construction of a proposed ski resort and recreation area in a national
24 game refuge. In finding the Sierra Club lacked standing, the Court opined as follows:

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1 But a mere ‘interest in a problem,’ no matter how longstanding the interest and no
2 matter how qualified the organization is in evaluating the problem, is not sufficient
3 by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the
4 meaning of the APA. The Sierra Club is a large and long-established organization,
5 with a historic commitment to the cause of protecting our Nation's natural heritage
6 from man's depredations. **But if a ‘special interest’ in this subject were enough
7 to entitle the Sierra Club to commence this litigation, there would appear to
8 be no objective basis upon which to disallow a suit by any other bona fide
9 ‘special interest’ organization however small or short-lived.** And if any group
10 with a bona fide ‘special interest’ could initiate such litigation, it is difficult to
11 perceive why any individual citizen with the same bona fide special interest would
12 not also be entitled to do so.

13 *Sierra Club*, 405 U.S. at 739 (emphasis added).⁷ “[T]he ‘injury in fact’ test requires *more* than
14 an injury to a cognizable interest. It requires that the party seeking review be . . . among the
15 injured.” *Allan*, 140 Wn.2d at 328 (quoting *Sierra Club*, 405 U.S. at 734–35). Whatever interest
16 Freedom Foundation has in the outcome here, it suffered no direct injury.

17 C. ATULC Did Not Act as an Unregistered Political Committee

18 Pursuant to RCW 42.17A.755(1), the Commission properly dismissed the allegations
19 raised by Freedom Foundation against ATULC. A court “will not set aside a discretionary
20 decision of an agency absent a clear showing of abuse.” *ARCO Prods. Co. v. Washington Utils.
21 & Trans. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995) (quoting *Jensen v. Dep’t of
22 Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984)). This Court need not address the merits of
23 the dismissal because Freedom Foundation lacks standing to seek judicial review, as discussed
24 previously. *See Freedom Foundation* 2020 WL 4528497 at *1 (court did not consider Freedom
25 Foundation’s other arguments after finding it lacked standing to seek judicial review).

26 ⁷ The Court in *Sierra Club* was interpreting the federal Administrative Procedure Act (APA), 5 U.S.C. § 702, which provided:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved
by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

This federal standard is *broader* than the standard under our state’s current APA. In fact, the federal standard is
similar to language that was included in an earlier version of our state’s APA, and which was removed by the
Legislature in favor of a more limited standing requirement. *See Andersen*, 64 Wash. L. Rev. at 823.

1 Nevertheless, the Commission’s decision to dismiss the complaint filed against ATULC should
2 be affirmed, should this Court deem a review of the merits necessary.

3 Freedom Foundation argues ATULC acted as an unregistered political committee. That
4 conclusion is contrary to the evidence available to the Commission. The FCPA defines a
5 “political committee” as any individual or entity that has “the expectation of receiving
6 contributions or making expenditures in support of, or opposition to, any candidate or any
7 ballot proposition.” RCW 42.17A.005(40). Washington Courts have further established that
8 this definition sets forth two alternative methods of triggering the FCPA’s registration
9 requirement. An organization may be acting as a political committee, and need to register as
10 such with the Commission, pursuant to either: 1) the “contribution prong,” whereby it receives
11 contributions in support of, or opposition to, candidates or ballot propositions; or, 2) the
12 “expenditure prong,” whereby one of its primary purposes is to make expenditures in support or
13 opposition to candidates or ballot propositions. *See State v. Grocery Manufactures Ass’n*,
14 195 Wn.2d 442, 455-56. 461 P.3d 334 (2020) (citing *Utter v. Bldg. Industry Ass’n of Wash.*,
15 182 Wn.2d 398, 341 P.3d 953 (2015)). Determinations under the expenditure prong, known
16 as the “primary purpose” test, requires a review of numerous analytical tools to evaluate
17 whether electoral political activity was a primary means of achieving an organization’s goals
18 and mission. *See Evergreen Freedom Foundation v. Washington Ed. Ass’n.*, 111 Wn. App. 586,
19 49 P.3d 894 (2002).

20 The Commission investigated the allegations raised by Freedom Foundation, and found
21 the totality of the evidence did not suggest that ATULC was acting as a political committee.
22 Making expenditures in support of candidates or ballot propositions was not one of its primary
23 purposes. *FF v. PDC ATULC 0304*. ATULC’s time and resources were spent on providing
24 educational training for Amalgamated Transit Union (ATU) locals and their members, providing
25 a forum for information to ATU locals and their members, and in supporting state legislation
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1 through lobbying at the state level.⁸ FF v. PDC ATULC 0304. Further, while ATULC made
2 some contributions to candidates and political committees, the majority of its activities did not
3 involve such activities. FF v. PDC ATULC 0304. After an objective and careful review of the
4 evidence, the Commission concluded that ATULC did not act as political committee and
5 dismissed the complaint.⁹

6 Freedom Foundation views this matter as an avenue to challenge that conclusion, and
7 seek a sanction against ATULC, including a civil penalty of \$10,000 per violation. *See* Petition
8 at 16. No such relief is available under the APA. *See* RCW 34.05.574(1) (“In reviewing matters
9 within agency discretion, the court shall limit its function to assuring that the agency has
10 exercised its discretion in accordance with law, and shall not itself undertake to exercise the
11 discretion that the legislature has placed in the agency.”). RCW 42.17A.755(1) requires the
12 Commission to consider and take some action on a complaint, within 90 days of when that
13 complaint was filed. That was done here.¹⁰ There is, however, no authority in the FCPA requiring
14 the Commission take a *particular* action. Rather, the Commission has been granted the discretion
15 to review complaint pursuant to the FCPA, and only take enforcement action if warranted. It did
16 so appropriately here by investigating the complaint and ultimately dismissing Freedom
17 Foundation’s alleged violations as unfounded.

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22 ⁸ ATULC is registered with the Commission as a Lobbyist Employer, and files reports with the
23 Commission regarding its lobbying efforts. FF v. PDC ATULC 0304.

24 ⁹ As ATULC receives only lump sum transfers from local transit unions, and not political contributions, it
25 likewise does not qualify as political committee under the contribution prong. FF v. PDC ATULC 0303.

26 ¹⁰ Prior to dismissing the complaint, the Commission initiated an investigation within 90 days of receipt of
the complaint. RCW 42.17A.755(1)(b). This action precludes a citizen action from being filed in the name of the
state. RCW 42.17A.775(2)(a); *Freedom Foundation*, 2020 WL 4528497 at *34. Freedom Foundation, without legal
authority to do so, nevertheless seeks a penalty against ATULC in this matter. Such relief would circumvent the
citizen action process and is not available under the FCPA.

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DATED this 20th day of August, 2020.

Chad L. Standish

DEFENDANT WASHINGTON STATE
PUBLIC DISCLOSURE COMMISSION'S
MOTION TO DISMISS

PROOF OF SERVICE

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

ROBERT A. BOUVATTE, JR.
ERIC R. STAHLFELD
FREEDOM FOUNDATION
PO BOX 552
OLYMPIA, WA 98507

- ☒ U.S. mail via state Consolidated Mail Service (with proper postage affixed)
☐ courtesy copy via facsimile:
☒ Courtesy copy via electronic mail
RBouvatte@freedomfoundation.com
EStahlfeld@freedomfoundation.com
☐ ABC/Legal Messenger

DMITRI IGLITZIN
BARNARD IGLITZIN & LAVITT, LLP
18 W MERCER ST, STE 400
SEATTLE, WA 98119

- ☒ U.S. mail via state Consolidated Mail Service (with proper postage affixed)
☐ courtesy copy via facsimile:
☒ Courtesy copy via electronic mail
iglitzin@workerlaw.com
woodward@workerlaw.com
berger@workerlaw.com
☐ ABC/Legal Messenger

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

DATED this 20th day of August, 2020, at Olympia, Washington.


MARLENA MULKINS
Legal Assistant

APPENDIX G

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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THURSTON COUNTY**

9 FREEDOM FOUNDATION, a Washington
10 nonprofit organization,

11 Petitioner,

12 v.

13 WASHINGTON STATE PUBLIC
14 DISCLOSURE COMMISSION, a State of
15 Washington government agency, and
16 AMALGAMATED TRANSIT UNION
17 LEGISLATIVE COUNCIL OF
18 WASHINGTON STATE, an IRS 527
19 political committee,

20 Respondents.

NO. 20-2-01470-34

ORDER GRANTING
RESPONDENT PUBLIC
DISCLOSURE COMMISSION'S
MOTION TO DISMISS AND
DENYING MOTION FOR LEAVE
TO CONDUCT DISCOVERY

~~PROPOSED~~

JCS

21 This matter came before the Court upon Defendant Washington State Public Disclosure
22 Commission's Motion to Dismiss and Petitioner Freedom Foundation's Motion for Leave to
23 Conduct Discovery. The Court having heard the parties' oral argument, considered the pleadings
24 in the case, as well as the following:

- 25 i. Defendant Washington State Public Disclosure Commission's Motion to
26 Dismiss, dated August 20, 2020;
ii. Petitioner, Freedom Foundation's Brief in Opposition to Washington State Public
Disclosure Commission's CR 12(b)(6) Motion to Dismiss, dated October 9, 2020;

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- 1 iii. Declaration of Robert Bouvatte in Support of Freedom Foundation's Response in
2 Opposition to Washington State Public Disclosure Commission's CR 12(b)(6)
3 Motion to Dismiss, dated October 9, 2020;
4 iv. Respondent ATULC's Response Adopting Respondent PDC's Motion to
5 Dismiss, dated October 9, 2020;
6 v. Defendant Washington State Public Disclosure Commission's Reply to Response
7 to Motion to Dismiss, dated October 16, 2020;
8 vi. Freedom Foundation's Motion for Leave to Conduct Discovery, dated
9 September 23, 2020;
10 vii. Declaration of Robert Bouvatte in Support of Freedom Foundation's Motion for
11 Leave to Conduct Discovery, dated September 23, 2020;
12 viii. Defendant Washington State Public Disclosure Commission's Response to
13 Petitioner's Motion for Leave to Conduct Discovery, dated October 12, 2020;
14 ix. Respondent ATULC's Response in Opposition to Freedom Foundation's Motion
15 for Leave to Conduct Discovery, dated October 13, 2020;

16 ///

17 ///

18 ///

1 x. Freedom Foundation's Reply in Support of Motion for Leave to Conduct
2 Discovery, dated October 21, 2020;
3 and otherwise being fully advised on the matter, hereby finds the following:

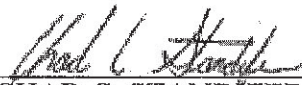
4 IT IS ORDERED, ADJUDGED, AND DECREED that the Motion to Dismiss is Granted,
5 the Court finding that the Foundation does not have standing for its APA Petition, the Motion
6 for Leave to Conduct Discovery is ~~denied~~ ^{granted} [denied as moot], and the case is dismissed with
7 prejudice as to all parties.

8 DONE IN OPEN COURT this 2nd day of November, 2020.


HONORABLE JOHN C. SKINDER
Superior Court Judge

11 Presented by:

12 ROBERT W. FERGUSON
13 Attorney General

14 
15 CHAD C. STANDIFER, WSBA # 29724
16 Assistant Attorney General
17 Attorneys for Washington State
18 Public Disclosure Commission

19 Approved as to form; Notice of presentation waived.

20 /s/ Robert A. Bouvatte, Jr.
21 ROBERT A. BOUVATTE, JR., WSBA #50220
22 Attorney for Freedom Foundation

23 /s/ Dmitri Iglitzin /s/ Benjamin Berger
24 DMITRI IGLITZIN, WSBA #17673
25 BENJAMIN BERGER, WSBA #52909
26 Attorneys for Amalgamated Transit Union
Legislative Council of Washington State

APPENDIX H

FILED
SUPREME COURT
STATE OF WASHINGTON
12/15/2020 4:19 PM
BY SUSAN L. CARLSON
CLERK

No. 99281-9

IN THE WASHINGTON STATE SUPREME COURT

FREEDOM FOUNDATION,

Petitioner/Plaintiff,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, a
State of Washington government agency, and AMALGAMATED
TRANSIT UNION LEGISLATIVE COUNCIL OF WASHINGTON
STATE, an IRS 527 political committee,

Respondents/Defendants.

PETITIONER/PLAINTIFF, FREEDOM FOUNDATION'S,
STATEMENT OF GROUNDS FOR DIRECT REVIEW

Robert A. Bouvatte, Jr., WSBA #50220
FREEDOM FOUNDATION
P.O. Box 552, Olympia, WA 98507
Phone (360) 956-3482; Fax (360) 352-1874
RBouvatte@freedomfoundation.com

Eric R. Stahlfeld, WSBA #22002
FREEDOM FOUNDATION
P.O. Box 552, Olympia, WA 98507
Phone (360) 956-3482; Fax (360) 352-1874
ESTahlfeld@freedomfoundation.com

*Attorneys for Petitioner/Plaintiff,
Freedom Foundation*

Petitioner/Plaintiff, Freedom Foundation (“Petitioner” or the “Foundation”), seeks direct review of the trial court’s dismissing the Foundation’s administrative procedure act challenge to the Public Disclosure Commission’s determination the Amalgamated Transit Union’s (ATU) Legislative Council is not a political committee. The ATU Legislative Council spends up to forty-six percent (46%) of its money in direct donations to other political committees, yet avoids public disclosure by claiming it is not a “political committee.” It purports to do so by utilizing an entity structure indistinguishable from that which resulted in the PDC assessing SEIU Council 14 a penalty of over Two Hundred and Fifty Thousand Dollars (\$250,000.00) – which, of course, was a mere fraction of the expenditures that Council 14 had unlawfully failed to disclose.

Without information of these tens of thousands of dollars in political spending, timely disclosed as the Fair Campaign Practices Act requires, the Foundation cannot reach out to ATU members at a critical time to let them know their dues are being contributed to political candidates. The Foundation cannot analyze, research, and report on ATU’s political activity. The Foundation cannot actually confirm that the ATU itself has spent any of its dues on political activity. The Foundation cannot advance individual liberty by informing public sector employees of basic facts: they do not need to belong to a union, the unions spend their dues on political activity, and identifying which candidates the unions support financially. Nevertheless, the trial court ruled the Foundation lacked standing to challenge the Washington State Public Disclosure Commission’s staff ruling. The trial

court accepted the PDC's argument that only an entity subjected to a PDC coercive order can bring an APA challenge. Combined with Division II's belief that a citizen's action is available only when the PDC completely fails to take any action whatsoever,¹ this leaves no meaningful avenue for citizens of Washington to subject the PDC's decisions to scrutiny.

Direct review is warranted pursuant to RAP 4.2(a)(3) and (a)(4) to clarify standing under the Fair Campaign Practices Act, RCW ch. 42.17A (the "FCPA"), for Administrative Procedures Act, RCW ch. 34.05 (the "APA"), review. The trial court erroneously analyzed injury in fact to the Foundation, competitive harm, and "party" status under the APA. The trial court's ruling conflicts with other decisions of the Court of Appeals, and also unduly restricts the notion of "competitive harm," contrary to decisions of the Washington State Supreme Court and the Court of Appeals – indeed, as well as decisions of the United States Supreme Court, which supplies Washington law here. In and of itself, the APA's definition of "party" is a substantially important public question.

An equally fundamental and urgent issue of public importance is whether essentially all of the Washington State Public Disclosure Commission's (the "PDC") non-enforcement decisions are insulated from *any* independent check. The Court should accept review to prevent this patently erroneous result, which is out of step with both the language and

¹ The Court of Appeals appears to believe that the 2018 FCPA amendments so fundamentally changed the principles on which the citizen's action provision was passed, that the mere action of informing the parties it will take no action is sufficient to prevent the citizen complainant from proceeding. See *Freedom Foundation v. Bethel Sch. Dist., Washington State Public Disclosure Commission*, 14 Wn. App. 2d 75, 83-85 (2020).

the policy of the Fair Campaign Practices Act since the voter's enacted it by initiative in 1972, from becoming law.

The dismissal below (*see* **Appendix A**, p. 001) presents not only important public questions, but conflicts with the published decisional law of this State, and this Court should therefore accept direct review.

I. NATURE OF CASE AND DECISION.

The matter below was a Petition for Judicial Review under the APA of the PDC's staff decision the ATU Legislative Council was not a political committee. *See generally* **Appendix B**, p. 005. The trial court, Hon. J. Skinder, granted the PDC's CR 12(b)(6) motion to dismiss, joined in by ATU Legislative Council. The PDC argued that the Foundation lacked standing under the APA to seek judicial review of the dismissal: (i) because it was not a "party" to the PDC proceedings; (ii) the Foundation did not have injury to its competitive interests as a result of the PDC's dismissal; and (iii) that the Foundation on its own did not suffer harm to its ability to advance individual liberty nor show associational standing for its officers and supporters inability to know the tens of thousands of dollars the ATU Legislative Council donates to other political committees. Appendix I, pp. 199-206.²

The Foundation timely filed its notice of appeal, on December 1, 2020, indicating an intent to seek direct review in the Washington State

² The trial court also found that the Foundation's motion for leave to conduct discovery was moot, as a result of the foregoing rulings. *See id.*

Supreme Court (*see generally* **Appendix C**, p. 080), and now timely files the instant Statement of Grounds in support of its petition.

II. ISSUES PRESENTED FOR DIRECT REVIEW.

1. Whether the trial court erred in ruling that the Foundation lacked standing to see APA review of the PDC’s dismissal, because:
 - a. it was not a “party” as defined by the APA, even where it filed the initial Complaint, provided additional information responding to the ATU Legislative Council’s denial, received notice of the decision, and was otherwise treated as a party throughout the proceedings?
 - b. it did not suffer an “injury in fact” to its competitive interests, where the ATU Legislative Council’s refusal to disclose tens of thousands of dollars in political donations to other political committees thwarted the Foundation’s core mission to advance individual liberty by letting ATU members know of the contributions to candidates they may oppose, and prevented analysis, research, and reporting on that political activity.?
 - c. the deliberate decision not to report political donations did not harm Foundation officers and staff even though denying information relevant to public policy issues, such as for whom to vote, giving the Foundation associational standing?
2. Whether the APA requires a party seeking judicial review to request leave of court prior to conducting any discovery, or only at

such time as it seeks to have “[a]dditions to the record pursuant to RCW 34.05.562...made as ordered by the court.” *See* RCW 34.05.566(6).

III. GROUNDS FOR DIRECT REVIEW.

This case should be accepted for direct review pursuant RAP 4.2(a)(3) and (4). The matters addressed herein involve fundamental and urgent issues of broad public import, and the trial court’s dismissal conflicts with the understanding of “party” status under the APA, as it has previously been understood in the appellate courts of this State. These issues require prompt and ultimate determination by this Court, in order to advance an ultimate determination of this action, as well as others presenting this fundamental issue (*see infra*, at **Section III.A**). Direct review at this juncture will serve judicial economy, because the Foundation intends to seek consolidation of this matter with at least one (1) pending matter where the Foundation has requested direct review in the Supreme Court, and likely another where the Foundation’s appeal from a similar ruling as that here remains pending in Division II (in the event that the disposition of that appeal is not favorable). Moreover, review in the Supreme Court will permit an expeditious resolution of these cases – on their merits, if the Foundation is correct, and on the procedural bar, if the Respondents are correct.

Under the Rules of Appellate Procedure 4.2(a) one basis for direct review is where “[a] case involv[es] a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” RAP 4.2(a)(4). This court has often found that standard to be met where the

dispute requires interpretation of governing statutory or other textual authorities. *See Cooper v. AlSCO, Inc.*, 186 Wn.2d 357, 361-62, 376 P.3d 382 (2016) (considering applicability of retail & service exemptions in RCW 49.46.130(3)); *McCleary v. State*, 173 Wn.2d 477, 512-13, 269 P.3d 227 (2012) (interpreting constitutional questions in the context of State’s duty to fund school system); *Washington Public Ports Association v. State, Dept. of Revenue*, 148 Wn. 2d 637, 640-42, 62 P. 3d 462 (2003) (considering scope of DOR’s authority under RCW 82.29A.050 and constitutionality of DOR rule).

Another recognized basis for accepting discretionary review is where there is an issue in the decision that touches upon a conflict in the opinions articulated by the appellate courts in this State. *See* RAP 4.2(a)(3).

A. Other Pending Matters Also Involve Standing Under the APA.

In addition to this matter, the very same arguments concerning standing have arisen in other matters below, as follows:

- In the matter of *Freedom Foundation v. Bethel School District, Washington State Public Disclosure Commission*, No. 53415-1-II (“*Bethel*”), the Court of Appeals, Div. II, affirmed the trial courts’ dismissals and held that the Foundation’s status as an administrative complainant before the PDC did not provide standing to seek judicial review of the agency’s dismissal (*see Bethel*, 14 Wn. App. 2d 75, 87-88 (2020) (**Appendix D**, pp. 095-096), and that the Foundation suffered no harm to its competitive interests as a result of the dismissal (*see id.*, at 88-89) (**App. D**, p. 096). The Court of

Appeals also held that the Foundation’s citizen’s action complaint under the FCPA was precluded as a result of the PDC’s dismissal based on the PDC’s determination of statutory meaning (*see id.*, at 84) (**App. D**, p. 094), leaving no avenue whatsoever for the Foundation to challenge this agency decision. The Foundation filed a Petition for Discretionary Review of that decision (**Appendix E**, p. 098), on September 3, 2020, arguing that the *Bethel* opinion is in conflict with the decisions of the Court of Appeals and of the Washington State Supreme Court. That petition currently remains pending; and

- In *Freedom Foundation v. Washington State Public Disclosure Commission and Service Employees International Union Political Education and Action Fund*, No. 53889-0-II (“*SEIU PEAFA*”), the Foundation filed in the trial court a Petition for Judicial Review (*see generally* **Appendix F**, p. 162) , and subsequently appealed a similar ruling of dismissal by the trial court, Hon. J. Skinder. The trial court granted the PDC’s motion to dismiss for lack of standing on September 27, 2019, and the Foundation timely appealed that order on October 1, 2019. **Appendix G**, p. 184. At this point, the matter is fully briefed, and the Court of Appeals has indicated its intention to decide the appeal without oral argument, on or around January 5, 2021.³ **Appendix H**, p. 193.

³ The Foundation has also challenged an adverse ruling precluding a citizen’s action in this matter, in which the PDC failed to sanction an “actual” but “minor” FCPA violation.

B. Whether Citizens Can Seek Judicial Review of PDC Decisions is a Question of Great Public Interest.

In dismissing the APA Petition, the trial court appears to have agreed with the PDC’s argument that the PDC “exercised no coercive power over Freedom Foundation,” and so it was not a “party” within the meaning of the APA. *See* Motion to Dismiss, at p. 7 (**Appendix I**, p. 202); *see also* RCW 34.05.010(12) (**Appendix J**, p. 213). In light of the abbreviated proceedings transpiring before the PDC, that understanding of what constitutes a “party” to an “agency proceeding” within the meaning of RCW 34.05.010 (12)(a) seems erroneously to conflate that concept with that of an “adjudicative proceeding,” which is separately defined in Subsection (1) of the APA’s definitions.⁴ But the definition of “party” in Subsection (12) uses the notably broader phrasing of “agency proceeding,” and therefore must be interpreted to import a different meaning than “adjudicative proceeding.” *See Seeber v. Washington State Public Disclosure Commission*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981);⁵ *see also* RCW 34.05.010(12).⁶

1. The Order of Dismissal Was an “Agency Action” “Specifically Directed” to the Foundation.

The PDC unquestionably issued an order, which represented the “agency action” at issue here. *See* RCW 34.05.010(11)(a) (“‘Order,’

⁴ “‘Adjudicative proceeding’ means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.” RCW 34.05.010(1).

⁵ “It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent.”

⁶ “Party to agency proceedings,” or “party” in a context so indicating, means: (a) A person to whom the agency action is specifically directed; or (b) A person named as a party to the agency proceeding or allowed to intervene or participate in the agency proceeding.”

without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.”). It is obvious that the PDC’s dismissal here qualifies. That definition does not require a directive to the Foundation for it to do anything; it only requires that someone’s legal rights or obligations be determined or impacted.

Here, the PDC staff determined the ATU Legislative Council was not a political committee, and did not need to report tens of thousands of dollars in political donations.

2. *The Foundation Was Permitted to Participate “As a Party” in the Agency “Proceedings.”*

Separately and independently, it is clear that the Foundation participated “as a party” in the “agency proceedings” that resulted from the filing of its PDC complaint, as necessary to satisfy RCW 34.05.010 (12)(b). Decisional law going back over twenty (20) years has established that nothing more is required for “party” status than an entity being treated as a party would otherwise be treated in more formal “proceedings” – having its submissions accepted, considered by the agency and responded to by the other party, receiving notice of documents and of a decision, and being apprised of the basis of that decision – *i.e.*, receiving the basic indicia of due process. *See Technical Employees Ass’n. v. Publ. Empl. Rel. Comm’n*, 105 Wn. App. 434, 439-40, 20 P.3d 472 (2001); *see also Yanisch v. Western Wash. Growth Mgmt. Hearings Bd.*, 120 Wn. App. 1033, at *2 (Mar. 2, 2004) (unpublished) (“party of record” status coextensive with “party to

agency proceedings” and requirement for service of documents, *citing Technical Employees Ass’n.*, 105 Wn. App. at 438).⁷ The looseness of these requirements was specifically to allow for the informal “proceedings” that transpired here, and to make sure that participants in such proceedings receive due process. *See Den Beste v. State, Pollution Cont. Hrgs. Bd.*, 81 Wn. App. 330, 339-40, 914 P.2d 144 (1996).⁸

Accordingly, the Court should accept direct review in order to vindicate the Legislature’s obvious intent to cast “party” status broadly, and to prevent the PDC from staking out a position here that would allow it to entirely insulate from judicial review its future decisions of this sort. Not only does the trial court’s dismissal implicate the important public questions of when APA review is available and by whom (for purposes of RAP 4.2(a)(4)), it conflicts with the Court of Appeals’ decisions in *Den Beste* and *Technical Employees Association*, so discretionary review is independently warranted under RAP 4.2(a)(3).

C. The Opinion Conflicts with Numerous Published Decisions in Failing to Recognize the Foundation’s Competitive Harm.

With respect to the “injury-in-fact” requirement, the trial court appears to have also accepted the argument that “Freedom Foundation has

⁷ Pursuant to GR 14.1, *Yanisch* is only cited for its persuasive value; the Foundation does not submit that the opinion presents any conflict with the trial court’s dismissal, for purposes of accepting direct review under RAP 4.2(a)(3).

⁸ “Further, as stated by applicants, because the Department is prohibited...from conducting adjudicative proceedings on water rights applications, it is not possible for anyone, except perhaps an applicant, to become a ‘party’ to these proceedings in the traditional sense. Finally, as the PCHB noted, the APA defines a party to include persons allowed to ‘participate as a party in the agency proceeding.’[...] We agree with the PCHB that, given its degree of participation, the Yakima Indian Nation was entitled to timely notice of the Department’s decision.” (emphasis added).

suffered no injury here sufficient to establish standing. There is no allegation that the conduct in question directly affected Freedom Foundation.” See Motion to Dismiss, at p. 7 (**Appendix I**, p. 202). This was incorrect, as a matter of precedent and as applied to the specific Foundation mission which the ATU Legislative Council seeks to thwart.

First, it is black letter law that the prejudice sufficient for an “injury-in-fact” need not be economic in nature. See *Association of Data Processing Svc. Orgs. v. Camp*, 397 U.S. 150, 154 (1970); *U.S. v. Students Challenging Regulatory Agency Procedures* (“*SCRAP*”), 412 U.S. 669, 687 (1973). Financial competition, while sufficient, is not required; the Foundation and entities that violate the FCPA need only (and undoubtedly do) have that “...concrete adverseness which sharpens the presentation of issues.” See *Baker v. Carr*, 369 U.S. 186, 204 (1962) see also *Seattle Bldg. & Const. Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 793, n.1, 920 P.2d 581 (1996); see also RCW 34.05.001.

Second, harm is felt from the ability gained by FCPA violators to cite the PDC’s decision under review here, to courts, the agency, or to the Foundation itself, in the context of future actions. The accumulation of such decisions allows unions and their affiliated entities to entirely circumvent accountability for their expenditures in Washington state politics, which is uniquely prejudicial to the Foundation’s ability to carry out its daily activities. The “perceptible harm” to the Foundation’s efforts that result from being unable to communicate with public employees concerning ATULC’s political expenditures affects it every day in all of its outreach

and lobbying efforts. Indeed, the Court of Appeals has recognized such harm as sufficient. *See Snohomish Cty.*, 173 Wn. App. at 514.⁹

Third, the Opinion is in direct conflict with the Court's decisions in *Seattle Bldg. & Const. Trades Council*, 129 Wn.2d 787, 920 P.2d 581 (1996) and *St. Joseph Hospital and Healthcare Center v. Department of Health*, 125 Wn.2d 733, 887 P.2d 891 (1995). Both of these published opinions recognized that competitive harm exists even where a competitive injury is not "direct." *See Seattle Bldg. & Const. Trades Council*, 129 Wn.2d at 795; *St. Joseph Hospital & Healthcare Center*, 125 Wn.2d at 742. The issues bound up with the trial court's dismissal have great public importance, as they affect the scope of individuals and/or entities who may seek APA review of agency decisions, and the fact that the Court of Appeals held in *Bethel* that the Foundation lacks standing only heightens the need for this Court's consideration of the weighty issues identified in this Petition. *See State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005).

D. The Trial Court Should Have Granted the Motion for Leave to Conduct Discovery, Notwithstanding its Dismissal for Lack of Standing.

Another substantially important public question is presented by the prevailing interpretation of RCW 34.05.566 in this state, which was an issue in connection with the Foundation's seeking leave to conduct discovery

⁹ Because the Foundation itself, as well as its supporters and employees, suffered a cognizable injury-in-fact, and because redressing that injury is germane to the Foundation's purpose as an organization, it also had associational standing for the APA Petition below. *See International Association of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn. 2d 207, 213-14, 45 P.3d 186 (2002).

below.¹⁰ To address that issue of statutory interpretation, the plain language of RCW 34.05.566 places no prerequisite on the service of discovery in proceedings pursuant to a petition for judicial review. That Section provides only that “[a]dditions to the record pursuant to RCW 34.05.562 must be made as ordered by the court” (*see* RCW 34.05.566(6)), and clearly does not address the timing of discovery; it embodies only the unremarkable notion that any additions to the record that may be made pursuant to RCW 34.05.558 must first be approved by the Court.

As such, the Court of Appeals seems to have made a great leap of logic, at the very least, in deciding that “...a party seeking discovery must first ask the court’s permission.” *See Wash. Independent Telephone Assoc. v. Wash. Utils. & Transp. Commission (“WITA”)*, 110 Wn. App. 498, 518 (2002). Nowhere does Chapter 34 require that, and so there is no conflict with the default rule that discovery should proceed without the Court’s intervention and that discovery may be served without first seeking leave of court. *See* CR 26(b)(1) and CR 36, LCR 26(f); *see also* RCW 34.05.510(3). For the Court of Appeals to require this extra step in the *WITA* case was erroneous, and *WITA* offered no reasoning in support of its conclusion – this

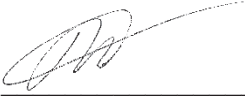
¹⁰ The trial court denied the motion for leave to conduct discovery as moot only as a result of its finding that the Foundation lacked standing. *See Appendix A*, p. 004. Judge Skinder heard substantial argument concerning the issue, however, and should have issued a ruling on a question of such obvious importance as whether discovery in the context of an APA Petition proceeds under the normal Superior Court Rules, or whether a party must seek leave of court before conducting any discovery in such proceedings. *See Washington Natural Gas Co. v. Public Utility District No. 1 of Snohomish County*, 77 Wn. 2d 94, 459 P.2d 633 (1969); *Watson*, 155 Wn.2d at 578. The issue had been framed by the parties’ submissions, and had been properly noted for hearing prior to the time scheduled for hearing upon the Respondents’ motions to dismiss, but the trial court postponed hearing on the motion for leave until it could be heard simultaneously with the Respondents’ motions.

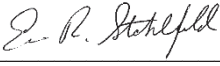
Court should not carry forward the error in reading into RCW 34.05.566 an obligation that does not appear there. Instead, the Court should give effect to the plain language of the statute (*see Green River Community College Dist. No. 10 v. Higher Education Personnel Board*, 95 Wn.2d 108, 113, 622 P.2d 826 (1980)), and hold that it only requires the Court's permission to actually effectuate a supplementation of the agency record on appeal, which is the entire context of RCW 34.05.562 and RCW 34.05.566.

IV. CONCLUSION.

To allow the decisions below to stand will mark a dark new era in the campaign finance law of Washington State, one which the residents who enacted the Citizen's Action by way of ballot initiative, in 1972, could scarcely have imagined. Collectively speaking, the decisions below will allow the PDC *carte blanche* to 'look the other way' and decline to enforce the law against favored entities, according such decisions the last word with respect to complaints under the FCPA and even foreclosing any avenue for judicial review. A citizen believing that the PDC has ignored a violation of law will have nowhere to turn for a remedy vindicating the rights that the FCPA purports to create. This perverse result should not be countenanced. The Foundation respectfully submits that the Court should instead correct the errors below, by accepting direct review, vacating the orders of the trial courts, remanding to the trial courts for further proceedings pursuant to the Court's disposition, and awarding costs on appeal to the Foundation.

RESPECTFULLY SUBMITTED, this 16th day of December, 2020.

By: 
Robert A. Bouvate, Jr.
WSBA #50220

By: 
Eric R. Stahlfeld
WSBA #22002

APPENDIX I

RCW 34.05.010

Definitions. (*Effective until January 1, 2020.*)

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.

(3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

Agency action does not include an agency decision regarding (a) contracting or procurement of goods, services, public works, and the purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions, or (b) determinations as to the sufficiency of a showing of interest filed in support of a representation petition, or mediation or conciliation of labor disputes or arbitration of labor disputes under a collective bargaining law or similar statute, or (c) any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests, or (d) the granting of a license, franchise, or permission for the use of trademarks, symbols, and similar property owned or controlled by the agency.

(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head.

(5) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(6) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(7) "Institutions of higher education" are the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, The Evergreen State College, the various community colleges, and the governing boards of each of the above, and the various colleges, divisions, departments, or offices authorized by the governing board of the institution involved to act for the institution, all of which are sometimes referred to in this chapter as "institutions."

(8) "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

(9)(a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required

solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

(b) "Licensing" includes the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.

(10) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution, as provided in RCW **34.05.260**. "Electronic distribution" or "electronically" means distribution by electronic mail or facsimile mail.

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

(b) "Order of adoption" means the official written statement by which an agency adopts, amends, or repeals a rule.

(12) "Party to agency proceedings," or "party" in a context so indicating, means:

(a) A person to whom the agency action is specifically directed; or

(b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

(13) "Party to judicial review or civil enforcement proceedings," or "party" in a context so indicating, means:

(a) A person who files a petition for a judicial review or civil enforcement proceeding; or

(b) A person named as a party in a judicial review or civil enforcement proceeding, or allowed to participate as a party in a judicial review or civil enforcement proceeding.

(14) "Person" means any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(15) "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

(16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW **34.05.240**, (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit,

graduation and the granting of degrees, employment relationships, or fiscal processes, or (v) the determination and publication of updated nexus thresholds by the department of revenue in accordance with RCW **82.04.067**.

(17) "Rules review committee" or "committee" means the joint administrative rules review committee created pursuant to RCW **34.05.610** for the purpose of selectively reviewing existing and proposed rules of state agencies.

(18) "Rule making" means the process for formulation and adoption of a rule.

(19) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

[2014 c 97 § 101; 2013 c 110 § 3; 2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5. Prior: 1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1. Formerly RCW 34.04.010.]

NOTES:

Effective dates—1992 c 44: See RCW **42.41.901**.

Effective dates—1989 c 175: "Sections 1 through 35 and 37 through 185 of this act are necessary for the immediate preservation of the public peace, health, or safety, or the support of the state government and its existing public institutions, and shall take effect on July 1, 1989. Section 36 of this act shall take effect on July 1, 1990." [**1989 c 175 § 186**.]

Severability—1982 c 10: See note following RCW **6.13.080**.

Legislative affirmation—1981 c 324: "The legislature affirms that all rule-making authority of state agencies and institutions of higher education is a function delegated by the legislature, and as such, shall be exercised pursuant to the conditions and restrictions contained in this act." [**1981 c 324 § 1**.]

Severability—1981 c 324: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1981 c 324 § 18**.]

RCW 34.05.010

Definitions. (*Effective January 1, 2020.*)

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except

as limited by RCW **66.08.150**, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter **42.41** RCW.

(3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

Agency action does not include an agency decision regarding (a) contracting or procurement of goods, services, public works, and the purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions, or (b) determinations as to the sufficiency of a showing of interest filed in support of a representation petition, or mediation or conciliation of labor disputes or arbitration of labor disputes under a collective bargaining law or similar statute, or (c) any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests, or (d) the granting of a license, franchise, or permission for the use of trademarks, symbols, and similar property owned or controlled by the agency.

(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head.

(5) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(6) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(7) "Institutions of higher education" are the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, The Evergreen State College, the various community colleges, and the governing boards of each of the above, and the various colleges, divisions, departments, or offices authorized by the governing board of the institution involved to act for the institution, all of which are sometimes referred to in this chapter as "institutions."

(8) "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

(9)(a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

(b) "Licensing" includes the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.

(10) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution, as provided in RCW **34.05.260**. "Electronic distribution" or "electronically" means distribution by email or fax.

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

(b) "Order of adoption" means the official written statement by which an agency adopts, amends, or repeals a rule.

(12) "Party to agency proceedings," or "party" in a context so indicating, means:

(a) A person to whom the agency action is specifically directed; or

(b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

(13) "Party to judicial review or civil enforcement proceedings," or "party" in a context so indicating, means:

(a) A person who files a petition for a judicial review or civil enforcement proceeding; or

(b) A person named as a party in a judicial review or civil enforcement proceeding, or allowed to participate as a party in a judicial review or civil enforcement proceeding.

(14) "Person" means any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(15) "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

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(17) "Rules review committee" or "committee" means the joint administrative rules review committee created pursuant to RCW 34.05.610 for the purpose of selectively reviewing existing and proposed rules of state agencies.

(18) "Rule making" means the process for formulation and adoption of a rule.

(19) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

[2019 c 8 § 701; 2014 c 97 § 101; 2013 c 110 § 3; 2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5. Prior: 1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1. Formerly RCW 34.04.010.]

NOTES:

Effective date—2019 c 8 §§ 102,103, 107, and 701-703: See note following RCW 82.04.067.

Existing rights and liability—Retroactive application—2019 c 8: See notes following RCW 82.02.250.

Effective dates—1992 c 44: See RCW 42.41.901.

Effective dates—1989 c 175: "Sections 1 through 35 and 37 through 185 of this act are necessary for the immediate preservation of the public peace, health, or safety, or the support of the state government and its existing public institutions, and shall take effect on July 1, 1989. Section 36 of this act shall take effect on July 1, 1990." [1989 c 175 § 186.]

Severability—1982 c 10: See note following RCW 6.13.080.

Legislative affirmation—1981 c 324: "The legislature affirms that all rule-making authority of state agencies and institutions of higher education is a function delegated by the legislature, and as such, shall be exercised pursuant to the conditions and restrictions contained in this act." [1981 c 324 § 1.]

Severability—1981 c 324: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 324 § 18.]


CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on March 11, 2021, I delivered a copy of the foregoing Petition for Discretionary Review, by email pursuant to agreement to:

Dmitri Iglitzin
Benjamin Berger
Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
P: (206) 257-6003
iglitzin@workerlaw.com
berger@workerlaw.com
Attorneys for ATULC

Chad C. Standifer
John Meader
Assistant Attorneys General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504
ChadS@atg.wa.gov
JohnM@atg.wa.gov
Attorneys for Washington PDC

Dated this 11th day of March, 2021, at Olympia, Washington.

By: 
Jennifer Matheson

FREEDOM FOUNDATION

March 11, 2021 - 11:44 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53889-0
Appellate Court Case Title: Freedom Foundation, Appellant v Public Disclosure Commission, et al Respondents
Superior Court Case Number: 19-2-02843-0

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- marlena.mulkins@ATG.WA.GOV
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Phone: (360) 956-3482

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FREEDOM FOUNDATION

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Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53889-0
Appellate Court Case Title: Freedom Foundation, Appellant v Public Disclosure Commission, et al Respondents
Superior Court Case Number: 19-2-02843-0

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Comments:

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