

Minding Your Ps & Qs with the PDC: Complying with Rules Governing Election Activities of Public Agencies when Running a Ballot Measure

Introduction. When running a ballot measure, local governments must abide by Public Disclosure Commission (“PDC”)¹ statutes and regulations regarding communications relating to the proposed ballot measure and the use of public resources and facilities to support or oppose the measure. These authorities expressly prohibit elected officials and staff from using government facilities to promote or oppose ballot propositions, though individuals remain free to do so on their own time, in their individual capacity, and without using public facilities. Exceptions to this general prohibition apply to certain types of statements by public officials and to activities undertaken as part of a local government’s normal and regular course of conduct. Most significantly, local governments may, under circumstances further described below, use government resources to convey objective, factual, and neutrally-worded information regarding the anticipated impacts of a ballot proposition. By contrast, promotional statements or activities, advocacy, or coordination with outside campaigns are prohibited. This paper summarizes relevant laws and administrative rules that govern the election activities of public agencies in Washington.

General Rule. As a general rule, Washington law prohibits public officials and employees—including members of a legislative body and staff—from using or authorizing the use of government facilities to promote or oppose ballot propositions. RCW 42.17A.555. “Government facilities,” for these purposes are defined broadly, and include “stationery, postage, machines, and equipment . . . employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency.” *Id.* As a general rule of thumb, anything paid for with public funds (e.g. paper, copiers, computers, facilities, vehicles) or operated by the public agency (e.g. social media pages or email accounts) may constitute a government facility for purposes of this prohibition.

While broad, this prohibition does not, by its terms, “restrict the right of any individual to express their own personal views concerning, supporting, or opposing any . . . ballot proposition, if such expression does not involve a use of the facilities of a public office or agency” such as staff time, public equipment, or government vehicles. WAC 390-05-271(1); PDC Interpretation No. 04-02.² Individuals engaged in such activity should, however, clarify that they are acting or speaking on their own behalf, unless, as discussed below, the legislative authority has adopted a resolution in favor of the proposition, in which case an elected official may speak on behalf of the entity.

Exceptions to the General Rule. As with any general rule, there are many exceptions. Certain types of statements and conduct by local governments fall within an exception to the general prohibition on use

¹ The PDC has responsibility for enforcing the state’s law and regulations prohibiting the use of government facilities in election campaigns.

² PDC Interpretation No. 04-02 (“Guidelines for Local Government Agencies in Election Campaigns”) includes a chart with further guidance regarding specified election activities, including guidance relating to use of surveys and research, uniforms and related equipment, agency calendars, and technology. It is available at <https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/guidelines-local-government-agencies-election-campaigns>.

Similar guidelines, specific to school districts, are available in PDC Interpretation No. 01-03 (Guidelines for School Districts in Election Campaigns”), at <https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/guidelines-school-districts-election-campaigns>.

of government facilities to support or oppose ballot propositions and are therefore permissible. The determination of whether conduct is problematic is highly dependent on the facts and circumstances. We encourage all election-related conduct to be reviewed with a careful eye before engaging in the activity or providing the information to the public.

Action on the Measure at a Public Meeting. Members of an elected board may “express a collective decision, or . . . actually vote upon a motion, proposal, resolution, order, or ordinance, or . . . support or oppose a ballot proposition” as long as such action occurs (1) at an open public meeting, the notice for which includes the title and number of the ballot proposition, and (2) members of the board and/or public “are afforded an approximately equal opportunity for the expression of an opposing view.” RCW 42.17A.555(1).³ Second, board or council members may express support for or opposition to a ballot proposition at open press conferences or in response to specific inquiries. RCW 42.17A.555(2).

Normal and Regular Conduct. Certain activities constituting “part of the normal and regular conduct of the office or agency” are also exempt from the general prohibition on use of government facilities to support or oppose a ballot proposition. RCW 42.17A.555(3). First, as part of its normal and regular conduct, a local government may make government facilities available on a nondiscriminatory, equal access basis for political uses by community groups or campaign committees. WAC 390-05-271(2)(a); PDC Interpretation No. 04-02. For this exception to apply, the entity must make the facilities available as a “neutral forum,” open to all groups on the same terms. PDC Interpretation No. 04-02. The entity may not allow for the selective use of such facilities, nor affirmatively endorse the activities hosted therein, in a manner that the public may view as promoting or opposing a ballot measure.

Second, as part of its normal and regular conduct, the local government may make an “objective and fair” presentation of the facts relating to a ballot measure. WAC 390-05-271(2)(b). “Normal and regular conduct,” in this context, refers to conduct that is “(1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner.” WAC 390-05-273. Applying these standards, the PDC has recognized that local government agencies have a responsibility to inform the public of their operational and maintenance needs. PDC Interpretation No. 04-02. Accordingly, the PDC has advised that public entities may prepare and distribute materials regarding a ballot measure (including through website postings), provided that such materials (i) recite fair and objective facts, (ii) include an accurate presentation of the costs and other anticipated impacts of the measure, and (iii) use language that is neutral in tenor and tone. *Id.* Such materials must avoid, among other things, inflammatory or emotionally-driven language, speculation about potential secondary or tertiary impacts from the ballot proposition, and statements minimizing the ballot proposition’s costs. PDC Guidance on Election-Related Communications by Local Government Agencies, dated January 12, 2015.⁴ In short, such materials should be informational as opposed to promotional, and marketing or sales efforts should be avoided.

In terms of content, publications may inform staff and others of community meetings relating to ballot measures, if (1) the local government normally publishes such information in a newsletter or community calendar, and (2) those supporting and opposing the measure both have the opportunity to appear. In terms of format and timing, the PDC has historically found that one jurisdiction-wide objective and fair presentation of the facts (such as a mailing or other publication, such as through regularly scheduled newsletters, a website, bilingual documents, or other format) per ballot measure is appropriate. In all

³ The legislative authority may *not* explicitly include the passage of a ballot measure among the district’s annual goals. PDC Interpretation No. 04-02.

⁴ Available at <https://www.pdc.wa.gov/sites/default/files/2021-09/Fact.Sheets.pdf>. This guidance contains additional detailed instruction on the content that PDC considers permissible and impermissible in government agencies’ election-related communications.

cases, the activity of making such mailing or distribution must have already been normal and regular conduct for the agency.

Facts and Circumstances. PDC statutes and regulations do not address the full range of election activities in which public officials or staff might seek to participate. The PDC has, however, drawn upon these rules and regulations to furnish fact-specific guidance pertaining to such activities. The PDC has acknowledged that “hard and fast rules . . . applicable to all situations . . . are difficult to establish” in this area. PDC Interpretation No. 04-02. Ultimately, the PDC closely considers such factors such as “the normal and regular conduct” of the agency “and the timing, tone, and tenor of activities in relation to ballot measure elections.” *Id.*

Notwithstanding the fact-dependent nature of these analyses, it is incumbent upon agency staff to review closely and comprehend the laws and regulations governing their use of facilities in election activities. Please let us know if we can offer any further assistance in this regard.

If you have any questions regarding ballot propositions or election requirements, please contact any of our public finance attorneys.

Deanna Gregory	Deanna.Gregory@pacificalawgroup.com	206.245.1716
Faith Li Pettis	Faith.Pettis@pacificalawgroup.com	206.245.1700
Jon Jurich	Jon.Jurich@pacificalawgroup.com	206.245.1717
Stacey Lewis	Stacey.Lewis@pacificalawgroup.com	206.245.1714
Toby Tobler	Tobias.Tobler@pacificalawgroup.com	206.602.1215
Katherine Van Gunst	Katherine.VanGunst@pacificalawgroup.com	206.602.1213

A Note: This publication is for informational purposes and does not provide legal advice. It is not intended to be used or relied upon as legal advice in connection with any particular situation or facts.

Copyright © 2023 Pacifica Law Group LLP. All rights reserved.

Last updated: January 20, 2023.