

CONNELLY LAW OFFICES, PLLC



John R. Connelly, Jr.
Lincoln C. Beauregard
Micah R. LeBank
Nathan P. Roberts
Julie A. Kays
Amanda M. Searle
Evan T. Fuller
Meaghan M. Driscoll
Marta L. O'Brien
Samuel J. Daheim
Jackson R. Pahlke
Matthew J. Wurdeman

Reply to Tacoma Office:
2301 North 30th Street
Tacoma, WA 98403

Seattle Office:
Smith Tower
506 2nd Ave, 33rd Floor
Seattle, WA 98104

Toll Free: (855) 593-5100
Tacoma: (253) 593-5100
Seattle: (206) 816-3002
Fax: (253) 593-0380
www.connelly-law.com

October 6, 2018

Via Email Attachment

Wayne Barnett
Executive Director of the Seattle Ethics & Elections Commission
Seattle Municipal Tower
700 5th Ave, Suite 4010
Seattle, WA

RE: Ethics Complaint — Misuse of Public Resources for Personal Gain

Dear Mr. Barnett:

Pursuant to Seattle Municipal Code 4.16.090, as a taxpaying citizen of the City of Seattle, I am writing to lodge a formal complaint and request for investigation against Mayor Jenny Durkan and the entire City Council for violating the local and state ethics laws.

Specifically, the elected officials at issue violated the laws by (1) using the resources of the Seattle City Attorney's Office in order to protect what they self-describe as "personal" and "political" interests, and (2) engaging the enclosed \$145,000 contract to retain private legal counsel for that same purpose. The facts are summarized by the Seattle Times:

Disputes rage on in lawsuit claiming Seattle City Council broke law on head-tax repeal

Originally published October 5, 2018 at 6:00 am Updated October 5, 2018 at 4:29 pm

A judge will consider next week whether polling data and other communications by city officials related to Seattle's ill-fated head tax should be kept under wraps or publicly disclosed in a civil suit accusing council members of breaking a state law aimed at ensuring their decisions on city business are made openly.

Lawyers for James Egan, one of two men now suing the city for allegedly violating the Open Public Meetings Act (OPMA) in the lead-up to the City Council's sudden

repeal of the controversial tax, argue in pleadings filed this week that the city is improperly withholding polling data and other records despite a court order to turn over relevant records by Sept. 28.

“(T)he City’s elected leaders are knowingly continuing a pattern of discovery evasiveness,” lawyers Lincoln Beauregard and Julie Kays contend in a motion asking the court to hold the city in contempt.

City Attorney Pete Holmes and David Bruce, a \$395-an-hour private lawyer whose firm was hired this week to assist in the city’s defense, counter in their own motion the records in question reflect city officials’ “personal political activity and other private matters” — not city business — so aren’t subject to disclosure.

The city wants the court to grant an order protecting the records and asks that a special master be appointed to manage further discovery disputes, “in an effort to ensure that Seattle’s scarce public resources may be devoted to actual civic problems of the day — like homelessness — rather than expansive litigation over a technical application of the OPMA.”

Egan also seeks to force EMC Research to comply with a subpoena for its head-tax polling data. An attorney for EMC has objected, calling Egan’s subpoena “oppressive, harassing, overbroad (and) unduly burdensome.”

King County Superior Court Judge Timothy Bradshaw could rule on all motions by next Thursday.

At the center of the latest scrum over records is EMC’s polling data generated for Bring Seattle Home, a political campaign formed to oppose the big business-backed No Tax on Jobs referendum that sought to overturn the head tax.

Previously disclosed city text messages show SEIU Local 775 President David Rolf, whose union bankrolled Bring Seattle Home, briefed several council members and Mayor Jenny Durkan’s top deputies about EMC’s unfavorable polling on the tax the weekend before the council repealed it.

Through a series of phone calls and texts, Durkan’s deputies then privately lined up a majority of council members for a repeal effort, records show. The mayor and seven of the council’s nine members later issued a joint statement justifying consideration of a reversal on the so-called Employee Hours Tax, which had been approved unanimously less than a month earlier. The council ultimately voted 7-2 in a public meeting to repeal the \$275-per-employee tax on large businesses that aimed to raise an estimated \$47 million annually for housing and homeless services.

Egan and open government activist Arthur West separately later sued, arguing the behind-the-scenes dealings predetermined the public vote, breaking the meetings law that prohibits a government body’s quorum from making decisions in private.

The city denies it broke the law, calling the pre-vote maneuverings in court papers “the normal everyday stuff of legislating.”

Disclosure of records has become a sore point, with Egan’s lawyers previously accusing the city of deliberately withholding “smoking gun” documents in hopes of settling the case before having to disclose them. After an initial Aug. 8 discovery deadline, Holmes’ office parceled out more than 34,000 documents amid protests of foot-dragging by Egan’s lawyers. Bradshaw last month ordered the city to disclose all records “as soon as possible,” and no later than last Friday.

The city met the deadline 42 minutes before close of business on Friday by disclosing another 1,103 documents. But city attorneys noted in court papers they weren’t turning over any “campaign/ballot measure-related documents” contained on city officials’ private devices or servers, arguing those records are private and not relevant.

Egan’s pleadings cite texts sent shortly after the polling briefing in which Councilmember M. Lorena González and an aide discussed a plan by Durkan’s deputies for “triangulating” the polling results among council members with the goal to “have unity on a repeal.”

“The related polling data played an integral role in the decision to repeal the head tax,” Egan’s lawyers argue.

Holmes and Bruce counter that city officials’ “private political activity” is outside of city control and didn’t become official business until “sometime over the weekend of June 9-10.”

Before that, records reflecting their discussions on personal devices and servers “are not — and cannot be — relevant or reasonably calculated to lead to the discovery of admissible evidence in this matter,” they contend.

Bruce and his law firm — contributors to Holmes’ re-election campaign last year — will be paid up to \$145,000 for helping with the case, according to a city contract. It’s the 21st time Holmes has hired the firm since he took office in 2010. Holmes last year denied any quid-pro-quo when hiring outside lawyers, saying he does so as needed based on track record and expertise.

Lewis Kamb: 206-464-2932 or lkamb@seattletimes.com; on Twitter: @lewiskamb.

To summarize, the City’s elected officials are claiming that the information at issue, such as the EMC polling data, is of a purely “political” and/or “personal” nature, and therefore exempt from public view. The City’s taxpayers have no incentive to fund the legal expenses associated with perpetuating these arguments. By admission, the elected officials are using public resources for personal benefit. To the extent that the elected officials seek to protect “personal” and/or “political” information, they are required to use their own funds, or perhaps ask Bring Seattle

Home to pay. These actions violated the following ethics rules: SMC 2.04.300¹, SMC 4.16.070², RCW 42.17A.555³, RCW 42.23.070⁴, and perhaps others.

¹ SMC 2.04.300 - Prohibition against use of public office facilities in campaigns.

No elected official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include but are not limited to use of stationery, postage, machines, and equipment, use of 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 officer or agency; provided, that the foregoing provisions of this section shall not apply to the following activities:

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

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

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

² SMC 4.16.070(B) – Improper Use of Official Position

A covered individual may not engage in any of the following acts:

* * *

1. Use or attempt to use his or her official position for a purpose that is, or could to a reasonable persona appear to be, primarily for the private benefit of the covered individual or any other persona, rather than primarily for the benefit of the City, except as permitted by Section 4.16.071;
2. Use or attempt to use, or permit the use of any City funds, property, or personnel, for a purpose which is, or to a reasonable person would appear to be, for other than a City purpose, except as permitted by Section 4.16.071; provided, that nothing shall prevent the private use of City property which is available on equal terms to the public generally (such as the use of library books or tennis courts), the use of City property in accordance with municipal policy for the conduct of official City business (such as the use of a City automobile), if in fact the property is used appropriately; or the use of the City property for participation of the City or its official in activities of associations that include other governments or governmental officials.

³ RCW 42.17A.555:

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of 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. However, this does not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to

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I respectfully request a full investigation into these matters. Thank you.

Very truly yours,

Lincoln C. Beauregard

Lincoln Beauregard

Enclosure:

Contract for Private Counsel

Declaration of Pete Holmes

cc: Washington Public Disclosure Commission
Commissioner Hardeep Rehki
All Counsel

support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are part of the normal and regular conduct of the office or agency.

(4) This section does not apply to any person who is a state officer or state employee as defined in RCW 42.52.010.

⁴ **RCW 42.23.070:**

(1) No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.

(2) No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law.

(3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.

(4) No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit.