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URGENT**VIA EMAIL**Seattle Ethics & Elections Commission
PO Box 94729
Seattle, WA 98124-4729
c/o Wayne Barnett, Executive Director
Wayne.Barnett@seattle.gov**Re: Request for Advisory Opinion on the Ed Murray Legal Defense Fund**

Dear Honorable Commissioners:

We represent the Ed Murray Legal Defense Fund (the “Fund”), an independent trust being created to help defray the legal expenses that the Mayor of Seattle, Edward B. Murray (the “Mayor”), must incur to defend himself in an ongoing civil lawsuit. The allegations in the suit are controversial and, especially given its timing, the suit is politically charged. The Mayor, a lifelong public servant, does not have the personal resources needed to fund his own legal defense. In these circumstances, concerned citizens should be allowed to raise or contribute funds to help defray legal expenses for a public official under attack, provided that adequate steps are taken to avoid any ethical conflicts.

Unlike some other jurisdictions, the State Washington and the City of Seattle (the “City”) have not enacted laws specific to legal defense funds in support of public officials. Instead, such funds are subject to generally applicable laws governing campaign finance and ethics. A legal defense fund in support of a City official, independent from a campaign committee, should be deemed in compliance with such laws so long as it is targeted, independent, and anonymous. If the fund only pays for legal expenses rather than campaign expenses, campaign-finance laws should not apply. If the fund is run independently from the City official, there is no opportunity for a misuse of public office for personal gain. And if contributions to the fund are anonymous, there can be no improper attempt to obtain special consideration or influence. In sum, when these three elements are met, the legal defense fund should be deemed lawful.

Here, the Fund would be established as a targeted, independent, and anonymous legal defense fund solely to help cover the Mayor's legal expenses. To ensure that it has adequate safeguards to satisfy the City's ethics requirements, the Fund is seeking an advisory opinion from this Commission pursuant to SMC 4.16.085. Below we set forth the relevant facts, explain the applicable legal standards, and describe the proposed structure and operation of the Fund—including oversight by an independent trustee, no control by the Mayor, and the use of robust non-disclosure agreements to maintain anonymity. The Fund respectfully requests a written opinion that its proposed activities would comply with applicable City law.

In light of the public and urgent nature of the ongoing lawsuit against the Mayor, and the mounting need to provide financial support for the Mayor's legal defense, the Fund also respectfully asks for a response as soon as possible. To whatever extent the Commission would like additional information or analysis, please do not hesitate to ask.

A. Factual Background

The Mayor took office on January 1, 2014. Since that time, he has become a prominent figure in both local and national politics.¹ He has also declared that he is seeking re-election.²

On April 6, the lawsuit against the Mayor was filed.³ The suit claims the Mayor paid a teenager for sex in the 1980s and makes numerous additional lewd allegations.⁴ The timing of the suit—filed within weeks of the campaign filing deadline and only a few months before the primary election—makes it particularly politically charged.⁵

For the Mayor, defending against this lawsuit is an important but expensive proposition. Allegations like these are easier to assert than to prove or disprove, and the allegation itself can be politically damaging even when proved false in the end. A substantial legal defense will be required to respond quickly and help reveal the truth. But experience shows that such a defense will be expensive.⁶ Given the rising costs of legal representation, the stale nature of the claims

¹ See, e.g., Mike Lewis, *Mayor Ed Murray re-election campaign has everything but an opponent*, MYNORTHWEST.COM (Jan. 16, 2017) (attached hereto as Exhibit A); Office of the Mayor, *Mayor Murray issues statement denouncing Trump's attack on transgender rights*, SEATTLE.GOV (Feb. 22, 2017) (Ex. B); Office of the Mayor, *City joins lawsuit for transgender student rights*, SEATTLE.GOV (Mar. 2, 2017) (Ex. C); Daniel Beekman, *Seattle sues Trump administration over 'sanctuary cities' order*, SEATTLE TIMES (Apr. 5, 2017) (Ex. D); Avi Selk, *He lobbied for gay rights and opposed Trump – now Seattle's mayor is accused of sexually assaulting minor*, WASHINGTON POST (Apr. 10, 2017) (Ex. E).

² See, e.g., Joel Connelly, *Mayor Ed Murray loves his stressful job: 'I am going to run for re-election'*, SEATTLEPI.COM (Feb. 13, 2016) (Ex. F).

³ *D.H. v. Mayor Edward Murray*, No. 17-2-09152-9 SEA (King Cnty. Super. Ct.).

⁴ *Id.*, Compl. for Damages: Child Sex Abuse & Illegal Child Prostitution (“Compl.”) at ¶¶ 3-9 (Ex. G).

⁵ See, e.g., Mayor Edward B. Murray, *Guest Editorial: The Motivation Is Political*, THE STRANGER (Apr. 14, 2017) (Ex. H).

⁶ See, e.g., Johnny Carter, *To Provide for the Legal Defense: Legal Defense Funds and Federal Ethics Law*, 74 TEX. L. REV. 147, 156-57 & nn.72-76 (1995) (discussing numerous examples of public officials incurring “more than a million dollars of legal expenses” in civil lawsuits alleging wrongdoing) (Ex. I).

here, the political undercurrent, and numerous other compounding factors, an effective defense could easily approach one million dollars or more.⁷

The Mayor and his husband are longtime public servants, without the personal resources needed to finance this litigation.⁸ The Mayor's legal team has already produced substantial work in furtherance of the Mayor's defense, including a medical examination disproving key allegations in the complaint.⁹ But the lawsuit is still in its infancy, and much more work remains to be done. If the Mayor were forced to pay for all this work on his own, he could be left bankrupt, or with less effective representation, or both.

The Fund is being formed to ensure that the Mayor can vigorously defend his rights while continuing the effective performance of his duties. The persons forming the Fund have known the Mayor personally and want to facilitate financial support for his legal representation. Before moving forward, however, they would like confirmation from the Commission that the Fund's contemplated activities comply with applicable City law.

B. Legal Background

The concept of a legal defense fund in support of a public official is a "phenomenon in American politics" that first emerged in the 1970s.¹⁰ Since then, numerous such funds have been created and relied upon at the federal, state, and local levels.¹¹ Some jurisdictions have enacted legal regimes specifically to govern legal defense funds.¹² Others, such as Washington State and Seattle, have not.¹³ In these latter jurisdictions, legal defense funds are subject only to general laws governing campaign finance and ethics in public office.¹⁴

In Washington, legal defense funds have received increased attention in recent years. In 2010, a work group was formed to study the issue, which included the General Counsel of the Public Disclosure Commission and the Executive Directors of the State Executive Ethics Board, Legislative Ethics Board, and Commission on Judicial Conduct.¹⁵ In 2011, the work group

⁷ *See id.*

⁸ *See* Jim Camden, *Spokane-area native Michael Shiosaki embraces role as Seattle mayor's husband*, SPOKESMAN-REVIEW (Sept. 5, 2014) (Ex. J).

⁹ *See, e.g.*, Brandon Macz & Daniel Nash, *Update: Mayor's attorney says no mole, no case*, CAPITOL HILL TIMES (Apr. 7, 2017) (Ex. K).

¹⁰ Carter, *supra* n.6, at 156.

¹¹ *See id.* at 150 & n.7, 153-56.

¹² *See, e.g., id.* at 164-68; *Legal Defense Funds Work Group Report*, Joint Research Project of Staff of Wash. State Pub. Disclosure Comm'n, Leg. Ethics Bd., Exec. Ethics Bd., and Comm'n on Judicial Conduct at 4-6 (2011) ("Work Group Report") (Ex. L).

¹³ *See* Work Group Report at 3, 9, 11.

¹⁴ *See, e.g.*, Memorandum from Nancy Krier, General Counsel, to Public Disclosure Commission Members (Aug. 18, 2011) ("[I]n Washington, a discussion concerning legal defense funds involves consideration of campaign finance laws, ethics laws (particularly provisions concerning receipt of gifts), and other sources.") (Ex. M); *see also* Work Group Report at 4 ("There may also be local ordinances or other ethics provisions governing local officials . . .").

¹⁵ Work Group Report at 3.

issued a report detailing its findings. The report found that “few questions have been posed in the past concerning the creation of legal defense funds under current laws or rules, and those have been handled on a case-by-case basis.”¹⁶ Notwithstanding this relative lack of precedent in Washington, the report recognized “the increasingly litigious reality of . . . public office service” and concluded that “a pro-active approach to providing guidance on legal defense funds is well worth considering.”¹⁷ The report provides useful, albeit unofficial, guidance.¹⁸

Under Washington and Seattle law, to proceed with a legal defense fund in support of a City official, three requirements must be met. **First**, the fund must pay only for legal expenses, not campaign expenditures. Using contributions for campaign activities would transform the legal defense fund into a political committee subject to campaign-finance regulations,¹⁹ including contribution limits and the prohibition against using contributed funds for personal expenses.²⁰ In contrast, legal defense funds are intended to collect and use contributions specifically for an official’s personal legal expenses. As such, contributions for this purpose are governed by ethics requirements, not campaign-finance laws.²¹ This conclusion is supported by the PDC’s treatment of this issue in past cases.²²

Second, the legal defense fund’s activities must not result in a misuse of public office or resources. Under City law, a public official may not “use his or her official position . . . primarily for the benefit of [the official] or any other person, rather than primarily for the benefit of the City,” nor may the official use “any City funds, property, or personnel . . . for other than a City purpose”²³ Accordingly, a City official may not invoke his official position to solicit contributions to the fund or direct City personnel to make such solicitations. But if the legal defense fund is independent from the City official being supported, and the official is not involved in soliciting contributions, there is no misuse of the official’s position.²⁴ Likewise, if other City staff members are involved only by personal choice, outside of normal working hours

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 12.

¹⁸ *See id.* at 3.

¹⁹ *See* RCW 42.17A.005(37), .200-205 (all cited RCW provisions in Ex. N); SMC 2.04.010, .350 (all cited SMC provisions in Ex. O).

²⁰ *See* RCW 42.17A.405(1), .445; SMC 2.04.340-350.

²¹ *See* RCW 42.52.010(9)(h), .120, .140 (ethics laws regulating “compensation” and “gifts” as distinct from “[c]ampaign contributions”); SMC 4.16.070(C)(1) (same).

²² *See* Work Group Report at 9 (noting that “PDC staff advised a city councilman that donations to his legal defense fund were not reportable to the PDC” but would be reportable if “intended to be used for, or [] used for, an election campaign”); *see id.* at 9-10 (noting “PDC staff will advise” public officials “they can create a separate legal defense fund” but “they cannot use campaign contributions . . . for the fund” and “may be subject to gift restrictions”); Letter from Nancy Krier, PDC General Counsel, to Rob Maguire, Davis Wright Tremaine LLP at 8 (Oct. 2, 2012) (“A candidate can establish a separate ‘legal defense fund’ for [] litigation, which is generally not subject to regulation under RCW 42.17A.” (emphasis omitted)) (Ex. P).

²³ SMC 4.16.070(B)(1)-(2). State law imposes a similar but narrower requirement on local officials. *See* 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.”).

²⁴ *Cf.* SEEC Advisory Op. 05-02 at 2 (noting City staff member could fundraise for non-profit organization but could “not invoke or refer to his City position” when doing so) (Ex. Q).

or while utilizing vacation or leave time, and in an unofficial capacity, there is no misuse of City personnel.²⁵ In other words, so long as the fund is independent from the City and its resources, the fund may proceed.

Third and finally, the fund must avoid corruption and the appearance of corruption. City law provides that an official may not “[s]olicit or receive any [] gift . . . or other thing of monetary value from any person . . . [that] has been . . . [or] would appear [to a reasonable person] to have been solicited, received, or given with intent to give or obtain special consideration or influence as to any [official] action”²⁶ As the Commission has recognized, determining whether this provision has been violated requires a “balancing” of relevant “factors.”²⁷ In the context of a legal defense fund supporting a City official, two factors are relevant.

The first relevant factor is the justification for the fund. This in turn depends on whether the expenses at issue are necessary and substantial. The need to raise money for an official’s cost-prohibitive legal defense, especially for a very public and politically charged lawsuit, is compelling. The same would be true for a necessary and expensive medical procedure, such as a heart transplant. Such justifications provide legitimate basis for a special fund, and thus, mitigate any concerns over impropriety. Legal defense funds are particularly important in such circumstances given the “strong incentives . . . [for] private parties to use the . . . civil justice system . . . to achieve political ends.”²⁸ Without the availability of legal defense funds, politically charged lawsuits would be an all-too-powerful tool for monied interests to oust officials with whom they disagree.²⁹

The second, more important relevant factor is the extent to which contributions to the fund are kept anonymous. Anonymity ensures the absence of impropriety because an official cannot give favors to someone who is unknown to him.³⁰ In multiple prior advisory opinions, this Commission has recognized anonymity as an effective tool for avoiding impropriety and its

²⁵ See SEEC Advisory Op. 05-02 at 1-2 (concluding that City staff member could “participate in fundraising activities” of non-profit organization if he did “not use City resources or his City position in connection with his fundraising activities”); SEEC Advisory Op. 97-07 at 3 (concluding that City employee could take unpaid position at non-profit organization if he did not “attempt to influence the City to award a grant to the non-profit”) (Ex. R).

²⁶ SMC 4.16.070(C)(1). Analogous state ethics requirements governing gifts apply only to “state officer[s] or state employee[s]” rather than local officials, and thus, are not applicable here. RCW 42.52.140-150; see also RCW 42.52.010(18)-(19).

²⁷ SEEC Advisory Op. 94-17 at 3 (Ex. S).

²⁸ Carter, *supra* n.6, at 180.

²⁹ See *id.* (“[T]here is a public policy justification for allowing legal defense funds: the need to give officeholders the tools to fight back against politically motivated legal wars.”).

³⁰ See Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 837-39 (1998) (“Mandating anonymous donations . . . would make it harder for candidates to sell access or influence because they would never know which donors had paid the price. . . . The idea that donor anonymity might reduce corruption is not new . . .”).

appearance in this way.³¹ An independent legal defense fund that ensures contributions are anonymous provides sufficient assurances against corruption and its appearance.

In sum, a legal defense fund in support of a City official may proceed under applicable law if it is targeted, independent, and anonymous. As explained in the next section, the Fund as contemplated has been designed to meet these requirements.

C. The Fund’s Contemplated Structure and Activities

The Fund will be formed as an independent trust devoted to providing financial support for the Mayor’s legal expenses in the ongoing lawsuit. The trustee will be Martha Choe, one of the Mayor’s longtime mentors and a respected member of the Seattle community who has been publicly recognized as “a person to be trusted with the jobs that mean something.”³² She is willing to undertake the responsibilities of an independent trustee and will oversee the Fund’s operations and compliance. She will be assisted by certain other persons in administering the Fund, none of whom will have any role within the Mayor’s Office or his re-election campaign. All persons administering the Fund will agree to maintain its independence and anonymity.

The involvement of the Mayor and his staff with the Fund will be extremely limited. The Mayor will agree not to communicate with anyone about the Fund or contributions made to it, or otherwise to seek out information about the Fund, other than communications directly with the Fund about the payment of his legal expenses or the total amount of Fund revenues. Members of the Mayor’s staff will agree not to communicate with the Mayor about the Fund, not to use City property or time for any Fund-related purposes, and not to seek out information about the Fund. Members of the Mayor’s re-election campaign will agree to similar restrictions. Finally, anyone contributing to the Fund will be required to agree to keep the contribution anonymous and confidential.

The commitments described above will be memorialized and acknowledged in a set of Confidentiality and Non-Disclosure Agreements (“NDAs”). The Fund administrators, the Mayor, his staff members, and any contributors each will sign an NDA appropriate to his or her role. Copies of these NDAs are enclosed for the Commission’s reference.³³ Obtaining written, signed commitments to abide by the rules of the Fund will not only help set meaningful and clear

³¹ See SEEC Advisory Op. 76-10 at 1-2 (approving local insurance companies funding a party for City employees graduating from “Arson Investigators Training School” but recommending that the “graduates not be advised of the names of the sponsoring companies in the event that some of [them] may have to appear against or for any of the said companies”) (Ex. T); see also SEEC Advisory Op. 94-17 at 3 (noting that validity of gift often depends on “whether the decision maker . . . knows the donor’s identity”).

³² Drew Atkins, *How Martha Choe forged one of Washington’s most influential careers*, CROSSCUT (Oct. 10, 2016) (awarding Lifetime Achievement award and noting that “the pursuit of influence has never shaped her decisions”) (Ex. U).

³³ See Exhibit V.

legal obligations for participants, it will also decrease any chance of non-conformance with such obligations in practice.³⁴

The Fund will solicit contributions in a targeted and discrete fashion. The Mayor will not participate. The Mayor's staff may participate, but only in an unofficial capacity and subject to narrow restrictions on communication designed to avoid any impropriety, at all times avoiding any discussion or disclosure of particular contributions.³⁵ The Fund administrators must be contacted directly for any contribution to be made. And the identity of any contributors will remain anonymous and confidential.

The Fund will monitor for compliance with applicable ethics laws. The structure and rules described above will generally ensure that the Fund is in compliance. But the Fund will also consider on an ongoing basis whether any ethical issues have arisen that were not previously contemplated and addressed. In that case, the Fund will determine an appropriate course of action to mitigate the ethical concerns as much as possible.

D. Conclusion

The Fund wishes to gather anonymous contributions so that the Mayor can defend himself in a controversial and politically charged lawsuit. The Fund will be limited to paying for legal expenses rather than any campaign expenditures. It will also be operated independently from the Mayor and his staff, and it will maintain the anonymity of all contributions. The Fund urgently and respectfully requests an advisory opinion that its proposed activities would comply with applicable City law.

Sincerely,

PACIFICA LAW GROUP LLP



Paul J. Lawrence



Taki V. Flevaris

Enclosures

³⁴ See, e.g., Keri L. Kettle & Gerald Haubl, *The Signature Effect: Signing Influences Consumption-Related Behavior by Priming Self-Identity*, 38 J. OF CONSUMER RSCH. 474, 475 (2011) (summarizing research showing that “requiring people to sign a contract” increases “their conformity” to the terms, regardless of whether there are legal and economic consequences for noncompliance) (Ex. W).

³⁵ See Ex. V.