



Clark County Republican Party

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December 1, 2014

Tony Golik
Clark County Prosecutor
PO Box 5000
Vancouver WA 98666

RE: Additional alleged violations of RCW by Greg Kimsey, County Auditor

Dear Mr. Golik:

I am writing to advise you of additional concerns we have with Mr. Kimsey's promotion of Proposition 1.

In addition to the allegations set forth in our letter of November 4th wherein we requested you investigate certain suspected violations of law, our investigation of other issues has now matured to a point that we believe they also warrant your attention. By way of this letter we are requesting you expand your investigation of Mr. Kimsey's advocacy of Proposition 1 to include in addition to alleged violations of RCW 42.17A.555, whether or not the following statutes were also violated:

RCW 36.22.110 - Auditor cannot act as attorney or lobbyist.

RCW 42.17A.565 - Solicitation of contributions by public officials or employees.

RCW 42.20.040 - False report

RCW 42.20.050 – False certificate

The examples and justifications we provide below are not intended to be exhaustive. They are meant to be indicative, and to lend both credence to the allegations as well as demonstrate that the decision to put them forward was not made superficially. We also request that while reviewing any of the examples given you continue to consider whether they also violate RCW 42.17A.555 as well. It is our hope that your thorough investigation will reveal all manners in which these and other statutes may have been violated, and all actions which may have violated them. While you consider these issues we ask you to keep in mind the legislature has intended all sections of RCW 42.17A to be "liberally construed" and why.

RCW 42.17A.904 - Construction

The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act.

RCW 42.17A.001 – Declaration of Policy

(5) That public confidence in government at all levels is essential and must be promoted by all possible means.

(6) That public confidence in government at all levels can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and decisions.

With these considerations in mind, we ask that you investigate the following possible violations of law.

RCW 36.22.110 Auditor cannot act as attorney or lobbyist.

The person holding the office of county auditor, or deputy, or performing its duties, shall not practice as an attorney **or represent any person** who is making any claim against the county, or **who is seeking to procure any legislative or other action by the board of county commissioners.** (emphasis added)

Obviously we are not alleging Mr. Kimsey acted as an attorney. The allegation is that he represented others seeking to procure legislative action by the board of commissioners.

Mr. Kimsey overtly and publicly established “Team Clark Forward” on June 19, 2013, and was making known its pending creation and intent well before then. Steve Stuart and Greg Kimsey were listed as the contacts for the organization on its webpage, and the same website solicited donations for the organization. Our understanding is the organization’s purpose was to advocate the board of commissioners pass legislation which would create the Board of Freeholders and initiate the process of proposing a Home Rule Charter. It is our contention that Mr. Kimsey, by representing the people and interests of Team ClarkForward, was “representing any person who is seeking to procure any legislative or other action by the board of county commissioners.” We believe that Mr. Kimsey, by way of creating an organization designed to represent the interests of others, then advocating for those legislative interests on behalf of that organization to the board of commissioners, violated RCW 36.22.110.

RCW 42.17A.565 - Solicitation of contributions by public officials or employees.

(1) No state or local official or state or local official's agent may knowingly solicit, directly or indirectly, a contribution to a candidate for public office, political party, or political committee from an employee in the state or local official's agency.

Our recollection is that at the first announcement of the formation of Team ClarkForward, a Rotary meeting broadly and personally publicized by Mr. Kimsey, and at the first public organizing meeting of Team ClarkForward as well as other subsequent meetings, he directly solicited contributions from all in attendance. Our recollection is that Mr. Kimsey made great efforts to publicize his role in the forming of this organization and its purpose. see <https://www.youtube.com/watch?v=6mCYdyNr5IU> and <http://www.columbian.com/news/2013/jun/19/kimsey-stuart-propose-reorganized-county-governmen/>

We believe that current and former Clark County employees may have assisted Clark County Commissioner Stuart and Clark County Auditor Kimsey onstage with the presentations. We are unaware

of whether any employee of Mr. Kimsey’s official agency was present at that meeting or at other subsequent meetings, however, his organization’s records might indicate this as might other witnesses present at the first or other meetings.

Such solicitations would in our eyes constitute a “direct” solicitation. Furthermore, we ask that you discover whether he directly or indirectly invited or induced any other employees of his agency to any of these meetings, the purposes of which were to organize interested parties and solicit contributions.

Finally, we suspect that broad public solicitation of contributions on Team ClarkForward’s website and other avenues may constitute “indirect” solicitation of donations from employees of his agency.

Under new management in 2014, ClarkForward went on to raise over \$100,000 by direct donations and solicitations through its advertising arms; notably CharterYes.com. The affiliated Facebook group, CharterYes, now dissolved, had numerous members who are Clark County employees. Even as of this writing the Team ClarkForward website is still online, with Greg Kimsey and Steve Stuart listed as their only contacts, and is still soliciting donations to this day.

RCW 42.20.040 - False report.

Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.

It is our belief that in a letter published online by The Columbian newspaper entitled “Letter: Charter restricts initiative power”, linked below, Mr. Kimsey commented as Auditor and made the following false report.

http://www.columbian.com/news/2014/oct/31/letter-charter-restricts-initiative-power/?fb_action_ids=847833228581963&fb_action_types=og.comments



Greg Kimsey · County Auditor at Clark County, Washington

A home rule charter that may be amended by the voters, may be repealed by the voters.

The proposed Home Rule Charter for Clark County provides three methods by which proposed charter amendments may be placed on the ballot for voters’ consideration: “Charter amendments may be proposed by the charter review commission, council or public.” (Article 9, Section 9.3)

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We have reason to believe that prior to the Auditor posting this statement, one or more people had already brought to his attention the fact that the Supreme Court of Washington previously decided a home rule charter was considered to be “organic law”, and that efforts to amend such charters by initiative were limited to be legislative in nature, and that this process of amending the charter could not do so in a way as to repeal the charter itself. Yet, as Auditor, he made a statement to the interested public which gives the appearance the exact opposite is so. While Ford v. Logan may be speaking solely to the limitations of the initiative process, and an amendment process “by the public” to which Mr. Kimsey refers may be citizen petition and not initiative, the article upon which Mr. Kimsey was commenting specifically focused on the limitations of the initiative process. His statement was made in that context and done in a way as to be claiming that the initiative process would allow amendments

and even repeal. Also, we are unaware of any legal distinctions which put the citizen petition process outside of the definition of an initiative. Based upon the comment giving him the title of Auditor, the context of the statement, and the lack of clarification of any nuance, we ask that you determine:

- Was the report made in his official capacity as Auditor?
- Is the statement either literally or de facto a false report or misleading?
- Was he acting as Auditor when making this statement of advocacy for Proposition 1?
- Was this a statement of legal opinion which, if made as Auditor would at minimum require some supporting legal evidence that indeed a home rule charter can be repealed?
- Is there any evidence to suggest a court would determine the process outlined in Article 9.5 of the charter is not also an “initiative process” subject to the same limitations of Ford v. Logan, and if so, what legal principle or decision differentiates the two?
- Is there any mechanism by which the home rule charter can be repealed?

Ford v. Logan

<http://law.justia.com/cases/washington/supreme-court/1971/41722-1.html>

“A fundamental limit on the initiative power inheres in its nature as a legislative function reserved to the people. In Washington, that power derives from our Const. art. 2, § 1 (amendment 7).[3] It is clear from the constitutional provision *155 that the initiative process, as a means by which the people can exercise directly the legislative authority to enact bills and laws, is limited in scope to subject matter which is legislative in nature.

The question before us is whether repeal of a "home rule" charter is a legislative act. In proceeding to answer this question, we first note that, once validly established, a "home rule" charter is the "organic law" of the county. Const. art. 11, § 4 (amendment 21).

[6] We find nothing in the provisions of Const. art. 2, § 1 (amendment 7) which places within the legislative authority the power to amend or repeal the very organic law which allocates that authority. To the contrary, our constitutional provisions for amendment are distinct and apart from article 2, relating to the legislative authority.”

Based upon this decision it is clear that the initiative process cannot amend the charter to the point of repeal. It is our reasonable suspicion that Mr. Kimsey was aware of this fact, that his statements were made as Auditor and were therefore an “official statement” as referenced in RCW 42.20.040.

RCW 42.20.050 – False certificate

“Every public officer who, being authorized by law to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing containing any statement which he or she knows to be false, in a case where the punishment thereof is not expressly prescribed by law, shall be guilty of a gross misdemeanor.”

Auditor Kimsey was authorized to publish the Voters’ Pamphlet as an aid to voters to ensure informed decisions and fair elections – a solemn duty. In his letter to voters in the pamphlet Greg Kimsey states:

“I urge you to read this pamphlet, but also seek more information. The best decisions are made by informed voters.”

Nobody including Mr. Kimsey would dispute that he was an ardent supporter of Proposition 1. When considering whether or not the related pages in the Voters’ Pamphlet were prejudicial, there should be no question as to whether or not there was motive. Therefore, it is reasonable to scrutinize carefully what he did cause to be printed in that publication of his office. We believe the Auditor violated both the spirit and the letter of the law with his conduct during the 2014 election season and in the Voters’ Pamphlet document itself.

The Voters’ Pamphlet is meant to inform. If it contains false or contradictory information the Auditor should highlight and clarify those issues. Intentional failure to do so is tantamount to the Auditor’s complicity in deception. Following are some examples which cause concern and we believe warrant detailed study of the full two page statement when considering whether or not the Voters’ Pamphlet was used in a way which was designed to influence the voters toward a position of support.

With regard to the Proposition 1, the text, reprinted verbatim in the pamphlet, contains a glaring contradiction. Section 7.2 A (6) states that the charter cannot be repealed or amended by initiative petition but Section 9.5 outlines a citizen petition process whereby the charter may be amended.

Because the two sections each outline a process of citizen initiative, the two sections are likely contradictory, in which case one or both is false.

Surely, it was incumbent on the Auditor to draw the contradiction to the attention of the voters and truthfully explain the contradiction if possible. We believe Greg Kimsey did neither.

We believe the Auditor further obfuscated the enigma by publishing the following contrary statement in the pamphlet at page 58,

“Voters may change the charter. The three methods by which proposed charter amendments may be placed on the ballot are: 1) Council action 2) Citizen petition 3) Charter Review Commission.”

This statement seems to directly contradict, without explanation, Section 7.2(A) 6 which states,

“Section 7.2 A. Initiative Limitations. The following are limited by state or federal law or court interpretations and may not be proposed or adopted by initiative...6. Amending or repealing this charter.”

In addition to the Voters’ Pamphlet, Mr. Kimsey’s office published on the Elections Division website a summary document entitled “What Is A Home Rule Charter” which we believe contains false statements and was also constructed in a way to advocate passage of Proposition 1 (<http://www.clark.wa.gov/freeholders/faq.html>). If a person uses the search facility on the Elections Division webpage and searches on the word “Charter”, this is the first item in the results, making it primary material for any voter searching the Elections Division website for information on the Charter. We ask that you also consider this document a “publication of the office” when investigating alleged violations of RCW 42.17A.555 per our previous request.

The document carries the date of “May 2014”

The proposed charter was adopted by the Board of Freeholders on May 27, 2014.

On June 25, 2014 the dissenting Freeholders wrote a letter to the BOCC requesting they ask the Auditor to include their minority report on the Elections Division website.

Please note that the Elections Division website states the page was last updated on 10/03/2014 07:46:01.

While considering if this document is a publication of the office, we ask that the following questions be answered:

- Was the question and answer portion of the document produced by the Freeholders or by the Auditor’s Office?
- If the entire document was prepared by the Freeholders, is the Auditor obligated to publish it on the Elections Division website even if it contains false statements or statements of opinion and/or advocacy?
- If the document was prepared by the Freeholders, does the fact that the Auditor published it on the Elections Division website make it a “publication of the office” subject to the restrictions of 42.17A.555?
- If it contains statements of opinion and/or advocacy, does the fact that it was produced by the Freeholders alleviate the Auditor of his obligation to provide fact-based and unbiased information, or of his obligation to not use publications of his office in the advocacy of a proposition?
- If the Auditor was obligated to publish the document on their website, and if the document does contain statements of opinion and/or advocacy, does the Auditor’s obligation to not use the facilities of his office in the promotion of a proposition require that he also publish information contrary to the Freeholder’s advocacy statements in an equally prominent and accessible manner, such as a minority report of the dissenting Freeholders?
- If the Auditor is obligated to publish the document, and if in the case it contains statements of opinion and/or advocacy then the Auditor is obligated to publish contrary opinions/advocacy, did someone render a decision as to whether the document did in fact contain statements of opinion and/or advocacy and if so, who made that decision?
- The dissenting Freeholders did create a “minority report” which most certainly addresses statements they believed to be opinion and/or advocacy statements made by the majority. The dissenting freeholders submitted that report to the BOCC with the request that the Auditor publish it on their website. Was a formal or informal request made to the Auditor to publish the minority report by the BOCC or any other person or group?

- If a request was made of the Auditor to publish the freeholder's minority report, who made the decision whether or not to publish it, and what was their justification for not publishing it?

Some areas of concern we believe do not meet a standard of unbiased and accurate statements of fact in this publication include but are not limited to:

- "...if the charter includes the initiative option, citizens could propose charter amendments through the initiative process."

This is a false statement. This statement is not only contradicted by Logan v. Ford as referenced above, but it is also in direct contradiction to the proposed charter itself which states:

Section 7.2(A) Initiative Limitations

The following are limited by state or federal law or court interpretations and may not be proposed or adopted by initiative.

....

6. Amending or repealing this charter.

- "...gives local voters the opportunity to make the structure of county government fit the community's needs."

Such a statement implies that the current form of government does not meet the community's needs. It is leading to the reader, and because others can certainly draw a different conclusion it is certainly a matter of opinion.

- "...members were nearly unanimous about what issues should be addressed in the charter."

We believe this statement is both false and misleading. Eleven out of fifteen in support is not nearly unanimous. By our calculations it is 73.3% in favor. The statement is designed to lead the reader to believe that there were no significant objections to the charter, which was not the case.

- "...contains checks and balances freeholders think will help maximize good governance."

In fact the minority of Freeholders as well as many in opposition to the charter believed that the proposed charter would have the exact opposite effect. Such diversity of belief on the matter clearly makes the above statement a matter of opinion, and not a statement of fact.

- "...strengthens citizens' representation"

Note that no qualifying statement was made. A statement that "the majority of freeholders believe" may have made the statement more technically accurate. As it stands it is portrayed as a statement of undisputed fact. Even with a qualifying statement, because a minority of

freeholders as well as many in opposition believed the exact opposite to be true, with or without a qualifier it is clearly a statement of opinion, one which advocates toward favoring the charter. Specifically, the charter reduces the number of representatives for whom the public may vote from three to two, clearly reducing the number of representatives of which each voter may avail themselves.

- "...this model would preserve close ties between voters and their elected representatives"

Few would purport this to be a universally held belief. This is another opinion based statement in advocacy of the charter. For example, many would claim it to be empirical fact that having part-time councilors who meet half as often reduces the ties between the voters and their representatives in half, because the voters have half the opportunity to address them in public.

- "...an appointed county manager and elected County Council would minimize potential conflicts between the positions"

Not only is this a matter of opinion, but many would believe if it were true that it directly contradicts the earlier claim that the charter will lead to better governance. It is a fact of our American system of governance that many believe conflicts between branches of government are precisely what leads to better governance. The point here is not to debate whether or not this view is true, but that any statement one way or another is at minimum a matter of opinion.

- Will be cost effective

Any effort to explain why this also is a matter of opinion would at this point be redundant.

- "Freeholders established thresholds for signature gathering and validation which will discourage frivolous petitions but allow practical use of these powers."

While freeholders most certainly did establish signature thresholds, who is to say if they will discourage frivolous petitions or in whose opinion would a petition be deemed to be frivolous? Does anyone believe a 100 signature threshold to put ordinances on hold would discourage actions of a frivolous nature? The charter certainly doesn't define what would be frivolous and any attempt to do so would certainly be a matter of opinion. Furthermore, others believe some thresholds are unreasonably high (20% of voters in last gubernatorial election to propose amendments) and therefore empirically does not allow practical use of the power.

Pages 58-59 of the Voter's Pamphlet, inarguably a publication of the office, contained three separate and distinct sections: Charter Background, Charter Summary and Charter Frequently Asked Questions.

- The Voter's Pamphlet portrays all three of these sections as "information provided by the Clark County Board of Freeholders." Were all three sections provided by the BOF, and specifically, who authored the section entitled "Charter Frequently Asked Questions?"

- If the BOF provided the Q&A section, was the Auditor under any obligation to review it for inaccurate or misleading statements or statements of advocacy, and if so, was this review conducted?
- If the Auditor had determined that these statements contained inaccurate, misleading or advocacy statements, what actions should the Auditor take to assure that a publication of his office does not contain such statements?
- If the Auditor authored the Q&A section, what process was used to assure that it did not contain false, misleading or advocacy statements?
- If the Auditor authored the Q&A section, was he under any obligation to inform the voters that this section was NOT “information provided by the Clark County Board of Freeholders?” We believe failure to do so may constitute a false certificate, false report, or both.
- The Charter Summary section contains the following statement: “The manager hires department heads and, subject to county council acceptance or rejection, appoints members of certain commissions, task forces, and boards.”

The wording of this statement, while technically correct, is constructed in a way to easily lead the average reader to be left with the impression that the council has the power of advice and consent over the appointment of department heads. A major objection to this charter by its opposition was the very fact that the council had no such power with respect to the manager’s appointment of department heads. An unbiased author or an editor opposing the charter would likely have insisted this statement be made in an unambiguous manner.

- The summary section states “Voters may change the charter” and states one of the methods is by “Citizen Petition”.

No effort is made to inform the reader that the citizen petition process is distinct from the initiative process, nor that its signature threshold is double that of the initiative. Why were signature requirements set forth for all aspects of the Charter except for the 20% requirement for citizen petitions? Why did the section on the initiative powers not specifically state that the process cannot be used to change the charter itself? Considering the controversy and conflicting claims about the proposed powers of initiative, wouldn’t these be points upon which an unbiased report would take special care to clarify?

- The Charter Frequently Asked Questions sections states, “Adding two council members will increase citizen representation and access”

This is a statement of opinion. As stated earlier with regard to the publication on the Auditor’s website, the fact that the councilors will be meeting approximately half as frequently certainly argues against the idea that the charter will increase citizen’s access to them, and the fact that voters will have two representatives instead of three directly contradicts the claim of increased representation.

- The FAQ sections also states, “Electing councilors by district (the same method by which state legislators are elected) gives minority groups with a geographic base a better chance of being represented on the council.

Depending upon how the districts are drawn, it could just as easily give minority groups with a geographic base a worse chance of being represented. Districts could either wholly include or bifurcate any particular minority group with a geographic base. Were minority groups and their geographic base considered when the districts were drawn, or was it based upon a mere geographic division of the voter population? Stating that the only possible outcome of additional districts is neutral or better for minority groups is a false statement.

- The FAQ section poses the question, “Would the charter cost taxpayers more than the current form of county government?” The question is answered with this statement:

“Any increases in county taxes, fees, and expenditures would require approval by the county council. The charter was designed to keep the five-member county council’s operational costs comparable to those of the current three-member Board of County Commissioners. By 2017, after a transition period, the salaries of the five council members will essentially be half of what the three commissioners are currently paid.”

The question asks what the overall cost to the county might be, yet the answer to this question is limited solely to the salaries of the council members. Not only must an accurate answer to this question include costs other than merely the councilors’ salaries, but must also include any costs beyond the costs of the council.

Mr. Kimsey, an experienced Auditor, presumably knows that this is a grossly over-simplified and misleading answer to the question. Even most laymen would realize that five benefits packages will likely cost more than three, and that the salary of the new County Manager would likely be higher and with greater severance liabilities than the current Administrator. Furthermore, professionals in government realize that changes in government structure make the question of their cost far more dynamic than a mere comparison of the gross salaries of three versus five people.

Even more egregious is to answer this global question by only addressing one portion of the cost (councilor salaries) of one portion of the county government (cost of the council) and is wholly insufficient to the question which was posed. The answer is misleading at worst and incompetent at best. If the Auditor chose to answer this question, he was obligated to provide a complete and unbiased answer which he did not do.

Such a question when posed to the County Auditor deserves and requires a more in depth and non-advocative answer, one which was not provided by the Auditor in the official Voters’ Pamphlet. It seems to us that Mr. Kimsey’s support of Proposition 1 made him reluctant to properly address this question to the voters.

- We believe the Auditor’s open advocacy of the charter clearly required he recuse himself from any authorship or review of any statements about the Charter in the Voter’s Pamphlet. If no such review was done, was that an abdication of the Auditor’s responsibility with respect to the Voter’s Pamphlet? If such a review was done, was it done by the Auditor, and if so, what precautions were taken to assure that his publicized personal bias would not exemplify itself in the statements he caused or allowed to be published? Was this question of recusal considered by the Auditor’s office, and if so, who decided recusal was unnecessary?

Finally, in any and all issues which you may decide to bring before a court, we ask that you also make the following arguments:

- 1) Advocating the board of commissioners pass legislation to create the Board of Freeholders, more than any other action taken, directly contributed to the outcome of the election results of Proposition 1, because without the creation of the Board of Freeholders Proposition 1 would never have been on the ballot.
- 2) Before and after Proposition 1 was placed on the ballot, Mr. Kimsey’s advocacy for it as Auditor had a great impact on the results of the vote.
- 3) The “Charter Summary” published on the Elections Division website was a “publication of the office” and due to its nature would reasonably be expected to have an impact on the outcome of the election.
- 4) Refusal to publish the freeholders’ minority report on the Elections Division website was extremely prejudicial to the voters, and would reasonably be presumed to have impacted the outcome of the election.
- 5) More than any other publication or advertisement, the Voters’ Pamphlet has the greatest impact upon the voters. Unlike any other advertisement or statement, it is effectively delivered to 100% of the voters. More than any other advertisement or statement, the voters expect all of its statements outside of the pro and con committees to be completely and entirely unbiased – both by a lack of prejudicial statements and by a lack of prejudicial omissions. Pages 58-59 failed in both regards.
- 6) That these actions and others, individually and especially in combination, may reasonably be suspected to have had a profound and immeasurable impact on the election results.
- 7) That these matters and others justify the court’s consideration of all remedies available, including those under RCW 42.17A.750(1)(a).

Thank you for your sincere consideration of these matters. Please let me know if we can be of further assistance in any way.

Sincerely,



Clark County Republican Party

Kenny Smith, Chairman