BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

In the Matter of Enforcement Action Against Don Bivins, Fire Chief, Vancouver Fire Department Marilyn Westlake, Education Outreach Coordinator, Vancouver Fire Department Marty James, Administrator, Clark County Fire District 5 Respondents.	NO. 02-286 STAFF RESPONSE TO BRIEF OF RESPONDENTS BIVENS AND WESTLAKE

The Public Disclosure Commission Staff, by and through its attorneys of record, ROB MCKENNA, Attorney General and LINDA A. DALTON, Senior Assistant Attorney General, submits this limited response to the brief filed by the Respondents Bivins and Westlake. Additional argument will be made at the time of hearing addressing the individual charges against each Respondent.

1. Production and Distribution of Lifelines and "Frequently Asked Questions"/Video Clips.

The parties have significant differences as to their view of the Respondents' actions related to the production, timing and distribution of the publications called "Lifeline," the frequently asked questions and the use of video footage from the Vancouver Fire Department.

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While Bivins and Westlake put forth one version of how the facts should be interpreted, the staff will put forth another at the time of hearing.

RCW 42.17.130 provides:

> No elective official nor any employee of his 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 office or agency: PROVIDED, That the foregoing provisions of this section shall not apply to the following activities:
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> (1) Action taken at an open public meeting by members of an elected legislative body 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 (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;
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> (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.

In addition, the PDC rules governing such use are WAC 390-05-271 and -273.

> **General applications of RCW 42.17.130.** (1) RCW 42.17.130 does not restrict the right of any individual to express his or her own personal views concerning, supporting, or opposing any candidate or ballot proposition, if such expression does not involve a use of the facilities of a public office or agency.
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> (2) RCW 42.17.130 does not prevent a public office or agency from (a) making facilities available on a nondiscriminatory, equal access basis for political uses or (b) making an objective and fair presentation of facts relevant to a ballot proposition, if such action is part of the normal and regular conduct of the office or agency.
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> **Definition of normal and regular conduct.** Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17.130, means conduct which 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. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition,

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in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

The ultimate decision about whether the charged publications violate RCW 42.17.130 will be determined by this Commission. When viewed on their face and in light of the events as they took place, the Commission will conclude that violations have occurred and assess an appropriate penalty.

2. Use of City Facilities and Equipment.

Respondents Bivins and Westlake have, in essence, admitted certain actions they took in support of an EMS levy that constitute violations of RCW 42.17.130, namely, use of a city vehicle, city computer and website, telephone and email system and facilities to store campaign materials. In doing so, however, they attempt to minimize or excuse their behavior and any potential penalty. Attached to this response is a list of prior PDC orders related to similar violations of RCW 42.17.130.

While Respondents Bivins and Westlake appear to minimize their actions as well as the penalty they should receive, the facts and prior orders by the PDC say differently. In light of the PDC's prior orders, the staff will be asking for a penalty higher than the nominal number set by the Respondents.

3. Contribution Solicitation.

A factual dispute exists between the parties as to whether Respondent Bivins violated the law by using a fire department vehicle and time to "solicit" a contribution from the American Medical Response company. Bivins' unsolicited statement through a telephone call to the PDC staff resulted in this charge. He admitted that he made statements, which will be illuminated at the hearing, which amounted to a solicitation. Following these communications, the American Medical Response company did in fact make a contribution to support the EMS levy.

The Commission will be asked to determine that while acting in his official capacity at an official fire department meeting, Respondent Bivins solicited a contribution.

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4. Conclusion.

The staff assert that once the evidence is before the Commission, the Respondents will be held to have violated RCW 42.17.130 and an appropriate penalty will be requested.

DATED this 23rd day of March, 2005.

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Past Violations and Penalties – Before Full Commission
Use of Public Facilities in Election Campaigns (RCW 42.17.130)

Case Name/Number	Charge	Penalty
1. Officials of Seattle School District No. 1, #94-139	Use of public facilities in the informational campaign, promoting passage of the school district's Capital Bond Measure.	Initially referred to the Attorney General's Office. The parties agreed on a $10,500 penalty, divided equally between three Respondents.
2. Bob Holman and Bill Verwolf, #98-405	Used public facilities of the City of Monroe to promote a local referendum by sending a letter to residents of the City of Monroe, and by including a letter in a newspaper advertisement, opposing Referendum 98-1130. public facilities to oppose Referendum 98-1130 during the critical signature-gathering phase of the process.	The PDC accepted a Stipulation of Facts, Violations and Proposed Penalty, ordering Respondent Holman to reimburse the City of Monroe $1,508.21 with non-public funds by June 30, 2000, and imposed on respondent Holman a civil penalty of $2,500, specifying that payment may not be made with public funds. The Commission suspended $1,508.21 of the penalty provided the respondent (1) in his capacity as Mayor of the City of Monroe does not violate RCW 42.17 for two years; (2) reimburses the City of Monroe $1,508.21 using non-public funds by June 30, 2000; and (3) pays the $991.79 non-suspended portion of the penalty to the Commission using non-public funds by June 30, 2000. The Commission ordered that the charges against respondent Bill Verwolf be dismissed.
3. Janet Barry, Superintendent, Issaquah School District No. 411, #99-075	Used/authorized the use of Issaquah School District facilities to support passage of the district's April 27, 1999 $68.7 million capital construction bond and $7.9 million technology levy by producing and distributing information in the February 1999 Focus newsletter, as well as in the publications "Capital	In accepting the Amended Stipulation of Facts, Violations and Penalty, the Commission assessed a total civil penalty of $3,500 with $1,000 suspended on the condition the Respondent commits no further violations of RCW 42.17 for a period of four years from the date of the order. The Stipulation included an agreement that no portion of the penalty may be satisfied with public funds.

	bond and Technology levy: The basics" and "Multi – Track 101" that supported passage of the district's April 27, 1999 capital construction bond and technology levy. The February 1999 Focus promoted passage of the April 27, 1999 ballot propositions because: (1) it was sent to registered voters rather than to all residents of Issaquah School District; (2) it contained promotional information and statements obtained from surveys and polls that attempted to market and sell the bond and levy; (3) it contained multiple examples of unbalanced, negative statements about the multi-tracking option and provided few positive statements in an effort to persuade voters to adopt the capital construction bond; and (4) It provided promotional statements about the benefits to the community if the capital construction bond and technology levy passed.	
4. Intercity Transit, #00-001	Used public funds to hire campaign consultants and mail promotional	Matter referred to the Attorney General's Office.

	literature in support of a local ballot proposition; made unreported in-kind contributions or independent expenditures to benefit the political committee supporting the ballot measure, and failed to register as a political committee to report their promotional activities. Used public facilities to promote the Agency's ballot proposition.	Penalty: $60,000 with $45,000 suspended. $20,000 was reimbursed to Intercity Transit for costs associated with the informational campaign.
5. Dr. Joseph McGeehan, #00-005	Promoted a ballot proposition in a District publication, containing information about a school district ballot proposition that appeared to be promotional in nature.	The Respondent was assessed a civil penalty of $2,500 with $1,000 suspended on the condition that there are no violations of RCW 42.17 during the next four years and Respondent agreed to conduct training for District personnel on the proper use of public facilities when discussing ballot propositions in District publications.
6. Christine Ohlsen and Richard Ridgeway, Case #00-866	Used public facilities to oppose Initiative 695 when they participated in political advertising to oppose the initiative, while in uniform, and with public equipment.	Ohlsen violated RCW 42.17.130, no penalty was assessed against Ohlsen. Ridgeway violated RCW 42.17.130 and assessed a civil penalty of $1,250. $1,000 was suspended based on the following conditions: (1) Ridgeway will comply with all requirements of chapter 42.17 RCW for a period of two calendar years; (2) the City of Tumwater will provide training to City management personnel regarding the provisions of RCW 42.17.130 within 90 days; (3) Commission staff will either approve the training agenda or participate in the training; and (4) Ridgeway will pay the non-suspended portion of the penalty with non-public funds within 60 days.

7. Gary Toothaker, Superintendent, Mukilteo School District No. 6, #00-884	Used/authorized use of the facilities of Mukilteo School District to support passage of the district's March 14, 2000 and May 16, 2000 bond and levy ballot propositions by: 1. producing a one-time-only Mid-Year Report in January, 2000 that promoted the district's bond and levy ballot propositions, at a cost of $12,067; 2. distributing the publication *"TELL ME MORE ABOUT . . . Bond & Levy Proposal"* to a select group of recipients rather than sending it to all residents in the district; 3. producing and distributing at least five flyers at a cost of $3,331 that contained opinions, were persuasive, and were not balanced; 4. writing six letters to the editor of *The Beacon* using district equipment and staff, during the six weeks preceding the May 16 election, promoting passage of the May 16 bond and levy; 5. sending out a special mailing	$7,000 with $2,000 suspended on the condition the Respondent commits no further violations of RCW 42.17 for a period of four years from the date of the order. As part of the Stipulation, the Respondent agreed to do the following: • Put in place an internal process for reviewing information related to ballot issues. • On both a district-wide and site-specific level, to train all personnel involved in publication of materials dealing with school ballot measures about the mandates of RCW 42.17.130. To distribute, through the Office of the Superintendent of Public Instruction, information about the case, to all school district administrators.

	from School Board President Ron Woldeit, at a cost of $1,862, concerning staff layoffs and program reductions, that also promoted the May 16 levy, and that was sent only to parents of the district's students, rather than to all residents of the district; 6. sending out a promotional flyer to all residents of the district, preceding the May 16th election, entitled, *"Vital Information about the Bond and Levy Propositions on the May 16th Ballot and the Future of the Mukilteo School District"* at a cost of $12,785; 7. producing a PowerPoint slide presentation, some of which promoted the March 14 and May 16 bond and levy elections, and by posting the slides on the district's Internet site and then directing readers to the site.	
8. Geoff Simpson, #01-133	Used public resources of the City of Kent Fire Department and the City of Sea Tac Fire Department by participating in a campaign photo shoot wearing his official City of	$2,500, $500 was suspended on the condition that the Respondent commits no violations of RCW 42.17 for two years.

	Kent uniform, and by using firefighting clothing and equipment, including a fire truck, and on-duty employees of the City of SeaTac.	
9. James White, Case #01-184	Sent an e-mail to "ALL USERS" of the City of Kent e-mail system (approximately 900 of the city's employees) apologizing to employees who may have received an invitation to his election kick-off event held Feb.1st. By sending the e-mail, which talked about his election kick-off event, Mayor White knowingly solicited contributions to his re-election campaign from employees of his agency. By notifying employees of his re-election campaign and of his election kick-off event, Mayor White also used City of Kent facilities to assist his re-election campaign, an alleged violation of RCW 42.17.130	$2,500. The parties stipulated that the penalty would be paid with non-public funds.
10. Gary Long, Burien City Manager, #02-269	Used public facilities of the City of Burien to oppose Initiative 747 by distributing a fact sheet concerning the Initiative that did not make a fair and objective presentation of the	$1,000 for a single violation. It was ordered that public funds may not be expended to pay the Respondent's civil penalty.

	facts.	
11. Kevin Rojecki, #02-277	Arranged for the use of facilities and equipment of the City of SeaTac Fire Department and coordinated a campaign photo shoot in which Geoff Simpson used City of SeaTac firefighting clothing and equipment, including a fire truck, and on-duty employees of the City of SeaTac.	$1,000 for single violation. $500 was suspended on the condition that the Respondent commits no violations of RCW 42.17 for two years.
12. John Gallup, #02-278	Used resources of the City of SeaTac Fire Department by coordinating a campaign photo shoot in which Geoff Simpson used City of SeaTac firefighting clothing and equipment, including a fire truck, and on-duty employees of the City of SeaTac, arranged for the use of facilities and equipment of the City of SeaTac Fire Department and coordinated a campaign photo shoot in which Geoff Simpson used City of SeaTac firefighting clothing and equipment, including a fire truck, and on-duty employees of the City of SeaTac.	$1,000 for single violation. $500 was suspended on the condition that the Respondent commits no violations of RCW 42.17 for two years.
13. Jim Downs, #02-	Authorized the use of facilities and	$1,000. The Commission ordered that public funds could

280	equipment of the City of SeaTac Fire Department for a campaign photo shoot in which Geoff Simpson used City of SeaTac firefighting clothing and equipment, including a fire truck, and on-duty employees of the City of SeaTac.	not be expended to pay the Respondent's civil penalty.
14. Ed Herbert, #04-663	Used the school mailboxes and public facilities of the public schools to disseminate information concerning ballot measure.	$500 with $450 suspended if there is no future violation of RCW 42.17 for two years from the date of the Order.
15. Dennis Nusbaum, #04-664	Used the school mailboxes and public facilities of the public schools to disseminate information concerning ballot measure.	$500 with $450 suspended if there is no future violation of RCW 42.17 for two years from the date of the Order.