

# JOHNSTON JACOBOWITZ & ARNOLD, PC

LITIGATORS. COUNSELORS. PROBLEM SOLVERS.

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BY EMAIL

August 17, 2017

Attn: Mr. Kurt Young  
Washington State Public Disclosure Commission  
PO Box 40908  
Olympia, WA 98504-0908  
[Kurt.Young@pdc.wa.gov](mailto:Kurt.Young@pdc.wa.gov)

## **Re: Rain Shadow Report, Case #22931, Response of Kyle Smith**

Dear Mr. Young:

I write on behalf of “Kyle Smith” in response to your email dated August 14, 2017 regarding the complaints filed by Mr. Burdine and Mr. Collins regarding the “Rain Shadow Report” (the “Report”) election issue, edited by my client. The Commission is asked whether my client violated RCW 42.17A.305 or RCW 42.17A.320.

We believe we did not violate those statutes, for the reasons below. We also understand, however, that the friendship between my client and the candidate has created controversy, which we regret. If the Commission determines that there was a violation, we respectfully ask that it show leniency toward a well-meaning citizen who made an error in his first entry into journalism.

### *Conquest Church, LLC*

To begin, let me give you a little relevant background about the alleged sponsor of the Report, Conquest Church, LLC. Conquest Church, LLC began as a small weekly prayer group in Yakima, WA about four years ago. In late 2015, the prayer group’s four core members, the Elders of this Church, formed the LLC to provide a structure for the group’s activities. (They inadvertently let the LLC’s registration lapse briefly, as noted in the Complaint, but it has since been restored.) The Church continues to hold its small prayer meetings every week.

The Church is owned only by the Elders. It has no regular outside funding, and no affiliates. It is allied with no party. It raises funds from its little congregation for its few expenses, and for charity. The Church believes strongly in giving back to the community.

*The Rain Shadow Report*

And so we come to the Report. Some members of the Church, and some non-members too, feel that Yakima needs a locally-owned news magazine to focus on local community concerns, quarterly (at least at first), providing in-depth coverage of issues such as homelessness, crime, politics, and local restaurants and arts. The Church put up funds to start off that effort with a few free issues.

Keith Effler, a local small business owner, belongs to a different church. But he's a friend of the Elders, and in 2016 he was one of the people who talked about this project with them. He even gave a little help drawing up the masthead graphics. He recused himself from any involvement with the project, though, once he decided to run for City Council in May 2017, long before any content was created.

*Kyle Smith*

The Report's editor/organizer took the pen name "Kyle Smith." He is not Mr. Effler or an agent of Mr. Effler or of Mr. Effler's campaign, and Mr. Effler and the campaign in no way directed or asked Mr. Smith or the Church to create, publish, or distribute the Report. Mr. Smith used a pen name because he hopes to make the Report an independent journal, not a church newsletter. The right to publish anonymously, especially about elections, is well enshrined in American history and law. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 115 S. Ct. 1511, 1524, 131 L. Ed. 2d 426 (1995). In view of the issues that have been raised, the Commission may learn, or may have already learned, Mr. Smith's identity, but in public correspondence at least, Mr. Smith prefers to maintain his anonymity if possible; for the reasons above, and also because he and the Church are concerned that his reputation will be harmed by the current furor. We will be glad, however, to confirm these facts by testimony or otherwise.

*The Election Issue of the Report*

The Yakima city council election was an obvious subject for the Report's first issue. They could only afford a small print run. They focused on District 4, which had the most hotly contested race out of the three District seats up for election. In July 2017, the Report's small staff rushed to interview the District 4 candidates and put out their first issue before the August 1st primary.

Organizing even a small journal for the first time was, as I'm sure you can imagine, hectic. One problem they ran into was finding good landscape photos of Yakima Valley. That wasn't needed for the articles, but they are trying to build a brand for the long-term. They turned to the graphics designer they knew best—Mr. Effler. Mr. Effler's business, Caffrey Photo, provided the landscape photographs, and also helped finish the front-page graphic, at standard rates, about \$300 total. This was not a secret—in the spirit of full transparency, Mr. Smith inserted into the Report a disclosure of Caffrey Photo's role.

Mr. Effler also, as a courtesy to the customer, helped them place their first print-run order. This was later reported in the Herald-Republic, which also reported that Mr. Effler said that he didn't pay for the run. That's correct. The Church paid for the run, and we will produce the receipt upon request.

To be clear, the above was the whole role played by Mr. Effler and his business in relation to the Report: before he was a candidate, he helped come up with the idea to start a news magazine, and did a little design work; later, as a business owner, he provided neutral graphics for pay at standard rates and helped place their print-run order, and, as a candidate, he sat for an interview. Other than answering interview questions, he did not provide or influence the subject matter, technique, content, sequence, or any other aspect of the presentation. He did not control or direct the Report what to say about him or other candidates. Nor did he direct, ask, help, or pay the Church or Mr. Smith to publish or distribute the Report.

#### *Value*

According to Mr. Effler's letter to the Commission dated August 10, 2017, the Commission believes the value of the Report, if it's considered as a contribution, was about \$315. While we don't believe the Report was a contribution in the first place, we agree that it couldn't have been any larger than that.

#### *No Violation*

As you may already see, the facts stated above do not add up to any violation of RCW 42.17A.305 or RCW 42.17A.320. Specifically:

RCW 42.17A.305 deals with required reporting of electioneering communication. "Electioneering communication" is defined as having a fair market value of at least \$1,000, substantially more than the Report's value. RCW 42.17A.005(19)(a). I would add that "electioneering communication" does not include an article in a regularly scheduled commercial news medium, RCW 42.17A.005(19)(b)(iii). While this was the first-ever issue of the Report, the Church does intend to keep publishing it regularly (they are working now on an issue about homelessness in Yakima County). Under both of those provisions, the Report is not electioneering communication, and therefore was not subject to RCW 42.17A.305.

For the same reasons, the Report was not subject to RCW 42.17A.320(2), either as electioneering communication, or as an "independent expenditure," which is also defined as being worth at least \$1,000 fair market value, and must be made in support of or in opposition to a candidate, none of which was true here. RCW 42.17.005(26), WAC 390-05-400. The Report is in print medium, not a yard sign, and not supporting or opposing ballot measures, so RCW 42.17A.320(4)-(7) also do not apply.

Lastly, RCW 42.17A.320(1) and (3) do not apply either, because the Report is not "political advertising." "Political advertising" is advertising "for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." The Legislature made clear that this concept is to be understood in light of *McConnell, et al. v.*

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*Federal Elections Commission*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), “including when issue advocacy is the functional equivalent of express advocacy.” RCW 42.17A.300(1)(e). As discussed in *McConnell*, express advocacy can generally be identified by its use of hortatory phrases such as “vote for,” “vote against,” “reject,” “stand up for,” “give,” “help us,” and so forth. While *McConnell* and the statute acknowledge that context may substitute for such phrases, the lack of any exhortation or appeal weighs heavily against considering the Report “political advertising.” Mr. Smith candidly wrote that he “likes” Mr. Effler, but he stopped short of an editorial endorsement and certainly stopped short of an appeal for votes. The Report’s interviewers asked all the candidates the same questions and reported all their answers in context and at about the same length. The Report finds something to criticize and something to praise about each candidate—Mr. Effler, for instance, is criticized as “naïve,” and Complainant Michael Collins’s wife, Candidate Kay Funk, is praised as “understands policy, focused on data, classy with integrity.” To the best of our understanding, this is not “political advertising.”

The Complaints make much of the fact that the Church’s Elders had other connections with Mr. Effler. Bluntly, Yakima is a small city. Only 1,198 people cast votes in the 4th District primary. Everybody knows everyone, everybody does business with everyone, and if you look hard enough, you’re going to find some connections between most people who are at all active in public affairs. (For instance, candidate Sandra Belzer is a prominent member of the same church attended by the mother of one of the Elders). It’s not relevant unless Mr. Smith did something that actually violated the statute. He didn’t.

I have gone into all of this at some length because Mr. Smith is mortified that this public-spirited project has cast a pall over the District 4 election. Mr. Smith does not know election law, but he greatly respects the principles of fair play and openness in elections, and he has done his best to abide by them. We believe he has succeeded. If the Commission finds, however, that despite his intentions, he created an “electioneering communication” or “political advertising” as defined by the Public Disclosure Act and beyond the bounds of the First Amendment after all, we respectfully ask that any penalty be waived under RCW 42.17A.755(5), or at least assessed leniently, and we ask the Commission to find that any such violation was unintentional.

Please let me know if we can provide any further information or otherwise help in any way to clear this matter up.

Sincerely,

JOHNSTON JACOBOWITZ & ARNOLD, PC



Emanuel Jacobowitz, WSBA No. 39991

Counsel for Kyle Smith and Conquest Church, LLC