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SECRETARY OF STATE
STATE OF IDAHO

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WARDEN

REVISED LETTER

May 14, 2018

The Honorable Lawrence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Request To Review *The Idahoan* – Our File No. 18-61527

Dear Secretary of State Denney:

This letter is in response to your request of this office to review a publication entitled *The Idahoan*. Specifically, you have asked this office to review *The Idahoan* under Idaho's campaign finance laws to determine if it is an "electioneering communication" under Idaho Code § 67-6602. If this publication is an "electioneering communication," then its publisher is required to comply with the reporting requirements under Idaho's campaign finance laws. After reviewing *The Idahoan*, this office concludes that in the absence of an applicable exemption it would be an electioneering communication under Idaho Code § 67-6602(f)(1) because, among other things, it unambiguously refers to candidates and was part of a mass mailing to members of the electorate within thirty days of the primary election. However, within the following exemptions found in Idaho Code § 67-6602(f)(2) apply to the definition found in subsection (f)(1):

"Electioneering communication" does not include:

- (i) Any news articles, editorial endorsements, opinion or commentary, writings, or letter to the editor printed in a newspaper, magazine, or other periodical not owned or controlled by a candidate or political party;
- (ii) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;
- (iii) Any communication by persons made in the regular course and scope of their business or any communication made by a membership organization solely to members of such organization and their families;
- (iv) Any communication which refers to any candidate only as part of the popular name of a bill or statute;

- (v) A communication which constitutes an expenditure or an independent expenditure under this chapter.

The Idahoan contains a series of news articles, editorial endorsements, and other writings printed in a newspaper, magazine, or other periodical that is not owned or controlled by a candidate or political party. Idaho law does not define the terms newspaper, magazine or other periodical. Idaho law does define what a newspaper is for purposes of qualifying to publish legal notices within Idaho Code 60-106, but that definition only establishes what types of newspapers qualify for publication. It is inapplicable as a broad definition of newspaper.

But the test for the exemption is not solely content based, it also test for ownership and control. A publication is exempt if it is not controlled by a candidate or a party.

Summary of *The Idahoan*

The Idahoan is a limited liability company registered to do business with the Idaho Secretary of State's Office as of April 18, 2018. It is governed by Patrick Malloy, who does not appear to be a candidate for office. *The Idahoan* does not appear to be controlled by a political party or candidate. According to its text, *The Idahoan* will be published up to three times a year, an edition prior to each election cycle (Primary/General) as well as a pre-legislative session publication. The current edition contains information on candidates of both parties in all statewide and legislative races, editorial endorsements of candidates, an explanation of the endorsement process, and news articles regarding: voting, President Trump's agenda, tax cuts, and urban renewal among other topics. Additionally, it appears that *The Idahoan* has sold advertising space within its pages. *The Idahoan's* content at this point is provided free of charge in both printed and website form.

Legal Analysis

Under the exemption, the providers of *The Idahoan* must demonstrate two things:

- (1) Is the entity a newspaper, magazine or other periodical; that
- (2) Is not owned or controlled by a candidate or political party.

In evaluating an entity under this statutory exemption, the entity must be engaged in a press type of activity—meaning is the publication and its writings something that the press would ordinarily engage in?

Status as a newspaper, magazine, or other periodical.

Idaho Code 67-6602(f)(2)'s exemption is clearly intended to respect the First Amendment Freedom of the press. This exemption enables the press the unfettered ability to cover and comment on political campaigns. *The Idahoan's* publication and website provide election information on candidates of all parties, news content, and editorial endorsements. *The Idahoan* produces original content and retains editorial control of its content similar to the way that magazine and newspaper editors generate and manage the content of their publications.

Additionally, it appears that *The Idahoan* is performing a legitimate press function. Its content is available to the general public both in printed and on its website. With regard to its website, any user may access the site and its content, there is no registration process, and it appears to be serving a legitimate press function. It is important to note that an entity otherwise eligible under the newspaper exemption would not lose its eligibility due to a lack of objectivity in its news stories, commentary, or editorial endorsements even if the news story, commentary, or editorial clearly advocates for the election or defeat of a candidate. It is important to note that numerous newspapers across the State of Idaho engage in editorial endorsements advocating the election or defeat of clearly identified candidates for state, legislative, and local offices. Such conduct does not render the exemption inapplicable.

Not owned by a party, committee, or candidate.

The publication entity cannot be owned or controlled by a party or candidate. Based upon this office's knowledge, the entity is not owned by a party or a candidate. Based upon the Certificate of Organization for *The Idahoan*, the sole governor of the company is Patrick Malloy. The editors of *The Idahoan*, are listed as Patrick Malloy and Lou Esposito. This office recognizes that certain authors of the publication are members of political committees such as Idaho Chooses Life (David Ripley) and the Free Enterprise PAC (Lou Esposito). It appears that other political committees purchased advertising within *The Idahoan* including Idaho Chooses Life, Gun PAC, and Land PAC. Although it appears that *The Idahoan* is controlled by political committees, Idaho's law only tests for ownership and control by a candidate or a party. Nothing indicates such ownership and control to this office.

A note about Idaho Code § 67-6602(f)(2)(i).

Idaho law is narrower in its application than the federal law. Under the federal campaign finance law, the test for ownership and control includes candidates, parties, **and committees**. 52 U.S.C. § 30101(9)(B)(i). As explained below, although *The Idahoan* enjoys the reporting exemption provided under Idaho law, it may not be exempt under the federal law.

The publication is funded by investors and political action committees. Most notably, the Free Enterprise PAC, which is headed by Lou Esposito, appears to have funded \$100,000 of costs of *The Idahoan*. According to Mr. Esposito, this funding is 1/3 or less of the total funding for *The Idahoan*. Based upon the information available, it does not appear that *The Idahoan* is owned by a candidate or a party. A closer question arises as to whether *The Idahoan* is controlled by a political committee.

Looking specifically at the front page of *The Idahoan*, Lou Esposito is listed as its publisher and editor along with Patrick Malloy. Within the capacities of publisher and editor, Mr. Esposito directly controls the content of the publication and website. More significantly, Mr. Esposito is the author of every single editorial endorsement within the publication. Additionally, one of the few articles within the publication is authored by Zach Brooks, a legislative candidate who received an endorsement from Mr. Esposito. Finally, there are a number of articles under a byline of "The Idahoan" which do not reflect an author. Based on

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the above, the question of whether the Idahoan is an electioneering communication could require closer examination under federal law or if Idaho's law is amended.

Conclusion

Based upon the above, it appears that *The Idahoan* qualifies for the press exemption in Idaho Code § 67-6602(f). Recognizing the gap created through the omission of the term "committee" from the Idaho statute, the Secretary may want consider an amendment to Idaho Code § 67-6602(f)(2) if he believes the activity discussed in this analysis warrants oversight.

I hope you find this letter helpful.

Sincerely,

A handwritten signature in black ink, appearing to read 'BK', with a long horizontal flourish extending to the right.

BRIAN KANE
Assistant Chief Deputy

BK/tjn