



STATE OF WASHINGTON
**BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS**
P.O. Box 9025, Olympia, WA 98507-9025

**Washington Administrative Code
Notice of Permanent Rules for
WAC 196-26A Registered professional engineers and land surveyor fees
and
WAC 196-30 Fees for on-site wastewater treatment designers and inspectors**

The Administrative Procedure Act (RCW 34.05.325(6)) requires agencies to complete a concise explanatory statement before filing adopted rules with the Office of the Code Reviser. This statement must be provided to anyone who gave comment about the proposed rulemaking.

Adoption of:

WAC 196-26A-040 Renewals for professional engineer and professional land surveyor licenses. (Amended)
WAC 196-30-020 On-site wastewater treatment designers and inspectors (Amended)
WAC 196-30-030 License renewals (Amended)

Effective date: These rule changes will become effective 31 days after filing (approximately April 1, 2023).

Summary of all public comments received on this rule proposal and the agency's response to those comments:

Comment:

I agree. Thank you.

Response:

The Board thanks you for your support of the proposed change.

Comment:

The Board's power and authority regarding and relating to the "criminal history" of licensees was expressly prescribed and limited in *Ritter v. State Board of Registration for Professional Engineers and Land Surveyors*, 161 Wn. App. 758, 255 P.3d 799 (2011); to wit, the commission or conviction of the specific acts identified in RCW 18.235.130(1), and RCW 9.96A.020(2), must directly relate to the practice of the licensee's profession or operation of the licensee's business. Moreover, (1) the exception set forth in RCW 9.97.020(1) overrides any otherwise disqualifying consideration and use of criminal records by the Board, and (2) only felony convictions directly related to the business or occupation are subject to the 10 year time period for relevancy in making licensing determinations.

...the Board is an administrative agency that has only that authority expressly provided by statute and can reasonably be adopted by Rules to fill any gaps. There is no express statutory authority to compel self-reporting, and there are reasonably no gaps to fill with such a compulsion.

I therefore respectfully request that this proposed Amendment be **WITHDRAWN** pending a full and formal review of the proposed Application and the specific wording of such requested information, as well as express statutory authority that is applicable to ALL State licensees, regardless of occupation.

Response:

Thank you for your input. The Board has considered your comments, and staff is in the process of working with the Department of Licensing to remove the criminal action question from the online licensing system and Board staff will be removing the question from the Board's licensing and renewal applications.

The Board has determined that the language regarding previous enforcement actions is within their legal authority and responsibility and believe that RCW 18.235.130 grants the Board the authority to request and consider enforcement actions.

RCW 18.235.130 Unprofessional conduct – Acts or conditions that constitute.

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:

- (1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession or operation of the person's business, whether the act constitutes a crime or not.
- (2) Misrepresentation or concealment of a material fact in obtaining or renewing a license or in reinstatement thereof;
- (5) The suspension, revocation, or restriction of a license to engage in any business or profession by competent authority in any state, federal, or foreign jurisdiction. A certified copy of the order, stipulation, or agreement is conclusive evidence of the revocation, suspension, or restriction;

Changes made to the proposed WAC as a result of public comment:

None.

The Board appreciates your involvement in this rule making process. If you have any questions, please contact Shanana Gillespie, Board Rules Coordinator, at (360) 664-1570 or e-mail at Shanana.Gillespie@brpels.wa.gov.

From: [Bergmans](#)
To: [Engineers \(BRPELS\)](#)
Subject: RE: Washington State Rulemaking Activity
Date: Wednesday, December 21, 2022 12:26:23 PM

External Email

I agree – Thank You

From: Board of Registration for Professional Engineers & Land Surveyors (BRPELS)
[mailto:donotreply@brpels.wa.gov]
Sent: Wednesday, December 21, 2022 7:08 AM
To: bergmans@pacifier.com
Subject: Washington State Rulemaking Activity

WA BRPELS Rulemaking Activities

From: [Rhys Sterling](#)
To: [Engineers \(BRPELS\)](#); [Gillespie, Shanan \(BRPELS\)](#)
Subject: Response and Public Comments re Proposed Amendments to WAC 196-26A-040
Date: Wednesday, December 21, 2022 8:49:04 AM
Attachments: [Letter to Board re Self Reporting of Infractions.pdf](#)
[Bd of Reg Petition for Rulemaking Supplement.pdf](#)
[Comment Letter - Ken Fuller - 08 05 2019.pdf](#)
[Bd of Reg DOL Public Records Request Final.pdf](#)

External Email

Honorable Board Members (c/o Shanan Gillespie) -- Please consider and accept the following as my formal response and public comments regarding and relating to the proposed Amendments to WAC 196-26A-040 (hearing scheduled for February 1, 2023, at 2:00 PM).

----> Attention is drawn to, *inter alia*, the **yellow highlighted** and **red highlighted** portions of the proposed amendments to WAC 196-26A-040, below.

AMENDATORY SECTION (Amending WSR 14-03-029, filed 1/8/14, effective 2/8/14) WAC 196-26A-040 Renewals for professional engineer and professional land surveyor licenses. ((The date of renewal, renewal interval and renewal fee is established by the director of the department of licensing in accordance with chapter 43.24 RCW. A completed)) (1) Licenses for professional engineers or professional land surveyors shall be renewed every two years. The date of expiration shall be the licensee's birthday. The initial license issued to an individual shall expire no earlier than one year after the issue date. (2) To renew your license, complete an application for renewal ((requires payment of a)), pay the required renewal fee, **and ((any)) provide the information ((specified by the board)) requested in the renewal notice and application form.** This information may include email address or other contact information **and information regarding prior unprofessional conduct pursuant to RCW 18.235.110 and 18.235.130. Information regarding unprofessional conduct will be evaluated by the board to determine whether it is related to the practice of the applicant's profession.**

----> Compare with the current regulation:

WAC 196-26A-040A: A completed application for renewal requires payment of a fee, and any information specified by the board in the renewal notice.

----> It seems to me that we've been down this road before. See attached letters to the Board dated 2015, 2017, and 2019. I believe my previously submitted letters are relevant to your consideration of the proposed Amendments. (Note that the requested "unprofessional conduct" self-reporting mandate in the proposed amendment is even more broad and ill-defined as any former 10-year criminal history demand.) Moreover, and as legal bar to the proposed amendments, see existing statutory authority set out below (as an administrative agency, it is clear law that the Board has only such authority as set forth in statute --

mandatory self-reporting of either criminal history and/or unprofessional conduct is a bridge too far and opens significant due process and Fifth Amendment issues, as under Washington law, professional license disciplinary matters are quasi-criminal and are entitled to certain fundamental constitutional protections (until our State Supreme Court expressly holds otherwise): -- *see, e.g., Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001); *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed. 2d 117 (1968); *cf. Nims v. Washington Board of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002).

----> In the absence of express statutory authority, and the actual Application and specific language implementing this proposed regulatory change, it is impossible to determine whether such intrusive query is permitted under the law. My previous correspondence addresses the issues raised by the proposed overly broad and undefined amendatory language.

----> I therefore respectfully request that this proposed Amendment be **WITHDRAWN** pending a full and formal review of the proposed Application and the specific wording of such requested information, as well as express statutory authority that is applicable to ALL State licensees, regardless of occupation.

Thank you for your attention to this matter. Please contact me at any time if you have any questions.

Rhys A. Sterling, P.E., J.D.
Attorney at Law
PO Box 1421
Pullman WA 99163

Email: rhyshobart@hotmail.com
Cell Phone: 425-281-1641

Existing WAC 196-26A-040:

WAC 196-26A-040 Renewals for professional engineer and professional land surveyor licenses. The date of renewal, renewal interval and renewal fee is established by the director of the department of licensing in accordance with chapter 43.24 RCW. A completed application for renewal requires payment of a fee, and any information specified by the board in the renewal notice. For a professional land surveyor the renewal application requires completion of professional development requirements. If a completed application for renewal has not been received by the department by the date of expiration (postmarked before the date of expiration if mailed or transacted online before the date of expiration), the license is invalid.

Renewals that remain expired over ninety days past the date of expiration require payment of a penalty fee equivalent to the fee for a one-year renewal in addition to the base renewal fee. The licensee is responsible to ensure timely renewal whether or not they received a renewal notice from the department. The licenses for individuals registered as professional engineers or professional land surveyors shall be renewed every two years or as otherwise set by the director of the department of licensing. The date of expiration shall be the licensee's date of birth. The initial license issued to an individual shall expire on the next occurrence of his or her birth date. If the next birth date is within three months of the initial date of licensure, the original license shall expire on his or her second birth date following original licensure.

[Statutory Authority: RCW 18.43.080 and 43.24.086. WSR 14-03-029, § 196-26A-040, filed 1/8/14, effective 2/8/14. Statutory Authority: RCW 43.24.086 and 18.43.035. WSR 02-13-080, § 196-26A-040, filed 6/17/02, effective 9/1/02.]

Existing Statutes Under Which WAC 196-26A-040 is adopted: (NOTE that neither of these statutes sets forth any requirement for self-reporting either unprofessional conduct or criminal history.)

RCW 18.43.080 Expiration and renewals of certificates—Fees— Continuing professional development. (1) Certificates of registration, and certificates of authorization and renewals thereof, shall expire on the last day of the month of December following their issuance or renewal and shall become invalid on that date unless renewed. It shall be the duty of the board to notify every person, firm, or corporation registered under this chapter of the date of the expiration of his or her certificate and the amount of the renewal fee that shall be required for its renewal for one year. Such notice shall be mailed at least thirty days before the end of December of each year. Renewal may be effected during the month of December by the payment of a fee determined by the board. In case any professional engineer and/or land surveyor registered under this chapter shall fail to pay the renewal fee hereinabove provided for, within ninety days from the date when the same shall become due, the renewal fee shall be the current fee plus an amount equal to one year's fee. (2) Beginning July 1, 2007, the board may not renew a certificate of registration for a land surveyor unless the registrant verifies to the board that he or she has completed at least fifteen hours of continuing professional development per year of the registration period. By July 1, 2006, the board shall adopt rules governing continuing professional development for land surveyors that are generally patterned after the model rules of the national council of examiners for engineering and surveying. [2019 c 442 § 11; 2005 c 29 § 1; 1985 c 7 § 43; 1981 c 260 § 4. Prior: 1975 1st ex.s. c 30 § 47; 1975 c 23 § 1; 1965 ex.s. c 126 § 1; 1961 c 142 § 3; 1959 c 297 § 5; 1947 c 283 § 11; Rem. Supp. 1947 § 8306-28; prior: 1935 c 167 § 10; RRS § 8306-10.]

RCW 43.24.086 Fee policy for professions, occupations, and businesses—Determination by rule. It shall be the policy of the state of Washington that the cost of each professional,

occupational[,] or business licensing program be fully borne by the members of that profession, occupation[,] or business. The director of licensing shall from time to time establish the amount of all application fees, license fees, registration fees, examination fees, permit fees, renewal fees, and any other fee associated with licensing or regulation of professions, occupations[,] or businesses, except for health professions, administered by the department of licensing. In fixing said fees, the director shall set the fees for each such program at a sufficient level to defray the costs of administering that program. All such fees shall be fixed by rule adopted by the director in accordance with the provisions of the administrative procedure act, chapter 34.05 RCW. [1999 c 240 § 2; 1989 1st ex.s. c 9 § 315; 1987 c 467 § 7; 1983 c 168 § 12.] Effective date—Severability—1989 1st ex.s. c 9: See RCW 43.70.910 and 43.70.920.

SUPPLEMENT TO PETITION FOR ADOPTION OF A STATE ADMINISTRATIVE RULE

The following information supplements that set forth in the attached Petition For Adoption, Amendment, Or Repeal Of A State Administrative Rule on Page 1 in the Section titled “Information On Rule Petition” under Part 1 “New Rule”.

This Petition is based on and prompted by the detailed responses to my July 25, 2017, Request for Public Records in a letter dated August 29, 2017, from the Board of Professional Engineers and Land Surveyors’ Acting Executive Director, Shanan Gillespie, that I received on September 6, 2017, from the Department of Licensing’s Public Disclosure Coordinator, Teresa Clark. *Attached hereto are a copy of (1) my July 25th Request for Public Records, and (2) the Board’s August 29th letter.*

My Request for Public Records sought any and all records, including rules, that the Board has in its custody regarding and/or relating to the Board’s mandatory requirement that a currently licensed professional engineer and/or land surveyor answer a series of “criminal history questions” as part of his/her professional license renewal. The Board admits that there has been no formal rule making, or even written guidelines adopted, regarding and relating to its “criminal history” disclosure mandate. Nevertheless, the Board demands of all licensees, as part of the license renewal process, personal details for the last 10 years for any and all (1) defaults, convictions, and certain pleas regarding any gross misdemeanors or felony crimes; and (2) actions taken against any professional and/or occupational license, certification, or permit – even if totally unrelated to the profession and/or business of engineering or land surveying – including fine, suspension, revocation, surrender, censure, etc. **Query – just what precisely does the term “etc” encompass? – and yes, this term is in fact included in the Board’s demand.** The Board merely asserts that it has statutory authority to request such information and that its staff will review such information to determine its relevancy. However, the Board’s statutory authority regarding and relating to a licensee’s “criminal history” is expressly limited to:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession or operation of the person's business, whether the act constitutes a crime or not. . . . For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended. **RCW 18.235.130(1).**

(2) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession or operation of the person's business. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. **RCW 18.235.130(13).**

(3) A person . . . may be denied a license, permit, certificate or registration to pursue, practice or engage in an occupation, trade, vocation, or business by reason of the prior conviction of a felony if the felony for which he or she was convicted directly relates to . . . the specific occupation, trade, vocation, or business for which the license, permit, certificate or registration is sought, and the time elapsed since the conviction is less than ten years, except as provided in RCW 9.97.020.¹ **RCW 9.96A.020(2).**

It is axiomatic that the Board, as a State administrative agency as defined in RCW 34.05.010(2), has only such powers and authority as are prescribed by law. *State ex rel. Evergreen Freedom NonProfit Corporation v. Washington Education Association*, 140 Wn.2d 615, 999 P.2d 602 (2000) (“The powers of an administrative agency are derived from statutory authority expressly granted or necessarily implied.”). The Board’s power and authority regarding and relating to the “criminal history” of licensees was expressly prescribed and limited in *Ritter v. State Board of Registration for Professional Engineers and Land Surveyors*, 161 Wn. App. 758, 255 P.3d 799 (2011); *to wit*, the commission or conviction of the specific acts identified in RCW 18.235.130(1), RCW 18.235.130(1), and RCW 9.96A.020(2), must directly relate to the practice of the licensee’s profession or operation of the licensee’s business. Moreover, (1) the exception set forth in RCW 9.97.020(1) overrides any otherwise disqualifying consideration and use of criminal records by the Board, and (2) only felony convictions directly related to the business or occupation are subject to the 10 year time period for relevancy in making licensing determinations.

The Board’s demand for information posed in its Criminal History Questions is overbroad, unconstrained, vague, and unauthorized by the express limitations imposed by statute and binding judicial decisions. If the Board desires to obtain relevant information from the licensees, it must do so within the constraints of its prescribed authority. In the absence of formal regulations setting forth the authority, purpose, use, and protection of what is extremely personal information, the Board engages in the violation of due process and ad hoc, arbitrary action regarding a valuable property right.² *See, e.g., In re Miserocchi*, 749 A.2d 607, 611 (Vt. 2000) (“[A] decision arrived at without reference to any standards or principles is arbitrary and capricious; such ad hoc decision-making denies the applicant due process of law.”); *Town of Westford v. Kilburn*, 300 A.2d 523, 526 (Vt.

¹ RCW 9.97.020(1) provides that “[e]xcept as provided in this section, no state, county, or municipal department, board, officer, or agency authorized to assess the qualifications of any applicant for a license, certificate of authority, qualification to engage in the practice of a profession or business, or for admission to an examination to qualify for such a license or certificate may disqualify a qualified applicant, solely based on the applicant's criminal history, if the qualified applicant has obtained a certificate of restoration of opportunity and the applicant meets all other statutory and regulatory requirements, except as required by federal law or exempted under this subsection.”

² The State must provide due process when it deprives an individual of “life, liberty, or property.” U.S. Const., amend. XIV, § 1; Wash. Const. art. I, § 3. The Washington Supreme Court in *Ongom v. Department of Health, Office of Professional Standards*, 159 Wn.2d 132, 138-39, 148 P.3d 1029 (2006), *cert. denied*, 127 S.Ct. 2115 (2007), noted that a professional license represents both liberty and property interests (*Ongom* was subsequently overruled on other grounds). Thus, professional license determinations that may result in the loss thereof must satisfy due process requirements. *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 732, 818 P.2d 1062 (1991).

1973) (the absence of standards results in the exercise of discretion in a discriminatory fashion).³ Moreover, without adequate protection to the very limited, relevant information regarding a licensee's criminal history expressly authorized by statute, his/her privacy rights and personal/professional reputation may be adversely and irrevocably affected. *See* RCW 10.97.050; RCW 42.56.050. The Board must ever have foremost in mind that any information submitted to it by licensees may be subject to public disclosure under and pursuant to Chapter 42.56 RCW.

The Board's demand for limited, relevant, and authorized criminal history information from licensees and/or applicants for a professional license must be conducted in all respects, if at all, within strict regulatory guidelines and procedures formally promulgated by the rule making process as prescribed in Chapter 34.05 RCW. As a suggested starting point, it is requested that the DOL and Board consider the following outline of a proposed Rule that addresses the foregoing concerns:

1. Upon specific written request to a current licensee based on probable cause or written complaint, and in all applications for a new or reissued license, except as otherwise provided in Paragraph 2, below, the following shall be submitted to the Board for its due, proper, confidential, and careful consideration in the licensing process:
 - A. Information specifically regarding and relating to the commission of any act involving moral turpitude, dishonesty, or corruption directly relating to the practice of the licensee's/applicant's profession or operation of his/her business, whether the act constitutes a crime or not within the past three years. Conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended.
 - B. Information specifically regarding and relating to the licensee's/applicant's conviction of any gross misdemeanor or felony directly relating to the practice of his/her profession or operation of his/her business within the past ten years. Conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended.
 - C. As may be relevant and applicable, evidence that the licensee or applicant has obtained a certificate of restoration of opportunity and that he/she meets all other statutory and regulatory requirements for licensure in accordance with the provisions of RCW 9.97.020.

³ *See also Harnett v. Board of Zoning*, 350 F. Supp. 1159 (D.V.I. 1972) (ad hoc rule making is arbitrary and violates due process); *State v. Klemmer*, 566 A.2d 836 (N.J. Super. 1989) (procedural rules that are nonexistent and legally unavailable to those persons required to abide by them are more offensive to constitutional due process than enactments which are only vague). "[D]ue process requires some standards, both substantive and procedural, to control agency discretion. . . . The use of personal unwritten standards [is] violative of due process." *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 852-56 (E.D. Va. 1980).

2. In accordance with RCW 34.05.020, the licensee or applicant shall have the absolute, unfettered right and privilege to refuse to answer any questions and/or produce any documents or information requested by the Board pursuant to Paragraph 1, above, under and pursuant to U.S. Const., amends IV and V, and Wash. Const, art. I, §§ 7 and 9, without any weight or consideration ascribed thereto, adverse consequence, or sanction resulting therefrom. The Board retains the right and power to issue a proper subpoena and/or judicially issued warrant to compel or otherwise obtain the production of relevant information and documents from the licensee or applicant.
3. Inadvertent or good faith omission of any information to be submitted pursuant to Paragraph 1, above, shall not be deemed to constitute an act of unprofessional conduct subject to disciplinary action.
4. Information submitted to the Board pursuant to Paragraph 1, above, shall be considered and treated as personal, private, and confidential, and shall not be subject to public disclosure except under those express circumstances and conditions that such information shall not be further disseminated and the privacy rights and interests of the licensee/applicant will be adequately protected. The provisions of RCW 10.97.050 and RCW 42.56.050 shall be duly considered by the Board prior to the release of any information submitted to it by a licensee or applicant pursuant to Paragraph 1, above.
5. Only authorized and trained staff employed by the Board and under the direct supervision and control of the Executive Director may review the information submitted by a licensee or applicant pursuant to Paragraph 1, above. Based on a full review of such information, authorized staff may make written recommendations to the Board members for their collective consideration in the licensing process.
6. The Board members are solely authorized to make a final determination regarding the weight and relevancy of the information submitted pursuant to Paragraph 1, above, and to make a final decision regarding the renewal of an existing license or the issuance of a new license (or reissuance as may be applicable).
7. The licensee or applicant shall have all rights, privileges, and powers he/she has and may be accorded under statute and constitutional provisions to contest, dispute, correct, and otherwise appeal the Board's final decision regarding the renewal or issuance of a license to him/her.

Respectfully submitted this
8th day of September, 2017.

A handwritten signature in black ink, appearing to read "Ryan Steyer". The signature is written in a cursive, flowing style.

RHYS A. STERLING, P.E., J.D.
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August 5, 2019

VIA EMAIL ONLY: *kfuller@dol.wa.gov*

Ken Fuller, PE, Executive Director
Board of Registration for Professional
Engineers and Land Surveyors
Department of Licensing
PO Box 9025
Olympia, WA 98507-9025

Re: August 7-8, 2019, Committee and Board Meetings
Board Consideration of Proposed Rule Making
Amendments to WAC 196-26A-040 and WAC 196-30-030

Dear Mr Fuller:

Please accept this letter as my formal comments on the proposed amendments to WAC 196-26A-040 and WAC 196-30-030. I ask that you ensure that each Board member, as noted below, receives this letter prior to the August 7-8, 2019, Committee and Board meetings in Spokane at which I understand that these amendments are intended to be considered/approved for publication and subsequent presentment for public consideration and hearing prior to formal adoption.

My concerns regard the following draft language proposed and as appropriately to be inserted in the foregoing identified WACs:

(2) To renew your license your license, complete an application for renewal, pay the required renewal fee, and provide the information requested in the renewal notice and application form. This information may include email address or other contact information **and information regarding prior unprofessional conduct pursuant to RCW 18.235.110 and RCW 18.235.130. Information regarding unprofessional conduct will be evaluated by the board to determine whether it is related to the practice of the applicant's profession.**

Emphasis added.

The foregoing emphasized language mandates that each licensed professional self-report his/her alleged acts that arguably fall under the scope of unprofessional conduct as broadly defined in the two referenced statutes - and further by inclusion, as set forth in RCW 18.43.105 and WAC 196-27A-020, -.030. This requirement has direct and significant implications and ramifications under both applicable statutes and State and federal Constitutions that must be fully and carefully considered by the Board prior to its taking any further action on these proposed regulation amendments.

My concerns regarding this subject matter were first expressed to the Board in my December 17, 2015, letter to then-Executive Director Michael Villnave, PE, stemming from an article titled "Ohio: Disorderly Conduct Conviction Had 'No Nexus' With License," that appeared in the Washington Board Journal, No. 56 (Fall 2015, "As The Courts See It" Section, p. 8).¹ This article was noteworthy in its direct relationship to, and mirroring of, the Washington Court of Appeals published decision in *Ritter v. Board of Registration for Professional Engineers & Land Surveyors*, 161 Wn. App. 758, 255 P.3d 799 (2011).²

It appears to me that as a result of the *Ritter* decision - which is legal precedent in the State of Washington - the Board was determined to address this 'nexus' criterion by requiring all licensees to answer a broadly and poorly crafted 'criminal history' question as a condition of renewal. I first was confronted with this query when it was included as part of my license renewal in 2017. Having found no statutory or regulatory authority for such query, on July 25, 2017, I filed with the Department of Licensing a Public Record Request asking for any and all records relating to such demand. The Board responded to my Request by letter dated August 29, 2017; in relevant part stating:

There are no specific instances in Chapter 18.43 RCW or Chapter 196 WAC that expressly includes the requirement of criminal history questions as part of the professional engineer's license renewal process. . . . There has been no rule making on this subject.

Board's Response to Public Record Request. Upon my receipt and review of the Board's Response, on September 8, 2017, I filed with the Board and Department a Petition for Adoption, Amendment, or Repeal of a State Administrative Rule asking that a Rule be promulgated "regarding the scope of the criminal history questions requirement for the licensure/relicensure of professional engineers and/or land surveyors . . . [because] [t]he current unregulated requirement for the mandatory disclosure of such personal information is outside the legally permissible nexus set forth in *Ritter* . . .; violates Wa. Const. art. I, secs 7 & 9; [and] is not protected from pub[lic] disclosure." By letter dated October 23,

¹ The seminal case was *Freisthler v. State Board of Education*, (2002) Ohio App. 3rd, No. 10236, 02-LW-3066, 2002-Ohio-4941. The Ohio Appellate Court held that it is implicit in the determination of whether conduct is unbecoming and subject to discipline is that there must be a nexus between such conduct and the individual's profession. *Freisthler*, ¶ 20.

² Similar to the *Freisthler* court's ruling, the Washington Court of Appeals in *Ritter* held that the alleged unprofessional conduct as defined in applicable statutes must have a nexus to the individual's profession, in this case, as a licensed professional engineer.

2017, the Board responded to my Petition and, by a CR-101 dated October 18, 2017 (published as WSR 17-21-104), stated that it "will proceed with an administrative rule amendment . . . [to] amend Washington Administrative Code 196-26A-040, and 196-30-030." That was the last I heard of this matter until I recently received my license renewal notice for 2019; when I was once again confronted with the same criminal history question that the Board admitted was not expressly authorized by existing statutes and adopted Rules, and that it promised would be the subject of Rule Making in accordance with a CR-101 published almost two full years earlier.

By email dated July 17, 2019, I inquired of several Board and Department key personnel the status of the Board's Rule Making as set forth in the October 2017 CR-101. By email dated July 18, 2019, the Department's Shanan Gillespie responded that "[a]t the June 19, 2019 Exam Qualification Committee meeting, the committee members finalized the draft rule language regarding WAC 196-26A-040 and WAC 196-30-30 . . . [; and] [i]t will be presented to the full board during the August 8, 2019 meeting for their consideration, and approval of the language and filing of the CR102" for publication and notice to all licensees. By email dated July 25, 2019, Ms Gillespie sent me a courtesy copy of the draft amendment that will be considered for the Board's approval - **copy attached hereto.**

Respectfully, but very frankly, my review is that the proposed amendments do not resolve the substantial issues raised by the previous 'criminal history' question,³ they very much exacerbate the problem and raise very significant legal issues stemming from mandatory self-reporting in a **quasi-criminal** context without due regard given to constitutional due process and fundamental protections against self-incrimination in the absence of an express statutory grant of immunity.⁴

³ My principal concerns with the 'Criminal History' question were: (a) the query was composed of vague and uncertain terms, including 'etc.'; (b) a response was mandatory with no option for objection; (c) Board staff would be privy to very sensitive private information, with no guarantee of non-disclosure; and (d) there was no express legislative authority given the Board to mandate self-reporting - as such is an investigative tool outside of the customary complaint process. Mandatory self-reporting of possible criminal activity that could lead to both disciplinary action and criminal prosecution is tantamount to a government search and intrusion into private affairs without authority of law.

⁴ Under Washington law, professional license disciplinary proceedings are quasi-criminal actions in which, under established U.S. Supreme Court decisions, the licensee has rights, privileges, and protections under U.S. Const., Amends. IV and V, as enhanced by Wash. Const. art. I, §§ 7 and 9 (including the right to remain silent and the privilege against self-incrimination without penalty or adverse inference and the protection from government intrusion into private affairs in the absence of probable cause and a search warrant). *Nims v. Washington Board of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002) (the *Nims* court held that the Board was required to apply the higher - quasi-criminal - standard of
(continued...)

My concerns regarding the proposed amendments and the mandate for self-reporting are several-fold; each of which is firmly grounded in statutory and constitutional principles of law.

First, it is an undisputed legal fact that the Board is a State administrative agency (created by RCW 18.43.030) and thus, as a matter of settled law, possesses only those powers and authority expressly granted by the Legislature.⁵ As so clearly and unambiguously admitted by the Board in its August 29, 2017, response to my Public Record Request - "There are no specific instances in Chapter 18.43 RCW or Chapter 196 WAC that expressly includes the requirement of criminal history questions as part of the professional engineer's license renewal process." Accordingly, the Board is powerless and without legal authority to amend its Rules to add a mandatory self-reporting requirement to the license renewal process in the absence of express statutory authorization because:

1. Administrative Rules must be written within the framework and policy of the applicable statutes. *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 580, 311 P.3d 6 (2013) (quoting *Department of Labor &*

⁴(...continued)

proof in an action against a professional engineer, citing *Nguyen, infra*, as authority - this quasi-criminal greater standard of proof remains binding precedent); *In re Disciplinary Proceeding Against Placide*, 190 Wn.2d 402, 414 P.3d 1124 (2018) (attorney disciplinary proceedings are quasi-criminal actions - this very recent State Supreme Court decision reaffirms the legal principle that professional license disciplinary proceedings are quasi-criminal actions); *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001) (disciplinary proceedings against physicians are quasi-criminal actions). Accordingly, mandatory self-reporting of any of the myriad of very broadly and ill-defined acts that could allegedly constitute unprofessional conduct could likely be construed as compulsory self-incrimination, as such reporting (or non-reporting) will, in the absence of a statutory grant of immunity, be used against the licensee as grounds for a disciplinary action (a quasi-criminal action) and also reported by the Board to authorities for criminal prosecution. RCW 18.43.110 (as amended by HB 1176 - Chapter 442, Laws of 2019). Unlike the statutory grant of immunity given the Board members under RCW 18.235.190, licensees who are required to self-report acts and conduct potentially criminal in nature are not so protected and will likely face criminal prosecution and incarceration. Query: Will Board members self-report possible unprofessional conduct should they fail to report possible criminal acts/conduct for prosecution under RCW 18.43.110; as any violation of Chapter 18.43 RCW is also defined as unprofessional conduct? RCW 18.43.105(5). These concerns underscore the fundamental flaws with mandatory self-reporting of overly broad terminology.

⁵ *Swedish Hospital v. Department of Labor and Industries*, 26 Wn.2d 819, 828, 176 P.2d 429 (1947) ("an administrative agency has no inherent power or authority other than that necessarily incidental to its express and delegated powers"); *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994) (an agency has only the authority granted by statute); *Northlake Marine Works, Inc. v. Department of Natural Resources*, 134 Wn. App. 272, 282, 138 P.3d 626 (2006) ("An agency may exercise only those powers conferred by statute, and cannot authorize action in absence of statutory authority.").

Industries v. Gongyin, 154 Wn.2d 38, 50, 109 P.3d 816 (2005));

2. Administrative rules or regulations cannot amend or change legislative enactments. *Swinomish Indian Tribal Community*, 178 Wn.2d at 580-81 (quoting *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002)); and
3. Rules that are not consistent with or are broader than the statutes they implement are invalid. *Swinomish Indian Tribal Community*, 178 Wn.2d at 581 (citing *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846 (2007)).

Second, professional licenses, subsequent to issuance, are a valuable property right,⁶ and any action taken against the licensee must strictly adhere to and apply all protections afforded by due process.⁷ Mandatory self-reporting by licensees of any and all of his/her own acts that could fall under the ambit of unprofessional conduct compels the licensee to disgorge possibly incriminating evidence else face the summary consequence of non-renewal of such license and the loss of his/her livelihood.⁸ This compelled self-incrimination, without a statutory grant of immunity, violates fundamental constitutional rights and privileges held sacred by and guaranteed to each individual - professional licensees included.⁹

⁶ *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983); *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 732, 818 P.2d 1062 (1991); *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001).

⁷ Due process protections include all those rights and privileges accorded under and pursuant to the Fourth and Fifth Amendments of the U.S. Constitution, made applicable to the States by and through the Fourteenth Amendment's due process clause. Accordingly, the "Fifth Amendment privilege against compulsory self-incrimination applies in . . . quasi-criminal cases, *Boyd v. United States*, 116 U.S. 616, 633-34 . . . (1886)". *Washington v. Ankney*, 53 Wn. App. 393, 397, 766 P.2d 1131 (1989).

⁸ The privilege against self-incrimination has consistently been accorded a liberal construction. There is no wriggle room in this constitutional right in which it is denied to certain individuals based merely on their job classification, and any denial will not lightly be sanctioned by the courts. *Spevack v. Klein*, 385 U.S. 511, 514-16 (1967).

⁹ *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (the government sought a waiver of immunity from individuals to compel testimony that could be incriminating). The Court noted that such compulsion secured under threat of substantial economic sanction cannot be termed voluntary. *Lefkowitz*, 414 U.S. at 82-83. Moreover, and directly applicable to the Board's proposed mandate of self-reporting, integral to deciding cases involving the choice to incriminate oneself or forfeit jobs to which he/she is otherwise entitled is the observation that "[w]here the

(continued...)

Third, mandatory self-reporting of any and all acts that could constitute unprofessional conduct under the guise of a mere request for information adjunct to license renewal¹⁰ in fact and legally constitutes a form of Board-sanctioned investigative tool¹¹ that (a) compels self-incrimination, as a matter of law made under duress,¹² and (b) intrudes into the private affairs of all licenses without a search warrant or lawfully issued subpoena.¹³ The legislatively

⁹(...continued)

choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967). In other words, the choice facing professional engineers and land surveyors is to either (a) waive his/her right against self-incrimination with no grant of immunity, or (b) refuse to answer and summarily lose his/her professional license. This fundamental loss of either one's constitutional rights or his/her profession must first and foremost be made by and under the careful consideration and deliberation of the State Legislature - not by administrative fiat.

¹⁰ "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis* [resist the first approaches or encroachments]." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

¹¹ This fact is underscored by Board staff being empowered under the proposed Rule amendment to review the mandated self-reported conduct of each licensee for renewal and then, based on such personal and potentially biased review, refer suspect acts for disciplinary action and possible criminal prosecution. It is beyond peradventure that required self-reporting is a government mandated investigative tool without the protections of due process and undertaken without probable cause to have any reasonable suspicion of unprofessional conduct by each and every registrant applying for renewal of his/her professional license.

¹² The Fifth Amendment privilege against self-incrimination is not limited to the context of criminal trials but "can be claimed in any proceeding, be it criminal or civil, administrative or judicial, **investigatory** or adjudicatory." *In re Gault*, 387 U.S. 1, 47 (1967) (emphasis added). *State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173 (1988) (Fifth Amendment privilege against self-incrimination applies to all stages of the case, investigation and prosecution). Even being compelled to provide answers to a Statement of Charges under threat of punishment for failing to cooperate violates the Fifth Amendment. *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 487, 491 (Fla. 1973).

¹³ It is well-established under Washington law that the U.S. Supreme Court's decisions interpreting and applying the Fifth Amendment are binding on Washington courts in their interpretation and application of Wash. Const. art. I, § 9. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008); *State v. Earls*, 116 Wn.2d 364, 375, 805 P.2d 211 (1991). However, Wash. Const. art. I, § 7, is more protective of private affairs than is the Fourth Amendment. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.2d 1062 (2002); *State v. O'Neill*, 148 Wn.2d 564, 584, (continued...)

prescribed/statutory basis for the Board's investigatory power into the acts and conduct of any one of its licensees is by and through the filing with it of a formal complaint; not by mere administrative fiat of mandatory self-reporting. RCW 18.43.110 (any third person may file a sworn, written complaint against any registrant). A third person filing a complaint against a licensee is the sole, express legislatively authorized means and manner of bringing to the attention of the Board acts that may constitute unprofessional conduct that would then be subject to formal investigation and possible disciplinary action following the adjudication of such allegations.¹⁴

Finally, the proposed amendments are not saved from constitutional infirmity by any regulatory exception to the Fifth Amendment privilege against self-incrimination. This very limited exception may arise where "the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment."¹⁵ *California v. Byers*, 402 U.S. 424, 431 (1971).¹⁶ Because a professional license disciplinary proceeding, including the investigative stage, is a quasi-criminal action and compelled self-reporting of any and all

¹³(...continued)
62 P.3d 489 (2003); *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). "Except in the rarest of circumstances, the *authority of law* required to justify a search pursuant to [Wash. Const.] article I, section 7 consists of a valid search warrant or subpoena issued by a neutral magistrate. This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes *authority of law* justifying an intrusion into the *private affairs* of its citizens. This defies the very nature of our constitutional scheme." *Ladson*, 138 Wn.2d at 353 n.3.

¹⁴ A sworn, written third person complaint is the proper, authorized, and legal means of bringing before the Board alleged unprofessional conduct; and thus gives rise to the requisite probable cause upon which to commence an investigation and possible disciplinary action - all in accord with due process.

¹⁵ Important to remember is that self-reporting is not the sole means for the Board to discover alleged unprofessional conduct - the statutorily authorized means for reporting alleged unprofessional conduct is by the third person sworn, written complaint. RCW 18.43.110. Mandatory self-reporting is very clearly not indispensable to any underlying statutory purpose relating to the renewal of an engineer's or land surveyor's professional license.

¹⁶ At issue in *Byers* was the question whether a State 'hit and run' statute which required a driver involved in a motor vehicle accident to stop at the scene and give his name and address infringed the constitutional privilege against compulsory self-incrimination. In a plurality opinion, Chief Burger wrote: "Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly." 402 U.S. at 427. In order to involve the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with "substantial hazards of self-incrimination." 402 U.S. at 429.

possible acts that may legally constitute unprofessional conduct will likely, realistically, and substantially subject the licensee to disciplinary action that could result in not only immediate non-renewal of his/her license to practice, but also revocation¹⁷ and possible criminal prosecution.¹⁸ Under such real legal jeopardy, a statutory grant of immunity from further disciplinary action and criminal prosecution is absolutely essential as a pre-requisite to any regulatory compulsory self-reporting of any and all possible unprofessional conduct as a condition of professional license renewal. For an excellent discussion of the regulatory exception to the Fifth Amendment's privilege against self-incrimination in the context of a government regulation mandating self-reporting, see *United States v. Serianne*, 68 M.J.580 (N.M.Ct.Crim.App. 2009), *aff'd*, 69 M.J. 8 (C.A.A.F. 2010) (**copy of each of these decisions is attached hereto** for immediate reference).¹⁹

INHERENT PROBLEMS WITH SELF-REPORTING

Just for a second consider the following very broad and ill-defined definitions of acts constituting unprofessional conduct, and then consider the mandatory duty to self-report any and all of your own personal acts over an extended number of years that might fall under the ambit of one or more of these categories:

1. RCW 18.235.130(4): "Incompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another."

¹⁷ The revocation of a professional license by the State is a punitive action for an offense against the law - and is the ultimate forfeiture of such property to the State. *In re Revocation of License of Kindschi*, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958) ("[A professional license revocation proceeding's] consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose."); *In re Revocation of the License to Practice Dentistry of Flynn*, 52 Wn.2d 589, 596, 328 P.2d 150 (1958) ("[R]evocation of a [professional] license is much like the death penalty in criminal law - it is not imposed to reform the particular person involved.").

¹⁸ RCW 18.43.120. At a minimum, certain acts constituting unprofessional conduct may be prosecuted as a gross misdemeanor under Washington's criminal statutes and result in not only a monetary penalty of up to \$5,000 but also up to one year imprisonment. RCW 9A.20.021(2). The implication is that there exist very substantial grounds for a registrant to simply fail to report all potential acts and conduct that the proposed amendment seeks to compel. In the absence of a statutory grant of immunity, there exists the extremely high probability that the mandatory self-reporting requirement is self-defeating and will not aid in the fulfillment of any purported statutory purpose.

¹⁹ Only subsequent to the inclusion of a grant of immunity from prosecution did the military finally acquiesce to mandatory regulatory self-reporting as constitutionally being on firm ground. See *United States v. Castillo*, 74 M.J.160 (C.A.A.F. 2015) (functional grant of immunity mitigated the self-incrimination from the compulsory self-reporting of the fact of a civilian arrest).

The inclusion of 'negligence' creates such an overly broad universe of possible acts that are totally unrelated to the profession so as to render it almost an impossibility to recall all such acts over an extended time. How about a simple fender-bender? What would the cumulative effect be if the registrant is accident-prone? This is a legal standard that necessarily requires legal advice in order to properly answer; all at a substantial extra cost to each registrant, else he/she fail to properly respond and thus itself constitute unprofessional conduct. WAC 196-27A-020(4)(a).

2. WAC 196-27A-030(17): "Disorderly, discriminatory or abusive behavior or statements which are significantly disruptive to the normal activities of a place of business or public view, where such behavior would give anyone witnessing the act a reasonable belief to be concerned for their safety or well-being."

What in the world might constitute 'disorderly behavior' that could in all likelihood go unreported to the police, yet be required to be reported to the Board? A backyard argument with a neighbor over a fence or tree that is seen by other neighbors - and thus occur in public view? An argument at a local drinking establishment that ended with no punches thrown but being ejected from the premises? Again, where is the boundary beyond which such acts are not compelled to be reported? And why is staff the final arbiter?

3. RCW 18.235.130(8): "Violating any of the provisions of this chapter or the chapters specified in RCW 18.235.020(2) or any rules made by the disciplinary authority under the chapters specified in RCW 18.235.020(2)."

This single provision constitutes the broadest and most ill-defined ground for unprofessional conduct because the prohibition applies to "any of the provisions of this chapter or the chapters specified in RCW 18.235.020(2) or any rules made by the disciplinary authority under the chapters specified in RCW 18.235.020(2)." (Emphasis added.) The disjunctive "or" means any one of the provisions listed can be grounds for unprofessional conduct - even those admittedly and obviously totally unrelated to the practice of engineering/land surveying.²⁰ Taken on its face, as lay professional

²⁰ "'When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning.' *State v. Gonzalez*, 168 Wn.2d 256, 263, [226] P.3d [131] (2010). The dictionary describes 'or' as a 'function word' indicating 'an alternative between different or unlike things.' Webster's Third New International Dictionary 1585 (2002). In this sense, 'or' is used to indicate an inclusive disjunctive - one or more of the unlike things can be true. The dictionary gives the example: 'wolves [or] bears are never seen in that part of the country.' *Id.* But the dictionary notes 'or' can also mean a 'choice between alternative things, states, or courses,' and gives the usage: 'will you have tea [or] coffee.' *Id.* This is the exclusive (continued...)

engineers/land surveyors would naturally do in the absence of procuring expensive legal assistance, this defined act would mean that a possible violation of any Rule applicable to any other profession must be self-reported, regardless of its obvious irrelevance.

The foregoing are only three examples of strictly applying the Board's proposed self-reporting mandate on all of its registrants. Ridiculous and absurd in the analysis thereof? No - as who in their proper mind wishes to possibly violate the Board's dictate and suffer the drastic and immediate consequences of failing to respond? However, who in their proper mind is willing to confess to acts that are totally and undoubtedly unrelated to the practice of professional engineering and/or land surveying, and is no one's business and right to intrude into one's private affairs?

CONCLUSION

The *Ritter* decision requires that to be subject to disciplinary action, there must exist a nexus between the alleged unprofessional conduct and the practice of engineering and/or land surveying; totally unrelated acts and conduct do not constitute grounds for discipline or, as a matter of law, non-renewal of the registrant's professional license. Nevertheless, what the Board would mandate under its proposed Rule is to compel each and every professional licensee to self-report any and all acts that may, and more likely than probably not, constitute possible unprofessional conduct, and let and trust Board staff to sift such disclosure and see what can be found that could be prosecuted as unprofessional conduct. This is nothing other than a government compelled fishing expedition²¹ imposed under the guise of a mere license renewal process. Without probable cause to suspect any individual licensee of

²⁰ (...continued)

disjunctive - one or the other can be true, but not both. These two logical variations of the disjunctive have long confounded the drafters of contracts. See E. Allan Farnsworth, 'Meaning' in the Law of Contracts, 76 Yale L. J. 939, 955 (1967) ('Particularly hazardous as a source of ambiguity for the contract draftsman are the words 'and' and 'or.'')." *Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). There should and can be no sanctioned ambiguity in a self-reporting mandate - too much is at stake and risk for any uncertainty to exist.

²¹ The legal requirement that there be an identifiable nexus between the alleged conduct and one's profession is absolutely essential, as without such palpable connection the government would be allowed to intrude into a person's private affairs in the mere hope of finding something actionable, a suspicionless search without probable cause and in violation of constitutional rights and privileges - clearly an illegal **fishing expedition**. See, e.g., *State v. Cornwell*, 190 Wn.2d 296, 412 P.3d 1265 (2018) (even as to persons on probation and with a reduced expectation of privacy, a search of that person's property without a clearly identified nexus between it and the alleged violation is nothing more than a fishing expedition which Wash. Const. art. I § 7 clearly prohibits as a matter of well-established law).

such conduct, there is no room under our State and federal Constitutions to allow and permit such intrusive inquiry based on mere regulatory fiat.²² The *Ritter* decision does not require this over-reaction by the Board; it requires no more or less than the current legislatively authorized means of discovering, investigating, and prosecuting alleged unprofessional conduct - by the third person sworn, written complaint. This is what gives rise to reasonable suspicion/probable cause; this is what allows government intrusion into private affairs while protecting the substantive due process rights and privileges accorded each and every citizen of this Country and State; and unless and until the Legislature amends the underlying statutes to give the Board any other express powers and authority, this has been, is, and will continue to be the sole legal means of investigating alleged unprofessional conduct.²³

The Fifth Amendment, U.S. Const., as well as provisions in many state constitutions and laws, prohibit the government from requiring a person to be a witness against himself involuntarily or to furnish evidence against himself. It is the burden of the government to accuse and to carry the burden of proof of guilt. The [individual] cannot be compelled to aid the government in this regard.

Black's Law Dictionary, at p. 1220 (5th ed. 1979). Yet, the Board's proposed amendments run directly contrary to this well-established principle of law by compelling each and every registrant to, as a required pre-condition to license renewal and without any reasonable suspicion to believe that such registrant has, or even that anyone in the entire population of registrants has, in fact committed any unprofessional conduct, be a witness against himself/herself and disgorge personal acts over many years that more likely than not, are not - a form of mass suspicionless, forced *mea culpa*.

²² Even our northern neighbors held that, under somewhat liberal self-reporting requirements for a taxation system (that would ostensibly require means of verification, inquiry, and inspection), the demand by the Minister of National Revenue for a complete list of the business customers of Hydro-Québec in an attempt to ferret out which of them might not have filed all required income tax returns, akin to a large scale tax audit, with no reasonable suspicion cast on any of them at the outset of the inquiry, was not only the definition of a *fishing expedition*, such a general survey seeking to determine whether the business customers were complying with the Tax Act was "a full-fledged fishing expedition" that would cause an undue and potentially unlimited invasion of the privacy of many individuals, none of whom were specifically targeted for any suspected wrongdoing, was an unreasonable inquiry and would not receive judicial authorization because, as so succinctly stated, "everyone has the right to be left alone by the government." *Minister of National Revenue v. Hydro-Québec*, 2018 FC 622, at pp. 9, 11, 19, 28, 43, 49, 52-54 (CanLII).

²³ See also WAC 196-27A-020(4)(c) that imposes a duty on each registrant to report possible unprofessional conduct of "another person or firm" - this is not a self-reporting requirement.

Ken Fuller, PE, Executive Director
Board of Registration for Professional
Engineers and Land Surveyors
August 5, 2019
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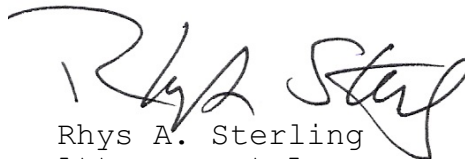
The proposed amendments to WAC 196-26A-040 and WAC 196-30-030 are problematic to say the least; and fail to pass constitutional muster of greatest import. Respectfully, the Board members must carefully reflect on what it is that they are compelling all of the Board's registrants to do, and whether each of them fully understand just what acts must be included and which may be excluded without facing possible disciplinary action for failure to respond? The previous 'criminal history' question was overly broad and ill-defined - especially with the inclusion of "etc." That issue can be easily corrected. Regardless, only those acts having a nexus to our profession as engineers and/or land surveyors may legally be the subject of investigation and disciplinary action. The Board should not, and can not, approve the proposed amendments unless such are wholly redrafted and until the Legislature addresses this matter for all professions - thus eliminating possible equal protection arguments - and granting express authorization and immunity related to compulsory self-reporting of professional licensees.

Clearly and as a matter of law, in the absence of express statutory authorization (1) mandating self-reporting, and (2) granting immunity for such compelled disclosures, the Board's proposed amendments to WAC 196-26A-040 and WAC 196-30-030 fail to pass constitutional muster, are patently invalid, and are unenforceable. Moreover, there is no reasonable necessity for the Board to demand this information in this manner; it has the essential tools now at hand by which to discover, investigate, and discipline registrants for unprofessional conduct - there is no justifiable need for more.

I respectfully ask each of the Board members to very carefully and fully consider the foregoing in their collective deliberations on the proposed amendments. At this time, the proposed amendments should (and must) be rejected. Thank you.

Very truly yours,

RHYS A. STERLING, P.E., J.D.

A handwritten signature in black ink, appearing to read "Rhys A. Sterling". The signature is fluid and cursive, with the first name "Rhys" being particularly prominent.

Rhys A. Sterling
Attorney at Law

Attachments

cc: Shanan Gillespie, WaDOL, Regulatory Program Manager
Julie Konnersman, CR-101 Board/WaDOL Contact

Board Members: Ivan VanDewege, PE, Chair; Aaron Blaisdell, PLS, Vice Chair; Stephen Shrope, PE; Nirmala Gnanapragasam, Ph.D., PE; Marjorie Lund, PE; Doug Hendrickson, PE; James Wengler, PLS

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December 17, 2015

Via E-Mail Only - engineers@dol.wa.gov

Michael Villnave, P.E., Executive Director
Washington State Board of Registration for
Professional Engineers and Land Surveyors
P.O. Box 9025
Olympia, Washington 98507-9025

Re: Washington Board Journal, No. 56 (Fall 2015)
Proposal To Self-Report Any Infractions For License Renewal

Dear Mr Villnave,

I read in the above-referenced Journal the article titled "Ohio: Disorderly Conduct Conviction Had 'No Nexus' With License," at p. 8 ("As The Courts See It" Section). This article referenced an Ohio appellate court decision regarding the administrative suspension of a teaching license based on the teacher's guilty plea to criminal disorderly conduct, and a Washington appellate court decision regarding the Board's suspension of a professional engineer's license based on a conviction for first degree child molestation. As noted in the article, in each of these cases the respective appellate court overturned the administrative suspension because there was no nexus (*i.e.*, close, legal connection) between the specific criminal conduct and the practice of one's profession.¹ The article ends with the note that "[f]uture changes coming to the online renewal system will require you to inform the Board of any infractions [and] [t]he Board will examine all infractions to determine if there is a nexus to the performance of your work." Obviously, as both a professional engineer (since 1976) and an attorney (since 1983), this intent to mandate self-reporting of "any infractions" caught my attention.

In stark contrast to the actual criminal convictions in each of the referenced cases in the article, under Washington law an "infraction" is legally defined by the Supreme Court as "noncriminal violations of law defined by statute." IRLJ 1.1(a). Infractions very broadly include (1) "[f]ailure to perform any act required or the performance of any act prohibited by [Title 46 RCW] or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses" (RCW 46.63.020); and (2) violations of any local zoning, building, and other regulatory

¹ In particular, under Washington law the essential element upon which a disciplinary action and punishment rests for such conduct stems directly from RCW 18.235.130(1); -.130(13).

codes (Chapter 7.80 RCW; Laws of 1987, Ch. 456, Sections 25 through 30, and 32). Accordingly, such acts and conduct generally characterized by law as an infraction include parking tickets, jaywalking, excessive vehicles on property, picknicking outside of designated picnic areas, and excessive celebratory noise for a Seahawks victory. Suffice it to say that none of the foregoing infractions have, by any stretch of one's well-grounded imagination, any relation to the "performance of our work" in the practice of engineering. Yet, mandating self-reporting of any and all infractions with the resultant oversight of reporting but a single parking ticket or alleged zoning or picknicking violation could likely be construed and prosecuted as unprofessional conduct under the broad provisions of RCW 18.235.130(8).² A mandate such as that proposed in the article is unnecessary and an overreaction to a nonexistent issue.

I have reviewed past and current adopted and proposed rule-making in the Washington Register by the Department of Licensing and the Board. I do not readily find any existing or proposed rules from either of these agencies that mandate self-reporting of any infractions as a requirement for professional license renewal. I respectfully ask the Board to carefully consider my foregoing comments and cautiously embark on any regulatory path to require self-reporting of any infractions that will be subject to examination by the Board "to determine if there is a nexus to the performance of your work." Such a requirement is overbroad and the danger to the professional in failing to report some minor parking ticket is too great. Nevertheless, it should be the Department of Licensing that undertakes the responsibility for proposing any rule that applies to all professions, and not just the Board imposing such a requirement solely on its regulated licensees, as the provisions of RCW 18.235.130 apply to all professions regulated thereunder - not just engineers, land surveyors, and onsite sewage system designers. Thank you for your consideration.

Very truly yours,

RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling
Attorney at Law

² Moreover, under established Washington law, professional license disciplinary proceedings are quasi-criminal actions in which, under established U.S. Supreme Court decisions, the licensee has rights, privileges and protections under U.S. Const., Amends. IV and V, as enhanced by Wash. Const. art. I, Sections 7 and 9 (including the right to remain silent and the privilege against self-incrimination without penalty or adverse inference and the production of records in the absence of a search warrant). Accordingly, mandatory self-reporting of any infractions (civil in nature) could likely be construed as compulsory self-incrimination, as such reporting (or non-reporting) will be used against the licensee as grounds for a disciplinary action (a quasi-criminal action).

Public Record Request

Use this form to request business/professional, driver, or other Department of Licensing public records. For a complete list of public disclosure forms, go to www.dol.wa.gov/forms/formspd.html.

PLEASE NOTE

Do not use this form to request your own driver record or vehicle or vessel/boat records. Use the following links for these requests:

[Vehicle Record Request](#)
[Boat Record Request](#)
[Address from Driving Record](#)
[Your Driver Record Request](#)

Email (quickest) PublicRecords@dol.wa.gov Print and scan or upgrade to Adobe Reader XI or above)	Mail Public Records Officer Department of Licensing PO Box 2957 Olympia, WA 98507
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Your information

PRINT or TYPE Your name		Business or Agency/Jurisdiction name, if applicable	
Mailing address			
City		State	ZIP code
(Area code) Telephone number	Email		Return records to me by <i>(choose one)</i> <input type="checkbox"/> Email <input type="checkbox"/> U.S. mail

Records requested

Check all that apply <input type="checkbox"/> Driver <input type="checkbox"/> Business/Professional <input type="checkbox"/> Other _____
License number(s)
Complaint/Case number(s)
List the specific record(s) you are requesting
How will you use the records? (Required if requesting lists of individuals or records from driver files other than your own.)

Agreement to protect lists of individuals from use for a commercial purpose and contact

Except as provided for in RCW 42.56.070, I hereby agree that the list of individuals provided to me by the Department of Licensing will not be used for commercial purposes or to contact individuals on the list.

By signing or typing your name, you declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Date and place signed

X

Signature

From: [Rhys Sterling](#)
To: [Gillespie, Shanan \(BRPELS\)](#)
Subject: Sterling - Supplemental Written Testimony - WAC 196-26A-040 - Public Hearing 2/1/2023
Date: Wednesday, February 1, 2023 7:36:38 AM
Attachments: [Supplemental Written Testimony - Feb 1 2023 Hearing - WAC 196-26A-040.pdf](#)

External Email

Honorable Board Members (c/o Shanan Gillespie)

Please accept, read, and enter into the record of today's Public Hearing the attached (in pdf format) supplemental written testimony regarding and relating to the proposed amendment to WAC 196-26A-040.

Thank you.

Rhys A. Sterling, P.E., J.D.
Attorney at Law
Pullman, WA

(PS - Shanan -- please confirm receipt and distribution of the attached supplemental written testimony to the Board Members for today's hearing -- thank you.)

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RHYS A. STERLING, P.E., J.D.
Attorney at Law

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Pullman, Washington 99163-1381 E-mail: RhysHobart@hotmail.com

February 1, 2023

Via Email Only (shanan.gillespie@brpels.wa.gov)

Board of Registration for Professional
Engineers and Land Surveyors
c/o Shanan Gillespie
605 11th Ave SE, Suite 201
Olympia, Washington 98501

Re: Proposed Rule Amendment: WAC 196-26A-040
Public Hearing - Supplemental Written Testimony

Honorable Board Members:

Thank you and good afternoon. First, I'd like to ensure that my December 21, 2022, email to the Board and Shanan Gillespie, including the four attachments, have been entered into the record of this matter and reviewed by the members. Confirmation of receipt was sent me by Shanan also on December 21st. If these have not yet been entered into the record, I will formally offer them at this time and respectfully ask they be admitted together with this written testimony regarding and relating to the proposed amendment to WAC 196-26A-040.

Second, this matter seems like *déjà vu* all over again. It seems that every several years the Board proposes to amend its license renewal Rules to insert compulsory self-reporting of factual instances that could constitute unprofessional conduct to see if such would fly this time around. It doesn't and it won't. I won't unduly repeat myself as to the arguments I made in my prior written testimony; but very simply put, the Board is an administrative agency that has only that authority expressly provided by statute and can reasonably be adopted by Rules to fill any gaps. There is no express statutory authority to compel self-reporting, and there are reasonably no gaps to fill with such a compulsion. In fact, the Board admits that the proposed amendments are not necessary due to federal, State, or judicial case law - see Proposed Rule Making, WSR 23-01-085. Accordingly and to spare any

excessive legalisms, if this proposed Rule is not necessary, it is most obviously - unnecessary. So the critical question is: **WHY?**

What exists and what has satisfactorily existed for many years is a disciplinary process that comports with due process - that little constitutional imperative and right that provides protection to professional licensees that guarantees a process they are each due before their license is sanctioned or revoked by an administrative board. Complaints are lodged, a proper investigation is made, a hearing is held, and an appropriate decision is reached grounded on clear, cogent, and convincing competent evidence. The Board wishes to sidestep this long standing procedure, and skip right to the end - with the compelled admission by the licensee that he or she has perchance (at some unspecified prior time(s)) committed an act or acts constituting unprofessional conduct. This admission is compelled and made under the duress that failure to respond would be grounds to deny license renewal; or would be an instance of lack of cooperation and/or lack of candor to the Board that would likely be sanctionable. Compelled admission of guilt, without at least a mini-*Miranda* warning initially given such as that provided in RCW 18.130.095(2)(a), is unquestionably contrary to due process - especially in a disciplinary setting that, unless and until our State Supreme Court clearly states otherwise, is a quasi-criminal proceeding. Such compulsory admissions could not be used in a court of law, but this Board is not such a tribunal and its rules of evidence would likely permit such compelled admissions. Worst case scenario, after some unidentified Board staff reviews such admissions (under what legal parameters does this person review potentially very private, personal information - independence from Board; standard of proof; applicable written guidelines to prevent arbitrary decision-making; nda to protect privacy? nevertheless), a complaint could be lodged based on such compulsory disclosures and, with the admission of guilt already of record, the professional's license could be promptly sanctioned or revoked - a total absence of due process and, I would submit, a wholly

unconstitutional act by the Board and total disregard of the rights accorded professional licensees.

And lastly, this is not who we are as a country - at least not yet or ever I sincerely hope - and as an attorney as well as a PE, I am sworn to and will uphold and zealously protect our constitutional rights. Growing up on a farm in central New York I learned one valuable lesson - if you don't properly assert your rights, you lose your rights. And this proposal is certainly not in keeping with a Board that acts under and in accordance with those rights and the law. Due process is not a mere slogan - it is a fundamental right that the Board has and should continue to recognize and honor. Respectfully, I ask the Board to shelve the proposed amendments in any way relating to self-reporting for engineers and designers. If you need to make the existing system better, then do it - but don't wreck it and destroy our reliance on the good faith and fairness of the Board in any and all disciplinary actions.

Thank you for your consideration and continued cooperation in this matter.

Very truly yours,

RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling
Attorney at Law