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**MEMORANDUM**

DATE: July 18, 2018

TO: Keenan Konopaski  
Legislative Auditor

FROM: ~~SEA~~ Stacia E. Hollar  
Senior Assistant Attorney General

SUBJECT: **Citizen's Commission on Tax Preferences Questions for Citizen Testimony**

By way of brief background, the Legislature established the Citizen Commission for Performance Measurement of Tax Preferences (Commission) to participate in the review of tax preferences to “determine if their continued existence will serve the public interest.” RCW 43.136.011. In addition to scheduling the reviews, the statute authorizes the Commission to comment on the results of the reviews and provide a report with its conclusions to the legislature. As part of the process for reaching its comments, the Commission has chosen to allow public comment regarding the tax preferences under review.

In order to assist with receipt of public comment, over the past few years the Commission has set forth questions which those providing testimony may choose to answer. For the upcoming reviews, the Commission is considering using the following questions:

1. Is there evidence that the tax preference achieved its purpose, as noted in the 2018 tax preferences reports?
2. Do you believe this preference provides benefits in addition to those stated in its intended or inferred purpose?
3. Do you believe the taxes associated with any increased economic activity stimulated by this tax preference exceed the preference's loss of tax revenue?
4. Do you believe this preference has negative consequences? For example, were other industries, workers, or the environment harmed by activities stimulated by this tax preference?

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An individual testifying at the May 9, 2018 Commission meeting queried whether the final question falls within the Commission's authority. It is within this context that you posed the following legal question:

*When the Commission requests that parties address specific questions in their testimony, are there legal limitations on the topics the Commission may ask in its questions?*

**I. BRIEF ANSWER**

The Commission has the legal authority to ask questions that relate to the legislatively established factors JLARC may consider in its reviews, which includes asking about negative impacts on other industries, the environment or other workers as these items, relate to the stability of the community.

**II. ANALYSIS**

**A. Authority to Pose Questions**

As a creation of the Legislature, the Commission has those powers expressly granted or necessarily implied by the granting statutes. *Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994). In order to determine the scope of the Commission's authority, the purpose it serves must first be determined.

As noted above, the Legislature established two main roles for the Commission: setting the schedule for review of the preferences (RCW 43.136.045(1)) and commenting on the reviews at their conclusion (RCW 43.19.065(1)). The Joint Legislative Audit and Review Committee (JLARC) performs the reviews in accordance with the factors set forth by the Legislature. RCW 43.136.055(1). As stated in the Final Bill Report for SB 5044, which amended the tax preference statutes in 2011:

The job of scheduling tax preferences, holding public hearings, and commenting on the reviews is assigned to the Citizen Commission for Performance Measurement of Tax Preferences (Commission). The responsibility for conducting the reviews is assigned to the staff of the Joint Legislative Audit and Review Committee (JLARC).

The Commission's role must be viewed in the greater context of what the Legislature seeks to achieve. At the time of the original enactment, the Legislature noted, "tax preferences are enacted to meet objectives which are determined to be in the public interest." 2011 SB 5044. (Codified as RCW 43.136.011). Due to changing economic times and other factors, such as other state's tax structures, the Legislature became concerned that the tax preferences may not

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continue to effectively, or efficiently serve current goals and thus called for periodic performance audits. The Legislature again focused on the public interest stating a need to determine whether the preferences are continuing to serve those goals. *Id.*

True to its focus on the public interest, the Legislature specifically provided that JLARC, in performing reviews, look at several broad public policy factors, “including, but not limited to, legislative history, legislative intent, or the extent to which the tax preference encourages business growth or relocation into this state, promotes growth or retention of high wage jobs, or helps stabilize communities.” RCW 43.136.055(1)(b). The statute includes other factors that JLARC could consider but specifically left JLARC the discretion regarding the relevancy of any certain factor in a particular review. RCW 43.136.055(1).

Given that the Commission is to comment on JLARC’s report, it follows that the Commission would likewise focus on public policy factors and seek to determine if it concurred with JLARC’s assessment regarding whether the preference was presently in the public interest. The Commission has the authority to take those steps reasonably directed at allowing it to gain access to the information it needs to do its job. *Lenander v. Washington State Dep’t of Ret. Sys.*, 186 Wn.2d 393, 377 P.3d 199, 205 (2016). Accordingly, the Commission may propose questions, the answers to which would further assist in fulfilling its responsibilities to comment on the JLARC findings and reviews. While the scope of these questions is broad, they should bear legal relevancy to the factors identified by the Legislature for JLARC consideration. As noted above, the factors include a number of public policy concerns including helping to stabilize communities.

The statutory evolution of this process demonstrates that the review factors, and thus the Commission’s comments, are not limited to economic impacts. In 2011, the Legislature specifically addressed the role of job growth by adding the following language to the Chapter 43.136 RCW intent section:

The legislature further finds that **tax preferences that are enacted for economic development purposes** must demonstrate growth in full-time family wage jobs with health and retirement benefits. Given that an opportunity cost exists with each economic choice, it is the intent of the legislature that the overall impact of economic development-focused tax preferences benefit the state's economy.  
(*Emphasis added*)

RCW 43.136.011. (SB 5044). The Legislature simultaneously added a new economic impact factor for JLARC to consider in its reviews. RCW 43.136.055(1)(j). This insertion was coupled with the addition of language clarifying that JLARC may exercise discretion in choosing when to consider any of the listed factors. RCW 43.136.055(1). The Legislature specifically called out

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those tax preferences enacted for economic development purposes for additional review while leaving intact the earlier language acknowledging that preferences address a variety of public interests. Accordingly, the Commission is not limited to asking questions related only to economic factors such as job creation but instead can ask about any factors that JLARC could have considered in conducting its review. Since the Legislature authorize JLARC to look at the impact of the preferences on the stability of communities, the Commission may inquire into the items listed in its proposed final question.

*Please be advised that the opinions expressed above are my own and do not constitute a formal opinion of the Attorney General's Office.*

SEH/dg