

# Memo

To: Commissioners

From: Wayne Barnett

Date: October 2, 2008

Re: Possible Amendments to Ethics Code  
Phase Two: Use of Position, Gifts, and Interest in City Contracts

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## Current Law

### **2. Improper Use Of Official Position.**

- a. Use his or her official position for a purpose that is, or would to a reasonable person appear to be primarily for the private benefit of the officer or employee, rather than primarily for the benefit of the City; or to achieve a private gain or an exemption from duty or responsibility for the officer or employee or any other person, except as permitted by Section 4.16.071;
- b. Use or permit the use of any person, funds, or property under his or her official control, direction, or custody, or of any City funds or City property, for a purpose which is, or to a reasonable person would appear to be, for other than a City purpose, except as permitted by Section 4.16.071; provided, that nothing shall prevent the private use of City property which is available on equal terms to the public generally (such as the use of library books or tennis courts), the use of City property in accordance with municipal policy for the conduct of official City business (such as the use of a City automobile), if in fact the property is used appropriately; or the use of City property for participation of the City or its officials in activities of associations of governments or governmental officials;
- c. Except in the course of official duties, assist any person in any City transaction where such City officer or employee's assistance is, or to a reasonable person would appear to be, enhanced by that officer or employee's position with the City; provided that this subsection 4.16.070 A1c shall not apply to any officer or employee appearing on his or her own behalf or representing himself or herself as to any matter in which he or she has a proprietary interest, if not otherwise prohibited by ordinance;
- d. Regardless of prior disclosure thereof, have a financial interest, direct or indirect, personally or through a member of his or her immediate family, in a business entity doing or seeking to do business with the City, and influence or attempt to influence the selection of, or the conduct of business with, such business entity by the City.

### **3. Accept Gifts or Loans.**

- a. Solicit or receive any retainer, gift, loan, entertainment, favor, or other thing of monetary value from any person or entity where the retainer, gift, loan, entertainment, favor, or other thing of monetary value has been solicited, or received or given or, to a reasonable person,

would appear to have been solicited, received or given with intent to give or obtain special consideration or influence as to any action by such officer or employee in his or her official capacity; provided, that nothing shall prohibit contributions which are solicited or received and reported in accordance with applicable law.

**5. Hold Financial or Beneficial Interest in City Transaction.**

- a. Regardless of prior disclosure thereof hold or acquire a beneficial interest, direct or indirect, personally or through a member of his or her immediate family, in any contract which, in whole or in part, is, or which may be, made by, through, or under the supervision of such officer or employee or which may be made for the benefit of his or her office, except as permitted by Section 4.16.071; or accept, directly or indirectly, any compensation, gratuity, or reward in connection with such contract from any other person or entity beneficially interested therein, in violation of Chapter 42.23 RCW;
- b. Regardless of prior disclosure thereof, be beneficially interested, directly or indirectly, in any contract or transaction which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract or transaction from any other person beneficially interested therein, except as permitted by Section 4.16.071. This subsection shall not apply to the furnishing of electrical, water, other utility services or other services by the City at the same rates and on the same terms as are available to the public generally.

**Issues and possible changes**

- 1. When a City employee tries unsuccessfully to use their City position for their private benefit, it's not as clear as it could be that the Code has been violated.
  - Add language to 2(a) and 2(b) making it express that an attempt to use one's position violates the law.
- 2. Section 2(a)'s structure is confusing. Is there a difference between "private benefit" and "private gain or an exemption from duty?" They're in different clauses, which suggests that there is. Why does the first clause call for balancing the interests of the employee and the City, while the second clause bars achieving a gain or an exemption for anyone, whether or not that gain is outweighed by a benefit to the City?
  - Eliminate the clause referring to private gain or exemption from duty. Both are captured by the phrase "private benefit." Add "other persons" to the first clause.
- 3. Section 2(c) uses the term "City transaction," a term which is not defined in the ordinance. State law contains the following definition: "'Transaction involving the state' means a proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other similar matter...." This is similar to the Ethics Code's definition of "matter."

- Replace “City transaction” with “matter,” so that City employees may not assist others with some “matters.”
4. Section 2(c) states that no City employee may “assist any person in any City transaction where such City officer or employee’s assistance is, or to a reasonable person would appear to be, enhanced by that officer or employee’s position with the City.” In 1990, the Commission relied on this provision to hold that an employee could not assist another in dealings with his or her own department, writing that “the work relationships and other departmental associations do not provide for an environment which would prevent a reasonable person from concluding that the assistance you were providing was enhanced by your employment with the Department.”
    - Replace the opaque language of 2(c) with the bright line test articulated in Advisory Opinion 1990-4. Add language clarifying that legislative department personnel and staff from the mayor’s office may not, except in the performance of official duties, assist any person in matters involving *any* department.
  5. By its terms, section 2(c) does not apply to “any officer or employee appearing on his or her own behalf or representing himself or herself as to any matter in which he or she has a proprietary interest.” I don’t see a difference between representing oneself and appearing on one’s own behalf. And I don’t think an officer or employee can have a proprietary interest in a “matter.” They can have a proprietary interest in a business that is involved in a “matter,” but not a proprietary interest in a matter.
    - Eliminate the clause that begins “or representing himself or herself…” Reword the first clause to permit officers and employees to appear on their own behalf and on behalf of businesses in which they are the sole owners.
  6. Translating state law into the City code yielded a version of section 5 that is difficult to understand. State law bars State officers from having an interest in contracts made for the benefit of their office. But extending the Ethics Code to reach City employees as well as City officers makes the bar on contracts for the benefit of one’s office difficult to apply. If a Parks Department groundskeeper has a financial interest in a concession contract awarded by the Parks Department, is that a “contract for the benefit of her office” that would violate section 5? If so, what about that contract is *per se* offensive? (Section 2 bars the employee from misusing her position for her private benefit.) I’ve struggled to articulate a workable application of what constitutes a City employee’s “office.”
    - Eliminate the bar on having an interest in a contract made for the benefit of one’s office, and replace it with a bar on having an interest in a contract made by a person in one’s chain of command. This isn’t a perfect fit, because there may still be contracts for the benefit of one’s office that would not be made by a

person in one's chain of command. (For example, if DoIT purchased computers for a City department from a vendor in which the department's director had an interest, that arrangement would arguably not violate section 5 as I've proposed it be rewritten.) I still believe my proposed revision is an improvement on the current version.

## **Executive Director's proposed changes**

### **2. Improper Use ~~Of~~ Official Position.**

a. Use or attempt to use his or her official position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of the officer or employee or any other person, rather than primarily for the benefit of the City; ~~or to achieve a private gain or an exemption from duty or responsibility for the officer or employee or any other person~~, except as permitted by Section 4.16.071;

b. Use or attempt to use, or permit the use of any ~~person, funds, or property under his or her official control, direction, or custody, or of any City funds or City~~ property, or personnel, for a purpose which is, or to a reasonable person would appear to be, for other than a City purpose, except as permitted by Section 4.16.071; provided, that nothing shall prevent the private use of City property which is available on equal terms to the public generally (such as the use of library books or tennis courts), the use of City property in accordance with municipal policy for the conduct of official City business (such as the use of a City automobile), if in fact the property is used appropriately; or the use of City property for participation of the City or its officials in activities of associations ~~of~~ that include other governments or governmental officials;

c. Except in the course of official duties, assist any person in any ~~City transaction~~ matter ~~where such City officer or employee's assistance is, or to a reasonable person would appear to be, enhanced by that officer or employee's position with the City~~ involving the officer or employee's department; provided that officers and employees working in the Mayor's office or the legislative department may not assist any person in any matter. ~~This subsection 4.16.070~~ The paragraph (c) shall not apply to any officer or employee appearing on his or her own behalf ~~or representing himself or herself as to~~ on any matter, ~~or on behalf of any business entity solely owned by the officer or employee in which he or she has a proprietary interest~~, if not otherwise prohibited by ordinance;

d. Influence or attempt to influence a City decision to contract with, or the conduct of City business with, a business entity in which the officer or employee has ~~Regardless of prior disclosure thereof, have~~ a financial interest, direct or indirect, personally or through a member of his or her immediate family, ~~in a business entity doing or seeking to do business with the City, and influence or attempt to influence the selection of, or the conduct of business with, such business entity by the City.~~

### **3. Accept Gifts or Loans.**

a. Solicit or receive any retainer, gift, loan, entertainment, favor, or other thing of monetary value from any person or entity where the retainer, gift, loan, entertainment, favor, or other thing of monetary value has been solicited, or received or given or, to a reasonable person, would appear to have been solicited, received or given with intent to give or obtain special consideration or influence as to any action by such officer or employee in his or her official

capacity; provided, that nothing shall prohibit campaign contributions which are solicited or received and reported in accordance with applicable law.

**5. Hold Financial or Beneficial Interest in City ~~Transaction~~ Contract.**

a. ~~Regardless of prior disclosure thereof~~ Hhold or acquire a financial or beneficial interest, direct or indirect, personally or through a member of his or her immediate family, in any contract which, in whole or in part, is, ~~or which may be,~~ made by, through, or under the supervision of such officer or employee ~~or which may be made for the benefit of his or her office,~~ or which is made by or through a person supervised, directly or indirectly, by the officer or employee, except as permitted by Section 4.16.071; or accept, directly or indirectly, any compensation, gratuity, or reward in connection with such contract from any other person or entity beneficially interested therein, ~~in violation of Chapter 42.23 RCW.;~~ This subsection shall not apply to the furnishing of electrical, water, other utility services or other services by the City at the same rates and on the same terms as are available to the public generally.

~~b. — Regardless of prior disclosure thereof, be beneficially interested, directly or indirectly, in any contract or transaction which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract or transaction from any other person beneficially interested therein, except as permitted by Section 4.16.071. This subsection shall not apply to the furnishing of electrical, water, other utility services or other services by the City at the same rates and on the same terms as are available to the public generally.~~