

October 8, 1998

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No. 98-07

Re: Request For Advisory Opinion No. 98-1A-0604-1, Use Of City Facilities at Skagit To Conduct Private Business In Seattle

Dear \*\*\*\*\*:

You ask if the Code of Ethics prohibits you from using City provided bunkhouse phones at the Skagit Dams to conduct a private business, during your off-hours, when you work for a week at a time at the Skagit Dam, and the public phone is outside near the public restrooms in the public waiting area for the tram that is used on the public tours of the dams.

The brief answer is no, so long as there is no cell phone service in the bunkhouse area or no access to a public phone inside a building near the bunkhouses. In that case, the bunkhouse phones may be used only on personal time, not City paid time and all long distance calling must be done on a private credit card, not City authorization code. The Code does prohibit the placement of employee's private business catalogues in City facilities. The Code also prohibits a City employee from having associates in her private business, from whose work she receives a gain, if the associates are: (a) City employees whom she supervises, or (b) persons whose work impacts her City work or must be evaluated by her, or (c) persons with whom she conducts City business.

## STATEMENT OF FACTS

\*\*\*\*\* is a Survey Party Chief for the Seattle Public Utility. Before the Seattle Public Utility was created, she worked for the Engineering Department. Her duties include working at the Skagit Dams several times each year, for a week at a time. The Skagit Dams are located outside of Newhalem, Washington, about 150 miles from Seattle. \*\*\*\*\* work at the Skagit is generally done in an eight hour shift. She is paid at the same rate at the Skagit that she earns in Seattle. The only difference is that when she works at the Skagit, she is paid one hour of overtime each day for the extra time spent outside of the regular shift, checking the work she has already done and preparing for the next day's work.

\*\*\*\*\* also owns a private business. Her business is a home-based franchising/marketing business in which she sells goods and services to her customers. She also recruits associates to sell those goods and services and she receives a commission from their sales. Her business involves making a lot of phone calls to set up appointments and to respond to customers, associates and potential customers and associates.

Her business also involves the use of catalogues. She distributes the catalogues to inform her potential customers and potential associates of the products and services available and of the benefits of being an associate. She would like to distribute the catalogues in the main office, cookhouse, bunkhouses, and restrooms at the Skagit.

When \*\*\*\*\* works at the Skagit, the City provides free housing for her at the bunkhouses located at Diablo Dam. The bunkhouses have phones for employees to use. She has checked with AirTouch Cellular and was told that cell phones cannot be used beyond the town of Concrete, which is about 40 miles away from the bunkhouses. The nearest phone is a public phone next to the restrooms under a shelter at the public tram waiting area. While this is not far from the bunkhouses, it is in the open, there are no sides on the shelter. During the winter months, it will be cold and windy. The nature of her business requires the use of books and papers when she is making the phone calls. There is no shelf or table at the public phone on which she could lay her books and papers and the windy location would make it very difficult to even use them. \*\*\*\*\* cannot use an answering service for the business, because she must make appointments with people and communicate with business associates in person or via voice mail. During the time that she works at Diablo, \*\*\*\*\* could, at her own expense, stay in a hotel or motel in Marblemount, which is 21 miles from Diablo, or at Concrete, which is approximately 40 miles from Diablo, or at another town or city further from the worksite. She is not required to stay at the Diablo site.

## ANALYSIS

### **1. A City Employee Who Is Working Away From Home, For An Entire Week, In An Area In Which Cell Phones Do Not Work And The Public Phones Are Not Convenient May Use City Bunkhouse Phones To Conduct A Private Business, With Certain Restrictions.**

The Code of Ethics prohibits City officers and employees from using City resources to conduct private business. SMC 4.16.070(2)(b) provides in relevant part that no current City officer or employee shall:

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.

The situation raised in this case is one of first impression. The Commission has never provided advice regarding the use of City facilities to an employee who is working away from home. In previous opinions, we have advised City employees that they may use City facilities for the necessities of daily living that are not accessible outside of working hours. *Op Sea Ethics & Elects Comm'n 11 (1994)*. Under that analysis, \*\*\*\*\* could use the Skagit bunkhouse phones to make doctor appointments, take care of child care, talk to her family, make auto repair appointments and other necessities of daily living, because all necessities of daily living would not be accessible to her outside of working hours or away from City facilities, while she is working at the Skagit.

We have always advised that there is no circumstance in which the City's facilities may be used to conduct a private business. For example, in *Op Sea Ethics & Elects Comm'n 37 (1992)*, we

advised an Assistant City Attorney who practices in Seattle Municipal Court that he may act as a judge pro-tem in King County District Court, provided he does not use City paid time, except vacation time, or City facilities to conduct the business of a judge pro tem. In Op Sea Ethics & Elects Comm'n 10 (1993), we advised the Director of the Department of Construction and Land Use Permits and Plans Division that he may privately contract with the City of Federal Way to act as a hearing examiner for building, mechanical and plumbing codes, so long as he does not use City of Seattle paid time, except vacation time, or City of Seattle facilities for his work. We clearly stated that he may not use his City of Seattle phones or mailing address to conduct Federal Way business. None of the cases in which we have said that City facilities may not be used to conduct private business involved a City employee working away from home, for an entire week, in an area in which cell phones do not work and the public phones are not convenient.

It is undisputed that \*\*\*\*\* may not use City paid time or City facilities to conduct her private business when she is working in Seattle. It is also undisputed that \*\*\*\*\* may not use City paid time to conduct her private business in the Skagit. The question is whether she may use the City's facilities, on her own personal time, using her own private long-distance calling card, to conduct her private business while she is working in the Skagit. We advise that she may, so long as: (1) there is no cell phone service or other comparable communications capability in the Skagit area, or (2) there is no access to public phones inside a building near the bunkhouses, and (3) she is required to spend more than two consecutive business days in the Skagit. All long distance calls must be made using the employee's personal credit card, not the City's long distance authorization code, and the use of the bunkhouse phones may not interfere with the conduct of City business or other employee's use of the phones, making it difficult for other employees to call home. Therefore, \*\*\*\*\* and any other employee who qualifies under these conditions, must obtain management approval for the use of bunkhouse phones.

We have addressed only the question of whether the proposed use of bunkhouse phones would violate the Code of Ethics. Management has a fiduciary duty to the taxpayers and to other City employees to ensure that the City's resources are used prudently. Therefore, \*\*\*\*\* must follow all City Light policies and procedures for the use of the bunkhouse phones and must obtain the permission of the facility managers to use the bunkhouse phones for this purpose, to ensure that the other employees are not unnecessarily inconvenienced or prevented from using the phones for the purpose for which they were provided.

## **2. A City Employee Who Has A Private Business May Not Distribute the Business Catalogues In City Facilities.**

In Op Sea Ethics & Elects Comm'n 39 (1992), we advised that a City employee who worked in the Municipal Building in downtown Seattle may place Avon catalogues in the public restrooms in the building, so long as the catalogues did not have her work phone number or address on them and so long as she did not use City paid time or City facilities to take or deliver orders. We now reverse that decision based on the following analysis.

The Code of Ethics prohibits City officers and employees from using their City positions to achieve a private gain for themselves or others. SMC 4.16.070(2)(a) provides that no current City officer or employee shall:

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.

The City does not permit private businesses to advertise on City property, unless they pay the City for the privilege, e.g., the Key Arena permits paid advertising in designated areas of the building. Therefore, a City employee who distributes on City property catalogues from which she will profit would be taking advantage of an opportunity that is not available to the public, thereby using her City position for private gain. We reverse our decision in Op Sea Ethics & Elects 39 (1992) and hold that City employees may not place in City facilities catalogues for goods or services from which they will profit.

### **3. A City Employee May Not Receive A Private Gain From The Outside Work Of Her Supervisees, Or Of Those Whose City Work Impacts Her City Duties Or Of Those With Whom She Conducts City Business.**

The Code of Ethics prohibits City officers and employees from having a private or financial interest in matters on which they must act. SMC 4.16.070(1)(b) provides that no current City officer or employee shall:

Have a financial or other private interest, direct or indirect, personally or through a member of his or her immediate family, in any matter upon which the officer or employee is required to act in the discharge of his or her official duties, and fail to disqualify himself or herself from acting or participating.

In the instant case, \*\*\*\*\* has a financial interest in the associates in her private business. She profits from their sales of goods and services. Therefore, she may not enlist as associates in her private business any of her supervisees, without violating this section. Since she must act on the performance of her supervisees, e.g., rely on their work for the next day's work, or evaluate their work performance, she would have a financial interest in matters on which she must act if they were also associates in her private business. The same is true for any person whose work for the City impacts her City work or whose work she must evaluate in her City position. Likewise, she may not enlist as an associate in her private business anyone with whom she conducts City business.

## **CONCLUSION**

City officers and employees may not use City paid time or City facilities to conduct private businesses. A City employee who works away from home at the Skagit Dams one week at a time, several times a year, in an area in which cell phones do not work and there is no indoor public phone , except at the City provided bunkhouses, may use the City's bunkhouse phones to conduct a private business so long as:

- (1) there is no cell phone service in the bunkhouse area,
- (2) there is no access to a public phone inside a building near the bunkhouses,

- (3) the employee does not conduct the private business on City paid time,
- (4) the employee uses a personal credit card for all long distance calling,
- (5) the employee does not monopolize the phone when other employees wish to use it,  
and
- (6) the employee obtains the appropriate management permission to use the phone for  
this purpose.

A City employee may not distribute on City property catalogues for her private business. This opinion reverses a previous Commission opinion, number 39, issued in 1992.

A City employee may not enlist as an associate in a private business from whose work she will profit any of the following: (1) supervisees, (2) persons whose work impacts her City duties or whose work she must evaluate, as a City employee, or (3) any person with whom she conducts City business.

The Commission's advisory opinion is based on the general facts as stated above. The Commission does not investigate the facts. Please be aware that modification of the facts, or knowledge of more specific facts or circumstances, might cause the Commission to reach a different conclusion. In addition, Commission advisory opinions are narrowly drawn to interpret the ordinances the Commission is authorized to administer. They do not address whether the proposed action is prudent, good public policy or effective management practice.

#### FOR THE SEATTLE ETHICS AND ELECTIONS COMMISSION

Carolyn M. Van Noy,  
Executive Director

This action was reviewed and approved by the Commission at its meeting of October 7, 1998. The Commission members voting to take this action were:

Daniel Ichinaga, Chair  
Catherine L. Walker, Vice Chair  
Timothy Burgess  
Sharon K. Gang  
John A. Loftus

Dissenting from this action was:  
Paul J. Dayton