

Memo

To: Commissioners

From: Wayne Barnett

Date: September 24, 2008

Re: Possible Amendments to Ethics Code
Phase One: Confidential Information and Post-employment Restrictions

Over the course of the next several months, I'd like the Commission to consider some amendments to the Ethics Code. The Code hasn't received a comprehensive review in fifteen years, and I think the Code deserves a fresh look.

I'm proposing that we start with SMC 4.16.070.4 and the post-employment restrictions, move on to discuss SMC 4.16.070.2, 3 and 5, and finish with SMC 4.16.070.1.

At the close of this process, I recommend that the Commission send out the draft changes to some stakeholders. I recommend that we ask these groups to provide the Commission with feedback within some set time frame.

After getting feedback from these outside groups, I recommend that the Commission consider that feedback over the course of one or two meetings before releasing a draft for public comment. (This assumes that the Commission shares my view that some changes should be made.) The Commission may want to hold a hearing to take public comment. At the close of this process, the Commission would be in a position to send draft amendments to City Council with the assurance that the Commission had engaged in a transparent process, and that public comment had been solicited and considered. The City Council would likely initiate their own public process, but changes to the Ethics Code should be rigorously reviewed.

Phase One

Current Law

SMC 4.16.070.4. Disclose Privileged Information.

- a. [No current City officer or employee shall] Disclose or use any privileged or proprietary information gained by reason of his or her official position for a purpose which is for other than a City purpose; provided, that nothing shall prohibit the disclosure or use of information which is a matter of public knowledge, or which is available to the public on request.

SMC 4.16.075. Prohibited conduct after leaving City.

- A.No former officer or employee shall disclose or use any privileged or proprietary information gained by reason of his/her City employment unless the information is a matter of public knowledge or is available to the public on request;
- B.No former officer or employee shall, during the period of one (1) year after leaving City Office or employment:
1. Assist any person in proceedings involving the agency of the City with which he/she was previously employed, or on a matter in which he or she was officially involved, participated or acted in the course of duty;
 2. Represent any person as an advocate in any matter in which the former officer or employee was officially involved while a City officer or employee;
 3. Participate as a competitor in any competitive selection process for a City contract in which he or she assisted the City in determining the project or work to be done or the process to be used.
- C.A City officer, who contracts with a former City officer or employee for expert or consultant services within one (1) year of the latter's leaving City office or employment, shall promptly inform the Administrator about the agreement.
- D.The prohibitions of Sections 4.16.075 B1 and 4.16.075 B2 shall not apply to former employees acting on behalf of a governmental agency unless such assistance or representation is adverse to the interest of the City.

Issues and recommended changes

1. I believe the bar on sharing “privileged and proprietary” information could be reworked to make it clearer what kinds of information officers and employees cannot share. I find the words “privileged and proprietary” difficult to graft on to the kinds of information that most City employees come into possession of regularly. For example, if a police officer knows of a planned raid on a business owned by her brother, is that information “privileged?” Probably not. “Proprietary?” Maybe, but the word “proprietary” is usually associated with ownership, and saying that the City “owns” that information requires a cognitive leap. A better word to describe this information is *confidential*.
 - Replace the phrase “privileged and proprietary” with the word “confidential” and define “confidential information” in SMC 4.16.030. The state’s Ethics in Public Service Act defines the phrase as follows: “‘Confidential information’ means (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law.”
2. Who decides whether information is “available to the public on request?” If a City employee discloses information to a permit applicant, is it a sufficient defense for the employee to claim “I’d have given the same information to anyone else who asked me for it?” An enforcement action would turn on the credibility of the respondent.
 - Define “confidential information” to make it clear that the information must be available to a person who files a public records request.

3. Barring former employees from “assisting any person in proceedings” involving their former agency can work a hardship for some former employees, especially those who work in fields heavily regulated at the local level, such as land use. Under the Code, “assist” means “to act, or offer or agree to act, in such a way as to help, aid, advise, furnish information to, or otherwise provide assistance to another person, believing that the action is of help, aid, advice, or assistance to the person and with intent so to assist such person.” This broad definition has the effect of barring a former DPD planner, for example, from working for one year after leaving the City *in any capacity* on a Seattle development that will need to be permitted.
 - Replace the bar on *assisting* others in proceedings with a bar on *appearing* before one’s former agency in proceedings. This remedy better fits the potential problem – former employees trying to use their relationships with current City employees to sway decisions in their clients’ favor. It leaves former employees free to employ their expertise in the private sector.

4. The Code bars former employees from assisting others with matters in which they were “officially involved, participated, or acted in the course of official duty,” and “representing any person as an advocate” in matters in which they were officially involved. It’s not clear why four different terms – involved, participated, acted and representing – are necessary, especially with the definition of “participate” adopted last year. (“Participate” means to consider, investigate, advise, recommend, approve, disapprove, decide, or take other similar action.”)
 - Delete the references to “official involvement” and “action in the course of official duty” from paragraph (B)(1). Both are captured by the term “participate.”
 - Delete the bar on former employees representing others as an advocate in matters in which they had participated. Since (B)(1) bars former employees from “assisting” others in matters in which they participated, and representation is a form of “assistance,” paragraph (B)(2) is redundant. (The broad bar on *assistance* is appropriate when the employee actually worked on the matter while a City employee, and has inside knowledge of the City’s consideration of the matter. The narrower bar on *appearance* would apply only to a former employee’s dealings with his or her former department on a matter in which the employee never participated.)

5. The Code exempts former employees who are acting “on behalf of” a government agency from (B)(1) and (B)(2). It’s not clear how the exemption applies to former employees who work for consultants or contractors who are working for a government agency.
 - Change the code to exempt “employees or agents” of government agencies from (B)(1) and (B)(2). There is a body of law that the Commission can draw on to

determine whether an individual is acting as an “agent” of a government agency, which makes the term more useful than “on behalf of.” In giving advice, I have looked to agency principles – for example, whether the government agency directs the work, and whether the contractor has a fiduciary duty to the government agency – to determine whether a former employee is working “on behalf of” a government agency.

Executive Director’s proposed changes

SMC 4.16.030. Definitions

O. “Appear,” for the purposes of SMC 4.16.075, means to communicate in any form, including, without limitation, personally, through another person, by letter, by electronic mail, or by telephone.

P. “Confidential Information” means (i) specific information, rather than generalized knowledge, that is not available to a person who files a public records request, and (ii) information made confidential by law.

SMC 4.16.070.4. Disclosing ~~privileged~~ confidential information.

a. Disclose or use any ~~privileged or proprietary~~ confidential information gained by reason of his or her official position for a non-City purpose ~~which is for other than a City purpose;~~ provided, that nothing shall prohibit the disclosure or use of information which is a matter of public knowledge, or which is available to the public on request.

SMC 4.16.075. Prohibited conduct after leaving City.

A.No former officer or employee shall disclose or use any ~~privileged or proprietary~~ confidential information gained by reason of his/ or her City employment ~~unless the information is a matter of public knowledge or is available to the public on request;~~

B.No former officer or employee shall, during the period of one (~~1~~) year after leaving City ~~Office~~ or employment:

1. Assist any person in ~~proceedings involving the agency of the City with which he/she was previously employed, or on a matter in which he or she was officially involved, participated or acted in the course of duty as a City officer or employee;~~
2. Represent any person as an advocate in any matter in which the former officer or employee was officially involved while a City officer or employee Appear on behalf of any person in proceedings involving the agency of the City with which he or she was previously employed;
3. Participate as a competitor in any competitive selection process for a City contract in which he or she assisted the City in determining the project or work to be done or the process to be used in selecting a contractor.

C.A City officer or employee, who contracts with a former City officer or employee for expert or consultant services within one (~~1~~) year of the latter's leaving City office or employment, shall promptly inform the ~~Administrator~~ Executive Director about the agreement.

D. The prohibitions of Sections 4.16.075.B.1 and 4.16.075.B.2 shall not apply to former employees acting ~~on behalf~~ as employees or agents of a governmental agency unless ~~such assistance or representation~~ that governmental agency's interest in the matter or proceeding is adverse to the interest of the City.