May 26, 2009

Sally J. Clark, Chair
Planning, Land Use, and Neighborhoods Committee
City Hall
Seattle, WA 98104

Dear Councilmember Clark:

Thank you for the opportunity to provide written responses to several questions posed by councilmembers regarding the Commission's proposal for amending the Ethics Code. My responses follow.

Question 1. The Commission has recommended extending jurisdiction to reach individuals serving as City contractors for more than 1,000 hours in any 12-month period. Please provide specific examples of circumstances that SEEC has witnessed for which such a provision is needed and explain the problem that the Commission is hoping to address. Is the Commission aware of any other jurisdictions that apply its ethics codes/standards to contractors? What volume of additional case-load does the Commission anticipate as a result of this expansion of jurisdiction? How many City contractors and individuals does the SEEC anticipate will be impacted by this amendment? What is the rationale for selecting 1,000 hours as the threshold?

The Commission selected 1,000 hours to limit this amendment's reach to contractors working essentially half-time for the City. While there is no good city-wide date on how many contractors work for the City, and how many hours they are working, the Commission expects that the number of contractors affected by this change will not be substantial. In the Commission's view, this is a pilot program to be reevaluated once the Commission has experience administering the Code vis-à-vis contractors.

I expect that the impact of this change on the Commission's caseload will be negligible. The Executive Director of the Los Angeles Ethics Commission communicated to me that the time spent on consultant-related matters was a "very small part" of that Commission's work. And my experience in Massachusetts, where public contractors are also subject to the Ethics Code, also leads me to believe that the change will not lead to a sizable increase in the Commission's caseload.

In the past five years, staff has received less than a half-dozen inquiries regarding City contractors. Since the Commission lacked jurisdiction we did not investigate, but here are brief summaries of the circumstances alleged in some of those inquiries:

- A large City department filled a senior management position on a contract basis for several months while it searched for an employee to fill the position. The contractor oversaw the department's contracts with his own consulting firm.

- A large City department had a contractor working on a major project. The contractor convinced the department to hire his wife and assign her to the project as well.

As you noted at the Committee's brown bag discussion on this bill earlier this month, in flush times the Department of Planning and Development retains contractors to review permit applications. And as the Commission's Chair noted, tax auditors retained by the City have significant discretion as they go about doing their work for the City. In the Commission's opinion, there should be consequences under the City's ethics code if a DPD contractor accepted tickets to a football game from a developer whose plans he or she was reviewing, or if a tax auditor reviewed the books at his or her sister's company.

Commissioner Ed Carr, who was a former Ethics Officer at Boeing and now oversees corporate ethics and compliance at Avanade, shared with the Commission that in the private sector contractors are routinely subjected to the Ethics Code of the company for which they are contracting. Public contractors are subject to the Ethics Code in every locality in the states of California[1] and Massachusetts.[2]

Question 2. The Commission has recommended extending the bar on former City employees helping people with matters on which they worked on while with City government from 1 year to 2 years. Please explain the Commission's rationale for this change. Has there been a problem with former employees working on matters with the City? Please describe specific examples. It has been noted that other jurisdictions have lifetime bans related to this provision. Please list the jurisdictions that the Commission is

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1 "'Public official' means every member, officer, employee *or consultant* of a state or local government agency. CA Government Code 82048." (Emphasis added)

2 "'Municipal employee', a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, *contract of hire or engagement*, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis…" Mass. Gen. L. c. 268A(1)(g).

aware of that have lifetime bans. Please list the jurisdictions that the Commission is aware of that do not have lifetime bans. How many jurisdictions did the Commission review prior to proposing this change to the code?

With some variations, the Ethics Codes in Washington State, New York City, Los Angeles, San Francisco, Philadelphia, Massachusetts, and the federal government all contain permanent bans on former public employees assisting others in matters in which they officially participated. The Model Ethics Ordinance available at City Ethics.org, a project that arose out of a 2000 meeting of the Council on Government Ethics Laws, also contains a permanent ban for matters in which a public employee participated. The cities of Chicago, Atlanta and San Diego all have one-year bars.

The Commission did not make this recommendation in response to any specific concern. Seattle was in the vanguard when it adopted an Ethics Code almost 40 years ago, and surveying the field it appeared that the City's post-employment restrictions placed Seattle's restrictions among the most relaxed of the jurisdictions surveyed.

To my recollection, Commission members were most influenced by the gap between City law and State law on the subject of post-employment restrictions. State law provides that "[n]o former state officer or state employee may at any time subsequent to his or her state employment assist another person, whether or not for compensation, in any transaction involving the state in which the former state officer or state employee at any time participated during state employment." RCW 42.52.080(5).

Question 3. Please explain why the Commission has proposed a mechanism to waive the bar on City employees from having dealings with his or her former employer for a year but not propose to allow for a mechanism for employees that leave City employment to be able to have dealings with his or her former City department? Please provide a rationale for why the ethics code would prohibit a private citizen/party with a compelling need for a person's services based on their expertise as a former employee of the City from having dealings with the City, but provide a mechanism to allow such dealings if the City has a compelling need for an employee to deal with their former employer? What is the rationale for not creating a similar waiver mechanism under the before mentioned condition?

In enacting a "reverse revolving door" law, which bars City employees from dealing with their former employers for a year, Seattle was decades ahead of its time. President Obama recently received glowing reviews for his decision to institute a reverse revolving door policy by

executive order at the federal level. In my reviews of other local and state jurisdictions, I have not run across a similar law on the books anywhere else.

But the lack of a mechanism to opt out of this restriction has had real-world impacts for the City. In one case, the restriction barred SPU from utilizing the services of a new employee who had been intimately involved with the Alaskan Way viaduct project while working for a consultant to the City. The best person to do the job was firewalled off from the project for a year.

The Ethics Code already contains a provision that makes it explicit that those working "on behalf of" the City or another government are not barred from assisting their new employer on projects they worked on while with the City. (The Commission has recommended clarifying this provision to make it clear that it applies to "employees or agents" of the City or another government, since the phrase "on behalf of" is difficult to interpret.)

The reality is, then, that there is no reason to create a waiver mechanism in the post-employment restrictions because individuals working as City agents, or as employees or agents of another government whose interests do not conflict with the City's, do not violate the Ethics Code when they assist on the same matters that they worked while with the City. Only when a former employee owes their duty of loyalty to someone other than the City are they forbidden from working on the same matters they worked on while with the City.

Question 4. One issue that has been raised with regard to the expansion of the definition for "personal financial interest" is the possibility that an individual may not have knowledge about the financial interests of some members of their family, such as a sister-in-law or parent of a spouse. If an employee is charged with participating in a matter where a family member has a financial interest (as defined in the proposed language), but is able to prove that they did not have knowledge of that financial interest, would the Commission still regard this fact pattern as a violation? For family members further removed from the employee, would a more reasonable standard be the requirement of actual knowledge of the financial interest of the family member in order for the interest to be a per se violation? Why or why not?

If an employee participated in a matter in which a family member had a financial interest but was able to establish that they lacked knowledge of that financial interest, there would be a violation. It would, however, be inadvertent. If the violation was inadvertent *and* minor, the Ethics Code *requires* that the complaint be dismissed. If the violation was inadvertent but *not* minor, the executive director could ask the Commission to administratively dismiss the complaint, or the executive director could charge the person with a violation of the law.

It is important to note that under the Code as it exists today, the executive director routinely advises City officers and employees that participating in matters in which, for example, a sister-in-law or a parent of a spouse had a financial interest would violate SMC 4.16.070.1.a, which bars employees from participating in matters in which their private dealings would appear to impair the performance of their official duties. So this change does not expand the scope of the Ethics Code at all.

Finally, knowledge requirements are generally found in criminal statutes, not civil ones. Requiring the executive director to establish knowledge as an element of a violation could make for longer and more invasive investigations, which would likely require staff to interview family members in an effort to establish what the officer or employee knew about the family member's employment. It could also force the Commission into a position where, if lack of knowledge was claimed, a finding of a violation would necessarily mean that the Commission concluded that the employee did not testify truthfully.

Conclusion

Thank you for this opportunity to respond to councilmembers' questions. If there are additional questions, I remain at the Committee's disposal.

Very truly yours,

/s/

Wayne Barnett
Executive Director

cc: Seattle Ethics and Elections Commission