

July 9, 1998

On July 9, 1998 the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion on its own motion:

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION ADVISORY
OPINION NO. 98A-1003**

ISSUE: The acquisition of technology by government entities has created new considerations for public employers relating to adopting guidelines for employees use of agency equipment for personal purposes. The premise that publicly owned automobiles are to be used only for official public business is virtually undisputed; however, that same premise has not been as clearly accepted or understood in relation to publicly owned resources such as computers, cellular telephones and even regular land line telephones in a public agency office. Managers and employees of public agencies have contacted the GSPC to request guidance concerning employees personal use of agency owned equipment.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed in this opinion:

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

QUESTION #1: Do Oregon Government Standards and Practices laws permit public officials to use resources owned by their public employer such as telephones, cellular telephones and computers for the personal benefit of the public officials?

OPINION: ORS 244.040(1)(a) specifically prohibits all public officials in the State of Oregon from using their official position to obtain financial benefit or avoid financial detriment if the opportunity to do so arises only because of the holding of the position. This provision applies equally to elected persons, compensated public employees and uncompensated persons who volunteer their time to a public entity.

This interpretation includes all publicly owned property or other resources of a government body such as photocopiers, fax machines and document scanners; however, because questions relating specifically to personal use of telephones, cellular telephones and computers have been made to the GSPC staff with increasing frequency, this opinion will address the personal use of each of those items:

(We note that public agencies' own adopted employment policies may be more specific and restrictive than ORS Chapter 244; however, agency policy may not permit what state law prohibits. If such policies apply, the public employee must comply with both state law and the employer policy.)

Telephones: The ability to make outgoing and receive incoming telephone calls is an essential element of a government agency's ability to provide service to the public. A public agency's telephones are intended to be used only for official business of the agency.

We believe, however, that there are occasions when public officials may use their employing agency's telephones for personal purposes without such usage being at odds with the law. It is normal practice by both public and private employers to permit employees to use business telephones to talk to family members, make medical appointments, schedule service technicians, confer with a child's school and take care of any of a variety of other matters which can only be accomplished during regular working hours. Most employers believe that it is less disruptive to permit employees to make such personal calls at their work stations than to

require an employee to take a break or leave from work to take care of personal matters.

Personal telephone calls made during working hours from public employers' telephones should, of course, be brief, infrequent and otherwise comply with any specific rules or policies of the agency. Personal long distance calls, even if the employee reimburses the public agency for the cost of such calls, may not be made on agency telephones. If it becomes necessary for a public official to make personal long distance calls while at work, such calls must be made with the employee's personal calling card or from a pay phone. (The reimbursement issue is discussed later in this opinion.)

Cellular phones: The statutory considerations relating to the use of cellular telephones are essentially the same as those which apply to regular telephones. That is, public agencies provide cellular phones to their employees specifically to facilitate the carrying out of official business. Public agencies' cellular phones are not for the convenience or personal use of employees.

The instances when public agency cellular phones may be used by employees for personal purposes are more limited when compared to those for the personal use of agency telephones cited above. This is because of the air time costs associated with cellular phone usage. We believe that an occasion when an employee's personal use of a public agency cellular phone would not violate the provisions of ORS 244.040(1)(a) would be the need to contact a spouse or child care giver to advise that the employee is going to be late getting home or picking up children for a reason directly related to official duties such as a meeting which ran later than expected or a last minute change of schedule. Another permitted personal use of a public agency cellular phone by an employee would be receiving an incoming call regarding a family emergency. As we stated previously in relation to telephones, such calls should be of brief duration and should occur infrequently, such as 2 to 3 times monthly. We do not believe that such limited use of an agency cellular phone by an employee would constitute personal gain within the meaning of ORS 244.004(1)(a). Accordingly, any requirement for an employee to reimburse the employing agency for such calls would be a matter of local policy.

If public employees desire to have the convenience of a cellular telephone while on duty to make the types of routine personal calls cited in the section relating to telephones above, the employees must acquire and pay for their own personal cellular service. This requirement is independent of whether or not public employees also possess a cellular phone assigned by their employing agency. Such a situation would require a public official to have two cellular phones - one

for business calls and another for personal calls.

Computers: Computers are now standard tools of the workplace in the public sector. Public agencies provide computers at employee work stations, some agencies provide laptop units which may be used virtually anywhere and some public agencies provide computers at employees homes to facilitate working at home or telecommuting. The result of computers being so commonplace in the public sector has been to create a need for guidelines regarding public officials using their agency s computer for personal purposes.

The statutory considerations are, again, essentially the same as for both telephones and cellular telephones cited above. Publicly owned equipment is intended to be used for the official business of the government entity. Thus, computers owned by public agencies may not generally be used by employees for personal purposes. Employees also must comply with any employer policies which may place additional restrictions on the use of computers.

There are some instances, however, in which we believe the personal use of publicly owned computers would violate neither the spirit nor the intent of ORS 244.040(1)(a). One example would be the occasional use of a public agency computer by a public official to type a social letter to a friend or family member on the employee s own time. We believe another use allowable under the law would be the preparation of application materials for a different position with the employing government agency. Still another example of what we believe to be personal use not prohibited by state law would be playing computer games during break periods. Such personal use by public officials may also serve to improve keyboard proficiency and familiarity with software components. We believe uses such as these to be allowed under the law because no or negligible financial gain would result. Again, public employers may impose more restrictive policies.

There are some instances in which the personal use of a government owned computer by a public official would result in significant financial gain or avoidance of financial detriment. Such instances would be clearly prohibited by the provisions of ORS 244.040(1)(a). One example would be a public official using an agency computer to maintain financial records or otherwise facilitate an outside business operated for the official s personal financial gain. Another example of prohibited personal use would be the preparation of papers for ongoing college courses over a long period of time, unless the course work was part of an agency related training program. Such usage is prohibited because it could result in the avoidance of a financial detriment for the public official. That is, if the official is able to continue using the agency computer for such purposes, the official avoids having to expend personal funds to buy a computer. Use of official position to avoid financial detriment is specifically prohibited by law.

Internet Access: Some public employers have also equipped publicly owned computers with access to the Internet in order to have access to information and to provide information to the public. Personal use of the Internet is subject to the same considerations as the use of the computer itself. If the public employee uses Internet access through a publicly owned computer in order to avoid the financial expense of subscribing to an Internet service at personal expense, it would be a violation of ORS 244.040(1)(a).

QUESTION #2: Do Oregon Government Standards and Practices laws permit public officials to make personal long distance telephone calls on agency phones or use agency cellular phones for personal purposes as long as the official reimburses the agency for any costs which are incurred for such calls?

OPINION: No. The Oregon Supreme Court, in Davidson v. Oregon Government Ethics Commission, 300 OR 414, 712 p2d 97 (1985), stated the broad policy of Oregon's ethics (government standards and practices) laws is to ensure ...that government employees do not gain personal financial advantage through their access to the assets and other attributes of government. In the case, the court held that a public official could not use official position to obtain financial gain for the public official where, through access to the official's employing agency's buying power, the public official personally purchased an automobile at a discounted price. The court emphasized that the term "use" in ORS 244.040(1)(a) includes availing oneself of a benefit not available to the general public.

Ordinarily, the rates government entities pay for telephone service and cellular telephone service are significantly less than what individuals pay for their own personal service. Thus, if a public official were to reimburse a public employer only the costs incurred by the entity for long distance calls or cellular telephone air time used for personal purposes, the official could still be obtaining a financial advantage available only because of the official position held. The rate difference between what is generally available to the public and the government rate would be a key factor in determining whether a violation of ORS 244.040(1)(a) occurred. If the public official made reimbursement at a higher rate generally available to the public, no personal gain would result and no violation of ORS Chapter 244 would occur. However, the public official may also benefit in other ways by having access to the government telephone services, even if there is little or no price difference. The public official could avoid having to arrange for personal telephone service, and qualifying through credit checks.

QUESTION #.3: Do Oregon Government Standards and Practices laws permit public officials to use agency resources such as discounted long distance telephone service and cellular service or make use of publicly owned computers if the public body establishes such use as part of an official salary and benefits package?

OPINION: Yes. Official salary is specifically excluded in the language of ORS 244.040(1)(a) as a prohibited use of public office for financial gain. We interpret official salary to include all components of a compensation package such as insurance, paid leave, retirement benefits and formally adopted policy providing access to and usage of agency resources for non-salaried officials. Thus, if a governing body of a public body were to officially adopt a policy which would enable public officials of that entity to obtain personal cellular telephone service at the same rate charged to the entity as part of official compensation, the employees would be able to take advantage of such a benefit without violating Government Standards and Practices law.

We caution, however, that public bodies insure that they comply with any requirements to report the value of such benefits as income to the federal and state governments.

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN.

Issued by Order of the Oregon Government Standards and Practices Commission at Salem, Oregon on the _____ day of _____, 1998.

Donald Reiling, Chairperson

Lynn Rosik
Assistant Attorney General

Date