

March 5, 2009

Randall Tosh  
City Attorney  
555 Liberty Street SE  
Salem, OR 97301

Dear Mr. Tosh,

This is in response to your correspondence dated November 4, 2008 regarding proposed policy regarding the use of electronic telecommunications devices by City employees and volunteers.

**OREGON GOVERNMENT ETHICS COMMISSION STAFF OPINION NO. 09S-001**

**STATED FACTS:** The City of Salem has written administrative policies regarding the use of electronic telecommunications devices (ETDs). The city is in the process of formally adopting a new policy regarding the use of electronic telecommunications devices when conducting city business. The policy affirms that city electronic telecommunication devices are for official business. This policy will affect all city elected and appointed officials, employees, volunteers and city agents who use city-owned or city-provided ETDs. The policy clearly states that the definition of “public official” applies to all city employees and volunteers.

The term “ETDs” includes all electronic telecommunication devices, including, but not limited to, telephones, wireless telephones, Blackberrys, iPhones, personal digital assistants, includes voice mail connected with the use of telephones and cell phones.

The City of Salem has one general policy that establishes the rules for use of city-owned and city-provided electronic telecommunications devices. The distinction between city-owned and city-provided is that an ETD is city-provided if the city pays the employee \$39.00 per month and the employee purchases his/her own device and is reimbursed by the city for use of the device on city business.

The City of Salem has three cell phone voice and data options for city employees. Each department head has the authority to select one or more of the options for city-owned or city-provided cell phone use. The options are as follows:

- Option 1- The city provides a single line wireless telephone.
- Option 2- The city provides a reimbursement for a personally owned wireless telephone used for conducting city business.
- Option 3- The city adds a line to an employee's personal wireless telephone.

NOTE: The Electronic Telecommunication Device usage policy is attached to this opinion as part of these stated facts.

**QUESTION:** Would city public officials, employees and volunteers, violate Oregon Government Ethics law if they use Electronic Telecommunications Devices in the manner prescribed in the city's policy?

**ANSWER:** Oregon Government Ethics Commission has applied the provisions in ORS 244.040(1) [previously ORS 244.040(1)(a)] to a public official who makes personal use of a government agencies resources, such as the electronic telecommunications devices that are addressed in the city's policy.

All of the city's employees and volunteers would meet the definition of a public official as provided in ORS 244.020(13) [previously ORS 244.020(15)]. All public officials must comply with the provisions in ORS Chapter 244. ORS 244.040(1) prohibits city employees and volunteers from using or attempting to use their official positions or offices to obtain financial gain or to avoid a personal financial cost if the opportunity for the financial benefit would not otherwise be available but for their holding of an official position or office with the city. This prohibition also extends to the use of an official position or office that would result in a financial benefit to a public official's relative or member of the household or any business with which they, a relative or member of their household is associated.

The Commission has applied ORS 244.040(1) to the personal use of electronic telecommunications devices since and before the adoption of Commission Advisory Opinion 98A-1003. A city employee or volunteer who complies with the city policy on the use of electronic telecommunications devices would also avoid violating ORS 244.4040(1) based on the following analysis:

- The policy restricts a city employee or volunteer from the personal use of the land line devices, other than that use that is brief and infrequent. This provision reflects the application of ORS 244.040(1) that was provided in Commission Advisory Opinion 98A-1003.
- The policy addresses the city's providing employees and volunteers with various wireless devices [telephones, Blackberrys, Iphones, personal digital assistants (PDA)] for the conduct of official business. The personal use is restricted to the

“brief and infrequent” standard and also requires the employee to reimburse the city for any inadvertent costs related to personal use. This policy provision would insure that the employee or volunteer does not avoid a personal cost through the use of city owned wireless devices. [Administrative Policy and Procedures, Section 4.2, Option 1]

- The policy addresses personally owned wireless devices [telephones, Blackberrys, Iphones, personal digital assistants (PDA)] which have been purchased with a monthly \$39.00 allowance paid by the city. The employee may also use these personal devices for official business. This policy provision would insure that the employee or volunteer does not avoid a personal cost because the monthly allowance is a taxable portion of the employee’s compensation and the device is personally owned by the employee or volunteer. [Administrative Policy and Procedures, Section 4.2, Option 2]
- The policy addresses personally owned wireless devices with the city adding and paying for a second line on the device with a separate number for the conduct of official business. The personal use is restricted to the same “brief and infrequent” standard and as the city pays for the costs related to the second line. This policy provision would insure that the employee or volunteer does not avoid a personal cost because the employee or volunteer bear the expense for the device and the primary service plan. [Administrative Policy and Procedures, Section 4.2, Option 3]

Each public official is responsible for compliance with the provisions of Oregon Government Ethics law. Some government agencies adopt policies that guide the agency's public officials in the decisions made on matters regulated by ORS Chapter 244. Those policies may be more restrictive than the law but they often provide clear guidance for public officials so as to avoid unintended violations. Any policy adopted by a government agency must not be less restrictive than the provisions in the law as that could cause the agency's employees to commit violations.

The City of Salem administrative policy and procedure regarding electronic telecommunications device usage would be in compliance with Oregon Government Ethics law.

The statutes cited in this opinion are provided as an addendum to this Commission Advisory Opinion.

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**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT ETHICS COMMISSION.**

Please contact this office again if you would like this opinion submitted to the Oregon Government Ethics Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

Ronald A. Bersin  
Executive Director

RAB/th 09S-001

## ADDENDUM

**RELEVANT STATUTES:** The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

**244.010 Policy.** (1) The Legislative Assembly declares that service as a public official is a public trust and that, as one safeguard for that trust, the people require all public officials to comply with the applicable provisions of this chapter.

**244.020(13) “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.

**244.020(14) “Relative”** means:

- (a) The spouse of the public official;
- (b) The domestic partner of the public official;
- (c) Any children of the public official or of the public official’s spouse;
- (d) Siblings, spouses of siblings or parents of the public official or of the public official’s spouse;
- (e) Any individual for whom the public official has a legal support obligation; or
- (f) Any individual for whom the public official provides benefits arising from the public official’s public employment or from whom the public official receives benefits arising from that individual’s employment.

**244.040 Prohibited use of official position or office; exceptions; other prohibited actions.** (1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official’s holding of the official position or office.

**244.040(2) Subsection (1) of this section does not apply to:**

- (a) Any part of an official compensation package as determined by the public body that the public official serves.
- (b) The receipt by a public official or a relative or member of the household of the public official of an honorarium or any other item allowed under ORS 244.042.
- (c) Reimbursement of expenses.
- (d) An unsolicited award for professional achievement.
- (e) Gifts that do not exceed the limits specified in ORS 244.025 received by a public official or a relative or member of the household of the public official from a source that could reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.
- (f) Gifts received by a public official or a relative or member of the household of the public official from a source that could not reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.
- (g) The receipt by a public official or a relative or member of the household of the public official of any item, regardless of value, that is expressly excluded from the definition of "gift" in ORS 244.020.
- (h) Contributions made to a legal expense trust fund established under ORS 244.209 for the benefit of the public official.