

Seattle Ethics and Elections Commission  
700 5th Ave, Suite 4010  
Seattle WA 98124

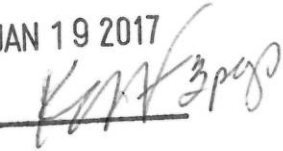
ORIGINAL

CITY OF SEATTLE  
ETHICS AND ELECTIONS COMMISSION

January 19, 2017

JAN 19 2017

Appeal of Dismissal Decision on Case 17-1-0103-1

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To the Seattle Ethics and Elections Commission:

I am hereby appealing the Commission's dismissal of the above complaint. Commissioner Barnett dismissed the complaint cursorily, without addressing the basis for the complaint or weighing it on the merits. The complaint was filed on January 3, 2017. On January 8, Commissioner Barnett sent me an e-mail reply from his home computer dismissing the complaint and giving a form letter-like explanation (see attached). Commissioner Barnett's reply did not include a case number or contact information and, as of today, has not been followed by a mailing. In his e-mail, Commissioner Barnett said this:

The Ethics Code deals primarily with four areas of concern: (1) conflicts of interest, (2) misuse of one's City position and City resources for private gain, (3) city officials' receipt of gifts intended to influence their official actions, and (4) the disclosure of confidential information. Your complaint does not fit into any of these four areas, and so no action is possible on our part. The e-mail that Councilmember Herbold shared was not confidential, it was a public record.

### **1. The basis of the complaint was improperly disregarded**

Commissioner Barnett's response caused me to wonder whether he had read through my complaint before dismissing it. The sole basis of the complaint was that Councilmember Lisa Herbold violated Item 2 cited above: "misuse of one's City' position and City resources for private gain." Item 4 (disclosure of confidential information) was not claimed. In the complaint, I argued that CM Herbold had used her City *position* for private gain. The claim was that CM Herbold had improperly shared a constituent e-mail for the benefit of her blogger friend, Eric C. Barnett, and that that action was made possible by CM Herbold's position in government. Had CM Herbold not been in her position, she would not have received the constituent's e-mail; accordingly, she would not have been able to pass it along for her friend's benefit. CM Herbold conferred an additional private benefit on Ms. Barnett by allowing her to circumvent the Public Disclosure Request process. Any private person who sought the same record would have been required to create an account online, submit a PDR, pay a fee (usually nominal) and wait in the

queue for the records to be returned. Ms. Barnett did not have to go through that process or to wait, owing to her relationship with CM Herbold.

## 2. The complaint on the merits

Did CM Herbold use her position for private gain? That is the question the Commission must now address. Setting aside the fact that CM Herbold circumvented the PDR process to help her friend, the question remains: Did giving a document to a blogger constitute an additional private gain for the blogger? –Yes. Not a gain that can be measured in dollars, but still a gain. Ms. Barnett is paid for her work as a writer, and she is particularly known for her style of “outing” people who criticize City policies. An argument could be made that gain must have a dollar figure attached to it, but for the Commission to accept that would be a mistake, because it would create a moral hazard in which city officials would be tempted to send whatever records they chose to whomever they chose, based on nothing more than a desire to help their friends or hurt their enemies.

The authors of the Code could have settled the question of whether gain must be financial by using “private financial gain” instead of “private gain.” The fact that they didn’t suggests that they understood that gain could take forms other than financial ones. To address this complaint fairly, and on the merits, the Commission must therefore take up the question of whether CM Herbold’s actions constituted a misuse of her position for private gain in that larger, non-financial sense of the term.

I look forward to your response.

Regards,



David Preston  
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Seattle WA 98106  
Ph: 206.768.8090  
e-mail: david@roominate.com

attachment

**David Preston**

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**From:** "Barnett, Wayne" <Wayne.Barnett@seattle.gov>  
**Date:** Sunday, January 08, 2017 8:38 PM  
**To:** "David Preston" <preston.david@comcast.net>  
**Cc:** "Flack, Kate" <Kate.Flack@seattle.gov>  
**Subject:** Your complaint

Dear Mr. Preston:

We have reviewed your January 3 complaint regarding Councilmember Herbold. For the following reasons, I am dismissing your complaint.

The Ethics Code deals primarily with four areas of concern: (1) conflicts of interest, (2) misuse of one's City position and City resources for private gain, (3) city officials' receipt of gifts intended to influence their official actions, and (4) the disclosure of confidential information.

Your complaint does not fit into any of these four areas, and so no action is possible on our part. The e-mail that Councilmember Herbold shared was not confidential, it was a public record.

If you wish, you may appeal this dismissal to the Commission. The appeal process is detailed in Rule 4 of the Commission's Administrative Rules, excerpted here:

- A. Upon the written request of a party aggrieved by the Executive Director's decision to dismiss a complaint, or to impose late-filing penalties under SMC 2.04.330, the action may be reviewed by the Commission.
- B. An appeal of a dismissal shall be served at the Commission's office no later than 21 days after the date of mailing the decision of which review is sought.
- C. An appeal of late-filing penalties shall be served at the Commission's office no later than 14 days after the date of mailing the decision of which review is sought.
- D. A request for review shall state the grounds therefor, and shall be no longer than twelve 8-1/2" x 11" double-spaced pages in length with margins of at least 1" on every side, and no more than 12 characters per inch.
- E. When an appeal is filed, the Executive Director's decision shall not be final until the Commission has acted on the appeal.
- F. The Commission shall act on the request at the next meeting at which it may be practicable by:
  - 1. deciding whether to review the Executive Director's decision; and
  - 2. if it decides to do so, either affirming, reversing, or amending the decision.
- G. In reviewing the Executive Director's decision, the Commission shall base its review on whether the Executive Director had a rational basis for the decision, and shall only reverse or amend a decision to the extent that a rational basis is lacking.

Best regards,  
 Wayne Barnett