MEMORANDUM OF LAW

DATE: April 17, 1986

TO: Deputy Mayor Ed Struiksma
FROM: City Attorney
SUBJECT: Distinguishing Between Private and Public Property

In a series of communications, you have asked our opinion on what articles of personal property a departing City employee may take when they leave. Specifically, you referred to Kathi Howard, former Chief of Protocol, leaving her former office with "boxes" containing "documents from other countries," "gifts from other cities" and a "large rolodex" with cards. Additionally, you attached a list of articles describing the above and adding a large Japanese doll, books and wall hangings.

By this memorandum, we will describe the legal test to ascertain the nature of the articles, references to validate items that are claimed as private property and penalties for removal of City property.

1. GIFTS OF PROPERTY

The essentials of a valid completed gift of personal property are 1) competency of the donor to contract, 2) a voluntary intent on the part of the donor to make a gift, 3) delivery, either actual or symbolical, 4) acceptance, actual or imputed, 5) complete divestment of all control by the donor and 6) lack of consideration for the gift. Bank of America v. Cottrell, 201 Cal.App.2d 361 (1962).

Hence whether a gift was delivered to an employee as an individual or in his capacity as a representative of the City depends upon the donor's intent at the time of delivery. The donor's intent at the time of delivery is a question of fact. The courts will examine the donor's acts and declarations both before and after his transfer of the gift on a case by case basis. See e.g., Bank of America v. Cottrell, supra at 363. Thus, through testimony of witnesses to the transfer and/or any written documents, the donor's intent is established and is determinative as to whether the gift was made to the City or to the employee as an individual.

State and City restrictions also yield evidence on whether a gift was intended to be private for the individual or public as a gift to the City. Council Policy 100-2 requires that all gifts to the City be reported to the Endowment Officer, who is required

to acknowledge the gift and depending on the nature of the gift seek City Council acceptance. Secondly, Council Policy 000-4 prohibits City employees from:

> . . . .
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> . . . (e) Receiving or accepting, directly or indirectly, any gift or favor from anyone doing business with The City of San Diego under circumstances from which it could reasonably be inferred that such was intended to influence him in his official employment or duties, or as a reward for official action.

Hence no article can be accepted as a gift simply for doing one's job.

Similarly each department has enacted an agency Conflict of Interest Code. The Chief of Protocol position is covered in the agency code for the Department of the Mayor and the Department of Executive Services whose code provides in part:

> SECTION 201 GIFTS, ENTERTAINMENT AND FAVORS
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> A. An employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of more than nominal monetary value, from a person with whom he or she has dealings in the course of his or her employment who:
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> 1. Has, or is seeking to obtain, contractual or other business or financial relations with The City of San Diego.
>
> 2. Conducts operations or activities that are regulated by The City of San Diego.
>
> 3. Has interests that may be substantially affected by the performance or nonperformance of City governmental duties.

Hence both Council Policy and the department Conflict of Interest Code strongly discourage the acceptance of gifts for benefit of the individual. We note that the position of "Chief of Protocol" is not listed as a designated employee for purposes of reporting receipt of gifts over fifty dollars ($50) on an annual basis.

California Government Code sections 87300 and 87302. If such a position were listed, then all individually received gifts amounting to over fifty dollars ($50) would be reflected on the individuals Statement of Economic Interest (S.E.I.).

In light of these strong pronouncements against accepting personal gifts, we believe that a gift received by the Chief of Protocol may be presumed to be given to the City of San Diego, unless the individual establishes that the donor designated the gift for the individual. Of course files, documents and accumulated references created by the labor of a City employee in the course of their job assignment is unquestionably the property of the City. California Government Code sections 6252(d) and (e). People v. Pearson, 111 Cal.App.2d 9, 18 (1952).

2. REMOVAL OF CITY PROPERTY

Once it is ascertained what articles are personal property and what articles are public property using the principles and presumptions referred to supra, the law is clear that upon termination the employee may remove only his/her personal property. Government Code section 6200 makes it a crime for an officer to remove any public record or book of which he/she has custody. Such an act is punishable by imprisonment for two, three or four years. A public record embraces any document or record which may properly be kept by an officer in connection with the discharge of official duties. People v. Pearson, supra at 18. Thus, a paper written by a public official in the performance of his/her duties or in recording their individual efforts or those under their command, is a public record.

3. CONCLUSION

As you can see from the above, the principal factors of the donor's intent and acceptance by the employee for themselves or on behalf of the City of San Diego are both questions of fact that must be determined to characterize the property as personal or public. Simple possession is inconclusive as to ownership. Sealite, Inc. v. Finster, 149 Cal.App.2d 621 (1957). With respect to the articles in boxes that were removed by the Chief of Protocol, we suggest that your office request a full inventory of the articles taken including how acquired, when acquired, from whom and purpose if it was a gift and when and how created if it is a work product. Once we have those facts, this office can pursue a recovery action for a return of all property that belongs to the City.

JOHN W. WITT, City Attorney
By
Ted Bromfield

Chief Deputy City Attorney

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