

Municipalities, use of city provided cell phones

Number: INFORMAL

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Mr. Paul R. Gougelman, III
Attorney for the Town of Melbourne Beach
1825 Riverview Drive
Melbourne, Florida 32901

Dear Mr. Gougelman:

You have asked whether the Town of Melbourne Beach may allow its employees and officials to use cell phones for personal calls when such use is incidental to a plan whereby the city pays a set fee for a specified number of minutes. It has been the experience of the city that each month excess minutes remain available for use, due in part to a free walkie-talkie feature that allows employees and officials to talk to each other without using minutes from the basic plan. In light of the "free" minutes that remain available for usage each month at no additional cost, the town is considering revising its cell phone usage policy to allow personal use of the phones. Any usage over the base amount would be charged to the individual employee or officer.

Your specific questions relate to emergency and casual use of the phones when such use does not incur any additional charges and whether the walkie-talkie feature may be used for personal calls and contacts.

Municipalities have been granted home rule powers to exercise any power for municipal purposes except when expressly prohibited by law.[1] This broad power, however, is tempered by the basic premise that municipal funds may be used only for a municipal purpose.[2] The determination of what constitutes a valid municipal purpose for the expenditure of public funds is a factual determination for the legislative and governing body involved, which in this case would be the Town of Melbourne Beach Commission.[3] Such a determination must be made by the town's commission and cannot be delegated to this office.[4] In making this determination, the commission must make appropriate legislative findings.

This office has previously commented on the personal use of such items as a patrol car and the uniform/equipment used by a law enforcement officer. In Attorney General Opinion 74-384, this office considered whether a sheriff could assign department vehicles to department personnel on a permanent basis for use both on and off duty. Citing the objectives in making such assignments, this office concluded that, if the vehicles were used to fulfill the objectives, their use would be a direct benefit to the public and personal use would be an incidental benefit.

The opinion further recognized that each situation in which a governmental body seeks to allow private use of public property must be evaluated separately and the justification for such use must be determined by the individual situation. Thus, this office has approved of an instance where the use of an official vehicle benefitted a public officer or employee incidentally, but the overall purpose served by the use was primarily a public one.[5]

The conclusion in Attorney General Opinion 74-384 was based upon the cited objectives of a plan to provide quicker response of off-duty personnel when called back to duty or to emergency situations, as well as requiring that radio contact be maintained at all times to ensure availability for emergency response and restricting use of the vehicle to within the jurisdictional limits of the law enforcement agency. The opinion stressed, however, that the mere statement that a public purpose is served by allowing the private use of the vehicles is insufficient; rather, it must be shown that the public purpose objectives are fulfilled.[6]

I trust these informal comments will assist the City of Melbourne Beach in its consideration of allowing the personal use of cell phones issued to city employees and officials.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/tgk

[1] See s. 166.021, Fla. Stat., and Art. VIII, s. 2(b), Fla. Const.

[2] See Opinions Attorney General Florida 83-6 (1983) and 72-198 (1972). See *also*, section 10, Art. VII, Florida Constitution (municipality prohibited from lending or using its taxing power or credit to aid private parties) and s. 166.021(1), Fla. Stat. (municipalities may exercise any power for municipal purposes, except when expressly prohibited by law).

[3] See, *e.g.*, *State v. Housing Finance Authority of Polk County*, 376 So. 2d 1158, 1160 (Fla. 1979).

[4] See, *e.g.*, Ops. Att'y Gen. Fla. 88-52 (1988), 86-87 (1986), 84-76 (1984), and 83-5 (1983) (legislative determination and findings as to the purpose and the benefits accruing to the county from the program could not be delegated to the Attorney General, nor could the Attorney General undertake to make such legislative findings on behalf of the county).

[5] See Op. Att'y Gen. Fla. 74-295 (1974).

[6] See *also*, Op. Att'y Gen. Fla. 90-61 (1990) where this office applied the analysis in AGO 74-384, concluding that off-duty use of sheriff's department uniforms, equipment and vehicles may be allowed.