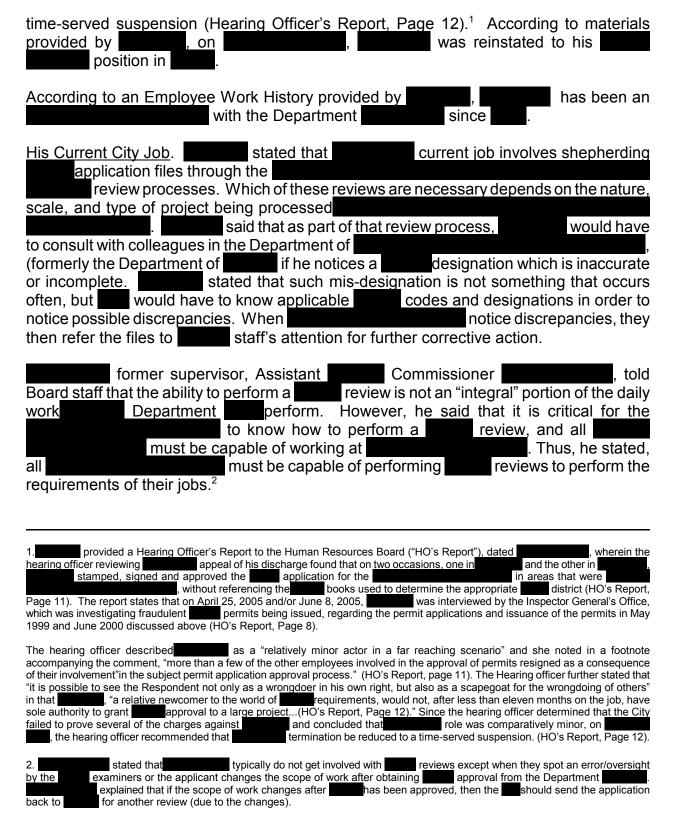
## **ADVISORY OPINION**

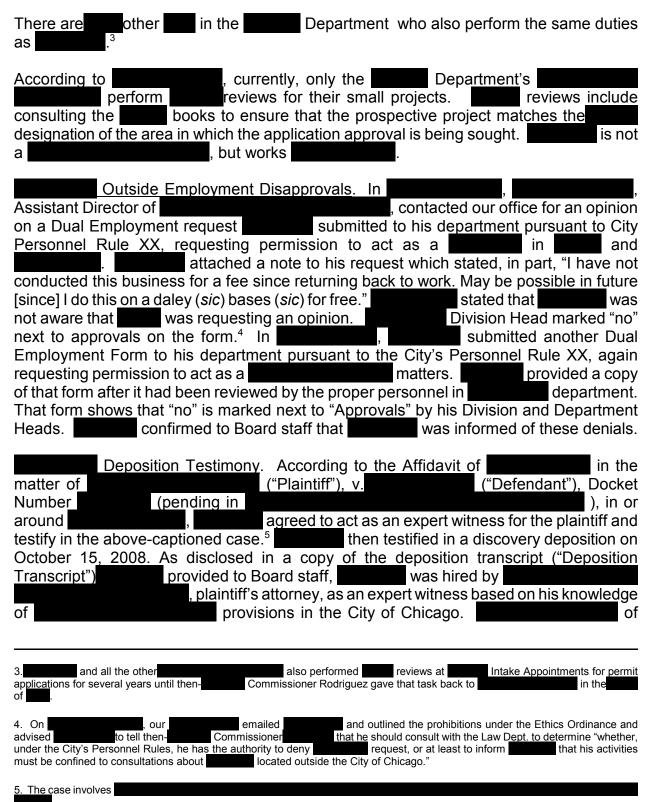
## **CONFIDENTIAL**

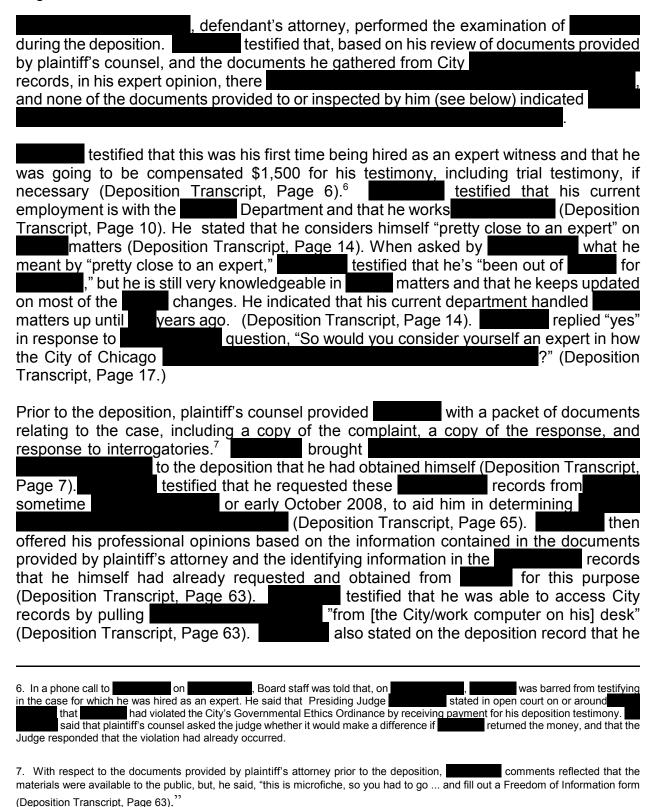
Case No. 09012.A, Money for Advice May 20, 2009
On March 10, 2009, , requested an advisory opinion addressin whether one of the employees under his supervision, violated the Ethics Ordinance by testifying as a paid witness in deposition. As explained in this opinion, the Board has determined that based on the facts presented and summarized in this opinion, did violate §2-156-020 of the Ordinance, entitled Fiduciary Duty, §2-156-050, entitled "Solicitation or Receipt of Money for Advice or Assistance and §2-156-060, entitled "City-Owned Property." The facts upon whice the Board's determination is based and a detailed analysis follow.
History. According to materials provided to Board staff, began City employment on as a in what was then called the Department of ("Department"). As a reviewed applications to determine the applicable fees, updated his "whenever changes were made to the application after reviewing his
In 2003, became a an was transferred to what was then called the Department of The responsibilities held remained the same as in his previous department.
A letter provided by shows that on was terminated from his position in because his Department concluded that he violated several paragraphs of Personnel Rule XVII namely, giving inappropriate approval for a project, approving application without referencing the books used to determine the appropriate district, and giving inaccurate and/or deliberated incomplete statements when interviewed by the Inspector General's office regarding the above approvals on

On \_\_\_\_\_, a hearing officer reviewing ap discharge recommended that his termination be reduced to a

appeal of his







Case No. 09012.A May 20, 2009 Page 5 checked Department records on his City computer to see if there were any previous and to ensure that the information provided by Plaintiff's attorney was accurate (Deposition Transcript, Page 64). LAW AND ANALYSIS: This situation presents issues under three sections of the Governmental Ethics Ordinance. 1. The first section of the Ordinance is Fiduciary Duty, §2-156-020, which states: Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City. The Board has held that a City employee or official violates his or her fiduciary duty City by using his or her City position to obtain a private benefit (See Case No. 92014.A). In 92014.A., the Board determined that it would be a violation of the Ordinance for an employee to use his direct access to departmental records for the purpose of acquiring clients for his private business transactions, thus bypassing the standard freedom of information procedure that persons without the advantage of his City position must use to testified in a deposition that he used the obtain similar information. Here, records that he had by virtue of his official City position to access to City directly retrieve City records, using his City computer, in order to prepare testimony as a paid expert witness in a case. bypassed the Freedom of Information form which any person without the advantage of his City position would have had to have used to obtain this information. The Board concludes that violated his fiduciary duty to the City by directly accessing records outside of the regular FOIA process for use in preparing for testimony as a paid expert witness. 2. The next section under which this situation presents an issue is City-Owned Property, §2-156-060, which states: No official or employee shall engage in or permit the unauthorized use of Cityowned property. City employees, such as violate this section if they engage in or permit the unauthorized use of City-owned property (See Case No. 98025.I.06). in a deposition that he used his City computer to access information he gathered in preparing the opinions he offered as a paid witness in a case, and he testified that he obtained records from another City Department in order to confirm the accuracy of the

documents he was provided by plaintiff's attorney in the case. As a City employee,

authorized. Thus, the Board concludes that engaged in the unauthorized use of

had twice sought, and been denied, approval to engage in such conduct (acting as

matters), and thus, this use of his City computer was clearly not

City-owned property when he used his City computer to access records to prepare his testimony as a paid expert witness in this case.

3. Finally, this situation presents an issue under Solicitation or Receipt of Money for Advice or Assistance, §2-156-050, which states:

No official or employee, or the spouse, domestic partner, or minor child of any of them, shall solicit or accept any money or other thing of value including, but not limited to, gifts, favors, services or promises of future employment, in return for advice or assistance on matters concerning the operation or business of the City; provided, however, that nothing in this section shall prevent an official or employee from accepting compensation for services wholly unrelated to the official's or employee's City duties and responsibilities and rendered as part of his or her non-City employment, occupation, or profession.

City employees, such as violate this section if they accept money or anything else of value in return for advice or assistance on matters concerning the operation or business of the City, unless it is for services wholly unrelated to their City duties and responsibilities and rendered as part of their non-City employment. (See Case Nos.)
02011.A; 98062.A; 91041.A;).
must have an ability to understand and handle stated that all must be available to work in a stated that all must be capable of performing full reviews, no matter their current duties respecting himself testified in his deposition that he considered himself "pretty close to an expert" on
matters. Both and and told Board staff that would become involved in greater depth in matters in cases where a sissue error or oversight was detected by the him/herself.
The factual record presented in this opinion is clear that: (i) current City position requires him to perform varying duties in the area of and exercising judgment on matters; (ii) performance of his performance of his testified at a deposition as to matters concerning City which is a component of his current City job; and (iv) Mr. Bivins stated that he was giving that testimony in return for compensation. Therefore, the Board concludes that deposition on for which he was compensated \$1,500, and which he gave on behalf of a litigant in the matter of
),
about City matters, was not "wholly unrelated" to his official responsibilities with the City, and thus he violated §2-156-050 of the City's Governmental Ethics Ordinance.

<b>DETERMINATION AND RECOMMENDATION:</b> Based on the Board's analysis of the facts presented in this opinion under the City's Governmental Ethics Ordinance, the Board determines that (i) violated §2-156-020 of the City's Governmental Ethics Ordinance by bypassing the regular FOIA procedures to access records to prepare his testimony as a paid expert witness in a case; (ii) violated §2-156-050 of the City's Governmental Ethics Ordinance by giving paid testimony as an expert in the matter of , on ; and (iii) violated §2-156-060 by using his City computer to access City records to testify as a paid witness in the above case. Accordingly, under §§ 2-156-410(a) and -380(e) of the City's Governmental Ethics Ordinance, the Board, having considered the nature of the determined violations, recommends to the Department of Buildings that it consider pursuing discharge of from City employment.
The Board's determinations do not necessarily dispose of all issues relevant to this situation, but are based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. Other City rules or policies or laws may also apply. If the facts stated are incorrect or incomplete, please notify us immediately, as any change may alter those determinations.
<b>RELIANCE:</b> This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.
Miguel A. Ruiz, Chair
cc:

<sup>8.</sup> Although the Board has no authority to interpret the City's Personnel Rules, the Board nonetheless recommends that the Department of pursue all available remedies for potential willful violations thereunder.