

May 15, 2008

SDEC Formal Advice Letter No. FA08-05

Robert P. Wadell
Wadell Engineering Corporation
1350 Bayshore Highway, Ste. 690
Burlingame, CA 94010-1838

Re: Request for Advice Regarding the “Technical Data or Analysis” Exemption in the City’s Lobbying Ordinance

Dear Mr. Wadell:

This advice letter responds to your e-mail to the City of San Diego Ethics Commission dated May 1, 2008. You seek advice from the Ethics Commission interpreting the provisions of the City’s Lobbying Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Specifically, you ask whether you have any registration obligations under the City’s Lobbying Ordinance in light of your communications with City Officials regarding a private development project at Brown Field.

QUESTION

Are you required to register with the City as a Lobbying Firm if your communications with City Officials on behalf of a private developer concerning a Brown Field project are limited to providing technical data or analysis regarding that project?

SHORT ANSWER

No. The City’s Lobbying Ordinance contains an exemption for communications that solely involve the provision of “technical data or analysis.” If your communications with City Officials are limited to technical statements based upon your expertise as an airport engineer, you will not be required to register as a Lobbying Firm with the City. Note, however, that if your paid communications with City Officials extend beyond the scope of the “technical data or analysis” exemption, and are not otherwise exempt under the Ordinance, you will be required to register with the City Clerk as a “Lobbying Firm.”

BACKGROUND

According to your May 1, 2008, e-mail, you have been retained by developer Richard Sax to serve on a team proposing to develop new aviation facilities at Brown Field. You stated that your role on the team is as an airport planning and engineering technical consultant to the developer,

and in that capacity you will provide assistance to the project as deemed necessary and appropriate by the developer and City staff. The developer was selected following a competitive bid process and has entered into negotiations with the City of San Diego to build facilities at Brown Field. You will provide technical analysis to ensure that the development is consistent with airport engineering standards and meets FAA requirements. In connection with these duties, you will prepare an update to the City's Airport Layout Plan to show the proposed facilities and to assist City staff when meeting with the FAA to approve the plan. You plan to have meetings with the City's Airport Director regarding this project.

You also advised us that your role on the developer's team does not involve negotiating with the City or urging the City's acceptance of any aspect of the developer's project, but that you will instead be discussing any technical merits or downsides with various individuals, including City staff. You stated that other individuals on the team will be responsible for promoting the project and negotiating the City contract.

Your e-mail also indicates that you have already registered with the City Clerk out of an abundance of caution. You are seeking advice regarding whether your past or anticipated future communications with City staff concerning the Brown Field project, as described above, requires your registration under the City's Lobbying Ordinance.

ANALYSIS

Under the City's Lobbying Ordinance, any individual who, on behalf of a client, has at least one paid lobbying contact with a City Official is required to register as a "Lobbying Firm" within ten calendar days of making that lobbying contact. SDMC § 27.4007. "Lobbying" is defined as a "direct communication with a City Official for the purpose of influencing a municipal decision on behalf of any other person." SDMC § 27.4002. The term "City Official" refers to the high-ranking officers and employees of the City whose titles are listed in the Ordinance.^{1,2} You have indicated that you will communicate with the City's Airport Director, an individual who is considered a "City Official" under the Ordinance. A communication with the Airport Director on behalf of your client regarding a pending municipal decision is potentially a lobbying contact that could trigger the registration requirement.

There are, however, a number of exemptions to the Lobbying Ordinance. The exemption most pertinent to your question states: "The following persons and activities are exempt from the requirements of this division: . . . (1) the provision of purely technical data or analysis to a City Official by an expert, so long as the expert does not otherwise engage in direct communication for the purpose of influencing a municipal decision." SDMC § 27.4004(1).

¹ Please refer to SDMC section 27.4002 for a full list of the titles held by those who are considered "City Officials" under the City's Lobbying Ordinance. In addition, the Ethics Commission maintains a list on its website, updated quarterly, containing the names of individual City employees who are "City Officials."

² Because the term "City Officials" does not include state or federal public officials, nothing in the Lobbying Ordinance regulates any communications you have with FAA officials.

According to the information you provided to us, you have expertise in the field of airport engineering and you were retained by the developer to use this expertise in connection with the Brown Field project. Thus, the “technical data or analysis” exemption appears to be applicable to the scope of your duties. Ultimately, however, the application of the exemption is fact-specific. You have not identified the exact words you used in prior communications with City Officials, and obviously you cannot state with any certainty the exact words you will use in future communications with such officials. Thus, we cannot say with any certainty that your communications with City Officials have, or will, fall entirely within the technical exemption.

The term “technical data or analysis” is not defined in the Lobbying Ordinance, but based on guidance provided by the Fair Political Practices Commission (*In re Ross*, FPPC Adv. Ltr. I-06-085), we have interpreted this term to be limited to communications that employ objective methodologies, principles, techniques, standards, or specialized knowledge within a particular scientific field, or in your case the field of airport engineering. We can say, therefore, that to the extent that your communications with City Officials fall within this limited scope, the technical exemption will apply. If your communications are so limited, you will have no obligation to register your firm as a “Lobbying Firm” under the City’s Lobbying Ordinance.

On the other hand, paid communications you have with City Officials that are outside the limited scope of an airport engineering analysis will not be subject to the exemption. Thus, if your discussions with a City Official concerning an engineering aspect of the project (e.g., adhering to FAA height requirements) evolve into a non-engineering conversation (e.g., showing how the project will create jobs or increase tourism), you will have stepped outside the scope of the exemption and would instead be “lobbying.” Such communications, unless exempt under another exception in the Lobbying Ordinance, will trigger the Ordinance’s registration requirement.

Although this letter focuses on the “technical data or analysis” exemption, there are a number of other exemptions that could be applicable to the Brown Field project. You indicated that bids for the project were made through the competitive bid process. Submitting bids, submitting responses to requests for proposals and requests for qualifications, and related oral interviews are all exempt activities under the Lobbying Ordinance. SDMC § 27.4001(c)(1)-(3). When the developer was selected at the conclusion of the bid process, the developer’s negotiations with the City concerning the terms of the contract or agreement also became exempt. SDMC § 27.4001(c)(4). Similarly, communications made in connection with administering an existing contract between the developer and the City will also be exempt. SDMC § 27.4001(c)(5). Moreover, communications made with respect to “ministerial decisions” (where no City Official is asked to exercise discretion) are exempt. SDMC § 27.4004(f). Communications made at, or documents submitted and made part of the record of, a public meeting subject to the Ralph M. Brown Act are exempt. SDMC § 27.4001(j). Finally, solely responding to questions from a City Official is exempt. SDMC § 27.4001(i). Any of these exemptions could be applicable to you in addition to the “technical data or analysis” exemption.

You stated that one of your duties for the developer will involve proposing updates to the City’s Airport Layout Plan. Such duties illustrate the potential application of one or more of the above-discussed exemptions. If your proposed updates to the Plan are of a technical nature, the

“technical data or analysis” exemption will apply. On the other hand, if you are asking City Officials to approve changes that are not of a technical nature, i.e., do not involve your use of objective methodologies, principles, techniques, standards, or specialized knowledge within the field of airport engineering, then the exemption will not apply. As indicated above, however, if you submit your proposed changes in a document that is made part of the record of a “Brown Act” meeting then your communication of those changes would be subject to the “public meeting” exemption.³ SDMC § 27.4004(j). In other words, even if the technical exemption does not apply to a particular communication, another exemption could be a basis for you not being required to register under the Lobbying Ordinance.

CONCLUSION

You will not be required to register yourself as a “Lobbying Firm” under the City’s Lobbying Ethics Ordinance if your communications with City Officials are limited to your provision of purely technical data or analysis and you do not otherwise engage in any communications for the purpose of influencing a municipal decision. To the extent that you have already registered as a Lobbying Firm, you may terminate that registration so long as your communications with City Officials fall within the scope of the technical exemption discussed herein, or are subject to another exemption contained in the Lobbying Ordinance. On the other hand, if you are having communications with City Officials that fall outside one of the enumerated exemptions to the Ordinance, you must maintain your registration and file quarterly statements disclosing information regarding those communications.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

Sincerely,

Alison Adema
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance

³ The “public meeting” exemption only applies to the version of the document that is made part of the record. It would not apply to preliminary drafts that you circulate to City Officials “behind the scenes.”