

October 5, 2006

SDEC Formal Advice Letter No. FA06-10

Advice Provided To:

Susan Cola

Kane, Ballmer & Berkman

515 S. Figueroa St., Ste. 18950

Los Angeles, CA 90071

Re: Request for Advice Regarding the Impact of the City's Post-Employment Restrictions on Your Legal Representation of the City's Redevelopment Agency and Centre City Development Corporation

Dear Ms.Cola:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated September 27, 2006. You are seeking advice from the Ethics Commission with regard to how your employment with a firm that represents the City's Redevelopment Agency and Centre City Development Corporation [CCDC] is affected by the post-employment lobbying provisions of the Ethics Ordinance.

QUESTION

As a former City Official subject to the Ethics Ordinance's post-employment lobbying restrictions, may your compensated activities lawfully include engaging in direct communications with current City Officials, including Redevelopment Agency and CCDC officials, for the purpose of influencing municipal decisions?

SHORT ANSWER

Although the City's Ethics Ordinance restricts the ability of former City Officials to lobby the City, it also contains exemptions for communications that are made on behalf of a public agency. Because any communications you have in connection with your representation of the Redevelopment Agency or CCDC would be on behalf of these public agencies, rather than on behalf of a private business, such communications would not violate the City's Ethics Ordinance.

BACKGROUND

From January of 1996 to May of 2006, you were employed by the City of San Diego as a Deputy City Attorney. During your service with the City, you were a compensated member of the City's unclassified staff and were obligated to file an annual Statement of Economic Interests. As such, you were a "City Official" subject to the City's Ethics Ordinance, and upon leaving City service you became subject to the Ethics Ordinance's one-year post-employment lobbying prohibitions. You are now employed by a law firm that has been retained by the Redevelopment Agency and CCDC. You anticipate that your work at this firm will involve providing these entities with legal advice and opinions as well as participating in negotiations and drafting agreements. Your question concerns whether or not the legal services you seek to render in connection with your new employment will be impacted by the City's post-employment prohibitions.

ANALYSIS

A. General Prohibitions

There is nothing in the Ethics Ordinance that prohibits a former City Official from accepting employment from any company or entity after leaving City service. What the Ethics Ordinance does prohibit, however, are certain types of "lobbying" activities on behalf of a former City Official's new employer. The term "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." San Diego Municipal Code [SDMC] § 27.3503. The SDMC defines "direct communication" to include talking to other persons by telephone or in person, and corresponding with other persons in writing, electronically, or by fax.

Your question implicates several types of direct communications with City Officials. First, the Redevelopment Agency and CCDC are both "City" entities, and therefore their members, officials, and employees are considered "City Officials."¹ Thus, any direct communications that you have with these individuals are potentially subject to the Ethics Ordinance's post-employment lobbying prohibitions. Second, your employment might require you to communicate with City Officials other than those directly connected to the Redevelopment Agency or CCDC. For example, you may have to communicate with someone in the Mayor's office with regard to a matter involving CCDC. As discussed below, however, both types of communications are permissible under the Ethics Ordinance because in both instances you are communicating on behalf of a public agency.

The "public agency" exemption is expressly set forth in the Ethics Ordinance provisions that restrict the lobbying activities of City Officials after they leave City employment. SDMC § 27.3550. In particular, section 27.3550's prohibitions include the following:

¹ Although the members of the City Council serve as the Board of Directors of the Redevelopment Agency, this entity is legally separate and distinct from the City of San Diego. CCDC is a non-profit corporation created by the City of San Diego, and has some degree of independence from the City. Despite these distinctions, however, the Ethics Ordinance considers these entities' members, officials, and employees to be "City Officials." SDMC § 27.3503.

- (a) It is unlawful for any former City Official who received compensation from the City to work on a particular project during his or her City service to engage in direct communication with the City, for compensation, with regard to any pending application for discretionary funding or discretionary entitlements before the City relating to that particular project *on behalf of any person other than a Public Agency* for a one year period immediately following termination of service with the City.

....

- (b) It is unlawful for any former City Official, for compensation, to knowingly counsel or assist *any person other than a Public Agency* in connection with an appearance or communication in which the former City Official is prohibited from engaging pursuant to subsection (a) for a one year period immediately following termination of service with the City.

....

- (d) It is unlawful for any former City Official to engage in direct communication for the purpose of lobbying the City if all of the following circumstances apply:
 - (1) the former City Official served as a City Official within the previous twelve months; and
 - (2) the former City Official received compensation from the City for his or her services as a City Official; and
 - (3) the former City Official is receiving compensation *from a private business* to engage in the direct communication with the City.

(emphasis added)

B. Project Ban

The provisions of subsections (a) and (b), above, pertain to work on a particular project, and are intended to prevent City Officials from working on a particular project on behalf of the City and then “switching sides” to work on the same project for the other side while the project is still pending before the City. In other words, this restriction generally prevents former officials from lobbying the City on any pending projects they worked on while a City employee. It is clear, however, that subsections (a) and (b) exempt communications made on behalf of a “public agency.” The Redevelopment Agency and CCDC are both “public agencies.” Therefore, under the circumstances described in your letter, any communications you make on behalf of the Redevelopment Agency and CCDC are exempt from the prohibitions contained in SDMC section 27.3550(a) and (b).

C. One Year "Cooling Off" Period

In addition to the "project ban," the Ethics Ordinance contains a much broader prohibition that generally precludes former City Officials from lobbying the City on any matter for a one year period following their separation from City service. This one year period is often referred to as the "cooling off period" or the "revolving door" provision. As indicated by SDMC section 27.3550(d), above, former City Officials who were compensated by the City during the course of their City employment may not, in general, engage in any "lobbying" activities with the City during a one year period.

As was the case with the project ban, however, the "cooling off" period also contains an exemption for public agencies. SDMC section 27.3005(d) applies only to lobbying activities paid for by a private business. The term "private business" is defined in the Ethics Ordinance to exclude any public agencies.² Thus, the one-year cooling off period does not apply to any communications you have with City Officials on behalf of the Redevelopment Agency or CCDC.

D. Blanket Exemption

Finally, SDMC section 27.3550(e) provides another exemption applicable to the prohibitions stemming from both the project ban and the cooling-off period. Subsection (e)(3) states that these prohibitions do not apply "to the activities of any former City Official who is an elected or appointed officer or employee of any Public Agency, or a consultant of any Public Agency, when that former City Official is solely representing that agency in his or her official capacity as an officer, employee, or consultant of the agency." In other words, the Ethics Ordinance's post-employment lobbying restrictions do not apply to your communications with any City Officials to the extent that such communications are made within the course and scope of your representation of the Redevelopment Agency and CCDC.

As indicated above, multiple provisions of the Ethics Ordinance provide that you may communicate with the City Officials who are your clients (i.e., the Redevelopment Agency and CCDC)³ and with any City Officials who are not your clients (e.g., the Mayor, department heads,

² Although it appears that you will receive a salary from a private law firm to perform the work you describe in your letter, it is clear that your communications will be performed on behalf of, and ultimately paid for by, the two public agencies you've identified. As is confirmed by the "blanket exemption" discussed in the next paragraph, as well as the overall legislative intent of section 27.350, communications made on behalf of a public agency are not subject to the post-employment lobbying restrictions.

³ The "public agency" exemption is traditionally used to allow former City Officials to represent other public entities, such as the County of San Diego, City of Oceanside, etc. on matters before the City. To a large degree, however, your question contemplates a more internal type of communication, i.e. working for the City and communicating with the City. The post-employment restrictions were intended to limit the ability of former City Officials to use their influence to benefit private entities, rather than to prevent a former City Official from communicating with his or her own client, particularly when the City itself is the client. Thus, it is doubtful that you would be precluded from communicating with the Redevelopment Agency or CCDC (your clients) even without the exemptions identified herein. Instead, your relationship with these entities is more akin to coming back to work for the City, albeit in a somewhat indirect manner. In any event, because the exemptions clearly apply in your situation, there is no doubt that the contemplated actions do not violate the letter or spirit of the Ethics Ordinance.

City Attorney staff, etc.) on any matter without violating any of the City's post-employment lobbying provisions, so long as those communications are made on behalf of a public agency. Because your role as counsel for the Redevelopment Agency and your role as counsel for CCDC are entirely related to rendering services on behalf of public agencies, it is clear that all of the above-mentioned exemptions apply.

CONCLUSION

The Ethics Ordinance prohibits certain types of post-employment lobbying, but expressly allows former City Officials to engage in lobbying-type activities that are performed on behalf of a public agency. Providing legal services to the Redevelopment Agency and CCDC fall within this exemption, and accordingly, you may lawfully provide such services even if they involve having direct communications with City Officials for the purpose of influencing municipal decisions during your one-year post-employment period.

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.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Cristie McGuire
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance