

[NOTE: In 2014, the California Fair Political Practices Commission amended Regulation 18706 to state that an outcome is “reasonably foreseeable” if it is a “realistic possibility.” An outcome need not be “substantially likely” to be considered “reasonably foreseeable.”]

October 29, 2008

SDEC Formal Advice Letter No. FA08-07

Jeff W. Graham
Centre City Development Corporation
401 B Street, Suite 400
San Diego, California 92101

Re: Request for Advice Regarding Disqualification from Municipal Decision Based on Prior Employment

Dear Mr. Graham:

This advice letter responds to your e-mail to the City of San Diego Ethics Commission dated October 21, 2008. You are an Assistant Vice President with the Centre City Development Corporation [CCDC] and are seeking advice from the Ethics Commission interpreting the provisions of the City’s Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Specifically, you ask whether your past employment with Gafcon, Inc. [Gafcon] now disqualifies you from participating in a particular municipal decision involving that entity.

QUESTIONS

1. Does your past employment with Gafcon disqualify you from participating on a selection panel for the hiring of a financial peer review consultant when two of the firms seeking the consulting contract would use Gafcon as a subconsultant?
2. If the answer to question number 1 is no, are you required to make any disclosures regarding your past employment with Gafcon?
3. Does a past rental agreement between CCDC’s former President/CEO and a current employee of Gafcon create any disqualification concerns?

SHORT ANSWERS

1. Because Gafcon has not been the source of income to you over the past twelve months, your past employment with this entity does not disqualify you from participating on a selection panel for the hiring of a financial peer review consultant even if two of the firms involved would use Gafcon as a subconsultant.

2. You are not required to make any disclosures regarding your past employment with Gafcon in connection with your service on the selection panel.
3. A rental agreement between CCDC's former President/CEO and a current employee of Gafcon does not create any disqualification concerns for you.

BACKGROUND

According to your October 21, 2008, e-mail, you were previously employed by Gafcon, a downtown San Diego-based development consulting firm. You held the position of Senior Manager, Real Estate Economics. You left Gafcon on May 31, 2007, and began employment with CCDC on June 4, 2007. You received your final compensation from Gafcon on May 31, 2007, and have not earned or received any additional compensation from Gafcon since leaving the firm. In November of 2007, you rolled over your 401(k) retirement savings balance to CCDC's 403(b) savings plan. The funds rolled over were those contributed by Gafcon to the plan and vested prior to your departure on May 31, 2007. You not currently have, nor have you ever had, any ownership interest in Gafcon. In addition, you do not have any type of continuing relationship with, or financial interest in, the firm.

As an employee of CCDC, you anticipate participating on a selection panel for the hiring of a financial peer review consultant on the Civic Center Complex project, for which you have been the project manager since June of 2007. Two of the firms responding to the peer review Request for Proposals [RFP] have included Gafcon as a subconsultant to perform construction cost evaluation services. The first meeting of the selection panel is scheduled for November 4, 2008.

On a somewhat unrelated matter, you indicated in your October 21, 2008, e-mail that Nancy Graham (no relation to you), the former President/CEO of CCDC, rented an apartment from Jack Miller during her first two years with CCDC. Jack Miller is an employee of Gafcon. Because Gafcon is listed as a subconsultant in two proposals CCDC received in response to the Civic Center Complex financial peer review consultant RFP, you asked whether the past relationship between Ms. Graham and Mr. Miller currently constitutes any type of conflict of interest under the City's ethics laws.

ANALYSIS

A. Basic Prohibitions

As an Assistant Vice President for CCDC who is required to file an annual Statement of Economic Interests, you are a "City Official" for purposes of the City's Ethics Ordinance. SDMC § 27.3503. The Ethics Ordinance prohibits you, as a City Official, from knowingly influencing a "municipal decision" if it is reasonably foreseeable that the municipal decision will have a material financial effect on any of your economic interests. SDMC § 27.3561. Thus, if Gafcon is one of your economic interests, you may not lawfully participate in decisions that are substantially likely to have a material financial interest on Gafcon. Based on the information you

have provided, however, there is no basis for concluding that Gafcon is one of your economic interests, notwithstanding your prior employment with this entity.

The Ethics Ordinance defines “economic interests” as follows:

- (1) any business entity in which the City Official or a member of the City Official’s immediate family has invested \$2,000 or more;
- (2) any business entity for which the City Official or a member of the City Official’s immediate family is a director, officer, partner, trustee, employee, or hold any position of management;
- (3) any real property which the City Official or a member of the City Official’s immediate family has invested \$2,000 or more;
- (4) any person from whom a City Official or a member of the City Official’s immediate family has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the municipal decision; and
- (5) any person from whom a City Official or a member of the City Official’s immediate family has received gifts which total \$320 or more within twelve months prior to the municipal decision.¹
- (6) the personal expenses, income, assets, or liabilities of a City Official or a member of the City Official’s immediate family.

SDMC § 27.3561(b). These provisions are based on the state law contained in the Political Reform Act (Cal. Gov’t Code §§ 81000-91014).

You stated in your October 21, 2008, email that you have no investment interest in Gafcon; you hold no position of management in Gafcon; and you are no longer an employee of Gafcon. Although you were an employee of Gafcon prior to June of 2007, the income you earned in connection with that employment was received well before the twelve month period set forth in SDMC section 27.3561(b)(4). Moreover, you stated that Gafcon has not provided you with any economic consideration whatsoever since May 31, 2007. Thus, Gafcon is not a source of \$500 or more in income to you within the past twelve months. Based on the facts before us, therefore, Gafcon does not fit within any of the six economic interests listed in section 27.3561(b), and is not one of your economic interests for purposes of disqualification. In other words, you may lawfully serve on a selection panel tasked with hiring a financial peer review consultant even if two of the firms responding to the RFP have identified Gafcon as a subconsultant.

¹ The \$320 gift limits at the time this section went into effect have been raised to \$390, and will increase again to \$420 on January 1, 2009.

B. Disclosure Rules

The City's Ethics Ordinance requires City Officials to disclose on their Statements of Economic Interest [SEI] the reportable income they earned during an applicable reporting period. Presumably, you reported your Gafcon salary when you filed an assuming office SEI. At this point in time, however, you are under no legal obligation to report income from Gafcon on a future SEI or in connection with serving on the selection panel. Because more than twelve months have elapsed since your receipt of income from Gafcon, there is nothing in the Ethics Ordinance that requires you to inform the individuals involved in the selection process of your past employment relationship with Gafcon. You may certainly choose to disclose that relationship for other reasons, but you are under no legal requirement to do so.

C. Prior Rental Relationship

As indicated above, your October 21, 2008, e-mail also seeks conflict of interest advice with regard to the rental relationship between CCDC's former President/CEO and a current employee of Gafcon. When providing advice to a City Official, the Ethics Commission's assistance extends only to the contemplated actions of the individual seeking advice. Thus, we can advise you only with regard to whether or not your own actions are permissible under the Ethics Ordinance; we cannot advise you with regard to anyone else's actions. Moreover, the City's conflict of interest laws generally apply only to the actions of individual City Officials, not the actions of an entity such as CCDC². In other words, under SDMC section 27.3561, it is an individual, not an entity like CCDC, who may have a disqualifying financial interest in a municipal decision.

None of the facts you have provided us with regard to the rental matter involve you. On that basis, it is clear that you are not precluded from participating in the Civic Center Complex financial peer review consultant RFP on the basis of a past rental relationship between Ms. Graham and Mr. Miller. We cannot provide any additional assistance on this issue other than to refer you to the SDMC section 273561(b) economic interests listed above and point out that none of those interests includes a person or entity who has received money from a City Official.

CONCLUSION

Based on the facts you've provided, Gafcon is not one of your economic interests under the City's Ethics Ordinance, and your prior employment relationship with Gafcon does not disqualify you from participating in municipal decisions that may have an economic impact on Gafcon. Accordingly, you may lawfully participate on the selection panel for the hiring of a financial peer review consultant notwithstanding any likelihood that Gafcon may be financially impacted by the decision to hire a particular consultant.

² There is an exception to the general rule: a governmental body may be precluded from entering a contract when one of its members has a financial interest in that contract. SDMC § 27.3560(b). In the matter before us, however, there are no facts before us suggesting that a member of the CCDC Board of Directors has a financial relationship with a Gafcon employee.

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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