

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: February 11, 2002

TO: The Council of the City of San Diego

FROM: Charles B. Walker, Executive Director, City of San Diego Ethics Commission

SUBJECT: City of San Diego Ethics Ordinance

Background

On June 5, 2001 the City Council adopted Ordinance Number O-18945 establishing an Ethics Commission. The stated purpose of the Ethics Commission is to “monitor, administer, and enforce the City’s governmental ethics laws, propose new governmental ethics law reforms, conduct investigations, refer violations to appropriate enforcement agencies, audit disclosure statements, and advise and educate City officials and the public about governmental ethics laws.” Upon establishment of the Ethics Commission, Mayor Murphy solicited nominations from Council Members and the City Attorney for appointments to the Commission. The appointment of the seven inaugural members of the Commission was confirmed by the City Council on August 6, 2001.

The Ethics Commission convened for its first public meeting on August 22, 2001. The Commission immediately established several ad hoc subcommittees: a Personnel Subcommittee to recruit and hire an Executive Director, a Subpoena Subcommittee to propose a ballot measure giving the Ethics Commission the ability to issue subpoenas, and a Complaint and Investigation Procedures Subcommittee charged with responsibility for drafting an ordinance for City Council consideration. Lastly, upon advice from the City Attorney, the Commission has established an ad hoc subcommittee to create a local ordinance to address the substantive ethical requirements contained in the Political Reform Act and other state laws related to conflicts of interest and the conduct of public officials.

Charles Walker, the Executive Director of the Ethics Commission, was hired by the Commission and his selection confirmed by action of the City Council on November 19, 2001. A ballot measure granting subpoena power to the Commission has been proposed and was adopted by the City Council on November 5, 2001, for inclusion on the ballot of March 2002. The Complaint and Investigation Procedure ordinance was adopted by the City Council on February 11, 2001.

The City of San Diego Ethics Ordinance was reviewed by the Rules Committee at three workshops and unanimously approved for referral to the full City Council on February 6, 2002.

Major Elements of the Draft Ordinance

Disclosure of Economic Interests

The Political Reform Act of 1974 (Gov. Code sections 81000-91014) requires many state and local public officials and employees to disclose certain personal financial holdings. The PRA, which has been amended frequently, began as a ballot initiative approved by over 70 percent of California voters in the wake of the Watergate political scandals.

One of the PRA's stated purposes declares:

Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided.

Cal. Gov't. Code section 81002(c).

Employees and officeholders at virtually all state and local agencies, as well as candidates for public office, use the Fair Political Practices Commission's (FPPC) form 700 to file their statements of economic interests. The statements are sometimes informally referred to as "SEIs," "700s" or "conflict-of-interest statements." In the City of San Diego, these forms are not filed directly with the FPPC. Rather, they are filed with the City Clerk who has been designated as the filing officer for the City. Filers must sign the form 700 under penalty of perjury. Once filed, the form is a public document and must be made available to the public on request.

The forms alert public officials about their own economic interests and potential areas of conflict in relation to their duties, and also provide information to members of the public who may monitor official actions for any conflicts.

Section 27.3510 of the proposed Ethics Ordinance mirrors the basic disclosure requirements of the PRA as described above. However, Section 27.3510(d) contains an additional requirement above and beyond the minimum set forth in state law by requiring that "High Level Filers" (a defined term in the ordinance which includes officials and a small group of top level City Officials) elected to office by the electors of the City (this includes the Mayor, Council members and City Attorney) are required to semi-annually disclose any reportable gifts received between

January 1 through June 30. This additional disclosure requirement will further the goals inherent

in the PRA to alert City Officials about potential areas of conflict and to provide pertinent information to the public.

Restrictions on Receipt of Benefits

An effort was made in drafting the regulations to use plain language and to simplify the complex laws and regulations of the PRA pertaining to the acceptance of gifts, loans, honoraria, and travel expenses. The proposed language regulating the acceptance of such benefits is purposefully modeled after the state law requirements contained in the PRA and California Code of Regulations. The City is not permitted to regulate in a manner that is less restrictive than the PRA. For example, the annual \$320 gift limitation established by state law is matched by the Ethics Ordinance's \$320 gift limitation. In general, exceptions allowed under state law are also allowed under the Ethics Ordinance.

Revolving Door Restrictions on Former City Officials

It is common practice for government ethics codes to contain restrictions on the lobbying activities of former City Officials. These type of restrictions are in place at both the state and federal level. In the private sector, non-competition employment agreements are illegal in California if the agreement serves to preclude employment in a certain line of work. Cal. Bus. and Prof. Code § 16600. A company is, however, permitted to protect their trade secrets; agreements precluding former employees from using confidential information has been upheld by the courts. *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App.4th 853, 861 (1994).

The revolving door restrictions proposed in the Ethics Ordinance are patterned after existing regulations contained in the PRA and applicable to former state officials. The proposed restrictions would not serve to preclude any former City Official from obtaining future employment in the private sector. Rather, the effect is to restrict the lobbying activities of those former City Officials. The public policy reasons for placing limitations on the lobbying activity of former City Officials for compensation on behalf of private parties are threefold.

1. Restricting such activity will have the effect of encouraging individuals to seek employment with the City for the right reason: to engage in public service, as opposed to being primarily motivated to join the City for the purpose of securing a private sector placement; and,
2. The restrictions on future lobbying promote retention of qualified City employees who will be less tempted to leave public service to take advantage of an economic

opportunity in the private sector which was directly derived from contacts with a private business while working for the City; and,

3. When former City Officials leave the City and then quickly turn around to represent a party seeking to contract or do business with the City, the potential is ripe for the public to perceive that favoritism is occurring or that the playing field is not level for those seeking to do business with the City.

Section 27.3550 contains two basic rules. First, former City Officials who were employed by the City are forever precluded from lobbying the City on behalf of a private client in connection with any project they worked on while employed as a City Official. This prohibition applies only if the specific project is still pending before the City. Second, the regulations establish a one year waiting period that must expire before a former City Official may lobby the City or otherwise represent a private client on any matter before the City. There is a grandfather clause built into these regulations; these provisions will only be applicable to City Officials terminating service prospectively. The one year waiting period would not preclude any of the following communications between the former City Official and the City:

1. a former *City Official* making or providing a statement, based on the former *City Official's* own special knowledge in the particular area that is the subject of the statement, provided that no *compensation* is thereby received other than that regularly provided for by law or regulation for witnesses;
2. a former *City Official* representing himself or herself, or any member of his or her *immediate family*, in their individual capacities, in connection with any matter pending before the *City*;
3. the activities of a 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;
4. any ministerial action, i.e., an action that does not require a *City Official* to exercise discretion concerning any outcome or course of action; or,
5. the actions of any individual who terminated status as a *City Official* prior to July 1, 2002, except that any such individual who returns to service as a *City Official* on or after July 1, 2002, shall thereafter be subject to the provisions of this section.

The lifetime ban on lobbying applies only to those particular projects which a former City

Official “worked” on while employed by the City. The definition of having “worked” on a project is narrowly drawn to be in line with the definition of “participation” as contained in the revolving door restrictions found in the State law. Essentially, to qualify for having “worked” on a project, the threshold would require “substantial and personal” involvement of the City Official during his or her tenure with the City. See proposed section 27.3550(a).

The term “project” is defined in a narrow and clear way to include only those matters where “a private business has made application to the *City* for discretionary funding, discretionary entitlements, or where the City exercises discretion to award or elect to enter into an agreement or contract with the private business.”

Some projects can have a long life with many phases; the different phases of a project can sometimes be completely unrelated. Therefore, in recognition of this fact, section 27.3550(c) of the regulations allows a former City Official to seek a determination from the Ethics Commission to confirm whether a “particular project” which the former City Official seeks to directly communicate with the City about is not the same “particular project” which he or she worked on as a City Official, even if the same private business is involved.

Lastly, the lifetime ban on lobbying relates only to “direct communications” with the City, a term defined in the regulations. With respect to indirect conduct, where a former City Official is merely counseling or assisting others on a project and not having direct communications with the City, the ban or separation period is one year.

Using Status as City Official to Secure Future Employment

Section 27.3551 makes it unlawful for a City Official to negotiate future employment with any private enterprise doing business with the City. This is also a common provision in governmental ethics codes. It serves to instill confidence that public officials are making public decisions for the right reasons and without regard to their own personal interests.

Financial Interest in Contracts

Section 27.3560 is intended to mirror the state law restrictions contained in Government Code section 1090. This provision precludes City Officials from participating in the formation or approval of any contract in which the Official, or a member of the Official’s family, has a financial interest. It is important to note that pursuant to both the state and proposed local law, if any individual member of a legislative body (including City boards or commissions) has a financial interest in a contract, the entire board, commission, or legislative body is precluded by law from entering into the contract, even if the interested member abstains.

Disqualification from Participating in Municipal Decisions Affecting Economic Interests

Section 27.3561 is intended to codify the requirements in the Political Reform Act pertaining to the disqualification of City Officials from decisions involving any of the City Official's economic interests. This provision is commonly known as disqualification for a conflict of interest.

Disqualification from Participating in Municipal Decisions Involving Benefactors

Section 27.3562 is intended to impose new and stricter disqualification provisions than are currently set forth in state law. This section would preclude a City Official from participating in any municipal decision in which a party to the municipal decision has given, or promised to give, the City Official an opportunity for compensation. Compensation is broadly defined in the ordinance to include discounts or economic opportunities for investment income not made available in the regular course of business to members of the general public.

Incompatible Activities

Section 27.3563 precludes City Officials who are employed by the City from engaging in activities that are inconsistent with their official duties. Incompatible activities include using the facilities, equipment, or supplies of the City for private gain, and using City time to earn private compensation.

Misuse of Position and Resources

Section 27.3564 prevents City Officials from using their official power or authority to induce or coerce any person to provide anything of value for the official's private advantage, benefit, or economic gain. It identifies certain forbidden practices, such as engaging in campaign-related activities while on City time or using City facilities, equipment, or supplies.

This section of the Code also precludes City Officials from disclosing to anyone any confidential information he or she acquired in the course of his or her official duties, except when such disclosure is a necessary function of his or her official duties. The definition of "confidential information" includes:

information pertain[ing] to pending contract, labor, or real property negotiations and [where] disclosing the information could reasonably be expected to compromise the bargaining position of the City; or the information pertains to pending or anticipated litigation and disclosing the information could reasonably be

expected to compromise the ability of the City to successfully defend, prevail in, or resolve the litigation.

This definition of “confidential information” is used in conjunction with a regulation found at proposed section 27.3564 providing that, “No current or former City Official shall use or disclose to any person any confidential information he or she acquired in the course of his or her official duties, except when such disclosure is a necessary function of his or her official duties.”

Solicitation of Political Campaign Contributions

Section 27.3571 prohibits City Officials and candidates for elective City office from soliciting City employees and City Officials for political campaign contributions. This prohibition is subject to the provisions of subsection (c), however, which allows solicitations to a significant segment of the public that happens to include City employees.

This section is intended to mirror state law found in Government Code Section 3205 which restricts the solicitation of campaign contributions from local agency “employees and officers.” There is no case interpreting the scope of the word “officer” in 3205 and the word is not defined in that particular Chapter of the Government Code. However, the term officer is used throughout the state Government Code and our City Charter and has been interpreted by the courts for over a century. Essentially, the definition of “officer” involves a two part test:

1. The person must serve a tenure of office “which is not transient, occasional or incidental,” but is of such a nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency, and,
2. The City must delegate to that person some portion of the sovereign functions of government, either legislative, executive, or judicial.

This is roughly the same test that is used by the City to decide whether members of boards or commissions should be considered “public officials” subject to the PRA, and whether the City requires those individuals to file Statements of Economic Interest. If the nature of the advisory committee, board, commission, or task force is “ad-hoc” and temporary (appointed by the Council or Manager for a specific limited purpose), typically the City does not require members of that group to file statements of economic interest. Therefore, they would not qualify as “City Officials” within the meaning of the Ethics Ordinance and would not be subject to the restrictions on political solicitations. On the other hand, the restrictions would be applicable to members of boards and commissions of the City where members are required to file statements

of economic interests.

Protection of Employees Against Retaliation

Section 27.3573 is designed to protect individuals from retaliation by City Officials for reporting a work-related violation of any law or regulation by a City Official, a gross waste of City funds, a gross abuse of authority; a conflict of interest of a City Official, or a specific and substantial danger to public health or safety due to an act or omission of a City Official, use of a City office or position, or use of City resources for personal gain. This section also provides that an individual subject to any such prohibited actions may file a complaint with the Ethics Commission.

Advice of the Ethics Commission

Section 27.3580 provides that the individuals subject to the provisions of the Ethics Ordinance may request advice from the Ethics Commission with regard to their obligations under the ordinance. In the coming months, the Ethics Commission will be drafting procedures establishing the manner in which it will handle requests for advice.

Penalties

Violations of the Ethics Ordinance are subject to administrative enforcement by the Ethics Commission. Such enforcement will be in accordance with the Complaint and Investigation Procedures previously adopted by the City Council.

City of San Diego Ethics Commission

By
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