DATE: April 29, 1988

TO: Jack McGrory, Deputy City Manager
FROM: City Attorney
SUBJECT: Super Bowl Party Passes and the Political Reform Act

Your memorandum of February 9, 1988 to Curtis Fitzpatrick, Assistant City Attorney, on whether certain passes to Super Bowl 1988 parties provided to councilmembers and manager must be declared under the Political Reform Act has been referred to me for response. The facts outlined below were set forth in your memorandum and supplemented by Marty Breslauer, Assistant Director of the Property Department, who worked with you on Super Bowl week negotiations.

FACTS

During the recent Super Bowl week festivities, the council and manager were invited to attend several parties. These included media reception parties ("parties") at the Hotel Del Coronado, Sea World, and the NFL Commissioner's party. These parties were free (no charge) to those invited.

In addition, the council was provided with two credentials each for the hospitality tent village set up at the stadium and operated by Keith Prowse under contract with the city. The value of a credential or ticket at the village was $289. The hospitality village credentials to the city were specifically negotiated with the contractor, Keith Prowse.

Some members of the council attended all or part of the events described above; some members did not.

QUESTIONS

1. Are the hospitality village credentials required to be declared under the Political Reform Act?

2. Are the media reception parties required to be declared under the Political Reform Act?

ANALYSIS

The Political Reform Act ("PRA") was adopted by the people of the State of California in 1974. Among other things, it generally requires local elected officials and city managers to disclose on annual Statements of Economic Interests any source of income aggregating two hundred fifty dollars ($250) or more in value or fifty dollars ($50) or more in value if the income was a gift. (Gov. Code, .. 87200, 87207, subd. (a)(1).) In addition to disclosure, it is possible for disqualification to be required in some instances if the amount of income equals or exceeds two hundred fifty dollars ($250). (Gov. Code, .. 87100, 87103,

subd. (c).)

The term "gift" is defined in relevant part as follows:

(a) "Gift" means, except as provided in subdivision (b), any payment to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value.

(b) The term "gift" does not include:

. . . .

(2) Gifts which are not used and which, within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes.

(Gov. Code, . 82028.)

Note that under this definition, not all items offered as gifts are ultimately treated as "gifts" under the PRA. Gifts which are not used and which are, within thirty (30) days of receipt, returned to the donor or given to charity are not considered gifts under the PRA.

Regulations adopted by the Fair Political Practices Commission ("FPPC") further refine this definition. If an official rejects the offer of a gift or declines to accept it, there is no "gift." (2 Cal. Admin. Code, . 18726.1, subd. (a).) Discarding a gift after acceptance or turning a gift over to another person, however, constitutes acceptance of a gift and is therefore declarable. (2 Cal. Admin. Code, . 18726.1, subd. (a).)

Valuation is not an issue on the first question presented. The facts given indicate that the value of the hospitality village credentials was $289 for each credential.1

The issue presented by the first question is whether the credentials constitute a "gift" under the PRA, or are exempted from the definition. A new regulation adopted by the FPPC in 1987 indicates that some passes or tickets given to an agency are not gifts under the Act. (2 Cal. Admin. Code, . 18726.7.) This regulation reads:

18726.7. Passes or Tickets Given to an Agency

Passes or tickets which provide admission or access to facilities, goods or services, or other tangible or

intangible benefits (including passes to motion picture theaters, amusement parks, parking facilities, country clubs, and similar places or events, but not including travel or lodging), which are provided to an agency official2 are not gifts to the official whenever (a), (b), (c) or (d) applies:

1 No facts were provided to show how this value was determined. There is a special detailed regulation on how to establish the values of gift passes which provide access to facilities, goods or services. (2 Cal. Admin. Code, . 18726.3.) If you have any doubts about the value of the credentials, please ask for a copy of this regulation. The FPPC through one of their staff attorneys, Marguerta Altamirano, notes that this regulation modifies an earlier FPPC opinion, Hopkins, Peter G, City Attorney, Anaheim (1977) 3 FPPC 107, which had set forth the law on valuation of gift passes until this regulation was adopted in 1987.

2 There is an ambiguity in this regulation regarding the applicability to local, as opposed to state, officials. At first blush this regulation appears to apply only to state officials not local officials, because of the use of the term "agency official," which by definition in the PRA includes only state, not local, agency officials. (Gov. Code, . 82004.) The term "agency" is defined to include, however, local governments as well as state agencies. (Gov. Code, . 82003.) An FPPC staff attorney, Marguerita Altamirano, by telephone confirmed that this regulation applies to state and local governmental officials in the FPPC's view. In fact, the regulation was adopted in 1987 at the request of the Los Angeles County Board of Supervisors.

(a) The donor gives the tickets or passes to the official's agency, through a responsible official of the agency, for the sole purpose of distributing the passes or tickets to officials of the agency and their spouses and immediate families and use of the tickets or passes is so limited by the agency; and

The tickets or passes are not earmarked by the donor for any specific agency officials; and

The agency retains a written public record of the terms under which the tickets were accepted by the agency and the terms under which the tickets or passes were distributed and to whom they were distributed.

(b) The tickets or passes are provided to the agency for an event at a publicly-owned facility under the jurisdiction of the agency and neither the agency

nor any agency official receiving or distributing the tickets or passes for the agency gives any of the tickets or passes to any person who is not an agency official, or not an agency official's spouse or immediate family member.

(c) The tickets or passes are provided to the agency as part of the contract for the use of the facility and the distribution and use of the passes or tickets are regulated by an officially adopted policy of the agency.

(d) The tickets or passes are provided to the agency official for use by the official and his or her spouse and immediate family because the official has an official or ceremonial role or function to perform on behalf of the agency at the event in question.

(2 Cal. Admin. Code, . 18726.7.) ╒Emphasis added.σ

Note that under this rule only one of the four conditions in subdivisions (a) through (d) need apply to exempt passes or tickets from the "gift" definition. The conditions are disjunctive rather than conjunctive.

Under this regulation, acceptance of the credentials would not constitute acceptance of a gift if any one of the four exceptions applied. Under the facts as presented, it appears that the credentials do not qualify as gifts under either subdivision (b) or (c). There are no facts to indicate whether subdivisions (a) and (d) also apply.

The credentials were for an event held at the stadium, a publicly-owned facility ultimately under the jurisdiction of the city council, therefore, subdivision (b) would appear to apply (assuming the councilmembers did not pass their credentials on to persons other than another "agency official" or their family members). The facts also indicate that subdivision (c) applies to exclude the credentials from the "gift" definition because the credentials were specifically negotiated with Keith Prowse.

In conclusion on the first question presented, because the credentials do not constitute a gift under the PRA, they do not have to be disclosed as such on the Statement of Economic Interests form next year.

Since the value of each credential exceeded $250, however, any one of the councilmembers who accepted them may be precluded from voting on or participating in matters pertaining to contracts or other business with the Keith Prowse firm for the next year following the date of acceptance. (Gov. Code, .. 87100, 87103, subd. (c).) Whether the official must

disqualify himself or herself from participating in or voting on a particular governmental decision will turn on the particular facts of a given situation. If the manager or any of the councilmembers have any further questions about disqualification arising from acceptance of the credentials, please do not hesitate to ask.

To answer the second question presented about the media reception parties, it is first necessary to determine whether the councilmembers or manager actually accepted the invitations and attended the parties, or whether they returned the invitations to the donors or passed them to a charity within thirty (30) days of receipt. If the invitations were accepted, then they potentially must be declared as "gifts" under Government Code section 82028, subdivision (b)(2) and 2 California Administrative Code section 18726.1.

Assuming the invitations were accepted, it is next necessary to examine whether they were exempt as declarable gifts under the FPPC regulations. There are insufficient facts presented to determine whether 2 California Administrative Code section 18726.7 may apply to exempt them as gifts. This regulation may exempt these parties if, under subdivision (a), the invitations to the parties were given and distributed in the manner

prescribed, the invitations were not earmarked for the council or manager, and the city has kept a written record of how they were distributed. If the invitations were specifically earmarked for the council and manager, this subdivision would not apply to exempt the invitations as gifts.

The parties may also be exempt as gifts under subdivision (d) if the council and manager had ceremonial functions at the parties. Neither the statute nor the regulations define the term "ceremonial role or function" to help us apply this rule. Common sense rules, however, do come to mind. An official who sits at a head table at a formal dinner and gives a speech would clearly be acting in a ceremonial role; thus, the invitation would not have to be declared as a gift. On the other hand, an official who merely attends a party and who is not introduced in his or her official capacity would likely not be attending in a ceremonial role. In that instance, the party may not be exempt as a gift under 2 California Administrative Code section 18726.7, subdivision (d). The manager and councilmembers who attended the parties must determine factually whether they attended in a ceremonial capacity to determine whether they declare the parties as gifts or not. There are no facts to support finding the parties exempt under either subdivisions (b) or (c) of the

above-cited regulation.

Assuming for the sake of argument that the parties do not qualify for exemption under the above cited rule, the question of whether attendance at the parties must be declared may hinge on the value of the invitations to those parties. The fact that the media reception parties were free to the councilmembers is irrelevant to the analysis. It is the value of attendance at the media reception parties that counts. Where the value is unknown, gifts are to "be valued at fair market value as of the date of receipt or promise." (2 Cal. Admin. Code, . 18726, subd. (a).) If the gift is unique or unusual and the fair market value is not readily ascertained, then the value is the cost of the gift to the donor if that is known or ascertainable. (2 Cal. Admin. Code, . 18726, subd. (b).) If the cost is unknown or unascertainable, the recipient should make a reasonable approximation of the cost, using the prices of similar items as guidelines if prices are available, or make a good faith estimate if similar items are not available. (2 Cal. Admin. Code, . 18726, subd. (b).)

There is a special valuation rule for gifts to an official and his or her family. If the official enjoys the direct benefit of a gift and members of the official's family also enjoy direct benefit of the gift, then the full value of the gift is attributable to the official. (2 Cal. Admin. Code, . 18726.2.)

There is another special rule governing gifts from multiple donors, which may come into play in answering the question presented about the media reception parties. Generally, "┌aσ gift which is received from multiple donors must be declared if the gift's value equals or exceeds $50," but names of individual donors do not have to be disclosed unless a particular donor's gift was $50 or more. (2 Cal. Admin. Code, . 18726.6.)

Applying the above guidelines to the second question presented, it is first necessary to determine whether the councilmembers and manager actually accepted their invitations by either attending the parties personally or by passing their invitations on to persons other than charitable institutions. If the councilmembers or manager returned their invitations to the donors or passed them on to a charity within thirty (30) days of receipt, then their invitations would not have to be declared. (Gov. Code, . 82028, subd. (b)(2); 2 Cal. Admin. Code, . 18726.1.)

Next it is necessary to determine factually whether the invitations to the parties meet the exemption criteria of 2 California Administrative Code section 18726.7 subdivision (a),

or whether the councilmembers and manager had ceremonial roles at the parties to qualify for exemption under subdivision (d) of that same regulation. To do this, however, each recipient must test the particular facts of his or her attendance against the requirements of subdivision (a) or (d). If the free invitations were received and used under the circumstances outlined in the regulation, they need not be declared. If they were not so received and used, they must be declared if their value equals or exceeds fifty dollars ($50) as discussed below.

Lastly, assuming the parties do not quality for exemption as gifts under 2 California Administrative Code section 18726.7, then the next issue to be determined is valuation of attendance at the parties. If the value of the invitations to each party equalled or exceeded $50, then the invitations must be declared. The fair market value of the invitations, if ascertainable, or cost to the donor, if actual fair market value is not ascertainable, determines the value. (2 Cal. Admin. Code, . 18726.) If spouses or families of councilmembers and the manager also were invited and attended, then the value of the invitations to the family members must also be attributed to the value of the gift to the councilmember and manager for purposes of declaration. (2 Cal. Admin. Code, . 18726.2.) If the media reception parties were given by more than one person or entity, then the multiple donor rule, as set forth above, would apply to determine whether individual donors must be stated separately on the disclosure statement. (2 Cal. Admin. Code, . 18726.6.)

In short, if the councilmembers and manager accepted the media reception party invitations; if the parties did not qualify for exemption under 2 California Administrative Code section 18726.7; and, if the invitations for each party equalled or exceeded $50 in value, then the councilmembers and manager should disclose the required information on next year's Statement of Economic Interests form. These facts, however, are peculiar to each recipient and therefore can only be answered by each individual using the above-stated guidelines.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

CCM:fs:012(x043.2)
cc Marguerita Altamirano,
Attorney at Law, FPPC
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