

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: February 8, 2007

TO: City Departments

FROM: City Attorney

SUBJECT: Determining Whether a City Consultant Must File a Statement of Economic Interests (Form 700)

INTRODUCTION

The City of San Diego retains many professional consultants each year, such as architects, engineers, lobbyists, attorneys, and auditors. Under the California Political Reform Act [PRA], regulations promulgated by the Fair Political Practices Commission [FPPC] and the City's Conflict of Interest Codes, a determination must be made at the time of hiring as to whether the level of services provided by the individual consultants require disclosure of their economic interests. In most cases, City consultants will not be required to disclose because they are hired for a limited scope and purpose, or their recommendations are subject to significant substantive review. On the other hand, consultants that are acting in a staff capacity or making governmental decisions are required to disclose certain economic interests under the applicable department's Conflict of Interest Code.

This memorandum provides an overview of the applicable laws and recommendations to assist departments in making the determination as to whether a consultant must disclose his or her economic interests by filing a Statement of Economic Interests (Form 700) [SEI] with the Office of the City Clerk.

DISCUSSION

The City recently conducted the required biannual review of all the Conflict of Interest Codes for each department to determine if any amendments or revisions were necessary.¹ Appendix A of each department's Conflict of Interest Codes lists designated positions which involve the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest. Appendix B describes the sources of income that an employee holding a designated position must disclose by completing the form SEI and filing it at

¹ The Conflict of Interest Codes may be viewed on the City Clerk's website at <http://www.sandiego.gov/city-clerk/elections/eid/index.shtml>.

the Office of the City Clerk as a public record.

In addition to designated positions, the Conflict of Interest Codes identify “consultants” as individuals who are required to file a SEI. Whether a “consultant” is required to file is a determination that must be made on a case-by-case basis following the regulations issued by the Fair Political Practices Commission [FPPC]. The term “consultant” as used in the Conflict of Interest Codes should follow the definition provided in the FPPC regulations as more fully discussed below.²

A. Overview of the Law and Policy Regarding Consultant Disclosure.

1. The Political Reform Act.

The purpose of the conflict of interest provisions of the Political Reform Act [Act] is to ensure public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their financial interests or those of persons who have supported them. By disclosing relevant financial interests, public officials can determine whether a conflict of interest exists and avoid participating in a matter. The Act also makes this information available to the public to help ensure government decisions are free from undue influence or improper financial motives.

In particular, the purpose of these laws is “to promote and accomplish several state policies including: (1) assuring the independence, impartiality and honesty of public officials; (2) informing citizens regarding those economic interests of officials which might present a conflict of interest; (3) preventing improper personal gain by persons holding public office; (4) assuring that governmental decisions are properly arrived at; and (5) preventing special interests from unduly influencing governmental decisions.” *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 667 (1974), citing legislative findings in then-Government Code section 3601. See, Govt. Code § 81001(b).

“Public officials” include elected officers and other high-ranking public employees. In addition, certain “designated employees” are considered “public officials.” The “designated employees” are the persons holding positions set forth in the City’s conflict of interest code who are required to make financial disclosures. In addition, certain consultants to government agencies may be considered a “consultant” under the Act’s definition and thus be required to make disclosures. In general, this occurs if the agency has delegated governmental decision-making authority to that person or the consultant is acting in a “staff capacity.”

² The City cannot issue a “blanket” code requiring all outside consultants to automatically file statements of economic interest as a condition of receiving a City contract. See *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d. 259 (1970) and *County of Nevada v. MacMillen*, 11 Cal. 3d. 662 (1974).

2. Definition of “Consultant.”

According to Title 2, Section 18701(a)(2) of the California Code of Regulations, the regulations of the FPPC, and the California Government Code, a “consultant” is defined as follows:

(2) “Consultant” means an individual³ who, pursuant to a contract with a state or local government agency:

- (A) **Makes a governmental decision** whether to:
1. Approve a rate, rule or regulation;
 2. Adopt or enforce a law;
 3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
 4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
 5. Grant agency approval to a contract which requires agency approval and to which the agency is a party, or to the specifications for such a contract;
 6. Grant agency approval to a plan, design, report, study, or similar item;
 7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; **or**
- (B) **Serves in a staff capacity** with the agency **and** in that capacity participates in making a governmental decision as defined in Regulation 18702.2, **or performs the same or substantially all the same duties** for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Government Code Section 87302.

2 Cal. Code of Regs. § 18701(a)(2)[emphasis added].

Thus, a “consultant” will be required to disclose certain financial interests if he or she either makes a “governmental decision” or serves in a “staff capacity.” These terms are placed in quotes as they have special definitions under the Act and as interpreted by the FPPC.

³ A consultant is a natural person and not a corporation or entity; the individuals within a firm are the ones who file. Thus, if the contract is with a large corporation or entity, the work of individual employees must be reviewed to determine which individuals must file. See Widders Advice Letter, No. I-90-212.

a. “Makes a Governmental Decision.”

Under section 18701(a)(2)(A), an individual “makes a governmental decision” when he or she, acting within the authority of his or her position: (i) votes on a matter; (ii) appoints a person; (iii) obligates or commits the agency to any course of action; (iv) enters into any contractual agreement on behalf of the agency; (v) determines not to act on the actions above. 2 Cal. Code of Regs. § 18702.1. A person likely would be considered a “consultant” if such decision making authority is delegated to that person.

b. Serves in a “Staff Capacity.”

Under section 18701(a)(2)(B), a “consultant” will be required to disclose financial interests if he or she serves in a “staff capacity” *and* participates in making a governmental decision as defined in Regulation 18702.2. This includes an official who, when acting within the authority of his or her position,

(a) Negotiates, *without significant substantive review*, with a governmental entity or private person regarding a governmental decision . . . **or**

(b) Advises or makes recommendations to the decision maker either directly or *without significant intervening substantive review*, by:

(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); **or**

(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A).

2 Cal. Code of Regs. § 18702.2; Cal. Govt. Code § 83112.

According to the FPPC, an individual “serves in a staff capacity” if he or she performs substantially all the same tasks that normally would be performed by a staff member of a government entity. The length of a contractor’s services to an agency and whether services are rendered on a regular and continuous basis are other factors to consider in making this determination. Similarly, an individual will be considered a “consultant” if he or she performs the same or substantially all the same duties for the City that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Government Code section 87302.

In most cases, individuals who work on only one project or a limited range of projects for an agency are not considered to be working in a “staff capacity.” However, if the scope of duties changes and an individual provides ongoing advice on a wide range of matters, he or she may be deemed to be acting in a “staff capacity.” This is especially so if the tasks are substantially the same as those performed by a person in a position that is or should be specified in the City’s conflict of interest code. Accordingly, individuals who serve in a staff capacity and “participate in” government decisions on general matters on an ongoing basis would be “consultants” under the above regulations.

B. Examples of Consultant Determinations by the FPPC.

The following examples are illustrative only and should not be relied on without additional factual review of the types of services being provided by a particular consultant.

The FPPC has determined the following may be “consultants:”

- Law firm retained to provide general advice and assistance to an agency on an on-going basis. (Koppes Advice Letter, No. A-88-408).
- Outside contractor to provide “plan checkers” who review plans for building code compliance and approve or deny permits. (Kalland Advice Letter, No. I-96-78.)
- Investment managers who manage and invest the portion of the agency’s assets, have authority to direct others with respect to the acquisition or disposition of securities, have complete authority and discretion to establish accounts with securities brokers or dealers, votes on issues of mergers or acquisitions as directed by managers. (Koppes Advice Letter, No. A-88-408).
- Real estate investment consultant who participates in the making of system policy; participates in purchasing decisions by making recommendations regarding appropriate software; can affect persons and entities who serve the agency as real estate advisors and managers.(Koppes Advice Letter, No. A-88-408).
- Federal lobbyist who makes on-the-spot decisions to influence a particular result before House and Senate committees on behalf of the agency; duties are broad and undefinable. (Koppes Advice Letter, No. A-88-408).
- As-needed environmental consultant hired for three years; negotiates directly with federal, state and local agencies on behalf of the agency to obtain concurrence with environmental study’s conclusions; performs duties similar to those of a staff person included in the agency’s conflict of interest code. (Patterson Advice Letter, No. A-92-570).

- Architect who determined type of construction, quality of construction within budgetary limitations of the agency, provided advice and consultation with the client and assisted in obtaining permits and approvals; assisted in obtaining bids and awarding construction contract; participating in decisions in the same manner as an in-house architect would if the agency had such an architect. (Davis Advice Letter, No. I-91-473).
- Firm providing computer evaluation services and interacts directly with the decision-makers on an on-going basis as an integral part of the decision-making process; attends committee meetings and Board of Supervisors meetings as required; evaluates bid responses and advises committee as to the appropriate bid to select. (Workman Advice Letter, No. I-87-078).

The FPPC has determined the following may not be “consultants:”

- Agent custodian of assets that does not make or participate in the making of decisions, but rather obtains direction for each and every transaction from other sources, is in a ministerial position. (Koppes Advice Letter, No. A-88-408).
- Law firm that provides legal services for a particular piece of litigation; decisions are subject to on-going review or direction by the agency. (Koppes Advice Letter, No. A-88-408).
- Investment advisory committee members whose recommendations have been rejected or significantly amended or modified by final decision-makers; solely advisory. (Koppes Advice Letter, No. A-88-408).
- Consultant retained to construct a specific project according to specifications of a plan and there are no deviations from the plan. (Godwin Advice Letter, No. I-91-428).
- Survey-engineer that did not participate in any official decision-making. (In re Maloney (1977) 3 FCCP Ops. 69).
- Traffic subconsultant who provided traffic studies, identified necessary street designs and alternative mitigation measures where there was significant intervening substantive review by the lead consultant. (Gilbert Advice Letter, No. I-88-441).
- Firm providing sales tax auditing services; no research other than downloading existing data and reviewing the agency’s allocations from the State Board of Equalization; no recommendations to City staff. (Wasko Advice Letter, No. A-04-270).

C. Extent of Disclosure of Financial Interests.

The determination of which consultants must file is only the first issue. The second issue is the extent and scope of the disclosures they must make. The specific disclosures to be made are detailed in Appendix B to conflict of interest codes for individual City departments. Each City department must engage in a case-by-case analysis to determine which disclosure category is implicated.

Generally, “consultants” will be required to provide the broadest disclosures listed in the code for the department that employs them. However, a more limited disclosure may be appropriate if the consultant is providing a limited scope of services. In that situation, the designated City official must file a written determination that describes the duties and the extent of the disclosure requirements.

The City official designated in the applicable department’s Conflict of Interest Code has the responsibility to ensure compliance with these laws. We recommend that a determination as to whether the outside consultant meets the definition of a “consultant” required to file a SEI be made by the official at the time the contract is signed. Any doubts about whether an outside consultant is a “consultant” should be resolved in favor of disclosure to meet the public policy objectives of the Act. In addition, departments should continually monitor the contracts to determine whether any changes to the scope of work or other factors may lead to a determination that the contractor has become a “consultant” required to make the required financial disclosures. Consultants also have a duty to alert the department when they become aware of facts that indicate they may have an obligation to make financial disclosures as a “consultant.”

When the designated City official determines that an individual meets the definition of a “consultant” the official must notify the consultant of the filing obligation and scope of disclosure. The official must also file a determination with the Office of the City Clerk who will monitor compliance with filing requirements. Sample determination forms and letters are available from the Office of the City Clerk. We also recommend that written determinations that an outside contractor does not meet the definition of a “consultant” be maintained as a public record by the department or placed on file at the Office of the City Clerk.

CONCLUSION

A consultant for the City will meet the criteria of a “consultant” required to make certain financial disclosures if the individual “makes a governmental decision” or serves in a “staff capacity.” The City official designated in the department’s Conflict of Interest Code must make the determination as to whether a given consultant is to file. This is because the person who hired the consultant is in the best position to know the scope of his or her work and whether that scope changes over the course of the contract. Any doubts about whether an outside consultant is a “consultant” should be resolved in favor of disclosure.

When the individual is determined to be a “consultant” the City official must also determine the scope of the financial disclosure and notify the consultant of the filing requirements. Written determinations by the departments that a consultant must disclose his or her financial interests must be filed with the Office of the City Clerk to help ensure compliance with these laws. Finally, this Office is available to assist departments in making determinations about whether specific consultants should disclose their financial interests and the appropriate level of disclosure.

Respectfully submitted,

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MJA:jb
cc: Mayor and Councilmembers
Elizabeth Maland, City Clerk
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