

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

**MEMORANDUM**

**DATE:** February 9, 2007

**TO:** Honorable Mayor and City Council Members

**FROM:** City Attorney

**SUBJECT:** Outside Attorneys Retained to Advise Individual Council Members:  
Consultant Conflicts of Interest and SEI Filing Requirements

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**INTRODUCTION**

The City Attorney's Office has been asked whether outside attorneys hired to advise individual council members in connection with pension litigation or investigations by the Securities and Exchange Commission, FBI or U.S. Attorney's Office should be required to file statements with the City disclosing their financial interests. Such disclosures, known as Statements of Economic Interest [SEI], are filed on a form issued by the Fair Political Practices Commission, in compliance with determinations made under California law and the City's conflict of interest codes.

It is our understanding that at least four council members have retained, and have been relying upon, outside counsel to advise them in connection with the above investigations and as to their individual roles or knowledge of facts relevant to the City's financial disclosures and the City's retirement system. Due to these investigations, individual council members risk their political careers, reputations, and other personal losses. The council members' dependence on these outside attorneys and their firms is unique: these attorneys have broad access to individual council members. This access has the potential to influence governmental decisions on a variety of matters. In particular, we are concerned that this access may influence a council member's decisions with respect to a law firm's other clients that may have projects or contracts with the City or need City discretionary approval.

Our office has not reviewed the retainer agreements or detailed invoices because the council members have claimed that these are confidential communications protected by the attorney-client privilege. Due to the broad access described above, these attorneys may be providing council members with general legal advice, opinions and/or guidance beyond the limited scope of work for which they were authorized by the City Council: to represent the individual council member in connection with the ongoing financial investigations and the pension litigation. Accordingly, these attorneys may have exerted influence over government decisions and council members' votes, leading our office to conclude that those attorneys should disclose their financial interests.

## DISCUSSION

### 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. 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 individual<sup>1</sup> who, pursuant to a contract with a state or local government agency:

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<sup>1</sup> 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** 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.

**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. Outside Attorneys Retained to Advise Individual Council Members May be “Consultants”**

**1. Application of the Regulations.**

Under the FPPC regulations, a “consultant” is an individual who, pursuant to a contract with a state or local government agency “makes a governmental decision” or serves in a “staff capacity.” The FPPC has previously opined that when a person provides services under contract to a private party, and is not under contract with a state or local agency, he or she generally does not meet the definition of “consultant,” and would not file an SEI under the terms of the FPPC regulation.<sup>2</sup> However, the circumstances facing the council members in this situation are unique. Thus, despite the fact the contracts may be with the individuals, if the attorneys are providing advice beyond the narrow scope of their authorized retention they may meet the definition of a “consultant.”

As noted earlier in this memorandum, the scope and extent of legal advice being provided to individual council members is unknown due to the assertion of the attorney-client privilege. Under the definitions in the regulations, these attorneys may meet the definition of a “consultant” if they serve in a “staff capacity.” This occurs when the individual advises or makes recommendations to the decision-maker either directly or without significant intervening substantive review, by 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).

It is highly likely that these attorneys are making recommendations directly to individual council members that require the exercise of judgment by the attorney. The next question is whether they are providing such opinions to attempt to influence the council member’s vote or other governmental decisions made in the council member’s official capacity. These outside attorneys are authorized to advise the individual council members only on a limited basis. However, these council members have a unique and dependant relationship with their attorneys that give the attorneys broad access and opportunities to influence their decisions. In particular, this influence could extend to decisions affecting the individual’s personal financial interests and the firm’s other clients that may have matters pending before the City or need City discretionary approval. In which case, disclosure of the attorney’s financial interests would be required by the applicable regulations.

**2. The Public’s Right to Know.**

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 *County of Nevada v. MacMillen*, 11 Cal. 3d 662 (1974), the California Supreme Court upheld legislation requiring

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<sup>2</sup> See Olsen Advice Letter, No. I-90-451; Burns Advice Letter, No. A-91-485; Morrison Advice Letter, A-92-515 [consultant hired by a developer to prepare an environmental impact report is not a “consultant”].

public officials and candidates to make certain disclosures about their personal financial interests. As referenced in *Long Beach City Employees Association v. City of Long Beach*, 41 Cal. 3d 937 (1986):

The public interest in an "honest and impartial government" relied on in *MacMillen* referred to conflicts of interest and the integrity of the decision-making processes of government. We rejected an argument that their right of privacy "must inevitably prevail over the right of the public to an honest and impartial government." *MacMillen* at 672. We found the Legislature intended to enjoin only "substantial" conflicts of interest and that the required disclosure related only to agency action or decision-making having a "material economic effect" on the decision-maker's economic interests. *MacMillen* at 671.

The facts that the public is paying for these outside attorneys and that these outside attorneys have unique access to the council members weigh in favor of the attorneys' disclosure of their financial interests. Moreover, the City's express policy about transparency in government is instructive here. The City's Ethics Ordinance, for example, states that its purpose is to assure that individuals and interest groups have a fair and equal opportunity to participate in City government. The ordinance promotes disclosure and transparency in government to avoid conflicts of interest and the appearance of conflicts of interest. Overall, its goal is to help reinforce trust in governmental institutions. The same is true here.

### **C. Extent of Disclosure of Financial Interests.**

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. Because these attorneys are in a position to give advice on a broad range of matters, we recommend that the attorneys disclose to the broadest disclosure category (Category 1) in the Conflict of Interest Code for the City Council. They should file statements that cover the years in which they have rendered general advice to the council members beyond the scope authorized by the City Council. Sample determination forms and letters are available from the Office of the City Clerk. The completed forms are public records that are filed with the City Clerk.

## **CONCLUSION**

Under the FPPC regulations, an individual 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." With regard to the attorneys retained for individual council members, we are concerned that they may be advising on a broad range of matters, rather than the limited matters authorized by the City Council. As such, these attorneys may be acting in a "staff capacity" by providing advice that strays into an area in which they are exerting influence over government decisions and council members' votes. To ensure transparency and identify possible conflicts of interest, we recommend that those attorneys file a Statement of Economic

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Interests. The attorneys should disclose to the broadest disclosure category (Category 1) in the Conflict of Interest Code for the City Council and should file statements that cover the years in which they have rendered advice to the council members.

Respectfully submitted,

MICHAEL J. AGUIRRE  
City Attorney

MJA:jb

cc: Elizabeth Maland, City Clerk

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