MEMORANDUM OF LAW

DATE: November 10, 1994

TO: Councilmember Harry Mathis

FROM: City Attorney

SUBJECT: Evaluation of Potential Conflict of Interest in Asking City Attorney to Analyze Pending State Legislation

By memorandum dated October 7, 1994, you have asked the City Attorney to review whether you have a conflict of interest in having previously asked the City Attorney to review draft legislation pending in the California legislature, specifically SB 1988 (Alquist). The question arose because of a recent article appearing in the Reader newspaper.

BACKGROUND FACTS

I have learned the following either from you personally or from documents you have provided. By written memorandum dated June 10, 1994, you asked the City Attorney to analyze SB 1988 and assess its potential effects on the City's earthquake resistance program and its supporting Earthquake Hazard Reduction Ordinance (commonly known as the URM Ordinance) (SDMC Section 91.8801 et seq.). A copy of your June 10th memorandum and Deputy City Attorney Ann Moore's response of July 27, 1994, are attached to this memorandum. Contrary to allegations in the Reader article, you had no contact with Sacramento authorities on this bill and, in fact, you were unaware that the legislation had been amended until you read the article.

Several years ago, you were employed as a lobbyist for an organization known as the Classic Building Owners and in that capacity you lobbied the City on its earthquake resistance program and its supporting ordinances. You were last employed by them in October 1992. The organization ceased to exist in January 1993, eleven (11) months before you were sworn into office.

Over 1000 individuals contributed to your campaign for Council District No. 1, of which perhaps eight (8) - ten (10) were former members of Classic Building Owners.

QUESTIONS PRESENTED

1. Are campaign contributions considered income for purposes of disqualification of an elected official under the Political Reform Act of 1974?

2. Specifically, did the fact that you received campaign contributions from former members of the now defunct organization known as the Classic Building Owners disqualify you from asking the City Attorney about pending state legislation that possibly affected former members of that organization?

3. Is income that a public official received from an organization more than twenty (20) months prior to participating in decisionmaking regarding the matter considered a basis for disqualification of the public official under the Political Reform Act of 1974?

4. Specifically, did the fact that you received income in October 1992 from the now defunct Classic Building Owners organization disqualify you from asking the City Attorney in June 1994 about legislation pending before the California legislature that could affect former members of that organization?

5. Does asking the City Attorney to analyze pending state legislation constitute making, participating in, or influencing a governmental decision under the Political Reform Act of 1974?

6. Is merely asking the City Attorney to assess the effect of a particular bill on the City's earthquake resistance program and its supporting ordinance constitute making, participating in, or influencing a governmental decision within the meaning of California Government Code section 87100?

RESPONSES TO QUESTIONS PRESENTED

1. Contrary to assertions in the Reader article, "campaign contributions" are not "income" for purposes of disqualification under the Political Reform Act of 1974. California Government Code Sections 82030, 87100 and 87103.

2. Specifically, the fact that you received campaign contributions from former members of the now defunct Classic Building Owners organization did not and does not disqualify you from asking the City Attorney about pending state legislation that may have affected members of that organization.

3. Contrary to allegations in the Reader article, a public official's receipt of income twenty (20) months prior to making, participating in making, or influencing a governmental decision is not a basis for disqualification under the Political Reform Act of 1974.

4. Specifically, the fact that you received income from the Classic Building Owners in October 1992 did not disqualify you from asking the City Attorney in June 1994 about legislation pending before the California legislature that could affect members of that now defunct organization.

5. Merely asking the City Attorney to analyze pending state legislation, without more, does not constitute making, participating in making, or influencing a governmental decision under the Political Reform Act of 1974.

6. Merely asking the City Attorney to analyze specific legislation, without suggesting a desired outcome to the analysis or making other attempts to affect the analysis, does not constitute either making, participating in making, or influencing a governmental decision within the meaning of California Government Code section 87100.

ANALYSIS

The applicable law to be addressed in answering the questions presented is the Political Reform Act of 1974 (the "Act"), which is codified at California Government Code sections 81000-91015. California Government Code section 87100 sets forth the test to determine whether a public official is required to disqualify himself or herself from making, participating in making, or influencing governmental decisions. This code section reads as follows: "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." California Government Code Section 87100 (emphasis added).

The term "financial interest" as used in Section 87100 is defined in relevant part in California Government Code section 87103, as follows:

> An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:
>
> . . . .
>
> (c) Any source of income . . . aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made. (Emphasis added.)

I. Are campaign contributions considered income?

At the outset, it is necessary to state that the answer to the first four questions is based on a major assumption, namely, that asking the City Attorney about the effect of pending state legislation is a form of making, participating in making, or influencing a governmental decision. I make this assumption for the sole purpose of deciding the first four questions. Whether asking the City Attorney for an assessment of pending legislation is in fact a form of making, participating in making, or influencing a governmental decision is discussed and resolved in Section III of this memorandum.

The first question presented is whether campaign contributions are

considered income for purposes of disqualification under the Act. California Government Code sections 87100 and 87103, quoted above, set forth the economic interests that require disqualification. "Income" is the relevant kind of economic interest raised by your questions.

Are campaign contributions considered "income" for purposes of disqualification, as alleged in the Reader article in remarks attributed to the Fair Political Practices Commission's ("FPPC"'s) spokeswoman Jeanette Turvill. The answer is "no" for the following reasons:

1) The term "campaign contributions" is not a type of financial interest specifically listed in either California Government Code sections 87100 or 87103 as being a basis for disqualification; and

2) "Campaign contributions" are specifically excluded from the definition of "income" under the Act. California Government Code Section 82030(b)(1).

Therefore, in answer to your second, specific question, the fact that you received campaign contributions from former members of the now defunct Classic Building Owners organization did not and does not disqualify you from asking the City Attorney about pending state legislation that may have affected members of that organization, because "campaign contributions" are simply not "income" under the Act.

II. Does income earned twenty months previously constitute disqualifying income?

The third question presented is whether income received from an organization some twenty (20) months before a governmental decision is made constitutes a basis for disqualification under the Act.

To be disqualified from participating in governmental decisionmaking because of having received income, a public official must have received that income within twelve (12) months just previous to making, participating in making, or influencing the governmental decision. (See emphasized language in above-quoted portion of California Government Code section 87103(c)). Income received more than twelve (12) months earlier does not count for purposes of disqualification.

The fourth question presented is specific as to the effect of income you received from Classic Building Owners. You were a paid lobbyist for the Classic Building Owners organization, and you received your last payment from them in October 1992. Twenty (20) months later you sent a memorandum to the City Attorney asking for an assessment of legislation. Were you prohibited from doing so by virtue of the income you received from Classic Building Owners? The answer is "no." The money you received from the Classic Building Owners in October 1992 was clearly not "income" for purposes of prohibiting you from asking the question of the City Attorney, since that money was received some twenty (20) months prior to asking the question.

III. Does Asking the City Attorney about Pending Legislation,

Without More, Constitute Making, Participating in Making, or Influencing a Governmental Decision?

The fifth question presented is whether asking the City Attorney to analyze a particular bill pending before the state legislature constitutes making, participating in making, or influencing a governmental decision under the Act.

The phrases "makes a governmental decision" and "participates in making a governmental decision" as used in California Government Code section 87100, quoted above, are defined in subsections 18700(b) and (c) of 2 California Code of Regulations. A copy of these subsections is attached for your reference. It is clear that merely asking the City Attorney to analyze particular legislation does not rise to the level of either making or participating in the making of a governmental decision as defined in either of these regulations.

The more difficult question is whether asking the City Attorney to analyze specific legislation constitutes "influencing a governmental decision." Another FPPC regulation defines this phrase. 2 Cal. Code of Regs. Section 18700.1. A copy of this regulation is again attached for your reference.F

> The phrase "influence a government decision" is not defined in the statute or regulations. The dictionary defines the word "influence" to mean "(1) To produce an effect on by imperceptible or intangible means; sway (2) To affect the nature, development, or condition of; modify." The American Heritage Dictionary of the English Language (3d ed. 1992), p. 926. This definition corresponds to the definition of "influencing legislative or administrative action," which is a phrase used in the portion of the Political Reform Act that governs lobbyists. See Cal. Gov't Code " 82032, 82037, 82039 and 86100 - 86300.

Under this regulation, the rules for determining whether an official is attempting to influence governmental decisionmaking differ depending on whether the governmental decision is one involving the official's own agency (or one under its appointment powers or its budgetary control) or another agency outside of the official's control. If the official's own agency is involved, the official will not be found to have influenced or attempted to influence the governmental decision unless the contact with a member, officer, employee or consultant of the same agency 1) was made for the purpose of influencing the decision; and, 2) was made on behalf of a business entity, client, or customer. 2 Cal. Code of Regs. Section 18700.1(a). If another agency is involved, the official will not be found to have influenced or attempted to influence the governmental decision unless the contact with a member, officer, employee or consultant of the other agency 1) was made for the purpose of influencing the decision; and, 2) the official acted or purported to act on behalf of his or her own agency. 2 Cal. Code of

Regs. Section 18700.1(c). Under either portion of this regulation, merely asking the City Attorney of one's own agency to analyze pending legislation of another agency simply does not constitute "influencing" or "attempting to influence" a governmental decision. Even more important, the City was not involved in any decision pertaining to the pending legislation.

The last question posed is whether your memorandum asking the City Attorney to analyze specific legislation pending before the state legislature constituted making, participating in making or influencing a governmental decision under the Act. I reviewed your memorandum of June 10, 1994, a copy of which is attached to this memorandum. It simply asks the City Attorney to analyze SB 1988 and assess its potential effects on the City's earthquake resistance program and its supporting ordinance. Your memorandum does not suggest a desired outcome and does not attempt to sway the City Attorney to adopt any particular point of view. There is no evidence to suggest that you asked the question on someone else's behalf. Therefore, you did not attempt to influence a decision that the City or its City Attorney was making within the meaning of 2 Cal. Code of Regs. section 18700.1(a). You also informed me that you had no contact whatsoever with state officials on SB 1988. Therefore, you did not attempt to influence a governmental decision of another agency within the meaning of 2 Cal. Code of Regs. section 18700.1(c).

In summary answer to your sixth question, merely asking the City Attorney to analyze specific legislation, without suggesting a desired outcome to the analysis or making other attempts to affect the analysis, does not constitute making, participating in making, or influencing a governmental decision within the meaning of California Government Code section 87100 and 2 California Code of Regulations sections 18700(b) and (c), and 18700.1(a) and (c).

JOHN W. WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

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Attachments
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