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City Attorney

MEMORANDUM

TO: DEPARTMENT HEADS
FROM: DENNIS J. HERRERA
City Attorney
DATE: June 13, 2006
RE: Statements of Economic Interest Filing Requirements for Consultants

Many of our City departments and agencies rely on consultants to fulfill their increasingly specialized and complex responsibilities. Questions have arisen about whether these consultants are subject to state and local financial disclosure laws. The City Attorney's office would like take this opportunity to remind you of **your department's continuing obligation to identify and notify those consultants who are required by law to file financial disclosure statements.**

To that end, we are providing you with the attached list of Frequently Asked Questions (FAQ) to assist you in determining whether an individual consultant, volunteer or intern (all of which are referred to in these documents collectively as a "consultant") is required to file a Statement of Economic Interest (SEI or Form 700). In addition, we have provided a checklist that can be used to determine whether a particular consultant should file a Form 700.

These documents are not a substitute for legal advice. If you have any questions regarding the information in these documents or their applicability to a particular consultant, please contact the Deputy City Attorney assigned to your department, board or commission.

D.J.H.

FREQUENTLY ASKED QUESTIONS REGARDING CITY CONSULTANTS AND STATEMENTS OF ECONOMIC INTERESTS

State and City law require many individuals who work as consultants to the City to disclose certain personal financial information as part of a larger effort to avoid actual or perceived conflicts of interest in government decisions.¹ Conflicts of interest that go undiscovered can cause serious problems, such as disrupted City contracting, protracted litigation, and significant legal liability for the City and the individual consultant. It is therefore critical that each Department Head examine the responsibilities of the consultants used by his or her department, board or commission to ensure that every consultant with a filing requirement has fulfilled that duty by filing a Statement of Economic Interests ("SEI" or "Form 700"). The City Attorney's Office has prepared this list of frequently asked questions to assist you with this important task.

- **How do I know if a consultant is required to file a SEI?**

A "consultant" to the City is considered a "public official" and must file a SEI if the consultant is an individual who, pursuant to a contract with the City, performs tasks that meet any of the following three tests (which are described in greater detail below):

1. **Makes certain "governmental decisions"?**

or

2. **"Serves in a staff capacity" and participates in making certain "governmental decisions"?**

or

3. **"Serves in a staff capacity" and performs the same or substantially the same duties as a regular employee who would be required to file?**

The phrase "serves in a staff capacity" generally means that the consultant performs more than a limited number of projects for the agency and has an ongoing relationship with the agency of more than nine months' duration. This term is discussed in greater detail below.

- **How do the three tests work?**

Test #1: Does the consultant make certain "governmental decisions"?

The following seven kinds of "governmental decisions" will trigger the filing requirement for consultants:²

1. Approving a rate, rule or regulation;

¹ Gov. Code § 87300; S.F. Campaign and Governmental Code ("C&GCC") § 3.1-102. The filing requirement is just a precaution – it does not mean that a consultant actually has a conflict of interest or has done anything wrong. It merely helps the consultant and hiring agency know in advance what sorts of decisions in which the consultant should not be involved. An entirely separate analysis would be necessary to determine whether a consultant with certain financial interests would have a conflict of interest in relation to a particular governmental decision that would preclude the consultant's participation in that decision.

² A consultant "makes" a governmental decision when he or she votes on a matter, appoints a person, obligates or commits the agency to an action, enters into a contractual agreement on behalf of the agency, or determines not to take any of these actions. 2 C.C.R. 18702.1

2. Adopting or enforcing a law;
3. Issuing, denying, suspending, or revoking any permit, license application, certificate, approval, order, or similar authorization or entitlement;
4. Authorizing the agency to enter into, modify, or renew a contract that otherwise requires agency approval;
5. Granting agency approval to a contract;
6. Granting agency approval to a plan, design, report, study, or similar item; or
7. Adopting or approving policies, standards, or guidelines for the agency.

Examples: A consultant is hired to serve as a project manager to help build a City-funded neighborhood health clinic. As the project moves towards breaking ground, the current construction manager retires and the consultant is expected to take the lead in interviewing and hiring a new construction manager. Because the consultant would be making a governmental decision for the agency to contract with a new construction manager, the consultant would be required to file a SEI.

A third party contractor is hired by the Department of Human Resources to initiate and enforce a labor compliance program. The consultant functions with the same governmental authority to enforce labor compliance laws and regulations and follows the same procedures as a City employee. Because the consultant would be enforcing a law, he or she would be required to file a SEI.³

Test #2: Does the consultant "serve in a staff capacity" and participate in making certain "governmental decisions"?

A consultant "participates" in making a governmental decision when he or she either:

1. negotiates, without significant substantive review, with a government entity or private person regarding a governmental decision, or
2. advises or makes recommendations to a decision maker directly or without significant intervening substantive review by:
 - a. conducting research or making any investigation that requires the exercise of judgment on the part of the official and is intended to influence a governmental decision, or
 - b. preparing or presenting a report, analysis or opinion, orally or in writing that requires the exercise of judgment and is intended to influence a governmental decision.⁴

This test relies upon the same definition of "governmental decisions" as Test #1 above.

The phrase "significant intervening substantive review" generally means that someone other than the consultant, such as another consultant or a City official, must independently analyze and review from top to bottom the consultant's advice or recommendation. A consultant is deemed to have participated in a decision, even if the consultant's advice or work is reviewed by several of his or her superiors, if those superiors rely on the data or analysis

³ Rea Advice Letter, No. A-03-107 (2003).

⁴ 2 C.C.R. 18702.2.

prepared by the consultant without checking it independently or if they rely on the professional judgment of the consultant.⁵

Examples: A department hires a professional accounting firm to do periodic independent audits of the department's annual financial statements over the course of five years. The firm provides the department with a detailed report of their annual findings, but it does not provide recommendations as to any course of action. And although they appear to serve in a staff capacity (with an ongoing multi-year contract and regular contact with the agency), the consultants provide only independent data, not advice or recommendations, thereby preventing them from meeting the definition of "participating."⁶ As such, the consultants would not be required to file a SEI.

Alternately, the same firm is engaged as technical consultants to assist the City in implementing a new software-driven accounting system. Their contract would consist of three parts: analyzing how the old system will interface with the new system, assisting with negotiations for the software, and providing quality assurance analysis of the product once delivered. The total term of the contract is eighteen months. Because the consultants would be serving in a staff capacity and "participating" in governmental decisions, they would be required to file.⁷

Test #3: Does the consultant "serve in a staff capacity" and perform the same or substantially the same duties as a regular employee who would be required to file?

If a consultant serves in a staff capacity for a regular and prolonged period of time and performs the same or substantially the same duties for the agency that would otherwise be performed by a designated employee, then the consultant is required to file a Form 700. If there is no position in an agency analogous to the responsibilities of the consultant, then the agency must determine whether an employee with the same duties as the consultant would be a designated SEI filer.⁸ If so, then the individual would be deemed a consultant with an obligation to file.

Examples: The Department of Public Works retains consultants from a professional engineering firm to assist with the workload when the City does not have a sufficient number of employees to handle the work in a timely manner. These consultants generally review engineering plans, maps and documents relative to proposed development, which includes the authority to suspend noncompliant activities. The Department has retained the firm to do this work for the last two years. These consultants would be required to file a SEI because they serve in a staff capacity (more than a limited number of projects in a period longer than one year), and the work they do is roughly the same as the work done by designated engineers.⁹

A contractor is hired to assist the City in updating and revising certain parts of the City's General Plan. That assistance will include facilitating meetings and regularly attending public meetings. The contract will last for less than one year,

⁵ See Wald Advice Letter, No. A-99-302 (2000).

⁶ See Maze Advice Letter, No. I-95-296 (1995).

⁷ See Murabito Advice Letter, No. A-04-245 (2005).

⁸ See Ferber Advice Letter, A-98-118 (1998).

⁹ See Murad Advice Letter, No. A-04-070 (2004).

but the contractor will be primarily responsible for the report's preparation. Because the contract is for a limited time and the work performed is not the same or similar to work done by designated employees (because of its primarily facilitative and administrative nature), the consultant is not serving in a staff capacity and therefore would not be deemed a consultant.¹⁰

- **What does "serving in a staff capacity" mean?**

A consultant serves in a staff capacity when he or she has an "ongoing relationship" with the public agency over a substantial period of time.¹¹ An ongoing relationship requires two elements: a number of projects and a significant duration of time. As a result, "serving in a staff capacity" generally excludes individuals who work on only one project or a limited range of projects for a limited period of time. The FPPC has previously advised that "a term of more than one year is significant enough" to meet this requirement, "whereas nine months of regular and continuous work is not normally enough to qualify."¹² But an "ongoing relationship" can include work on separate projects if the combined period of time for all projects is long enough (presumably ten months or longer).

- **We hired a company to do project work for us, not a specific person. Can a company be considered a consultant, and does it need to file?**

Only natural persons, not companies, can be consultants for purposes of determining SEI filing requirements.¹³ Accordingly, when a company is the contractor, the individuals who actually provide the services called for in a City contract would be considered consultants.¹⁴ Employees of a business under contract with a local agency who do not perform the contracted duties are not considered consultants and do not need to file, nor do those performing solely clerical or administrative functions or those whose work is subject to significant intervening substantive review.¹⁵

- **When must individuals who qualify as consultants file their SEI's?**

Consultants must disclose their financial interests by filing a Form 700 within 30 days of assuming their designated position, which in most circumstances occurs when an individual begins performing work on behalf of the City, and annually thereafter by the First of April. In addition, consultants must file a Form 700 within 30 days of leaving their designated position.¹⁶

- **Why should a consultant have to file a Form 700 if he or she is not a City employee?**

Some consultants exercise a substantial amount of decision-making authority, such as awarding government contracts or providing significant technical guidance on

¹⁰ See Lyons Advice Letter, No. A-94-353 (1994).

¹¹ See, e.g., Randolph Advice Letter, No. I-95-045 (1995); Sanchez Advice Letter, No. A-97-438 (1997); Bernardy Advice Letter, No. I-04-041 (2004).

¹² Wasko Advice Letter, No. A-04-270 (2004).

¹³ 2 C.C.R. 18701(a)(2).

¹⁴ Sanchez Advice Letter, No. I-03-17; Bernardy Advice Letter I-04-041.

¹⁵ Del Guercio Advice Letter No. I-03-173.

¹⁶ 2 C.C.R. 18730(b)(5); S.F. Campaign and Governmental Conduct Code, Art III, Ch. 1, *et seq.*

government projects.¹⁷ SEIs help identify in advance those individuals whose personal interests may conflict with or otherwise be affected by the contractual responsibilities they exercise on behalf of the public. Individuals who have such a conflict are usually disqualified from participating in any governmental decision that could materially affect their financial interests.¹⁸ This disclosure process helps ensure that City officials, employees, and consultants alike make decisions with only the City's interest in mind so that the public may continue to trust in the integrity of their government.

- **The consultant never signed a contract with us – does she need to file?**

Yes. A contractual relationship between the consultant and the public agency is required for a consultant to be a "public official" with a disclosure requirement. But the FPPC has opined that such a contract may be implied by law even if a formal contract has not been created. As such, it is best to assume that all consultants and employees are "under contract" whether or not an actual written or oral contract exists.¹⁹

- **We have a volunteer working for us – does she need to file?**

Volunteers and interns can be considered consultants with an obligation to file a Form 700. As explained above, although a consultant must perform certain tasks pursuant to a contract with the City, the FPPC has concluded that the contractual requirement may be implied and need not be a formal contract.²⁰ Accordingly, a volunteer or intern might be considered a consultant. But actions by volunteers, interns or consultants whose work is substantively reviewed by a supervisor are exempt from the SEI filing requirement.²¹ Furthermore, actions that are solely ministerial, secretarial, manual, or clerical are also exempt and do not trigger the SEI filing requirement.²² As such, volunteers and interns should be treated as consultants for purposes of determining filing responsibilities, although the nature of their duties and the length of their service make them far less likely to actually trigger the reporting requirement.

Examples: A new County agency director assembles a group of retired private sector advisors who share their business judgment and experience with the director on a voluntary, part-time basis. They gather information from businesses and other agencies and make recommendations to the director. The volunteers are not compensated, they have no decision-making authority, they do not supervise any county employees, and while they have performed this service for more than a year, they work less than ten hours per week. Furthermore, the director makes policy recommendations directly to the County's Board of Supervisors.

In this case, these consultants would be required to file SEIs because they serve in a staff capacity (their work is regular and prolonged, see below) and their work includes research and investigation that require the exercise of judgment without substantial intervening review, which would require that a regular employee to be deemed a SEI filer.²³

¹⁷ Note that consultants can include individuals from other public agencies, not just private sector for-profit companies. See FPPC Bernardy Advice Letter, No. I-04-041(2004).

¹⁸ 2 C.C.R. 18700.

¹⁹ Andrus Advice Letter A-95-163.

²⁰ See Andrus Advice Letter, No. A-95-163 (1995); Ferber Advice Letter, No. A-98-118 (1998).

²¹ 2 C.C.R. 18702.2(a-b).

²² 2 C.C.R. § 18702.4(a)(1).

²³ See Andrus Advice Letter, No. A-95-163 (1995); Ferber Advice Letter, No. A-98-118 (1998).

Alternately, a department regularly hires college interns who work on an unpaid, part-time basis to assist it in preparing budgetary projections and proposals. The interns assemble data from a variety of agency reports based on direction from their supervisor, who closely reviews the final product for mistakes before it is released. These interns would not be required to file because little independent judgment is required and their reports and recommendations are substantively reviewed.

- **What kind of information is the consultant required to disclose?**

When consultants file a SEI they must disclose any investment, business position, interest in real property or source of income that may foreseeably be affected by a decision made or participated in by the consultant.²⁴ The hiring department must examine the types of decisions the consultant will make or participate in making and then determine the specific types of financial interests that must be reported. The agency's determination must provide "reasonable assurance" that all potential conflict of interest situations will be disclosed or prevented.²⁵

- **What happens if a consultant fails to file?**

Individuals who meet the definition of a "consultant" are required by state and City law to file a SEI. Failure to do so is a violation of law, which may be enforced against the governmental agency by the FPPC if and when a complaint is filed.²⁶ The San Francisco Ethics Commission also has the power to enforce local conflict of interest laws. The FPPC generally punishes violations of state law through administrative fines (up to \$5000 per violation), which can be levied on both the contracting agency and the individual contractor. In cases of particularly egregious behavior, civil and criminal penalties may be imposed as well.

The responsibility to file exists even after a consultant's contract with a public agency has ended. The statute of limitations for failure to file a SEI is five years from the day that the consultant incurred the obligation to file.²⁷ If a consultant started work with the City on April 1, 2006, failed to file and then left in 2007, the FPPC would still be able to bring an enforcement action until April 1, 2011. If the consultant fraudulently conceals that fact that he or she has failed to file, that period could be even longer.

Example: During the energy crisis of 2001, the California Department of Water Resources (DWR) contracted with dozens of individuals and companies to help operate the state's water and power system. Because of their influence over important governmental decisions (contracting for electricity, in particular), all of those consultants were legally required to submit a SEI within 30 days of assuming office. But DWR failed to alert those consultants of their filing responsibilities in a timely manner. As a result, dozens of SEIs were filed months late.

The FPPC instituted a 52-count enforcement action against DWR, and ultimately imposed an administrative penalty of \$69,500 upon the agency (the maximum possible fine for those charges had been \$260,000).

²⁴ Gov. Code §87302(a).

²⁵ Gov Code. §87309.

²⁶ Gov. Code § 91003.5. 2 C.C.R. 18730.

²⁷ Gov. Code § 91000.5.

- **Can the individual consultant be punished as well?**

Yes. Individual consultants are subject to the same disciplinary procedures and fines as the government agency. Accordingly, individual consultants who fail to file, can be punished in a variety of ways, ranging from remedial actions and administrative fines of up to \$5000 per violation to referral for civil or criminal legal action.²⁸

Example: During the same enforcement action against DWR for energy consultants' failure to file, the FPPC fined one individual consultant \$17,500 for his prolonged failure to file on time. As noted elsewhere, it is always better to file late than to not file at all, and the FPPC is likely to view a voluntary filing (even if late) as a mitigating factor.

- **How would a consultant go about filing a disclosure statement?**

A consultant should submit the required information by filling out and filing a Statement of Economic Interest (SEI, Form 700) - with the department that hired the consultant. Consultants may contact the Ethics Commission or the FPPC for further guidance or to get copies of the form.

- **Our consultant probably should have filed, but she started work a year ago and never filed an SEI with the department. Does she still need to file?**

Absolutely. While late filings may subject a consultant to disciplinary action for five years after the filing requirement begins, the FPPC has taken a "better late than never" approach in past enforcement actions. Factors that have influenced the size of fines in the past include the level of the contractor's influence, the length of the delay, and whether there were departmental procedures in place to prevent untimely notification.²⁹

If a complaint was made against a consultant for failure to file, the FPPC would likely treat late filers with more leniency than someone who never filed at all particularly where there is no evidence of an intent to avoid filing in the first place. If an individual were to become aware of the filing requirement and still chose not to file, the punishment for willful refusal to file would likely be more substantial.

Remember: it is always better to file late than to not file at all.

- **What is the purpose of financial disclosure laws?**

State and City conflict of interest laws prohibit a "public official" from making, participating in making, or otherwise using or attempting to use his or her official position to influence governmental decisions that may affect the official's personal financial interests.³⁰ A "public official" includes designated City officers, employees and certain "consultants" of the City.

²⁸ See FPPC, "Form 700 Statement of Economic Interest", page 3, available at: <http://www.fppc.ca.gov/index.html?id=36>. The agency's filing officer also has authority to impose administrative fines of \$10 per day after the filing deadline, to a maximum of \$100. Late filing penalties can be reduced or waived under certain circumstances. *Id.*

²⁹ See In re: California Department of Water Resources, Stipulation, Decision and Order, FPPC No. 01/335; *Id.*, Exhibit 1.

³⁰ Gov. Code §87100, *et seq.*; C&GCC, Art III, Ch. 2, *et seq.*

Generally speaking, a public official has a conflict of interest if the official knows or has reason to know that a government decision will have "a reasonably foreseeable material financial effect" on one or more of his or her economic interests, unless the effect is the same for the general public or the official's participation is legally required.³¹

In order to make it easier for officials and members of the public to identify potential conflicts of interest in advance of a government decision, state law requires the City to "designate" those City officers, employees and consultants who must file SEI's.³² But because the tenure and responsibilities of these individuals can vary widely, some individuals are not required to file, and those who are may be required to disclose different information.

- **What else should I do to make sure that our department is completely covered?**

First, if your department uses consultants, review your department's conflict of interest code to ensure that consultants are designated as a position that is required to file, as necessary. If you find that consultants are not now included, request that they be added when the Board of Supervisors solicits suggested changes later this year. Also, make sure that you have procedures in place to review every consultant hired for potential filing responsibilities.

Second, identify all consultants already hired by your department, board or commission and determine whether they need to file a SEI. If you believe that a consultant should file but has not already done so, have him or her file a SEI immediately.

Third, make sure that managers and other decision-makers are familiar with all conflict of interest requirements for the state and City (see the City Attorney's "Good Government Guide" or the Ethics Commission website for the relevant documents).

- **What should I do if I've read this memo and used the checklist and I'm still not sure whether or not a consultant is required to file?**

If you think that one of your consultants may be involved in the kinds of governmental decision-making described above or you are just not sure, contact the Deputy City Attorney assigned to your department, board or commission to determine whether that individual must file a SEI.

³¹ *Id.*

³² Gov. Code §87302.

CHECKLIST:

**When Is a Consultant, Volunteer or Intern
Required to File A Statement of Economic Interest?**

1. **Does the Individual Do Work for the City, But Not as a Regular Employee?**

Does the individual serve as a consultant, volunteer, or intern for a City agency or department, but has not yet filed a SEI? **If so, proceed to #2.**

If not, then stop. Do not use this analysis for regular employees, or for individuals who have already submitted a SEI.

2. **Does the Individual Perform Work for the City Pursuant to a Contract?**

Does the individual have a written, oral or implied contract with the City to perform work on behalf of the City?

If so, go to #3.

If not, then stop. If the individual does not perform work under either a written, oral or implied contract, then the individual cannot be a "consultant" with a SEI filing requirement.

3. **Does the Individual Make Governmental Decisions?**

Does the individual, acting within the scope of the contract, make (by voting, appointing, obligating, committing, contracting, or deciding not to take any of these actions) any of the following seven kinds of governmental decisions?

- Approving a rate, rule or regulation;
- Adopting or enforcing a law;
- Issuing, denying, suspending, or revoking any permit, license application; certificate, approval, order, or similar authorization or entitlement;
- Authorizing the agency to enter into, modify, or renew a contract that otherwise requires agency approval;
- Granting agency approval to a contract;
- Granting agency approval to a plan, design, report, study, or similar item;
- Adopting or approving policies, standards, or guidelines for the agency.

If so, go to #8. The individual is likely a "consultant" serving as a "public official" and will be required to file a SEI.

If not, proceed to #4.

4. **Does the Individual Serve in a Staff Capacity**

Does the individual work on more than a limited number of projects and have an ongoing relationship with the employer that has lasted longer than ten months?

If so, go to #5.

If not, then stop. If the individual does not serve in a staff capacity, and does not make certain governmental decisions as described in #3, then the individual cannot be a "consultant" with a SEI filing requirement.

5. Does the Individual Participate in Making Governmental Decisions?

Does the individual participate in making a governmental decision (of the kinds described above in Step #3) by doing either of the following:

A) negotiating governmental issues without significant substantive review?

Or...

B) advising or making recommendations to a decision-maker by conducting research, making an investigation, or preparing or presenting a report, which...

- had no significant intervening substantive review,
- requires the exercise of judgment on the part of the consultant, and
- is intended to influence a government decision?

If A) or B) or both apply, go to #7.

If neither applies, proceed to #6.

6. Does the Individual Perform The Same or Similar Duties as an Employee Required to File?

Does the individual make similar decisions (perform the same or substantially all the same duties for the agency) that would otherwise be made by an individual holding a position designated in your agency's Conflict of Interest code?

If so, proceed to #7.

If not, then stop. The individual is not involved in any decisions that would trigger a SEI filing requirement.

7. Does the Individual Perform Duties other than those that are Clerical in Nature or Perform Work Without Significant Substantive Review?

Is the individual's involvement in a "governmental decision" more than ministerial, secretarial, manual, or clerical in nature? Is the individual's work performed without substantive review before being presented to a decision-maker?

If so, proceed to #8. The individual is likely a "consultant" serving as a "public official" and will be required to file a SEI.

If not, then stop. Actions that are substantively reviewed or are wholly administrative are exempt from the filing requirement. The individual is not considered a consultant and is not required to file a SEI.

8. What Should I Do If My Consultant's Activities Appear to Trigger a SEI Filing Requirement?

If you applied this checklist to the job responsibilities of your consultant and he or she appears to have met the given criteria, you should do the following:

- Determine what financial interests the consultant should disclose and require the consultant to file an SEI.
- Contact the deputy city attorney assigned to your department or agency if you need additional assistance.