

Date April 3, 2009 Item No. 7

**LOCAL AGENCY FORMATION COMMISSION**  
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- Exceeds 20 pages; see file to review**  
**Available for review at City Hall, Room 244**

Completed by: Linda Wong Date: April 1, 2009

**\*This list reflects the explanatory documents provided**

# San Francisco Local Agency Formation Commission

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TO: LAFCO Commissioners

FROM: Nancy C. Miller, Interim Executive Officer

DATE: April 3, 2009

SUBJECT: Item 7: Communications With Potential Contractors. (Discussion and Possible Action Item)

At the March 6, 2009, LAFCO hearing, the Commission directed the Interim Executive Director to provide it with information regarding ex parte communications with potential contractors.

Since the March 6, 2009, LAFCO hearing, the Interim Executive Director and staff, have reviewed state laws and regulations, San Francisco municipal code and regulations, and the San Francisco Sunshine Ordinance, in order to effectively advise the Commission

**Ex Parte Communications:** There are general prohibitions that would restrict a Commissioner who has communicated with a potential contractor from participating in the decision on the contract.

One limitation is that if the Commissioner is financially interested in the potential contract, he or she is not permitted to participate in the decision making process for that contract, and is prohibited from attempting to influence the decision. (Gov. Code, § 87100.)

Another limitation is that if the Commissioner has received a campaign contribution of more than \$250 from a participant or party to a proceeding within the preceding 12 months before the participant or party began actively supporting or opposing a matter, the Commissioner must disqualify his or herself from the matter.

However, even if those limitations do not apply, a Commissioner who has an ex parte communication with a potential contractor should publicly disclose that

communication pursuant to the San Francisco Sunshine Ordinance (Sunshine Ordinance), which LAFCO has committed itself to follow. (SF LAFCo, Policies and Procedures, § 1.41.) The Sunshine Ordinance makes clear that "Government's duty is to serve the public, reaching its decisions in full view of the public." (S.F. Admin. Code, Ch. 67, § 67.1, subd. (a).) Expanding on this general principle, the Sunshine Ordinance states:

Commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

(S.F. Admin. Code, Ch. 67, § 67.7, subd. (g).) The Sunshine Ordinance's intent is to ensure that all decisions made are done in "full view of the public." Accordingly, to uphold the spirit and intent of the Sunshine Ordinance, anytime a Commissioner receives an ex parte communication from a potential contractor or person with a contract award pending before the Commission, the Commissioner should report that communication at the next meeting the matter is before the Commissioner. Finally, reporting the communication also satisfies the common law conflict of interest prohibition against even an appearance of impropriety. (*People v. Honig* (1996) 48 Cal.App.4th 289.)

**Lobbying Disclosure and Reporting Requirements:** The Commission has adopted policies and procedures requiring lobbying disclosures and reporting requirements for applicants or persons who are financially interested in a proceeding when they attempt to influence pending decisions by members, staff or consultants of the Commission, pursuant to Government Code section 56300, subdivision (c).

Under these policies and procedures, a participant disclosure form must be completed "by participants in a proceeding involving a license, permit, or other entitlement for use." Additionally, a party disclosure form must be completed "by parties in a proceeding involving a license, permit, or other entitlement for use pending before SF LAFCo."

A proceeding involving a "license, permit, or other entitlement for use" is defined as "all business, professional, trade and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises." (Gov. Code, § 84308, subd. (a)(5).) Therefore, proceedings involving competitively bid contracts are not proceedings involving a license, permit, or other entitlement for use.

In sum, the adopted policies and procedures requiring lobbying disclosures and reporting requirements for persons who attempt to influence pending decisions by

members, staff or consultants of the Commission, do not apply to ex parte communications on matters that are not within the definition of a "proceeding involving a license, permit, or other entitlement for use." Any ex parte communications that *do* fit within the definition must be disclosed.

**Disclosure of Personal, Professional and Business Relationships:** San Francisco Code requires that any City officer or employee publicly disclose any personal, professional or business relationship with any individual who is the subject of or has an ownership or financial interest in the subject of a governmental decision being made by the officer or employee where as a result of the relationship, the ability of the officer or employee to act for the benefit of the public could reasonably be questioned. (S.F. Campaign & Governmental Conduct Code, Art. III, § 3.214, subd. (a).) The attached Cheat Sheet details to process for determining when a relationship must be publicly disclosed.

**Recommended Best Practices:** To uphold the spirit and intent of the Sunshine Ordinance and the common law, the Commission should consider following a rule that anytime a Commissioner receives an ex parte communication from a contractor or a person involved in an award of a contract or for an entitlement of use before the Commission:

1. The Commissioner should report that he or she received an ex parte communication at the next public meeting where the subject matter of the ex parte communication is before the Commission.
2. The report should include:
  - a. The form of communication;
  - b. The identity of the party communicating; and
  - c. A short summary of the content of the communication.

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## RULES FOR MEETING WITH POTENTIAL CONTRACTORS OR PARTIES TO A PROCEEDING BEFORE LAFCO.

### Requirements under LAFCo Laws for Ex Parte Communications:

1. You may meet with a potential contractor who has bid on a contract yet to be awarded provided you report it to the Commission.
2. As a Commissioner you can refuse to meet with the potential contractor to eliminate any appearance of impropriety.
3. Additionally, if you are financially interested in the potential contract, you are prohibited from participating in the decision regarding the contract, or from attempting to influence the decision.
4. Finally, if you have received a campaign contribution of more than \$250 from the potential contractor within the preceding 12 months before the potential contractor began actively supporting his or her bid, you must disqualify yourself from the matter.

### Requirements under the San Francisco Sunshine Ordinance for Disclosure:

1. The purpose of the Sunshine Ordinance is to ensure that all governmental decisions are made in full view of the public.
2. The Sunshine Ordinance has no specific prohibitions on ex parte communications by potential contractors.
3. However, to adhere to the spirit and purpose of the Sunshine Ordinance, for any ex parte communication you receive, you should report that you an ex parte communication at the next public meeting where the subject matter of the ex parte communication is before the Commission.
4. Your report should include (1) the form of communication; (2) the identity of the party communicating; and (3) a short summary of the content of the communication.