

[NOTE: In 2014, the California Fair Political Practices Commission amended Regulation 18706 to state that an outcome is “reasonably foreseeable” if it is a “realistic possibility.” An outcome need not be “substantially likely” to be considered “reasonably foreseeable.”]

April 18, 2007

SDEC Informal Advice Letter No. IA07-05

Anna Danegger
Business Operations and Administration
City Administration Bldg., 9th Floor
202 “C” Street
San Diego, CA 92101

Re: Request for Advice Regarding Disqualification from Municipal Decisions

Dear Ms. Danegger:

This advice letter has been prepared in response to your e-mail communication to the City of San Diego Ethics Commission dated April 6, 2007. You are seeking general advice from the Ethics Commission interpreting the provisions of the City’s Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Your letter seeks the Commission’s assistance with regard to your ability to participate in a variety of actions as a result of your former employment with Grant Thornton, a business entity that currently does business with the City of San Diego. Because you have not identified any specific municipal decisions, we are treating your e-mail as a request for informal advice.

QUESTIONS

1. May you work on City projects in which your former employer, Grant Thornton, has been selected to provide services to the City of San Diego?
2. May you help negotiate task orders for future work under the contract that is in place with Grant Thornton?
3. May you oversee the delivery of Grant Thornton's work, including accepting or rejecting deliverables and approving payment of invoices?
4. May you have one-on-one meetings (either in person or via telephone) with staff from Grant Thornton?
5. May you provide facts to Grant Thornton in support of their delivery of contracted services?
6. May you ask Grant Thornton for support, advice, or information on behalf of the City in the areas of support for which they have been put under contract?

7. May you share your personal opinions about the City, its programs, its services, or its staff with Grant Thornton personnel?
8. May you have personal relationships or friendships with Grant Thornton staff?
9. May you have personal relationships or friendships with Grant Thornton staff if they are working on the City's contract?
10. May you socialize with Grant Thornton personnel, presuming that you do not accept meals, gifts, or other items with monetary value from them?
11. May you visit the out-of-town homes of Grant Thornton personnel for meals and/or vacation visits?
12. May you evaluate Grant Thornton for future contract awards?
13. May you negotiate contracts with Grant Thornton, on behalf of the City?

SHORT ANSWERS

1. Because you owed tuition reimbursement money to Grant Thornton while you were a City Official, that entity is a "source of income" to you for purposes of the Ethics Ordinance's conflict of interest rules. These rules provide that you may not influence municipal decisions that are substantially likely to have a material financial effect on an entity that has been a source of income to you within the previous twelve months. For this reason, you may not, during the twelve months subsequent to the last day that you owed money to Grant Thornton, participate in any municipal decisions that are substantially likely to have a material financial effect on your former employer.
2. See the response to question number 1. To the extent that negotiating task orders for future work under the contract that is in place with Grant Thornton will have a material financial effect on Grant Thornton, you are prohibited from doing so during the twelve months subsequent to the last day that you owed money to your former employer.
3. See the response to question number 1. To the extent that accepting or rejecting deliverables and approving payment of invoices will have a material financial effect on Grant Thornton, you are prohibited from engaging in this activity during the twelve months subsequent to the last day that you owed money to that entity. Note, however, that any ministerial

work (i.e., not requiring you to exercise discretion) you perform on such matters would fall outside the scope of the prohibition.

4. Nothing in the Ethics Ordinance precludes you from having one-on-one meetings (either in person or via telephone) with staff from Grant Thornton, but as indicated above, you may not, during the twelve months subsequent to the last day that you owed money to your former employer, use such meetings as a means of influencing municipal decisions that are substantially likely to have a material financial effect on that entity.
5. Nothing in the Ethics Ordinance precludes you from providing non-confidential facts to Grant Thornton in support of their delivery of contracted services.
6. Nothing in the Ethics Ordinance precludes you from asking Grant Thornton for support, advice, or information on behalf of the City in the areas of support for which they have been put under contract.
7. Nothing in the Ethics Ordinance precludes you from sharing your personal opinions about the City, its programs, its services, and its staff with Grant Thornton personnel to the extent that you do not share confidential information with those individuals.
8. Nothing in the Ethics Ordinance precludes you from having personal relationships or friendships with Grant Thornton staff.
9. Nothing in the Ethics Ordinance precludes you from having personal relationships or friendships with Grant Thornton staff who are working on a City contract.
10. Nothing in the Ethics Ordinance precludes you from socializing with Grant Thornton personnel, regardless of whether you accept meals, gifts, or other items with monetary value from them. (Note that the Ethics Ordinance precludes you from accepting gifts in excess of \$390 from any reportable source identified in your department's conflict of interest code.)
11. Visiting the out-of-town homes of Grant Thornton personnel for meals and/or vacation visits does not constitute a "gift" under the Ethics Ordinance unless the source of the hospitality is a "reportable source" and is not present during your stay. If you are granted access to lodging where the owner of the residence is not present, the "hospitality" exception in the Ethics Ordinance does not apply, and such access would be considered a "gift" if given to you by a reportable source identified in your department's conflict of interest code.

12. See the response to question number 1. Because Grant Thornton's receipt of a future City contract will clearly have a material financial effect on that entity, you are prohibited from participating in awarding such a contract to that entity during the twelve months subsequent to the last day that you owed money to your former employer.
13. See the response to question number 1. Because a City contract with Grant Thornton will clearly have a material financial effect on that entity, you are prohibited from negotiating the terms of a contract with that entity during the twelve months subsequent to the last day that you owed money to Grant Thornton.

BACKGROUND

You are a Program Manager in the City's Business Operations and Administration Department. Prior to commencing your City employment, you worked for Grant Thornton, a private sector business entity. Your last day of work for Grant Thornton was November 30, 2006. You began working for the City of San Diego on December 4, 2006. You received your last paycheck from Grant Thornton on December 15, 2006, in payment for all work performed through your last day of employment. You currently have no financial ties to Grant Thornton, i.e., you have no ownership interest in the business, nor are you entitled to any future income from the business. You have no plans to return to work for Grant Thornton, and have received no commitment of any kind to return to work for them.

During the course of your employment with Grant Thornton, you participated in a tuition reimbursement program in which your former employer provided you with financial support to pursue a master's degree. You terminated your employment with Grant Thornton before satisfying a post-benefit commitment related to accepting the tuition benefit. Accordingly, you became obligated to repay the sum of \$10,500 to your former employer. You paid this amount to Grant Thornton in late December of 2006; the payment was acknowledged by a Grant Thornton employee on January 3, 2007.

Your current job duties involve working on the City's managed competition program. Grant Thornton was selected under the City's Request for Proposals [RFP] process to perform services related to the managed competition program. Your questions pertain to the extent to which you may participate in matters involving Grant Thornton and its employees.

ANALYSIS

As an unclassified City Official, you are subject to the City's Ethics Ordinance, and in particular the provisions of the Ethics Ordinance that prohibit officials from participating in municipal decision in which they have a financial interest. SDMC section 27.3561 prohibits City Officials from knowingly influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on any of their economic interests. The term, "municipal decision" is defined at SDMC section 27.3503 to include ordinances,

resolutions, reports to Council and Council committees, contracts, quasi-judicial decisions, and any decisions by the City Council or any City board or commission. Note that a “municipal decision” does not include requests for advice or interpretation of laws, regulations, City approvals, or policies, nor does it include actions that are of a ministerial nature. SDMC § 27.3503.

The Ethics Ordinance also defines “economic interests” as follows:

- (1) any business entity in which the City Official or a member of the City Official’s immediate family has invested \$2,000 or more;
- (2) any business entity for which the City Official or a member of the City Official’s immediate family is a director, officer, partner, trustee, employee, or hold any position of management;
- (3) any real property which the City Official or a member of the City Official’s immediate family has invested \$2,000 or more;
- (4) any person from whom a City Official or a member of the City Official’s immediate family has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the municipal decision; and
- (5) any person from whom a City Official or a member of the City Official’s immediate family has received gifts which total \$320 or more within twelve months prior to the municipal decision.¹
- (6) the personal expenses, income, assets, or liabilities of a City Official or a member of the City Official’s immediate family.

SDMC § 27.3561.

A. Income From Former Employer

For the purpose of addressing the concerns raised in your April 6, 2007, e-mail, this advice letter will focus on subsection (4) above, which pertains to income you have received from a private entity.² As you stated in your e-mail, you were a paid employee of Grant Thornton, and accordingly the income you received through that employment must be evaluated for purposes of determining whether or not you are disqualified from participating in municipal decisions involving the source of that income. As indicated by the provisions of SDMC section 27.3561, you are generally prohibited from participating in municipal decisions that would have a material financial interest on an entity that has provided you with \$500 or more in income during the previous twelve months.

¹ The \$320 gift limits at the time this section went into effect have been raised to \$390.

² Note that this advice letter does not address other conflicts of interest that could arise from, for example, financial investments that you may have, or entities (such as Grant Thornton) providing you with gifts. Your e-mail did not mention the existence of such other financial interests, and accordingly we do not address them here. As indicated by the language of SDMC section 27.3561, however, you should be aware that a source of income is not the only type of financial interest that gives rise to conflicts under the Ethics Ordinance.

The City's conflict of interest rules are derived from state law, and accordingly we interpret our rules to be consistent with those set forth at the state level. The state's Fair Political Practices Commission [FPPC] has adopted a regulation containing an exception to the "source of income" rule in instances where the source of income is a former employer. Under this exception, a source of income "shall not include a former employer if: All income from the employer was received by or accrued to the public official prior to the time he or she became a public official; the income was received in the normal course of the previous employment; and there was no expectation by the public official at the time he or she assumed office of renewed employment with the former employer." FPPC Reg. 18703.3(b). Based on the information you provided to us, it is clear that this exception applies to the salary you received from Grant Thornton. That salary was earned in the normal course of your former employment, and you had no expectation of renewed employment when you assumed your City position. Accordingly, the salary you received as a Grant Thornton employee does not trigger the disqualification provisions of the City's Ethics Ordinance.

On the other hand, you received more than just salary from Grant Thornton. You stated that you participated in that entity's tuition reimbursement program, but ultimately had to pay back \$10,500 because of leaving the company before completing your post-benefit commitment. Thus, the question that arises is whether that debt was a form of "income." The state's Political Reform Act's [PRA] definition of "income" is incorporated in the City's Ethics Ordinance by reference. SDMC § 27.3503. Under the PRA, this term is broadly defined to mean: "a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse." Under this definition, the payment of your tuition by Grant Thornton could be considered a "payment," a "loan," a "payment of indebtedness," or a "reimbursement for expenses." In other words, it is clear that Grant Thornton's payment of your tuition qualified, in one way or another, as "income" under the above definition.

For the section 18703.3(b) "prior employer" exception to apply, "all income from the employer [must be] received by or accrued to the public official prior to the time he or she became a public official." You have stated that the obligation to reimburse the \$10,500 was not satisfied until the end of December of 2006, which is at least several weeks after you became a City Official. Stated another way, you had an outstanding loan or debt with Grant Thornton while you were a City Official. Because the "prior employer" exception does not make any distinction between an ongoing debt and a debt owed but paid shortly after assuming office, we cannot insert that distinction on our own. In other words, we must interpret the section 18703.3(b) "prior employer" exception as not applying to the facts of your situation. As indicated in *In re Acker*, FPPC Adv. Ltr. A-01-055, this exception is designed "for new public officials who have severed *all* ties with their private sector employer." (emphasis added) That advice letter also states that this particular exception must be construed narrowly. Because conflict of interest laws are designed to protect the public's interest in avoiding even the appearance of corruption, any

exception must be interpreted in a narrow fashion. *Id.*; see also *Bollinger v. San Diego Civil Service Comm.*, 71 Cal. App. 4th 568, 573 (1999).

Accordingly, we conclude that you may not influence any municipal decision where it is reasonably foreseeable that the decision will have a material financial effect on Grant Thornton until twelve months have passed from the date that your loan or debt from that entity was paid off.

Your April 6, 2007, e-mail communication does not identify any particular municipal decisions involving Grant Thornton, but instead describes the types of duties (e.g., negotiating contracts, negotiating task orders, accepting or rejecting deliverables, approving payment of invoices) that you might engage in with regard to matters involving Grant Thornton. We cannot, therefore, say that you are, or are not, disqualified from participating in a specific municipal decision. We can, however, offer you some guidance on how to determine whether or not it is “reasonably foreseeable” that a particular decision will have a “material financial effect” on your former employer.

1. Reasonably Foreseeable

The term “reasonably foreseeable,” although not defined in the Ethics Ordinance, has been thoroughly analyzed by the FPPC in its advice letters. The FPPC has opined that an effect is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. *In re Orlik*, FPPC Adv. Ltr. I-98-175. “A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility.” *In re Harron*, FPPC Adv. Ltr. A-07-02.

2. Material Financial Effect

According to SDMC section 27.3561(c), “material financial effect” has the same meaning as that set forth in sections 18705 through 18705.5 of the California Code of Regulations. Regulation 18705.3 sets forth the materiality standards for “direct” and “indirect” economic interests in a source of income. This regulation provides that the financial effect of a governmental decision on a source of income that is “directly involved” in the decision is deemed to be material. On the other hand, if a source of income is merely “indirectly involved” in the decision, then the decision’s financial effect on the source of income will be material only if certain dollar thresholds are met.

A source of income is considered “directly involved” in a municipal decision when it, either directly or through an agent: (1) initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or; (2) is a named party in the decision, or is otherwise the subject of the decision. A person is the subject of a decision if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the person. FPPC Reg. 18704.1. If, for example, Grant Thornton is the subject of a City contract, it clearly would be “directly involved” in municipal decisions

relating to that contract, and under the rules identified above, such decisions would be deemed to have a “material financial effect” on that entity.

On the other hand, there may be instances where Grant Thornton is indirectly involved in a municipal decision. In such cases, the municipal decision would have a material financial effect on that entity only if certain financial thresholds are reached. The applicable threshold depends on the financial size of the company. The larger the business entity or non-profit entity, the greater the impact the decision will need to be on that entity in order for the financial effect to be considered “material.” A decision that has a negligible financial impact on a large business entity, for example, could have a substantial impact on a small business. In other words, what is “material” to a small company might not be “material” to a large one. We have attached the Ethics Commission’s “Fact Sheet on Disqualification from Municipal Decisions – Part 3: Sources of Income,” which should assist you in determining the appropriate threshold for Grant Thornton.

Ultimately, if you determine that, with regard to a specific municipal decision, the decision will have a material financial effect on Grant Thornton, you may not engage in any action that could be construed as influencing that decision. The term, “influencing a decision” is defined in the Ethics Ordinance to mean: “affecting or attempting to affect any action by a City Official on one or more municipal decisions by any method, including promoting, supporting, opposing, participating in, or seeking to modify or delay such action. Influencing a municipal decision also includes providing information, statistics, analysis or studies to a City Official.” SDMC § 27.3503.

B. Confidential Information

Several of your questions involve communications with members of your former employer. In general, the Ethics Ordinance does not regulate the content of communications that City Officials have with employees of private businesses. The Ethics Ordinance does, however, prohibit City Officials from disclosing any confidential information they have acquired in their official City duties, except when such disclosure is a necessary function of their official duties. SDMC § 27.3564(e). The term, “confidential information” is defined to mean information to which any of the following apply:

- (a) At the time of the use or disclosure of the information, the disclosure is prohibited by a statute, regulation, or rule which applies to the City; or
- (b) the information is not general public knowledge and will have, or could reasonably be expected to have, a material financial effect on any source of income, investment, or interest in the real property of a City Official; or
- (c) the information pertains to pending contract, labor, or real property negotiations and disclosing the information could reasonably be expected to compromise the bargaining position of the City; or

- (d) the information pertains to pending or anticipated litigation and disclosing the information could reasonably be expected to compromise the ability of the City to successfully defend, prevail in, or resolve the litigation.

SDMC § 27.3503.

Thus, you must ensure that any communications you have with individuals outside the City do not divulge information that would violate the confidentiality provisions of the Ethics Ordinance, particularly with regard to individuals employed by a private entity that is likely to engage in contract negotiations with the City.

C. Socializing

Nothing in the Ethics Ordinance addresses socializing. In other words, there are no provisions in the ordinance that restrict the manner in which you spend your personal time. Accordingly, the questions you have posed on the subject of socializing with employees of Grant Thornton are outside the scope of the Ethics Commission's jurisdiction. You may wish to consult with your department head with regard to the existence of any internal policies that may be applicable.

One of your "socializing" questions, however, does pertain to visiting out-of-town homes of Grant Thornton personnel. In general, when a person gives you something of value, it is a "gift" under the Ethics Ordinance, and if that person is a "reportable source" under your department's conflict of interest code, then gifts from that person are subject to a \$390 per year limit, must be reported on your Statement of Economic Interests (if valued at \$50 or more), and may (if valued at \$390 or more) disqualify you from participating in municipal decisions involving that person. SDMC §§ 27.3510(b); 27.3520(g); 27.3561((b)(5)). For this reason, a key question is whether or not the source of a gift is a "reportable source." As a Program Manager in the Business Office, your conflict of interest code requires you to report gifts from these sources: "any person or business entity that supplies goods or services to the City, that is a tenant of the City, that is an adverse party to the City in a legal proceeding, or is granted by the City to use City facilities." Accordingly, if a particular friend or acquaintance does not fall within any of these categories, then you may accept unlimited gifts from that person without implicating the Ethics Ordinance. In other words, you may visit that person's home for any purpose, including vacationing in their home, without being subject to the gift restrictions contained in the Ethics Ordinance.

On the other hand, if a particular friend or acquaintance is a "reportable source" under your conflict of interest code, you would be subject to the gift restrictions contained in the Ethics Ordinance. As indicated above, you may accept no more than \$390 worth of gifts from the same reportable source within a single calendar year. There is, however, a "hospitality" exemption that may apply to your vacationing at a person's home. According to section 27.3525(q) of the Ethics Ordinance, the following is exempt from the definition of "gift": "hospitality, including food, beverages, or occasional lodging, provided to a [City Official] by an individual in his or her home when the individual or a member of the individual's immediate family is present." Therefore, if a person who is a reportable source offers you lodging his or her residence, and is also staying at that residence, then the exemption applies, and you would not treat that type of

hospitality as a gift. On the other hand, if a reportable source offers you lodging at his or her residence, but does not stay at that residence while you are there, then your stay would be a gift subject to the Ethics Ordinance's rules regarding gift limits, reporting requirements, and disqualification.

CONCLUSION

As set forth above, your participation in your prior employer's tuition reimbursement program created an outstanding debt that you carried forward into your employment with the City. Because this debt existed after you assumed your City duties, the "former employer" exemption does not apply. Even though you extinguished this debt shortly after you became a City Official, the fact remains that Grant Thornton was a source of more than \$500 in "income" to you, and that fact triggers the disqualification provisions of the Ethics Ordinance. Assuming that there are no other disqualifying conflicts of interest, you may begin participating in municipal decisions that are substantially likely to have a material financial effect on Grant Thornton at the end of December of 2007, which is twelve months from when you last received any "income" from that entity.

With regard to your communicating and socializing with employees of Grant Thornton, the Ethics Ordinance does not regulate such activities aside from the ancillary gift issues and confidentiality concerns addressed above in this letter.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

Sincerely,

Cristie C. McGuire
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance

Enclosure