

**CITY OF LOS ANGELES
CALIFORNIA**



CITY ETHICS COMMISSION

Helen Zukin
President

Paul Turner
Vice President

Marlene Canter
Nedra Jenkins

Valerie Vanaman

LeeAnn M. Pelham
Executive Director

200 North Spring Street
City Hall – 24th Floor
Los Angeles CA 90012
(213) 978-1960
(213) 978-1988 Fax
<http://ethics.lacity.org>

Whistleblower Hotline:
(213) 978-1999
(800) 824-4825

MEMORANDUM

November 2, 2010

To: Members of the City Ethics Commission

From: Heather Holt, Director of Policy and Legislation

Re: **AGENDA ITEM 7**
Governmental Ethics Ordinance Review:
Impartiality and Fairness, Part C (continued)

A. BACKGROUND

In January 2010, we began a comprehensive review of the Governmental Ethics Ordinance (GEO) and have been discussing specific recommendations for improving it. We divided the GEO into three categories, based on its underlying public policy goals: transparency; impartiality and fairness; and compliance. The Commission has reached consensus regarding the public disclosure and transparency recommendations in Category 1 and the compliance recommendations in Category 3.

Because of the fullness and complexity of the issues in Category 2 (impartiality and fairness), we spread the discussions out over several meetings and into three parts. The Commission has reached consensus regarding Parts A and B of Category 2. At the September meeting, the Commission began a discussion of Part C of Category 2, regarding ex parte communications, but did not reach consensus.

The policy focus at the October meeting was campaign finance issues related to possible ballot measures for the March 2011 election. We return this month to the GEO review, and this memo makes recommendations regarding ex parte communications, the final decision points related to the GEO review. This memo also identifies actions taken by the state's Fair Political Practices Commission (FPPC) regarding tickets and admission passes provided to public officials who perform ceremonial roles, an issue we previously discussed in Part B of Category 2.

B. SUMMARY

The staff recommends that ex parte communications be governed by adding the following regulations to the GEO.

Adjudicative Matters:

- a. Prohibit decision makers other than elected City officials from engaging in ex parte communications.
- b. Exclude from the ban communications regarding ministerial issues.
- c. Exclude from the ban communications with staff in the decision maker's agency, except for staff members who act as parties to the matter.
- d. Apply the ban from the time the decision maker is made aware of the matter until the decision maker or the body of which the decision maker is a member decides the matter.
- e. Require decision makers to disclose ex parte communications that occur during and up to six months prior to the ban by providing written notice to all parties, other decision makers, and the City Attorney.
- f. Require decision makers to disclose ex parte communications at the earlier of the hearing or within one business day of engaging in a prohibited communication or, for permissible communications, of receiving notice of a matter.
- g. Require decision makers to disclose the date of the communication, the persons with whom they communicated, the matter that was discussed, and the substance of the discussion.
- h. Permit parties to request up to five business days to respond to a disclosed ex parte communication if the request is made within one business day of receiving notice.
- i. Specify that participating in an ex parte communication during the ban may be grounds for a determination by the City Attorney that the decision maker should be disqualified from participating in the decision.

Legislative Matters:

- j. Require commissioners and board members other than elected City officials to disclose ex parte communications they have regarding legislative matters within their jurisdictions.
- k. Specify that disclosure must be a routine agenda item and that commissioners must disclose on the record, either verbally or in writing, their legislative ex parte communications (or the fact that no ex parte communications occurred) since the last meeting they attended.
- l. Require commissioners to disclose the date of the communication, the persons with whom the commissioner communicated, and the issue or agenda item that was discussed.

C. EX PARTE COMMUNICATIONS

The third and final component of Category 2 (impartiality and compliance) focuses on ex parte communications, a fairness issue that is not currently part of the GEO. Two City Council motions, both introduced by then-Councilmember Wendy Greuel, have urged the regulation of ex parte communications. See Council File Nos. 07-3294, 07-3294-S1, Attachment A. The City Attorney's office has also issued a report regarding a proposed ex parte communications policy. See City Attorney Report No. R07-0457, Attachment B.

Ex parte communications are, essentially, off-the-record interactions with decision makers that occur without the knowledge, consent, or participation of all involved parties. An ex parte communication leads to an information imbalance; opposing parties and other decision makers may not be privy to the data or perspectives obtained through the communication and may not be aware that the communication occurred. Ex parte communications may be initiated by either the decision maker or a third party. They may be verbal or written; and they may occur in person or by telephone, letter, fax, email, instant messaging, texting, or any other means of conveying a message.

Two of the GEO's stated purposes are to ensure that "individuals and interest groups in our society have a fair and equal opportunity to participate in the governmental process" and to ensure that "the governmental process itself promotes fairness and equity for all residents" Los Angeles Municipal Code (LAMC) §§ 49.5.1(C)(1)–(2). Another purpose of the GEO is to "help restore public trust in governmental and electoral institutions." LAMC § 49.5.1(C)(7). When ex parte communications occur, the public's confidence in the equity of City decisions can be threatened. Communications that occur outside a formal, public process can lead to the perception that City decisions are biased because of a particular person's special access or influence, rather than objectively based on facts, law, and good public policy.

To foster the GEO's important equity goals and to promote transparency about City processes, we recommend adding to the GEO restrictions that apply to ex parte communications in both adjudicative and legislative settings. A number of details must be addressed in order for the regulations to be effective, and those details are discussed below.

1. Adjudicative Matters

Adjudicative matters are those in which decision makers are required to conduct a hearing and make a decision based on the law and the facts in a particular case. There are parties to adjudicative matters, who have a personal stake in the decision that is made. As a result, minimum standards of due process apply, in order to ensure that the parties receive fair hearings. *See, e.g.*, U.S. Const. amend. V; Cal. Const. art. I, §§ 1, 7(a). Courts have said that receiving and considering evidence outside of the hearing process denies the parties a fair hearing. *See City Attorney Report No. R07-0457 (Attachment B, p. 2)*, citing *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1319. Furthermore, a court can overturn an adjudicative decision when the parties are not afforded a fair trial. *See Id.*, citing Cal. Code Civ. P. § 1094.5(b).

Ex parte communications jeopardize due process in adjudicative matters, because they do not provide notice and an opportunity for all parties to participate. We believe that protecting due process and helping to ensure that City decisions are procedurally proper is vital to good government. Accordingly, we believe that the GEO should prohibit adjudicative ex parte communications within the following framework.

a. Officials Subject to the Ban

There are a variety of ways that adjudicative City decisions are made. Commissions and boards, such as the Ethics Commission or the Board of Building and Safety Commissioners, can act as adjudicative decision makers. Individuals such as zoning administrators may also adjudicate City decisions. And the City Council (or certain City Council members acting as the Board of Referred Powers) may also sit as an adjudicative body.

The City Attorney has advised against applying the ban to elected officials. *See* Attachment B, pp. 4-5. The City Attorney notes that, in addition to the constitutional right of due process, citizens also have the constitutional right to petition their elected officials. *See, e.g.,* U.S. Const. amend. I; Cal. Const. art. I, § 3(a). Recognizing these competing and equally compelling interests, we do not recommend including elected City officials in the regulations regarding ex parte communications. We understand that the City Attorney's office will continue to caution elected officials against engaging in adjudicative ex parte communications. In addition, elected officials may voluntarily comply with the regulations when they believe is appropriate to do so.

b. Communications Subject to the Ban

We recommend that the ban apply only to substantive communications and not to communications regarding ministerial matters, such as scheduling. Additionally, we generally recommend that the ban not apply to a communication between a decision maker and City staff in the decision maker's agency. However, we believe the ban should apply to communications with agency staff when the staff are acting as parties (such as when they serve as prosecutors in an enforcement scenario).

c. Timing of the Ban

The framework for the ban must address when the ban applies. One school of thought is to impose the ban from the time decision makers are formally made aware of a particular matter, either because it appears on an agenda or because an application or appeal is filed, until a decision in that matter is made. Another perspective is that the ban should be constant. In other words, an adjudicative decision maker should never be involved in an ex parte communication regarding an adjudicative matter, regardless of whether that matter has been formally presented.

We recommend that the ban apply from the time a decision maker is made aware of a specific matter (through an agenda or an application) until the decision maker or the body of which the decision maker is a member makes a final decision in the matter. We believe that decision makers will be better able to comply with a ban that applies during a finite period of time. If the ban were constant, decision makers could be well into a conversation with a third party before discovering that it related to an adjudicative matter and that they were in violation of the ban. With a fixed ban, however, decision makers will know when ex parte communications are prohibited, based on when they receive official notice of a matter.

d. Handling Communications That Do Occur

A final framework detail is how to handle ex parte communications that do occur regarding adjudicative matters. Some of the communications will be permissible and some will not. However, when any adjudicative ex parte communication occurs, the process can be compromised because information becomes imbalanced. One remedy for that imbalance is to require the decision maker to disclose the communication and to afford other parties an opportunity to respond. Balance is restored and due process is protected in that scenario by making all information available to all parties. Another remedy is to disqualify the decision maker who engages in an ex parte communication from participating in the decision on that matter. Balance is restored and due process is protected in that scenario by eliminating from the process the additional information that was obtained during the ex parte communication.

We believe that disclosure is the appropriate way to restore informational balance in most situations, and we recommend that an adjudicative ex parte communication be disclosed if it occurs during the ban or up to six months prior to the date the ban takes effect. The California Administrative Procedures Act requires decision makers to provide written notice of ex parte communications and gives parties up to 10 days to request an opportunity to respond. Cal. Gov't Code § 11430.50. We recommend a modified version of that requirement. First, we recommend that the disclosure be written and provided to all parties and decision makers, as well as to the City Attorney. We recommend that the disclosure include the date the communication occurred, the persons involved, the matter at issue, and the substance of the information that was exchanged. We recommend that disclosure be required by the earlier of the hearing on the matter or one business day after either a prohibited communication occurs or the decision maker receives notice of a matter regarding which a permissible communication occurred. Finally, we recommend that parties be given the option of requesting up to five business days to respond to an ex parte communication, as long as the request is made within one business day of receiving the disclosure or at the hearing on the matter if that is when disclosure is made.

Although we believe that disclosure will sufficiently protect the adjudicative process in most circumstances, we also recommend specifying that a prohibited ex parte communication in an adjudicative matter may be grounds for disqualifying the decision maker from participating in that decision. The City Attorney's office has advised in the past that the disqualification of a decision maker who engages in an ex parte communication is appropriate "not only to avoid evil, but to avoid the appearance of evil, thereby giving the public a greater confidence in the acts of its public officials." *See* Attachment B, p. 3, citing 76 Ops. City Atty. 204, 211 (1967). However, the City Attorney also notes that disqualification is a fact-based determination and should be evaluated on a case-by-case basis. *Id.* We concur with that assessment. While disclosure is likely to be sufficient in most situations, we believe the GEO should allow for the possibility that the City Attorney might determine that disqualification should be imposed on a decision maker.

A timeline of when the disclosure and disqualification recommendations would apply for adjudicative ex parte communications is provided in Attachment C.

Finally, we note that neither disclosure nor disqualification should eliminate a person's liability for engaging in an impermissible adjudicative ex parte communication. Disclosure and disqualification would protect the process by restoring informational balance, but they should not negate other penalties that might apply to an individual who violates the ban.

2. Legislative Matters

In contrast to adjudicative matters, in which specific parties have specific interests at stake and decisions based on specific facts must be made, legislative matters apply broadly to all similarly situated persons. In this context, we use the term "legislative" to refer to matters that establish the policies and laws that are applied to facts in adjudicative decisions, as well as to other non-adjudicative issues, such as the budget or the awarding of contracts.

The City Attorney report states that there is no legal requirement that ex parte communications regarding legislative matters be banned. *See* Attachment B, p. 5. However, the GEO does create a legal mandate to ensure fair and equitable governmental processes. *See* LAMC §§ 49.5.1(C)(1), (2). We believe an important component of that mandate is requiring the disclosure of ex parte communications regarding legislative matters. Although due process does not have the same connotation in a legislative setting as it does in an adjudicative setting, the same public perception of biased governmental processes can occur as a result of ex parte communications regarding legislative matters. The GEO was adopted to, among other things, "help restore public trust in governmental and electoral institutions." LAMC § 49.5.1(C)(7). To support that mandate, we recommend a disclosure requirement for legislative ex parte communications and make the following recommendations regarding the details of such a requirement.

a. Officials Required to Disclose

We recommend that commissioners and non-elected members of other City boards (collectively referred to as commissioners) be required to disclose ex parte communications they have regarding matters within their jurisdictions. We do not believe the requirement should extend to elected City officials. As noted above in section C.1.a, citizens have a constitutional right to petition their elected officials, and a requirement that all petitions be disclosed could affect that right. In addition, even simple verbal disclosure by members of the City Council could add significant time to every meeting, because each council member likely meets with numerous persons each week to fulfill public responsibilities and because the City Council is three times larger than the typical City board.

b. Timing of the Disclosure

We believe that the most effective disclosure is timely disclosure, so we recommend that commissioners be required to disclose their legislative ex parte communications at each commission or board meeting. If a commissioner misses a meeting, the disclosure can simply be moved to the next meeting that the commissioner attends.

We also believe that the disclosure should identify legislative ex parte communications that occurred since the last meeting the commissioner attended. Focusing on communications that occur between meetings will minimize the length of time that the commissioners must keep track of their legislative ex parte communications and will also give the public timely information about the communications. Attachment C provides a timeline of the disclosure recommendation for legislative ex parte communications.

The Los Angeles Board of Harbor Commissioners (the Harbor Commission) currently has such a disclosure requirement in place. Each commissioner identifies on the record the ex parte communications in which he engaged, and the disclosures are included in the meeting minutes. Copies of four recent Harbor Commission minutes are provided in Attachment D as an example.

c. Method of Disclosure

Written disclosure of ex parte communications seems appropriate in adjudicative settings, but we do not believe that formal written disclosure should be mandatory in a legislative setting. As noted in the previous section, the members of the Harbor Commission are permitted to disclose legislative ex parte communications verbally. To make compliance as easy as possible, we recommend permitting either written or verbal disclosure.

We also recommend that disclosure be a routine agenda item, as it is for the Harbor Commission, at the beginning of each meeting. *See* Attachment D. A commissioner who arrives after that agenda item has passed can disclose as soon as it becomes practical to do so.

Finally, we recommend that disclosure be recorded in the meeting minutes, so that anyone who attends the meeting or later reviews it has actual notice of any ex parte communications that occurred. If disclosure is provided in writing, the commissioner should be required to state on the record that written disclosure has been submitted; and the written disclosure should be incorporated into the minutes. If a commissioner did not engage in any ex parte communications since the last attended meeting, we believe the commissioner should be required to affirmatively state that fact on the record. These requirements are easily implemented and would provide significant assistance in both promoting transparency and monitoring compliance.

d. Level of Disclosure

The last detail regarding legislative ex parte communications is the appropriate level of disclosure. In contrast to adjudicative ex parte communications, where due process is at stake, we do not believe it is necessary to require disclosure of the detailed substance of legislative ex parte communications. Instead, we recommend that the disclosure identify the date of the communication, the persons involved, and the issue or agenda item that was discussed. The disclosure made by the members of the Harbor Commission mirrors this recommendation. It focuses on general information and does not delve into the substance of the communications. *See* Attachment D.

3. Other Jurisdictions

Regulating the ex parte communications of public officials is not a novel concept. We surveyed 65 jurisdictions, at all three levels of government, that do so. Charts and a table summarizing the survey data are provided in Attachment E. As noted in the first pie chart, most of the surveyed jurisdictions (74 percent) regulate only adjudicative ex parte communications. However, 17 percent regulate legislative ex parte communications, and 9 percent regulate both. Most of the surveyed jurisdictions (68 percent) impose both a ban and a disclosure requirement on ex parte communications. Fourteen percent of the jurisdictions only impose a ban, and 18 percent only require disclosure.

D. CEREMONIAL TICKETS

At the September meeting, the Commission reached consensus regarding recommendations related to tickets and admission passes to entertainment events that are provided to public officials in exchange for performing ceremonial roles at those events (ceremonial tickets). The Commission determined that ceremonial tickets should be disclosed by elected officials, general managers, and commissioners through the City's annual statement of economic interests form, that filers should maintain records of ceremonial tickets for four years, and that restricted sources should not be permitted to give ceremonial tickets to City officials. It was also determined that, if the FPPC were to impose a disclosure requirement for ceremonial tickets, an additional requirement in the GEO would not be necessary.

Three days after the September meeting, the FPPC did just that. Its regulations now require public officials to disclose ceremonial tickets within 30 days on FPPC Form 802, which must be posted online. We submitted the letter in Attachment F, in response to the FPPC's request for comments on using Form 802 for ceremonial tickets and in anticipation of the FPPC's upcoming review of their gift regulations. A copy of Form 802, as the FPPC proposes to modify it to accommodate ceremonial tickets, is provided in Attachment G. The FPPC plans to consider its gift regulations on November 12 and the proposed changes to Form 802 on November 18.

As noted in the letter to the FPPC, we believe that some clarification and a separate disclosure form would improve the new reporting requirement. In keeping with the Commission's determination in September, however, we also believe that the FPPC's new reporting requirement provides enough transparency that a separate requirement in the GEO is unnecessary at this time. The recordkeeping requirement and the ban on ceremonial tickets from restricted sources will continue to be part of the GEO language that is presented for a formal vote.

E. NEXT STEPS

Ex parte communications are the last remaining issue related to this comprehensive review of the GEO. Once there is consensus on all of the GEO recommendations, we will draft

language to implement them. When the language is presented, the Commission will be asked to formally vote to forward the recommendations to the City Council for adoption.

I look forward to discussing this item with you at the meeting and would be happy to answer questions at any time.

Attachments:

- A City Council File Nos. 07-3294 and 07-3294-S1
- B City Attorney Report No. R07-0457
- C Timeline of Proposed Regulations
- D Minutes of Los Angeles Board of Harbor Commissioners meetings 5/6/10, 5/20/10, 6/3/10, and 6/17/10
- E Ex Parte Communications Survey
- F Letter to FPPC 10/25/10
- G Draft FPPC Form 802

Attachment A

OCT 12 2007

RULES & GOVERNMENT

MOTION

Ex parte communications are contacts made by one party with a decisionmaker – such as a City Commissioner - outside the presence of other interested parties. The City Ethics Commission does not currently have a Citywide ex parte communications program for City Commissioners and parties conducting business with a Commission.

City Commissioners have an obligation to ensure due process on all matters before them, particularly in the case of quasi-judicial matters. Additionally, the citizens of Los Angeles have a right to impartial decisionmakers and full disclosure of the evidence used to reach a decision. Ex parte communications by parties involved with business before a Commission could potentially be seen as a violation of ethical standards.

It is incumbent upon the Los Angeles City Government to make clear that there is transparency in how decisions get made. It is the foundation of our democracy that Angelenos believe that decisions are made on behalf of the people not the powerful. Several City Commissions have adopted their own policies regarding ex parte communications, addressing the importance of introducing issues of vital concern into the decisionmaking process. Recent restrictions prevent Commissioners from participating in a Department’s contracting process effectively create an ex parte restriction on contracting matters. However, there is no Citywide policy.

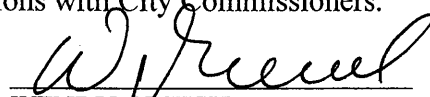
Various cities and agencies across the State of California have implemented ex parte communications restrictions, including the Los Angeles Board of Harbor Commissioners, the City of San Diego, the City of Santa Monica Planning Commission, and the California Coastal Commission. Substantial research into this matter as it regards commissioners in the State has been conducted.

Specific to the Los Angeles Board of Harbor Commissioners, ex parte communications include items pertaining to upcoming competitively bid contracts and items on the Board’s agenda from the time that it is published until the matter is finally determined.

This gap in the City’s ethics code should be evaluated. Options for Citywide regulations for City Commissioners should be investigated by the City Ethics Commission and City Attorney and be presented to the City Council for consideration and action.

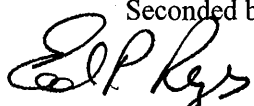
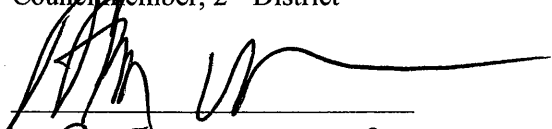
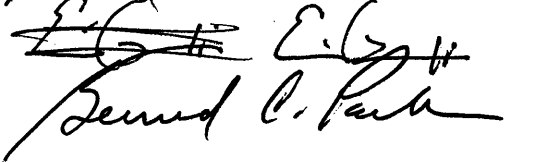
I THEREFORE MOVE that the City Council REQUEST the City Ethics Commission and City Attorney to evaluate and recommend within 90 days the most appropriate means to regulate ex parte communications with City Commissioners.

Presented by:


WENDY GREUEL
Council member, 2nd District

OCT 12 2007

Seconded by:

EG


07-3294

RULES & GOVERNMENT

07-3294-S1

MOTION

Ex parte communications between City Commissioners and parties conducting business with a Commission are of concern that have not been fully considered within the context of the City's ethics program. City Commissioners, particularly in the case of quasi-judicial matters, have an obligation to ensure due process on all matters before them. Ex parte communications by parties involved with business before a Commission could be seen as a violation of ethical standards.

Several City Commissions have adopted their own policies regarding ex parte communications, but there is no Citywide policy. In addition, recent restrictions that prevent Commissioners from participating in a Department's contracting process effectively create an ex parte restriction on contracting matters.

The City Attorney has prepared a report that evaluates issues associated with ex parte communications and recommends that matters related to ex parte communications be addressed through the adoption of a policy on this subject. A policy, however, does not have the force of law or penalties for non-compliance with the law, especially with regard to commissions handling quasi-judicial matters.

This gap in the City's ethics code should be closed. An ordinance should be presented to ensure that all City Commissioners disclose ex parte communications on a matter before their commission.

I THEREFORE MOVE that the City Attorney be requested to prepare and present an ordinance incorporating the recommendations contained in its report of 2007 on the subject of ex parte communications in quasi judicial matters and requiring compliance with all requirements applicable to, including disclosure of, other permissible ex parte communication.

PRESENTED BY: Wendy Greuel
WENDY GREUEL
Councilmember, 2nd District

SECONDED BY: [Signature]

APR 29 2009

ORIGINAL

Attachment B



OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

REPORT NO. R 0 7 - 0 4 5 7

DEC 1 9 2007

REPORT RE:

PROPOSED CITY *EX PARTE* POLICY

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Council File No. 07-3294

Honorable Members:

This report is in response to a City Council motion by Councilmembers Greuel and Garcetti. That motion requests recommendations from the City Attorney and City Ethics Commission regarding the potential regulation of *ex parte* communications by City Commissioners. We have been informed that the City Ethics Commission will consider this subject at its December meeting and will report under separate cover.

I. **Background**

Ex parte contacts are communications occurring between governmental decision-makers and third parties, outside of the official proceedings and off the record. In other words, *ex parte* communications occur outside the presence of all other interested parties. *Ex parte* communications arise in three distinct contexts: 1) adjudicative or quasi judicial actions; 2) legislative and policy matters; and 3) contracting processes. Different legal issues arise depending upon the context in which an *ex parte* communication occurs. For the reasons described in detail below, we recommend that the City adopt a policy reflecting the distinct nature of the three settings in which *ex parte* communications arise and addressing them accordingly.



II. Discussion

A. The City Should Adopt a Policy Prohibiting *Ex Parte* Communications on Quasi-Judicial and Quasi-Adjudicative Matters.

The United States and California Constitutions guarantee that participants in judicial proceedings have the right to "due process" of law. U.S. Const. Amend. 5 and 14; Cal. Const. Art. I, § 7. California statutory law extends the constitutional guarantee of due process to quasi-adjudicative proceedings, thereby ensuring that the parties receive a fair "trial" even in these non-courtroom proceedings. Code of Civil Procedure (CCP) § 1094.5(b). Quasi-judicial or quasi-adjudicative generally refers to a matter in which the decision-maker is required to hold a hearing and to make a decision by applying the law to particular facts presented at the hearing on the matter. The decision in each case must be based only on the evidence, the law and arguments presented at the hearing or otherwise made part of the record. Examples of City proceedings considered to be "quasi-judicial" or "quasi-adjudicatory" include permit appeals, license revocations, certain land use matters and enforcement matters.

The requirement for a fair hearing "requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it . . ." *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159. The courts have said that the receipt and consideration of evidence outside of the hearing process, *i.e.*, *ex parte*, denies the parties a fair hearing. *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1319. The failure to accord any of the parties a fair trial is a basis for a court to overturn the decision. CCP § 1094.5(b).

By its very nature, an *ex parte* communication occurs outside of the official proceedings and of the record, *i.e.*, outside the presence of all parties. In *Portland Audubon Society v. Endangered Species Commission* (9th Cir. 1993) 984 F.2d 1534, 1543, the court concluded that "ex parte communications are antithetical to the very concept of an administrative court reaching impartial decisions."

Other public agencies in California have enacted regulations applicable to *ex parte* communications in the context of quasi-judicial matters. Some policies prohibit *ex parte* contacts while other policies require public disclosure of *ex parte* contacts. For instance, the California Administrative Procedures Act (CAPA) prohibits the presiding officer, head of an agency and other persons or bodies with power to hear or make decisions in an adjudicatory proceeding from having *ex parte* communications with an employee of an agency where the agency is a party or with any interested party outside the agency. Cal. Gov't Code §§ 11430.10(a), 11430.70(a). The CAPA also provides for the disqualification of the official involved in the *ex parte* communication or requires the *ex parte* communication to be made part of the record, with notice to all parties. Similar rules apply at the federal level. 5 U.S.C. § 557(d)(1).

The City of San Diego is currently considering the adoption of an *ex parte* policy. The proposal, which was forwarded to the San Diego city council from the San Diego Ethics Commission, deals exclusively with quasi-judicial matters. The central issue raised by the San Diego Ethics Commission is whether to ban *ex parte* communications or, instead, to require that *ex parte* communications be disclosed. If the San Diego City Council opts to require disclosure, the San Diego Ethics Commission also raised the question of whether the disclosure should be in writing.

Mindful of the Constitutional, statutory and judicial concerns pertinent to *ex parte* communications, this office consistently has advised board and commission members to avoid *ex parte* contacts on quasi-judicial matters. *Ex parte* communications may give rise to an appearance of impropriety because excluded parties do not have the opportunity to know precisely what transpired during the private meeting and to address those points.

On at least three occasions, this office has issued formal opinions under former Charter Section 28.1 (now Charter Section 222) in which we held that it would not be in the public interest for a commissioner to act on a matter where the commissioner met privately with a party to the proceeding. See City Attorney Opinion Nos. 78-29 (April 24, 1978); 81-41 (January 27, 1982); and 85:27 (April 18, 1986). Each opinion noted that the disqualification of the commissioner who participated in an *ex parte* communication "is not only to avoid evil, but to avoid the appearance of evil, thereby giving the public a greater confidence in the acts of its public officials." 76 Ops. City Atty. 204, 211 (1967). Each opinion further noted that whether an *ex parte* communication should result in the disqualification of a commissioner or board member was a fact-specific determination that required a case-by-case analysis. Opinion No. 85:27 at p. 6.

This office continues to believe that preserving the validity and integrity of the City's administrative decisions is best served by a policy proscribing non-elected quasi-judicial decision-makers¹ from engaging in *ex parte* communications in quasi-judicial and quasi-adjudicative matters, as follows:

Non-elected decision-makers who preside over quasi-judicial or quasi-adjudicative matters should not engage in *ex parte* communications with any person on that matter except as provided below, including but not limited to the following: (i) parties to the matter and their representatives; (ii) staff of any City agency (as defined in LAMC Section 49.5.2) or official involved in the proceeding where the agency or official is an applicant, complainant, appellant, advocate or one who makes a recommendation for action (e.g., enforcement staff of the Ethics Commission, zoning administrators

¹ Non-elected decision-makers include all members of any board or commission even if elected by a membership such as the pension, retirement, and deferred compensation boards.

in an appeal of a nuisance abatement proceeding, and Internal Affairs Division in matters involving the Los Angeles Police Department); (iii) members of the public; and (iv) staff of any agency conveying information from any of the persons identified in (i)-(iii).

However, a decision-maker may engage in *ex parte* communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters, provided: (i) the decision-maker reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication; and (ii) the decision-maker promptly notifies all other parties of the substance of the *ex parte* communication.

Notwithstanding the policy against *ex parte* communications, if an *ex parte* communication described in the paragraph above inadvertently occurs, the board member or commissioner receiving the communication must disclose the fact of the communication and the substance of the communication on the record. Disclosure shall be made by placing a document in the record setting forth the particulars of the communication, including the date, initiating party, all recipients and a summary of the substance. Copies shall be given to each decision-maker and each party, and the parties will be given an opportunity to comment on the disclosure.

In addition, communications from complainants to quasi-judicial decision-makers in enforcement matters should be referred to the appropriate enforcement staff and the decision-maker should not have any extended discussion with the complainant about that matter. The details of these communications need not be disclosed.

This office does not recommend that the above-recited policy against *ex parte* communications for non-elected decision-makers be extended to elected officials, due to the Constitutional considerations applicable to interactions between constituents and their elected representatives. The First and Fifth Amendment to the U.S. Constitution and Article I, Sections 1, 3 and 7 of the California Constitution provide each citizen with the right to petition his or her elected officials and also to receive a due process fair hearing for those with property rights at stake. These two constitutional principles create a tension that can best be resolved by the following, narrowly tailored policy for elected officials:

With respect to matters that will potentially come before Elected Officials for a quasi-judicial decision, they should, to the extent feasible, avoid *ex parte* contacts. If these contacts do occur, Elected Officials should consider disclosing the communication on the record and giving the parties an opportunity to comment on the

disclosure. Neither the occurrence of an *ex parte* communication nor the failure to provide disclosure of the communication shall provide a basis for the invalidation of any City action or decision.

We recommend that *ex parte* policies be instituted via motion or resolution, rather than by codification in the Municipal or Administrative Codes.

If the City Council decides to institute an *ex parte* policy, it may wish to consider the format for adoption. A policy can be adopted by way of a resolution or an ordinance (uncodified or codified in one of the City's Codes). Codification could penalize unintentional conduct or potentially void City decisions, which we believe to be more likely if the policy is codified (but the risk is not entirely eliminated if the policy is not codified). A resolution, an uncodified ordinance or an ordinance amending the Los Angeles Administrative Code would not necessarily provide a specific penalty for violation. However, if the policy is adopted by ordinance codified in the Los Angeles Municipal Code, a criminal sanction may be available for violation.

B. The City Should Not Adopt A Ban On *Ex Parte* Communications On Policy or Legislative Matters.

Under existing law, there is no legal requirement that decision-makers avoid *ex parte* contacts on policy matters. Competing expectations bear on the issue of whether *ex parte* communications should be avoided in connection with legislative and policy matters. On one hand, when input is provided to elected officials or commission or board members via an *ex parte* communication, the substance of the communication and the impact of the communication on the decision-makers' deliberations is not open to public scrutiny. On the other hand, the public has Constitutional rights to access their elected officials. The public also has an expectation that they should be able to provide input into policy decisions at the commission or board level.

Most public agencies that have adopted *ex parte* policies have applied them only to quasi-judicial matters, not to legislative matters. However, at least two City Commissions have adopted some form of *ex parte* policy on legislative or policy matters. The Board of Harbor Commissioners is prohibited from engaging in *ex parte* contacts on legislative or policy matters after a meeting agenda has been posted. Rather than prohibiting *ex parte* communications, the members of Board of Information Technology Commission (BITC) are required to report *ex parte* contacts at the first public meeting occurring after the communication. The first item on each agenda requests disclosure of *ex parte* communications.

On balance, we believe that the public's Constitutional rights and expectation of access to government officials argues against a Citywide ban on *ex parte* communications with regard to legislative or policy matters. The Council may wish to consider whether disclosure of *ex parte* communications is appropriate.

C. City Law Already Prohibits City Board and Commission Members from Engaging in *Ex Parte* Contacts during the Contracting Process.

The City's Governmental Ethics Ordinance already prohibits members of City boards and commissions from engaging in *ex parte* communications in matters involving contracts or potential contracts. Los Angeles Administrative Code § 49.5.17. Section 49.5.17 prohibits members from participating in contracting decisions except during an official meeting in public session or to request information from staff in preparation for a public meeting. The ban on *ex parte* communications ensures integrity in the City contracting process. Therefore, we do not believe any additional Council action is necessary to address *ex parte* communications to protect the contracting process.

III. Conclusion

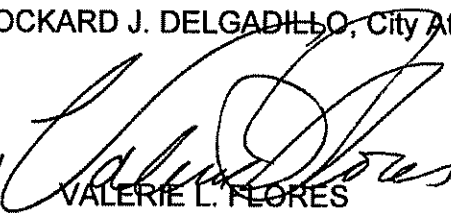
The best approach is to have a consistent Citywide *ex parte* policy and the City Council is the appropriate authority to adopt this policy. In the absence of a Citywide policy, each commission or other body can adopt a policy it deems appropriate. If the Council adopts a Citywide policy without codifying it, each commission or body could adopt a stricter policy.

If you have any questions about this matter, please contact Claudia Culling at (213) 978-7182, or me at (213) 978-2038.

Sincerely,

ROCKARD J. DELGADILLO, City Attorney

By



VALERIE L. FLORES
Assistant City Attorney

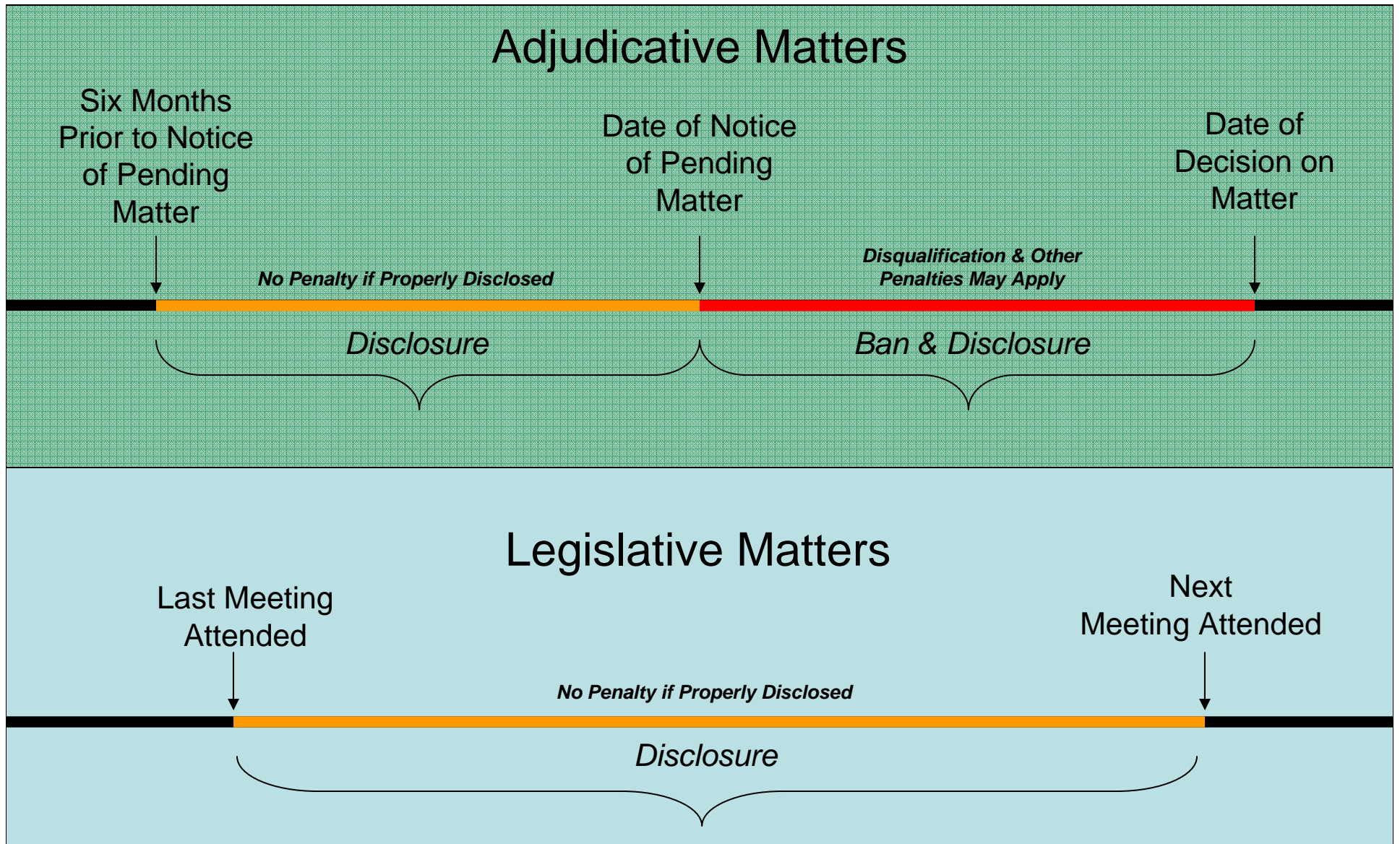
VLF:lee

cc: Gerry Miller, Chief Legislative Analyst
LeeAnn Pelham, Executive Director, City Ethics Commission

Attachment C

Timeline of Proposed Regulations: Ex Parte Communications

Los Angeles City Ethics Commission, November 2010



Attachment D

MINUTES OF THE REGULAR MEETING OF THE
LOS ANGELES BOARD OF HARBOR COMMISSIONERS
THURSDAY, MAY 6, 2010 AT 8:30 A.M.
PORT OF LOS ANGELES ADMINISTRATION BUILDING
425 S. PALOS VERDES STREET
SAN PEDRO, CA 90731

B. COMMENTS FROM THE PUBLIC ON NON-AGENDA ITEMS

There were no comments from the public.

C. EXECUTIVE DIRECTOR REMARKS

Deputy Executive Director Molly Campbell had no remarks.

D. REPORT OF THE COMMISSIONERS

Commissioner Krause reported that he had a telephone conversation with Dave Berry of Swift Transportation regarding the Clean Truck Program.

Commissioner Kim reported that on April 30, she had a meeting with Dave Berry of Swift Transportation and the Chief Financial Officer regarding the Clean Truck Program.

President Miscikowski reported that she had a telephone conversation with David Freeman regarding the Clean Truck Program. She met with Gary Knight and Todd Carlson from Knight Transportation regarding the Clean Truck Program. She also met separately with Dave Berry of Swift Transportation. She met with George Kiefer of the Los Angeles Chamber of Commerce on behalf of his clients from the Inland area. She also met with Dr. Glen McDonald of the Institute of the Environment at UCLA, and Madelyn Glickfeld who is a lecturer at UCLA regarding student programs at the Port.

E. BOARD COMMITTEE REPORTS

President Cindy Miscikowski had a Business Development Committee meeting today.

F. PRESENTATIONS

Retirement Resolution - Eileen Gray, Senior Systems Analyst, was presented with a Resolution from the Board of Harbor Commissioners on her retirement after 39 years with the City.

Clean Truck Program - Deputy Executive Director John Holmes provided a power point presentation on the Clean Truck Program.

MINUTES OF THE REGULAR MEETING OF THE
LOS ANGELES BOARD OF HARBOR COMMISSIONERS
THURSDAY, MAY 20, 2010 AT 8:30 A.M.
PORT OF LOS ANGELES ADMINISTRATION BUILDING
425 S. PALOS VERDES STREET
SAN PEDRO, CA 90731

B. COMMENTS FROM THE PUBLIC ON NON-AGENDA ITEMS

President Miscikowski called for comments from the public. The following persons commented:

Ms. Janet Esposito, State Fish
Mr. Ken Melendez, Wilmington Waterfront Development Subcommittee

C. EXECUTIVE DIRECTOR REMARKS

Executive Director Geraldine Knatz provided a power point presentation about POLA's TransPORTer visit to Sacramento.

She announced that there will be a community workshop regarding the Wilmington Marina on Saturday, June 5, 2010, 10 a.m. to 12:30 p.m.

She presented Harry Hunold with a certificate for six years of service as Sergeant of Arms at the Board meetings.

D. REPORTS OF THE COMMISSIONERS

President Miscikowski reported that she had a meeting earlier this week with Mr. Larry Frank from the Mayor's office to discuss issues regarding the Project Labor Agreement process.

E. BOARD COMMITTEE REPORTS

President Miscikowski reported that she and Commissioner Krause had a meeting with the Port auditors to discuss the recent audit.

MINUTES OF THE REGULAR MEETING OF THE
LOS ANGELES BOARD OF HARBOR COMMISSIONERS
THURSDAY, JUNE 3, 2010 AT 8:30 P.M.
PORT OF LOS ANGELES ADMINISTRATION BUILDING
425 S. PALOS VERDES STREET
SAN PEDRO, CA 90731

B. COMMENTS FROM THE PUBLIC ON NON-AGENDA ITEMS

President Cindy Miscikowski called for comments from the public. The following persons commented:

Mr. Ken Melendez, Wilmington Waterfront Development Subcommittee
Mr. Pat Nave, PCAC

C. EXECUTIVE DIRECTOR REMARKS

Executive Director Dr. Geraldine Knatz made the following remarks:

She commented on an advertisement she saw in the Preservation Magazine of the sale of Commodore Schuyler Heim Bridge that servers Terminal Island.

She provided copies of the history of the Smart and Final Building in Wilmington. She will be meeting with them to try and secure sources of funding for cultural and community projects.

She announced that this Saturday, 10 a.m. to 12 p.m. in the recreation center at Banning Park there is a kick-off meeting for the planning process of the Wilmington Marina area.

She discussed an item on today's consent calendar of the Agenda regarding the updated Port's code for Seismic Design. She acknowledged two Engineering employees, Peter Yin and Jin Kim, who worked on this Project.

D. REPORTS OF THE COMMISSIONERS

There were no Commissioner reports.

E. BOARD COMMITTEE REPORTS

There were no Board Committee reports.

MINUTES OF THE SPECIAL MEETING OF THE
LOS ANGELES BOARD OF HARBOR COMMISSIONERS
THURSDAY, JUNE 17, 2010 AT 11:00 A.M.
PORT OF LOS ANGELES ADMINISTRATION BUILDING
425 S. PALOS VERDES STREET
SAN PEDRO, CA 90731

B. COMMENTS FROM THE PUBLIC ON NON-AGENDA ITEMS

President Miscikowski called for comments from the public. The following person commented:

Ms. Bertha Campos, Women in Nontraditional Employment Roles

C. EXECUTIVE DIRECTOR REMARKS

Deputy Executive Director Michael Christensen announced the upcoming Cars and Stripes Event, Friday, July 2, 2010.

D. REPORT OF THE COMMISSIONERS

Commissioner Kim reported that on June 8, she had a phone conversation with David Berry of Swift Transportation regarding the Clean Trucks Incentive Program.

Commissioner Radisich reported that he received a phone call from David Berry of Swift Transportation regarding the Clean Trucks Incentive Program.

President Miscikowski reported that she had a meeting with LAANE and the County Federation of Labor regarding Item No. 6.

E. BOARD COMMITTEE REPORTS

There were no Committee reports.

F. PRESENTATION

Deputy Executive Director Michael Christensen presented Mr. Paul Johansen, Assistant Director of Environmental Management, with a Resolution from the Port of Los Angeles Board of Harbor Commissioners on his retirement from the Port.

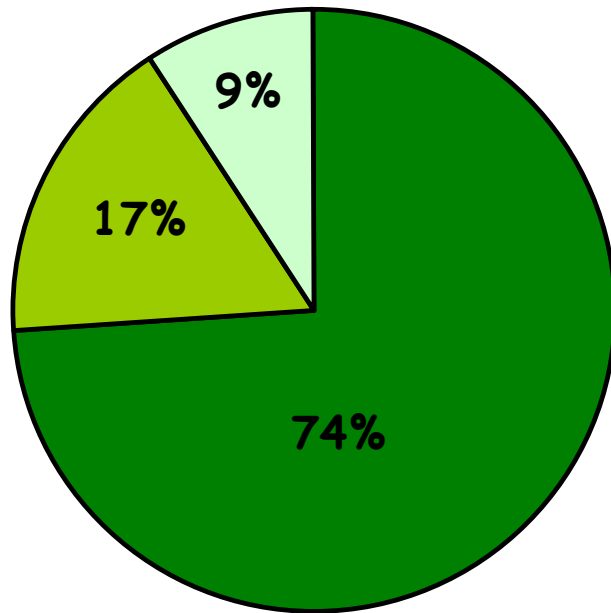
Attachment E

Ex Parte Communications

Based on an informal survey of 65 federal, state, and local government agencies.

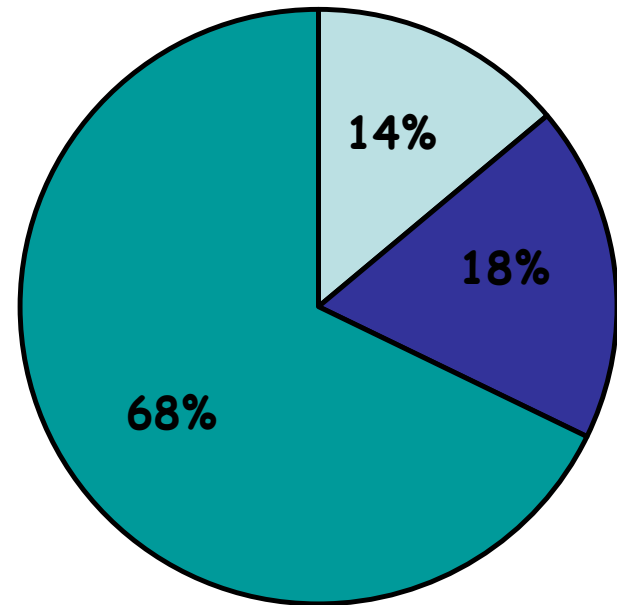
September 2010

Legislative v. Adjudicative



- Affects Adjudicative Matters (74%)
- Affects Legislative Matters (17%)
- Affects Both Types of Matters (9%)

Disclosure v. Ban



- EPCs Are Banned (14%)
- EPCs Must Be Disclosed (18%)
- EPCs Are Banned and Must Be Disclosed (68%)

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
California Municipal Agencies							
City of Berkeley	City Council; Commissions	x			x		
City of Lawndale	Elected Official; Public Official	x	x	x	x	x	Removal, suspension, or other
City of Los Angeles	Board of Harbor Commissioners		x		x		
City of Newport Beach	City Council; Commission; City Employees	x		x			
City of Oroville	Public Officials; City Employees	x	x	x	x	x	Removal, suspension, or other
City of San Diego	Ethics Commissioners	x		x	x		
City of San Francisco	Local Agency Formation Commission		x		x		
City of Santa Monica	Planning Commission	x		x	x		
California State Agencies							
California Air Resource Board	Hearing Officer; Executive Officer		x	x	x	x	Disqualification
California Coastal Commission	Commission	x	x		x	x	\$7,500

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
California Gambling Control Commission	Commission; Interested Person; Employee; Agent		x	x		x	Disqualification; denial of application
California Judicial Council (Family Court)	Attorney; Interested Parties	x		x		x	
California Judicial Council (Probate Court)	Attorney; Interested Parties	x		x	x	x	
California Energy Resource Conservation and Development Commission	Commissioners; Hearing Advisors		x	x	x	x	Disqualification; legal challenges to decision
California State Mining and Geology Board	Board Member; Interested Person		x	x	x	x	Fine up to \$7,500
California Occupational Safety and Health Appeals Board	Appeals Board Member; Administrative Law Judge	x		x	x	x	

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
California Local Transportation Agencies	Board Member; Interested Person		x	x	x	x	Disqualification
California Public Utilities Commission	Commission; Applicant; Agent;		x	x	x	x	Fines; disqualification; determination by judge
California Waste Management Board	Board Member; Interested Person	x	x	x	x	x	\$50,000 fine; imprisonment for up to a year; both; civil complaint; removal from office
California Water Resources Control Board	Board Member	x	x	x	x	x	Disqualification; legal challenges to decision
California Central Valley Flood Protection Board	Board Member; Interested Person	x	x	x	x	x	

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
California Workers' Compensation Appeals Board	Medical Evaluator	x		x		x	Termination of medical evaluation; contempt; costs of case
Non-California Municipal Agencies							
City of Centennial Board of Adjustment, CO	Board Member	x		x			
City of Seattle City Council, WA	City Council	x			x		
Seattle Ethics and Elections Commission	Commission; Interested Person	x		x	x	x	Disqualification
City of Sioux City Board of Adjustment, Planning, and Zoning, IA	Board Members	x		x	x	x	Fines
New York City Conflicts of Interest Board	Legal Counsel; Board Member	x		x		x	Penalties
Non-California County Agencies							
Montgomery County Board of License Commissioners, MD	Board Members	x			x	x	Removal

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
Montgomery County, MD	Public Officials	x	x		x	x	Removal
St. Mary's County Ethics Commission, MD	Commission	x		x	x		
Non-California State Agencies							
Arizona Citizens Clean Election Commission	Commission; City Employee	x			x	x	Penalties
Connecticut Office of State Ethics	Board Member; Designated Judge	x		x	x	x	Possible Appeal
Connecticut Freedom of Information Commission	Commission; Hearing Officer	x		x	x	x	Disqualification; recusal
Florida Public Service Commission	Commission	x		x	x	x	Removal; fine of \$5,000; cannot appear before board for 2 years
Florida Commission on Human Relations	Commission; Hearing Officer	x		x	x		

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
Hawaii State Judiciary	Judge	x		x	x	x	Case may be delayed or dismissed
Iowa Alcoholic Beverages Division	Presiding Officer	x		x	x	x	Censure; suspension; dismissal; or other
Iowa Banking Division	Presiding Officer	x		x	x	x	Censure; suspension; dismissal; or other
Iowa Civil Rights Commission	Presiding Officer	x		x	x	x	Censure; suspension; dismissal; or other
Iowa Dental Board	Presiding Officer	x		x	x	x	Censure; suspension; dismissal; or other
Iowa Employee Appeal Board	Board Member; Officer; Employee; Agent of Board	x		x		x	Disciplinary action
Iowa Insurance Division	Presiding Officer; Agency Personnel	x		x	x	x	Default; decision against offending party; censure; suspension

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
Iowa Workforce Development Department	Presiding Officer	x		x	x	x	Dismissal; decision against the offending party; censure; suspension; revocation of privilege to practice
Kansas Office of Administrative Hearings	Presiding Officer	x		x	x	x	Disciplinary action; disqualification
Michigan Gaming Control Board	Board Member; Licensee Applicant or Affiliate		x	x	x	x	Disciplinary action; disqualification
North Carolina General Assembly	Administrative Law Judge; Employee	x		x	x	x	Disqualification
Minnesota Public Utilities Commission	Commission	x		x		x	Recusal; removal; dismissal of proceeding; adverse ruling; strike evidence; public censure
New Mexico Public Regulation Commission	Advisory Staff; Hearing Examiner; Commission	x		x	x	x	Dismiss, deny, disregard, or otherwise take adverse action
Ohio State Medical Board	Hearing Examiner; Board Member	x			x	x	Recusal

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
Ohio Environmental Protection Agency	Director, the Assistant Director, the Deputy Directors, or Hearing Examiner	x		x	x	x	Disqualification
South Carolina Office of Regulatory Staff	Commission; Hearing Officer; Employee	x		x	x	x	Disqualification
Texas Administrative Procedures Agency	Board Member; Employee	x		x		x	Class A misdemeanor
Utah Public Service Commission	Commission; Administrative Law Judge; Employee	x		x	x	x	Item dismissed, denied, disregarded, or otherwise adversely affected
Utah State Courts (arbitration of fee disputes)	Parties Involved; Board Member	x		x	x	x	Disciplinary Action
Utah Tax Commission	Parties Involved; Commission; Administrative Law Judge	x		x	x	x	Disqualification
Washington State Legislature	Presiding Officer	x		x	x	x	Disqualification; seal portions of the record; sanctions; disciplinary action

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
Regional Agencies							
Northwest Power and Conservation Council	Council; Council Staff		x		x		Reopen public comment
Federal Agencies							
Federal Aviation Administration	Administration Members		x		x	x	Adverse decision; dismissal; denial
Federal Communications Commission	Board Member; Officer; Employee	x			x	x	Disqualification disciplinary action
Federal Election Commission	Commission; Staff	x		x	x	x	Disciplinary action
Federal Labor Relations Authority	Authority Member; Administrative Law Judge; Employee	x		x	x	x	Censure; suspension; dismissal; or disciplinary action
Federal Postal Regulatory Commission	Decision-making Commission Personnel	x		x	x	x	Adverse decision
Occupational Safety and Health Administration	Commission; Judge; Employee; Agent	x		x	x	x	Disciplinary action
United States House of Representatives	Members of the agency	x		x	x	x	Dismissal; disregarded; denial; adverse decision

Los Angeles City Ethics Commission
Ex Parte Communications Survey

September 2010

Jurisdiction	Restricted Party	Affects Adjudicative Matters ¹	Affects Legislative Matters	EPCs Are Banned	EPCs ² Must Be Disclosed	Codified ³	Sanction for Non- Compliance
United States Nuclear Regulatory Commission	Commission Adjudicatory Employee	x		x	x	x	Dismissal; disregarded; denial; adverse decision
Totals		54	18	53	56	54	49
Percentage*		83%	28%	82%	86%	83%	75%

* Percentages are based on the total number of agencies surveyed (65).

¹ "Adjudicative" matters are those in which decision makers are required to conduct a hearing and make a decision based on the law and the facts in a particular case.

² Ex Parte Communication.

³ Some jurisdictions memorialize these regulations through policies, while others codify them in law.

Attachment F

CITY OF LOS ANGELES
CALIFORNIA

CITY ETHICS COMMISSION

(213) 978-1960
(213) 978-1988 FAX
<http://ethics.lacity.org>



CITY ETHICS COMMISSION
200 N. SPRING STREET
CITY HALL - 24TH FLOOR
LOS ANGELES, CA 90012

October 25, 2010

Via Electronic and First Class Mail

Dan Schnur, Chairman
Honorable Members
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento CA 95814

Re: Form 802 and Ceremonial Tickets

Dear Chairman Schnur and Members of the Commission:

This letter provides comment on proposed revisions to the FPPC's Tickets Provided by Agency Report (Form 802). The Los Angeles City Ethics Commission supports a disclosure requirement for tickets and passes provided in exchange for ceremonial functions. To help ensure the effectiveness of the disclosure requirement, we suggest several recommendations, including a recommendation to use a form other than Form 802 for that purpose.

Background

The FPPC recently approved changes to its regulations governing the receipt of tickets or admission passes to events that are provided to public officials who perform ceremonial functions at those events on behalf of their agencies (ceremonial tickets). Previously, such tickets were not considered gifts when they were provided for entertainment, amusement, recreational, or similar events. On September 17, 2010, Regulation 18942 was amended to include in the list of gift exceptions a ticket or pass provided to a public official for admission to any event at which the official performs a ceremonial role or function on behalf of the agency. However, the new regulation imposes a condition on the exception, which requires the recipient official to disclose ceremonial tickets in compliance with Regulation 18944.1(c).

For a number of months, we have been comprehensively reviewing the governmental ethics laws for the City of Los Angeles, including how they interact with the state's ethics laws. As part of the review process, our commission has concluded, as you have, that the reporting of ceremonial tickets is an important component in ensuring transparent and accountable government processes. In its deliberations, the Ethics Commission voted unanimously to recommend a local disclosure requirement in the absence of a state requirement. Therefore, our



commission shares your public policy interests in this issue and strongly supports your decision to require the reporting of ceremonial tickets.

As we understand the reporting method currently proposed, however, it is our view that it would create unnecessary confusion for those seeking to comply with the new requirement. Our recommendations, detailed below, are designed to support the goal of this important new disclosure, as well as its implementation.

Recommendations – Regulations

We understand that the FPPC will be looking at all of the gift regulations this fall, and we urge you to take that opportunity to consider the following clarifications to the new reporting requirement for ceremonial tickets.

Type of Events

Prior to the amendment to Regulation 18942, the exception for ceremonial tickets applied only to entertainment, amusement, recreational, or similar events. However, new subsection (a)(13) to Regulation 18942 applies the exception to any type of event. This creates some confusion when reconciling the new reporting requirement with other gift exceptions. For example, Regulation 18942(a)(11) exempts from the definition of “gift” an admission to “an event at which the filer gives a speech, participates in a panel or seminar, or provides a similar service” In the past, that exception has applied without a reporting requirement. But new Regulation 18942(a)(13) raises the question of whether the official who gives a speech or participates in a panel must now disclose free admission to that event in order for an exception to apply.

In addition, Regulation 18946.2(d) states that an official who performs a ceremonial role at an invitation-only event receives a gift valued at the cost of the food and beverages provided to the official and any other item given to the official at the event. When such gifts are received, they must be reported on the official’s Form 700. To minimize confusion, we recommend that new Regulation 18942(a)(13) be clarified either to apply only to entertainment events or to specify how it should be read in conjunction with existing regulations regarding admission to non-entertainment events at which a public official performs a service.

Definition of “Agency”

New Regulation 18942(a)(13) creates an exception for ceremonial tickets when a public official performs a ceremonial role on behalf of “the agency”. Additionally, disclosure under Regulation 18944.1(c) must be posted on “the agency’s website.” We recommend that the regulations be clarified to say that, for ceremonial tickets, “agency” means not just a public official’s specific department, but the entire governmental entity. With regard to performing a ceremonial role, for example, a public official such as the Fire Chief might be asked to perform a ceremonial role on behalf of the city, rather than on behalf of the Fire Department. We believe that the exception should apply in that scenario.

With regard to the posting of disclosure, we strongly recommend that ceremonial tickets be posted in a centralized location for the entire governmental entity. In the City of Los Angeles, for example, the Ethics Commission is the clearinghouse for ethics-related public disclosure; that is where disclosures related to lobbying, campaign financing, governmental ethics, and conflicts of interests are housed. The purpose of providing transparency is to promote the public's understanding of government processes and to promote accountability in government decision making. We believe the public is best served when information can be readily accessed. In our view, requiring the public to look at multiple agency websites (in our case, it would be over 50 websites) to see if any public officials have received ceremonial tickets is not the most effective means for achieving true transparency. The more steps required to determine which officials have received ceremonial tickets and which have not could lead to incomplete information and faulty conclusions, both of which can raise unnecessary concern about the effectiveness of the provision.

As a result, we recommend that the disclosure of ceremonial tickets be posted on the website of "the filing officer who receives the agency employees' statements of economic interests", as is currently required for gifts to an agency under Regulation 18944.2(c)(3)(F). In our case, the Ethics Commission is the filing officer who receives employee statements of economic interests.

Number of Tickets

New Regulation 18942(a)(13) creates an exception for "A ticket or pass, provided to an official for his or her admission ..." (emphasis added). However, Regulation 18944.1(c)(5) and Form 802 require filers to disclose the "number of tickets provided to each person". We have interpreted the exception for ceremonial tickets to apply only to a single admission for the public official who performs the ceremonial role. However, we understand that the FPPC's perspective may be that the exception should also apply to admissions for persons who are required to attend the event as part of their job duties (e.g., a member of a security detail or a necessary assistant to a physically challenged individual). We recommend that the regulations be modified to clarify whether more than one ceremonial ticket per event may qualify for the exception and, if so, which individuals may accept those additional tickets.

Definition of "Ceremonial Role"

Finally, we urge you to specifically define the types of activities that qualify as ceremonial roles and invoke the exception. We understand that throwing out the first pitch on opening day of baseball season may be a sufficient ceremonial role but that simply attending an event as a public official may not. See FPPC Staff Memorandum by Lenkeit and Hallabrin (August 29, 2008). To clarify public expectation about the purpose of the new regulation, as well as to better inform public officials of their obligations and equip them to comply, we recommend that a definition of "ceremonial role" be added to the regulations.

Recommendations – Form of Disclosure

The disclosure required by Regulation 18944.1(c) applies to tickets and admission passes that an agency distributes to its employees in accordance with an adopted agency policy. An FPPC form must be posted on the agency’s website within 30 days after a pass is distributed, and the posting must include the name of the person who received the pass, a description of the event, the date of the event, the face value of the pass, the number of passes provided to each person, the official who behested the pass (if applicable), and either a description of the public purpose for which the pass was distributed or a statement that the pass was distributed as income. Form 802 must be used to disclose passes distributed by an agency under Regulation 18944.1.

The proposal for implementing the new disclosure requirement for ceremonial tickets is to require officials who receive such tickets to file Form 802 and to add to that form a question asking if the official performed a ceremonial role (and, if so, requesting a description). We believe, however, that passes provided to a public official by the official’s agency—and the information necessary to provide adequate transparency about those passes—are sufficiently different from ceremonial tickets that they should be reported separately. It is our view that combining them into one reporting vehicle would create unnecessary confusion for thousands of elected and appointed officials at both the state and local levels. Therefore, we recommend requiring the reporting of ceremonial tickets through a form other than Form 802. Our specific concerns about using Form 802 for ceremonial tickets are as follows.

Title

The title of Form 802 is “Tickets Provided by Agency Report”. This does not reflect the disclosure requirement for ceremonial tickets, because ceremonial tickets are not provided by agencies. We recommend a separate form with a title that accurately reflects the nature of the disclosure, such as “Tickets Provided for Ceremonial Role”.

Section 1

The first section of Form 802 requires the filer to identify the agency that provided the tickets by name, address, phone number, email, and contact. Detailed information about the agency is unnecessary in the reporting of ceremonial tickets, and it is certainly not the information that should hold the place of prominence. We recommend that the first section of the new form identify the name of the public official who received the ceremonial tickets, the official’s title, and the name of the official’s agency.

Section 2

The next section on Form 802 requires information regarding the event. This is important information for ceremonial tickets, but we do recommend some changes. First, it is unnecessary to ask whether it was an agency event. An official who performs a ceremonial function at an agency event is doing so as part of his official duties, and the gift restrictions do not come into play. Even a retirement dinner at which an official might perform a role such as

master of ceremonies is typically not an agency event—instead, it is an event sponsored by the retiree’s colleagues in their individual capacities.

Second, identifying the source of ceremonial tickets is vitally important to transparency. However, no reference to the agency should be made when requesting the identity of the source, because ceremonial tickets are provided to the public officials, themselves. In addition, the source will always be an outside, non-agency source. Therefore, we recommend that the third line of Section 2 be amended to read, “Name of ~~Outside Source of Ticket(s) Provided to Agency:~~”

Third, because ceremonial tickets are provided directly to public officials, it is unnecessary to ask whether they are provided to the agency gratuitously or pursuant to a contract. We recommend eliminating that portion of the fourth line of Section 2. We note that the remaining portion of the fourth line refers to the number of tickets received. As discussed above on page 3, we believe it is important to clarify whether and when tickets to persons other than the official who performs the ceremonial role are permissible.

Fourth, because a ceremonial role is mandatory if the exception is to apply, we recommend that the fifth line in Section 2 be modified to eliminate a question about whether a ceremonial role was performed. Instead, the form should simply require the filer to describe the ceremonial role.

Sections 3 & 4

We recommend that the third and fourth sections of Form 802 not be incorporated into a new disclosure form for ceremonial tickets. They request information that is either irrelevant to ceremonial tickets (e.g., whether the tickets are income to the official, who behested the tickets, which outside organization received tickets, etc.) or would be redundant (e.g., the recipient official’s name, the number of tickets received, etc.).

Verification

A verification section is important, but we recommend one that is tailored to ceremonial tickets. The verification should not refer to a distribution or to Regulation 18944.2. Instead, it should require the filer to certify that the information reported in the form is complete and accurate. Additionally, new Regulation 18942(a)(13) states that the exception for ceremonial tickets applies “so long as the official complies with the posting provisions ...” (emphasis added). Therefore, the public official who received the ceremonial tickets, and not that person’s agency head, should be required to sign the verification.

Instructions

The instructions should be specific to the disclosure of ceremonial tickets and the components of the new form. The existing instructions for Form 802 focus exclusively on

tickets provided by an agency, except for a suggested amendment that refers to the proposed question regarding whether the official performed a ceremonial role (see page 5).

Conclusion


The public disclosure of ceremonial tickets is an important aspect of governmental transparency, and we applaud the FPPC's decision to require such disclosure. We recommend that the FPPC regulations be amended to clarify that the exception for ceremonial tickets applies to entertainment events (or to specify how the new reporting requirement affects existing regulations regarding non-entertainment events), to define "agency" to mean the entire governmental entity for ceremonial tickets, to require the disclosure of ceremonial tickets to be posted on the website of the filing officer who receives employee statements of economic interests, to clarify how many tickets (and which individuals) qualify for the exception, and to define "ceremonial role".

We also recommend that the disclosure be required through a form other than Form 802 and that the following information be reported:

1. The recipient's name, title, and agency.
2. The date of the event.
3. A description of the event.
4. The number of tickets received [if more than one is permissible].
5. The source of the tickets.
6. The face value of the tickets.
7. The ceremonial role in exchange for which the tickets were provided.
8. The recipient's verification that the reported information is complete and accurate.

We thank you for soliciting input on these important issues and welcome the opportunity to comment on the implementation of this new reporting requirement. Please do not hesitate to contact me if you have questions or if we can provide additional information.

Sincerely,



LeeAnn M. Pelham
Executive Director

cc: Roman Porter, FPPC Executive Director
Bill Lenkeit, FPPC Senior Commission Counsel
Renee Stadel, Deputy City Attorney

Attachment G

Tickets Provided by Agency Report

A Public Document

TICKETS PROVIDED BY AGENCY REPORT

1. Agency Name		Date Stamp	California Form 802 For Official Use Only
Division, Department, or Region <i>(if applicable)</i>			
Street Address			
Area Code/Phone Number	E-mail	<input type="checkbox"/> Amendment <i>(Must explain in Part 5.)</i>	
Agency Contact <i>(name and title)</i>		Date of Original Filing: _____ <i>(month, day, year)</i>	

2. Event For Which Tickets Were Distributed

Date(s) of Event: ____/____/____ Description of Event: _____
 ____/____/____ Face Value of Ticket: \$_____

Agency Event Yes No (Identify source of tickets below.)

Name of Outside Source of Ticket(s) Provided to Agency: _____

Number of Tickets Received: _____ Ticket(s) Provided to Agency: Gratuitously Pursuant to Contract

Did an Official Perform a Ceremonial Role? Yes Describe: _____

3. Agency Official(s) Receiving Ticket(s) (Use a continuation sheet for additional names.)

Name of Official (Last, First)	Number of Tickets	State Whether the Distribution is Income to the Official or Describe the Public Purpose for the Distribution

4. Individual or Organization Receiving Ticket(s) at the Behest of an Agency Official

Name of Behesting Agency Official: _____

Name of Individual or Organization: _____ Number of Tickets: _____

Description of Organization: _____

Address of Organization: _____
Number and Street City State Zip Code

Purpose for Distribution: (Describe the public purpose for the distribution to the organization.)

5. Verification

I have determined that the distribution of tickets set forth above is in accordance with the provisions of FPPC Regulation 18944.2.

_____ Signature of Agency Head or Designee	_____ Print Name	_____ Title	_____ <i>(month, day, year)</i>
---	---------------------	----------------	------------------------------------

Comment: *(Use this space or an attachment for any additional information including amendment explanation.)*

A Public Document

This form is for use by all state and local government agencies to disclose the distribution of tickets or passes that allow admission to facilities, events, shows, or performances for entertainment, amusement, recreational, or similar purposes. The agency must complete Form 802 identifying agency officials who receive tickets or passes from the agency as well as other individuals and organizations that receive tickets or passes at the behest of agency officials. Form 802 must be posted in a prominent fashion on the agency's website.

Gifts of Tickets or Passes to Public Officials

FPPC Regulation 18944.1 sets out the circumstances under which an agency's distribution of tickets or passes to or at the behest of an official in the agency does not result in a gift to the official. (Regulation 18944.1 is available on the FPPC website at www.fppc.ca.gov.) Even though the distribution of tickets or passes to a public official under the regulation is not a gift to the official, the agency must disclose the distribution on Form 802. The official does not have to disclose tickets or passes received or distributed under the regulation on his or her Statement of Economic Interests (Form 700), but tickets or passes received or distributed by the official that do not fall under the regulation may be subject to disclosure on the official's Form 700 and subject to gift limits.

Posting Form 802

The Form 802 must be posted on the agency's website within 30 days after the distribution. If the agency does not maintain a website, the form must be maintained by the agency as a public record, be available for public inspection and copying, and be forwarded to the FPPC for posting on its website.

Part 1. Agency Identification

List the agency's name, address and the name of an agency contact. Mark the amendment box if changing any information on a previously filed form and include the date of the original filing.

Part 2. Event For Which Tickets Were Distributed

Provide the date(s) of the event, a description of the event, and the face value (i.e. the cost to the public) of the ticket or pass. Check the box indicating whether the event was an "agency event" (such as a county fair, or an event for which the agency purchased tickets). If the agency received the tickets from an outside source, identify the source, the number of tickets received, and check the box to identify whether the tickets or passes were provided to the agency:

- Gratuitously; or
- Pursuant to a contract.

Mark "Yes" if the ticket or pass was provided to an official to perform a ceremonial role or function. For example: *Presented scholarship award.*

Part 3. Agency Official(s) Receiving Ticket(s)

Disclose the name of each agency official that received a ticket or pass and the number of tickets or passes the official received. Also state whether the distribution is income to the official or describe the public purpose for which the official received the tickets or passes.

Part 4. Individual or Organization Receiving Ticket(s)

If tickets or passes were distributed to an individual or organization outside the agency, at the behest of an official of the agency, provide the name of the official. Disclose the name(s) of the individual(s) who received the tickets or passes and the number of tickets or passes provided. If the tickets or passes were provided to an organization, the agency may post the name, address, a description of the organization, and the number of tickets or passes provided to the organization in lieu of posting the name of each individual that received a ticket or pass. Also, describe the public purpose for the distribution to the individual or organization.

Part 5. Verification

The agency head or his or her designee must sign the form.

Privacy Information Notice

Information requested on all FPPC forms is used by the FPPC to administer and enforce the Political Reform Act (Government Code Sections 81000-91014 and California Code of Regulations Sections 18109-18997). All information required by these forms is mandated by the Political Reform Act. Failure to provide all of the information required by the Act is a violation subject to administrative, criminal, or civil prosecution. All reports and statements provided are public records open for public inspection and reproduction.

If you have any questions regarding this Privacy Act Notice, please contact the FPPC.

General Counsel
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814
(916) 322-5660