

CITY OF OAKLAND
Public Ethics Commission

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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: November 1, 2004

RE: A Report And Action To Be Taken Regarding Lobbyist Registration Committee's Proposed Amendments To The Lobbyist Registration Act

At its regular meeting of October 4, 2004, the Commission reviewed and took comment on a proposed series of amendments from the Campaign Finance And Lobbyist Registration Committee to the Lobbyist Registration Act.

In summary, the Committee proposes that the Act be amended to provide:

- 1) annual registration of lobbyists every January. **See §3.20.040(C).**
- 2) an exemption from lobbyist registration for activities that include: a) communications involving employee contracts and agreements; and, b) responses to bids and RFP's. **See §§3.20.060(F) and (G), respectively.**
- 3) the identification of the person(s) a lobbyist seeks to influence. **See §3.20.110(B).**
- 4) the disclosure of a lobbyist's fundraising activities **See §3.20.110(D).**
- 5) a restriction on gifts and other forms of compensation by lobbyists to elected officials and certain staff. **See §3.20.180.**
- 6) misdemeanor penalties and a one-year practice ban for knowing and willful violations of the ordinance. **See §3.20.200.**

In addition to the Committee's proposed amendments, the Commission directed staff to prepare two additional amendments. The first is "severability" language that provides if a court

determines that one or more portions of the ordinance is invalid, the remainder of the ordinance can still remain in effect. The Limited Public Financing Act, OCRA, the Sunshine Ordinance and the False Endorsement Act all contain severability provisions. Commission staff recommends that Section 3.30.230 be added to the Lobbyist Registration Act:

Section 3.20.230 Severability

The provisions of this Chapter are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this Chapter, or the invalidity of the application thereof to any person or circumstances, shall not affect the validity of the remainder of this Chapter, or the validity of its application to other persons or circumstances.

The second requested amendment is to provide a specific period of time in which enforcement actions must commence. Under OCRA, misdemeanor prosecution must commence within four years after the date on which the violation occurred. Administrative complaints must be filed with the Ethics Commission no more than two years after the date the violation occurred. The Limited Public Financing Act also provides a four-year period for criminal enforcement and a two-year period for administrative enforcement. While the Commission may propose a period of more than two years for administrative enforcement, Commission staff recommends that the Lobbyist Registration Act follow the same four-year/two-year framework to maintain consistency with the other ordinances over which the Commission has enforcement authority.

Commission staff recommends that the relevant portions of Sections 3.20.190 and 3.20.210 be amended as follows:

3.20.190 Procedures and Action

- A. Any person who violates this Act is subject to civil enforcement proceedings before the Public Ethics Commission pursuant to the Commission's General Complaint Procedures. No complaint alleging a violation of any provision of this Act shall be filed with the Public Ethics Commission more than two years after the date the violation occurred.

3.30.210 Criminal Violation

- A. Any person who knowingly or willfully violates the provisions of this Act is guilty of a misdemeanor.
- B. The prosecution of any misdemeanor violation of this Act shall commence within four [delete: "two"] years after the date on which the alleged violation occurred.

All requested changes are demonstrated in the attached "redline" version of the ordinance.

Attachment 1.

I. Commissioner Reinke's Proposed "Revolving Door" Language

During the Commission's discussion, Commissioner Reinke proposed specific language that would prohibit City officials and employees from lobbying within one year after leaving City office or employment. Commissioner Reinke's proposal reads as follows:

"No public official or employee of the City of Oakland may act as a paid lobbyist on behalf of a private interest for at least one year after completion of their employment or appointment by the City of Oakland."

Commissioner Reinke's proposed language raises the issue of whether the Lobbyist Registration Act should also include a so-called "revolving door" provision. Such revolving door laws have been adopted by the State of California and a number of other local jurisdictions. The Commission directed staff to review Mr. Reinke's proposal and to analyze the approach taken by other jurisdictions to regulate lobbying by former officials and employees.

A. Introduction To Revolving Door Laws

In general, revolving door laws seek to regulate the relationship between 1) public officials or employees and their former agencies (so-called "post-employment" restrictions), and/or 2) the relationship between current public officials or employees and a prospective employer (so-called "prospective employment" restrictions).

Characteristic of most "post-employment" laws is a cooling-off period between the time the official or employee leaves public service and the time when he or she may begin influencing a particular matter or a former agency. A few public agencies impose a permanent ban on attempting to influence the same subject matter or agency that the public official or employee worked on while in public service.

Most "prospective employment" laws generally prohibit public officials or employees from negotiating future employment with any person having business pending before the public agency.

The underlying rationale for these laws is to avoid the appearance of conflicts of interest, and to prevent such subsequent or prospective employers from gaining an unfair advantage in their dealings with the City by hiring or negotiating employment with public officials or employees.

Commission staff previously reviewed the revolving door laws of the following public agencies: Port of Oakland, Los Angeles, San Francisco, San Jose, San Diego, Santa Monica, Sacramento and the State of California. The following describes how these entities approach the various types of employment regulations.

1. Permanent Ban On Post-Employment Activities

Only a few jurisdictions, notably the City of Los Angeles, Port of Oakland, and the State of California, impose a permanent ban on former public officials or employees from influencing decisions by their former agency. Such permanent bans are almost always limited, however, to a specific matter on which they previously worked or deliberated while in office. The "specific matter" must also still be pending before the agency, or the agency must be a party to, or have an interest in, the specific matter to invoke the ban. **Attachment 2** demonstrates the elements of each "permanent ban" law for the City of Los Angeles, Port of Oakland and the State of California.

The Port of Oakland's permanent ban is notable because it only extends to contemplated contracts between the Port and former boardmembers who may have "considered or advised" on the subject matter of the contract. Attempting to lobby or influence Port decisions are otherwise subject to a one-year restriction that is described in the section below.

An example of how a permanent ban would operate under the Los Angeles ordinance can be seen in the case of a retired city councilmember who is retained by a local developer to help obtain permits on a new high-rise development. Even though the councilmember retired three years before her new employment and receives only a modest retainer fee, that former councilmember would be precluded from influencing a decision on the permits if she had participated in a decision on that project while in office. She arguably would *not* be precluded from influencing a decision on the permits if the project first came before the city council after she retired, or if she were representing the developer or a local group without compensation.

2. "Cooling Off" Periods

All of the surveyed agencies impose some form of restriction, for varying periods of time, on former officials or specified employees from attempting to influence actions of their former legislative body or employer. **Attachment 3** demonstrates the elements contained in each public agency's ordinance or statute.

Under a typical "cooling off" approach to post-employment activities, a former City official or employee is prohibited from lobbying or communicating with his or her former agency regardless of the issue or the extent to which the former official participated in it.

3. Influencing Prospective Employment

Prospective employment laws generally seek to restrict current public officials and certain employees from negotiating future employment with any person or entity that has business pending before the legislative body or agency. Some laws also prohibit public officials or employees from participating in a decision that involves the interests of a

person with whom they have an agreement regarding future employment. Los Angeles, San Diego, San Jose and the State of California have all enacted prospective employment laws.

Most prospective employments laws only regulate the conduct of public officials or certain employees. A few, like Los Angeles', also impose restrictions on the prospective employer. The City of San Jose additionally requires its officials and covered employees to file a written disclosure whenever someone with pending business before the city discusses or makes an offer of employment to them. **Attachment 4** demonstrates the elements contained in the various provisions on prospective employment.

B. Discussion Of Revolving Door Ordinances

In deciding whether to adopt and/or to further develop Commissioner Reinke's proposal, the Commission may wish to consider the following questions:

1. What Conduct Or Activity Should Be Regulated?

As the attached surveys demonstrate, the reviewed public agencies varied in the type of post-employment conduct they sought to regulate. The identified activities subject to regulation can be categorized as: 1) attempting to influence specific items of business; 2) attempting to influence a former agency or its representatives; 3) contracting with a former agency; and 4) seeking direct employment from a former agency.

Commissioner Reinke's proposal seeks to regulate "lobbying" by former City officials and employees. As **Attachment 2** demonstrates, some agencies that impose a cooling-off period like the one Commissioner Reinke is proposing also restrict a broader class of activities than simply lobbying. For example, some jurisdictions also prohibit former officials from counseling or consulting with persons who have matters before the public official's former agency, or they prohibit such officials from contracting with their former agency during the restricted period. The Commission may wish to consider whether any revolving door legislation should regulate additional areas of activity, including offers of employment to current City officials and/or employees (i.e., a "prospective employment" restriction).

2. How Should The Conduct Or Activity Be Regulated?

As the attachments demonstrate, public agencies generally attempt to restrict post-employment activities of public officials and employees either by completely banning the activity, or by imposing a cooling-off period between the employment and the activity. In determining how best to regulate post-employment activities, the Committee should keep in mind that it is generally easier to enforce, and usually easier to obey, laws providing "objective" standards of conduct rather than those requiring special definitions or interpretation. For example, an ordinance requiring a one-year restriction on former city officials from influencing items under their "official responsibility" or on matters in which they "participated" will inevitably raise more questions of interpretation than a one-year restriction on influencing the public agency for which they formerly served.

Another important consideration is whether to provide certain exemptions and waivers in the ordinance. An example of an exemption to a restriction on influencing a former agency would be for so-called "invited testimony," in which a former official or employee is recognized to possess unique and/or and specialized knowledge which the public agency requires. Waivers from a restriction on influencing or contracting with a former agency could be invoked when the former agency makes specific findings that it is in the public interest for a former official or employee to provide the information or expertise. Most exemptions and waivers tend to be narrowly defined to avoid creating loopholes in the law.

Commissioner's Reinke's proposal invokes an objective, one-year restriction on all lobbying activity. At a minimum, the Commission should clarify whether the restriction will apply only if the former City official or employee meets the definition of a "lobbyist" under existing law, or whether the restriction will apply whether they qualify as a lobbyist or not. The Commission should also clarify whether the exemptions contained in current Section 3.20.060 would also apply to former City officials and employees. For example, would former City officials and employees be entitled to provide so-called "invited" testimony to the City Council or to a City board or commission, or would the proposed language supersede all current exemptions?

3. Who Should Be Regulated?

All of the laws reviewed applied at least to "public officials." This term is defined differently by the jurisdictions, but usually includes elected or appointed officers and, in some cases, department or agency heads. As a point of reference, the City of Oakland identifies in its Charter Section 400 the following persons as "city officers": the Mayor, Councilmembers, the City Manager, City Attorney, the City Clerk, the City Auditor "and such department heads, members of boards and commissions and executive officers of such boards and commissions as may be so designated by ordinance."

Some cities extend their employment restrictions to employees. Of those cities which do, some attempt is usually made to distinguish between those employees who exercise discretionary decision-making authority and those whose job duties are administrative or ministerial in nature. For those laws which apply to employees, most laws are restricted to so-called "designated employees" who are required by the local financial conflict of interest code to file an annual statement of economic interest.

The Commission should consider whether to include *all* employees in Commissioner Reinke's proposal. Another option would be to restrict the prohibition only to designated employees, or to an even narrower class of employees such as agency and department heads and directors.

C. Conclusion And Recommendations

Compared to other local revolving door laws, Commissioner Reinke's proposal represents a broad but temporary restriction on lobbying by former City officials and

employees. The Commission needs to determine whether to adopt and recommend Commissioner Reinke's proposal along with the other proposed amendments to the Lobbyist Registration Act, as well as whether to modify the proposal in light of the other approaches discussed in this memorandum. Any substantial modification of the proposal would arguably be best studied and considered at the committee level.

Regardless of whether the proposal is made a part of the other amendments or submitted as a separate piece of legislation, Commission staff further recommends that the Commission solicit comments from the various employee associations whose members may be affected by any final proposal.

Respectfully submitted,

Daniel D. Purnell
Executive Director

ATTACHMENT 2

PERMANENT BAN ON POST-EMPLOYMENT ACTIVITIES

NAME OF AGENCY	RESTRICTED ACTIVITIES	TO WHOM THE BAN APPLIES
Los Angeles	Prohibits attempting to influence action on any "specific matter" for compensation if the person "personally and substantially" participated in the matter during his or her City service. Ban applies only if the "specific matter" is still pending before an agency or if the agency is a party to, or has a direct interest in, the specific matter. Exemptions exist for "invited testimony" and if the agency gives its consent.	Former elected officials, members of the Ethics Commission, and senior City employees
Port of Oakland	Prohibits contracting with the Port on matters which the Board member "may have considered or advised before departure from the Board."	Former Board members
State of California	Prohibits representing for compensation any other person to influence any proceeding in which the former state official participated and in which the state is a party or has a direct and substantial interest.	Former state administrative officials

ATTACHMENT 3

JURISDICTIONS IMPOSING "COOLING OFF" PERIODS

NAME OF AGENCY	LENGTH OF BAN	RESTRICTED ACTIVITIES	TO WHOM RESTRICTION APPLIES
Los Angeles	One Year	Prohibits any "direct communication" to influence any action or decision by any agency on any pending matter. Exempts legal testimony and providing certain information to the agency.	Former elected officials, members of the Ethics Commission, and senior City employees
Los Angeles	One Year	Prohibits any "direct communication" to influence any action or decision by any agency for which he or she served.	Former city employees required to file a Statement of Economic Interests
San Francisco	Two Years	Prohibits representing any private interests before any board or agency of which he or she was a member. Exempts appearances on behalf of personal interest.	All former city officers and employees
San Francisco	Two Years	Prohibits any communication with City agencies, boards or City representatives to represent a private interest.	Former members of the Board of Supervisors
San Diego	One Year	Prohibits: A) Directly communicating with the city on any pending application for discretionary funding or entitlements. B) Counseling or assisting any person in connection with an appearance that the former public official would be precluded from making. C) Lobbying the city on behalf of another person for compensation.	Former elected or appointed city officeholders, City commission members, and employees or consultants required to file Statements of Economic Interests

		Exempts communications made without compensation, personal representation, or representation on behalf of a public agency.	
San Jose	One Year	Prohibits: A) Working on any matter which he or she worked on during the 12 months prior to the termination of service. B) Representing anyone else before a City board or agency. Exempts testimony in a legal proceeding or from working as a supervisor of an employee whose work would otherwise be prohibited.	Former City officials or employees required to file a Statement of Economic Interests Exempts former officials and employees who work as an employee or volunteer of a non-profit or governmental agency, and those former officials and employees who are retained by the City as an independent contractor to provide "transitional services" at an amount not to exceed his or her City rate of pay.
San Jose	One Year	Prohibits representing anyone before the commission on which he or she served.	Former members of City commissions
Santa Monica	Two Years	Prohibits: A) Representing anyone in connection with any proceeding if the City has a "direct or substantial interest" and the proceedings is one in which he or she participated. B) Accepting any employment with an organization that receives 50% of its funding from the City or which has 50% of its members or directors appointed by the Council. Exempts legal testimony or appearances on one's own behalf.	All former City employees and officials
Sacramento	One Year	Prohibits appearing personally before the City Council, department, board	Certain former employees

		or commission as an agent for anyone on a matter that was under his or her "official responsibility".	
Port of Oakland	One Year	Prohibits: A) Working for or contracting with the Port. B) Contracting with the Port if the former member has a non-remote "equity interest" in the contracting entity. C) Acting as a paid representative to influence a pending Board (or Board committee) decision.	Former Port Board members
State of California	One Year	Prohibits acting as a paid representative to influence the decisions or actions of the legislature or an administrative agency.	Former state elected officials
State of California	One Year	Acting as a paid representative to influence the decisions or actions of the administrative agency for which he or she worked 12 months before leaving office or employment.	Former designated state employees

ATTACHMENT 4

INFLUENCING PROSPECTIVE EMPLOYMENT

CITY	SPECIFIC RESTRICTION	TO WHOM RESTRICTION APPLIES
Los Angeles	<p>A) Prohibits "knowing or willful" negotiations of future employment with any person (other than a gov't agency) that has a matter currently pending before the City official or employee or the board or agency of which they are a member.</p> <p>B) No person who has a matter pending before a City official or before any body of which the official is a voting member shall negotiate the possibility of future employment of that City official.</p> <p>C) No City official shall make, participate in, or influence a decision involving the interest of a person with whom she has an agreement concerning future employment.</p>	Current city officials and employees; also those making an offer of prospective employment
San Diego	<p>A) No City official may make, participate in, or influence a decision involving the interests of any person with whom he or she is seeking, negotiating or securing future employment.</p> <p>B) No person who has a matter pending before the City may negotiate "knowingly or willingly" the possibility of future employment with a City official whom is making or using his or her position to influence a decision concerning the matter.</p>	Current elected or appointed city officeholders, city commission members, and employees or consultants required to file Statements of Economic Interests.
San Jose	<p>A) Restricts participation in any decision involving the financial interests of any person or entity which has discussed or offered prospective employment and is "actively lobbying" any issue before the City.</p> <p>B) Requires covered officials and employees to file a written disclosure of any discussion or offer of prospective employment.</p>	Current elected officials, certain employees, and board and commission members.