
Item 8

Information

Ex Parte Communications

Executive Summary: This item presents recommendations for regulating ex parte communications, as well as draft ordinance language to implement the recommendations.

Recommended Action: This item is for informational purposes only.

Presenter: Heather Holt, Executive Director

Ex Parte Communications

A. Introduction

Over the course of 2010, the Ethics Commission conducted a comprehensive review of the Governmental Ethics Ordinance (GEO). In addition to approving recommendations for improving existing provisions of the GEO, the Commission also approved recommendations to add new regulations regarding ex parte communications.

In January 2012, the Rules, Elections, and Intergovernmental Relations Committee considered a motion (Perry-Englander) regarding ex parte communications and asked us to report back on the status of our work on this issue after our review of the campaign finance laws was completed. *See* Council File No. 11-0187-S1, provided in Attachment B.

This report explains the recommendations that were previously approved, proposes draft language, and discusses some newly identified issues. As an informational item, this report creates an opportunity to revisit the concepts surrounding ex parte communications before taking formal action regarding specific language. By deferring formal action until the next meeting, we hope to ensure that commissioners who were not involved in the original discussions are well informed and that the City Attorney's office has sufficient time to assess new legal issues that were identified during the drafting process.

Draft ordinance language that regulates ex parte communications is provided in Attachment A. In addition to the substantive changes identified below, the draft also makes technical improvements, such as creating subsections in the GEO's definition section and employing consistent references to the California Political Reform Act.

II. ORIGINAL RECOMMENDATIONS

A. Process

One of the overriding considerations in the GEO review was the importance of fair and impartial government. The GEO is designed to, among other things, "assure that individuals and interest groups in our society have a fair and equal opportunity to participate in the governmental process" and "that the governmental process itself promotes fairness and equity for all residents." Los Angeles Municipal Code (LAMC) §§ 49.5.1(C)(1)–(2).

Impartiality is critical to good government and helping to "restore public trust in governmental and electoral institutions." LAMC § 49.5.1(C)(7). Government decisions should be made in the best interests of the public—not based on bias for or against a particular citizen or based on a public servant's own, personal interests. The state also acknowledges this by

declaring in the Political Reform Act that “government should serve the needs and respond to the wishes of all citizens equally ...” and that “[p]ublic officials, whether elected or appointed, should perform their duties in an impartial manner ...” Cal. Gov’t Code §§ 81001(a)–(b).

As a fairness issue that is not currently part of the GEO, ex parte communications were discussed in detail at three Ethics Commission meetings during the GEO review. Then-Councilmember Wendy Greuel had introduced two motions urging the regulation of ex parte communications. *See* Council File Nos. 07-3294, 07-3294-S1, provided in Attachment C. The City Attorney’s office had also issued a report regarding ex parte communications. *See* City Attorney Report No. R07-0457 (CA Report), provided in Attachment D.

B. Background

Ex parte communications are, essentially, off-the-record interactions with decision makers that occur without the knowledge or consent 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.

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, the Ethics Commission determined that ex parte communications should be regulated. In determining the most appropriate way to regulate them, distinctions were made between ex parte communications that occur regarding adjudicative matters and those that occur regarding legislative matters.

C. 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 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. CA Report, 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. *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. Protecting due process and helping to ensure that City decisions are procedurally proper is vital to good government. Accordingly, the Commission approved a ban on adjudicative ex parte communications.

1. *Duration of Ban*

The approved ban would apply from the time a decision maker is made aware of the matter, such as 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 regarding that matter. *See* proposed LAMC § 49.5.18(A)(1)(a). Certain exceptions, such as communications regarding ministerial issues and communications between the decision maker and certain staff members in the decision maker's agency, would be exempt from the ban. *See* proposed LAMC § 49.5.18(A)(1)(b).

2. *Affected Decision Makers*

There are a variety of ways that adjudicative City decisions are made. Commissions and boards, including the Ethics Commission, 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 advised against applying regulations regarding ex parte communications to elected City officials. *See* CA Report, pp. 4-5. The City Attorney noted 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). In balancing these competing and equally compelling interests, the Ethics Commission determined that elected City officials should be excluded from the ban. *See* proposed LAMC § 49.5.18(A)(1).

3. *Communications That Do Occur*

Despite the ban, adjudicative ex parte communications are likely to occur. Some will occur in violation of the ban, but others may be permissible (such as those that occur before a decision maker becomes aware that an adjudicative matter is on an agenda).

When an adjudicative ex parte communication occurs, the decision-making process is compromised because information becomes imbalanced. To remedy that imbalance, the Ethics Commission approved a disclosure requirement. A decision maker would be required to disclose adjudicative ex parte communications that occur either during the ban or in the six months prior to the ban. *See* proposed LAMC § 49.5.18(A)(2). The disclosure must be made in writing and must provide specific information about the communication. *See* proposed LAMC §§ 49.5.18(A)(2)(a)–(b).

The disclosure must also be timely. The Ethics Commission approved a short deadline for disclosure, as well as a process that would permit parties to request additional time to respond to an adjudicative ex parte communication. *See* proposed LAMC §§ 49.5.18(A)(2)(c)–(d).

For adjudicative ex parte communications that occur during the ban, disclosure may not be the only appropriate remedy. The enforcement provisions in the GEO would apply to

violations of the ex parte communications requirements, but the Ethics Commission also approved a recommendation to permit the City Attorney to determine on a case-by-case basis whether a decision maker should be disqualified from participating in the decision regarding the matter about which the ex parte communication occurred. *See* proposed LAMC § 49.5.18(A)(2)(f).

D. 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. Legislative matters establish the policies and laws that are applied to the facts in adjudicative decisions. They can also address other non-adjudicative issues, such as the budget or the awarding of contracts.

Banning legislative ex parte communications is not necessary for due process reasons, but the GEO does create a legal mandate to ensure fair and equitable government processes. LAMC §§ 49.5.1(C)(1)–(2). The same public perception of biased governmental processes that can occur as a result of adjudicative ex parte communications can also occur as a result of legislative ex parte communications. Therefore, the Ethics Commission determined that an important component of the GEO’s mandate to foster fair and equitable government processes requires the disclosure of legislative ex parte communications.

The approved structure for disclosing legislative ex parte communications requires members of City boards and commissions to disclose communications that occur regarding items that appear on their agendas and involve a person who attempts to influence the member. *See* proposed LAMC § 49.5.18(B)(1). As with adjudicative ex parte communications, certain types of communications would be exempt from the disclosure requirement. *See* LAMC § 49.5.18(B)(2).

The approved disclosure of legislative ex parte communications is less formal than the approved disclosure of their adjudicative counterparts. Disclosure would be a routine item on each board or commission agenda, board members would be permitted to disclose either verbally or in writing, and they would only be required to disclose the legislative ex parte communications that occurred since the last meeting they attended. *See* proposed LAMC §§ 49.5.18(B)(3)–(4). In addition, disclosure would only be required when the board member attends a meeting. In other words, if a member is absent from a meeting and, therefore, does not participate in the public discussion of a particular issue, legislative ex parte communications regarding that issue need not be disclosed by that member, unless the issue is continued to a subsequent meeting that the member does attend. *See* proposed LAMC § 49.5.18(B)(3).

III. NEW RECOMMENDATIONS

As often occurs in any drafting exercise, several new issues were identified by both our staff and the City Attorney’s office during the process of creating language to implement the approved recommendations. Those issues are explained below.

A. Exempt Ex Parte Communications

1. *Communications That Are Privileged*

The approved recommendations exempt certain types of ex parte communications regarding both adjudicative and legislative matters. For example, communications regarding ministerial issues would not trigger a ban, and communications with family members would not trigger disclosure. *See* proposed LAMC §§ 49.5.18(A)(1)(b), 49.5.18(B)(2).

During the GEO review, the issue of confidential or privileged communications was not considered in light of ex parte communication regulations. However, we believe there may be circumstances in which certain types of communications should not be banned or disclosed. As a result, the draft ordinance exempts ex parte communications that are confidential under City law or protected by the attorney-client privilege. *See* proposed LAMC §§ 49.5.18(A)(1)(b)(ii), 49.5.18(A)(B)(2)(b).

This issue was identified by staff late in the drafting process, and the City Attorney's office was unable to thoroughly consider it prior to this meeting. Additional time is needed for that office to assess possible legal concerns, such as how such an exemption would affect due process and whether additional types of privileged communications should be included in the exemption.

2. *Communications With Agency Staff*

The approved recommendations also exempt communications between a decision maker and staff members in the decision maker's agency. The City Attorney's office makes two additional recommendations regarding that exemption.

First, they recommend including City consultants in the decision maker's agency. Second, they recommend a more narrow exemption for adjudicative ex parte communications, which would apply only when the staff member or consultant is not involved in the adjudicative matter as an applicant, complainant, respondent, appellant, advocate, investigator, party, or interested person. The draft ordinance incorporates both recommendations. *See* proposed LAMC §§ 49.5.18(A)(1) (b)(iii), 49.5.18(B)(2)(d).

3. *Legislative Communications Regarding Contracts*

The City Attorney's office also recommends exempting from disclosure legislative communications regarding contracts and the contracting process. Those communications are specifically regulated by LAMC § 49.5.17, which prohibits board members from participating in an individual capacity in the contracting process. The draft ordinance incorporates this recommended exemption. *See* proposed LAMC § 49.5.18(B)(2)(d).

B. Method of Disclosing Adjudicative Ex Parte Communications

The approved recommendation for disclosing adjudicative ex parte communications requires decision makers to provide written notice to the City Attorney and all parties. Because of the potential for overly broad notice, the City Attorney's office recommends a modification that would require decision makers to provide written notice to the City Attorney and the board secretary or executive assistant. That individual would then be required to provide notice to applicants, complainants, respondents, appellants, advocates, and other persons who have requested notice in the matter. The draft ordinance incorporates this recommendation. *See* proposed LAMC § 49.5.18(A)(2)(a).

C. Deadline for Disclosing Adjudicative Ex Parte Communications

The approved recommendations require decision makers to disclose adjudicative ex parte communications within one business day of three possible trigger dates: the date of the communication; the date the decision maker receives notice of the matter; or the date of the hearing. We recommend changing the deadline to two business days.

Particularly when the trigger date is the day a decision maker receives notice of an adjudicative matter, there may be a number of disclosures required at one time. One business day may be an unreasonably short amount of time in that scenario to properly comply with the disclosure requirement. The draft ordinance incorporates this change. *See* proposed LAMC § 49.5.18(A)(2)(c).

D. Responding to Adjudicative Ex Parte Communications

The approved recommendations permit a person to request up to five business days to respond to an adjudicative ex parte communication, as long as the request is made within one business day of receiving notice of the communication. Again, we recommend that the deadline for the request be modified to two business days.

In addition, the City Attorney recommends specifying that additional response time may not be granted if doing so would cause the City to miss a state or City deadline. The draft ordinance incorporates both recommendations. *See* LAMC §§ 49.5.18(A)(2)(d)(i), (iv).

E. Primacy of Regulations

Finally, the City Attorney's office recommends adding language to specify that, when a matter is both adjudicative and legislative, the more restrictive requirements for adjudicative ex parte communications apply. That recommendation is incorporated into the draft ordinance. *See* LAMC § 49.5.18(2)(e).

IV. CONCLUSION

The draft ordinance in Attachment A provides a framework for discussing ex parte communications and the recommendations that would regulate them. At the next meeting, we will present finalized language for formal action. Once specific language has been approved, the recommendations will be forwarded to the City Council for their consideration and action.

Attachments:

- A Draft Ordinance*
- B Motion (CF No. 11-0187-S1)*
- C Motions (CF Nos. 07-3294, 07-3294-S1)*
- D City Attorney Report No. R07-0457*

Governmental Ethics Ordinance

EX PARTE COMMUNICATIONS

SEC. 49.5.2

Definitions

The following terms used in this ~~a~~Article shall have the meanings set forth below. Except as otherwise provided herein, the terms and provisions of this Article shall have the meanings and shall be interpreted in accordance with the applicable definitions and provisions of the Political Reform Act ~~of 1974, as amended (Government Code Section 81000, et seq.) and the regulations of the California Fair Political Practices Commission, as amended.~~

A. **"Administrative action"** means the proposal, drafting, development, consideration, amendment, enactment or defeat by any City agency of any matter, including any rule, regulation or other action in any regulatory proceeding or any proceeding involving a contract, license, permit, franchise, or entitlement for use, whether quasi-legislative or quasi-judicial. Administrative action does not include any action which is solely ministerial.

B. **"Adjudicative matter"** means a matter in which a decision maker is required to conduct a hearing and make a decision based on the law and the facts in a particular case.

C. **"Agency"** means the City of Los Angeles or any department, bureau, office, board, commission, other agency of the City, or any other government agency, required to adopt a conflict of interest code subject to City Council approval. With respect to employees of a Councilmember's staff and employees of the Chief Legislative Analyst's office, **"agency"** means the City Council.

D. **"Attempting to influence"** means promoting, supporting, opposing or seeking to modify or delay any action on municipal legislation (as defined in Section 48.02 of this Code) by any means, including but not limited to providing or using persuasion, information, statistics, analyses or studies.

E. **"City Official"** means any elective City officer, member, officer, employee, commissioner or consultant of any agency required to adopt a conflict of interest code subject to City Council approval, and who is required to file statements of economic interests pursuant to the conflict of interest code of his or her agency.

F. **"Compensation"** means the receipt of any monetary or non-monetary payment and includes, but is not limited to, salary, wages, fees, partnership or other similar financial interest, or any other payment or reimbursement for the services or time of the person.

G. **"Confidential information"** means information to which all of the following apply:

- (1) At the time of the use or disclosure of the information, the information is not a public record subject to disclosure under the California Public Records Act.

(2) At the time of the use or disclosure of the information, the disclosure is prohibited by

(ia) a statute, regulation, or rule which applies to the agency in which the officer or employee serves; or

(ib) any limitation placed on outside employment pursuant to Section 49.5.11 of this Code.

(3) The use or disclosure of the information will have, or could reasonably be expected to have, a material financial effect on any investment or interest in real property which the officer or employee, or any person who provides pecuniary gain to the officer or employee in return for the information, has at the time of the use or disclosure of the information or acquires within 90 days following the use or disclosure of the information.

H. “**Contract**” means without limitation any agreement, lease, right of entry, franchise, or concession, including but not limited to agreements for the performance of any work or the rendition of any service or the provisions of any materials, equipment or supplies to the City of Los Angeles or to the public, which is let, awarded or entered into with, or on behalf of, the City of Los Angeles by the City Council, any board or commission, office or department and shall include departments which have control of their own funds.

I. “**Co-owner**” means a person who resides in, does business in, plans to do business in or owns an interest in real property located within the City of Los Angeles, and either

(1) possesses a 10 percent or greater ownership, security, or leasehold interest in real property in which a filer also possesses an interest, or

(2) possesses a 10 percent or greater investment in a business entity in which a filer also owns an investment.

A “**co-owner**” does not include

(1) any member of the official's immediate family or

(2) any commercial lending institution which made a loan in the lender's regular course of business on terms available to members of the public without regard to official status.

J. “**Dependent child**” means a child who is either

(1) unmarried, under the age of 21 and living in the same household as the filer or

(2) otherwise listed as a dependent of the filer for federal income tax purposes.

K. “**Direct Communication**” means appearing as a witness before, talking to (either by telephone or in person), corresponding with (including sending electronic mail to), or answering questions or inquiries from, any City official or employee, either personally or through an agent.

L. **"Disclosable"** means an investment, interest in real property, source of income, gift, loan, honorarium or travel expenses, or business position, which the filer is required to disclose pursuant to Article 2 of Chapter 7 of the Political Reform Act ~~of 1974, as amended,~~ or pursuant to the conflict of interest code of the filer's agency.

M. **"Doing Business with the City"** means entering into or performing pursuant to a contract with the City of Los Angeles, an agency of the City or another local government agency required to adopt a conflict of interest code subject to City Council approval. Doing business with the City includes entering into or performing contracts for goods, equipment, services or financial assistance but does not include the receipt of or payment for services normally rendered by the City to residents and businesses such as sewer service, water and power, street maintenance and the like.

N. **"Elective City officer"** means any person who is a City Council Member, City Attorney, Controller or Mayor, whether appointed or elected.

O. **"Ex parte communication"** means a communication between a decision maker and any person regarding a matter within the decision maker's jurisdiction, which occurs by any means outside of a public meeting or hearing and which may be initiated by either the decision maker or another person. The term does not include a communication between a decision maker and an individual in the City Attorney's office who is providing legal advice to the decision maker regarding permissible or appropriate courses of action.

P. **"Foreign gift"** means a gift from an individual domiciled in a foreign country, a foreign government, or a business entity or other entity having its principal place of business located in a foreign country, which gift is accepted by a City official either while that official is traveling abroad or from the donor while that donor is visiting the United States. A foreign gift includes

- (1) an otherwise qualifying gift of food, beverages or customary business entertainment cumulatively valued at no more than \$250 during any calendar year accepted by an official during the course and scope of official business and
- (2) an otherwise qualifying gift which is accepted by the official on behalf of the City of Los Angeles and which gift is transmitted to and becomes the property of the City. A foreign gift does not include a gift from any corporation organized under the laws of the United States, or under the laws of any state or territory of the United States.

Q. **"Gift"** means, except as otherwise provided in this definition, any payment to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value. The term **"gift"** does not include:

- (1) Informational material such as books, reports, pamphlets, calendars, periodicals, seminars, or informational conferences, exclusively for official or office use and valued at less than \$250 (except that such dollar limit does not apply to

informational material received from a government agency). No payment for travel or reimbursement of any expenses shall be deemed "**informational material.**"

- (2) Gifts which are not used and which, within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes.
- (3) Gifts from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, partner in a bona fide dating relationship, nephew, niece, aunt, uncle, or first cousin, or the spouse of any such person; provided that a gift from any such person shall be considered a gift if the donor is acting as an agent or intermediary for any person not covered by this paragraph.
- (4) Campaign contributions required to be reported under Chapter 4 of the Political Reform Act ~~of 1974, as amended.~~
- (5) Any devise or inheritance.
- (6) Personalized plaques and trophies with an individual value of less than two hundred fifty dollars (\$250).
- (7) Gifts of food, beverages or occasional lodging provided in an individual's home.
- (8) Gifts valued at no more than \$100 from an individual to a City official or to a member of the official's immediate family in connection with a non-recurring ceremonial occasion.

R. "**High Level Filer**" means the Mayor, City Attorney, Controller, member of the City Council, member of the City Ethics Commission and Executive Officer of the City Ethics Commission.

S. "**High Level Official**" means the Mayor, the City Attorney, the Controller, the members of the City Council, the Chief of Staff to the Mayor, the Assistant Chief of Staff to the Mayor, each Deputy Mayor, the Special Assistant to the Mayor for Legal Affairs, the Executive Assistant City Attorney, each Chief Assistant City Attorney, each Senior Counsel, the Chief Deputy Controller, the Administrative Coordinator to the Controller, two members of the staff of each City Council Office possessing the most decision-making responsibilities relative to governmental policy as designated by each member of the Council, the members of the City Ethics Commission, the Executive Officer of the City Ethics Commission, the members of the City Planning Commission, the Director of Planning, the members of the Board of Public Works, the Director of the Office of Administrative and Research Services, each Assistant Director of the Office of Administrative and Research Services, the Chief Legislative Analyst, each Assistant Chief Legislative Analyst, the Treasurer, and the City Clerk. In addition, "high level official" means any other member of the staff of an elected City officer possessing significant decision-making responsibilities relative to governmental policy as may be designated in writing to the City Ethics Commission by the elected City officer.

T. "**Honorarium**" means a payment for speaking at any event, participating in a panel or seminar or engaging in any similar activity. An "**honorarium**" does not include free

admission, food, beverages and similar nominal benefits provided to an officer or employee of the City at an event at which he or she speaks, participates in a panel or seminar or performed a similar service, nor does it include reimbursement or advances for actual intrastate travel or for necessary accommodations provided directly in connection with the event.

U. "**Legislative action**" means the drafting, introduction, consideration, modification, enactment, or defeat of any ordinance, charter amendment, resolution, amendment, report, nomination or other matter by the City Council or by any committee, subcommittee thereof, or by a member or employee of the City Council acting in his or her official capacity. "**Legislative action**" also means the action of the Mayor in approving or vetoing any ordinance or resolution.

V. "**License, permit or other entitlement for use**" means any business, professional, trade or land use license or permit, any other entitlement for use, (including all entitlement for land use), any contract (other than labor, personal employment, or competitively bid contracts), and any franchise.

W. "**Lobbying Firm**" means any business entity, including an individual contract lobbyist, which meets either of the following criteria:

(a1) the business entity received or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action on behalf of any other person; and any partner, owner, officer, or employee of the business entity is a lobbyist; or

(b2) the business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, to communicate directly with any elective city officer, agency official, or legislative official for the purpose of influencing legislative or administrative action on behalf of any other person.

X. "**Lobbyist**" means any individual who is required to register as a lobbyist or municipal legislative advocate pursuant to any City ordinance requiring such registration.

Y. "**Lobbyist Employer**" means any person, other than a lobbying firm, who:

(a1) Employs one or more lobbyists for economic consideration, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action, or

(b2) Contracts for the services of a lobbying firm for economic consideration, other than reimbursement for reasonable travel expense, for the purpose of influencing legislative or administrative action.

Z. "**Participant**" means any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision, as described in Article 1 (commencing with Section 87100) of Chapter 7 of the Political Reform Act ~~of 1974, as amended~~. A person actively supports or opposes a particular decision in a proceeding if he or she lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency.

AA. "Party" means any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.

BB. "Pecuniary Gain" means any monetary benefit to a person or to a member of the person's immediate family.

CC. "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, or any other organization or group of persons acting in concert.

DD. "Political Reform Act" means the California Political Reform Act of 1974 (California Government Code Sections 81000 et seq.) and the related regulations of the California Fair Political Practices Commission.

EE. "Proceeding involving a license, permit or other entitlement for use" includes any proceeding to grant, deny, revoke, restrict, or modify a license, permit or other entitlement for use.

FF. "Restricted source" means the following with regard to each of the following classes of City officials.

(1) With regard to "high level filers" and "high level officials," "restricted source" means:

- (a) a lobbyist, lobbying firm, or lobbyist employer;
- (b) a person doing or seeking to do business with the City;
- (c) a person who, during the reporting period, knowingly attempted to influence the official in any legislative or administrative action which would have a direct material financial effect on such person; or
- (d) a person who is a party to a proceeding involving a license, permit or other entitlement for use while a proceeding involving such matter is, or within the prior nine months was, pending before the official or before the City Council or a board, commission, committee, or other similar body of which the official is a voting member, and for nine months following the date a final decision is rendered in the proceeding.

(2) With regard to filers other than "high level filers" and with regard to officials other than "high level officials," "restricted source" means:

- (a) a lobbyist, lobbying firm, or lobbyist employer, seeking to influence decisions of the filer's agency;
- (b) a person doing or seeking to do business with the filer's agency;
- (c) a person who, during the reporting period, knowingly attempted to influence the official in any legislative or administrative action which would have a direct material financial effect on such person;

- (d) or a person who is a party to a proceeding involving a license, permit or other entitlement for use while a proceeding involving such matter is, or within the prior nine months was, pending before the official or before a board, commission, committee or other similar body of which the official is a voting member, and for nine months following the date a final decision is rendered in the proceeding.
- (3) With regard to all filers and all City officials, a "**restricted source**" does not include an individual (other than a lobbyist) who is employed by a restricted source, provided that the gift or income is neither paid for by the employer nor provided at the direction of the employer.

**SEC. 49.5.6
Disclosure Regarding Economic Interests**

A. **Persons Required to File.** The Mayor, City Attorney, Controller, members of the City Council, each chief administrative officer of a City department or office, and each member of a board or commission who is a designated employee pursuant to the conflict of interest Code of his or her agency shall file a statement of economic interests pursuant to the Political Reform Act ~~of 1974, as amended~~, and shall additionally file a financial disclosure statement pursuant to the provisions of this section. There shall be two classes of filers,

~~(1)~~ "high level filers" and

~~(2)~~ "other filers," who shall include all filers other than "high-level filers."

C. **Disclosure Requirements for High-Level Filers.**

1. In addition to statements of economic interests filed pursuant to the Political Reform Act ~~of 1974, as amended~~, high-level filers shall file financial disclosure statements disclosing the following financial interests:

2. Except as otherwise provided in this subsection, the information required to be disclosed with respect to each financial interest, and the manner of disclosing that information, shall be the same as required by Article 2 of Chapter 7 of the Political Reform Act ~~of 1974, as amended~~, or by the conflict of interest code of the filer's agency.

D. **Disclosure Requirements For Other Filers.**

1. In addition to statements of economic interests filed pursuant to the Political Reform Act ~~of 1974, as amended~~, other filers shall file financial disclosure statements disclosing the following financial interests:

2. Except as otherwise provided in this subsection, the information and amounts required to be disclosed with respect to each financial interest, and the manner of disclosing that information, shall be the same as required by Article 2 of Chapter 7 of the Political Reform Act ~~of 1974, as amended~~, or by the conflict of interest code of the filer's agency.

F. **Exception If Disclosure Would Violate Legally Recognized Privilege.** A filer need not disclose the name of a person who paid fees or made payments to the filer or to a business entity in which the filer or the filer's spouse owns an investment if disclosure of the person's name would violate a legally recognized privilege under California law, such as but not limited to the attorney-client and the physician-patient privileges. Such person's name may be withheld in accordance with the rules relating to privilege applicable to disclosure under the ~~California Political Reform Act of 1974, as amended, and pursuant to the procedure established by 2 California Code of Regulations Section 18740, as amended, or by a successor regulation.~~

J. **Recusal Notification**

1. Each member of a City board or commission required to file statements of economic interests pursuant to the Political Reform Act ~~of 1974, as amended,~~ shall complete a "Recusal Notification Form" each time the member recuses himself or herself in relation to an actual conflict of interests or the appearance of a conflict of interests under any applicable law.

**SEC. 49.5.10
Restrictions on Gifts and Travel Expenses**

B. **Restrictions on Travel Advances and Reimbursements.**

4. The payment for travel expenses of a City official traveling on government business shall not be prohibited by this section in any case where the payment is a gift or other payment to the City of Los Angeles or to any government agency for which the City Council is the code reviewing body with respect to that agency's conflict of interest code, rather than a gift or income to the official, within the meaning of the Political Reform Act ~~of 1974, as amended, and the regulations of the Fair Political Practices Commission.~~

**SEC. 49.5.11
Lobbying Activities of Current and Former City Officials**

- J. No member of a board or commission of the City shall, for compensation, communicate directly, either personally or through his or her agent(s) at the member's behest, with any City official for the purpose of attempting to influence action on municipal legislation on behalf of any other person. For the purposes of the subsection, "municipal legislation" shall have the meaning set forth in Section 48.02 of this Code. This subsection is applicable only to members of those boards and commission[s] of the City who are required to file statements of economic interests pursuant to the Political Reform Act ~~of 1974, as~~ **amended**. Nothing in this subsection shall prohibit a member of a City board or commission from appearing before any City agency in the same manner as any other member of the general public solely to represent himself or herself on a matter related to his or her personal interests.

SEC. 49.5.18

Ex Parte Communications

A. Adjudicative Matters.

1. A City official, other than an elective City officer, who serves as a decision maker in an adjudicative matter may not engage in an ex parte communication regarding that matter while the matter is pending before the decision maker or the body of which the decision maker is a member.

a. This prohibition applies from the time the decision maker is made aware of the adjudicative matter, such as 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 regarding and no longer has jurisdiction over that matter.

b. This prohibition does not apply to the following:

i. A communication regarding ministerial issues, such as scheduling.

ii. A communication that is confidential under City law or protected by the attorney-client privilege.

iii. A communication between a decision maker and a City employee or consultant in the decision maker's agency, as long as the employee or consultant is not involved as an applicant, complainant, respondent, appellant, advocate, investigator, party, or interested person in the adjudicative matter and is not relaying a prohibited communication on behalf of another person.

2. If an ex parte communication regarding an adjudicative matter occurs during or in the six months prior to the beginning of the prohibition period specified in paragraph 1, the decision maker involved in the communication must disclose the communication.

a. The disclosure must be made in writing and provided to the City Attorney and to the board secretary, executive assistant, or similar person for the decision maker or the body of which the decision maker is a member.

i. The board secretary or executive assistant must provide copies of the disclosure within two business days to applicants, complainants, respondents, appellants, advocates, and other persons who have requested notice in the matter.

ii. The decision maker must verbally note the disclosure at the beginning of the hearing on the adjudicative matter, and the disclosure must be made part of the record of the proceeding.

b. The disclosure must identify the following:

i. The date the ex parte communication occurred;

ii. The persons involved in the ex parte communication;

- iii. The adjudicative matter at issue; and
 - iv. The substance of the information that was exchanged.
 - c. The disclosure must be made by the earlier of the following dates:
 - i. The date of the hearing on the adjudicative matter;
 - ii. Two business days after the communication occurred; or
 - iii. Two business days after the decision maker receives notice of the adjudicative matter.
 - d. A person may request up to five business days to respond to an ex parte communication that is disclosed.
 - i. The request must be made by the earlier of two business days after receiving the disclosure or at the hearing on the adjudicative matter.
 - ii. The request must justify the need for additional time to respond to the ex parte communication.
 - iii. The individual or body charged with making the final decision in the adjudicative matter will decide whether to grant or deny the request and how much additional time to grant the requestor. If the circumstances warrant, more than five business days may be granted.
 - iv. An extension of time may not be granted if it would cause a state or City deadline to be missed, unless otherwise authorized by law.
 - e. If a matter is both adjudicative and legislative, the requirements in this subsection regarding adjudicative matters apply.
 - f. The City Attorney may determine that an ex parte communication that occurs during the prohibition period specified in paragraph 1 is grounds for disqualifying the decision maker from participating in the decision regarding that adjudicative matter.

B. Other Matters.

- 1. A member of a City board or commission, other than an elected City officer, must disclose an ex parte communication that occurs regarding an item that appears on an agenda for that member's board or commission when the ex parte communication involves a person who attempts to influence the member to take a particular course of action regarding that item.
- 2. Disclosure is not required for the following:
 - a. A communication regarding ministerial issues, such as scheduling.

- b. A communication that is confidential under City law or protected by the attorney-client privilege.
 - c. A communication with a family member, as that term is defined for gift purposes by the Political Reform Act, or the member's partner in a bona fide dating relationship.
 - d. A communication between the member and a City employee or consultant in the member's agency.
 - e. A communication regarding contracts that is regulated by Section 49.5.17.
3. Disclosure is required at the board or commission meeting at which the item appears on the agenda. If an item appears on more than one agenda, disclosure is required for any ex parte communications that occurred since the last meeting for which the item was on the agenda and the member was present. Disclosure is not required for meetings that a member does not attend.
4. The disclosure of ex parte communications must be an item on each board or commission meeting agenda, and members must disclose any ex parte communications on the record, either verbally or in writing.
5. The disclosure must identify the following:
- a. The date of the ex parte communication;
 - b. The persons who attempted to influence the member; and
 - c. The agenda item at issue.

SEC 49.5.19
Ethics Training

SEC. 49.5.1920
Enforcement

SEC. 49.5.201
Late Filing Penalties

SEC. 49.5.212
Effect of Campaign Money Laundering Violation on Contracts and Fee Waivers

SEC. 49.5.223
Authority of Enact

SEC. 49.5.234
Applicability of Other Laws

SEC. 49.5.245
Severability

11-0187-S1

MOTION

When the voters approved reform of the City Charter in 1999, they expected that future efforts to draw City Council boundaries would be open and transparent, conducted free from back-room deals. The new Charter required that new boundaries be drawn by a commission of appointed City voters who would consider federal and State voting rights laws, the unique nature of Los Angeles communities and neighborhoods, and do so in an open and transparent manner.

One concern, however, is that the City does not currently have any rules regarding *ex parte* communications with City commissioners. *Ex parte* communications are private communications with decision makers that create an appearance of undue influence and favoritism and deprive others of their right to comment. Since they are by definition outside the record, *ex parte* communications are consequently unavailable for review by the public or the courts.

In a December 2007 report to the City Council, the City Attorney evaluated issues associated with *ex parte* communications on policy and legislative matters. They recognized the conflicts inherent in any rules associated with *ex parte* communications. The report recognizes the Constitutional right afforded the public to access their City officials, but that at the same time *ex parte* communications, which are not open to public scrutiny, can influence decision makers. The City Attorney advised against a ban on *ex parte* communications, but indicated that the Council may consider whether "disclosure of *ex parte* communications is appropriate."

The City Ethics Commission is currently considering rules and regulations associated with *ex parte* communications. In addition, the Board of Harbor Commissioners and the Board of Information Technology Commissioners have both adopted *ex parte* communications rules. Finally, the Los Angeles Metropolitan Transportation Authority has also adopted *ex parte* communications rules.

It is essential that the public have full confidence in the integrity of the City Council redistricting process and that all communications related to the drawing of Council district boundaries be placed on the record. Further, it is essential that any plan presented by the Redistricting Commission and approved by Council have a complete record that justifies the changes to be made to the Council boundaries.

There is no better way to improve the level of open, transparent decision-making needed in this process than for the Los Angeles City Council Redistricting Commission to immediately adopt *ex parte* communications rules that require disclosure communications from any elected official or organization concerning their work to evaluate and recommend changes to the City Council district boundaries.

I THEREFORE MOVE that the City Council request that the Los Angeles City Council Redistricting Commission immediately adopt *ex parte* communication guidelines similar to those adopted by the Los Angeles Metropolitan Transit Authority Board that would require Commissioners to disclose communications from any elected official or organization concerning the Commission's work to evaluate and recommend changes to the City Council district boundaries; and

I FURTHER MOVE that the City Council instruct the City Ethics Commission to report on the status of their work to implement *ex parte* communications rules for City commissioners, including any ordinances necessary to implement those rules.

MB
NOV 4 2011

PRESENTED BY:

Bernard C. Peltz

Jan Perry
Councilwoman, 9th District

SECONDED BY:

M. Angelo

ORIGINAL

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:

W. Greuel
WENDY GREUEL
Councilmember, 2nd District

Seconded by:

Ed P. Reyes
Ed P. Reyes
Ed P. Reyes
Bernard C. Park

OCT 12 2007

EG
EG

07-3294

DATE: September 7, 2011
TO: Interested Persons
FROM: Office of the City Clerk
SUBJECT: NOTICE OF EXPIRED FILE STATUS

In 2005, the Council approved a policy wherein all Council files pending before the City Council, which have not been placed on a Council or Committee agenda for consideration for a period of two years or more, are deemed "received and filed." The City Clerk is responsible for the administration of this process.

Quarterly each year, the City Clerk administratively closes all received and filed Council files. This letter provides notice that this Council file, and its subject matter, is no longer active as of August 18, 2011. This Council File is deemed closed.

07-3294-S1

RULES & GOVERNMENT

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

EG

ORIGINAL

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OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

REPORT NO. R 0 7 - 0 4 5 7

DEC 1 8 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.

DEC 1 8 2007

RULES & GOVERNMENT

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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