CITY OF MOUNTAIN VIEW

Office of the City Attorney • 500 Castro Street • P.O. Box 7540 • Mountain View, CA 94039-7540
650-903-6303 • FAX 650-967-4215

August 21, 2008

Ross Johnson, Chairman
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Re: Proposed Revisions to FPPC Regulation 18944.1 – Tickets Provided to Public Agency Owners of Public Facilities; Proposed New Regulation 18944.3 – Gifts From a Government Agency to Officials in that Agency

Dear Chair Johnson:

On behalf of the League of California Cities, City Attorney's Division, FPPC Committee, we appreciate the time the Commission has devoted to considering our input on the proposed amendments to Regulation 18944.1. Our Committee as well as representatives of constituent California cities affected by the regulation also participated in the July 10th Interested Persons Meeting held in your offices. In trying to share with the Commission the city attorneys' views of the proposed amendments to 18944.1, we offer general comments based on the goals of the Political Reform Act and the significant constitutional and statutory rights of a public agency in the management of its own affairs. We will also offer some specific comments, should the Commission decide to pursue an amendment.

From that broad perspective, the city attorneys throughout the State favor very clear rules and also believe that public governance is enhanced when the public has confidence in its officials and in the public process. The Political Reform Act is an important component of that process. City attorneys also recognize that there are a number of gift regulations that need to be examined more closely and we have actively participated in many of those changes. We also note there are some gift regulations that remain in effect that need to be changed as soon as possible (e.g., 18944; Gifts to an Official's or a Candidate's Immediate Family).

Regulation 18944.1

From a macro standpoint we remain circumspect about changing Section 18944.1 for two key reasons. The first is that tickets received by a public agency pursuant to a contract for use of a city-owned facility or a facility located on city property are but one form of consideration received by a public agency for use of that public property. Both the State constitution and the general law require that those using public property must pay consideration to the public agency unless specific exceptions apply. In those agreements

and leases, the public agency receives a variety of different types of consideration including rent payments which are revenue; use of the facilities; marketing rights, tickets, right to charge for parking, etc. The tickets are always a very small portion of consideration paid to the public agency for use of the facility. In every instance, the local public agency, not the State or the Commission, determines the appropriate use for that consideration, whatever form it may be received.

The second reason is that most of the contracts we have reviewed in preparation for our comments to you have been drafted not only in consideration of 18944.1, but drafted to specifically comply with it. Public agencies therefore find themselves in the somewhat untenable position of having entered into often long term contracts and leases (e.g., 15 to 99 years) for the use of public facilities in return for various considerations, one of which may be tickets. In some contracts the use of those tickets is limited (e.g., they cannot be resold), obviously cognizant of the existence of the regulation which gave rise to the particular lease or contract provision.

Proposed Changes to 18944.1

With respect to the Commission's consideration of changes to 18944.1(c), we reiterate our concern that tickets are merely one form of consideration and as such, they do not fall within the definition of gifts under the Act. Therefore, they should not be the focus of further Commission action. Having said that, we recognize that the Political Reform Act, as a purpose-driven statute, also seeks to avoid the appearances of impropriety that can occur when an agency's ticket distribution policy is not clear and/or when the public cannot access information about ticket distribution in a timely manner.

To that end, we believe that if the Commission pursues any refinements to the existing regulation, the refinements should be aimed at tailoring the regulation to enhance the transparency of an agency's ticket distribution policy, while not interfering with the public agency's right to determine the disposition of consideration received under a contract or lease.

Along those lines, we have attached a draft regulation for the Commission's consideration which we believe accomplishes those purposes and yet protects the important rights of the public agencies. (See Attachment "A".)

The attached draft regulation, if adopted, would for the first time outline the minimum requirements for a policy developed to implement 18944.1(c). Importantly, it closely follows the disclosure and public access requirements of the Commission's recently adopted re-write of Section 18944.2 (Gifts to an Agency).

The proposed changes include requiring the policy be formally adopted by the agency at a noticed public meeting and that the policy provide for the distribution of <u>all</u> tickets received as consideration by the public agency. It requires the agency to maintain a

written list of all ticket distributions which shall include the name, address and title of the person receiving the tickets and requires an official to immediately notify the agency of the name of any person to whom a ticket is transferred. Finally, the list is made subject to the public records and copying requirements of Section 81008(a) and provides that within thirty (30) days of any distribution, the agency's filing officer shall post a copy of the list on the agency's website or on the agency's bulletin board used for agenda postings, if there is no website.

In closing, we extensively discussed numerical limitations on tickets as well as disclosure. We found it impossible, however, to generalize about tickets, venues or contract terms due to the amazing variety of same throughout California. In the end, we feel confident that both the public and the media have been an effective check and balance on the distribution of tickets and the use of tickets by public officials. While it is easy to look at any agency's particular distribution method and criticize it, we believe that if there are excesses, they are minor in nature. Many agencies' distribution policies favor the public, residents and nonprofits over public officials and again it is within the public agency's power to determine that distribution. The agency does so within the context of answering both to their constituents and the fourth estate; the press and other media.

Proposed New Regulation 18944.3 – Gifts from a Government Agency

We acknowledge that we may not fully understand the purpose or need for new Section 18944.3, as proposed. It seems to attempt to interpret a governmental payment to an official, including employees of the local agency, to be a gift if the payment is not an otherwise lawful expenditure of public funds. If a payment is not a lawful expenditure of public funds, it is not a gift, it is illegal. We do not believe the Commission would want to transform an illegal payment into an allowable gift. Moreover, under the PRA, the gift rules are designed to control the influence gained by third parties who make gifts to public officials. How does a payment from an agency to its officials or employees trigger that concern?[1]

Having said that, there are several other problems with the proposed regulation. State law and the State constitution already prohibit not only gifts of public funds, but also extra compensation. Additionally, the salaries of most local elected officials are generally prescribed by State law and recently the courts have confirmed that compensation paid to individual officials and employees is a public record. This regulation therefore, at a minimum, seems to be unnecessary and in a broader sense, is confusing and potentially counterproductive to the asserted goal of the regulation.

[1] Similarly, we do not fully understand the scope of current Regulation 18941.1 (Payments for Food), if indeed that scope includes the government agency providing a meal to one of its elected officials.

As always, we are appreciative of the Commission's consideration of our input and we will be present at the Commission meeting to answer any questions or provide further input as you so desire.

Sincerely,

Michael D. Martello
City Attorney

cc: FPPC Committee; Constituent City Attorneys

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations)

§ 18944.1. Recipient of the Gift: Passes or Tickets Given to an Agency.

Passes or tickets which provide admission or access to facilities, goods or services, or other tangible or intangible benefits (including passes to motion picture theaters, amusement parks, parking facilities, country clubs, and similar places or events, but not including travel or lodging), which are provided to an official are not gifts to the official whenever (a), (b), (c), (d), or (e) applies:

(a) The donor gives the tickets or passes to the official's agency, through a responsible official of the agency, for the sole purpose of distributing the passes or tickets to officials of the agency and their spouses and immediate families and use of the tickets or passes is so limited by the agency; and

The tickets or passes are not earmarked by the donor for any specific officials of the agency; and

The agency retains a written public record of the terms under which the tickets were accepted by the agency and the terms under which the tickets or passes were distributed and to whom they are distributed.

(b) The tickets or passes are provided to the agency for an event at a publicly-owned facility under the jurisdiction of the agency and neither the agency nor any official of the agency receiving or distributing the tickets or passes for the agency gives any of the tickets or passes to any person who is not an official of the agency, or not the official's spouse or immediate family member.

(c) The tickets or passes are provided to the agency as part of the contract for the use of the facility and the distribution and use of the passes or tickets are regulated by

an officially adopted policy of the agency consistent with the minimum requirements set forth in subsection (f).

(d) The tickets or passes are provided to the official of the agency for use by the official and his or her spouse and immediate family because the official has an official or ceremonial role or function to perform on behalf of the agency at the event in question.

(e) The tickets or passes are provided to an agency or officials of the agency for use at an event at a publicly-owned facility constructed or operated under the provisions of a joint exercise of powers agreement and such agency is a party to the joint exercise of powers agreement, and the distribution and use of the passes or tickets are regulated by an officially adopted policy of the agency.

(f) The policy adopted pursuant to 18944.1(c) above must meet the following minimum criteria:

1. The policy is formally adopted by the agency at a noticed public meeting. The policy will provide the distribution of all tickets received as consideration by the public agency.
2. The policy shall provide that any public official who receives a ticket may not sell, barter or receive anything in exchange for a ticket transferred by the official to a third party. If the public official transfers a ticket to any person, the official shall notify the agency of the name of any person to whom a ticket is transferred within five (5) business days of the transfer.
3. The agency shall maintain a list of all ticket distributions which list shall include the name and title, if any, of the person(s) receiving the tickets.

4. The list shall be maintained as a public record subject to inspection and copying under Section 81008(a).

5. Within thirty (30) days of any distribution, the filing officer shall post a copy of the list, or of the information contained therein, on the agency's website. If the agency does not maintain a website, the agency shall post a copy of the list with its agenda postings.

6. Nothing within this section shall be construed to authorize the distribution of tickets or be interpreted to supersede any other Federal, State or local rules relative to the reporting of the receipt of these tickets.

Note: Authority cited: Section 83112, Government Code. Reference: Section 82028, Government Code.

HISTORY

1. Renumbering of former section 18726.7 to section 18944.1 with amendment of section heading filed 6-22-94; operative 6-22-94 (Register 94, No. 25).
2. Change without regulatory effect relocating section filed 11-17-94 pursuant to section 100, Title 1, California Code of Regulations (Register 94, No. 46).
3. Amendment of first paragraph and subsections (a)-(b) and (d)-(e) filed 7-25-95; operative 7-25-95 pursuant to Government Code Section 11343.4(d) (Register 95, No. 30).