

May 4, 2009

Julie D. Wiley
General Counsel
San Diego Association of Governments
400 B Street, Suite 800
San Diego, California 92101-4231

**RE: Your Request for Informal Assistance
Our File No. I-08-196**

Dear Ms. Wiley:

This letter responds to your request for advice on behalf of the San Diego Association of Governments (“SANDAG”) regarding the gift provisions of the Political Reform Act (the “Act”)¹ and is based on the facts presented; the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because you seek general information, we are treating your request as one for informal assistance.²

QUESTIONS

1. If SANDAG receives an item, other than a ticket or admission to an entertainment or similar event, from an outside source as a donation to be used for charitable fundraising and SANDAG provides the item as a raffle prize for a raffle held among its employees, are there any circumstances whereby the item must be reported by the winning employee on his or her statement of economic interests³ and must the agency report the receipt of the gift on a Form 801?

2. If SANDAG receives tickets to an entertainment event, and the donor does not designate any particular recipient, and the agency head or his or her designee determines

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed).

³ Also referred to as an SEI or Form 700.

which employee will get the tickets based on a random drawing, will the winning employee still have to report the tickets on his or her Form 700 if the tickets are valued at \$50 or more?

3. According to SANDAG policy, when an employee wins a prize, such as through a business card drawing, while attending an event on behalf of SANDAG the employee turns the prize into SANDAG so that he or she does not have a reportable interest. SANDAG then would like to give all employees one raffle ticket and let employees buy more raffle tickets to increase their odds of winning. Proceeds from the raffle would go the SANDAG employee events committee to help pay for future employee morale-building events such as Secretary's Day breakfast, flowers for hospitalized employees, or best employee Halloween costume prizes. Would the employee who ultimately received the item have to report its receipt on his or her Form 700?

CONCLUSIONS

1. Regulation 18944.2 does not apply to items provided to SANDAG for an employee raffle because the items are not being used for official agency business. Therefore, these items would not be reported. Under these circumstances, the employee has received a gift from the outside source and SANDAG is an intermediary of the gift. If the employee is required to report the source of the gift on his or her SEI, the agency, in its capacity as an intermediary under the Act, must, as specified below, disclose the name and other required information regarding the outside source to the employee.

2. If SANDAG adopts a policy meeting the requirements of Regulation 18944.1(c) and follows that policy and the other applicable requirements of Regulation 18944.1 in distributing the tickets in question, under the Act they will not be considered gifts to the employees who receive them. In the alternative, under Regulation 18944.1(b)(1), the tickets will not be considered a gift to the employees who receive them, provided each employee who receives tickets treats them as income consistent with the tax laws and the agency reports this in accordance with Regulation 18944.1(d).

3. Prizes won by agency employees while performing their official duties, which then become assets of the agency by operation of agency policy, and are later raffled off to agency employees to raise funds to help pay for future employee "morale-building events" such as Secretary's Day breakfast, flowers for hospitalized employees, or best employee Halloween costume prizes, are analyzed under Regulation 18944.3. Given the unique method in which the item was acquired by the agency, as described herein, we find that the method of distribution satisfies the lawful expenditure of public moneys requirement under Regulation 18944.3.

FACTS

The San Diego Association of Governments (“SANDAG”) is a legislatively created regional government agency and, as such, is subject to the state’s economic disclosure laws and reporting requirements. In the last six months the Commission has been in the process of amending its gift reporting requirements as set forth in Regulations 18944.1 and 18944.2. These changes have led you to conduct a closer analysis of SANDAG’s processes with regard to how it handles gifts to the agency. You seek advice regarding how SANDAG should document gifts in two contexts: (1) gifts to the agency intended to be used for donations for a charitable fundraiser; and (2) gifts to the agency that are awarded by the agency to an employee at morale-building events. You have provided the following information:

SANDAG and its employees are active in the community and become involved from time to time in projects such as United Way campaign drives. Many times when SANDAG announces its intention to support these types of projects, third parties make donations to SANDAG to use as prizes. For example, if a restaurant donates a \$100 gift card to SANDAG, SANDAG would like to sell raffle tickets to its employees, with the proceeds going to the United Way, and the winner of the raffle would receive the restaurant gift card.

In addition, on an unsolicited basis, SANDAG receives theatre tickets, county fair tickets, gift baskets, and other gifts in excess of \$50 in value from both the public and private sector and businesses with which SANDAG does and does not do business. For example, if the San Diego Civic Center donates tickets to SANDAG for the ballet, does not designate a particular recipient, and the agency head or his designee determines which employee will get the tickets based on a random drawing, will the winning employee still have to report the tickets on his or her Form 700 if the tickets are valued at \$50 or more?⁴

SANDAG employees also sometimes attend conferences or events while conducting official agency business and win a prize of \$50 or more in value at the event. In order to provide a fair process for distributing these items and not allow a windfall or conflict of interest for the particular employee who attended the event and won a prize or received a gift from a vendor, SANDAG would like to distribute these gifts to all employees via a random drawing. For example, a SANDAG employee attends an educational seminar and, through a business card drawing, wins an iPod worth \$100 that was donated by a vendor with whom SANDAG does business. According to SANDAG policy, the employee turns the prize into SANDAG so that he or she does not have a reportable interest. SANDAG then would like to give all employees one raffle ticket and then let employees buy more raffle tickets to increase the odds of winning. Proceeds from the raffle would go the SANDAG employee events committee to help pay for future

⁴ We wish to point out that although your facts stated “more than \$50” the reporting threshold under the Act states “\$50 or more.” We have therefore amended the facts to indicate the reporting threshold specified in the law.

employee morale-building events such as Secretary's Day breakfast, flowers for hospitalized employees, or best employee Halloween costume prizes.

Under any of these circumstances, would the employee who ultimately received the item have to report its receipt on his or her Form 700? Are there any safeguards or processes that could be instituted to allow such gifts to be randomly distributed to employees without triggering the individual reporting requirements? Lastly, if SANDAG is required to report such a gift on the new Form 801 or Form 802, what should it report as the "governmental or public purpose" for the item's distribution? Is employee morale a legitimate government or public purpose?

In our telephone conversation, you indicated that SANDAG has approximately 220 employees, half of whom file a Form 700. Of those filers, about 10 are subject to full disclosure.

ANALYSIS

The Act establishes a statutory and regulatory scheme to reduce influences on public officials⁵ from the receipt of gifts. First, it prohibits certain public official from accepting large gifts (currently defined as more than \$420) from identified sources. (Section 89503, Regulation 18940.2.) Second, it requires certain public officials to disclose his or her receipt of any gift of \$50 or more from identified sources, so that the public is made aware of such gifts (Sections 87207 and 87302.). Finally, it prohibits a public official from using his or her position to influence the outcome of a decision involving the donor of a gift valued at more \$420. (Section 87100, 87103(e), Regulation 18940.2.)

Section 82028 defines gift as:

"any payment that confers a personal benefit on the recipient, 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."

Your letter requests advice with respect to the gift disclosure provisions of the Act. Public officials who are covered by the Act's gift disclosure provisions are required to disclose gifts from certain specified sources pursuant to the terms of their agency's conflict-of-interest code, formulated in accordance with the Act's provisions.

Section 87300 requires every agency to "adopt and promulgate" a conflict-of-interest code and that it shall "have the full force of law." A violation of an agency's conflict-of-interest code is a violation of the Act. Section 87301 provides that a conflict-

⁵ Section defines "public official" as every member, officer, employee or consultant of a state or local government agency. Employees of SANDAG are public officials.

of-interest code “shall be formulated at the most decentralized level possible, but without precluding intradepartmental review. Generally, a conflict-of-interest code is formulated by each individual agency. “Any question of the level of a department [that] should be deemed an ‘agency’ for purposes of Section 87300 shall be resolved by the code reviewing body.”⁶

Section 87302 sets forth the required provisions of a conflict-of-interest code. Subdivision (a) thereof provides that the conflict-of-interest code shall enumerate the positions within the agency that involve the “making or participation in the making of decisions [that] may foreseeably have a material effect on any financial interest.” Employees holding these positions are known as designated employees.⁷ (Regulation 18730(b)(2).) Section 87302(b) requires that employees holding these positions file annual statements disclosing their investments and income (including gifts) as specified in Sections 87206 and Section 87207.

The reporting obligations of a designated employee are determined by the disclosure category assigned to that employee. The agency determines the disclosure category for its designated employees, which specifies the kinds of economic interests that are reportable, and those categories are listed in the appendix to the conflict-of-interest code. A designated employee must then disclose on his or her Form 700 “those economic interests he or she has [that] are of the kind described in the disclosure categories to which he or she is assigned in the Appendix. ...[T]he economic interests set forth in a designated employee’s disclosure categories are the kinds of economic interests [that] he or she foreseeably can affect materially through the conduct of his or her office.” (Regulation 18730(b)(3)(C).)

The Commission has recently amended two regulations, and adopted a third, that impact the reporting obligations of individual employees relating to items provided to these employees from their agency from which an employee receives a “personal benefit.” Colloquially referred to as the “gifts to agencies regulations,” Regulation 18944.1 addresses “Tickets or Passes to Events” and Regulation 18944.2 addresses other “Gifts to an Agency.” Regulation 18944.3 generally clarifies that payments to agency employees that provide a personal benefit will be treated as gifts under the Act unless the payment is a lawful expenditure of public funds.⁸ It is with respect to the changes in these regulations that your letter is addressed. Before addressing your specific questions, we will review the provisions of the applicable regulations.

⁶ Section 82011 defines “code reviewing body.” Generally for local agencies, it is the county board of supervisors for county agencies and the city council for city agencies.

⁷ Also known as “code filers.” In addition, public officials designated under Section 87200, known as “statutory filers,” must file annual statements disclosing their investments and income (Form 700).

⁸ Former Regulation 18944.2 was repealed and the current Regulation 18944.2 was adopted by the Commission on June 11, 2008, and became operative on July 1, 2008. Former Regulation 18944.1 was repealed and the current Regulation 18944.1 was adopted on by the Commission December 11, 2008, and becomes operative on February 7, 2009, along with newly adopted Regulation 18944.3.

Regulation 18944.2 Gifts to an Agency.

The title of this regulation, in its use of the word “gifts,” refers to gifts under the common, ordinary definition of the word and not under the Act’s definition (provided above), because the Act only regulates gifts to individual public officials (any item that provides a personal benefit).

Only when an item is received or utilized by an agency employee does the employee receive a personal benefit from the item and, therefore, become the recipient of a gift under the Act.

However, there are many legitimate examples of cases where a governmental agency will receive a payment for something that is then passed along to one of the agency employees, and that employee will receive something that may be deemed to confer a “personal benefit” even though its use is in performance of the employee’s governmental duties. These would include, for example, admission to a seminar that provides job training, or transportation, lodging, and meals provided to an employee to attend a function in which he or she performs a service or furthers a purpose for which the agency exists.

“Dating back to the *Stone* Opinion in 1977, the Commission has recognized that there are circumstances where a service or benefit provided to an official actually benefits the state or a public agency, and should be considered a gift to the agency, not a gift to the public official reportable on his or her statement of economic interests and subject to gift limits under the Act.” (Staff Memorandum dated February 29, 2008, for March 13, 2008, Pre-Notice Discussion of Regulation 18944.2.) The provisions of the Act are not intended to make such items gifts to the individual even if the individual receives some personal benefit. Regulation 18944.2 was drafted to address these situations and provides a framework whereby a public agency may accept payments from outside sources that further the agency purposes without any individual employee who uses the payment becoming subject to the receipt of a gift.

There are a number of provisions in Regulation 18944.2 that deal with how the payment is directed and controlled so that only the agency, and not the donor, has the exclusive say in how it is to be used. In addition, Regulation 18944.2(c)(2) provides that the payment must be “used for official agency business.” If the payment is not used for official agency business, the regulation does not apply, and there is no need to further analyze its provisions.

The term “official agency business” as used in the regulation was meant to apply to only those expenses that are directly related to the performance of the agency’s public function or a specific pursuit for which the agency was created to accomplish.⁹

⁹ Contrast this with the phrase “valid public purpose” as used in Regulation 18944.1, which implies a broader meaning.

Regulation 18944.2 excepts from the Act's definition of gifts to a public official only those types of items for which the agency might itself legally expend funds. For that reason, the \$100 restaurant gift card described in your first example and the iPod described in your third example would not fall under this regulation.¹⁰ Additionally, because Regulation 18944.2 does not apply to tickets (see subdivision (d)(4)) the tickets to the ballet described in your second example would not fall under the scope of this regulation. Therefore, Regulation 18944.2 does not apply to any of the situations you have described.

As a consequence, to the extent these items are not tickets or passes, which are covered exclusively under Regulation 18944.1, they are gifts to the agency officials who receive them, and the source of the gift is the individual or entity who donated the item to the agency.¹¹ In addition, the agency would be an intermediary of the gift and must, under Section 87313 and Regulation 18945.3(b) inform its designated employees who receive such gifts of \$50 or more in a month of the donor's name, street address, and business activity.¹²

Regulation 18944.1 Gifts: Tickets or Passes to Events.

Because your second example concerns a ticket to the ballet — an entertainment event, it would fall under the provisions of Regulation 18944.1. The question you posed was “if the San Diego Civic Center donates tickets to SANDAG for the ballet, does not designate a particular recipient, and the agency head or his designee determines which employee will get the tickets based on a random drawing, will the winning employee still have to report the tickets on his or her Form 700 if the tickets are valued at \$50 or more?”

Regulation 18946.5 states that a prize or reward shall be reported as a gift unless the prize or reward is received in a “bona fide competition” unrelated to the recipient's status as a public official. An item won in a “random drawing” is considered a prize. Because the raffle is limited to SANDAG employees, this is not a bona fide competition, and the tickets would be considered gifts unless the procedures set forth in Regulation 18944.1 are followed.

¹⁰ The iPod example presents an interesting question. Because we do not have all the facts for the example presented, we are unable to determine for certain, but the employee who won the iPod may be able to show that the item was not a gift from the vendor under the “bona fide competition” provision in Regulation 18944.5. However, if so, it would then need to be reported as income, if valued at \$500 or more, and, unlike gifts, there is no provision for returning or divesting income to avoid its classification as such.

¹¹ Except for tickets or passes subject to Regulation 18944.1, or gifts that are covered under the provisions of Regulation 18944.2, staff has always characterized a “gift to an agency” that does not comply with those provisions as a gift to the benefitting official from the individual or entity who donated the gift.

¹² If the agency official receiving the gift is required to file an SEI under Section 87200, Section 87210 and Regulation 18945.3(a) require the agency to provide the same information for any gift totaling \$50 or more.

Regulation 18944.1(b) provides that free tickets and other admissions to certain events provided by a public agency to its employees are not a gift under the Act if the employees treat them as income consistent with federal and state tax laws and the agency reports this information in accordance with the public disclosure provisions in Regulation 18944.1(d). Thus, if SANDAG officials treat these tickets as income in this manner and SANDAG discloses this information, the tickets would not be considered gifts under the Act, nor would they be reportable as income by the officials because they would fall under the governmental salary exception in Section 82030(b)(2). (See Regulation 18232.)

In the alternative, regulation 18944.1(b)(2) establishes a procedure by which an official, who receives a ticket or pass to certain events, will meet the burden under Section 82028 that equal or greater value has been provided in exchange for the ticket or pass, and it therefore will not be considered a gift under the Act. (Section 18944.1(b)(2).) There are three requirements that must be met: (1) the ticket or pass may not be earmarked by the original source for use by a particular agency official; (2) the agency must determine, in its sole discretion, which official uses the ticket; and (3) the distribution of the ticket or pass must be made in accordance with a policy that follow the requirements of Regulation 18944.1(c). (Regulation 18944.1(b)(2)(A)(i)-(iii).)

Under your facts, the first two requirements appear to have been met. Accordingly, if your agency adopts a policy meeting the requirements of Regulation 18944.1(c) and follows that policy in distributing the tickets in question, they will not be considered gifts or income, under the Act, to the employees who receive them.

Regulation 18944.1(c) provides as follows:

“(c) Any distribution of tickets or passes under subdivision (b)(2) by an agency to, or at the behest of, its officials must be made pursuant to a written policy duly adopted by the legislative or governing body of the agency that states the public purposes to be accomplished by the agency policy. If the agency maintains a website, the written policy shall be posted on the website in a prominent fashion. The written policy shall contain at a minimum, the following:

“(1) a provision setting forth the public purposes of the agency to be accomplished by the distribution of the tickets or passes;

“(2) a provision requiring that the distribution of any ticket or pass by the agency to, or at the behest of, an official accomplish a public purpose of the agency; and

“(3) a provision prohibiting the transfer by any official of any ticket or pass, distributed to such official pursuant to the agency policy, to any

other person, except to members of the official's immediate family solely for their personal use.”

As to the agency policy requirement of Regulation 18944.1, you have asked whether distribution of tickets or passes to employees of the agency for the purpose of improving or sustaining employee morale is a legitimate public purpose, as required under subdivision (c).

Under Regulation 18944.1(e), the Commission generally defers to an agency's determination of whether its distribution of tickets or passes to its employees serves a legitimate public purpose and thus complies with subdivision (c) of the regulation. However, subdivision (e) also limits the agency's discretion by requiring the distribution to be “consistent with state law.” Several statutes and court rulings govern the expenditure or use of public resources by state and local agencies. (See, e.g., Sections 8314, 54964 and 85300; Penal Code Section 424; and *Stanson v. Mott* (1976) 17 Cal.3d 206.) Generally, these rules permit agencies to expend or use their resources for public purposes within the express and reasonably implied parameters of their governing statutes but specifically prohibit them from using their resources for private or campaign purposes. The Commission's intention in adopting subdivision (e) was to essentially treat these tickets as public resources held by the agency and to not question the agency's expressed policy basis for the distribution unless the distribution is clearly an illegal use of public resources under these authorities. As a consequence, the Commission staff will not offer specific advice to governmental agencies as to whether or not a particular stated policy underlying the agency's distributions of tickets adequately supports a legitimate public purpose.

Nevertheless, the Commission reserves the right to bring an enforcement action for violations of the Act's gift provisions by public officials who receive tickets distributed by their agencies when, for example, the agency does not comply with the general provisions of Regulation 18944.1, the agency distributes the tickets in a manner inconsistent with the policy adopted pursuant to Regulation 18944.1(c), the policy cited by the agency pursuant to Regulation 18944.1(c) is so vague as to be meaningless or was merely adopted as a pretext to allow distribution of agency assets to certain individuals under the guise of law, a court or a prosecuting authority such as the District Attorney or Attorney General has determined that distribution of the tickets violates the “use of public resources” rules referenced above, or facts beyond the stated policy clearly show that the distribution of tickets does not serve or support that policy in any plausible way.¹³

¹³ In regards to a ticket distribution policy based on improving or sustaining employee morale, we can conceive of factual situations that could lead to a conclusion that the distribution clearly does not serve or support that policy in any plausible way. There is no question that improving employee morale is a desirable goal for any employer because it presumably increases the efficiency of employees and assists the employer in recruiting and retaining efficient, productive employees. For a public agency, this is likely to result in better service to the public and more efficient use of taxpayer dollars. On the other hand, “improving employee morale” is a broad statement that, in the context of an agency distributing tickets to its employees, could be used to justify the distribution of unlimited and very expensive tickets donated by any source, including persons who have business before the agency, to selected officers or employees of

Returning to the situations presented in your first and third questions, which do not fall under either of the two regulations we have discussed above, these items (\$100 restaurant gift card and an iPod) meet the definition of gift in that they provide a personal benefit to the recipient. They would therefore need to be reported on the employee's Form 700 if so required by the agency's conflict-of-interest code and SANDAG would be an intermediary of the gift, with the attendant duties the Act assigns to intermediaries of gifts as described above. (See Section 87313 and Regulation 18945.3(b).)

Regulation 18944.3 Gifts from a Government Agency to Officials in That Agency

Finally, Regulation 18944.3 provides:

“Except as provided in Regulation 18944.1 and 18944.2, a payment by a government agency that provides food, beverage, entertainment, goods, or services of more than a nominal value to an official in that agency is a gift to that official unless the payment is a lawful expenditure of public moneys.”

This regulation applies only when an agency distributes its own assets, rather than those received from an outside source, to its employees. However, you have indicated that in certain situations when employees attend functions as part of their job duties and receive prizes through raffles or drawings while attending such events, agency policy requires the employee to turn the item over to the agency, which then offers the prize in a raffle to all agency employees.¹⁴ Because the employee who wins the prize at the non-agency raffle is required to turn it over to the agency, that employee has not received a gift at that point and is merely acting as the agent for SANDAG.

At that point the item has become an asset of the agency through the operation of the policy that requires employees to turn over any assets they acquire in the performance of their duties. Thereafter, when the agency raffles the prize to all of its employees,

the agency. A distribution system of this kind could easily lead to the gross misuse of agency resources or possibly foster public corruption or at least the perception of corruption. This would seriously undermine the Act's financial disclosure rules and gift limits and conflict with the Act's goals of deterring public employee conflicts of interest and eliminating practices that unfairly favor incumbent elected officials. (See Section 81002(c) and (e).) Therefore, while we believe that an agency's distribution of tickets to its employees for the purpose of improving or sustaining employee morale can serve a legitimate public purpose under a well-regulated policy tailored to accomplish that specific purpose (such as, for example, recognizing a specific employee or agency unit for outstanding services performed to the agency), the agency must be careful that its distribution policy is supported by a method of ticket distribution that is reasonably calculated to support that policy and that circumstances relating to the distribution, such as unsupported disparities as to which agency officers and employees are entitled to the tickets or the methods by which the agency obtained the tickets (e.g., were agency vendors pressured into donating the tickets to the agency?) do not act to undermine the intended benefit to employee morale.

¹⁴ You have asked how or whether Regulations 18944.1 or 18944.2 would apply to prizes won by agency employees at non-agency raffles but, under agency policy, turned over to the agency. As we have explained, because the prizes you have indicated are not tickets, Regulation 18944.1 does not apply, and because they are not being giving to the agency for official agency business, Regulation 18944.2 does not apply.

Regulation 18944.3 would apply. A payment received by a public official governed by Regulation 18944.3 is only a gift to that official under the Act if the payment is not a lawful expenditure of public funds. As with the determination of what constitutes a “legitimate public purpose” under Regulation 18944.1(c), discussed above, it was the Commission’s intention to essentially treat “payments”¹⁵ governed by Regulation 18944.3 as public resources held by the agency and to not question the agency’s use of that public resource unless the use is clearly an illegal use of public resources. Therefore, consistent with our discussion of 18944.1(c) and (e) above, the Commission staff will not offer advice to governmental agencies as to whether a payment governed by Regulation 18944.3 is lawful. Instead, the Commission will normally defer to the agency’s judgment on the matter but reserves the right to bring enforcement action for violations of the Act’s gift provisions by public officials who benefit from these payments when a court or a prosecuting authority such as the District Attorney or Attorney General has determined that distribution of the tickets violates the “use of public resources” rules referenced above or the facts clearly show that the payment does not serve or support a public purpose in any plausible way.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel

SH:jgl

Enclosure

¹⁵ Section 82044 defines “payment” as “a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible.”