



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Proposed Ordinance to Require
Elected Officials to File Monthly
Disclosure Statements to Report
Time Spent on Services
Unrelated to the Duties of Office
and the Income Earned

DATE: August 24, 2006

BACKGROUND

On August 8, 2006, the City Council approved the recommendation made by Vice Mayor Chavez and Councilmembers Yeager and Cortese that this Office prepare an ordinance requiring elected officials to disclose on a monthly basis the time spent by the elected official on performing services unrelated to the elected official's duties of office and the income earned from such services.

EXECUTIVE SUMMARY

The proposed ordinance would require elected officials to report any time spent on services unrelated to their duties of office and the income earned from such services. Except as otherwise provided, the terms and provisions of the proposed ordinance would be interpreted in accordance with the reporting requirements of the Political Reform Act of 1974 ("PRA"). The proposed ordinance differs from the PRA in the following ways: (1) reporting is on a monthly basis; (2) time spent on services unrelated to the duties of the office is required to be reported; (3) only the elected official's earned income is required to be reported; and (4) earned income from other governmental entities is required to be reported.

Consistent with the City Council's intent to capture time away from the office and the income earned during that time, the proposed ordinance would define "income" to include payment for services rendered to another governmental agency but excludes other types of interests normally treated as income under the PRA, e.g. community property interest, registered domestic partner's interests, gifts, loans, and investments. The proposed ordinance would provide limited information for the purpose of identifying conflicts of interest.

Attached are a proposed ordinance and a draft disclosure statement form which we believe reflect the Council's direction.

ANALYSIS

A. Political Reform Act – Form 700 Reporting

The PRA, adopted in 1974 by California voters, was intended to, among other things, ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests. This policy and purpose is served by the public official making annual disclosures of sources of income and, in instances where participation in the governmental decisions would create financial conflicts of interest, the public official's disqualification from participation in the decision. Failure to provide the information required by the PRA may result in administrative, civil, or criminal prosecution.

Each Council member, as a public official under the PRA, must report his or her economic interests on the annual Form 700 disclosure statement including (1) investments in business entities (e.g. stock holdings, ownership in a business, a partnership) that do business in San José; (2) interests in real property in San José (except personal home); (3) sources of personal income; and (4) a "Business Position" with a business entity that does business in San José. The term "Business Position" is broadly defined to include serving as a director, officer, partner, trustee, employee, or holding any position of management in the business entity.

Furthermore, if the public official worked for a business entity, including a sole proprietorship, and received income equal to or in excess of \$500 in a calendar year, the public official must list the employer (i.e. business entity). The PRA does not require that individual sources of income to the business entity be identified unless the public official's pro rata share of the gross receipts paid to the business entity from a single source was equal to or in excess of \$10,000 or the public official received \$10,000 or more in commission income from a single source.

B. Reportable Single Source of Income: Privilege and Privacy Interests

A person's name is not ordinarily protected from disclosure by the law of privilege in California. Under current law, for example, a name is protected by the attorney-client privilege only when the facts concerning an attorney's representation of an anonymous client are publicly known and those facts, when coupled with disclosure of the client's identity, might expose the client to an official investigation or to civil or criminal liability. Similarly, a patient's name has been protected by the physician-patient privilege only when disclosure of the patient's name would also reveal the nature of the treatment received by the patient because, for example, the physician is recognized as a specialist. Finally, the names of business customers are not protected by the trade

secret privilege unless, because of surrounding circumstances, disclosure of a particular customer's identity would also result in disclosure of special needs and requirements of the customer that are not generally known to competitors.

Under the PRA, if a public official believes that the name of a source of income is protected by a legally recognized privilege and does not disclose that name on the Form 700, he or she must file with the Form 700 a separate document that sets forth the basis for assertion of the privilege for each undisclosed name and, as specifically as possible without defeating the privilege, facts which demonstrate why the privilege is applicable. The public official must state to the best of his or her knowledge that he or she will not make, participate in making, or in any way attempt to use an official position to influence a governmental decision if doing so would be a violation of the PRA. The PRA sets forth a procedure for the Executive Director of the Fair Political Practices Commission ("FPPC") to order disclosure including procedures for the public official to appeal the Executive Director's decision to the FPPC.

The California Supreme Court has held that the disclosure of the names of clients does not violate the attorney-client privilege or the privacy interests of the public official or the public official's clients. With respect to the privacy interests, the Court held disclosure of limited information about sources of income over a threshold amount did not result in an unwarranted or unconstitutional intrusion into protected zones of privacy. The Court noted that the PRA did not pry into the exact nature and amount of the financial interest and what information it did seek served the substantial governmental interest of protecting against conflicts of interest.

C. Proposed Ordinance and Statement Form

Consistent with the August 4, 2006 Memorandum and Council discussion on August 8, 2006, the Council's objectives in requiring a monthly disclosure are to better understand the amount of time spent on outside compensatory activities, the nature of these activities, and if these activities create potential conflicts of interest. The proposed ordinance and disclosure statement form are based upon the reporting requirements of the PRA with the certain exceptions discussed below. Instructions would be provided with the disclosure statement form.

1. Application

The proposed ordinance would apply to elected officials who are defined as any of the Members of the City Council including the Mayor.

2. Frequency of Reporting and Reporting Time

The proposed ordinance differs from the PRA in that it would require elected officials to report each month the income he or she earned for services rendered that are unrelated to his or her duties of office and the time spent on performing these services. The

disclosure statement would be due no later than the 15th day of the following month, or the next business day, if the 15th falls on a weekend or holiday.

The income to be reported in any particular month is that which is **earned** and does not necessarily need to have been received. The amount earned from any source of income including a business entity, trust, or governmental agency would be aggregated from month to month and reported in ranges as opposed to actual amounts.

For example, if a Councilmember earns \$200 from a source of income in January, the January disclosure statement should disclose the time and income but the source of income need not be identified since the income is less than \$500. If that Councilmember then earns \$400 from the same source in February, the time and income would be reported, and the source would be identified because the aggregate income from the same source that year is over \$500. If the Councilmember does no work for this source in March, he or she would indicate zero hours, no income earned for that month, the aggregate income that year, and the name of the source because the aggregate income from the same source that year is over \$500. If the Councilmember then receives \$10,000 in April from the same source, he or she would report the time, income received that month, aggregate income received that year, the name of the source. Additionally, if the \$10,000 April payment was commission income from a particular client or if the \$10,000 April payment was the Councilmember's pro rata share of the payments made by a particular client to the source, he or she would name the particular client.

3. Definition of Income

The proposed ordinance defines "income" as payment for services rendered that are unrelated to the duties of office. For example, the proposed ordinance would not require the reporting of the time spent or the income earned for serving on an administrative or governing board of another government agency, district or special purpose entity if that service is part of his or her duties as a member of the Council.

The proposed ordinance differs from the PRA in that the proposed definition of "income" excludes community property and registered domestic partner interests and includes compensation paid by another governmental agency for services not related to the duties of office. We believe these distinctions are consistent with the Council's intent to capture the time that a member of the Council has spent away from the duties of office and the income received for this time.

If the elected official receives money or other economic consideration and does not spend any time earning the money, the proposed ordinance would not require any disclosure. For example, an elected official's receipt of rent for the use of the elected official's property would not trigger disclosure under the proposed ordinance.

4. Identifying Conflicts of Interest

The proposed ordinance would identify conflicts of interest that arise from earned income. The elected official should not rely solely on the reporting requirements under the proposed ordinance or the PRA to identify all conflicts of interest. For example, the PRA requires elected officials to report investments, gifts, and loans on the Form 700 which is far broader than the disclosure of earned income required by the proposed ordinance. On the other hand, Form 700 does not require reporting interests such as an elected official's personal home which could present a conflict of interest.

Moreover, the proposed ordinance would not require the elected official to state whether the income disclosed during the reporting period has given rise to a conflict of interest or is likely to in the future for the following reasons:

- To identify future conflicts, the elected official would be forced to speculate in the abstract about whether a source of income will have a matter before Council, whether the source would be directly or indirectly related to the matter, and if the Council decision would have a material financial effect on that source of income.
- For matters currently before the Council, Council members are required by the PRA to disclose conflicts prior to the Council's consideration of the matter. Additionally, the Council has referred a Sunshine reform measure that would require members of the Council and Board/Commission members to submit a form identifying any conflicts of interests with an action before them. This policy and form are being prepared and will be submitted for Council review and discussion.

5. Reportable Single Source of Income

Consistent with the PRA, the proposed ordinance would require disclosure of a single source of income (i.e. client) if the elected official has received \$10,000 or more in commission sales or his or her pro rata share from the single source's payment to the business entity is \$10,000 or more. The name of the single source would be identified on the disclosure statement once the business entity has received income from which the elected official's pro rata share is \$10,000 or more.

Under the PRA and the proposed ordinance, the elected official may determine that identification of a single source of income will violate a legally recognized privilege under California law or that disclosure is prohibited by California or federal law. In those instances, the elected official would be required to set forth in a separate document an explanation and an affirmative statement that he or she will not participate in any governmental decision in violation of the PRA. The proposed ordinance is not intended to require the disclosure of a single source of income if such disclosure would violate

California or federal law. A complaint regarding the adequacy of the explanation for nondisclosure would be subject to review by the San José Elections Commission.

6. Verification and Enforcement

The proposed ordinance would require that the elected official attest under penalty of perjury that he or she has reviewed the statement and that the information set forth in the statement is true and complete. If an elected official should fail to file a monthly statement or otherwise fail to comply with the proposed ordinance, any member of the public could seek enforcement of a violation by filing a complaint with the San José Elections Commission and following the process set forth in Chapter 12.04 of Title 12.

7. Retroactive Application

The proposed ordinance, if approved on August 29, 2006 and then adopted by the City Council at its second reading on September 12, 2006, would become effective on October 13, 2006. Rather than require that the reporting obligations commence as of the ordinance's first reading on August 29, 2006, we recommend instead that the reporting obligations commence as of September 1, 2006. The first disclosure statement would be due no later than October 16, 2006 because October 15th falls on a Sunday.

In order to align the reporting obligations under the proposed ordinance with the annual reporting obligations under the PRA, the first reporting year under the proposed ordinance would commence on September 1, 2006 and would conclude on December 31, 2006. Thereafter, the reporting year would be a calendar year, January 1 through December 31.

PUBLIC OUTREACH

The contemplated action does not appear to qualify as an item of significant interest based on the established criteria. This memorandum and proposed ordinance are posted on the City's website for the August 29, 2006 Council Agenda.

COORDINATION

The City Clerk has reviewed the proposed ordinance and disclosure statement.

CEQA

Not a project.

RICHARD DOYLE
City Attorney

By 

ROSA TSONGTAATARII
Deputy City Attorney

For questions, please contact Norm Sato at 535-1900.

cc: Les White
Lee Price

Attachment

INCOME AND TIME DISCLOSURE STATEMENT

(San Jose Municipal Code Chapter 12.19)

NAME (LAST) (FIRST) (MIDDLE) DAYTIME TELEPHONE NUMBER

REPORTING PERIOD

During the Reporting Period, how many hours did you spend rendering services unrelated to your duties of office for which you earned Income? (If your answer is none, please proceed to Section 2 below.) _____

1. INCOME EARNED THIS REPORTING PERIOD*

LESS \$500 \$500 - \$1,000 \$1,001 - \$10,000 \$10,000 - \$100,000 OVER \$100,000

*If aggregate in Reporting Year is more than \$500, proceed to Section 2. If aggregate in Reporting Year is less than \$500, proceed to Section 5.

2. INCOME EARNED THIS REPORTING YEAR*

LESS \$500 \$500 - \$1,000 \$1,001 - \$10,000 \$10,000 - \$100,000 OVER \$100,000

*If aggregate in Reporting Year is more than \$500, proceed to Section 3. If aggregate in Reporting Year is less than \$500, proceed to Section 5.

3. BUSINESS ENTITY/TRUST/GOVERNMENTAL AGENCY & DESCRIPTION OF SERVICES

NAME OF BUSINESS ENTITY/TRUST/GOVERNMENTAL AGENCY

ADDRESS

TYPE OF BUSINESS ENTITY/TRUST/GOVERNMENTAL AGENCY:

Proprietorship Partnership LLC Corporation
 Trust Governmental Agency Nonprofit Organization _____
Other

GENERAL DESCRIPTION OF BUSINESS ENTITY/TRUST/GOVERNMENTAL AGENCY ACTIVITY:

POSITION: _____

GENERAL DESCRIPTION OF SERVICES RENDERED: _____

4. LIST EACH REPORTABLE SINGLE SOURCE OF INCOME OF \$10,000 OR MORE FOR THIS REPORTING PERIOD AND IF THE AGGREGATE IN REPORTING YEAR IS \$10,000 OR MORE (attach a separate sheet if necessary)

5. VERIFICATION

I have used all reasonable diligence in preparing this statement. I have reviewed this statement and to the best of my knowledge the information contained herein and in any attached schedules is true and complete. I certify under penalty under the laws of the State of California that the foregoing is true and correct.

Signature _____
(File the originally signed statement with the City Clerk.)

Date Signed _____
(month, day, year)

DRAFT

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
TITLE 12 OF THE SAN JOSE MUNICIPAL CODE TO ADD
CHAPTER 12.19 TO REQUIRE AN ELECTED OFFICIAL
TO FILE MONTHLY DISCLOSURE STATEMENTS
REPORTING THE TIME SPENT ON, AND THE INCOME
EARNED FOR SERVICES RENDERED, THAT ARE
UNRELATED TO THE DUTIES OF OFFICE**

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Title 12 of the San José Municipal Code is hereby amended to add a new chapter, to be numbered, entitled and to read as follows:

**CHAPTER 12.19
INCOME AND TIME DISCLOSURE
Part 1
Purpose and Interpretation**

12.19.010 Purpose

The purposes of this Chapter are to (1) provide disclosure of the time spent by elected officials in rendering services unrelated to their duties of office for which the elected official is compensated so that the public is informed of these activities; and (2) to avoid actual and apparent conflicts of interest that result from income earned by the elected official for these services.

12.19.020 Interpretation

Except as otherwise provided in this Chapter, the terms and provisions of this Chapter shall be interpreted in accordance with the applicable definitions and provisions of the

Political Reform Act of 1974, Government Code Section 81000 et seq., as amended, and the regulations of the California Fair Political Practices Commission, as amended.

Part 2
Definitions

12.19.200 Definitions

The definitions set forth in this Part shall govern the application and interpretation of this Chapter.

12.19.210 Business Entity

“Business Entity” means any organization or enterprise including, but not limited to, a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, association, or nonprofit organization, if the Business Entity or any parent, subsidiary, or otherwise related Business Entity has an interest in real property in San José, or does business or plans to do business or has done business in San José at any time during the two (2) years prior to the date the Disclosure Statement is required to be filed.

12.19.220 Business Position

“Business Position” means a position in any Business Entity in which the Elected Official is a director, officer, partner, trustee, employee, or holds any position of management

12.19.230 Governmental Agency

“Governmental Agency” includes a state, local, or federal government agency.

12.19.240 Income

“Income” for the purposes of this Chapter shall mean payment earned for services rendered that are unrelated to the duties of office. Income may include, but not be limited to, salary, wages, tips, professional fees, commissions, contingency fees, success fees, bonuses or awards. The income shall be the gross amount earned before deducting losses, expenses, taxes, or amounts reinvested in a Business Entity. Income shall not include any interest in the community property of a spouse or property of a registered domestic partner.

12.19.250 Disclosure Statement

“Disclosure Statement” means the report specified in Section 12.19.320 of this Chapter.

12.19.260 Elected Official

“Elected Official” means any of the members of the City Council including the Mayor.

12.19.270 Filing Date

“Filing Date” means the fifteenth (15th) day of the month following the last day of the Reporting Period. If the Filing Date is a weekend day or a holiday, the Filing Date shall be the next day on which the City Clerk’s Office is open to conduct business.

12.19.280 Reporting Period

“Reporting Period” means each calendar month. The first Reporting Period under this Chapter shall commence on September 1, 2006.

12.19.290 Reporting Year

“Reporting Year” means the twelve (12) calendar months of each year except that the first Reporting Year shall commence on September 1, 2006 and shall conclude on December 31, 2006. Each Reporting Year thereafter shall commence on January 1 and shall conclude on December 31.

Part 3

Disclosure, Reporting Requirements

12.19.300 Disclosure Requirement

Each Elected Official shall file the Disclosure Statement required in Section 12.19.320 on a monthly basis.

12.19.310 Filing Officer

The City Clerk shall be the Filing Officer for the Disclosure Statement and will be responsible for the preparation of the forms and explanatory materials.

12.19.320 Reporting Requirements

- A. Each Elected Official shall file each month a Disclosure Statement that includes the information specified in this Section with the Filing Officer. The Disclosure Statements filed pursuant to this Chapter shall be public records.
- B. Each monthly Disclosure Statement shall include the following information:
 - 1. Name of the Elected Official;

2. The Reporting Period;
3. Number of hours during the Reporting Period that the Elected Official has rendered services unrelated to his or her duties of office for which he or she has earned Income;
4. Identification of the Business Entity, Governmental Agency, or trust; brief description of the nature of the services; and, if applicable, identification of the Business Position the Elected Official held with the Business Entity, and if applicable, the position with the Governmental Agency or trust;
5. Identification of the amount of Income earned in the Reporting Period from each Business Entity, Governmental Agency, or trust in the following ranges: (a) less than five hundred dollars (\$500); (b) at least five hundred dollars (\$500) but did not exceed one thousand dollars (\$1,000); (c) greater than one thousand dollars (\$1,000) but did not exceed ten thousand dollars (\$10,000); (d) greater than ten thousand dollars (\$10,000) but did not exceed one hundred thousand dollars (\$100,000); or (e) greater than one hundred thousand dollars (\$100,000);
6. Each Business Entity with whom the Elected Official has a Business Position, or if applicable, each Governmental Agency or trust with whom the Elected Official has a position, and has earned five hundred dollars (\$500) or more in Income for services rendered. If the Income earned is less than five hundred dollars (\$500) in any Reporting Period but subsequently aggregates to or exceeds five hundred dollars (\$500) within the Reporting Year, the Elected Official shall list the name of the Business Entity, Governmental Agency, or trust in the Disclosure Statement for the Reporting Period when the total Income aggregates to or exceeds five hundred dollars (\$500), and for each subsequent Reporting Period of that Reporting Year;

7. Each source of income to the Business Entity with whom the Elected Official has a Business Position if the Elected Official's pro rata share of gross receipts to the Business Entity is ten thousand dollars (\$10,000) or more. If the Income received is less than ten thousand dollars (\$10,000) in any Reporting Period but subsequently aggregates to or exceeds ten thousand dollars (\$10,000) within the Reporting Year, the Elected Official shall list the name of the source of income in the Disclosure Statement for the Reporting Period when the total income aggregates to or exceeds ten thousand dollars (\$10,000), and for each subsequent Reporting Period of that Reporting Year. The reporting requirement of this Section is not intended to require the disclosure of the identity of a single source of income if such disclosure would violate federal or state law; and
 8. If identification of a single source of income under Subsection (7) would violate a legally recognized privilege or privacy interest under federal or California law, the Elected Official shall file, in a separate document, with respect to each undisclosed person, the basis for assertion of the privilege or privacy interest and, as specifically as possible without defeating the privilege or privacy interest, facts which demonstrate why the privilege or privacy interest is applicable. The Elected Official shall also state, with respect to each undisclosed source of income, that to the best of the Elected Official's knowledge that he or she will not make, participate in making, or in any way attempt to use an official position to influence a governmental decision if doing so would be a violation of the Political Reform Act of 1974, Government Code Section 81000, et seq., as amended.
- C. The Elected Official shall sign and date the Disclosure Statement under penalty of perjury.

- D. The Elected Official shall file each Disclosure Statement with the Filing Officer no later than the Filing Date.

12.19.330 Enforcement

Enforcement of this Chapter shall be through the San José Elections Commission pursuant to the procedures set forth in Chapter 12.04, as amended.

SECTION 2. Retroactive Application.

It is the intent of the City Council that this Chapter be applied retroactively. The first Reporting Period shall commence on September 1, 2006. Each Elected Official shall file his or her Disclosure Statement for the first Reporting Period with the Filing Officer no later than October 16, 2006.

PASSED FOR PUBLICATION of title this _____ day of _____, 2006, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

RON GONZALES
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk