4/15/09 - Item 4

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MEMORANDUM OF LAW

DATE: January 30, 2009

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Supplemental Memorandum of Law Regarding Car Allowances Provided to City Officials

INTRODUCTION

On April 18, 2008, the City Attorney's Office issued a Memorandum of Law concluding that AB 1234, amending the California Government Code, did not change state law that specifically allows a flat car allowance to be paid to members of a City Council. The memorandum concluded that to the extent the Council wished to "change the car allowance or opt for a straight reimbursement plan, this is a policy issue for the Council to decide."

The April 18 memorandum addressed legality of a flat car allowance. This memorandum considers whether the disclosure requirements of AB 1234 apply to Councilmembers who receive a flat car allowance and whether additional steps should be taken to comply with AB 1234.[1]

QUESTIONS PRESENTED

1. Do the disclosure requirements of AB 1234 apply to Councilmembers who receive a flat car allowance?

2. What additional steps should be taken to comply with AB 1234?

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[1] As set forth in the prior memorandum, AB 1234 and the corresponding new Government Code sections apply only to members of a legislative body (i.e., the Council), although other City employees and officials may receive a car allowance as well.

SHORT ANSWERS

1. Disclosure requirements of AB 1234 apply to Councilmembers who receive a flat car allowance. AB 1234 added laws focused on better reporting of expenses. It imposes a new obligation on officials to file reports to "document that expenses meet the existing policy . . . for expenditure of public resources." Cal. Gov't. Code § 53232.3(b). The City should establish a policy for content and timing and distribute expense report forms to be filed by Councilmembers.

2. Although AB 1234 does not preclude a flat car allowance, it requires that the City adopt a "reasonable" reimbursement rate for travel expenses. Cal. Gov't. Code § 53232.2(b), (c). The City Council should ensure that the allowance "reasonably" achieves the stated purpose.

ANALYSIS

1. Disclosure Requirements of AB 1234 Apply to Councilmembers Who Receive a Flat Car Allowance.

AB 1234 added California Government Code section 53232.3(a)[2], which states in relevant part:

> If a local agency reimburses members of a legislative body for **actual and necessary expenses** incurred in the performance of official duties, then a local agency shall provide expense report forms to be filed by the members of the legislative body for reimbursement for **actual and necessary expenses** incurred on behalf of the local agency in the performance of official duties. . . . (Emphasis added.)

Section 53232.3(a) requires that the City "provide expense report forms to be filed by the [Councilmembers] for reimbursement for **actual and necessary expenses**" (emphasis added). Thus, if car allowances are "actual and necessary expenses" under the law, they are subject to the disclosure requirements of section 53232.3(a).

Courts deem a car allowance to be reimbursement for actual and necessary expenses because public officials are being compensated for having their private vehicles available for use in performance of their duties. Thus, availability serves an "actual and necessary" purpose. As explained by a California appellate court in *Citizen Advocates, Inc. v. Board of Supervisors,* 146 Cal. App. 3d 171, 179 (1983):

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[2] All references to section numbers are to the California Government Code unless otherwise stated.

> If the duties of the officer or employee require frequent and adequate transportation in conducting county business, the keeping available of his privately owned or leased vehicle with which to conduct county business would be in the performance of his or her duty. Thus, **availability serves an "actual and necessary" purpose.** Therefore, to the extent the motion compensates public officials and employees for having their **private vehicles "standing by"** it does not violate sections 1091.5, subdivision (a)(2) and 1223. (Emphasis added.)

The car allowance provided to San Diego City Councilmembers appears in section 1.1. of the City's Fiscal Year 2008-2009 Salary Ordinance. The ordinance defines the "automobile allowance" as an amount paid for "**expenses related to the operation and maintenance of their personal automobiles in the performance of their duties.**" Salary Ordinance, § 1.1. (Emphasis added.)

Filing expense reports for a flat car allowance is consistent with the plain meaning of section 53232.3(a). It is also consistent with the purpose of AB 1234, which was designed to shed more light on the expenses of and reimbursements claimed by public officials — in the case of an allowance, "expenses related to the operation and maintenance of their personal automobiles in the performance of their duties." Salary Ordinance, § 1.1. The reports would be helpful to the Council and the public in connection with determining whether the allowance rate is "reasonable."

Accordingly, whether reimbursement is in the form of mileage or car allowance, members of the City Council must submit expense reports.

2. The City Council Should Ensure that the Car Allowance Reimbursement Rate is "Reasonable."

AB 1234 does not mandate any method or rate of reimbursement for travel. It does, however, require adoption of a written reimbursement policy (§ 53232.3(b)), and that travel reimbursement rates be "***reasonable.***" § 53232.3(c).

The City Councilmembers' allowance is for "expenses related to the operation and maintenance of their personal automobiles in the performance of their duties." The City Council should ensure that the rate paid ***reasonably*** achieves that purpose.

The City's current policy sets the allowance rate based upon the national average costs of operating an automobile as computed by Runzheimer and Company, transportation consultants, for the American Automobile Association, as previously authorized pursuant to Resolution No. R-263924 adopted by the City Council on August 19, 1985. City Councilmembers presently receive $9,600 per year.

Consideration of the "reasonableness" of the allowance rate may be addressed at any time, but must be addressed prior to adoption of the next Salary Ordinance, which establishes the annual allowance rate.

3. The City Should Develop a Policy on Content and Timing of Expense Reports.

a. Content

AB 1234 gives little guidance as to the content of expense reports. The reports must "document that expenses meet the existing policy . . . for expenditure of public resources" (section 53232.3(b)), and include receipts "documenting each expense." § 53232.3(c).

When reimbursement is in the form of a car allowance, a reasonable policy would match expenses with the stated policy for a flat allowance — "expenses related to the operation and maintenance of their personal automobiles in the performance of their duties." Salary Ordinance, § 1.1.

b. Timing

AB 1234 requires that the reports be filed with the City "within a reasonable time after incurring the expense, as determined by the legislative body." § 53232.3(c). Determining a "reasonable time" is within the discretion of the Council.

The car allowance rate is set annually. Disclosure reports would be useful in setting a "reasonable" annual rate.

However, we recognize that the deadline is quickly approaching for this year's Salary Ordinance discussions. The Salary Ordinance must be introduced no later than April 15 of each year to comply with San Diego City Charter section 290(a). We also recognize that Councilmembers previously were not required to submit reports for the flat car allowance. Thus, Councilmembers who seek an allowance should submit reports containing whatever information and receipts they have and an explanation as to what information and receipts are unavailable. We would recommend that reports be filed by March 15 of each year beginning this year.

c. Implementation

Section 53232.2(a) states that "a local agency shall provide expense report forms to be filed by the members." Accordingly, the City must prepare and distribute expense report forms to Councilmembers, thereby triggering the reporting requirement.

Section 53232.4 provides penalties only where a public official either misuses public resources or participates in falsifying records in violation of "expense reporting policies." The City has yet to adopt "expense reporting policies" for those receiving car allowances because of

apparent uncertainty in application of the law. The purpose of this memo is to assist in clarifying the law and implementing an expense reporting policy.

CONCLUSION

The new Government Code sections that resulted from AB 1234 are designed to shed more light on the expenses incurred by, and paid to, government officials and to provide transparency in the activities of local officials. Requiring Councilmembers to file the expense reports mandated by AB 1234 and section 53232.2(c) would provide that disclosure and comply with the law's plain meaning. As set forth above, the Council should adopt policies regarding reporting and ensure that the reimbursement rate is reasonable.

Except as supplemented herein, the April 18, 2008 Memorandum of Law remains in full force and effect. Should there be an opinion of the California Attorney General, an appellate decision or amendment of the law, we will further supplement or amend our opinion as necessary.

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