



OFFICE OF THE CITY ATTORNEY  
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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**

## 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* (9<sup>th</sup> 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-makers<sup>1</sup> 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**

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<sup>1</sup> 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.

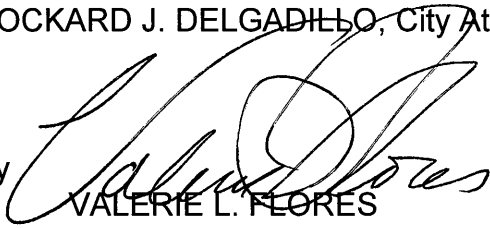
**III. Conclusion**

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,

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By 

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