

Office of the City Manager

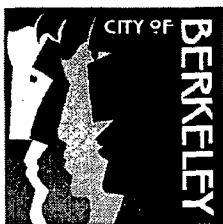
SUPPLEMENTAL AGENDA MATERIAL

Meeting Date: July 25, 2006

Item Number: 33

Item Description: Implementation of Council Expense Reimbursement Policy Under AB 1234

Attached is the Supplemental Report requested by Council at the July 18, 2006 Work session.



Office of the City Manager

ACTION CALENDAR

July 25, 2006

To: Honorable Mayor and
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Manuela Albuquerque, City Attorney

Subject: Implementation of Council Expense Reimbursement Policy
Under AB 1234

At the July 18, 2005 Work Session to discuss Implementation of a Council Expense reimbursement Policy Under AB 1234, Council placed the item over for the next meeting and requested that Council members forward all questions regarding implementation to the City Attorney.

Council member Spring was the only Council member to submit additional questions to the City Attorney. Council member Spring requested that the City Attorney obtain information from the cities of Oakland, Hayward, and Richmond, and from Alameda and San Francisco counties regarding their expense reimbursement policies. The City Attorney contacted all of these entities. However, only Oakland, San Francisco, Richmond and Alameda County responded.

Alameda County reported that it has not yet adopted a policy as it is still in the process of developing one. Counsel for the City of Richmond reported that Richmond adopted an expense and expenditure policy last month, which is modeled after Institute for Local Government's sample policy, and very similar to the policy drafted for Berkeley. Oakland and San Francisco both responded that they had not adopted new expense policies for their governing bodies because they have existing written policies that comply with AB 1234's requirements. However, the Oakland City Attorney's office noted that although it has existing policies and procedures, there have been problems with council members following the policies, as has been reported in the press. As a result, the Oakland City Attorney recently issued several opinions regarding the proper use of officeholder funds and the proper procedures for making expenditures.

Honorable Mayor and
Members of the City Council
Implementation of Council Expense Reimbursement Policy
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ACTION CALENDAR
July 25, 2006

Additionally, the City Attorney's office queried the Oakland, Richmond, San Francisco and Alameda County attorneys regarding their policies on charitable contributions. All reported that individual elected officials may not make charitable contributions from their officeholder expense accounts, as it would be an unlawful gift of public funds. All agreed that even where the local governing body allocates funds to a charitable organization, it requires that it be done the Council as a whole and charitable organization enters into enters into a contract and/or grant with the city that requires that the monies be used to provide some benefit to the public.

COUNCIL WORKSHOP 7/18/06
IMPLEMENTATION OF COUNCIL EXPENSE REIMBURSEMENT
POLICY UNDER AB 1234

I OVERVIEW OF AB 1234, GOVERNMENT CODE SECTIONS 53232, et. seq.

- Effective date – January 1, 2006
- Establishes new requirements related to expense reimbursement for local officials. If a local agency (including the City) reimburses elected and appointed officials **for the actual and necessary expenses of office**, the governing body of the agency **must adopt a written expense reimbursement policy**, at a public meeting, that specifies the types and amounts of expenses of office which may be reimbursed.
- Also requires two (2) hours of ethics training for these local officials. *(Separate training will occur later this year to comply with this requirement)*

II OTHER LEGAL ISSUES

Development of the City's AB 1234 policy led to the discovery of other legal problems with the City's existing practices with respect to Council expenditures. They seemed to be a product of a lack of written standards, a good faith misunderstanding about what was legally permissible and an evolving and expansive approach to Council expenditures. These problems also had to be addressed.

A. CITY CHARTER SECTION 61

Charter Section 61 requires that the justification for the disbursement of City funds **precede** not **succeed** the disbursement of City funds, i.e., that the City must review and approve the bill/invoice to determine if it is an appropriate expense before any City funds are expended. The City's longstanding practice of advancing Council funds is inconsistent with Charter Section 61. This practice is corrected in the Auditor's New Expense Reimbursement Policy.

**B. ACTUAL AND NECESSARY EXPENSES OF OFFICE-
UNLAWFUL DELEGATION OF CHARTER
AUTHORITY**

The funds budgeted in each Council member's budget are for the actual and necessary expenses of Council and Mayoral office e.g. staff, office equipment and the like. The funds are not allocated for the purpose of allowing each Council member to decide for himself or herself what expenditures are in the best interest of the City. While the Charter provides for election of Council members by district, it does not provide for decision making or the allocation of funds by individual Council members for each district.

C. UNLAWFUL GIFT OF PUBLIC FUNDS

An expenditure of public funds is permitted where there is a municipal purpose, i.e., "the welfare of the community and its inhabitants is involved and benefit results to the public." (*Albright v. City of South San Francisco* (1975) 44 Cal.App.3d 866, 869.)

1. Donations to Charitable Organizations

While the City regularly funds organizations to provide services to the public, it may not simply donate funds to non-profits, however laudable the organization. **This is true whether the Council as a whole donates the funds or an individual Council member does so.**

2. City Reimbursement of Attendance at Charitable or Cultural Fund raisers

For the same reason that it would be an unlawful gift of public funds for the City to donate monies to a charitable or cultural organization, it is likewise an unlawful gift of public funds for the City to reimburse attendance at charitable fund raisers or the annual dinners or luncheons of such organizations because the attendance does not serve a municipal public purpose nor can it be said to involve the actual necessary expense of office, unless the subject matter of the event is related to municipal business.

III MAJOR CHANGES UNDER THE NEW EXPENSE REIMBURSEMENT POLICY

- **Eliminates the practice of advancing funds to Mayor and Council and requires Mayor and Council to purchase all office supplies, equipment, etc. through the same procurement process all other City departments utilize.** The City Manager will designate a staff member to assist and train Mayor and Council staff in the use of the City's procurement system and policies. *Impact on the Council should be minimal since a review of Council expenses for the last year showed that the actual amounts expended for office supplies were not significant.*
- **Limits reimbursement to "actual and necessary expenses" of office.** Thus, attendance at events sponsored by nonprofits organizations or other entities will only be reimbursed if the subject matter of the event relates to City business. For example, a luncheon sponsored by the Chamber to discuss the impact of the City's proposed Downtown Plan would be reimbursable. Similarly, attendance at a luncheon sponsored by the NAACP to provide training on hate crimes would be subject to reimbursement. Information obtained at these types of events may provide Council members with information to aid in the passage of local policies or laws.
- **Disallows the use of Council funds to make contributions to nonprofits.** The City Council may still make allocations to non-profits for public services provided for a municipal purpose as the Council already does through, for example, its CDBG funding process. To the extent that the funds allocated for actual and necessary expenses of office exceed the funds necessary to fund these expenses, the budget allocated for this purpose should be reduced and the surplus funds allocated for disbursement for other municipal purposes that can include the funding of non-profit organizations to provide public service pursuant to contract when approved by the Council as a whole.

- **Expenses incurred for attendance at events are only reimbursable where the subject matter of the event relates to the conduct of the City's business.** Thus, for example, neither a fundraiser by a local nonprofit nor a dinner sponsored by an organization to honor a local member of the community would be a reimbursable expense. The resolution requires that the subject matter of the event be related to City business.

IV. OTHER CITIES

The City Attorney's office queried the City Attorney's list serve, talked to experienced City Attorneys in other cities and consulted with the Institute for Local Self Government, (the League of California Cities' nonprofit arm) which has prepared a model AB 1234 policy and extensive ethics training. It is their unanimous view that charitable contributions by local officials are unlawful gifts of public funds prohibited by the California Constitution Article XVI, Section 6. Coincidentally, the attached article in the September 2005 Western City reinforces this point.

Public funds must be used for public services, programs, and facilities. When an individual elected official makes such a charitable contribution, there is no municipal public purpose served. For example, neither San Francisco nor Los Angeles allow individual elected officials to fund organizations. Even when the Council as a whole does so, it requires the provision of some service to the public that is enforced by contract. Similarly, these City Attorney's offices confirmed their view that the elected officials attendance at an event must have some nexus with the elected official's duties of office for the expenses to be subject to reimbursement from city funds. This limitation is present in the AB 1234 model policy as well.

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Everyday Ethics For Whom the Whistle Blows

<PRINTER-FRIENDLY PAGE>

April 2005

This column is a joint effort of the members of the Institute for Local Government's advisory panel on ethics. The questions in this column thus far have been suggested by the ethics advisory panel members to stimulate discussion and thinking on ethical issues faced by local officials. For more information about ILG, visit www.ilsg.org. To suggest a future topic, e-mail ilg@cacities.org.

QUESTION

I am a newly appointed city finance director working on my first budget. The city has a policy of giving each elected official an "allowance" to use for whatever community projects or causes he or she believes are worthy - with no collective findings of public purpose by the council as a whole. Looking at the records, it appears most officials use this "allowance" for charitable purposes. At the last agency I worked in, our attorney cautioned us against this kind of charitable giving because of its potential to create gift-of-public-funds issues.

I raised my concern with the city attorney, and she agrees the practice is problematic. She says the council, naturally, likes the policy. The city manager is sympathetic to these concerns but is unwilling to rock the boat over what is, after all, a fairly small amount of money. This still feels uncomfortable to me, but I can't afford to lose my job over it. What should I do?

ANSWER

What you have described is a classic "personal cost" kind of ethical dilemma. You have identified a practice that is legally problematic but are worried that the cost to you of rectifying the situation is more than you want to pay.

At stake, however, is the ethical value of responsibility, inasmuch as you have a legal and ethical responsibility to not misuse public resources. You also may feel a sense of conflicting loyalties; wanting to do what your employer wants (and not appear in-subordinate) - but not wanting to harm the organization's reputation in the community if your concerns about the legal issues associated with such expenditures are valid. Let's analyze these issues.

The Professional Responsibility to Safeguard the Public's Trust

When faced with an ethical dilemma, it can be useful to consult relevant codes of ethics. The places to start include both the city's code, if there is one, as well as the relevant codes of ethics for your and your supervisor's professional associations.

For example, both the California Society of Municipal Finance Officials Code and the International City-County Management Association Code emphasize integrity and preserving public trust and confidence at the outset of their respective codes.

A question to ask is: How the public will perceive your professionalism and integrity if it

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were known that you had a basis to question this kind of expenditure and did not do so? This is where the "news-paper test" can be a handy guide. How would you feel if this situation were re-reported on the front page of the local newspaper, and it was reported that you knew the expenditures were questionable but processed them anyway? What will such an experience mean in terms of your future job prospects?

These are more than rhetorical questions. According to Mountain View City Manager Kevin Duggan, those in positions of authority in an organization should expect to be asked the following when ethics issues surface:

- ▣ What did you know?
- ▣ When did you know it?
- ▣ What did you do about it?

Recent newspaper coverage in cities rocked by scandal back up Duggan's prediction that staff's actions (and possible inaction) will be scrutinized.

The Risk of Going Along

Notwithstanding one's professional ethical responsibilities, it can be tempting to adopt a "go-along, get-along" kind of approach to this situation. After all, the amounts of money are relatively minor, and the city has never been challenged on this particular practice. And the money is going to charities in the community; it's not as if anyone is receiving a personal benefit from public funds.

Nonetheless, there is a good argument that, depending on how the program is structured, the practice could be a misuse of public resources. State law prohibits misuse of public resources¹ and imposes severe penalties for those who even permit the misuse of public resources.² This includes a fine of up to \$1,000 a day and three times the value of the resource used. Although there has not been a reported appellate court case finding the practice you describe as indeed a misuse of public resources, these kinds of penalties make the stakes fairly high.

But What if I Get Fired?

State whistle-blowing laws make it unlawful for employers to retaliate against employees who refuse to participate in unlawful activities.³ Furthermore, if an employee can demonstrate by a preponderance of evidence that his or her whistle-blowing activities were a contributing factor in an adverse employment action, the burden of proof then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the action for "legitimate, independent reasons" even if the employee had not been a whistle-blower.⁴

These protections apply specifically to local agency employees.⁵ Violations of the whistle-blowing laws are subject to a \$10,000 civil penalty. In addition, employees subjected to discipline for whistle-blowing activities have been known to bring civil rights actions.⁶ Such actions carry the prospect of damages and attorneys fee awards.

Do these legal protections provide absolute and complete protection against the potential negative consequences of delivering an unwelcome message or refusing to cooperate? Of course not.⁷ This is why there are two challenges in being ethical: deciding on the right thing to do and then having the moral courage to indeed do the right thing.⁸

Or as City Manager Duggan observed at a recent manager's conference about the ethical obligations of staff: "While there can be significant negative consequences to taking action, you can be viewed as complicit in the unethical behavior if you do not. In a worst-case scenario, you may need to take the long-term view about the situation and ask yourself whether this is an instance in which you need to lose your job to save your career - not to mention your integrity and reputation."

If This Is a Legal Issue, Isn't It the City Attorney's Job to Pursue?

Interestingly, the city attorney is in a particularly sticky situation if she has given advice that has not been followed. State law imposes on all attorneys a duty to keep client

communications confidential.⁹ Under the California State Bar's Rules of Professional Responsibility, the city attorney can only work her way up the city's hierarchy, sharing her concerns ultimately with the highest level decision-makers (in this situation, the city council).¹⁰ If that decision-maker does not heed her concerns, her only option is to resign; attorneys' professional responsibilities preclude them from disclosing the organization's problematic conduct to outsiders.¹¹ Repeated efforts to change this prohibition for public agency attorneys have been vetoed.¹²

Figuring Out How to Proceed

Talk with the city manager and city attorney about communicating your collective concerns to the council. Ethicist Michael Josephson offers the following tips on how to bring your concerns to the city manager's - and ultimately the council's - attention.

1. **Be prepared.** Make sure you have your facts correct and you are speaking with the right person.
2. **Be respectful.** Watch your tone. Be earnest but not self-righteous or accusatory. Don't raise your voice or make threats. Be willing to listen as well as talk.
3. **Be fair.** Don't assume bad motives; be open to new facts and explanations. Don't equate not agreeing with you as not listening, not caring or being stupid.
4. **Be honest.** Don't exaggerate or omit important facts.
5. **Stick to the point; stay focused.**¹³

Let's assume that your city attorney has expressed her view that the way your city administers the policy presents legal issues. You may want to ask the city attorney to advise you and the council on the potential legal liabilities for each of you. This approach mirrors one of the recommendations of the League's Ethics Education Task Force, which is to highlight the consequences of ethical and legal lapses. One such consequence is that any employee or member of the public can call the state attorney general's whistle-blower hotline, handled through the Public Inquiry Unit at (800) 952-5225, to register their concerns about such potentially unlawful practices.¹⁴ State law now requires employers to post this number at the workplace.¹⁵ The attorney general has authority to bring actions to redress improper use of public resources, as do district attorneys.¹⁶

As with all ethical dilemmas, there is no one-size-fits-all solution. Ideally, by working with the city manager and city attorney, you can devise a strategy that keeps the city - and all of its decision-makers - well on the safe side of the law.

To the "Higher-Ups" in the Chain of Command

If staff expresses an ethical or legal concern about something happening within your agency, your immediate reaction may be to feel defensive, criticized and annoyed if the practice being questioned is one you like. Resist this impulse! Whistle-blowers are, by and large, trying to keep the organization from doing something that may ultimately result in legal action or embarrassment - to both the organization and its leaders. Just as a complaint is a gift in customer service circles, so is "internal" whistle-blowing. It makes sense to encourage employees to express concerns to those inside the organization who are in a position to evaluate the concerns and, if appropriate, take steps to address them.

Encouraging internal whistle-blowing is an important management practice to avoid damage to an organization and its credibility when an employee brings his or her concerns to the attention of those outside the organization. In the article "Encouraging Internal Whistle-Blowing in Organizations," the Markkula Center for Applied Ethics offers the following "best practices" for encouraging employees to bring up problems before they become damaging to an organization:

- Develop a whistle-blowing policy that includes a clear explanation for the process of voicing concerns and bans retaliation against those that use it.
- Secure endorsement from top management and communicate the

organization's commitment to management and staff at all levels.

- Publicize the organization's commitment to ethical and legal conduct regularly; publicly acknowledging and rewarding employees who raise concerns is one way to communicate the depth of the organization's commitment to ethics.
- Investigate and follow up when concerns are expressed. Inaction is the best way to create cynicism about an organization's commitment to ethics.
- Assess the organization's internal systems. Find out employees' opinions about the organization's commitment to ethics and values.
- Walk the talk. The performance review process should hold staff accountable not only for meeting the organization's goals and objectives but doing so in accordance with the organization's values, which are ideally expressed in an adopted code of ethics.¹⁷

Without question, some whistle-blowers have less than honorable motivations for whistle-blowing. The goal, however, is to create a culture where all employees feel comfortable sharing concerns to help their leaders determine which concerns are valid and which are not.

On Public Agency Charitable Giving

Why is the practice described in this article legally questionable? California's Constitution prohibits gifts of public funds,¹⁸ because charitable contributions are gifts, this prohibition has implications for charitable giving by public agencies.¹⁹ The presumption underlying the constitutional prohibition is that taxpayer funds should be used for public services, programs and facilities; any purely philanthropic activities should be left to the discretion of the individual taxpayer.

Consequently, the test for any use of public resources is whether a valid public purpose is served.²⁰ The challenge with having individual officeholders make this decision is that there is no collective finding by the decision-making body regarding the public purpose served by an individual expenditure. Although the courts give deference to a legislative body's findings concerning public purpose,²¹ they can't defer to findings that don't exist (which is what happens if the decision is made solely by an individual council member).

For example, the state auditor recently criticized a water district for providing support to a variety of nonprofit organizations, noting both the constitutional prohibition against gifts of public funds and the obligation that special districts have to show that an expenditure falls within the specifically enumerated powers of the district.²² The state auditor also faulted the district for not having policies that define the types of public and private agencies whose support furthers the interests of the district.²³

Although a number of local agency attorneys expressed discomfort with this practice of leaving decisions concerning public agency support for charities to individual officeholders, there may be ways to structure such a program so it conforms better to legal requirements.

Even so, the council should still have a policy discussion about whether this is the best system for making decisions about the use of scarce public resources. For example, another public agency's practices in this regard came under scrutiny even though the agency reportedly put safeguards in place to make sure the funds were appropriately spent. The president of the local taxpayers' association suggested that using such monies for charitable contributions involves "a thin line," observing that the practice is "almost like they're buying votes."²⁴ The local newspaper also noted that such funds were used to boost officeholders' public profiles.

Recent research²⁵ suggests that the public's perception that government misuses public resources is one of the reasons that the public is reluctant to give government greater authority to solve pressing problems. Although these accounts may have personal and political advantages for local officials, those advantages may come at significant cost in terms of whether the public perceives that their taxpayer dollars are being used only for critical public services. In short, decision-makers need to ask themselves the usual

question: Even if this program could be structured in a way to be legal, does that mean that the practice is ethical - or that the public will perceive it to be so?

1. See Cal. Penal Code section 424 ("Each officer of ... any county, city, town or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys who ... without authority of law, appropriates the same ... to the use of another ... is punishable by imprisonment in the state prison for two, three or four years, and is disqualified from holding any office in this state.") Cal. Gov't Code section 8314(a) ("It is unlawful for ... any ... local appointee, employee, or consultant, to use or permit others to use public resources for ... personal or other purposes which are not authorized by law."). See also *Stockett v. Association of California Water Agencies Joint Power Insurance Authority*, 34 Cal. 4th 441, 20 Cal. Rptr. 3d 176 (2004) (dismissed employee allowed to proceed with wrongful termination claims; administrative claim included sufficient information).

2. See, e.g., Cal. Gov't Code section 8314(c)(1) (imposing a civil penalty of up to \$1,000 per day, plus three times the value of the resource used).

3. See Cal. Labor Code section 1102.5(c) ("An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.")

4. Cal. Labor Code section 1102.6.

5. See Cal. Labor Code section 1106.

6. See *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004) (upholding a deputy district attorney's civil rights claim, finding that his expression of concern about the handling of a prosecution was protected First Amendment speech and the fact that these concerns were expressed internally was no less deserving of First Amendment protection), pet. for cert. filed. Oct. 1, 2004.

7. See, e.g., *C. Fred Alvord Whistleblowers: Broken Lives and Organizational Power* (New York: Cornell University Press, 2001).

8. See Roger J. Sullivan, *Immanuel Kant's Moral Theory* (New York: Cambridge University Press, 1989), as cited in Curtis Ventriss and Shane M. Barney, "The Making of a Whistleblower and the Importance of Ethical Autonomy," *Public Integrity* Volume 5, Number 4 (Fall 2003) at 355, 356.

9. Cal. Bus. & Prof. Code section 6068.

10. State Bar Rules of Professional Conduct, rule 3-600(B).

11. See 71 Ops. Cal. Atty. Gen. 255 (1988) (Opinion No. 87-302) (finding whistle-blowing statutes do not override the attorney-client privilege).

12. See, e.g., AB 363 (introduced in 2002 and vetoed by Governor Davis) and AB 2713 (introduced in 2004 and vetoed by Gov. Schwarzenegger).

13. Michael Josephson Commentaries, *Being an Effective Critic* 350.1 (March 26, 2004). www.josephsoninstitute.org.

14. See Cal. Labor Code section 1102.7 (requiring the attorney general to set up the hotline).

15. See Cal. Labor Code section 1102.8 (requiring employers to post employees' rights and responsibilities under the whistle-blower laws, including the telephone number for the attorney general's hotline).

16. See Cal. Gov't Code section 8314(c)(1) (so do city attorneys in cities with populations over 750,000).

17. Lilanthi Ravishankar "Encouraging Internal Whistleblowing in Organizations" prepared for the Markkula Center for Applied Ethics' Business and Organizational Ethics Partnership, available at www.scu.edu/ethics/publications/submitted/whistleblowing.html.

18. See Cal. Const. art. XVI, section 6 ("nor shall it [the Legislature] have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individuals, municipal or other corporation whatever; ?"). See also *Albright v. City of South San Francisco*, 44 Cal. App. 3d 866, 870, 118 Cal. Rptr. 901, 902 (1975) (making the connection between council member expenses and the prohibitions against a gift of public funds). Although the prohibition is directed to the Legislature, the courts' theory is that, since general law cities, counties and special districts derive much of their authority from the Legislature, such local agencies also do not have the power to make gifts of public funds.

19. See generally *McQuillin, Municipal Corporations*, section 39.25 (3d ed.) ("Appropriations to charitable or nonprofit associations, without consideration [something in return], cannot be made.")

20. *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 103-04, 248 Cal. Rptr. 290, 295 (1988) See also *McQuillin, Municipal Corporations*, section 39.19 (3d ed.) (all expenditures must be for a public purpose).

21. *Board of Supervisors of City and County of San Francisco v. Dolan*, 45 Cal. App. 3d 237, 119 Cal. Rptr. 347 (1975) (The determination of what constitutes a "public" purpose is primarily a matter for the Legislature and its discretion will not be disturbed by the courts so long as the determination has a reasonable basis).

22. California State Auditor "Metropolitan Water District of Southern California: Its Administrative Controls Need to Be Improved to Ensure an Appropriate Level of Checks and Balances Over Public Resources (Report #2003-136, June 2004), at 15-18.

23. *Id.* at 18.

24. "Here's \$50,000 - Spend it Well," *Sacramento Bee*, Nov. 23, 2003, page B1, B6.

25. *Viewpoint Learning, Listening to Californians: Bridging the Disconnect (Executive Summary)*, January 2005.

More information about legal and ethical issues relating to the use of public resources, particularly as they relate to charitable giving, is available in the publication *Of Fishbowls and Cookie Jars: A Public Official's Guide to the Use of Public Resources*, available at www.ilsg.org/trust and through CityBooks at (916) 658-8257 or www.cacities.org/store.

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