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April 13, 2009

DRAFT

Patrick Buscovich
Patrick Buscovich & Associates
235 Montgomery Street, Suite 823
San Francisco, CA 94104-2906

Re: Request for Advice Regarding Application of Compensated Advocacy Ban to
Members of San Francisco Board of Examiners

Dear Mr. Buscovich:

You requested advice regarding San Francisco Campaign and Governmental Conduct Code ("C&GC Code") section 3.224, which prohibits officers of the City and County of San Francisco (the "City"), from communicating with other City officers and employees on behalf of other persons for compensation with the intent to influence governmental decisions. In other words, section 3.224 prohibits City officers from being paid to lobby.

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. *See* S.F. Charter § C3.699-12. Written formal opinions are available to individuals who request advice about their responsibilities under local laws. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice. Informal advice does not provide similar protection. *See id.* In providing either type of advice, the Ethics Commission does not act as a finder of fact. The Commission's advice to you is based on the facts presented by you, as reflected in this letter. The advice in this letter may provide immunity, but only to the extent that the material facts related to a future enforcement are presented here. *See id.*

Because you seek advice regarding specific actions that you may take in the future, the Commission is treating your question as a request for a formal opinion.

Question

You asked the Ethics Commission to consider the following question:

Does section 3.224 of the C&GC Code prohibit you, as a member of the Board of Examiners, from communicating on behalf of other persons with officers or employees of the City with the intent to influence governmental decisions?

Summary of Advice

The compensated advocacy ban in C&GC Code section 3.224 applies only to City officers. Because members of the Board of Examiners are not “officers,” as that term is defined in the San Francisco Administrative Code, you are not subject to the compensated advocacy ban.

Background

You are a licensed structural engineer working for Patrick Buscovich & Associates, a structural engineering firm in San Francisco. In that capacity, you design projects and interpret building codes for your clients, and regularly contact the Department of Building Inspection, the Planning Department and other City agencies on behalf of your clients. In those contacts, you may attempt to influence City decisions to benefit your clients.

You are a member of the Board of Examiners. The Board of Examiners is a group of experts created under Section 105A.1 of the San Francisco Building Code. The Building Code sets forth the responsibilities of the Board of Examiners, including: determining whether new materials, new methods and types of construction comply with established safety standards; approving certain variances from the Building Code’s requirements; recommending interpretations of the Building Code; and hearing appeals from any Abatement Orders involving construction methods, assemblies or materials, and other safety issues. *See* S.F. Building Code § 105A.1.1.1.

The Building Inspection Commission appoints, and may remove at its discretion, all members of the Board of Examiners. *See* S.F. Charter § D3.750-4. One seat on the Board of Examiners must be filled by a registered structural engineer. *See* S.F. Building Code § 105A.1.4. You have indicated that there are approximately forty registered structural engineers residing in the City. The Building Inspection Commission has appointed you to fill that seat.

In 2005, the Building Inspection Commission appointed you to a separate City body, the Unreinforced Masonry Building Appeals Board (“UMBAB”). At that time, you requested that the Commission grant a waiver to allow you to engage in compensated advocacy. At its meeting in September 2005, the Commission granted your waiver request. You are no longer a member of the UMBAB.

Discussion

A. The Compensated Advocacy Ban

Section 3.224 of the C&GC Code¹ prohibits any officer of the City from directly or indirectly receiving any compensation to communicate orally, in writing, or in any other manner on behalf of any other person with any other officer or employee of the City with the intent to influence a government decision. *See* C&GC Code § 3.224(a). The section does not apply to certain communications, such as routine requests for information or communications by an officer on behalf of a business, union, or organization of which the officer is a member or full-time employee, but you have provided no facts indicating that any of the enumerated exceptions applies to you. *See* C&GC Code § 3.224(b); EC Reg. 3.224-1.² San Francisco voters enacted the compensated advocacy ban as part of Proposition F on June 3, 1986, and the voters later approved additional amendments to the ban as Proposition E on November 3, 2003.

The Proposition F ballot materials state that the compensated advocacy ban sought “to eliminate undue influence by officeholders retained as paid lobbyists for projects requiring City approval.” *See* June 3, 1986 San Francisco City and County Propositions, Argument in Favor of Prop. F, at 52. In an advice letter analyzing an earlier version of section 3.224, the Ethics Commission concluded “that the Ordinance was designed specifically to address the possibility of undue influence and/or conflicts of interests that arise from a City officer’s representation of a private interest before any agency operating exclusively within the City and County of San Francisco.” *See* S.F. Ethics Commission Formal Adv. Letter to William W. Fay, D.D.S., May 15, 2001, available at http://www.sfgov.org/site/ethics_page.asp?id=14054 (“Fay Advice Letter”).

B. Application of the Compensated Advocacy Ban to City “Officers”

¹ Section 3.224 states, “PROHIBITION ON REPRESENTING PRIVATE PARTIES BEFORE OTHER CITY OFFICERS AND EMPLOYEES--COMPENSATED ADVOCACY.

(a) **Prohibition.** No officer of the City and County shall directly or indirectly receive any form of compensation to communicate orally, in writing, or in any other manner on behalf of any other person with any other officer or employee of the City and County with the intent to influence a government decision.

(b) **Exceptions.** This Section shall not apply to any communication by: (1) an officer of the City and County on behalf of the City and County; (2) an officer of the City and County on behalf of a business, union, or organization of which the officer is a member or full-time employee; (3) an associate, partner or employee of an officer of the City and County, unless it is clear from the totality of the circumstances that the associate, partner or employee is merely acting as an agent of the City and County officer; or (4) a City officer acting in his or her capacity as a licensed attorney representing clients in communications with the City Attorney's Office, outside legal counsel hired by the City, or representatives of the City who are named in a pending litigation matter.

(c) **Waiver.** The Ethics Commission may waive the prohibitions in this Section for any member of a City board or commission who, by law, must be appointed to represent any profession, trade, business, union or association.

² The Ethics Commission may waive the prohibitions in section 3.224 for any member of a City board or commission who by law must be appointed to represent any profession, trade, business, union, or association. *See* C&GC Code § 3.224(c). In your initial letter to the Commission on March 19, 2009, you requested that the Commission waive the prohibition as applied to you because you would occupy a seat on the Board of Examiners designated for a structural engineer. Because this letter concludes that section 3.224 does not apply to you, there is no need for the Commission to consider your waiver request.

By its terms, section 3.224 applies only to “officer[s] of the City and County of San Francisco.” *See* C&GC Code § 3.224(a). Neither the ordinance itself nor the Commission’s regulations define the term “officer.” But the City’s Administrative Code does define the term:

The officers of the City and County shall be the officers elected by vote of the people, members of the Board of Education, members of boards and commissions appointed by the Mayor and the Board of Supervisors, members of the Building Inspection Commission, members of the Ethics Commission, members of the Elections Commission, members of the Retirement Board, members of the Health Service Board, members of the Sunshine Ordinance Task Force, members of the Youth Commission, members of the Small Business Commission, members of the Board of Law Library Trustees, the Superintendent of Schools, the executive appointed as the chief executive officer under each board or commission, the Controller, the City Administrator, the head of each department under the Mayor, and such other officers as may hereafter be provided by law or so designated by ordinance.

S.F. Admin. Code § 1.50.

Notably, Proposition E amended both this section of the Administrative Code and the compensated advocacy ban. In other words, that measure approved both section 3.224’s restriction on compensated advocacy by “officers” and section 1.50’s definition of the term “officers.” Based on that legislative history, the Commission concludes that section 1.50 defines the term “officer” for section 3.224.

Before Proposition E’s enactment, the Ethics Commission in the Fay Advice Letter reasoned that because the compensated advocacy ordinance applied to “officers” but the ordinance itself did not define the term, the definition in the 2001 version of Administrative Code section 1.50 applied. *See* Fay Adv. Letter, May 15, 2001. We reach the analogous conclusion here.

Members of the Board of Examiners are not City officers, as that term is defined under section 1.50. Neither the Board of Supervisors nor the Mayor appoints members of the Board of Examiners. Rather, the Building Inspection Commission appoints, and may remove at its discretion, any member of the Board of Examiners. *See* S.F. Charter § D3.750-4. And while section 1.50 specifically enumerates specific other commissioners and board members, such as Ethics Commissioners and Retirement Board members, as “officers,” that section does not mention the Board of Examiners. Accordingly, based on the plain language of the ordinance, we conclude that members of the Board of Examiners are not City officers.

We note that this conclusion may, at first, appear inconsistent with two prior Ethics Commission actions and decisions. First, the Building Inspection Commission’s Statement of Incompatible Activities refers to members of the Board of Examiners as “officers.” But the Statement of Incompatible Activities explicitly states that members of the Board of Examiners are officers solely for the purpose of the Statement of Incompatible Activities. The Statement of Incompatible Activities does not define the term “officer” for section 3.224.

Second, this conclusion may contradict a footnote in the Commission staff's memorandum regarding your 2005 waiver request. In that footnote, the staff explained that "[f]or the purposes of this waiver request, staff concludes that a member of the UMBAB is an officer of the City. . . ." At that time, the City was considering legislation that would have applied all of the City's conflict of interest laws to all employees and officers required to file Statements of Economic Interests. Partly due to that imminent possibility, the Ethics Commission assumed that you were an officer for purposes of the compensated advocacy ban with respect to your prior waiver request. That legislation ultimately did not pass, and it should not determine the analysis here. Based on the current law and the plain language of Administrative Code section 1.50, we conclude that the compensated advocacy ban does not apply to members of the Board of Examiners.

Conclusion

For the reasons discussed above, the Commission finds that section 3.224 does not prohibit you from communicating with City employees and officers on behalf of your clients with the intent to influence governmental decisions.

Other ethics laws, such as the Political Reform Act, Cal. Gov't Code §§ 81000, et seq., or the Building Inspection Commission's Statement of Incompatible Activities, may otherwise limit your ability to act on behalf of your clients.³ If you would like to discuss those laws, or if you have additional questions on this matter, please contact me at (415) 252-3100.

Sincerely,

John St. Croix
Executive Director

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³ The Statement of Incompatible Activities that governs the Board of Examiners requires a member of the Board of Examiners to "disclose all permit applications and other matters pertaining to their official business before the DBI [Department of Building Inspection] to the Ethics Commission within fifteen calendar days of the end of each quarter." Each member must also disclose to the Ethics Commission all permit applications and other matters pertaining to their official business before the DBI submitted by secondary parties such as the member's clients, Limited Liability Companies, Partnerships, Limited Partnerships, Corporations or any other entity in which the member has an ownership or controlling interest of at least 10 percent or from which the member has received income exceeding \$500 in the past 12 months. *See* Department of Building Inspection and Building Inspection Commission Statement of Incompatible Activities, § III.A.1.g.