

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: March 2, 2009

MEMORANDUM

TO: Mayor Cieslewicz
All Alders

FROM: Michael P. May, City Attorney

RE: Ethics Code: Statement of Interest Forms; Some Suggested Changes

At the Common Council meeting on February 24, I was asked to provide a brief summary of the provisions in the Ethics Code related to Statement of Interest (SOI) forms. In this memo, I will provide that summary and suggest some changes in the Code to make these provisions more workable. I also will suggest a change in the Lobbying Ordinance based on recent communications from Dane County District Attorney Brian Blanchard.

Ethics Code Statement of Interest Forms

Sec. 3.35(9), MGO, requires the filing of SOI forms by a number of City officials and employees. It applies to elected officials, candidates for office, appointed officials, any member of a City board, commission or committee, and to certain City employees. The ordinance specifies the times of filing, the data to be included in the SOI, and imposes certain duties on the City Clerk with respect to those who fail to timely file the SOI. The general time for filing is annually, no later than the first Tuesday in January. Sec. 3.35(9) (d), MGO.

Sec. 3.35(9)(i) requires the Clerk to send forms to all persons at least 45 days prior to the January filing and to send a reminder to all City department heads and staff to City committees at least 15 days prior to the January filing. The Clerk is then to notify all persons who fail to timely file the SOI and, finally, to notify the Common Council of those who have still not filed within 10 days after the notice. Previously, the ordinance gave some discretion to the Council as to how to treat those committee members who did not timely file, but it now provides in sub. (9)(i):

The Common Council shall, at the second meeting after receipt of the Clerk's notice, revoke the appointment of any such member who has not filed the required disclosure statement by the time of such Council meeting.

The ordinance provides that, as for City employees who fail to timely file, "[t]he Comptroller shall withhold the compensation of any such person until the Statement is

filed." As will be noted below, this final provision on withholding pay is likely unenforceable, has engendered problems and should be changed.

Committee Members SOI: Problems and Suggested Changes

With respect to members of City boards, committees and commissions, the current system creates significant work for the City Clerk's office, often results in members' appointments being revoked and then either being reinstated or being reappointed, and sometimes creates problems meeting quorum during interim periods. At the same time, the removal of the Council's discretion put some added teeth in the ordinance to force members to either file or get off the City committee.

The Common Council may wish to consider modifying this portion of the ordinance, perhaps along the following lines: If, after the usual notices and the Clerk's report to the Council, a member has not complied with the SOI provisions in the Ethics Code, the member would be barred from voting, taking part in discussion or debate, or making any motions at the City committee. But the member would still be counted toward quorum, so the committee could meet and take action. The ordinance could provide that if the member completed the SOI at the start of a committee meeting within a certain number of days of the Clerk's report, the member could then participate as a full member of the committee. If there were no filing within a certain number of days of the Clerk's report to the Council, the member would automatically be removed. The ordinance might even require that staff to the City boards, committees and commissions bring SOI forms to meetings held in December and January, or even require placing the issue of filing SOI forms on the agenda of those meetings in order to increase compliance.

As with the other suggestions in this memo, I recommend that this issue be placed on a future agenda of the Common Council Organizational Committee for initial discussion purposes. If there is support for some or all of these changes, we could then draft the necessary ordinance modifications to go through the usual referral and approval process.

City Employees SOI: Problems and Suggested Changes

The situation for City employees is slightly more complex. The Ethics Code provides that all "appointed officials" and "Mayor's assistants" are to file the SOI. Sec. 3.35(9)(b)1. and 3. It also provides that City employees who are involved in the following activities for the City are to file the SOI (sec. 3.35(9)(b)5.):

- "a. In negotiations related to the sale or acquisition of personal property or real estate; or
- b. In negotiations related to economic development projects; or
- c. In the appraisal or assessment of property for tax purposes; or

- d. In regulation of activities pursuant to state law or city ordinance, or in enforcement of state laws or city ordinances.”

A number of City employees are potentially covered by this section. To my knowledge, the Clerk's office had not included a list of employees who had failed to file the SOI in prior reports to the Council, but such a list was included this year. Many Assistant City Attorneys were on the list.

The City Attorneys Union (MCAA) along with at least one other union (Local 60) take the position that the SOI relates to a term or condition of employment and therefore is a mandatory subject of bargaining. Since they have never agreed to such a requirement in the collective bargaining agreement, they assert they are not covered by it.

I have disagreed with this interpretation, but the Human Resources department had acceded to the unions' positions at some point in the past. HR is particularly concerned about the provision allowing the Comptroller to withhold wages for non-compliance. HR correctly points out that this provision makes the "term and condition of employment" argument a colorable one.

State law explicitly authorizes municipalities to enact local ethics ordinances and include in them a "provision directing the ... municipal treasurer to withhold the payment of salaries or expenses from any local ... employee ... who fails to disclose his or her economic interests in accordance with the requirements of the ordinance." Sec. 19.59(3)(c), Wis. Stats. This would argue against the SOI being subject to bargaining.

However, under other provisions of state and federal law, our office is not convinced that the Comptroller could withhold wages from persons who performed all aspects of their job duties other than the filing of an SOI, without risking liability on behalf of the City. And, as noted above, the mere existence of this provision on wages implicates the bargaining process, making it difficult to resolve. In 2001, this issue was resolved in the City's favor in an arbitration award with Local 236, but it is impractical for the City to go to arbitration on this single issue if all other issues with a union are resolved.

I discussed this issue with the HR Director and we agreed on a procedure to resolve this issue. I recommend deleting the provision in the ordinance relating to the withholding of wages. HR believes this removes the basis to claim the SOI is term or condition of employment and therefore a mandatory subject of bargaining. Instead of withholding wages, employees who failed to file the SOI would be subject to a forfeiture in municipal court upon a complaint brought by the City Attorney. This places the SOI requirement on a similar basis as other ordinance requirements.

I should, in fairness, make two other points before moving on to the third issue. The Ethics Code exempts police officers from the SOI, making them subject to whatever requirements are adopted by the MPD. Assistant City Attorneys have argued to me

March 3, 2009

Page 4

that they should have a similar exemption since they are subject to the restrictions on conflicts of interest in the Rules of Professional Conduct for Attorneys. My reaction has been that, while it may be true, it does not vitiate the need for the disclosure and transparency called for in the City's Ethics Code and, in any event, if there is to be such an exemption based on the attorneys' separate code of ethics, the City ordinance should explicitly so provide.

I suggest this issue also be taken up at a CCOC meeting before proceeding further.

Lobbying Ordinance and Alcohol Licenses

This is a separate but related ethics issue.

Currently, a business seeking a license to sell alcohol in Madison is subject to the same rules as other businesses to register under the lobby law. As applied here, because they are not seeking funds from the City and are not seeking approval of a development, the owners of the business are generally exempt from any lobby ordinance requirements. Paid outside agents, such as lawyers, may become subject to the ordinance, with the resulting reporting requirements.

Dane County District Attorney Brian Blanchard recently suggested that the City consider changing this rule. Although neither he nor I have any indication of such activities in Madison, DA Blanchard noted the recent issues involving a Milwaukee alder and liquor licenses in that city. Milwaukee City Attorney Grant Langley has raised the question of requiring a public filing of all contacts with alders related to the granting of liquor licenses in Milwaukee. The City of Madison could accomplish this by putting within the lobbying ordinance all agents working on behalf of a person or entity seeking a new or renewal license, thus triggering a requirement to file a record of contacts with alders regarding the license.

I will be happy to discuss these three issues with any of you who have questions.

CC: Janet Piraino
Joel Plant
Maribeth Witzel-Behl
Brad Wirtz
Dean Brasser
Clifford Blackwell
Lara Mainella