

11/27/18


item b A-E



City Council

Item #6 (A-E)
**Santa Clara Convention
Center/Convention-Visitors
Bureau**

November 27, 2018



**City of
Santa Clara**
The Center of What's Possible

Agenda

- Background and Audit Context
- Santa Clara Chamber of Commerce Response
- Auditor Response to Chamber Response
- City Response to Audit Recommendations

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POST MEETING MATERIAL



Background

- Council directed audit of Convention Center and CVB on May 22, 2018
- TAP International (TAP) presented audit to Council on September 18, 2018– *today is a continued discussion*
- Chamber requested opportunity to respond to the audit
- TAP was not available on October 9, 2018

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Audit Context

- **Audit is a normal function of due diligence**
 - City's responsibility to audit per the Convention Center Management Agreement, it did not for 30+ years
 - City never audited the Tourism Improvement District (TID) nor its Fiscal Agent (Chamber) since its inception in 2005
- **City allowed a high-risk environment without any Council oversight, assigned City staff, or management controls.**

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Audit Findings

Tonight's City-Chamber discussion on these two audits has various common denominators:

- **Chamber**

- Mismanagement of public funds and assets
- Inadequate financial controls, lack of policies or compliance with them, sloppy record keeping, and no disclosure of how it was managing public resources
- Lack of understanding of governance (e.g., conflict of interest violations, disclosures to Council, authority of Council with respect to public funds and assets, alignment to role and responsibilities, etc.)

- **City**

- Lack of proper Governance, Contract Management and Oversight

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Chamber of Commerce Response to TAP Audit (Item 6.A)

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Auditor Response to Chamber of Commerce (Item 6.B)

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City Response to Previous Council Questions (Item 6.C)

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City Council Questions

1. What groups received discounts and/or free facility rentals?
2. What were the commissions and incentives paid to Chamber staff?
3. Review of Santa Clara Chamber of Commerce's Political Action Committee (PAC) Fair Political Practices Commission (FPPC) Filings

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Discounts & Free Rentals

- **Groups receiving partial discounts (Attachment 2)**
 - Data provided by TAP using data provided by the Chamber
 - *The data does not detail the nature of the discount*
- **Groups receiving a free rental (Attachment 3)**
 - Data provided by TAP using data provided by the Chamber
 - *The data does not detail the rationale for the free rental*

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Commissions and Incentives Paid

- During the audit period the Chamber paid
 - over \$300,000 in commissions and
 - \$23,500 in incentive bonus payments
- Commissions/Incentive pay are not offered in publicly funded environments
- Commission structure created incentive to book day events vs. multi-day (economic generators)
- Commissions largely paid to one employee
- Attachment 4 provides commissions and bonuses paid by month, quarter, and calendar year

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Chamber PAC FPPC Filings

- **Appointed City Clerk and City Auditor**
 - reviewed the Santa Clara Chamber PAC FPPC Reports on file with the City Clerk's Office
 - issued two reports/audits on October 29 and October 31, 2018, respectively (Attachments 5 and 6)
 - identified potential violations of FPPC report filings
- **On November 13, the FPPC issued a letter stating that "the Enforcement Division of the Fair Political Practices Commission will investigate the allegation."** (Attachment 7)

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City Response to Audit (Item 6.D)

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City's Response -- TAP's Audit

- Staff concurs with audit recommendations
- Implementation matrix developed (Attachment 3) and staff will report, as necessary, once a new operator is selected
- The majority of recommendations can be resolved by a new Management Agreement and City oversight of it

	RFP Related	Future Management Contract	City Action Related	Total
Complete	0	0	3	5
Partially Complete	11	0	0	11
Not Implemented	0	10	2	12
Total	11	10	5	26

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City Action Related Items

- Council authorized an additional 1.5 FTEs for Convention Center and CVB oversight
- Referrals have been made to FPPC and to IRS
- Establishment of other controls (e.g., accounting and contract performance) will be developed with new staff and SCCC/CVB operators

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City's Response – Chamber's Audit Response

Demonstrates lack of basic understanding of governance, contract requirements, and contract principles, City's response to Chamber's response is focused on four categories:

- Public Sector Governance
- Conflicts of Interest
- TID Audit (Item #7)
- Obligations to Report Preliminary Audit Observations and Respond to Council's Directives

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Public Sector Governance

Chamber's response demonstrates deficiencies with understanding:

- Council – Manager form of government – Council as governing body of public assets and City Manager implements direction
- City's right to communicate broadly with residents and businesses on Council actions
- Oversight and use of a public asset
- Budget appropriation
- Public sector contracting and Contractor responsibilities
- Business and industry oversight

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Use of a Public Asset

- Private sector practices do not apply.
- Use of public facilities (Convention Center) and public funds (Convention Center and CVB) are subject to public sector business practices, e.g., governance, transparency, compliance, and reporting.
- Like SCSA focus, the governing body (Council) and public have a right to know how its resources are being used. Chamber's response does not appropriately account for this requirement.

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Use of a Public Asset

- Fee waivers/discounts must be examined through policies and held to a high level of scrutiny, transparency, fairness.
- Unless authorized by City Council through policy, Chamber did not have authority to waive fees at the public's expense:
 - During the audit period, \$16.1 million in discounts granted (45% of total bookings),
 - During the audit period, **\$2.8 million free use** privileges granted to the Chamber; Chamber employees and members, and SCCC vendor partners. **Public did not have access to this privilege.**
 - Chamber did not follow its own policy, nor report these practices to the Council

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Budget Appropriation

- By an affirmative Council vote, at a properly noticed public Council meeting, Council may establish budget appropriations.
- Budget appropriations do not grant spending authority, unless delegated to the City Manager or approved by Council agreement (e.g., MOUs, CM contract authority, contracts and amendments explicitly stating funds, etc.)
- Expenditures must be consistent with City budget adopted by Council. In this case, staff failed to disclose to Council an increased budget appropriation and subsequent increased payments.

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Budget Appropriation

- Individual members of the Council cannot authorize expenditures, bind the City Council, or direct the City Manager
- Chamber's reference, whether true or untrue, to informal and/or private discussions with two Councilmembers does not bind the City nor does it constitute legitimate action to provide for an increased payment in the Management Fee

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Public Sector Contracting

- City and Chamber had two public contracts, (1) Convention Center management and (2) CVB activities.
- Among other requirements, Chamber obligated to provide Convention Center marketing, reporting, etc. through these two separate contracts which it can not due to its own actions.
- Separately, Chamber signed on as fiscal agent/administrator for the TID which requires various services and obligations—separate fund.
- Chamber's overly broad termination of its staff, regardless of funding source, left it unable to meet contractual obligations for the Convention Center or its TID requirements.

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Public Sector Contracting

- Termination of the CVB contract did not relieve Convention Center contract obligations or TID requirements. Chamber's actions demonstrate a lack of understanding of its separate contract or TID obligations.
- Up to Chamber to determine how it will comply with its public contract (Convention Center).
- However, Council granted City Manager broad authority to work with Chamber to shift funds to Convention Center contract for some staffing and other expenditures for the Convention Center and TID. Publicly stated that this was the only way to fund activities.

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Public Sector Contracting

- Chamber took broad action to terminate its employees, including those funded by the TID for which the Council took no action.
- City's advice (through ACM Shikada) was clearly relevant to CVB public contract and it DID NOT regard Convention Center or TID legal obligations. Demonstrates Chamber's lack of understanding of legal obligations under each role and/or contract.
- Employees are Chamber employees. Chamber makes hiring/termination decisions – City did not terminate them, as often suggested.

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Business and Industry Oversight

- Chamber's public contract to manage a public facility does not allow for private sector practices (see governance).
- Chamber's and City's policy objective for the management of the Convention Center and CVB should have been to protect the General Fund and maximize revenue, unless an explicit public policy decision was made to subsidize it.
- Chamber Board, responsible to the Council for this contract, should have managed the facility, including its own conflicted business practices

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Business and Industry Oversight

- Board meeting minutes reflect shallow management of Convention Center and CVB to keep Santa Clara competitive in the industry through active management; trend analysis; and strategic planning.
- Audit findings of conflicts between CVB multi-day and SCCC single-day bookings went unnoticed or unresolved, at a potential adverse impact to revenues and hotel night bookings. Shows Chamber's lack of management and best industry practices.

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Conflict of Interest

- Chamber Conflict of Interest Policy & Forms
- Chamber Conflict of Interest – Form 990
- Truthfulness at the core of status of Conflict of Interest Policy
- Management of Conflict and Governance

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Chamber's Conflict of Interest Policy

A conflict of interest exists when officers, board members or staff has a direct or indirect business, professional or personal situation or relationship that **may influence or be perceived to influence** the judgment or action of the officer, Board Member or staff when servicing the Santa Clara Chamber of Commerce & Convention-Visitors Bureau ... **All real or perceived conflict of interest will be disclosed to the appropriate level of authority necessary for consideration, resolution and direction.** [emphasis added]

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Chamber Conflict of Interest Policy

- Chamber's Policy requires their avoidance of even a perception of personal or professional conflict, as well as an actual conflict
- Conflicts not actively managed, corrected, or disclosed
 - Timing and date of executive of submittal of Chamber forms to the City surface reasonable questions regarding truthfulness
 - Appears conflicts not discussed or addressed at the Board level and/or brought to the City's attention ("appropriate level of authority necessary for consideration," e.g., the City Council, governing body responsible for these public contracts)

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Lack of Management of Actual Conflicts of Interest

- **Santa Clara Weekly Ads and Boardmember's profit from personal and professional role:**
 - Response provides various versions of profit and discounts
 - Justifies conflict by intent of CVB staff, which is irrelevant for a violation
 - Uses various internal "chain of command" review to justify corrective action and/or management of conflict.
 - Chamber should have rejected ads and required disclosure to the Board. Boardmember should have actively managed his conflict by declining ads and revenue/profits.
 - Chamber's response demonstrates that it can not manage conflicts

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Lack of Management of Actual Conflicts of Interest

- **UPS Store Lease Agreement**
 - Chamber has a Management Agreement to **operate** Convention Center
 - City did not convey any property rights in the Management Agreement.
 - A Lease Agreement conveys property rights. Only Council can approve lease agreements, on behalf of the City, as the owner.
 - Convention Center is not a legal entity with rights to enter into contracts that bind the City to lease agreements.
 - Chamber does not have rights either to bind the City or its property.

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Lack of Management of Actual Conflicts of Interest

- **UPS Store Lease Agreement**
 - Chamber/Convention Center had no authority to sign a lease agreement.
 - Chamber / Convention Center created risk with entering into a lease agreement for which it has no legal authority to execute.
 - City has directed Convention Center General Manager to take no further action, City will need to address.

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Lack of Management of Actual Conflicts of Interest

- **UPS Store Lease Agreement**
 - Putting aside the complete absence of legal authority to enter into a lease agreement, Chamber created an actual conflict when it allowed for a Boardmember to move into this space, without a legitimate contract, to conduct his private business.
 - UPS Store transfer provisions are not relevant--contract is not legal; however, Chamber did not protect public's interest by allowing an individual with no proper legal documentation to conduct his private business in a City owned facility.

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Lack of Management of Actual Conflicts of Interest

- **UPS Store Lease Agreement**
 - Last, the correct manner to allow private business in public facilities is through a public process, with open competition and fair access, similar to the recent SCSA concessionaire contract

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Obligations to Report Audit Observations & Staff Research

- Chamber asserts inappropriateness or politically motivated action of Auditor and Staff relative to June report and has miscommunicated purpose for reporting—demonstrating a lack of understanding of reporting requirements, governance, and proper forum.
- Council directed research of Conflicts of Interest and Review of Form 990s
- Auditor bound to ethics and standards of United States Government Accountability Office Government Auditing Standards (Yellow Book)
- Notification was appropriate to Council in open session and does not qualify for Closed Session, where other matters were heard

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Government Audits – Yellow Book (2011) Section 6.49

Auditors report deficiencies in internal control, fraud, noncompliance with provisions of laws, regulations, contracts, or grant agreements, or abuse. **For some matters, early communication to those charged with governance or management may be important because of their relative significance and the urgency for corrective follow-up action.** Further, when a control deficiency results in noncompliance with provisions of laws, regulations, contracts or grant agreements, or abuse, early communication is important to allow management to take prompt corrective action to prevent further noncompliance.

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Obligations to Report Audit Observations & Staff Research

- Chamber's response does not professionally acknowledge the governance and professional responsibilities to disclose and report to the governing body, Council, of the Auditor or staff.
- Staff disclosed publically Auditor's statement in July 2018 Information Memo, which stated:

"..when there is preliminary evidence of potential fraud, waste or abuse, it is an audit requirement to immediately report it to the client (City). The Chamber/CVB and CC providing discounts to Chamber members at the Convention enter, including full discounts to Chamber and other entities that use convention Center facilities triggered this requirement."

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Notification to Council -- Open Session

- Council commissioned audit regarding the Chamber's contracts (Council is the client): Convention Center and Convention and Visitors' Bureau
- Council also directed staff to review Conflict of Interest Policy and Form 990-Tax Exempt Filing
- City Manager obligated to report to Council and implement direction
- Not a closed session matter allowable under the Brown Act
- Staff's actions to report to the Council in public were completely appropriate and reflect proper reporting to Council

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TID Audit

- Separate item on the agenda, but the findings reveal the same pattern of Chamber mismanagement of public funds
- New development from this Audit is that Chamber's own independent auditor commissioned to review the TID financial statements surfaced "significant deficiencies" with its fiscal management (dated October 25, 2017).
- Chamber could have been transparent with the City during the course of these audits and our efforts to reform these contracts of its fiscal management shortcomings.
- Further review is needed to understand how long the Chamber has known of its mismanagement, what was corrected, and ignored.

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TID Audit

- Establishment of TID is authorized under State Law through the City's authority
- Governing of the TID is the City Council / TID Advisory Body is advisory only with no legal authority
- The funds collected for the TID are public funds
- Chamber asserts that the City recommended that TID Advisory Board stop doing business with the Chamber
- The TID Advisory Board's role is only advisory
- The Chamber's role has been fiscal agent – responsible for meeting all legal requirements of the administration of these public funds
- TID business is the City's interest and fiscal agent actions are its concern

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Recommendation

- 1.** Note and File Reports 6A, 6B, 6C, 6D and/or 6E and direction to continue to implement the audit recommendations
- 2.** Direct staff to further review credit card expenses
- 3.** Direct staff to further review bonuses and commissions paid
- 4.** Direct staff to return to Council with information and next steps regarding UPS store occupancy, at the appropriate time
- 5.** Partner with the Chamber to successfully transition Convention Center/CVB to a potential new operator
- 6.** Any other action determined by Council