



California Fair Political Practices Commission

January 8, 1987

Wes Bannister
19242 McLaren Lane
Huntington Beach, CA 92646

Re: Your Request for Advice
Our File No. I-86-327

Dear Mr. Bannister:

You have requested advice concerning your duties as a member of the Huntington Beach City Council under the conflict of interest provisions of the Political Reform Act (the "Act").^{1/} Your letter states only a general question and does not involve a specific decision. Therefore, we consider it to be a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).^{2/}

QUESTION

You are an insurance agent and broker. You and your spouse own an insurance agency. When will you be prohibited from participating in decisions of the City Council?

CONCLUSION

You may not participate in any decision which will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on your insurance agency or on any person who has been a source of income to you of \$250 or more in the 12 months preceding the decision. This determination must be made on a decision-by-decision basis.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

FACTS

You were recently elected to the Huntington Beach City Council. You and your wife own 100 percent of the stock in Bannister and Associates Insurance Agency, Inc. ("Bannister and Associates"). Your interest in Bannister and Associates is worth over \$100,000.

Bannister and Associates insures a variety of individuals and businesses including property owners, financial institutions, contractors, architects, engineers and accountants. Insurance is sold either by you or by solicitors in your office. If the insurance is sold directly by you, any commissions earned from the sale go to the corporation. If insurance is sold by one of your solicitors, commissions are split between the corporation and the solicitor.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or attempting to influence a governmental decision in which he knows or has reason to know he has a financial interest. A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more....

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management....

Section 87103(a), (c) and (d).

In the present situation, you may not participate in any decision which will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on (1) Bannister and Associates or (2) any person

who has been a source of income to you of \$250 or more in the 12 months preceding the decision.^{3/} Since you and your spouse own all of the stock in Bannister and Associates, all commission income to Bannister and Associates is attributed to you. (Section 82030.) Accordingly, any person who provides \$250 or more in commission income to Bannister and Associates will be considered a source of income of \$250 or more to you.

"Commission income" means gross payments received as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. (Regulation 18704.3(b).) However, any portion of the commission which is paid to a solicitor is not included as commission income to Bannister and Associates. (See, Carey Opinion, 3 FPPC Opinions 99 (No. 76-087, Nov. 3, 1977); copy enclosed.) Thus, if for example the sale of an insurance policy by a solicitor results in a \$400 commission which is split 50/50 between the solicitor and Bannister and Associates, Bannister and Associates has earned \$200 in commission income.

The sources of commission income in a specific sale or similar transaction include:

- (A) The insurance company providing the policy;
- (B) The person purchasing the policy; and
- (C) The brokerage firm, agency, company, or other business entity through which the broker or agent conducts business.

Regulation 18704.3(c)(1)(A), (B)
and (C).

For purposes of disqualification, the full gross value of any commission income for a specific sale or similar transaction is attributed to each source of income in that sale or transaction. (Regulation 18704.3(d).) Thus, in the above-mentioned example, the insurance company providing the policy, the person purchasing the policy, and Bannister and Associates would each be a source of income to you of \$200.

^{3/} "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert. (Section 82047.)

Assuming that a decision before the City Council will affect Bannister and Associates or a person who has been a source of income to you of \$250 or more in the 12 months preceding the decision, you must analyze whether the effect is reasonably foreseeable, material, and will be distinguishable from the effect on the public generally. Each of these elements is discussed below.

Foreseeability

An effect on an official's economic interest is foreseeable when there is a substantial likelihood that it will ultimately occur as a result of a governmental decision. An effect does not have to be certain to be reasonably foreseeable; however, if an effect is a mere possibility, it is not foreseeable. (See, Thorner Opinion, 1 FPPC Opinions 198 (No. 75-089, Dec. 4, 1975); copy enclosed).

Materiality

Regulations 18702, 18702.1 and 18702.2 (copies enclosed) provide guidance in making a determination as to whether the effect of the decision on any one of the official's economic interests will be "material." It is usually necessary to estimate the dollar value of the effect of a decision on the official's economic interest to determine whether the effect is material.

Whether an effect on a business entity in which an official has an investment, or which is a source of income to an official, will be considered material depends on the financial size of the business entity. (Regulation 18702.2.) For example, an effect of only \$10,000 on the gross revenues or assets of a small business is material. (Regulation 18702.2(g).)^{4/} However, in the case of a Fortune 500 company,

^{4/} You have expressed a specific concern that many decisions could in some way affect a client's premium basis and thereby affect your agency's commission income. It should be noted that, assuming the effects on your agency's income are foreseeable as described above, the decision must increase or decrease your agency's gross revenues by at least \$10,000 to be a possible basis for disqualification. If such a decision comes before you, we would be happy to provide you with more specific advice. Of course, even if the effects which a decision will have on your agency are not a basis for disqualification, a determination must be made as to whether the decision will have a reasonably foreseeable material financial effect on your client if that client is a source of income to you of \$250 or more.

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the effect would need to be at least a \$1 million effect on the company's gross revenues or assets for it to be material. (Regulation 18702.2(c).)

A similar "sliding scale" applies to effects on real property in which an official holds an interest. As a general rule, an effect of \$10,000 or more on the fair market value of real property is material. When the effect is between \$1,000 and \$10,000, it may be material, depending on the value of the real property. (Regulation 18702(b)(2).) An effect below \$1,000 is deemed not material. (Regulation 18702(b)(2)(B).)

Sometimes it is difficult to give a dollar value to the effect of a governmental decision. In such cases, it is necessary to consider whether the decision could significantly affect the official's economic interests. (Regulation 18702(a).) For example, the effect may be material if the decision significantly affects the use or enjoyment of land or other interests, or if the official's receipt of income from a private source is directly related to the decision. (Regulation 18702(b)(3)(B).)

Public Generally

A determination must be made as to whether the effect of the decision on the official's economic interest will be distinguishable from the effect on the public generally. Regulation 18703 provides that a material financial effect of a governmental decision on an official's economic interests is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public. For example, a decision by a city council to increase the sales tax, which will affect all residents of the city, does not affect any individual city councilmember in a different manner than it affects the public generally. As a result, it does not create a conflict of interest for any city councilmember. By way of contrast, a decision concerning a zoning variance for an official's business or home, which has a different effect on the official's economic interest than on other members of the general public, may constitute a conflict of interest for the official.

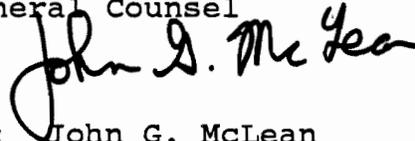
We would be pleased to provide you with more specific guidance regarding specific decisions which come before the

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City Council. If you should have any questions, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

A handwritten signature in black ink that reads "John G. McLean". The signature is written in a cursive style with a large, looping initial "J".

By: John G. McLean
Counsel, Legal Division

DMG:JGM:plh
Enclosures

F. P. P. C.
Dec 8 8 50 AM '86

WES BANNISTER
19242 MC LAREN LANE
HUNTINGTON BEACH,
CALIFORNIA, 92646

NOVEMBER 28, 1986

MRS. HELEN ANDINO
FAIR POLITICAL PRACTICES COMMISSION
107 SOUTH BROADWAY
ROOM 7007
LOS ANGELES, CALIFORNIA 90012

RE: CONFLICT OF INTEREST

DEAR MRS. ANDINO:

THIS MONTH I WAS ELECTED TO FILL ONE OF THE CITY COUNCIL POSITIONS IN THE CITY OF HUNTINGTON BEACH. NOW, AFTER THAT ELECTION, I FIND THAT THERE MAY BE A PROBLEM WITH MY ABILITY TO COMFORTABLY FILL THAT POSITION. IT HAS TO DO WITH MY OCCUPATION AND THE POTENTIAL OF CONFLICT OF INTEREST. I WOULD APPRECIATE YOUR REVIEW AND THE OPINION OF THE F.P.P.C. AS IT RELATES TO MY POSITION ON THE COUNCIL.

ENCLOSED WITH THIS LETTER PLEASE FIND A COPY OF THE LETTER AND OPINION OF OUR CITY ATTORNEY, GAIL HUTTON, RELATING TO MY CONCERN. I ORIGINALLY ASKED FOR AN OPINION FROM HER OFFICE, BUT THEN AFTER RECEIVING IT, WAS ADVISED BY HER THAT THE OPINION WAS NOT BINDING AND WOULD HAVE TO BE VALIDATED BY YOUR OFFICE. AS A RESULT, I AM ASKING FOR THAT OPINION FROM THE F.P.P.C NOW.

ALTHOUGH THE LETTER FAIRLY REPRESENTS MY POSITION, I WOULD LIKE TO ADD A FEW MINOR ITEMS FOR CONSIDERATION. EACH ARE, I FEEL, IMPORTANT TO YOUR REVIEW.

AT PRESENT, I, OR MY OFFICE, CURRENTLY INSURE A MIX OF BUSINESS IN AND AROUND THE CITY AMOUNTING TO OVER 200 ACCOUNTS. SOME OF THESE ACCOUNTS ARE PROPERTY OWNERS, SOME FINANCIAL INSTITUTIONS, SOME CONTRACTORS, AND SOME PROFESSIONAL PEOPLE, SUCH AS, ARCHITECTS, ENGINEERS, AND ACCOUNTING.

MY CONCERN, OF COURSE, IS WITH THE PROVISIONS OF CALIFORNIA GOVERNMENT CODES #87100, 87103 AND YOUR SECTION 18702 AND 18703. I AM NOT SURE WHETHER ANY OTHER PROVISIONS PERTAIN, BUT THESE ARE THE ONES DISCUSSED BY OUR CITY ATTORNEY.

UNDER #87103, OUR ATTORNEY OUTLINED THE PARAGRAPH BEGINNING WITH, "NO PUBLIC OFFICIAL....". ANY DECISION I MAKE COULD BE RELATED TO A

SUBJECT HAVING TO DO WITH A "FINANCIAL INTEREST" FOR ME. IF I PARTICIPATE ON A CODE CHANGE, IT COULD AFFECT THE PROFESSIONAL CLIENTS I INSURE, OR ON A ZONE CHANGE, I COULD AID ANY OF THE FINANCIAL INSTITUTIONS BY ALLOWING A SITUATION AFFECTING THEIR FUTURE LOANS, THE CONTRACTORS BY GIVING THEM THE OPPORTUNITY TO BUILD, OR THE PROPERTY OWNERS (OR INVESTORS) THAT MAY BENEFIT FROM THE CHANGE. IT WOULD APPEAR THAT AS LONG AS THE PHRASE "HAS REASON TO KNOW" EXISTS, I WILL HAVE TO ABSTAIN ON ALMOST ANY THING BEFORE THE COUNCIL OTHER THAN THE LEAST IMPORTANT OF ISSUES.

PERHAPS IT IS IMPORTANT TO UNDERSTAND HOW MY INSURANCE AGENCY, AND THEREFORE, I BENEFIT FROM THE SALE OF INSURANCE.

FIRST, AS AN AGENT, I REPRESENT INSURANCE COMPANIES, SUCH AS AETNA, MARYLAND CASUALTY, OHIO CASUALTY, ETC., AND HAVE AUTHORITY ALLOWED BY CONTRACT TO SOLICIT, BIND AND SERVICE POLICIES ISSUED BY THEM, THROUGH OUR AGENCY. AS A BROKER, I REPRESENT CLIENTS IN THE NEGOTIATION OF INSURANCE CONTRACTS WITH BROKERAGE TYPES OF CARRIERS, SUCH AS, AMERICAN INTERNATIONAL, GREAT AMERICAN SURPLUS, ETC. WHEN THE INSURANCE POLICY IS ACCEPTED BY THE CLIENT, PREMIUMS ARE PAID TO MY AGENCY'S TRUST ACCOUNT AND HELD FOR A PERIOD OF TIME UNTIL BILLED BY THE INSURANCE COMPANY. AT THAT TIME, THE "NET" PREMIUMS ARE PAID THE COMPANY FROM TRUST, AND THE COMMISSIONS EARNED BY THE AGENCY ARE PAID FROM TRUST. COMMISSIONS ARE A PERCENTAGE OF THE PREMIUM AND VARY FROM POLICY TO POLICY DEPENDING ON THE TYPE OF INSURANCE PLACED AND THE COMMISSION LEVELS AUTHORIZED BY THE DIFFERENT COMPANIES.

IT IS IMPORTANT TO UNDERSTAND THAT THE COMMISSIONS ARE A PERCENTAGE OF PREMIUM. PREMIUM IS DEVELOPED IN VARIOUS WAYS. ON PROPERTY, THE VALUE OF THE REAL PROPERTY IS THE GENERALLY ACCEPTED BASIS. FOR WORKERS' COMPENSATION, THE PAYROLLS OF THE CLIENT ARE THE BASIS. FOR LIABILITY, THE AREA OF THE BUSINESS, THE PAYROLLS, OR THE RECEIPTS (DEPENDING ON TYPE OF INSURANCE POLICY) ARE THE BASIS. IT IS IMPORTANT TO UNDERSTAND, HOWEVER, THAT ALL INSURANCE POLICIES OF THE COMMERCIAL TYPE ARE "AUDITABLE" AND, AS SUCH, SUBJECT TO CHANGE BASED ON EITHER INCREASE OR DECREASE OF THE EXPOSURE OF THE INSURED DURING THE TERM OF THE POLICY.

THAT LAST SENTENCE IS THE "CATCH" IN MY SITUATION. IF A CODE CHANGE, OR A ZONE CHANGE, WOULD AFFECT THE INSURED'S PREMIUM BASIS, EITHER BY PAYROLL INCREASE OR DECREASE AND/OR RECEIPT INCREASE OR DECREASE, THEIR PREMIUM WOULD BE AFFECTED, AND, OF COURSE, MY AGENCY'S COMMISSION. FOR THAT REASON, ANY DECISION I MAKE COULD AFFECT MY AGENCY'S COMMISSION INCOME, AND AS A CONSEQUENCE, MY INCOME. THE LIMITATIONS PLACED BY CODE 87103 WOULD HAVE LITTLE BEARING SINCE I HAVE NO WAY OF DETERMINING THE EFFECT OR THE CHANGE ON THE CLIENT'S PREMIUM BASIS, THEREFORE, NO ABILITY TO DETERMINE THE EFFECT ON MY INCOME.

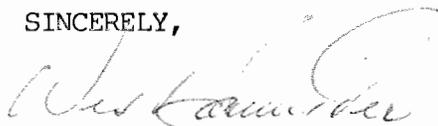
I FULLY UNDERSTAND THE REASONS THE F.P.P.C. RULINGS WERE ESTABLISHED AND THEIR PERCEIVED NEED, BUT IN THIS CASE, THE ABILITY TO SERVE MY

CITY AND MY CONSTITUENCY STAND TO BE DETRIMENTALLY AFFECTED. FOR THAT REASON, UNLESS THE RULINGS ARE CLARIFIED IN MY CASE BY AN OPINION FROM YOUR OFFICE, THEY ARE ESSENTIALLY ELIMINATING MY ABILITY TO VOTE ON ALMOST ANY AND ALL RULINGS PERTAINING TO CODE OR ZONING RULINGS BY OUR CITY COUNCIL. CARRIED TO THE EXTREME, THE APPLICATION OF THE LAW AS CONTROLLED BY YOUR OFFICE WOULD PRECLUDE ANY LOCAL BUSINESS PERSON FROM PARTICIPATING IN ELECTED OR APPOINTED POSITIONS IN THE COMMUNITY. I CANNOT BELIEVE THAT WAS OR IS THE INTENT AND ASK THAT CLARIFICATION BE MADE BY YOU.

SINCE OUR FIRST MEETING WILL BE THIS MONDAY NIGHT, DECEMBER 1, 1986, I WOULD APPRECIATE AN OPINION FROM YOUR OFFICE AS SOON AS POSSIBLE. THE ISSUE IS OF SUCH OBVIOUS IMPORTANCE, AN OPINION RATHER THAN A RULING IS, I FEEL, ESSENTIAL. PERHAPS OTHER INSURANCE AGENTS OR BROKERS HAVE FOUND THIS SITUATION TO EXIST AND AN OPINION HAS ALREADY BE OFFERED. IT THAT CASE, PLEASE PROVIDE A COPY FOR MY BENEFIT.

THANK YOU FOR YOUR CONSIDERATION.

SINCERELY,

A handwritten signature in cursive script, appearing to read "Wes Bannister".

WES BANNISTER



CITY OF HUNTINGTON BEACH
INTER-DEPARTMENT COMMUNICATION

To WES BANNISTER
Councilman-Elect

From GAIL HUTTON
City Attorney

Subject Conflict of Interest
Regulations Re: Wes Bannister
Councilman-Elect

Date November 25, 1986

BACKGROUND

Councilman-Elect Bannister is a general insurance agent and broker. He deals in a wide spectrum of services offered by his industry. He has both commercial and individual clients. His income, however, is derived from commissions paid by the insurance companies to him, based on the premiums paid by his clients to the companies. The premiums paid by his clients are based on their receipts. An increase in a client's business, then, results in an increase in Mr. Bannister's business.

ISSUE

Whether Mr. Bannister will have a conflict of interest as a result of his personal business activities with businesses or individuals in Huntington Beach with matters before the City Council.

DISCUSSION

The law concerning the conflicts of interest of public officials is found in Cal. Gov. Code §§ 87100 et seq. The sections that are pertinent to Mr. Bannister's situation are § 87100 and § 87103.

§87100 reads as follows:

"No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a government decision in which he knows or has reason to know he has a financial interest." (Emphasis added)

A "financial interest" is defined by § 87103, which reads as follows:

"An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official with 12 months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater."

A "material financial effect" is outlined in Section 18702 of the Regulations of the California Fair Political Practices Commission (FPPC). This regulation states the general standard that:

(a) The financial effect of a governmental decision on a financial interest of a public official is material if the decision will have a significant effect on the business entity, real property or source of income in question.

Section 18702(b) outlines three factors to consider when determining whether it is reasonably foreseeable that the effects of a governmental decision will be significant. These factors concern gross income, net income, and the current assets or liabilities of the business entity.

1) Gross Income:

The first factor is whether the annual gross income of the business entity is increased or decreased by the lesser of \$100,000 or (if the effect is one thousand dollars or more) 1%.

2) Net Income:

The second factor is whether annual net income is raised or lowered by the lesser of \$50,000 or (if the effect is \$1,000 or more) 0.5%.

3) Change In Current Assets or Liabilities:

The third factor is whether current assets or liabilities are increased or decreased by the lesser of \$100,000 or (if the effect is \$1,000 or more) 0.5%. Assets are deemed decreased by the amount of any expenses incurred as a result of a governmental decision. The regulations are written so that satisfaction of any one of these factors may result in a tainted decision; these are, however, only factors for consideration, and are not themselves determinative of the issue.

A determination of the dollar amounts involved does not end the inquiry. It must also be decided whether or not the decision will have an effect that is distinguishable from its effect on the public in general. The pertinent regulation reads as follows:

Section 18703: "A material financial effect of a governmental decision on an official's interests...is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public..."

2 Cal. Admin. Code § 18703.

The inquiry of "distinguishable from the public generally" seldom operates to eliminate disqualification, once a decision has been found to have a material financial effect.

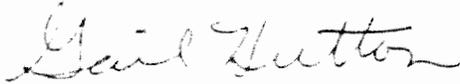
CONCLUSION

Because Wes Bannister & Associates enjoys a wide-spread clientele, it is safe to assume that during Mr. Bannister's term he might

GAIL HUTTON
November 25, 1986
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face possible conflicts of interest in one or more situations. This is not unusual or out of the ordinary. If conflicts arise, they should be dealt with in light of the guidelines outlined above and on a case-by-case basis.

However, the policy of the law is to minimize disqualifications; a public official may vote unless clearly disqualified. Although difficult to predict, it appears unlikely that decisions of the City Council could have a material financial effect on Mr. Bannister's firm and for this reason, in most situations that we can foresee at this time, he would not fail a disqualification.



GAIL HUTTON
City Attorney

Attachments



California Fair Political Practices Commission

December 10, 1986

Wes Bannister
19242 McLaren Lane
Huntington Beach, CA 92646

Re: 86-327

Dear Mr. Bannister:

Your letter requesting advice under the Political Reform Act was received on December 8, 1986 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John McLean, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
General Counsel

DMG:plh