



# California Fair Political Practices Commission

January 23, 1987

John J. Pomidor  
Fremont Deputy City Attorney  
City Government Building  
39700 Civic Center Drive  
Fremont, CA 94537

Re: 87-026

Dear Mr. Pomidor:

Your letter requesting advice under the Political Reform Act was received on January 16, 1987 by the Fair Political Practices Commission. Before we can answer your request, we must have the name and address of the planning commissioner on whose behalf you have requested advice. Please contact Kathy Donovan, an attorney in the Legal Division, directly with this information 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*  
by *Ked*  
Diane M. Griffiths  
General Counsel

DMG:plh



# California Fair Political Practices Commission

February 25, 1987

John J. Pomidor  
Fremont Deputy City Attorney  
City Government Building  
39700 Civic Center Drive  
Fremont, CA 94537

Re: Your Request for Informal  
Assistance  
Our File No. I-87-026

Dear Mr. Pomidor:

You have requested advice on behalf of Pauline McIvor, a member of the Fremont Planning Commission, concerning her duties under the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1/</sup> Your letter states only a general question; it does not seek advice concerning a specific question pending before the Planning Commission. Therefore, we consider it to be a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).<sup>2/</sup>

## FACTS

Ms. McIvor and her husband jointly own a retail hardware shop located in the City of Fremont. It is one of about seven hardware outlets in the Tri-City area (Fremont, Newark and Union City), although it is the only hardware store in a small commercial area of Fremont. A substantial majority of the retail hardware business in the Tri-City area is conducted by three other larger stores, which you have called hardware

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<sup>1/</sup> 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.

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

"supermarkets." These three major stores draw customers from throughout the Tri-City area. In contrast, Ms. McIvor estimates that nearly all of her customers are residents of Fremont.

#### QUESTION

Does Section 87103.5 exempt Ms. McIvor from the disqualification provisions of the Act when a decision would foreseeably affect one of her retail customers who has provided payments totaling \$250 or more to the hardware store during the preceding 12 months?

#### CONCLUSION

We do not have sufficient facts to determine whether Section 87103.5 exempts Ms. McIvor from the disqualification provisions of the Act. We provide general guidance in the analysis section of this letter to assist you in applying Section 87103.5 to specific future decisions.

#### ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using her official position to influence a governmental decision in which she knows or has reason to know she has a financial interest. An 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, among other things, any source which provided or promised the official \$250 or more in income within 12 months prior to the time when the decision is made. (Section 87103(c).)

Section 87103(c) states the general rule that Ms. McIvor may be required to disqualify herself from a decision which could affect any person who has provided income of \$250 or more to her during the 12 months preceding the decision. Customers of Ms. McIvor's hardware store are considered sources of income to her based on her pro rata share of the gross receipts of the business. (Section 82030(a).) Since Ms. McIvor and her husband jointly own the business, any person who provided a total of \$250 or more in gross receipts to the store during the 12 months preceding a decision will be considered a source of income of \$250 or more to Ms. McIvor. Accordingly, Ms. McIvor may be required to disqualify herself from any decision which affects one of her customers who has purchased \$250 or more from her store in the preceding 12 months.

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As you noted in your letter, Section 87103.5 provides an exception to this general rule: If retail customers of a business entity constitute a significant segment of the public generally, and if the amount of income received from a particular customer is not distinguishable from the amount of income received from other retail customers, that customer is not a source of income for purposes of Section 87103(c). Section 87103.5 was intended to address the concern that a small town, retail store owner could be unable to participate in virtually all governmental decisions if the general rule applies. If almost everyone in the town buys at least \$250 in merchandise at the public official's store, then nearly everyone in the town would be a source of income to the official, and the official would be unable to participate in most decisions before her agency. Section 87103.5 alleviates this concern by allowing the official's participation so long as the affected customer is a member of the general public and the level of income provided to the store owner is comparable to that provided by other members of the general public. (See Baxter Advice Letter (No. I-86-131) and Christiansen Advice Letter (No. I-87-018), copies enclosed.)

In Ms. McIvor's situation, we do not have sufficient facts to determine whether Section 87103.5 would apply. However, in a metropolitan area with several hardware stores in close proximity, it is not likely that the retail customers of Ms. McIvor's hardware store would constitute a significant segment of the public generally. The "public generally" for purposes of this analysis is the entire population of the City of Fremont. (See Owen Opinion, 2 FPPC Ops. 77, 81 (No. 76-005, June 2, 1976), copy enclosed.) Unless a significant segment of the population of the City of Fremont shops for hardware at Ms. McIvor's store, Section 87103.5 would not apply. The fact that the hardware store is open to the general public is not sufficient to make Section 87103.5 applicable.

In the event that a significant segment of the city's population does shop at Ms. McIvor's hardware store, the exception provided by Section 87103.5 is a limited one. Ms. McIvor would still be required to disqualify herself from participating in decisions that affect her store's larger customers. Section 87103.5 applies only when the customer affected by the decision has provided an amount of income to the official's business that is not distinguishable from the amount of income received from the business's other retail customers. It is necessary to determine whether a particular customer is one of many customers who spend substantially the same amount of money in the store during any given 12-month period. (Baxter letter, supra.) Thus, the exception in

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Section 87103.5 is available for decisions affecting the "average" customer; it does not apply to a customer who does a larger amount of business with the official's store.

You have also asked several questions about whether Ms. McIvor "knows or has reason to know" of her financial interest in particular decisions. If a customer purchases \$250 or more from the hardware store in a 12-month period, but all purchases are made in cash, Ms. McIvor may not know or have reason to know that the customer is a source of income to her of \$250 or more. If in fact she does not know or have reason to know that a particular person is a source of income of \$250 or more, she need not disqualify herself from a decision affecting that person.

However, Ms. McIvor does have a duty to inquire about the store's customers who may be sources of income of \$250 or more. For example, if customers have charge accounts with the store, she should conduct a regular examination of those accounts to determine which customers spend \$250 or more at her store in a 12-month period. She also should examine the store's records with regard to customers who have paid by check or credit card. In the Christiansen letter, supra, we discussed a possible method of ensuring an official's compliance with the disqualification requirements of the Act. The method discussed in that letter should provide some practical guidance for Ms. McIvor.

If you have any further questions regarding this matter, please contact me at (916) 322-5901.

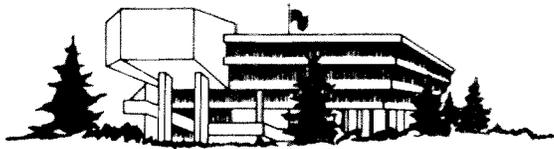
Sincerely,

Diane M. Griffiths  
General Counsel



By: Kathryn E. Donovan  
Counsel, Legal Division

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Enclosures



JAN 16 10 23 AM '87

## City of Fremont

City Government Building  
39700 Civic Center Drive  
Fremont, California 94537

January 12, 1987

Fair Political Practices Commission  
P. O. Box 807  
Sacramento, CA 95804

Dear Sirs:

A City of Fremont Planning Commissioner owns one retail hardware shop jointly with her husband and has authorized me to seek an opinion from you on Government Code Section 87103.5.

As stated, the Commissioner has an undivided full joint ownership interest in the business with her husband. The business is one of about seven hardware outlets in the Tri-City area (Fremont, Newark, Union City); I refer to the area simply because residents do a great deal of crossover shopping here. The population of the Tri-City area is about 250,000, and a substantial majority of its hardware business is conducted at three major stores, none of which is the Commissioner's. Fremont's population is about 155,000. The Commissioner's store is the only one in a small commercial area of the City, and does take in about \$600,000.00 in gross receipts per year. However, many customers do come from throughout the City, enough so that the business could not survive on neighborhood customers alone.

The Commissioner estimates nearly all of her customers come from Fremont, as hers is a relatively small, immediate-purchase-oriented store. By contrast, the three major stores probably do most of the crossover business, being akin to hardware "supermarkets".

It is expected that customers of the hardware store will have financial interests in decisions that the Commission makes. Although some of them will be known to the Commissioner who owns the store, most will not. The volume of the business simply does not allow for recollection of all persons who have spent over \$250 in the store in twelve months; and although many times a large item - such as a lawn mower - may be noted as purchased for future potential conflict reference, oftentimes return customers spend more than \$250 in twelve months in several minor purchases. Moreover, even referencing and cataloging purchases in excess of \$250 will be a burdensome, and probably impossible, task for her business. For one thing, the business retains several employees; additionally, the Commissioner and her husband are not at the store at all hours. Actually, cataloging customers probably would have a deleterious effect on business.



Government Code Section 87103.5 does state that a retail customer of a business entity engaged in retail sales to the public generally is not a source of income if the business customers constitute a significant segment of the public generally, and if the particular customer does not generate income for the retailer "distinguishable" from other customers.

I am in receipt of a copy of your informal assistance letter to Marjorie Baxter dated May 9, 1986. In it, you seem to pose, essentially, five questions:

- (1) Does the official own at least 10% interest in the business entity in question?
- (2) Is the business entity retail in nature?
- (3) Does the business have customers both diverse enough and in enough numerical volume to constitute a significant segment of the public generally?
- (4) Do most of the customers spend roughly the same amount of money in the store?
- (5) Does the particular customer belong to the class of customers identified in question (4)?

It is stipulated the answers to the first two questions are "yes". I am asking for advice and clarification on the latter three questions, however.

First, assume a customer is before the Commission on an item and that customer has spent \$800 in the hardware store over the last twelve months. However, the Commissioner is unaware of this fact and votes on the matter. Second, assume the same situation, but the Commissioner is aware of the volume of business she has done with the customer and is faced with a question of whether or not to abstain.

Does the fact, although the hardware store is open to the general public, most local residents do not shop there, mean that the Commissioner must disqualify herself? If not, under question (4), if only half the store's customers spend a similar amount in it each year, does that mean Section 87103.5 is inapplicable because the standard deviation in individual customer spending (from the rest of the customers) is unusually high? (Incidentally, I see nothing in Section 87103.5 requiring all customers to spend "substantially the same" amount at the store.) Further, it is presumed that the business simply does not lend itself to identification of an "average" customer (because of the anonymity of customers and the wide range of product prices); what type of customer is distinguishable? If a typical customer can't be identified, is 87103.5 totally unavailable? And, is disqualification or criminal enforcement in order in either of the above two situations?

We would appreciate an opinion on this matter and any other insight, such as legislative history, which could explain Section 87103.5. This is especially true, because, under the tests outlined above, it would seem one of the Commissioner's problems is her lack of size in the marketplace. If you have any questions, please do not hesitate to call me at the below number.

Thank you for your attention to this matter.

Sincerely,



JOHN J. POMIDOR  
Deputy City Attorney II  
(415) 790-6620

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cao-8017