



California Fair Political Practices Commission

April 15, 1988

Robert B. Maddow
General Counsel
East Bay Municipal Utility District
P. O. Box 24055
Oakland, CA 94623

Re: Your Request for Advice
Our File No. I-88-108

Dear Mr. Maddow:

This is in response to your letter requesting advice regarding the responsibilities of East Bay Municipal Utility District Director Sanford M. Skaggs under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} Because your request is more of a general inquiry than a request for advice as to a specific action pending before the planning commission, we treat your request as one for informal assistance.^{2/}

QUESTION

Director Skaggs is a partner in a law firm. He owns less than 10 percent of the firm. Is Director Skaggs prohibited from participating in decisions of the district because they will affect clients of his law firm?

CONCLUSION

Director Skaggs is not prohibited from participating in decisions of the district simply because they will affect the clients of his law firm. However, if there is a nexus between his duties as legal counsel to a particular client and a

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

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

decision before the district, he will be required to disqualify himself from participation in that decision. Application of the nexus test is discussed more particularly in the analysis section of this letter.

FACTS

East Bay Municipal Utility District ("district") is a publicly owned utility providing water and wastewater treatment services to portions of Alameda and Contra Costa Counties. The district's board of directors is elected by ward. Director Sanford M. Skaggs is currently president of the board.

Prior to 1985, Mr. Skaggs was a partner in a law firm in which he had more than a 10-percent (10%) interest. Since clients of the firm were property owners or developers doing business in the district's service area, he routinely excused himself from board decisions which might have had a material financial effect upon these clients. In 1985 the Skaggs law firm merged with a larger firm of which Mr. Skaggs is now less than a 2-percent (2%) owner. The law firm is not a publicly traded entity.

The firm has some developer clients, at least one of which is doing business within the district's service area. Mr. Skaggs is one of the firm's several attorneys who provide legal service to these clients. In addition, at least one client of the firm currently owns one or more golf courses in the district's service area, and the firm represents industrial clients, some of which use large volumes of water in their facilities. The board periodically adopts water service rates or regulations which apply generally to all district customers but which might especially affect some industrial consumers, golf courses, and other customer classes which use large volumes of water.

No board decisions are anticipated that will increase or decrease the law firm's gross revenues, expenses, liabilities or assets, or the amount of income to Mr. Skaggs by \$10,000 per year or more. In addition, the law firm has not made and will not make any appearance before the district's board and will not represent clients with respect to transactions or litigation involving the district.

District staff may recommend to the board certain changes in rate structures or regulations. Such changes could affect a number of rates and charges, some payable by land owners and tenants generally, and some typically paid by developers. In addition, the board may consider adoption of water conservation requirements, including seasonal rates, a surcharge on the

volume rate and a charge for use of volumes in excess of specified amounts.

A number of these alternatives will affect new developments and large-volume customers more than they will the general public. Some of the developers and large-volume users affected may be clients of Mr. Skaggs firm.

For purposes of our analysis you would like us to assume that there will be a material financial effect on the law firm's clients. However, you do not believe that any of the decisions facing the district will have a material financial effect on Mr. Skaggs' law firm, nor will the effect on the clients impact the law firm's assets or income.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he 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 the official or a member of the official's 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.

* * *

(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.

Mr. Skaggs is a public official by virtue of his position with the district. (Section 82048.) Assuming Mr. Skaggs' investment in the law firm is worth at least \$1,000, his position with the law firm constitutes a business interest and an investment interest. Thus, if the decisions of the board

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would foreseeably and materially affect the law firm in a manner that is distinguishable from the effect on the public generally, he must disqualify himself from participating in those decisions.

The law firm is also a source of income to Mr. Skaggs. "Income" is defined in the Act to include, among other things, the following:

...Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10 percent interest or greater....

Section 82030 (a).

As you noted in your letter, prior to 1985 Mr. Skaggs had more than a 10-percent interest in the law firm. Those clients whose payments to the firm were sufficient to result in Mr. Skaggs' pro rata share equaling \$250 or more were sources of income to him under Section 87103(c). As a consequence, he was required to disqualify himself from participation in decisions which could foreseeably have a material financial effect on these clients of the firm, as well as those decisions materially affecting the law firm. (See In re Carey (1977) 3 FPCC Ops. 99, and Winnie Advice Letter, No. A-85-228, copies enclosed.) This requirement was in effect so long as Director Skaggs retained his 10-percent-plus interest in the firm, and for 12 months thereafter. (Section 87103(c).)

Since Mr. Skaggs now has only a 2-percent interest in the law firm, the "10-percent rule" no longer applies. Consequently, the clients of the firm are no longer sources of income to him.^{3/} Only the law firm is a source of income for Mr. Skaggs. (See Cadei Advice Letter, No. A-86-246, copy enclosed.) As a result, he is no longer required to disqualify himself when a decision of the board would have a foreseeable material financial effect on the clients of the firm. He need only be concerned when the law firm could foreseeably be

^{3/} This conclusion is based on the information you provided over the telephone that Mr. Skaggs receives no added remuneration from the clients or the firm, such as a fee-splitting or other fee arrangement. If he did receive additional compensation directly attributable to a client, the client could be a source of income to him.

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affected, and the effect is a material financial effect distinguishable from the effect on the public generally.

Foreseeable Material Financial Effect

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required; however, if the effect is a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

Regulations 18702 and 18702.2 (copies enclosed) clarify whether the foreseeable effect of a decision on a financial interest of a public official will be "material." Regulation 18702(b)(3)(B) provides that the effect of a decision is material when "there is a nexus between the governmental decision and the purpose for which the official receives income." In other words, the Act prohibits an individual from accomplishing as a public official that which he is paid to do in his private capacity.

For example, assume there is a proposal before the board to carve out exemptions to the increase in rates, or to the water conservation requirements for new developments and golf courses. If Mr. Skaggs receives income from the law firm to represent developers and golf course owners in matters related to public utility regulation, he would be required to disqualify himself from these decisions. However, if Mr. Skaggs' representation of developers and golf course owners has no relation to public utility regulation, the "nexus test" would not require disqualification. (See Advice Letters to Swallow, No. A-86-229 and Marovich, No. A-86-086, copies enclosed.)

Where there is no nexus between the governmental decision and the private professional activities of a public official, Regulation 18702.2 provides monetary guidelines for determining whether the financial effect of a decision on the official's source of income will be material. These guidelines vary with the financial size of the business entity in question.

In your letter you note that the law firm is not publicly traded. We will assume, as well, that the firm does not qualify for public sale. Thus, the guidelines in Regulation 18702.2(g) should be applied in this instance, and a decision will have a material effect on the law practice if:

- (1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

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(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

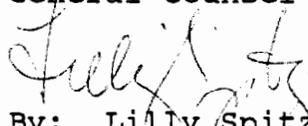
It appears that you have already considered the application of Regulation 18702.2(g) to Mr. Skaggs' situation since you note specifically in your statement of facts that "no board decisions are anticipated that will increase or decrease the law firm's gross revenues, expenses, liabilities or assets...by \$10,000 per year or more."^{4/}

Based on your assertion, and absent any information to the contrary, we assume that the decisions of the board will not have a material financial effect on the law firm. If, however, there is any change in circumstances, or additional information comes to light which could alter the foreseeable effect on the law firm, you may want to request additional advice from the Commission.

I trust this response provides sufficient guidance regarding Mr. Skaggs' responsibilities under the Act. If, in the future, you have questions concerning the specific components of these important issues facing the board, please feel free to contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Lilly Spitz
Counsel, Legal Division

DMG:LS:plh
Enclosures

^{4/} Please keep in mind that in order for there to be a material financial effect on the law firm, a decision need result in only a \$2,500 increase or decrease in expenses, rather than the \$10,000 effect applicable to gross revenues, assets and liabilities. (Regulation 18702.2(g)(2).)



F P P

MAR 14 8 26 AM '88

March 10, 1988

Ms. Diane F. Griffiths
General Counsel
Fair Political Practices Commission
Post Office Box 807
Sacramento, California 95804-0807

Dear Ms. Griffiths:

This is a request for advice pursuant to Government Code Section 83114(b). Specifically, we seek advice with respect to whether a Board member is required to disqualify himself from decisions which may impact clients of a law firm which is a source of income to the Board member.

PERTINENT FACTS:

East Bay Municipal Utility District ("District") is a publicly owned utility providing water and wastewater treatment services to portions of Alameda and Contra Costa Counties. The District's Board of Directors is elected by ward, and Director Sanford M. Skaggs, who is currently President of the Board, represents Ward 2 which is located within Contra Costa County.

Prior to 1985, Director Skaggs was a partner in a law firm and had more than a ten percent (10%) interest therein. Since clients of the firm were property owners or developers doing business in the District's service area, Director Skaggs routinely excused himself from Board decisions which might have had a material financial impact upon these clients, including decisions establishing charges payable by applicants for water service.

In 1985, the Skaggs law firm merged with a larger firm (over 200 lawyers, with gross revenues over \$45 million in 1986), of which Director Skaggs is now less than a two percent (2%) owner. He receives more than \$1,000 annually as a result of this ownership interest. The firm has some developer clients, at least one of which is doing business within the District's service area. Director Skaggs is one of the firm's several attorneys who



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March 10, 1988
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provide legal service with respect to these clients. The law firm is not a publicly traded entity.

In addition, at least one client of the firm currently owns one or more golf courses in the District's service area, and the firm represents industrial clients, some of which use large volumes of water in their facilities. The Board periodically adopts water service rates or regulations which apply generally to all District customers but which might especially affect some industrial consumers, golf courses, and other customer classes which use large volumes of water.

No Board decisions are anticipated that will increase or decrease the law firm's gross revenues, expenses, liabilities, or assets or the amount of income to Director Skaggs or his immediate family by \$10,000 per year or more. In addition, the law firm has not made and will not make any appearance before the District's Board and will not represent clients with respect to transactions or litigation involving the District.

District staff has been studying a number of rates and charges issues and may recommend certain changes in rate structures or regulations to the Board. Board decisions are not likely until later in 1988 or perhaps 1989. Such changes could affect the following rates and charges (copies of the current rate schedules are attached hereto):

1. Water service charges, including a service charge applicable to all metered services, the volume charge for water delivered, and an elevation surcharge applied to all customers at higher elevations. (See Schedule A.) Issues to be studied may include the service charge and the elevation surcharge. Increasing rate blocks for large consumption may also be analyzed.
2. Installation charges. (See Schedules D, E and F.)
3. Water main extension charges payable by applicant for water service. (See Schedule G.)
4. A system Capacity Charge (SCC) required of all applicants for water service to premises where a standard service connection does not exist or where a standard service is to be enlarged. (See Schedules I and J.)
5. Charges for annexation. (See Schedule K.)

The system capacity charge, water main extension charges and annexation charges are generally paid by developers (i.e., by

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some entities which may be clients of Director Skaggs' firm) since they are often the applicant for water service. All of the charges are cost-based. The water service charge and the volume charge for delivered water are generally paid by property owners or tenants.

In addition to the changes in the established schedule of rates and charges, the Board might also consider adoption of water conservation requirements which could impact new developments and current classes of customers, possibly including clients of the firm. Seasonal rates are another possibility. Due to dry conditions, a surcharge on the volume rate and a charge for use of volumes in excess of specified volumes of water may also be recommended in 1988.

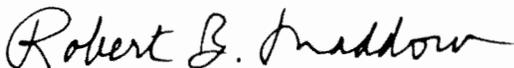
I do not believe that any of the decisions facing the District will have any chance of having a material financial effect on Director Skaggs' law firm. Although it is unlikely there will be a material financial effect on any of the firm's clients, for the purposes of this analysis, you should assume there will be such an effect. The presence of such an effect would not impact the law firm's assets or income. Absent such impact on the law firm, it appears that Director Skaggs need not excuse himself from the Board's decision-making process. Do you concur?

Please address your response to:

Robert B. Maddow
General Counsel
East Bay Municipal Utility District
Post Office Box 24055
Oakland, California 94623

If you have any questions, please direct those inquiries to myself (415/835-3000, ext. 496) or to Nancie Ryan (415/835-3000, ext. 495). Thank you for your time and attention to this matter.

Very truly yours,



ROBERT B. MADDOW
General Counsel

RBM:gme
Enclosures
cc: Director Sanford M. Skaggs

rmb/griffiths.ltr

88-105



F P P C

MAR 14 8 26 AM '88

March 10, 1988

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General Counsel
Fair Political Practices Commission
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Please address your response to:

Robert B. Maddow
General Counsel
East Bay Municipal Utility District
Post Office Box 24055
Oakland, California 94623

If you have any questions, please direct those inquiries to myself (415/835-3000, ext. 496) or to Nancie Ryan (415/835-3000, ext. 495). Thank you for your time and attention to this matter.

Very truly yours,



ROBERT B. MADDOW
General Counsel

RBM:gme
Enclosures
cc: Director Sanford M. Skaggs

rmb/griffiths.ltr



California Fair Political Practices Commission

March 16, 1988

Robert B. Maddow
General Counsel
East Bay Municipal Utility District
P.O. Box 24055
Oakland, CA 94623

Re: 88-108

Dear Mr. Maddow:

Your letter requesting advice under the Political Reform Act was received on March 14, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Lilly Spitz, 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 if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

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,

A handwritten signature in cursive script, appearing to read "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh
cc: Sanford M. Skaggs, Director