



California Fair Political Practices Commission

March 31, 1989

Honorable Richard F. Holmes
Vice Mayor
City of Lafayette
251 Lafayette Circle
Lafayette, CA 94549

Re: Your Request for Advice
Our File No. A-88-471

Dear Vice Mayor Holmes:

This is in response to your request for advice regarding your responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act")^{1/}

QUESTIONS

1. Do your investment interests in two garbage companies which are presently involved in solid waste landfill decisions before the city council prohibit you from participation in these decisions?

2. Does it make any difference that your position on the issues would not financially benefit the companies in which you have an interest?

3. If you are prohibited from participating as a member of the city council, in what other ways can you voice your views on these issues?

CONCLUSIONS

1. Because the decisions before the city council would foreseeably have a material financial effect on your investment interests, you must disqualify yourself from these decisions.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. 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. Whether or not your position on the issues before the city council would benefit your financial interests does not alter the disqualification requirement of the Act.

3. Since you must disqualify yourself from participation in the landfill decisions, you are also prohibited from influencing the decisions pending before the city council, except by way of communicating with the general public or the press. Should this issue be brought before another agency, e.g., the board of supervisors, you may address the members of that agency as a private citizen, but not as a representative of the city or the city council.

FACTS

You are a member of the Lafayette City Council. You and your wife own common stock in Waste Management Corporation and Browning-Ferris Industries. The stock is valued at approximately \$45,000 for each corporation. Both corporations are on the Fortune 500 list and have gross revenues of more than \$2 billion per year.

The city council is presently involved in deliberations regarding the selection of solid waste landfill sites. Both of the corporations in which you have an investment have an interest in the city's decisions. The landfill decisions before the city will affect millions of dollars in gross revenues to the waste management corporations involved.

You have consistently urged that public entities, such as Contra Costa County and Contra Costa County Central Sanitary District, should own 51% of new solid waste landfills in order to protect citizens against monopoly pricing by the private landfill owners. This position is vigorously opposed by the waste management companies in which you have an investment.

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 his 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.

Section 87103(a).

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You have a \$45,000 investment interest in Waste Management Corporation and a \$45,000 investment interest in Browning-Ferris Industries. Consequently, you must disqualify yourself from any decision before the city council which would foreseeably and materially affect either of these corporations, in a manner different from the effect on the general public.

The decisions pending before the city council presently involve the deliberations regarding the siting of solid waste landfills. There is no question that these decisions would have a foreseeable financial effect on the two waste management corporations in which you have an investment interest. It is also clear that the decisions regarding landfill will affect corporations which are in the business of waste management, differently than they will affect the general public.

To determine whether the foreseeable effect will be material, Regulation 18702 (copy enclosed) must be applied. You have not indicated whether either Waste Management or Browning-Ferris are actively pursuing a contract with the city for the landfill site. If either corporation is so directly involved in the decisions, the effect of the decisions are presumed to be material. (Regulation 18702.1(a)(2) and (b).) Under that scenerio, you are required to disqualify yourself from participation in the decisions regarding the site.

If neither Waste Management nor Browning-Ferris is directly involved in the negotiations regarding the landfill, the guidelines of Regulation 18702.2 regarding indirect effect of a decision must be applied. These guidelines are based on the financial size of the corporation in which you have an interest. For corporations on the Fortune 500 list, a decision is material where it will result in an increase or decrease to the gross revenues for a fiscal year of \$1,000,000 or more for the business entity. (Regulation 18702.2(a), copy enclosed.)

Your facts state that the results of the decisions regarding the landfill would mean millions of dollars in gross revenues to the waste management corporations involved. Consequently, the financial effect of the decisions will be material, and you must disqualify yourself from the decisions regarding the landfills.

You have noted that your position on the issue of waste management is counter to that of the corporations in which you have an investment. Whether your position on a particular decision will benefit or harm your financial interests is not relevant to a conflict-of-interest analysis. The Act prohibits participation in any decision where a financial interest exists.

Communicating Your Concerns

Regulation 18700.1 specifies under what conditions a public official may voice his concerns about a decision in which he has a disqualifying interest:

(a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

(b) Notwithstanding subsection (a) an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by subsection (a) if the official:

(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:

* * *

(B) A business entity wholly owned by the official or members of his or her immediate family.

(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.

(2) Communicates with the general public or the press.

* * *

(c) With regard to a governmental decision which is within or before an agency not covered by

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subsection (a), the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or I.consultant of an agency. Such actions include, but are not limited to the use of official stationery.

(Regulation 18700.1, emphasis added.)

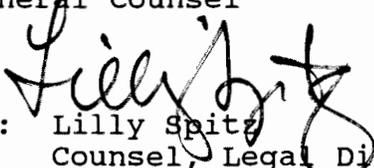
Since you are not the sole owner of the business entities in which you have an investment interest, and you do not have sole direction or control of either corporation, you do not fall within the requirements of Regulation 18700.1(b)(1)(B) or (C) which allow a disqualified public official to testify before his own agency. You may, however, take every opportunity to state your personal position to the general public through public forums, meetings or through the press. (Regulation 18700.1(b)(2).)

In addition, assuming a number of these decisions will eventually be brought to the county level, you may testify on your own behalf before the county board of supervisors or any other county agency. You are prohibited, however, from representing yourself as an official spokesperson for the city council or using city stationery for your communications. (Regulation 18700.1(c).)

I trust this analysis provides you with the guidance you require. If I can be of further assistance, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Lilly Spitz
Counsel, Legal Division

DMG:LS:plh

Enclosures



CITY COUNCIL

Avon M. Wilson, Mayor
Richard F. Holmes, Vice Mayor
Ernest W. Parti
Donald L. Tatzin
Gayle B. Uilkema

FPPC
DEC 16 4 00 PM '88

December 14, 1988

FPPC
428 "J" Street, Suite 800
Sacramento CA 95814
ATTN: Legal Division

Gentlemen:

My wife and I own common stock in both Waste Management Corporation and Browning-Ferris Industries. The current value of these shares is approximately 45,000 in each company.

I am a member of the Lafayette City Council and have been for the past 6 years. In representing the interest of the citizens of my city I have urged that public entities, such as Contra Costa County and/or Contra Costa County Central Sanitary District, should own 51% of new solid waste landfills in order to protect citizens against monopoly pricing by the private landfill owners. You will recognize, therefore, that my proposals are 180' against the interest of private landfill owners, which potentially may include either of the above two companies.

My economic interest in these companies amounts to a tiny fraction of 1% of their common stock. These companies have, respectively, gross revenues of about 3 billion dollars and 2 billion dollars per year. The gross revenues of any landfill in this county would amount to millions of dollars.

My question to you is whether I can legally continue to participate in City Council matters affecting the selection of solid waste landfills. Please advise soonest. Again, let me emphasize, the plan I would like to see adopted is opposed by landfill operators, including Waste Management and Browning-Ferris, who would prefer that the owners keep control of the setting of "tipping fees" and profits accrue exclusively to themselves.

Assuming that you should rule that I should not participate in any City Council vote affecting landfills, does my position as a City Councilman preclude my active efforts with others to foster 51% public ownership of landfills? In other words, have I lost all rights as a citizen on this matter?

If you need any further explanation or data, please feel free to call me at (415) 284-4669 during normal working hours.

Sincerely,


Richard F. Holmes
Lafayette Vice-Mayor

RFH:lt

cc: Avon Wilson, Mayor

Charles J. Williams, City Attorney

12-12rfh

251 LAFAYETTE CIRCLE, LAFAYETTE, CA 94549

TELEPHONE: (415) 284-1968



California Fair Political Practices Commission

December 21, 1988

Honorable Richard F. Holmes
Vice Mayor
City of Lafayette
251 Lafayette Circle
Lafayette, CA 94549

Re: 88-471

Dear Vice Mayor Holmes:

Your letter requesting advice under the Political Reform Act was received on December 16, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Kathryn Donovan, 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,

Diane M. Griffiths
Diane M. Griffiths (CS)
General Counsel

DMG:plh