



California Fair Political Practices Commission

April 17, 1989

James L. Markman
Law Office of
Markman, Arczynski, Hanson and Goldman
P. O. Box 1059
Brea, CA 92622-1059

Re: Your Request For Advice
Our File No. A-89-172

Dear Mr. Markman:

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

This letter addresses significant policy questions more appropriate for a decision by the Commission than for staff advice. Accordingly, we will refer this letter to the Commission for consideration at its next meeting. Meanwhile, we will provide you with interim advice.

QUESTION

May public officials who have received gifts in excess of \$250 in the preceding 12 months from a bond consultant participate in decisions regarding the issuance of bonds?

CONCLUSION

Public officials who have received gifts in excess of \$250 from a bond consultant within the preceding 12 months are required to abstain from participating in decisions regarding the issuance of bonds when it is reasonably foreseeable the bonds will be issued through the bond consultant.

^{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.

FACTS

The City of Buena Park is considering the construction of a civic center and/or cultural center. In order to finance the project, the city intends to issue bonds.

On September 6, 1988, the City of Buena Park entered into an agreement with GRC Municipal Finance, Inc. (GRC), a bond consultant. The agreement provides for a contingent fee to be paid to the bond consultant upon issuance of the bonds. Alternatively, if the bonds are not issued and the bond consultant's services are terminated, the bond consultant will be compensated for all out-of-pocket expenses and for actual time expended based upon the bond consultant's applicable hourly rate.

Between September 6, 1988, and December 7, 1988, Mayor Donna Chessen, Councilmember Rhonda McCune, Councilmember Don Griffin, Councilmember Kenneth Jones, Councilmember Don Bone, City Manager Kevin O'Rourke, and Finance Director Susan Temple accepted gifts in excess of \$250 from the bond consultant.

ANALYSIS

The Political Reform Act prohibits public officials from making, participating in making, or using their official positions to influence the making of any decision in which they have a financial interest. (Section 87100.) Councilmembers and employees of a local agency are public officials. (Section 82048.)

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 the effect upon the public generally on, among others, any person who has been a source of gifts to the official of \$250 or more in the 12 months preceding the decision.^{2/} (Section 87103(e).)

You have suggested that the gifts to the city officials might be excluded from the definition of "gift" under the Act because the city ultimately will repay the bond consultant from the bond sale proceeds. We do not agree. Regulation 18726.1(b)(1) (copy enclosed) provides that there is no gift if the donor is reimbursed within 30 days after the gift to the official is made. You have not informed us that reimbursement was provided within this time.

^{2/} "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.)

For disqualification to be required, the decision's effect must be reasonably foreseeable, material, and distinguishable from the effect on the public generally, as follows.

Foreseeability

The effect of a decision 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. (In re Thorner, 1 FPPC Ops. 198, copy enclosed.)

You point out correctly in your letter that the contractual relationship with the bond consultant was entered into prior to the acceptance of any gifts from the consultant. This agreement is not violative of the conflict-of-interest provisions of the Act. However, prior to the issuance of the bonds, a governmental decision will have to be reached. This decision will involve the bond consultant who has been a source of gifts to the public officials named above. For example, if the city decided to go ahead with the issuance of the bonds, the consultant would be benefited by payment of a certain percentage. It is thus foreseeable that the decision will affect the bond consultant.

Materiality

An effect on a business entity which is a source of income or gifts to an official will be considered material whenever the business entity is directly involved in a decision before the official's agency. (Regulation 18702.1(a)(1), copy enclosed.) Under Regulation 18702.1(a)(1), a public official may not participate in a decision if a person or business which has been a source of gifts of \$250 or more in the preceding 12 months "appears before" the official in connection with a particular decision.

A business entity, such as GRC Municipal Finance, Inc., "appears" before a public official when that entity, either personally or by an agent, initiates the proceeding in which the decision will be made by filing an application, claim, appeal or similar request, or is a named party in a proceeding such as a contract decision. (Regulation 18702.1(b).) Thus, because GRC Municipal Finance, Inc. has been a source of gifts to the aforementioned officials, those officials must disqualify themselves and abstain from participating in decisions involving the contractual relationship with GRC and the issuance of bonds for a period of 12 months from receipt of gifts totaling \$250 or more from GRC.

Public Generally

Section 87103 provides that an official is disqualified from participating in a governmental decision which would foreseeably and materially affect his or her economic interests only if the decision will affect the official's economic interests differently than it will affect the public generally. Regulation 18703 provides that a material financial effect of a governmental decision on an official's economic interest 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 a significant segment of the public. The decision to issue the bonds will not affect the public generally in substantially the same manner as it will affect the bond consultant. Thus, this exception is inapplicable to the instant situation. As a result, disqualification is required as discussed above.

Legally Required Participation

Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his or her participation is legally required for the action or decision to be made. (Section 87101.) The fact that an official's vote is needed to break a tie does not make the participation legally required. (Section 87101.)

However, in In re Hopkins (1977) 3 FPPC Ops. 107 (copy enclosed), the Commission stated that the rule of "legally required participation" does not always apply to a conflict of interest that arises because of gifts an official has accepted. The Commission held that the rule of "legally required participation" is inapplicable if it was reasonably foreseeable at the time the gift was received that the official would be asked to make or participate in making a governmental decision affecting the donor. (In re Hopkins, supra at 110.) The need for disqualification in the situations you have presented, therefore, should be assessed under the standards set forth in Government Code Sections 87100 and 87103 discussed above, without regard to the provisions of Section 87101. (In re Hopkins, 3 FPPC Ops. 107, 110, copy enclosed.) Because at the time the officials received gifts from the bond consultant it was reasonably foreseeable that decisions affecting the bond consultant would come before the officials for resolution, this exception does not apply and disqualification is required.^{3/}

^{3/} The advice on this issue presents significant policy questions and therefore will be provided to the Commission for consideration at its next meeting. We will inform you if the Commission directs us to change our advice. In the meantime, we have provided a conservative and cautious interpretation of the Act.

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I have enclosed, for your information, copies of two enforcement stipulations which concern conflicts of interest and bond issuance decisions. The Commission has approved both of these stipulations.

Should you have any questions regarding this matter, do not hesitate to contact me at (916) 322-5901.

Sincerely,

Diane Griffiths
General Counsel


By: Blanca M. Breeze
Counsel, Legal Division

DMG:BMB:ld

Enclosures



California Fair Political Practices Commission

April 28, 1989

James L. Markman
Law Office of
Markman, Arczynski, Hanson and Goldman
P. O. Box 1059
Brea, CA 92622-1059

Re: Your Request For Advice
Our File No. A-89-172

Dear Mr. Markman:

This is a correction to our response to your request for advice, our File No. A-89-172.

In your request for advice, you indicated that Councilmembers Don Bone and Kenneth Jones had been guests of a bond consultant at a dinner. The total cost of the dinner was \$70.22 per person. Thus, Mr. Bone and Mr. Jones received gifts from the bond consultant in the amount of \$70.22 each. We erroneously stated in our advice letter that between September 6, 1988, and December 7, 1988, Councilmember Kenneth Jones and Councilmember Don Bone, along with other officials, had received gifts of \$250 or more from the bond consultant.

Because, pursuant to the facts as presented in your request for advice, Councilmembers Bone and Jones did not receive gifts of \$250 or more from the bond consultant in the preceding 12 months, they may participate in decisions regarding the issuance of bonds even when it is reasonably foreseeable that the bonds will be issued through the bond consultant from whom the gift was received.

We regret any inconvenience our error may have caused you. Should you want to discuss the matter further, please do not hesitate to call me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

By: Blanca M. Breeze
Counsel, Legal Division

KED:BMB:plh

**AGREEMENT FOR FINANCIAL CONSULTING SERVICES
BETWEEN
CITY OF BUENA PARK
AND
GRC MUNICIPAL FINANCE, INC.**

THIS AGREEMENT is made and entered into this 6th day of September, 1988 by and between the City of Buena Park, a municipal corporation in the State of California (hereinafter called "City") and GRC Municipal Finance, Inc., a California Corporation (hereinafter called "GRC").

RECITALS

WHEREAS the Community Redevelopment Agency of the City of Buena Park (the "Agency") and the City are considering proceedings for the acquisition, construction and equipping of certain property to be used for municipal purposes of the City (the "Financing") and in connection with such proceedings the Agency and the City propose to form a joint powers authority pursuant to Article 1 of Chapter 5 of Division 7 of Title 1 of the Government Code of the State of California in order that such authority may exercise the powers authorized under the Marks-Roos Local Bond Pooling Act of 1985 (Government Code 6584 et seq.); and

WHEREAS the City, the Agency and the Authority require assistance from a financing consultant in the development of a sound and practical financing plan to implement the Financing by taking into consideration, program requirements, cash flow requirements, annual administrative costs, the allocation of those costs, statutory requirements and restrictions, and alternative methods, if applicable; and

WHEREAS GRC represents it is qualified to perform the services under this contract; and

WHEREAS the City at a regular meeting held on September 6, 1988 authorized the City Manager to enter into this Agreement,

NOW, THEREFORE, AND IN CONSIDERATION OF THE MUTUAL COVENANTS HEREINAFTER CONTAINED, it is mutually agreed between the parties as follows:

COVENANTS

1. APPOINTMENT OF GRC BY CITY

The City hereby appoints and designates GRC as its financing consultant for the purposes of assisting the City in the preparation and sale of the Financing.

2. SCOPE OF SERVICES

GRC will be responsible for performing the following:

1. Develop the Financing to precisely define the financing structure.
2. Assist in the selection of necessary program participants and the negotiation of the fees of these participants.
3. Review and comment on all security documents prepared by Bond Counsel.
4. Develop and monitor the schedule of activities during the Financing to assist the City in meeting anticipated deadlines.
5. Preparation of the text of the Official Statement and Official Notice of Sale and Bid Form to be issued in connection with the offering of the Bonds.
6. Cause to be mailed to prospective bidders the preliminary official statement and notice inviting bids and the bid form on the Bonds and notice inviting bids on the Investment Agreement.
7. Coordinate the plans of the bid opening, evaluate the bids submitted, check them for mathematical accuracy, advise the City of the bids and make a recommendation as to award.

8. Review the proposed arrangements for closing and delivery of the Bonds and review the planned investment of Bond proceeds.

3. COMPENSATION

For services relating to serving as financial consultant on the Financing, GRC shall be compensated a fixed fee of \$20,000 for Bonds issued up to \$2,000,000 principal amount, \$7,500 for each \$1,000,000 principal amount of Bonds in excess of \$2,000,000 up to \$4,000,000, \$5,000 for each \$1,000,000 principal amount of Bonds in excess of \$4,000,000 up to \$10,000,000, \$2,500 for each \$1,000,000 principal amount of Bonds in excess of \$10,000,000 up to \$15,000,000, and \$1,250 for each \$2,000,000 principal amount of Bonds in excess of \$15,000,000, payable upon delivery to the City of the Bond proceeds (GRC's fee is on a contingent basis only; that is, no fees are charged unless Bond proceeds are successfully delivered).

In addition, GRC shall be reimbursed for any out-of-pocket expenses.

4. COST THE RESPONSIBILITY OF THE CITY

There are several program costs that are required for completion of the financing that shall be the responsibility of the City. These include the cost of issuance of Bonds, including the cost of printing and distributing the official statement, notice of sale or other notices, the securities or other legal documents, accountants, rating services, bond counsel, special tax counsel and of any other experts retained by the City in connection with the financing.

5. COOPERATION BY CITY

City agrees to make available to GRC without cost, documentation and records of the City and the Agency pertaining to the financing, sufficient copies of the resolutions, preliminary and final official statements and other relevant material pertaining to the financing, the City, or the Bonds as reasonably may be required from time to time for the prompt and efficient performance by GRC of its obligations hereunder.

6. DESIGNATED REPRESENTATIVES

The following individuals are hereby designated as representatives of the City and GRC respectively to act as liaison between the parties.

City :	Kevin O'Rourke City of Buena Park
GRC:	Rod Gunn GRC Municipal Finance, Inc.

Any change in designated representatives will be promptly reported to the other party in order to insure proper coordination of the project.

7. NOTICES

Notice by the City to GRC shall be deemed delivered if sent by certified mail, return receipt requested or by Federal Express, to GRC Municipal Finance, Inc., 3010 Old Ranch Parkway, Suite 330, Seal Beach, CA 90740-2750. Notices by consultant to City shall be deemed delivered if sent by Certified Mail, return receipt requested or Federal Express, to the City Manager, City of Buena Park, 6650 Beach Blvd., Buena Park, CA 90622.

8. BUENA PARK FINANCING AUTHORITY

It is understood that this agreement shall inure to the benefit of and be binding upon the Authority in connection with the undertaking by the Authority of the financing.

9. TERMINATION

This agreement may be terminated by either party due to either party's failure to comply to the terms of this agreement, provided that written notice must be given not less than 30 days prior to such unilateral termination. In the event of such termination, GRC shall be compensated for all out-of-pocket expenses and for

actual time expended (based upon GRC's applicable hourly rate schedule) on behalf of City pursuant to this agreement.

10. INDEMNIFICATION CLAUSE

Neither party hereto shall be liable for any damages proximately resulting from the negligent or wrongful actions or omissions of the other parties, employees, agents or contractors performing under this agreement, and each party shall indemnify, defend and save harmless the other party from such damage or liability.

It is expressly understood and agreed by City that in performing the duties and activities under this agreement GRC is to be acting solely on their own behalf.

11. ENTIRE AGREEMENT

This agreement shall constitute the entire agreement between the parties. Any amendments to or clarification necessary to this agreement shall be in writing and acknowledged by both parties to the agreement.

In witness whereof that the parties hereto have caused this agreement to be executed by their duly authorized officials and representatives as of the day and year above written:

GRC Municipal Finance, Inc.

By: 

Rodney L. Gunn
Principal

City of Buena Park

By: 

Kevin O'Rourke,
City Manager



California Fair Political Practices Commission

March 22, 1989

James L. Markman
City Attorney
City of Buena Vista
Markman, Arozynski, Hanson & Goldman
P.O. Box 1059
Brea, CA 92622-1059

Re: Letter No. 89-172

Dear Mr. Markman:

Your letter requesting advice under the Political Reform Act was received on March 21, 1989 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 that reads "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh

Law Offices of
Markman, Arczynski, Hanson & Goldman
A Professional Corporation

JAMES L. MARKMAN
ANDREW V. ARCZYNSKI
RALPH D. HANSON
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NUMBER ONE CIVIC CENTER CIRCLE
P. O. BOX 1059
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March 17, 1989

Diane Griffith
Chief Counsel
Fair Political Practices Commission
428 "J" Street, Suite 800
P.O. Box 807
Sacramento, California 95804-0807

Re: Request for advice pursuant to California
Government Code Section 83114(b) as to
whether certain members of the City Council
of the City of Buena Park and certain staff
personnel of the City of Buena Park may
participate in decisions related to the
issuance of proposed bonds

Dear Ms. Griffith:

As indicated above, this letter should be considered a written request on behalf of officials of the City of Buena Park as to whether they may participate in decisions to approve and sell bonds for a civic center project without finding themselves in violation of Government Code Section 87100.

The facts upon which this advice letter request is based are stated as follows:

For some time, the City of Buena Park has been considering the construction of a civic center and/or a cultural center. In order to finance the project, during the fall of 1988, the City set in motion a structure for financing which would establish the Buena Park Financing Authority pursuant to the Marks-Roos Local Bond Pooling Act of 1985 (Government Code Sections 6584, et seq.). It was contemplated that utilizing that mechanism, the established Financing Authority would issue bonds to the highest bidder in a public bid process which would generate the construction of the project. The bonds would be serviced by the repayment of a debt between the Buena Park Financing Authority and the Buena Park Redevelopment Agency. The Redevelopment Agency (the proposed owner of the structures) would lease the structures to

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the City of Buena Park and use the lease payments to make its payments to the Financing Authority which in turn would make payments to the bond purchasers. Finally, the Buena Park Redevelopment Agency would agree to reimburse the City for the lease payments in question out of available tax increment funds generated within the redevelopment project area in which the civic/cultural center would be located. Even though there are three public entities described in the proposed structuring of the financing, the public officials guiding those public agencies are identical persons. That is, the City Council members of the City of Buena Park also are the members of the board of the Buena Park Redevelopment Agency and the members of the board of the Buena Park Financing Authority. Likewise, the City Manager of the City of Buena Park is the Executive Director of the Buena Park Redevelopment Agency and the Chief Operating Officer of the Buena Park Financing Authority. Finally, the City Treasurer of the City of Buena Park performs those services on behalf of the Redevelopment Agency and the Financing Authority.

In furtherance of the financing structure discussed above, the City of Buena Park entered into an agreement with GRC Municipal Finance, Inc. (hereinafter referred to as "the Bond Consultant") on September 6, 1988. The agreement was a typical consulting agreement for financial consultants dealing with bond issuance. The agreement provides for a contingent fee to be paid to the Bond Consultant upon issuance of the bonds. If the bonds are not issued and the Bond Consultant were to be terminated, the Bond Consultant still would be compensated for all out-of-pocket expenses and for actual time expended based upon the Bond Consultant's applicable hourly rate. A true and correct copy of the agreement in question is attached to this request for advice letter.

Subsequent to September 6, 1988, events occurred which constituted gifts made by the Bond Consultant to certain officials involved in the financing structure. Those gifts are described as follows:

1. On September 9, 1988, Buena Park City Manager Kevin O'Rourke and Buena Park Mayor and Council Member Donna Chessen accompanied the Bond Consultant to New York to effect a rating related to another bond issuance as to which the Bond Consultant had been hired previously. The Bond Consultant advanced the expenses related to that trip, which expenses were in an amount of \$2,078.00 for Mr. O'Rourke and \$2,078.00 for Mrs. Chessen. Those payments are referred to as advances in view of the fact that it was fully expected that upon the issuance of the bonds to which that trip was related, the advances would be reimbursed to the Bond Consultant. Such

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reimbursement did occur during the fall of 1988 when those bonds were issued other than with respect to an amount of \$142.40 each for Mrs. Chessen and Mr. O'Rourke. However, the reimbursement did not occur within thirty days of the time when expenditures were made. Accordingly, according to Fair Political Practices Commission regulations, the full amount is considered a gift for purposes of this request.

Subsequently, on October 11, 1988, the Bond Consultant hosted a dinner in San Francisco related to bond business. That dinner was attended by Mr. O'Rourke, Mrs. Chessen and Mrs. Susan Temple, Finance Director for the City of Buena Park. The cost of the dinner was \$106.18 per person which constituted a gift to those three city officials.

On October 17, 1988, the Bond Consultant hosted a dinner related to the League of California Cities Convention. The dinner was attended by Council Member Rhonda McCune, Mrs. Chessen, Council Member Don Griffin and his wife, Council Member Kenneth Jones, Council Member Don Bone and Mr. O'Rourke. The cost of the dinner constituted a gift in the amount of \$70.22 per person attending, or \$140.44 per couple.

On October 28, 1988, the Bond Consultant hosted another dinner involving City of Buena Park officials. That dinner was attended by Mrs. Chessen and her spouse, Mr. Griffin and his spouse, Ms. McCune and a guest, Mr. O'Rourke, and Mrs. Temple and her spouse. That dinner constituted a gift, the value of which was \$98.00 per person and \$196.00 per couple.

On December 7, 1988, the Bond Consultant accompanied Ms. McCune, Mr. O'Rourke and Mrs. Temple to New York to obtain a rating on the proposed bonds which are the subject of this request letter. The Bond Consultant advanced the cost of that trip with the full intent of recovering those costs upon issuance of the bonds. However, the reimbursement has not occurred to date and, therefore, would be made more than thirty days after the advances in question. Accordingly, under Fair Political Practices Commission regulations, the advances are considered gifts. The value of the gifts in the instance of this trip is an amount of \$2,500.00 per person.

In summary, subsequent to September 6, 1988, the date upon which the Bond Consultant was employed with respect to the bond issuance in question, the City Manager, Mr. O'Rourke, Council Members McCune, Chessen and Griffin and the City's Finance Director, Mrs. Temple, all have received gifts in excess of \$250.00, the last of which gifts occurred during December of 1988.

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The question as to which advice is requested in this letter is whether city officials Chessen, Griffin, McCune, O'Rourke and Temple may participate in actions or act to approve the bonds for the civic/cultural center project and sell those bonds prior to the lapse of one year from the time they received gifts from the Bond Consultant exceeding \$250.00. This office requires this advice due to the fact that the obligations of the Bond Consultant and the payments for discharge of those obligations were established on September 6, 1988, a date predating the Bond Consultant's making any gifts to any city officials. Furthermore, assuming performance by the Bond Consultant, it seems to the undersigned that the City, the Agency and the Financing Authority have undertaken a covenant of good faith and fair dealing to process the financing for the project in question, assuming that the Bond Consultant performs and that the structure of the bonds, the interest rate and the sales price of the bonds are acceptable to the public officials involved and the public officials involved make a decision to go forward with the project in question. Stated simply, it seems to the undersigned that the obligations of the parties could be considered to have been established in the September 6, 1988 contract and the performance of subsequent acts to discharge the obligations stated in the contract should not be considered violations of Section 87100 due to gifts received subsequent to the contract being entered into. The undersigned earnestly solicits the advice of the Fair Political Practices Commission on the issue presented herein.

Your prompt attention to this request for advice will be appreciated.

Very truly yours,



James L. Markman
City Attorney, City of Buena Park
and General Counsel, Buena Park
Redevelopment Agency and Counsel
to Buena Park Financing Authority

JLM:sjk
Encl.
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cc: Kevin O'Rourke