



California Fair Political Practices Commission

July 18, 1989

Honorable John Woodbury
Director, Alameda-Contra Costa
Transit District
1600 Franklin Street
Oakland, CA 94612

Re: Your Request for Informal Assistance
Our File No. I-89-302

Dear Mr. Woodbury:

This is in response to your request for advice regarding your responsibilities under the conflict-of-interest provisions of the Political Reform Act.¹ This letter confirms the tentative advice given to you during our telephone conversation on Thursday, June 8. Because your question does not involve a specific pending decision, we are treating your request as one for informal assistance pursuant to Regulation 18329(c) (copy enclosed).²

QUESTION

Does your employment with the City of Alameda (hereafter "city") as an associate planner, your position as a member of the Board of Directors of the Alameda-Contra Costa Transit District (hereafter "AC Transit"), and your anticipated employment as the editor of the newsletter of the Bay Chapter of the Sierra Club (hereafter "Sierra Club newsletter") create a conflict of interest?

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 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).)

CONCLUSION

Your employment with the city as an associate planner does not create a conflict of interest with your activities as an elected member of the Board of Directors of AC Transit. Your employment as the editor of the Sierra Club newsletter would require that you refrain from making, participating in, or using your official positions, as an associate planner or as an AC Transit board member, to influence a governmental decision which would foreseeably and materially affect the Sierra Club.

Our advice is limited to the provisions of the Political Reform Act. You should contact counsel at AC Transit or your city attorney regarding the application of Section 1090 of the Government Code and the doctrine of incompatible offices.

FACTS

You are an elected member of the Board of Directors of AC Transit. In addition, you are an associate planner for the city. Finally, you anticipate becoming the editor of the Sierra Club newsletter. The position of editor is a paid position.

ANALYSIS

Section 87100 prohibits any 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,³ or on:

(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 (c) and (d).

³ An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

You are a public official. (Section 82048.) Therefore you may not make, participate in making, or in any way attempt to influence a governmental decision in which you have a financial interest.

Presumably, you receive a salary from your employment as an associate planner for the city, and as a member of the Board of AC Transit. However, Section 82030(b)(2) excludes from the definition of income any salary and reimbursement for expenses or per diem received from a state, local or federal government agency. Therefore any salary you receive from either AC Transit or the city does not constitute a disqualifying interest pursuant to Section 87103(c). However salary received from the Sierra Club does constitute "income."⁴ (Section 82030.) Accordingly, you may not make, participate in making, or in any way attempt to influence a governmental decision which would have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on Sierra Club.⁵ (Section 87103(c).)

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPFC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest, it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's financial interest in a decision is "material" as required by Section 87103. If the official's financial interest is directly involved in the decision, then

⁴ We assume that your salary as editor of the newsletter will be at least \$250 per year, thus above the threshold established by Section 87103(c).

⁵ Your possible employment as editor of the Sierra Club newsletter does not constitute a disqualifying interest pursuant to 87103(d). Section 82005 defines a "business entity" as any organization operated for profit. Since the Sierra Club is a non-profit organization, it is not a "business entity" within the meaning of Section 87103(d).

Regulation 18702.1 (copy enclosed) applies to determine materiality.⁶ If, on the other hand, the official's financial interest is indirectly involved in the decision, then Regulations 18702.2 through 18702.6 (copies enclosed) would apply to determine if the effect of the decision is material. In this instance, for example, if the source of income to you, the Sierra Club, was indirectly involved in the governmental decision, Regulation 18702.5 would apply to determine whether the effect of the decision on Sierra Club is material.

Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87103.)⁷ A material financial effect 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. (Regulation 18703, copy enclosed.)

I have attempted to give you general information about the conflict-of-interest provisions of the Political Reform Act. Other provisions of the law such as Section 1090 of the Government Code or the general doctrine of incompatible offices may have some

⁶ Regulation 18702.1 would require that a public official disqualify himself or herself if there is a nexus between the purpose for which the official receives income and the governmental decision. Regulation 18702.1(d) defines the term "nexus" as follows:

There is a nexus between the purpose for which an official receives income and a governmental decision if the official receives income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.

Regulation 18702.1(d).

Thus if a governmental decision you are involved with furthers or hinders a goal or purpose which you are paid to achieve in your employment with the Sierra Club, you must disqualify yourself from participating in the decision.

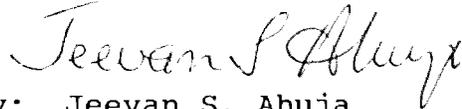
⁷ For the Alameda-Contra Costa Transit District, the public consists of all residents in the jurisdiction of the district. For the City of Alameda, the public consists of all residents of the city.

bearing on your situation.⁸ Please contact counsel at AC Transit or your city attorney for advice as to these matters.

I trust this letter has provided you with the guidance you requested. If you have any further questions, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel



By: Jeevan S. Ahuja
Counsel, Legal Division

KED:JSA:aa

Enclosures

⁸ As I mentioned to you during our telephone conversation on June 8, the Attorney General's opinion at 68 Ops. Atty. Gen. 337 (1985), (copy enclosed), addresses some of the issues pertaining to your question about holding two offices simultaneously. You should contact counsel at AC Transit or your city attorney for advice as to those issues. During our telephone conversation you questioned whether an honorarium of \$250 you have received from the University of California raises any conflict-of-interest issues. Since University of California is now a source of income to you, you must disqualify yourself from making, participating in making, or in any way attempting to influence a governmental decision which will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on the University of California. (Section 87103(c).)

May 15, 1989

Fair Political Practices Commission
428 J Street Suite 800
PO Box 807
Sacramento, California 95804

MAY 15 3 21 1989

RE: Conflict of Interest Opinion

I am writing to obtain a opinion, pursuant to Government Code Section 83114, on whether I may have a Conflict of Interest in connection with my current or possible future employment. I am currently an elected member of the Board of Directors of the AC Transit District. I am also currently an Associate Planner with the City of Alameda. In the near future, I may become the paid editor of a newsletter for the Bay Chapter of the Sierra Club. In the paragraphs below, I will outline my actual or potential role in decisions at AC Transit, the City of Alameda, and the Sierra Club.

AC Transit

As a member of the Board of Directors, I participate in discussions of, and cast votes on, all aspects of policy regarding the provision of transit service within the AC Transit service area, which includes the City of Alameda. The District is in the process of considering service changes which in part affect the City of Alameda, and about which in part the City of Alameda has taken supportive or opposing positions. In addition, the District may take a position for or against, and potentially be a bidder on the provision of, a shuttle service which is proposed jointly by the City of Alameda and the Bay Area Rapid Transit District.

City of Alameda

I am an Associate Planner for the City of Alameda. I am not the City employee who has primary responsibility for transportation planning. However, my role in some situations may involve transportation and transit issues. For example, I may manage contracts with consultants who are reviewing impacts of proposed developments. Such reviews may result in staff recommendations to mitigate traffic impacts by enhancing use of public transit, such as through the required purchase of AC Transit bus passes.

Secondly, in reviewing development proposals, I may be involved in discussing with project applicants, and making recommendations to the Planning Board, on how to use in-lieu parking fees; the use of in-lieu fees may include support for public transit, such as through the provision of bus shelters for AC Transit buses, or the purchase of bus passes.

Third, in the development of the proposed shuttle service by the

City of Alameda and the Bay Area Rapid Transit District, I may be requested by my employer to assist by providing information on what effect the service may have on AC Transit, and what position AC Transit may have, either currently or in the future. I may also find myself in the position of being told what position the City of Alameda would like AC Transit to take.

Sierra Club

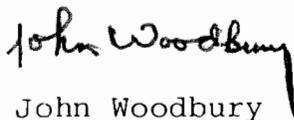
If I accept employment with the Bay Chapter of the Sierra Club (a non-tax exempt non-profit organization), my role would involve researching, writing, selecting and editing articles, and publishing a newsletter which is delivered to all Club members, plus some non-members. Subjects covered could include transportation, and involve providing information on Club positions on AC Transit service. Policies of the Club are made by a separate, elected Executive Committee. Staff, including the newsletter editor, would be involved in recommending policies to the Executive Committee. The Executive Committee may hope and want to ask that I would support Club positions in my role as a Director at AC Transit. However, if it would legally make a difference, I could probably obtain an employment contract which specifically stated that my employment was not contingent on how I acted or voted at AC Transit.

Urgency of Response

The above issues as they relate to the City of Alameda have immediate relevance. The issues as they relate to the Sierra Club will be critical within the next three to four weeks. I understand that opinions are generally available within 21 days. Given the urgency of these questions, I hope and request that you provide a written response within or faster than that time frame. I will be calling your office prior to your receipt of this letter to see what guidance you can provide immediately, pending preparation of a written response.

Thank you in advance for your attention to this matter. If you have any questions, you may reach me during office hours at (415) 748-4554.

Sincerely,


John Woodbury

May 9, 1989

TO: DIRECTOR JOHN WOODBURY
FROM: RICHARD L. KASSIS
SUBJECT: CONFLICTS OF INTEREST

You have requested from me a written opinion concerning potential conflicts of interest which allegedly could result from your dual positions as an elected member of the District's Board of Directors and your employment as a planner for the City of Alameda. You have raised three separate inquiries:

- (1) Given that you work for the City of Alameda, and that Alameda has taken an official position disagreeing with some aspects of the Comprehensive Service Plan, is there a conflict which would not allow you to participate in a discussion or vote on those aspects of the CSP as an AC Transit Director?
- (2) Given your employment and elected positions, is a conflict created by your management for the city of a proposed development project which would contain transportation elements favorable to AC Transit (such as a requirement that the operator of the development purchase transit passes for the employees of the development)?
- (3) Given your employment and elected positions, is a conflict created between the two positions by virtue of discussions between BART and the City of Alameda involving shuttle service to BART stations which may compete with AC Transit buses?

The term "conflict of interest" is often used both overbroadly and erroneously. As you can see from page four of the attached pamphlet concerning the Political Reform Act, an economic conflict of interest exists when all four the following elements exist:

1. The official makes, participates in, or uses his or her official position to influence a governmental decision;
2. It is foreseeable that the decision will affect the official economic interest;
3. The effect of the decision on the official's economic interest will be material;
4. The effect of the decision on the official's economic interest will be distinguishable from its effect on the public generally.

With regard to the three areas of your inquiry, certainly your potential staff involvement from the City of Alameda (if you make recommendations to decision-makers) and your decision-making capacity for the District could be construed as "making" or "participating in" the making of a decision. Of course, if you have no involvement at either public entity, then this element would not be satisfied and no conflict would exist. However, even if your activities on behalf of the two agencies did involve making or participating in a governmental decision, those potential decisions will not affect your economic interest. That is because the Political Reform Act specifically excludes from the definition of "income" compensation received from public entities such as the City of Alameda and AC Transit (Government Code Section 82030(b)(2)). Further, neither public entity is a "business entity:" within the meaning of Government Code Section 82005.

Thus, because your compensation from both the City of Alameda and AC Transit does not appear to be "income" under the Political Reform Act, you have no economic interest to be affected by your participation at either agency. Because this second requirement for creating a conflict of interest does not exist, it is my opinion that you have no disqualifying economic interest at either agency that would prevent your participation in the decision-making process in the three areas about which you have inquired. Of course, concerning a potential conflict specific to Alameda, such an inquiry would best be directed to your city attorney.

Furthermore, there are provisions within the Act which would allow you to seek final and determinative advice or opinions from the Fair Political Practice Commission (Government Code Section 83114). If these types of issues are likely to arise often during your dual tenure, you may

want to consider seeking such a formal response for your own guidance.

Is there some other body of law which could be violated by your dual positions? There is a doctrine in the common law of "incompatible offices" which can be applied when one person holds two different but overlapping public offices. For example, the Attorney General has held that one person may not simultaneously hold the offices of director of a public utility district and the board of supervisor of the county in which the district is located (Opinions of the Attorney General 64:137). However, since you are an employee of the City of Alameda and not an elected official, I see no direct incompatibility with that employed position and your elected position as a director of AC Transit pursuant to the "incompatible offices" doctrine. There is one contrary case discussed in an opinion of the Attorney General (Opinions of the Attorney General, 63:710 at 717) concerning a person serving as a member of a city council in New Mexico and as an employee of the state (Water Resource Manager). There the court found incompatibility, despite the fact it was not two appointed or elected offices. However, that decision involved a state statute that specifically prohibited such dual roles, whereas no similar California blanket prohibition exists. While I believe this incompatibility of office doctrine does not apply to your situation, it would be more definitive to seek an opinion of the Attorney General if you so desire. Such an approach could well put all legal issues to rest for the future. But, as you know, the process for obtaining an opinion from the Attorney General is more cumbersome.

Finally, one other statutory area that is applicable involves the provisions of Government Code Section 1126, et seq. This area of California law deals with "inconsistent, incompatible or conflicting employment activity" by a local agency employee. Section 1126 prohibits a public employee from engaging in employment or activity for compensation which is incompatible or in conflict with the employee's agency duties or with the functions of the agency itself. Under this statute, an agency is allowed to define what activities are inconsistent or incompatible. In this regard, I suggest you consult the Alameda City Attorney and/or City Manager to determine their rules (if any) since AC Transit has no laws or rules which would prohibit a director from working for another public agency. Further, I would suggest you obtain actual written permission from the city to serve as a Director for AC Transit.

In conclusion, absent some City of Alameda prohibition that would bar your service as an AC Transit Director, I see no conflict of interest or other limitation upon your serving AC Transit while also employed by Alameda. You may wish to seek a more definitive opinion as to a financial conflict of interest from the Fair Political Practice Commission, and guidance on the "incompatibility" concern from your City Attorney and/or the Attorney General. You may also want to seek actual written permission from the City of Alameda to serve as a Director for the Alameda-Contra Costa Transit District. In addition, so as to minimize even the appearance of a conflict, you may want to consider asking your employer to divert the transportation elements of work you are involved in to other staff members.

Finally, even if no legal conflict exists, if participating in the discussion or voting upon certain matters appears to you to be a conflict, you can always choose to state your reasons and abstain.

RLK

sme



California Fair Political Practices Commission

May 23, 1989

John Woodbury
246 John Street
Oakland, CA 94611

Re: Letter No. 89-302

Dear Mr. Woodbury:

Your letter requesting advice under the Political Reform Act was received on May 19, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeevan Ahuja 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,

Scott Halloran for
Kathryn E. Donovan
General Counsel

KED:plh

89-302

May 15, 1989

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428 J Street Suite 800
PO Box 807
Sacramento, California 95804

MAY 19 8 24 AM '89

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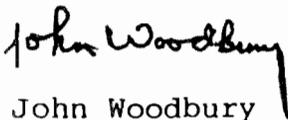
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May 9, 1989

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RLK

sme

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July 22, 1988

Fair Political Practices Commission
428 "J" Street
Sacramento, CA 95814

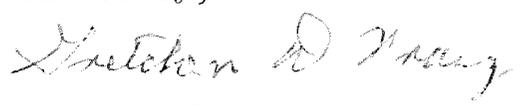
Gentlemen:

After reading, and rereading several times, the campaign material sent to me by the Riverside County Elections Department (all 140 pages), neither my husband nor I have been able to figure out where or not I am supposed to fill out a campaign disclosure statement. And, if I am, where is the proper form?

I am a member, elected, of the Riverside County Republican Central Committee. Have never spent or collected any money on behalf of my campaign. However, I have contributed to other campaigns or committees in excess of \$1,000.

For this reason, attached is a list of my contributions.

Sincerely,



Gretchen D. Franz
76-757 California Drive
Palm Desert, CA 92260
Riverside County
4th Supervisorial District

July 22, 1988

GRETCHEN D. FRANZ

RIVERSIDE COUNTY REPUBLICAN
CENTRAL COMMITTEE 4TH DISTRICT

76-757 California Drive, Palm Desert, CA 92260
(619) 345-3561

Retired

2/27/88	Committee to elect Myron Cole Rancho Mirage City Council	\$100.00
3/16/88	George Bush campaign	250.00
3/24/88	Bill Bradley 76 Club, State Assembly	100.00
4/25/88	Re-elect Al McCandless for Congress	250.00
5/27/88	California Republican Party Reception in Riverside	<u>150.00</u>
		\$850.00
	Total amount of contributions under \$100	<u>\$474.00</u>
		\$1,324.00

Gretchen D Franz



California Fair Political Practices Commission

August 2, 1988

Gretchen D. Franz
76-757 California Drive
Palm Desert, CA 92260

Re: 88-302

Dear Ms. Franz:

Your letter requesting advice under the Political Reform Act was received on July 20, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5662.

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 the 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,

Jeanne Pritchard
Jeanne Pritchard
Chief
Technical Assistance and Analysis
Division

JP:plh