



California Fair Political Practices Commission

August 3, 1989

John Cook
City Attorney
955 School Street
P.O. Box 660
Napa, CA 94559-0660

Re: Your Request for Advice
Our File No. A-89-401

Dear Mr. Cook:

You have requested advice on behalf of Napa City Councilmember Ed Barwick concerning his disclosure responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} While we are providing you with formal written advice concerning Councilmember Barwick's disclosure responsibilities, please be aware that the portions of this letter dealing with potential conflicts of interest and the "public generally" exception are merely informal guidelines for your information.^{2/} The Commission's policy is to decline to provide formal written advice where the request concerns a purely hypothetical situation. (Regulation 18329(b)(8)(D), copy enclosed.)

QUESTIONS

1. Must Councilmember Barwick disclose the names of sources of \$10,000 or more in income to his wholly owned business on his statement of economic interests?

2. May Councilmember Barwick participate in decisions that would foreseeably and materially affect sources of income to him and his business?

^{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. (Section 83114; Regulation 18329(c)(3).)

3. Would the "public generally" exception permit Councilmember Barwick to participate in decisions that affect sources of income to the councilmember and his business?

CONCLUSIONS

1. Councilmember Barwick must disclose the identity and other required information of any person or business entity that is a source of income to him personally in the amount of \$250 or more in a calendar year. In addition, Councilmember Barwick must disclose the name of every person or business from which his dealership received payments of \$10,000 or more during a calendar year.

2. As a city councilmember, Councilmember Barwick may not participate in any decision in which a source of income of \$250 or more in the preceding 12 months is directly involved if it is foreseeable that there will be a financial effect on the source. In addition, Councilmember Barwick may not participate in any decision that will foreseeably and materially affect a source of income indirectly.

3. Councilmember Barwick may participate in decisions where he has a conflict of interest only if (1) the customers of his business in the last 12 months constitute 10 percent or more of the population or households of the jurisdiction, or (2) the retail customers of his business during the preceding 12 months number at least 10,000, and the amount of income received from the specific source of income involved in the decision is not distinguishable from the amount of income received from his other retail customers. Whether Councilmember Barwick's business meets these requirements is a factual question that cannot be determined without more specific information.

FACTS

Ed Barwick is a city councilmember for the City of Napa. Councilmember Barwick and his wife are also sole owners of Ed Barwick Chrysler-Plymouth, Inc. You have been asked by Councilmember Barwick to request this written advice on his behalf concerning the councilmember's disclosure obligations under the Act. Specifically, you have asked about the councilmember's obligation to disclose the names of those persons and businesses that have been sources of income to his business of \$10,000 or more on his statement of economic interests.

You have informed us that Ed Barwick Chrysler-Plymouth, Inc. is the eighth largest Chrysler dealership in the United States. Councilmember Barwick's dealership sells between 5,000 to 6,000 automobiles at prices of \$10,000 or more. The councilmember is concerned that the disclosure requirements are unduly cumbersome and unwarranted.

ANALYSIS

Disclosure

The Political Reform Act was enacted by the people of the State of California by initiative in 1974. The purpose for the disclosure and disqualification provisions of the Act was to ensure that public officials, whether elected or appointed, would perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).)

Thus, under the Act, every public official must disclose all his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c), 87200-87313.) As a city councilmember for the City of Napa, Councilmember Barwick is a public official (Section 82048) and, consequently, is required to disclose certain statutorily specified investments, real property interests, sources of income and sources of gifts.

You have asked specifically about Councilmember Barwick's obligation to disclose income to his solely owned automobile dealership. "Income" is defined in Section 82030 as:

... a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse. Income also includes an outstanding loan. 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. "Income," other than a gift, does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title.

(Emphasis added.)

Thus, any person or business that has made any payment to Councilmember Barwick is a source of income to the councilmember for the purposes of the disclosure and disqualification provisions

of the Act. In addition, Section 82030 provides that the 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. (Russell Advice Letter, No. A-88-484, copy enclosed.) Thus, those persons that purchased automobiles from Councilmember Barwick's wholly owned dealership are sources of income to the councilmember.

Consistent with this statutory definition, Section 87207(b) provides:

(b) When the filer's pro rata share of income to a business entity, including income to a sole proprietorship, is required to be reported under this article, the statement shall contain:

(1) The name, address, and a general description of the business activity of the business entity;

(2) The name of every person from whom the business entity received payments if the filer's pro rata share of gross receipts from such person was equal to or greater than ten thousand dollars (\$10,000) during a calendar year.

In 1979, in Hays v. Wood (25 Cal. 3d 772), the California Supreme Court upheld the validity of Section 87207(b). The filer in that case claimed that Section 87207(b) was unnecessary and overly broad. The Supreme Court held:

... we find no basis for concluding that such a requirement necessarily results in unwarranted and unconstitutional intrusion into protected zones of privacy. On the contrary, we believe that inquiry into actual sources bears a demonstrable relation to the substantial governmental interests here involved. (Citation omitted.) It is after all the clients or customers of a business entity in which a public official has a substantial interest who present the greatest potential source of conflicting obligations and interests... Acknowledging, as we do, the public interest in avoiding such conflicts, and balancing that interest against the intrusion on recognized private rights, we do not find the statute invalid on grounds that it requires disclosure of the actual sources of business income.

Hays v. Wood, supra, at 783.

In summation, Councilmember Barwick must disclose the identity and other required information of any person or business entity that is a source of income to him personally in the amount of \$250 in a calendar year. In addition, Councilmember Barwick must disclose the name of every person or business from which his dealership received payments of \$10,000 during a calendar year.^{3/}

In your letter, you suggest that Section 87103.5 exempts Councilmember Barwick from disclosing the names of his customers. Unfortunately, Section 87103.5 does not govern disclosure of sources of income. It does provide an exemption from disqualification which may apply to Councilmember Barwick's situation. (Levy Advice Letter, No. A-87-222, copy enclosed.) Based on this conclusion, we would advise that Councilmember Barwick amend his statement of economic interests as soon as possible.

Disqualification

You have also asked about the potential for disqualification under the Act. Because you have not asked about a specific governmental decision, we can only provide the following guidelines for your information.

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 specifies that a public 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 on the public generally, on the official or a member of his or her immediate family or on any source of income, aggregating \$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.

Thus, as stated above, any person or business that has made any payment to Councilmember Barwick or his business is a source of income to Councilmember Barwick for the purposes of Section 82030. Moreover, if any person or business has been a source of income to Councilmember Barwick or his business of \$250 or more within 12 months prior to the decision, the person or business is a potentially disqualifying financial interest as defined in Section 87103.^{4/} Consequently, Councilmember Barwick may not

^{3/} Section 82030 does not distinguish between retail income and wholesale income.

^{4/} Although Councilmember Barwick is only required to disclose sources of income to his business of \$10,000 or more, Section 87103(c) sets a \$250 threshold for disqualification purposes. Thus, whether or not the councilmember is required to disclose the income, it may still be a disqualifying interest under the Act. (Levy Advice Letter, No. A-87-222.)

participate in any decision if it is reasonably foreseeable that the decision will have a material financial effect on that person or business.

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

In addition, the foreseeable effect on Councilmember Barwick's source of income must also be material to require disqualification. The test for material financial effect differs depending on the specific circumstances of each decision. For example, where a source of income is directly before the city council, Regulation 18702.1(a) (copy enclosed) provides that the effect of the decision on a source of income is deemed material and disqualification is required.^{5/} (Combs Advice Letter, No. A-89-177, copy enclosed.)

Where the source of income is not directly before the city council, but may be indirectly affected, Regulations 18702.2 and 18702.6 (copies enclosed) apply. Regulation 18702.6 applies to situations where a decision affects an individual who is a source of income of \$250 or more. Regulation 18702.2 provides different standards of materiality which apply to sources of income that are business entities under the following circumstances: Where a business entity is listed on the New York Stock Exchange or American Stock Exchange or Fortune Magazine Directory of the 500 largest U.S. Industrial Corporations, the standards in Regulation 18702.2(a) and (d)) would apply. Where the business entity is listed on the National Association of Securities Dealers National Market List, Regulation 18702.2(b), (e) and (f) would apply. Where the business entity is listed on the Pacific Stock Exchange, Regulation 18702.2(c) applies.

Regulation 18702.2(g) provides materiality standards for smaller business entities. The effect of a decision is material where:

^{5/} A source of income is directly before the board of trustees when the source initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or the subject of, the proceeding. A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity. (Regulation 18702.1(b).)

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

(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 the increase or decrease in the value of assets or liabilities of \$10,000 or more.

Finally, where a source of income is a person and not directly before the city council, Regulation 18702.6 provides:

The effect of a decision is material as to an individual who is a source of income or gifts to an official if any of the following applies:

(a) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

(b) The decision will affect the individual's real property interest in a manner that is considered material under Section 18702.3 or Section 18702.4.^{6/}

In summation, as a city councilmember, Councilmember Barwick may not participate in any decision in which a source of income of \$250 or more in the preceding 12 months is directly involved and it is foreseeable that there will be a financial effect on the source. In addition, Councilmember Barwick may not participate in any decision that will foreseeably and materially affect a source of income indirectly. The materiality of the effect would be determined by examining the extent of the foreseeable financial effect on the source of income.

The Public Generally Exception

For the "public generally" exception to apply, a decision must affect the official's interests in substantially the same manner as it would affect a significant segment of the public. (Regulation 18703, copy enclosed.) The "public" consists of the entire jurisdiction of the agency in question. (In re Owen (1976)

^{6/} Regulation 18702.3 and 18702.4 have been enclosed for your information.

2 FPPC Ops. 77, copy enclosed.) This is so because all the residents of the jurisdiction are constituents of the official.

Section 87103.5 provides a very specific "public generally exception" for retail businesses where customers of the business constitute a significant segment of the public, and the income received from the specific source of income involved in the decision is not distinguishable from income received from other retail customers. Regulation 18703.5 (copy enclosed) defines "significant segment" for the purposes of Section 87103.5 as follows:

(1) The retail customers of the business entity during the proceeding 12 months are sufficient in number to equal 10 percent or more of the population or households of the jurisdiction;^{7/}
or

(2) The retail customers of the business entity during the proceeding 12 months number at least 10,000.

Of course the issue of whether Councilmember Barwick's business meets the requirements of Section 87103.5 and Regulation 18703.5 necessarily a factual question. Thus, we cannot make this determination without specific facts as to the decision and participants, as well as more information about the councilmember's business. However, if the councilmember's business did meet the requirements of these provisions, the councilmember could participate despite any foreseeable and material effects on his retail customers. Please note, however, that even if this provision permitted the councilmember to participate in a particular governmental decision, he is not exempted from the disclosure requirements discussed above.

I hope that this answers your questions. If you have any further questions regarding this matter or a specific decision

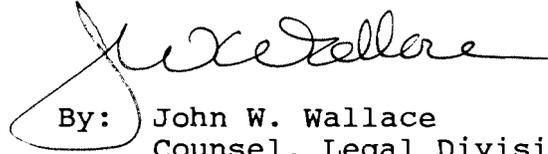
^{7/} By definition, Regulation 18703.5 only considers retail sales. Thus wholesale customers would not be considered in the determination of whether the customers of the councilmember's business in fact constitute a significant segment of the public generally.

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that you would like advice on, please feel free to contact me at
(916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

A handwritten signature in cursive script, appearing to read "John W. Wallace". The signature is written in black ink and is positioned above the typed name and title.

By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh

Enclosures



CITY of NAPA

June 21, 1989

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CITY ATTORNEY
955 School Street
PO Box 660
Napa, California 94559-0660
(707) 257-9516

Kathryn Donovan
General Counsel
Fair Political Practices Commission
P. O. Box 807
428 J Street
Sacramento, CA 95804

Re: Request for Written Opinion

Dear Ms. Donovan:

This letter is written on behalf of City of Napa Councilman Ed Barwick.

On June 14, 1989 Colleen McGee of your office sent Mr. Barwick a letter which requested that he provide in his disclosure statement the name of each individual to whom he sold an automobile if the sale price was \$10,000 or more. Since Mr. Barwick and his wife are the sole owners of Ed Barwick Chrysler-Plymouth Inc., his pro-rata share of sales is 100%. Thus, each vehicle sold for \$10,000 or more would be reportable as requested by Colleen McGee.

It is believed that such disclosure is both unduly cumbersome and not warranted by the Fair Political Practices Act. Mr. Barwick's corporation is reported in published journals as the eighth largest Chrysler dealer in the United States. Mr. Barwick informs me that his business sells between 5,000 - 6,000 vehicles per year at a price of \$10,000 or more. Obviously it would be extremely cumbersome, time consuming and practically impossible to disclose and apply such a bulky statement. The corporation has the sole franchise for Napa County. Figures are not available for the exact distribution of sales within the City of Napa as opposed to the County of Napa. However, the majority of the population in the County is located within the City of Napa.

It is believed that your office should apply the "public in general" exception to Mr. Barwick. Government Code Section 87103.5 provides that retail customers of a business under certain circumstances can be considered not to be a source of income. Unless your office applies this exception to Mr. Barwick, it will be practically impossible to factually determine his possible

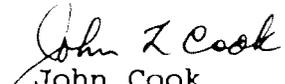
Kathryn Donovan
June 21, 1989
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conflicts of interest with regard to land use matters coming before the City Council. FPPC regulations require that concentric circles radiating outward from a project application be considered for possible conflicts of interest. Thus, Mr. Barwick would have to determine all the names of all residents falling within those various concentric circles and match it to the very large list of customers that go through his business each year.

I would also direct your attention to the aspect of his business wherein he sells vehicles to other corporations on a wholesale basis, such as to utility companies and rental car companies. The question is whether a business that sells wholesale must disclose each and every one of its customers where their gross payments aggregate \$10,000 or more.

I also ask your written confirmation that Mr. Barwick's timeframe for responding to Colleen McGee's June 14, 1989 letter has been indefinitely suspended as was indicated to him in the telephone conversation by Linda Morrow of your office.

Very truly yours,


John Cook
City Attorney

JC/bp

cc: Councilman Ed Barwick



CITY of NAPA

June 21, 1989

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955 School Street
PO Box 660
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General Counsel
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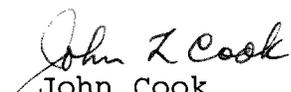
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Very truly yours,


John Cook
City Attorney

JC/bp

cc: Councilman Ed Barwick



California Fair Political Practices Commission

July 6, 1989

John Cook
City Attorney
P.O. Box 660
Napa, CA 94559-0660

Re: Letter No. 89-401

Dear Mr. Cook:

Your letter requesting advice under the Political Reform Act was received on July 5, 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,

A handwritten signature in cursive script, appearing to read "Kathryn E. Donovan".

Kathryn E. Donovan
General Counsel

KED:plh