



# California Fair Political Practices Commission

November 6, 1991

Gerald Weisbach  
Natkin & Weisbach  
568 Howard Street, Suite 300  
Sacramento, CA 94105-3002

Re: Your Request For Advice  
Our File No. I-89-549

Dear Mr. Weisbach:

You will recall that on September 22, 1989 you requested advice under the conflict of interest provisions of the Political Reform Act.<sup>1/</sup> In that request you indicated that your law firm represents numerous architects, engineers and landscape architects. One of your clients has been asked to disclose his or her financial interests as a consultant to a governmental agency. Such request had not previously been requested. You are asking under what circumstances architects, engineers and landscape architects would be consultants subject to the disclosure and disqualification provisions of the Political Reform Act (the "Act").<sup>2/</sup>

In your letter, you presented various contract scenarios between architects/engineers and governmental agencies. For each scenario, you are asking if the architect or engineer are consultants under the Act. Since the questions you pose are

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<sup>1/</sup> Your request for advice was misplaced by this agency. We apologize for this oversight. When we discovered the letter, your office was contacted to determine if this advice was still necessary. We were advised by "Donna" of your staff that your copy of the request had been sent to storage. A copy of your request is enclosed.

<sup>2/</sup> 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.

November 6, 1991

Page Two

hypothetical in nature, we are unable to give you formal written advice.<sup>3/</sup> We will however provide you with guidance and general information which you may then apply to your scenarios.

Section 87300 requires every agency to adopt and promulgate a conflict of interest code. A conflict of interest code is a set of rules or regulations which specifically designates positions within the agency which make or participate in the making of decisions which may foreseeably have a material effect on any financial interest. For each enumerated position, the code must set out the specific types of investments, business positions, interests in real property and income which are reportable. (Sections 82014, 87302).

The term "designated employee" includes any officer, employee, member or consultant of any agency involved in the making or participating in the making of decisions which may foreseeably have a material effect on any financial interest. (Section 82019 (emphasis added).)

A "consultant" is a natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency. (2 Cal. Code of Regs. Section 18700(a)(2).) The term "consultant" does not include a person who:

(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or any agency official, other than normal contract monitoring, and

(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.

Regulation 18700(a)(2)(A)(B)

The term "natural person" is used in Regulation 18700 to clarify that corporate entities do not file statements of economic interests. A consultant is not the corporate entity but rather the natural person within the entity who provide the consulting services. It is this person who must file a statement of economic interests.

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<sup>3/</sup> The Commission may decline to provide informal assistance or may limit such assistance to the explanation, in general terms, of the requirements of the Act if the questions presented are purely hypothetical. (2 Cal. Code of Regs. Section 18329(c)(4)(D)).

In In re Maloney, (1977) 3 FPPC Ops. 69, the Commission further explained:

Our regulation defining the term "consultant" ...excludes a person who does no more than provide advice, information, recommendation or counsel to an agency and whose advice is provided independent of the agency's control or discretion. 2 Cal. Adm. Code Section 18700(a)(2). The preparation of surveys and engineering studies would appear to fall within this exclusion. When performing these services, the county surveyor-engineer is not involved in any official decision making. He is merely carrying out the terms of a contract just as any vendor of goods or services to the county might. He is not subject to the control or discretion of the county when he performs his work, but is governed only by the provisions of his contract.

(Id., supra, at 71 (emphasis added).)

Generally, individuals who prepare a product or perform services for a single specific matter are not the type of consultants required to be covered by a code, whereas consultants who provide more general assistance and advice to a government agency on an ongoing basis should be covered. There may also be instances where a consultant provides recommendations or advice but there is significant intervening substantive review of the recommendations made by that consultant before submission to the final decision-maker. Such an individual would not be participating in a governmental decision.

When an agency determines that a contractor is a consultant, the consultant is not only subject to the disclosure provisions of the agency's conflict of interest code but is also subject to the Act's disqualification provisions.

Section 87100 provides that no public official at any level of state or local government shall make, participate in making or in any way attempt to use his or her official position to influence a governmental decision in which the official knows or has reason to know he or she has a financial interest.

Section 82048 defines a "public official" as every member, officer, employee or consultant of a state or local government agency.

The Act provides a four-part test to determine whether a public official has a conflict of interest in a particular governmental decision. First, is the official making, participating in making, or using his or her official position to influence a governmental decision? (Section 87100.) Second, is it foreseeable that the decision will affect the official's economic interest? (Section 87103.) Third, will the effect of the decision on the official's economic interest be material? (Id.) Fourth, is the effect of the decision on the official's economic interest distinguishable from its effect on the public generally? (Id.)

#### Participation In a Governmental Decision

Regulation 18700 defines making or participating in the making of governmental decisions. 18700(c)(2) provides that a public official participates in a governmental decision when he or she advises or makes recommendations to a decision maker, without significant intervening substantive revision, by (A) conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence the decision; or (B) preparing or presenting any report, analysis or opinion which requires the exercise of judgment and the purpose of which is to influence the decision.

#### Foreseeable Financial Effect

The second issue is the foreseeability that the decision will affect the official's economic interest. The effects of a decision are reasonably foreseeable if there is 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 Community 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 FPPC Ops. 198. 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.) An official has a financial interest in a decision within the meaning of Section 87100 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 or her 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.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts 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.

#### Section 87103(a)-(e)

#### Materiality

In order to determine if a decision's effect is material, it must first be determined whether the public official's economic interest is directly involved in the decision and whether the effect of the decision is material under Section 18702.1 (copy enclosed). If the official's economic interest is not directly involved in the decision, or the effect of the decision is not material under Section 18702.1, then it must be determined whether the decision indirectly affects the official's economic interest. Materiality is then determined under the appropriate regulation in Sections 18702 through 18702.6.<sup>4/</sup>

#### Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from effect on the public generally. (Section 87103.) If the decision does not affect all the members

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<sup>4/</sup> Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.

of the public in the same manner, disqualification may be required unless the effect of the decision is the same as the effect on a significant segment of the public. (Regulation 18703).

Please be advised that since the time you requested advice, the Legislature passed urgency conflict-of-interest legislation, including the addition of Section 87100.1, which provides as follows:

(a) A registered professional engineer or licensed land surveyor who renders professional services as a consultant to a state or local government, either directly or through a firm in which he or she is employed or is a principal, does not have a financial interest in a governmental decision pursuant to Section 87100 where the consultant renders professional engineering or land surveying services independently of the control and direction of the public agency and does not exercise public agency decisionmaking authority as a contract city or county engineer or surveyor.

(b) For purposes of this section, the consultant renders professional engineering or land surveying services independently of the control and direction of the public agency when the consultant is in responsible charge of the work pursuant to Section 6703 or 8703 of the Business and Professions Code.

(c) Subdivision (a) does not apply to that portion of the work that constitutes the recommendation of the actual formula to spread the costs of an assessment district's improvements if both of the following apply:

(1) The engineer has received income of two hundred fifty dollars (\$250) or more for professional services in connection with any parcel included in the benefit assessment district within 12 months prior to the creation of the district.

(2) The district includes other parcels in addition to those parcels for which the engineer received the income.

The recommendation of the actual formula does not include preliminary site studies, preliminary engineering, plans, specifications, estimates, compliance with environmental laws and regulations, or the collection of data and information, utilized in applying the formula.

This section does not affect whether an individual is a consultant, but, rather, focuses on whether a consultant will have

November 6, 1991  
Page Seven

a conflict of interest. You have not asked or provided facts concerning a particular factual situation which might result in a conflict of interest requiring disqualification. Therefore, we have not addressed the effect of the new sections on your consultants. Should you have a conflict-of-interest question concerning potential disqualification, please contact us for further advice.

We hope the above has provided you with some guidance on making an initial determination on when your clients become subject to the disclosure and disqualification provisions of the Act. If you need formal written advice, we would be happy to provide you with such once you have provided us with a factual contract situation between one of your clients and a governmental agency.

Sincerely,

Scott Hallabrin  
Acting General Counsel

  
By: Jeanette E. Turvill  
Political Reform Consultant  
Legal Division

SH/JET/jt  
Enclosures

FPPC

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Natkin & Weisbach

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Gerald Gamliel Weisbach

September 22, 1989

Jeannette E. Turvill  
Political Reform Consultant  
Legal Division  
California Fair Political Practices Commission  
428 "J" Street, Suite 800  
P. O. Box 807  
Sacramento, California 95804-0807

Re: Political Reform Act of 1974  
Title 2, Division 6 of  
California Code of Regulation  
Regulation 18700(a)(2)(A)&(B)

Dear Ms. Turvill:

We represent a large number of California architects, engineers and landscape architects. One of our clients has been asked by the City of San Jose to make a conflict of interest disclosure pursuant to Title 2, Division 6 of California Code of Regulations. While in the past our clients have executed simple non-conflict of interest statements, this is the first time that one of our clients has reported that a Political Reform Act disclosure has been mandated by a governmental agency.

You have offered to provide us with an interpretation as to in which instances a design professional is required to file a complete financial interest disclosure as required by the Political Reform Act of 1974 as Amended to January 1, 1989. We have prepared five scenarios that describe the type of services that a design professional might provide to a governmental agency. For convenience, we have assumed in our scenarios that the design professional retained by

Jeannette E. Turvill  
September 22, 1989  
Page 2

the governmental agency is an architect, though the same should represent those services performed by Consulting Engineers and Landscape Architects as well.

**Scenario #1 - Complete Professional Services as an Independent Contractor**

Architect is hired by governmental agency (hereinafter "client") to provide complete professional services, which include the following services:

1. Schematic Design Phase: Architect reviews and evaluates client's program, schedule and construction budget, and, based upon such information, prepares Schematic Design Documents consisting of drawings and other documents illustrating the scale and relationship of project components. Architect is responsible for providing normal structural, mechanical and electrical engineering services.
2. Design Development Phase: Based upon approved Schematic Design Documents, architect prepares Design Development Documents consisting of drawings and other documents to fix and describe the size and character of the project as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate.
3. Construction Document Phase: Based upon the approved Design Development Documents, architect prepares Construction Documents consisting of drawings and specifications setting forth in detail the requirements for the construction of the project. The specifications are expressed in terms of performance and design requirements for the finished results, without restriction as to a specific manufacturer or supplier, or construction means or methods. Any product or system that meets these minimum requirements established by the specifications and drawings may be chosen by the contractor. Architect is responsible for assisting the owner in preparing bidding information and documents required for securing agency approvals where such are required.

4. Bidding or Negotiation Phase: Architect assists the client in obtaining bids or negotiated proposals from contractors and assists in awarding and preparing contracts for construction. Such assistance is with technical matters and is not a substitute for legal consultation. Bidding on projects for governmental agencies in California is open, i.e., any bidder who meets the minimum qualifications established by the governmental agency may bid on the Project, and the low bidder will be awarded the Construction Contract if the bid is within the agency's budget. The Architect does not decide who can bid or who is awarded the construction contract. The construction contract, which incorporates the construction documents and other documents, is executed by the Client and Contractor. The Architect is not a party to the construction contract.
5. Construction Phase: Architect, as a representative of the client, observes construction, reviews contractor's submittals, certifies the amounts due to the contractor, and interprets and decides matters concerning performance of the client and contractor under the requirements of the Contract Documents.
6. Additional Services: If the client and architect agree, the architect may provide additional services not set forth as a part of Basic Services. Such additional service vary from project to project.

In scenario #1 the architect is hired by the governmental agency as a independent contractor and not as an employee, and is responsible for its own means and methods. Architect, as a professional, provides services and not products. To assist you in your evaluation, we have attached a standard American Institute of Architects' Agreement Between Owner and Architect. The services set forth in this agreement are often similar to those services requested by a governmental agency when the architect is hired to provide complete professional services.

Jeannette E. Turvill  
September 22, 1989  
Page 4

**Scenario #2 - Partial Professional Services as an Independent Contractor**

Architect is hired by a governmental agency to provide less than complete professional services. Typically, the client hires the architect to provide Schematic Design, Design Development, Construction Documents and Bidding and Negotiation phase services, but does not retain the architect to provide Construction Phase services. The architect is hired as an independent contractor responsible for its own means and methods of performance.

**Scenario #3 - Professional Consulting Services to Client as an Independent Contractor**

Architect is hired as a design consultant where client has hired another design professional to provide complete professional services. The architect advises and consults with the client in order to assist the owner in working with the other design professional. The architect, as a consultant, is hired as an independent contractor responsible for its own means and methods of performance.

**Scenario #4 - Partial Professional Services for Pre-Design Services as an Independent Contractor**

The architect is hired to perform Pre-design Phase services for the client. These services include coordinating client-supplied data, programming, preparing economic feasibility studies, presentations and site development planning. The client will retain another design professional to provide complete professional services. The architect is hired as an independent contractor responsible for its own means and methods of performance.

**Scenario #5 - Partial Professional Services During the Construction Phase as the Client's Agent**

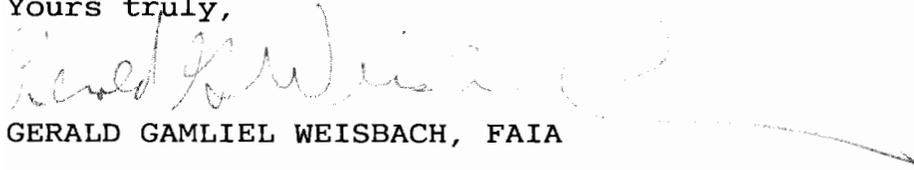
The architect is hired as the client's agent and not as an independent contractor, during the Construction Phase of the project. These services include reviewing and coordinating client-supplied data and equipment, processing of submittals issued to client, observing construction as a representative of the client, reviewing and negotiating change orders requested by contractor, and monitoring the project schedule (including reviewing contractor's punchlist). In some instances though the architect is regarded as the client's agent vis a vis the general

Jeannette E. Turvill  
September 22, 1989  
Page 5

contractor, the architect's contract would include a provision that the architect is an independent contractor.

If any of the above requires any further detail we would be most pleased to meet with you and discuss same. We look forward to your response.

Yours truly,



GERALD GAMLIEL WEISBACH, FAIA

GGW/dlm

SS33.75/GEA/1007



# California Fair Political Practices Commission

September 27, 1989

Gerald G. Weisbach  
Natkin & Weisbach  
568 Howard Street, Suite 300  
San Francisco, CA 94105-3002

Re: Letter No. 89-549

Dear Mr. Weisbach:

Your letter requesting advice under the Political Reform Act was received on September 25, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeanette Turvill, 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, we 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,

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

Kathryn E. Donovan  
General Counsel

KED:plh

FPPC

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## Natkin & Weisbach

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Gerald Gabriel Weisbach

September 22, 1989

Jeannette E. Turvill  
Political Reform Consultant  
Legal Division  
California Fair Political Practices Commission  
428 "J" Street, Suite 800  
P. O. Box 807  
Sacramento, California 95804-0807

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Jeannette E. Turvill  
September 22, 1989  
Page 3

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September 22, 1989  
Page 4

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