



California Fair Political Practices Commission

November 22, 1989

Honorable Barry Keene
State Senator
2nd Senate District
313 State Capitol
Sacramento, CA 95814

Re: Your Request for Informal Assistance
Our File No. I-89-613

Dear Senator Keene:

This is in response to your letter requesting advice regarding the North Coast Railroad Authority and their responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Your letter does not concern your duties under the Act nor the duties of a specific person whom you represent; therefore, we consider your request to be for informal assistance pursuant to Regulation 18329(c) (copy enclosed).²

QUESTIONS

1. Do the conflict-of-interest provisions of the Act apply to the North Coast Railroad Authority?
2. If the Act's conflict-of-interest provisions do apply to the North Coast Railroad Authority, what are the authority's responsibilities pursuant to the Act?
3. If the Act's conflict-of-interest provisions do apply to the North Coast Railroad Authority, what are the responsibilities of the members of the authority with respect to participation in decisions that might affect their financial interests?

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).)

4. What assistance can the Fair Political Practices Commission provide to the North Coast Railroad Authority in helping the authority comply with the Act?

CONCLUSIONS

1. The North Coast Railroad Authority is a local government agency and subject to the conflict-of-interest provisions of the Act.

2. The North Coast Railroad Authority, as a local government agency, is required to adopt and promulgate a conflict of interest code which specifically enumerates the positions within the agency subject to the disclosure and disqualification requirements of the code and the specific types of investments, business positions, interests in real property, and sources of income which are reportable.

3. As officials that make or participate in governmental decisions, the directors of the North Coast Railroad Authority must be designated in the code and are subject to the disclosure and disqualification requirements of the code. Consequently, where decisions may affect a director's financial interests, such as decisions involving acquisition of land or selection of a franchisee to acquire or operate a rail transportation system within the area, the director may not participate in those decisions.

4. The Commission, upon request, provides assistance to agencies in the preparation of conflict of interest codes. In addition, the Commission provides advice concerning the conflict of interest requirements to officials whose duties are in question.

FACTS

The North Coast Railroad Authority Act, enacted by Senate Bill 1663, created the North Coast Railroad Authority (the "authority".) The authority was created to ensure that railroad service on the Eureka Southern Railroad Line, the Northwestern Pacific Railroad Line and The California Western Railroad Line would continue despite potential decisions by the Interstate Commerce Commission to discontinue such service.

The authority will be governed by five directors, two directors appointed by the Board of Supervisors of Humboldt County, two to be appointed by the Board of Supervisors in Mendocino County and the last director will be the District Director of Transportation for State Transportation District 1, ex officio. While the authority is created with the passage of the legislation, the first meeting of the authority will not be held until 120 days after the abandonment of any of these lines.

The authority is expressly empowered to do the following:

1. Acquire, own, operate, and lease real and personal property reasonably related to the operation and maintenance of railroads.
2. Issue revenue bonds for any purpose of the authority.
3. Acquire property by purchase, lease, gift or through exercise of the power of eminent domain.
4. Operate railroads, including those outside its boundaries in order to connect its lines with the lines of another railroad corporation.
5. Accept grants or loans from state or federal agencies.
6. Select a franchisee, which may be a public or private entity, to acquire or operate a rail transportation system within the area of the authority's jurisdiction.

ANALYSIS

Do The Conflict-of-Interest Provisions of the Act Apply?

Section 87300 provides:

Every agency shall adopt and promulgate a Conflict of Interest Code pursuant to the provisions of this article. A Conflict of Interest Code shall have the force of law and any violation of a Conflict of Interest Code by a designated employee shall be deemed a violation of this chapter.

Section 82003 defines "agency" to include any state or local government agency. Section 82041 defines "local government agency" to mean a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing. Thus, if the new North Coast Railroad Authority is a local government agency, it is subject to the requirements of the Act and must comply with Section 87300.

In 1977 the Commission considered the definition of "local government agency" in In re Siegel. (3 FPPC Ops. 62, copy enclosed.) The Commission applied a four-part test to determine whether an organization is a "local government agency" for purposes of the Act.

1. Whether the impetus for formation of the entity originated with a government agency.
2. Whether the entity is substantially funded by, or its primary source of funds is a government agency.

3. Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and

4. Whether the entity is treated as a public entity by other statutory provisions.

As applied to the North Coast Railroad Authority, these factors indicate that the authority is a local government agency for purposes of the Act. First, the impetus for formation of the entity originated with the Legislature in Senate Bill 1663. Second, the authority will receive funding from the state of California out of the Transportation Planning and Development Account. (Public Utilities Code 99317 and 99310, et seq.) Third, the principal purpose for which the authority was formed is to provide railroad service on railroad lines in two counties, which is a service that public agencies have traditionally performed. (Miller Advice Letter, No. A-82-016, copy enclosed.) Finally, Public Utilities Code Section 93024(b) states that the authority is a "local agency" as defined in the Revenue Bond Law of 1941. Section 54307 of the Revenue Bond Law of 1941 defines "local agency" as any city, county, city and county, or any municipal or public corporation or district which is authorized to acquire, construct, own, or operate any enterprise as defined in Section 54309.

Consequently, the North Coast Railroad Authority is a local government agency and subject to the conflict-of-interest provisions of the Act.

What are the Authority's Responsibilities Under the Act?

As stated above, Section 87300 provides that every agency shall adopt and promulgate a conflict of interest code.³ Section 87302 requires that every conflict of interest code shall specifically enumerate the positions within the agency which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest.

In addition, the code shall contain requirements that each designated employee shall file statements disclosing reportable investments, business positions, interests in real property and income. (Section 87302(b).) Finally, the code must state the specific types of investments, business positions, interests in

³ As an agency with jurisdiction in more than one county, the North Coast Railroad Authority is required to include in the agency's code the provisions of Regulation 18730 (copy enclosed).

real property, and sources of income which are reportable. (Section 87302(a).) Disqualification shall be required by the conflict of interest code when the designated employee has a financial interest as defined in Section 87103, which it is reasonably foreseeable may be affected materially by the decision. (Section 87302(c).)

The code must be submitted to the code-reviewing body within six months after the agency comes into existence for the code-reviewing body's approval. (Section 87303.) Section 82011 provides that the code-reviewing body is the Commission with respect to the conflict of interest code of a state agency or any local government agency with jurisdiction in more than one county. Consequently, when the North Coast Railroad Authority develops its conflict of interest code it must submit the code to the Commission for approval.

What are the Responsibilities of the Members of the Authority?

You have asked several hypothetical questions with respect to the responsibilities of the directors of the North Coast Railroad Authority under the conflict-of-interest provisions of the Act. While specific definitive answers are impossible to provide at this time, the following general guidelines may be useful in understanding the directors' responsibilities under the Act. In addition, enclosed is a pamphlet summarizing the Act's conflict of interest laws. This pamphlet provides additional general guidance.

First, as public officials that make or participate in governmental decisions (Regulation 18700 and 18700.1, copies enclosed) the directors must be designated in the conflict of interest code and are subject to the disclosure and disqualification requirements of the code. Consequently, where decisions may affect a director's financial interests, such as decisions involving acquisition of land or the selection of a franchisee to acquire or operate a rail transportation system within the area, the director may not participate in those decisions.

Section 87103 defines "financial interest" as follows:

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.

Thus, in the hypothetical situations you posed, where a director is confronted with a decision concerning any financial interest, including a former or current employer, and it is reasonably foreseeable that the decision will have a material financial effect on the financial interest, the director may not participate in the decision.

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.)

The determination of a material financial effect varies depending on whether the financial interest is directly or indirectly involved in a decision. (Regulation 18702, copy enclosed.) For example, where a source of income to the director or employer of the director is directly before the authority, as an applicant or the subject of the decision, Regulation 18702.1(a) (copy enclosed) provides that the effect of the decision on a

source of income is material and disqualification is required.⁴ (Combs Advice Letter, No. A-89-177, copy enclosed.)

Where the financial interest is not directly involved in the decision, but may be indirectly affected by it, Regulations 18702.2 through 18702.6 (copies enclosed) provide guidelines for determining materiality depending on the specific facts of the situation.

Based on these general rules, it is safe to assume that a current employee of a railroad who becomes a director would be required to disqualify whenever his or her employer appeared before the authority, or where decisions of the authority would foreseeably and materially affect the employer indirectly.⁵ Of course, once the director ends his employment with a business entity and 12 months after the director receives his last payment from the business entity, disqualification would no longer be required.

Your last question, concerning persons associated with the franchise that acquires, finances, or operates the system would be analyzed in the same manner under the Act. However, because this question involves government contracts, it may also raise some issues under Government Code Section 1090. Government Code Section 1090 is not within our jurisdiction. This section is interpreted and administered by the Attorney General's Office. We suggest that you contact that office with any questions you may have concerning this section.

What Assistance can the Commission Provide to the Authority?

The Commission, upon request, provides technical assistance to agencies in the preparation of conflict of interest codes. If you should need assistance in the preparation of the authority's

⁴ A financial interest is directly before an authority when the financial interest 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 financial interest 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).)

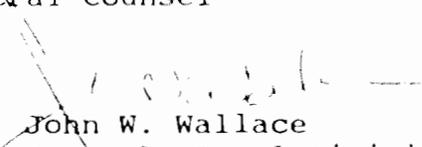
⁵ However, salary and reimbursement for expenses or per diem received from a state, local or federal government agency is expressly exempted from the definition of "income" for purposes of the Act. (Section 82030(b)(2).) In addition, a local government agency is not an organization or enterprise operated for profit and is not, therefore, a "business entity" as defined by the Act. Consequently, if a director's employer is a public entity, disqualification is not required.

conflict of interest code or general assistance in complying with the Act, please contact Jeanette Turvill or Cheryl Hoff in the Legal Division of the Commission at (916) 322-5901. In addition, the Commission's Legal Division provides telephone and written advice concerning conflicts of interest to persons who have duties under the Act. (See Section 83114(b) and Regulation 18329.)

If you have further questions regarding this letter or specific questions with respect to the disqualification requirements under the Act, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh

Enclosures



California Fair Political Practices Commission

October 26, 1989

Honorable Barry Keene
California State Senate
313 State Capitol
Sacramento, CA 95814

Re: Letter No. 89-613

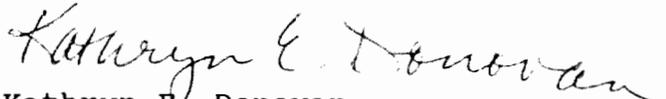
Dear Senator Keene:

Your letter requesting advice under the Political Reform Act was received on October 23, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John Wallace 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,


Kathryn E. Donovan
General Counsel

KED:plh



313 STATE CAPITOL
SACRAMENTO, CA 95814
(916) 445-3375
(916) 324-2273

631 TENNESSEE STREET
VALLEJO, CA 94590
(707) 648-4080

317-3RD STREET, SUITE 6
EUREKA, CA 95501
(707) 445-6508

FPPC
Oct 23 12 57 PM '89
California State Senate

BARRY KEENE
MAJORITY LEADER
SENATOR, 2ND DISTRICT

COMMITTEES:

APPROPRIATIONS, MEMBER
BANKING AND COMMERCE, MEMBER
GOVERNMENTAL ORGANIZATION, MEMBE
INSURANCE, CLAIMS AND CORPORATIONS
MEMBER
JUDICIARY, MEMBER

JOINT COMMITTEE ON FISHERIES AND
AQUACULTURE, CHAIR

SELECT COMMITTEE ON
FOREST RESOURCES, CHAIR

October 19, 1989

Kathryn Donovan
General Counsel, Fair Political Practices Commission
428 J St. # 800
Sacramento, CA 95814

Dear Ms. Donovan,

This is to request advice on the application of the Political Reform Act to the Northcoast Railroad Authority recently created by SB 1663 (Chapter 1085).

Initially the Railroad Authority will be composed of five members, two appointed by the Humboldt County Board of Supervisors, and two by the Mendocino Board of Supervisors. The fifth member is the District 1 Director of Transportation, ex officio.

The Authority will be formed only in the event that rail service is abandoned or discontinued on any of three designated lines. The Authority has various powers to operate and maintain the railroads, issue revenue bonds, accept grants, and select a franchisee to operate the railroad system.

As the two counties have already begun to consider possible appointees to the Authority, questions have been raised concerning the issue of conflict of interest. Therefore I request your advice and comment on the following questions:

- 1) Does the Political Reform Act apply to this Authority, even though SB 1663 is silent on the question?
- 2) If so, what procedures will the Authority need to follow to conform to the Act?
- 3) What constraints will be placed on the ability of appointees to vote on items in which they may have a financial conflict of interest?

For example, the following specific questions have been raised:

- Would a member who is a current employee of the railroad be ineligible to vote?
- Would some time period need to elapse before a former railroad employee or owner could serve?
- Would a person associated with the franchise that acquires, finances or operates the system be ineligible to serve or vote?

4) What assistance can the FPPC provide to the Authority in establishing its conflict of interest procedures?

A copy of the bill is enclosed for your reference. I appreciate your time and courtesy in responding to this request.

Sincerely,



BARRY KEENE

BK:at

cc: The Hon. Wesley Chesbro
The Hon. Marilyn Butcher
Hanna Burkhart