



California Fair Political Practices Commission

February 9, 1990

John McEvoy
Mulvaney and Kahan
First National Bank Building, 17th Floor
401 West "A" Street
San Diego, CA 92101-7907

Re: Your Request for Informal Assistance
Our File No. I-89-700

Dear Mr. McEvoy:

This is in response to your request for advice regarding the responsibilities of Esgil Corporation under the Political Reform Act (the "Act").¹ Because your request is one for guidance regarding the responsibilities of employees generally of Esgil Corporation, we are treating your request as one for informal assistance pursuant to Regulation 18329(c) (copy enclosed).

QUESTION

Should employees of Esgil Corporation, who perform only plan checking functions pursuant to a contract with a public agency, be included in the agency's conflict-of-interest code and be required to file statements of economic interests?

CONCLUSION

Employees of Esgil Corporation who perform only plan checking functions pursuant to a contract with a public agency need not be designated in the agency's conflict-of-interest code, since the employees are not making or participating in the making of a governmental decision within the meaning of the Act.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

FACTS

Esgil Corporation ("Esgil") provides plan checking and building inspection services to California cities and counties. Esgil has no other business and serves no non-governmental clients.

Esgil's contracts fall into two general categories. In the first category fall the contracts which require that Esgil's employees perform the entire building inspection function for the public agency, thus becoming, in effect, the building inspection department of the agency. You do not question that under these circumstances, these employees should be designated in the conflict-of-interest code and should file statements of economic interests as required by the particular agency.

In the second category fall the contracts which require Esgil employees to perform only the plan checking functions of the public agency. Esgil employees check the plans for conformance with the building code adopted by the agency. When the plans are found to be in compliance with the building code, the plan checker prepares a report to the appropriate agency official. Based upon the report plus other factors (such as zoning conformance and the requirements of the city engineer) the "building official" makes the decision whether or not to issue a building permit for the project. Any decisions by the plan checker which require the exercise of judgment are referred to the building official.

ANALYSIS

Section 87302 states in relevant part that the conflict-of-interest code shall include:

Specific enumeration of the positions within the agency, other than those specified in Section 87200, which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest and for each such enumerated position, the specific types of investments, business positions, interests in real property, and sources of income which are reportable. An investment, business position, interest in real property, or source of income shall be made reportable by the Conflict of Interest Code if the business entity in which the investment or business position is held, the interest in real property, or the income or source of income may foreseeably be affected materially by any decision made or participated in by the designated employee by virtue of his or her position.

Section 87302(a).

Section 82019 clarifies that a "designated employee" includes a consultant to an agency whose position with the agency is designated in a conflict-of-interest code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. (Section 82019(c).) Such designated employees must file statements of economic interests disclosing their financial interests pursuant to Section 87302. Thus the employees of Esgil who perform the plan checking functions pursuant to a contract with an agency must file such statements of economic interests if:

- (a) they are deemed to be consultants, and
- (b) they make or participate in making decisions which may foreseeably have a material effect on their financial interests.

CONSULTANT

Subdivision (a)(2) of Regulation 18700 (copy enclosed) defines a consultant to include:

[A]ny natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that "consultant" shall 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 of 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)
(emphasis added).

In In re Maloney (1977) 3 FPPC Ops. 69 (copy enclosed), with respect to a contract county surveyor-engineer, the Commission stated:

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.

In re Maloney supra at 71
(emphasis added).

Since the plan checkers are involved in checking the plans to ensure conformance with the agency's building code, and then submitting the plans to the building official, they are acting as agency employees while performing that function. The plan checkers are subject to the control and direction of the agency officials. Accordingly, the plan checkers are consultants within the meaning of the Act. (Regulation 18700(a)(2).)

PARTICIPATING IN A GOVERNMENTAL DECISION

Subdivision (c) of Regulation 18700 provides as follows:

(c) A public official or designated employee "participates in the making of a governmental decision" when, acting within the authority of his or her position, he or she:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(c).

In performing the plan checking functions, the plan checkers advise or make recommendations to the decision maker, the building official, by preparing a report regarding the plans they check. However, such report does not require the exercise of judgment on the part of the plan checkers, since their function is merely to check the plans for conformance with the non-discretionary building code adopted by the agency. You advised me that any decisions which require the exercise of discretion are referred to the building official. Under such circumstances, the plan checkers are not participating in the making of a decision within the meaning of the Act. Accordingly, the Act does not require the inclusion of their positions in the agency's conflict-of-interest code.

If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel



By: Jeevan S. Ahuja
Counsel, Legal Division

KED/JSA/aa

Enclosures

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December 15, 1989

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DEC 19 8 16 AM '89

Kathryn E. Donovan, Esq.
General Counsel
Fair Political Practices Commission
P.O.Box 807
Sacramento CA 95804

Re Request for Informal Assistance

Dear Ms. Donovan:

I am the attorney for Esgil Corporation. We are asking your advice at the suggestion of John Torrance, the City Attorney of the City of Simi Valley. A copy of Mr. Torrance's letter is attached hereto. As you can see, he raises the question of whether Esgil Corporation might be a "consultant" within the meaning of the Political Reform Act. At this time, the Conflict of Interest Code of the City of Simi Valley does not require filings by consultants. However, the City is considering the addition of consultants as a designated employee classification.

A description of Esgil Corporation's operations is necessary background to our request for advice. Esgil Corporation provides plan checking and building inspection services to California Cities and Counties. Esgil Corporation has no other business, and it serves no non-governmental clients. All shares of Esgil Corporation are owned by the two principal managers of the firm and by the spouse of one principal and the former spouse of the other. The spouse and former spouse take no part in the operation of the corporation.

The contracts held by Esgil Corporation may be divided into two classifications. In the first classification, the corporation performs all building inspection services (including plan checking) for its public entity client. In the second classification, Esgil

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Corporation performs only the plan checking service, and the public entity performs the actual building inspection function.

When Esgil Corporation performs the entire building inspection function for a public agency, it becomes, in effect, the building inspection department of the public agency. A principal employee of Esgil Corporation is appointed as either the Building Official or the Deputy Building Official of the public agency. Esgil Corporation employees who perform the building inspection function are appointed as Deputy Building Officials. All employees so designated are sworn in and, as officials of the City, file conflict of interest forms as required by the conflict of interest code of the particular jurisdiction.

The thinking underlying the foregoing procedure is that Esgil Corporation employees who act as building inspectors are charged with enforcement of the City Building Codes. In that role, they are exercising the police power of the City and often make decisions in the name of the City. It seems appropriate that a person who exercises such authority should be required to comply with the same reporting requirements as any other public official.

We have not followed this procedure where (as in the City of Simi Valley) the contract calls for Esgil Corporation to perform the limited function of plan checking. Plan Checking services are performed for jurisdictions which have their own Building Officials and building inspectors. Plans for proposed projects are presented to the appropriate City or County Official. Some or all of the plans submitted to the City are sent out to Esgil Corporation.

The Esgil Corporation plan checker checks the plans for conformance to the non-discretionary Building Code which was adopted by the City. Any discretionary "judgment calls" are referred to the City Building Official for decision. When the plans are found to be in compliance with the City Building Code, the plan checker prepares a report to the appropriate City Official. Based upon that report plus other factors (such as zoning conformance and requirements of the City Engineer) the Building Official makes the decision whether or not to issue a building permit for the project.

When Esgil Corporation performs only the plan checking function, its employees do not exercise any of the discretionary powers granted to the Building Official. Judgment calls are made by the appropriate City Official.

I feel comfortable in asserting that Esgil Corporation complies with the statute in jurisdictions in which an Esgil Corporation employee is designated as a Building Official or a Deputy Building Official since those persons are required to comply with the City Conflict of Interest Code in their roles as sworn public officials. The issue which seems to be raised is whether Esgil Corporation employees should file conflict of interest forms in jurisdictions, such as the City of Simi Valley, in which the

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role of the company and its employees is limited to non-discretionary plan checking. Perhaps such an obligation exists on the basis that the plan checker is a "consultant" within the meaning of your regulations or on some other basis.

I am furnishing herewith a two page description of the categories of service which the Corporation offers. This description is excerpted from the Corporation's application for Errors and Omissions insurance, and is incorporated by reference into our insurance policy.

I hope I have given enough information to describe the issue. If you would like additional information or if you feel that a meeting with Esgil Corporation management would clarify the situation, please call me.

Yours sincerely,



John McEvoy

cc Esgil Corporation

II. ESGIL CORPORATION SCOPE OF SERVICES

Esgil Corporation provides, by contract, a variety of services that are related to the Building Official duties. The services provided by the corporation vary with each jurisdiction but may be broadly categorized as follows:

- A. Provide employees of the corporation to work at the jurisdiction's permit counter where the staff people will meet permit applicants, explain regulations, perform certain plan checking functions, maintain permit records, calculate permit fees, issue permits and generally perform the permit processing function. The Building Official, in this case, is an employee of the jurisdiction and exercises final decision authority over the actions of the corporation employee.

- B. Provide employees of the corporation to work within the jurisdiction, in the field, performing mandated inspections to determine that facilities, and related work, is performed in accordance with the approved plans that were the basis for the permit being issued. The Building Official, in this case, is an employee of the jurisdiction and exercises final decision authority over the actions of the corporation employee.

- C. Provide employees of the corporation, either at the jurisdiction's location or the corporation's offices, to review proposed building plans submitted by permit applicants. The review, and any additional plan reviews, continue until the corporation staff can advise the Building Official that the plans conform to the regulations. The Building Official, an employee of the jurisdiction, exercises final decision authority as to whether or not the permit is to be issued.
- D. Provide the jurisdiction with all necessary corporation staff and other resources, to perform all of the duties of the Building Official. The services are provided by a contract between the jurisdiction and the corporation. The contract is approved by the elected City Council or Board of Supervisors and, within the body of the contract an employee of the corporation is designated to be the Building Official of the jurisdiction. The named corporation employee exercises final decision authority over matters pertinent to the Building Official role. In some jurisdictions, a Board of Appeals and Advisors is available to advise the Building Official in those difficult situations where a permit applicant elects to appeal a decision of the Building Official.



California Fair Political Practices Commission

December 22, 1989

John McEvoy
Mulvaney & Kahan
First National Bank Building
401 West "A" Street, 17th Floor
San Diego, CA 92101-7907

Re: Letter No. 89-700

Dear Mr. McEvoy:

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

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

Kathryn E. Donovan
General Counsel

KED:plh



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General Counsel

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