



FAIR POLITICAL PRACTICES COMMISSION

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August 31, 2009

Brian A. Pierik
Burke, Williams & Sorenson, LLP
City Attorney, City of Atascadero
2310 East Ponderosa Drive, Suite 25
Camarillo, CA 93010-4747

Re: Your Request for Informal Assistance
Our File No. I-09-199

Dear Mr. Pierik:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because you have not provided facts regarding any governmental decision and are, therefore, seeking general information, we are providing informal assistance, rather than advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Please note, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

Also, our informal assistance is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.²

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission (the "Commission") are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² It is not clear from the facts presented whether the positions your client holds with various government agencies are elected or appointed. Therefore, we draw your attention to Government Code Section 1099, which generally provides that elected public officials may not simultaneously hold incompatible offices.

QUESTIONS

1. May a business co-owned by Atascadero City Councilmember Thomas O'Malley, who is also a member (and, in some instances, a Board member and an officer) of the city's Community Redevelopment Agency, the Regional Transit Authority, and the San Luis Obispo Council of Governments, provide services to these government agencies: (a) for a fee; (b) at cost; (c) free of charge; or (d) in exchange for the government agency's acknowledgment of the business as a supporter of the agency's event?

2. May Mr. O'Malley's business provide services, as set forth above, to the following non-profit organizations of which Mr. O'Malley is a member, and in some cases a member of the Board of Directors: Atascadero Colony Days Committee, Main Street Association, the Economic Vitality Corporation, the Chamber of Commerce, the Zoological Society of San Luis Obispo, El Camino Homeless Organization, Kiwanis Club, the Veteran's Memorial Foundation, Boy Scouts of America, and the Atascadero Performing Arts Committee, if the city funds these organizations, or provides the organizations with "in kind" benefits?

3. May the business provide services, as set forth above, to the Carlton Hotel, if the city has made expenditures of approximately \$17,000 to promote downtown businesses, including the Carlton?

CONCLUSIONS

1. The Act does not prohibit a public official from providing services to government entities for a fee, at cost, or in exchange for acknowledgement as a sponsor. It does, however, prohibit a public official from making, participating in making, or attempting to use his or her official position to influence a governmental decision that has a reasonably foreseeable material financial effect on any of the official's economic interests. Payments made by these government entities to Mr. O'Malley's business are income that could result in a disqualifying conflict of interest. Also, a public official does not have an economic interest in a person for whom he or she provides services free of charge. Therefore, Mr. O'Malley may participate in governmental decisions by these agencies involving his business if the business will provide the services free of charge.

2. Mr. O'Malley is prohibited from making, participating in making, or attempting to use his official position to influence a governmental decision that has a reasonably foreseeable material financial effect on any of these entities if the entities are sources of income to him or his business. The payment of fees, costs or acknowledgement as a sponsor are considered income and, therefore, could give rise to a disqualifying conflict of interest if the entities are "sources of income" as defined below. As stated above, providing services for free does not give rise to a conflict of interest.

3. Yes. The determination of whether a public official has a disqualifying conflict of interest in a governmental decision is made at the time the governmental decision is made. Even if Mr. O'Malley had participated in the city's decision to spend \$17,000 to promote downtown businesses, which would include the Carlton, his participation would be barred only if it was reasonably foreseeable at that time that the decision would have a material financial effect on one of his economic interests. Because he has never had an economic interest in the Carleton, his participation in such a decision is not prohibited. If, in the future, the Carleton becomes a customer of Mr. O'Malley's business, any governmental decision coming before Mr. O'Malley that would involve the Carleton would need to be analyzed, using the steps outlined below, to determine whether the Act's conflict-of-interest provisions prohibit his participation in that decision.

FACTS

As the city attorney for the City of Atascadero (the "City"), you request advice on behalf of city council member Thomas O'Malley. In addition to serving as a city council member, Mr. O'Malley serves as a member of the City's Community Redevelopment Agency ("CRA"), the Regional Transit Authority ("RTA"), of which he is also a Vice President, and the San Luis Obispo Council of Governments ("SLOCOG"), which he also serves as a Vice President.

Mr. O'Malley co-owns with his wife an event planning business, Portola Event Planning ("PEP"). The business provides event planning services, which include planning and managing social events, providing disposable goods and event-related equipment, and providing facilities located on two properties for events such as weddings, dinners and meetings. One piece of equipment, a "DanceDeck Pro," is unique in that it is a modular dance floor designed for professional dancers and dance teachers, and no similar item is available elsewhere in the county. The DanceDeck Pro attracts professional dancers or teachers for professional or teaching events, as opposed to mere dance or party events. As the owner of the DanceDeck Pro, PEP has established connections with dancers and bands that it can call on to provide entertainment at events.³

Several community events occur each year within the City. PEP's event planning services or event-related equipment has been requested for these events and may continue to be requested in the future. In addition, PEP is seeking to expand its business and provide services or equipment for additional events.

³ Although you mention that Mr. O'Malley also operates a business involving "vacation rentals and other commercial and residential rental property," your questions do not relate to this business. Accordingly, our analysis is limited to the activities of PEP.

Mr. O'Malley is a member, and in some cases, a board member, of various non-profit organizations.⁴ These are: Atascadero Colony Days Committee, Main Street Association, the Economic Vitality Corporation, the Chamber of Commerce, the Zoological Society of San Luis Obispo, El Camino Homeless Organization, Kiwanis Club, the Veteran's Memorial Foundation, the Atascadero Performing Arts Committee and a fundraising committee of the Boy Scouts of America.

The Carlton Hotel, located in downtown Atascadero, is one of the businesses promoted by the City as part of an effort to promote downtown Atascadero businesses. The City has spent \$17,000 for this promotion. Mr. O'Malley has no financial interest in the Carlton, nor is he an officer or director of its owner(s). The Carlton has inquired of Mr. O'Malley about the possibility of renting a dance floor from PEP and using other services or equipment provided by PEP.

You have asked if PEP may provide its services, facilities and equipment to the above-named organizations (a) for a fee that would generate a profit; (b) at PEP's cost for the goods and services; (c) free of any charge or fee; and (d) in exchange for receiving the organization's acknowledgement of PEP as a supporter of events sponsored by the organization.

ANALYSIS

Section 87100 of the Act 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. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Step 1. Is Mr. O'Malley a "public official" within the meaning of Section 87100?

Section 82048 defines a public official as "every member, officer, employee or consultant of a state or local government agency." As a member of the Atascadero City Council, CRA, RTA, and SLOCOG, all of which are local government agencies, Mr. O'Malley is a public official.⁵ Therefore, he may not make, participate in making, or

⁴ These are characterized variously as "non-profit" organizations or "501(c)(3)" organizations. Some organizations appear to be non-profit tax-exempt organizations under other subdivisions of Section 501(c) of the Internal Revenue Code.

⁵ Section 82049 defines a local government agency as a "county, city or district of any kind including school district, or any other local or regional subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing."

otherwise use his official positions to influence any decisions that will have a reasonably foreseeable material financial effect on any of his economic interests.

Step 2. Will Mr. O'Malley be making, participating in making or influencing a governmental decision?

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a governmental decision that is before his or her agency when, for the purposes of influencing the decision, the official contacts or appears before or otherwise attempts to influence, any member, officer, employee, or consultant *of his or her agency*. (Regulation 18702.3(a).) A public official is attempting to use his or her official position to influence a governmental decision that is before an agency, *other than the official's agency* if, for the purpose of influencing the decision, the official acts or purports to act, on behalf of, or as the representative of his or her agency. (Regulation 18702.3(b).)

You have not identified any governmental decisions in which Mr. O'Malley will be involved. Accordingly, we offer the following guidelines to assist Mr. O'Malley in determining whether his participation in a governmental decision may give rise to a disqualifying conflict of interest. Each decision by the City, CRA, RTA or SLOCOG will need to be analyzed to determine if Mr. O'Malley is making, participating in making, or attempting to influence the decision.

Step 3. What are Mr. O'Malley's economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)

- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Mr. O'Malley has an economic interest in the business entity⁶ that he co-owns with his wife both as an investment (if he invested \$2,000 or more in the business entity) under Section 87103(a) and Regulation 18703.1(a) and as a manager of the business entity under Section 87103(d) and Regulation 18703.1(b).

The business entity is also a source of income to Mr. O'Malley if the income he receives from the business plus his community property share of the income his wife receives from the business totals \$500 or more within 12 months prior to his participating in or attempting to influence a governmental decision. A public official's income, for purposes of the Act, includes the community property interest in the income of his spouse. (Section 82030(a).)⁷

Also, assuming Mr. O'Malley owns an interest of ten percent or greater in the business entity, any clients of the business, including clients that are government agencies, from whom he receives pro rata income totaling \$500 or more within 12 months prior to his participating in or attempting to influence a governmental decision will also be a source of income to him. (Section 87103(c); Regulation 18703.3.)

⁶ Any enterprise, including a sole proprietorship, that is operated for profit falls within the definition of "business entity" under Section 82005. Thus, your business is a "business entity" for purposes of the Act.

⁷ Compensation received by Mr. O'Malley from the City, CRA, RTA or SLOCOG for his membership in, or service to, these agencies is not considered "income" under Section 82030, which provides that salary, reimbursement for expenses, social security, disability and other similar benefit payments from, among others, a local government agency, is not income to the public official.

Section 82030 broadly defines "income" to include payments made by PEP's customers that result in a profit to PEP and payments that merely cover PEP's costs. (Section 82030 provides that "reimbursement for expenses" is income.) Also, the acknowledgement of PEP as a sponsor of an event constitutes "in kind" income to PEP. (See *Valdez* Advice Letter, No. A-94-112.)

Finally, a public official always has an economic interest in his or her personal finances under Section 87103 and Regulation 18703.5.

Step 4. Will Mr. O'Malley's economic interests be directly or indirectly involved in decisions he will make, participate in making or influence as a public official?

Business Entities and Sources of Income

Under Regulation 18704.1(a) a person, including business entities and sources of income, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

"(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

"(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person 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."

Personal Finances

A public official or his or her immediate family is deemed to be directly involved in a governmental decision that has any financial effect on his or her personal finances or those of his or her immediate family.

If a public official's economic interest is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704.)

Step 5. What is the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the

nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Business Entities and Sources of Income

Business Entities and Sources of Income that are Business Entities

Regulation 18705.1 sets forth the applicable materiality standards for governmental decisions involving PEP. If the Carlton Hotel is a source of income to PEP, the same materiality standards would apply.

Subdivision (a)(1) sets forth the standard for a business entity in which a public official has an economic interest that is *directly* involved in a governmental decision. It generally provides that the financial effect of a governmental decision on a business entity that is directly involved in the decision is presumed to be material.⁸ The presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the business entity.

Regulation 18705.1(c) sets forth materiality standards for economic interests in business entities that are *indirectly* involved in a governmental decision, including those that are sources of income and are business entities. (See Regulation 18705.3(b)(1).) The standards are based on whether the company is listed on a particular stock exchange and, if not listed, the company's before-tax earnings. For example, for relatively small businesses, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will increase/decrease its annual gross revenues by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets by \$20,000 or more. (Regulation 18705.1(c)(4).) Because you have provided no information regarding PEP's or the Carlton's finances, we have prepared the table below to assist Mr. O'Malley in determining the applicable materiality standard for an indirectly involved business entity under Regulation 18705.1(c).

⁸ The exception to the general rule is set forth in subdivision (b)(2) and applies to investments of \$25,000 or less by the public official in relatively large business entities in which the official has no other interest other than his or her investment interest.

Type of Business	Effect on Gross Revenues	Effect on Expenses	Effect on Assets/Liabilities
Listed on the Fortune 500 or revenues of no less than the company listed as 500 th on the Fortune 500	\$10,000,000 or more	\$2,500,000 or more	\$10,000,000 or more
Listed on NYSE or earnings before taxes of no less than \$2,500,000	\$500,000 or more	\$200,000 or more	\$500,000 or more
Listed on NASDAQ or AMEX, or earnings before taxes of no less than \$750,000	\$300,000 or more	\$100,000 or more	\$300,000 or more
All others	\$20,000 or more	\$5,000 or more	\$20,000 or more

Sources of Income that are Non-Profit Entities, including Government entities

Regulation 18705.3 sets forth the materiality standards for sources of income that are non-profit entities, including those that are governmental entities. These would include: Atascadero Colony Days Committee, Main Street Association, the Economic Vitality Corporation, the Chamber of Commerce, the Zoological Society of San Luis Obispo, El Camino Homeless Organization, Kiwanis Club, the Veteran's Memorial Foundation, the Atascadero Performing Arts Committee, Boy Scouts of America, the City itself, CRA, RTA, and SLOCOG.

Under Regulation 18705.3(a), any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is *directly* involved in a decision before the official's agency, is deemed material.⁹

Regulation 18705.3(b)(2) sets forth the materiality standards for *indirectly* involved sources of income that are non-profit entities, including governmental entities. The standards are based on the gross annual receipts of the entity. For example for a non-profit entity with gross annual receipts between \$1,000,000 and \$10,000,000 the reasonably foreseeable financial effect on that entity would be material if it affected the entity's gross annual receipts by \$100,000, its expenses by \$25,000 or its assets by \$100,000. The following table summarizes these standards:

⁹ The Act's definition of "person" is broad enough to include the non-profit and governmental entities described in your letter. (Section 82047).

Gross Annual Receipts of:	Effect on Gross Annual Receipts	Effect on Expenses	Effect on Assets
\$400,000,000 or more	\$1,000,000 or more	\$250,000 or more	\$1,000,000 or more
More than \$100,000,000 but less than \$400,000,000	\$ 400,000 or more	\$100,000 or more	\$ 400,000 or more
More than \$10,000,000 but less than \$100,000,000	\$ 200,000 or more	\$ 50,000 or more	\$ 200,000 or more
More than \$1,000,000 but less than \$10,000,000	\$ 100,000 or more	\$ 25,000 or more	\$ 100,000 or more
More than \$100,000 but less than \$1,000,000	\$ 50,000 or more	\$ 12,500 or more	\$ 50,000 or more
\$100,000 or less	\$ 10,000 or more	\$ 2,500 or more	\$ 10,000 or more

Personal Finances

A reasonably foreseeable financial effect on a public official's, or a member of his or her immediate family's, personal finances is material if it is at least \$250 in any 12-month period. (Regulation 18705.5(a).)

Step 6. Is it reasonably foreseeable that the financial effect of a governmental decision on Mr. O'Malley's economic interests will meet the applicable materiality standard?

An effect is considered "reasonably foreseeable" if the effect is "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. When Mr. O'Malley is faced with a governmental decision, he will need to determine if it is reasonably foreseeable that the governmental decision will have a material financial effect on any of his economic interests.

Steps 7 & 8. The "public generally" and "legally required participation" exceptions.

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official's economic interest is indistinguishable from

its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). The applicability of these exceptions should be considered if it is determined that a governmental decision will give rise to a conflict of interest.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in cursive script, appearing to read "Valentina Joyce".

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl