

January 11, 2012

John Pinkney
Slovak Baron and Empey
1800 East Tahquitz Canyon Way
Palm Springs, CA 92262

Re: Your Request for Advice
Our file No. A-11-227

Dear Mr. Pinkney:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, on other conflict of interest laws outside the Act, such as Government Code Section 1090.

QUESTION

May Councilmember Kidd participate in the decisions related to the sale of the city hospital when the sale may have a financial impact on her husband's employer, EmCare, which has a contract to operate the hospital's emergency room?

CONCLUSION

Based on the facts you have presented, it appears that the decision to sell the city's hospital will have a reasonably foreseeable material financial effect on Councilmember Kidd's economic interest in her spouse's income. Therefore, Councilmember Kidd has a conflict of interest and she is prohibited from participating in that decision.

FACTS

You are the city attorney for the City of Needles and its municipal board known as the Colorado River Medical Center ("CRMC"). You seek advice on behalf of Needles Councilmember Linda Kidd regarding the Act's conflict of interest rules.

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 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.

CRMC contracts with a private company known as EmCare to operate the city hospital's emergency room. EmCare receives monthly fees in excess of \$30,000 a month through this contract. Councilmember Kidd's spouse works as an emergency room physician for EmCare and receives a salary from EmCare.

The city's electorate passed a ballot measure that requires the city to sell its hospital to a qualified nonprofit entity for fair market value as determined by an independent appraiser.

There are currently two prospective purchasers of the hospital that are being considered by the CRMC board of trustees and the city council. Whether EmCare's contract is renewed could be affected by which of the prospective purchasers the CRMC board and city council select to purchase the hospital.

Because Councilmember Kidd's spouse works for EmCare, which contracts with the city's hospital, you have advised her that she may have a conflict of interest, and that she should recuse herself from participating in the decision making process related to the sale of the hospital absent a written opinion from the FPPC indicating that she does not have a conflict.

You wish to know whether Councilmember Kidd may participate in the decisions related to the sale of the hospital.

ANALYSIS

The Acts conflict of interest provisions ensure that public officials will "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).) 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.

The Commission has adopted an eight-step analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule 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.

STEPS 1 & 2: IS COUNCILMEMBER KIDD A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As a member of the Needles City Council, Councilmember Kidd is a public official under the Act. (Section 82048.) As a city council member, she will be called upon to consider whether the city should approve or disapprove the pending sale of the city hospital that will come before the city council. Therefore, she will be making, participating in making, or otherwise using her official position to influence a governmental decision.

Accordingly, if Councilmember Kidd participates in discussions, votes on decisions, or attempts to influence any member of the city council involving the hospital sale, she will be making, participating in making, or influencing governmental decisions.

Recusal Requirements:

If a public official's office is listed in Section 87200 ("87200 filers" include members of a city council) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5, sub-divisions (c) and (d) apply. (Section 87105.)

STEP 3: DOES COUNCILMEMBER KIDD HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?

A public official has a financial interest in a decision within the meaning of Section 87103 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, a member of his or her immediate family, or on any one of five enumerated economic interests, including:

- 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)); or 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));
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 economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
An economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family – this is the "personal financial effects" rule. (Section 87103; Regulation 18703.5).

Under the facts you have presented, Councilmember Kidd will have an economic interest in EmCare based on her community property interest in her spouse's income if her interest is \$500 or more within 12 months prior to the decision. (Section 87103(c).)

Finally, Councilmember Kidd also has an economic interest in her personal finances and

those of his or her immediate family if the decision will result in an increase or decrease in her “personal expenses, income, assets, or liabilities.” (Section 87103.) These are the only economic interests identified from the facts presented.

STEP 4: ARE COUNCILMEMBER KIDD’S ECONOMIC INTERESTS DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?

Regulation 18704(a) provides:

“In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official’s economic interest is directly involved or indirectly involved in the governmental decision. If a public official's economic interest is not directly involved in a governmental decision, it is indirectly involved.”

Sources of Income:

For governmental decisions that affect sources of income that are business entities, the standards set forth in Regulation 18704.1(a) apply. Regulation 18704.1(a) states:

“(a) A person, including business entities, sources of income and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by 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.”

Based on the facts presented, EmCare is not a named party in, or the subject of, the proceedings and is therefore not directly involved in the decisions involving the hospital sale. Therefore, Councilmember Kidd’s economic interests in EmCare would be indirectly involved in the decisions.

Personal Finances: For governmental decisions that affect personal expenses, income, assets, or liabilities, the standards set forth in Regulation 18704.5 apply. Regulation 18704.5 states:

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

STEP 5: MATERIALITY STANDARD*Sources of Income and Business Entities:*

Whether the financial effect of a governmental decision on an indirectly involved business entity is material depends on the size of the business entity. The standards vary according to whether the business entity is a Fortune 500 company, is listed on the New York Stock Exchange, American Stock Exchange, or NASDAQ, or according to the size of the business entity. The following table summarizes these standards.

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 500th on the Fortune 500	\$ 10,000,000 or more	\$ 2,500,000 or more	\$ 10,000,000 or more
Listed on NYSE or net income 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 net income 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

Thus, for example, if the decision involving the hospital sale would impact EmCare to the thresholds set forth above, a conflict of interest would exist.

Personal Finances: Regulation 18705.5(a) states that a “reasonably foreseeable financial effect on a public official's personal finances is material if it is a least \$250 in any 12-month period.” You have not described any effects on Councilmember Kidd’s personal finances, therefore we do not analyze this economic interest.

STEP 6: REASONABLY FORESEEABLE

An effect upon economic interests is considered “reasonably foreseeable” if there is a

substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are reasonably foreseeable at the time the decision is made depends on the facts surrounding the decision. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

It should be noted that the determination of whether the financial consequences of a governmental decision are “reasonably foreseeable” at the time the decision is made is ultimately a factual determination.

Based on the facts you have presented, it appears reasonably foreseeable that the applicable materiality standard for Councilmember Kidd’s economic interest in the source of her spouse’s income will be met in light of the fact that EmCare receives monthly fees in excess of \$30,000 a month through its contract with the city. This contract is up for renewal and would be directly impacted by the sale of the hospital.

Therefore, Councilmember Kidd has a conflict of interest in the decision involving prospective purchasers of the hospital and she is prohibited from participating in that decision.

STEPS 7 AND 8: PUBLIC GENERALLY & LEGALLY REQUIRED PARTICIPATION

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 et seq.), or if the official is legally required to participate (Section 87103; Regulation 18708).

You have not presented any facts indicating that the “public generally” exception or the “legally required participation” exception would be applicable to Councilmember Kidd’s situation, thus we do not further analyze this issue.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl