



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

December 21, 2012

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

Re: Your Request for Advice
Our File No. A-12-176

Dear Mr. Pierik:

This letter responds to your request for advice on behalf of Atascadero City Councilmember Thomas O'Malley regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that our advice 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.

QUESTIONS

Does the Act prohibit Councilmember O'Malley from participating in the following Atascadero city council decisions where both the city and Councilmember O'Malley's business are members of the San Luis Obispo County's Countywide Visitors and Conference Bureau (the "Bureau")?

- (1) Appoint him as the city's representative to the Bureau, or
- (2) Appropriate city funds for payment of dues for the city's membership in the Bureau.

CONCLUSIONS

Councilmember O'Malley is not prohibited from participating in these decisions because

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.

these decisions will not have a material financial effect on his business. Moreover, Councilmember O'Malley does not have an economic interest in the Bureau.

FACTS

Councilmember O'Malley co-owns and operates with his wife a business called Portola that provides bed and breakfast services and event planning services. Portola has a business license issued by the city.

The Bureau is an unincorporated association of businesses and government entities. The purpose of the Bureau is to promote tourism in San Luis Obispo County and it is led by an executive director and operated by a small staff. The Bureau has a governing board that guides it in policy-making matters. The Bureau issues press releases about visitor and conference issues and events within San Luis Obispo County, maintains a website that features its members and issues relevant to visitors and conference-holders, and publishes a travel guide that features its members and highlights events and attractions within the County. It also maintains an office, open to visitors, in the city of San Luis Obispo.

Atascadero is a member of the Bureau and annually pays dues of \$10,000. In exchange for the dues, the city is permitted to appoint an individual to the Bureau's governing board. To spur tourism and economic development in the city, the city council appoints one of its members to the Bureau's board annually. The city receives no direct financial benefit from its membership in the Bureau, but, rather, receives exposure and indirect benefits through the Bureau's advertising, publications and public relations functions.

Portola is also a member of the Bureau and pays annual dues. As consideration for its dues, Portola receives mention in the Bureau's website and travel guide and referrals by Bureau personnel to visitors and persons intending to hold functions in the area. Portola receives no financial support, nor any other direct benefit, from the Bureau. Portola does have the opportunity to participate in the Bureau's operations and offers suggestions as to the Bureau's direction and goals.

ANALYSIS

The Act's 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 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 COUNCILMEMBER O'MALLEY A "PUBLIC OFFICIAL" WITHIN THE MEANING OF SECTION 87100?

As a city council member, Councilmember O'Malley is a public official. (Section 87200). Therefore, he may not make, participate in making, or otherwise use his official position to influence any governmental decisions that will have a reasonably foreseeable material financial effect on any of his economic interests.

STEP 2. WILL COUNCILMEMBER 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 if, for the purpose 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.)

When Councilmember O'Malley votes to appoint himself as the city's representative to the Bureau and to appropriate funds for the city's membership dues, he will be making a governmental decision.

STEP 3. WHAT ARE COUNCILMEMBER 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)) 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).)
- 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.)

- A public 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.) This gift threshold will increase to \$440, effective January 1, 2013, based on a cost-of-living adjustment.
- 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.)

Business Entity

Councilmember O'Malley has an economic interest in his business on two bases: he presumably has an investment of \$2,000 or more in the business and he is a partner or officer of the business.

Source of Income

We assume that Councilmember O'Malley receives at least \$500 annually from his business. Therefore, the business is a source of income to him. In addition, if a public official owns a ten percent or greater interest in a business entity, clients who are sources of income to the business entity are also considered sources of income to the official. (Section 82030(a).) Therefore, Councilmember O'Malley will have an economic interest in any client who pays his business \$500 or more in the 12 months prior to a decision as a source of income to him. (Section 87103(c).)

Personal Finances

Under the “personal financial effects” rule, a public official always has an economic interest in his or her personal expenses, income, assets, or liabilities, as well those of his or her immediate family. (Section 87103, Regulation 18703.5.)

We note that according to the facts provided, the councilmember has no economic interest (as defined in Section 87103) in the Bureau.

STEP 4: ARE COUNCILMEMBER O'MALLEY'S ECONOMIC INTERESTS DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISIONS?

Businesses and Sources of Income: Under Regulation 18704.1 a person, including a business entity, is directly involved in a decision before an official's agency when that person, either directly or by an agent, either initiates the proceeding in which the decision will be made,

is a named party, 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. (Regulation 18704.1(a)(2).)

Because Councilmember O'Malley's business will not be initiating the proceedings involving the determination of his appointment as the city's representative on the board of the Bureau nor the decision to appropriate funds for membership dues to the Bureau, and is not the subject of such proceedings, his business is indirectly involved in these decisions.

Personal Finances: Under Regulation 18704.5 a public official is deemed to be directly involved in decisions that have any financial effect on the official's personal finances. (Regulation 18704.5.) You did not provide any facts indicating that the councilmember's personal finances will be affected by either of the decisions in question. Therefore, we need not further analyze effects on the councilmember's personal finances.

STEPS FIVE AND SIX: WILL THERE BE A REASONABLY FORESEEABLE MATERIAL FINANCIAL EFFECT ON COUNCILMEMBER O'MALLEY'S ECONOMIC INTERESTS?

Materiality

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests 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.

For economic interests in business entities indirectly involved in a decision, including business entities that are a source of income to an official, the materiality standard is given at Regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business. Regulation 18705.1(c)(4) provides that the financial effect of a governmental decision on a business not publicly traded and relatively modest in economic size is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

Foreseeability

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A financial effect need not be certain or even substantially likely to be reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra.*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Nonetheless, the facts you have provided indicate that city council decisions to appoint the councilmember to the Bureau and to appropriate membership dues payable to the Bureau will not have *any* effect on the gross revenues, expenses or asset value of the councilmember’s business. Accordingly, the councilmember is not prohibited by the Act from participating in these decisions.²

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

² Steps Seven and Eight: We need not consider the “public generally” or “legally required participation” exceptions, set forth in Section 87101 and 87103, respectively, because the councilmember does not have a conflict of interest in the subject decisions.