

July 24, 2012

Julia M. Lew
City Attorney, Lindsay
McCormick, Kabot, Jenner & Lew
1220 West Main Street
Visalia, CA 93291

Re: Your Request for Advice
Our File No. A-12-105

Dear Ms. Lew:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that the Commission does not provide advice on legal requirements imposed outside the confines of the Act. Thus, we offer no opinion on the application of rules of professional conduct or other incompatible activities and conflict-of-interest laws that may apply, such as common law conflict of interest and Government Code Section 1090.

QUESTION

As the City Attorney for the City of Lindsay, may you represent the city in transactional negotiations with the Tulare County Housing Authority regarding a development project if the authority is represented by a partner in your law firm?

CONCLUSION

To the extent that participating in the negotiations is to carry out each of your respective contracts with the City of Lindsay and the Tulare County Housing Authority, for a price specified in the existing contracts, there is no reasonably foreseeable material financial effect on you, or your partner's, economic interests in McCormick, Kabot, Jenner & Lew. Accordingly,

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.

neither you nor your partner is prohibited from taking part in the negotiations under the provisions of the Act.

FACTS

You are a partner in the law firm of McCormick, Kobot, Jenner & Lew and are the contract City Attorney for the City of Lindsay (the “City”). Your professional services are paid for by the City under contract for a specified hourly rate. Another partner in your law firm is the contract General Legal Counsel for the Tulare County Housing Authority (the “TCHA”). Your partner’s professional services are paid for by the TCHA under an agreement that consists of both a retainer fee and an hourly rate.

Upon the dissolution of the City’s redevelopment agency (the “RDA”) under the provisions of AB1x26, the City opted to transfer the housing functions of its former RDA to the TCHA. Currently, the TCHA plans to develop a specific project on property formerly owned by the RDA, provided the City and the TCHA can reach an agreement regarding several outstanding issues. At this time, the scope of the agreement is uncertain as it has yet to be determined what issues will be resolved by operation of law under AB1x26.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

Step One: Are the individuals “public officials?”

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency...” (Section 82048.) The term “consultant” has been broadly interpreted to prevent evading the Act’s conflict-of-interest safeguards by delegating decisionmaking authority to private parties such as outside consultants or independent contractors. (See *In re Maloney* (1977) 3 FPPC Ops. 69.)

Under Regulation 18701(a)(2)(B), the term “consultant” includes any individual who, pursuant to a contract with a state or local government agency “[s]erves in a staff capacity with the agency and in that capacity participates in making a governmental decision.” A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision.

(Regulation 18702.2.) As the contract City Attorney and the contract General Legal Counsel for the TCHA, respectively, you and your partner are both “consultants” and therefore public officials within the meaning of the Act.

Step Two: Are the officials 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.) As stated above, public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive 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 decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Both you and your partner are making, participating in making, or influencing a governmental decision when taking part in any negotiations between the City and the TCHA regarding the development project.

Step Three: What are the officials’ economic interests?

Of the economic interests recognized under the Act², those interests that may be implicated by your account of the facts are the following:

Business Entity – 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, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(a) and (b).)

Source of Income – A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within the 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.) “Income” is defined to include a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest. (Section 82030(a).)

Personal Finances – A public official has an economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

McCormick, Kabot, Jenner & Lew: From the facts provided, you and your partner are both partners with the law firm of McCormick, Kabot, Jenner & Lew. As partners in this firm,

² Our analysis is limited to the economic interests you have identified.

you and your partner have economic interests in the firm as a business entity pursuant to Section 87103(d). In addition to the economic interests in the firm as a business entity, you and your partner also have economic interests in the firm as a source of income assuming you and your partner have received income from the firm of \$500 or more in the 12 months prior to the governmental decision. (Section 87103(c).)

The City and the TCHA: As for potential economic interests in either the City or the TCHA, only businesses operated for profit are defined by the Act as business entities (Section 82005) and salary received from a state, local, or federal agency is not considered income (Section 82030(b)(2)). Accordingly, it does not appear that you and your partner have economic interests in either the City or TCHA.

Personal Finances: A public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.)³

Step Four: Are your economic interests directly or indirectly involved in the decision?

Regulation 18704.1(a) states that a business entity or source of income is *directly* involved in a decision before the official's agency when that business entity or source of income, 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.”

A business entity or a source of income that is not directly involved in a governmental decision is regarded as *indirectly* involved. (Regulations 18704(a) and 18704.1(b).)

Previously, we have determined that a law firm providing legal counsel to a company regarding the company's purchase and development of a real estate project was indirectly involved in the city's decisions regarding the project. (*White Advice Letter*, No. I-07-106.) As legal counsel for the City and the TCHA, your firm is not directly involved in a decision

³ A financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official's personal finances and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Based upon the facts provided, there is no indication that the personal financial effects rule applies to your circumstances and we will not discuss it further.

regarding the development project merely because of the services provided. Accordingly, your firm will be regarded as indirectly involved in the negotiations.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your 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 material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) However, an 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.)

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*, at 198.)

Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*, at 71), 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.

Based upon the facts provided, it appears that any potential financial effect from your, or your partner's, participation in the negotiations will be limited to your respective economic interests in McCormick, Kabot, Jenner & Lew. While salary received from a state, local, or federal agency is not considered income under the Act (Section 82030(b)(2)), the Commission has previously advised that this narrow exception for governmental salary does not extend to the financial effect on a consultant's firm or employer. Accordingly, when a consultant participates in making a governmental decision that has a foreseeable material financial effect on the consultant's private employer, the official has a conflict of interest under the Act even if the financial effect derives from the consultant's governmental salary. (See *Eckis* Advice Letter, No. A-93-270 and *McEwen, Reimann, and Wolcott* Advice Letters, Nos. I-92-481, I-92-523, and I-92-614.)

Nonetheless, the Commission has also advised that there is no "foreseeable" financial effect on a consultant's employer if a governmental entity has already contracted to permit the consultant to make recommendations that result in the rendering of identified services for an agreed upon price, because the agency's decision to pay the consultant's employer, for the services contemplated by the contract, was previously made by disinterested agency officials and the consultant's participation merely constitutes the implementation of that preexisting decision. (See *Eckis* Advice Letter, *supra* and *McEwen, Reimann, and Wolcott* Advice Letters, *supra*.)

To the extent that participating in the negotiations is part of the implementation of your respective contracts with the City and the TCHA, for a price already specified in the contracts, there is no reasonably foreseeable material financial effect on your, or your partner's, economic interests in McCormick, Kabot, Jenner & Lew resulting from the negotiations. Accordingly, neither you nor your partner is prohibited from taking part in the negotiations under the provisions of the Act.

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

In light of the foregoing analysis, it is unnecessary to consider exceptions to the conflict-of-interest rules at this time.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl