



## FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

April 23, 2013

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-13-012**

Dear Mr. Pierik:

This letter responds to your request for advice regarding provisions of the Political Reform Act (the "Act")<sup>1</sup> and is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note there are other bodies of law, separate and apart from the Act, that may apply to Mayor Tom O'Malley's situation. We urge you to check with the Attorney General's office to determine whether any other laws are applicable in light of the facts you present. Also, 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.

### QUESTIONS<sup>2</sup>

1. Do the Act's conflict-of-interest provisions prohibit the listing of Mayor O'Malley's business on the City of Atascadero's (the "City") website?

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<sup>1</sup> 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.

<sup>2</sup> In our discussions, you indicated that your request for advice relates to all provisions of the Act as they relate to the posting of Mayor O'Malley's business on the City's website. However, a conflict-of-interest analysis can only be made as to a specific governmental decision. The only governmental decision implicated by your facts is the selection of items for posting on the City's website. To the extent that you are requesting advice as to other governmental decisions, you will need to request advice as to each governmental decision.

2. Do the Act's mass mailing provisions prohibit the listing of Mayor O'Malley's business on the website?

## **CONCLUSIONS**

1. Mayor O'Malley does not have a conflict of interest because he will not be making, participating in making or using his official position to influence any governmental decisions relating to the posting of items on the City's website.

2. The listing is not prohibited by the Act's mass mailing provisions, which only apply to the distribution of tangible items. Distribution of information over the Internet, including websites, does not constitute distribution of a tangible item.

## **FACTS**

The City maintains a website that includes, among other matters of interest to visitors, a listing of lodgings within the City. Mayor O'Malley owns a bed-and-breakfast establishment that is included in the listing. The only criterion for listing is that the lodging establishment must have a city business license.

All decisions regarding website content, including decisions to post specific items on the website, are made by staff and do not come before the city council. You have indicated that Mayor O'Malley has not nor will he be communicating with staff regarding the posting of any items on the website.

## **ANALYSIS**

### **Conflict of Interest**

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 Mayor O'Malley a "public official" within the meaning of Section 87100?***

As a city council member, Mayor 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 Mayor O'Malley be making, participating in making or influencing a governmental decision regarding the content of the City's website?***

**MAKING 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.) You have indicated that all decisions regarding website content, including decisions to post specific items on the website, are made by staff and do not come before the city council. Therefore, Mayor O'Malley will not be making a governmental decision.

**PARTICIPATING IN OR INFLUENCING A GOVERNMENTAL DECISION.**

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.)

You have indicated that all decisions regarding website content are made by City staff and that Mayor O'Malley will not be negotiating, advising or making recommendations to or communicating with staff on decisions involving website content. Accordingly, Mayor O'Malley will not be participating in making or using his official position to influence these governmental decisions.

Because Mayor O'Malley will not be making, participating in making or using his official position to influence any governmental decisions regarding website content, the listing of his business on the website does not give rise to a conflict of interest.

**Using Public Funds for Mass Mailings**

The Act's mass mailing prohibitions are set forth in Section 89001, which provides that "[n]o newsletter or other mass mailing shall be sent at public expense." Regulation 18901 lists four criteria all of which must be met to qualify as a "mass mailing." One criterion is that the publicly-funded item being sent must be a *tangible* item. (Regulation 18901(a)(1).)

Consistent with Regulation 18901, we have advised that providing information over the Internet, including websites, is not a distribution of a tangible item. (*Doyle* Advice Letter, No. I-94-364.) Accordingly, the Act does not prohibit the listing of Mayor O'Malley's bed-and-breakfast establishment on the City's website.

While the Act does not contain any provisions that would regulate this conduct, we respectfully suggest that you review any laws pertaining to the use of public resources for any guidance in this area.

In summary, neither the conflict-of-interest nor mass mailing provisions of the Act prohibit the listing of Mayor O'Malley's business on the City's website.

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