

February 20, 2013

John Underwood
LATV Commission
City of Los Alamitos
11072 Midway Drive
Los Alamitos, Ca 90720

Re: Your Request for Advice
Our File No. A-13-015

Dear Mr. Underwood:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note 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 advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) There are other bodies of law, separate and apart from the Act's conflict-of-interest provisions which may apply to the situation you have described. We urge you to check with the City Attorney to determine whether any other laws are applicable in light of the facts you present. Also, 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.

QUESTION

Do the Act's conflict-of-interest provisions prohibit you, as a member of the Los Alamitos City Cable Commission (the "Cable Commission"), from participating in decisions regarding a major equipment upgrade for the city's local community public access television station ("LATV" or the "station") if you are the producer of some of the station's programming?

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.

CONCLUSION

You are not prohibited by the Act's conflict-of-interest provision from voting on whether to upgrade the station's equipment. It is not reasonably foreseeable that the financial effect of the decision will have a material financial effect on any of your economic interests.

FACTS

You are a member of the Cable Commission which administers, oversees policy matters and allocates major general expenditures for LATV. The Cable Commission does not manage the day-to-day operations of the station, nor does it direct or authorize individual productions. You have indicated that the stations operations are funded by the city and that the amount of funds is fixed at the time the city budget is approved. Once the budget is approved, the only financial decisions left to the Cable Commission involve the allocation of the budgeted amount to individual expenditures, such as equipment purchases or upgrades. You indicate that decisions to make these expenditures are "revenue neutral." Although the funds to operate the channel are paid directly by the city, the major part of these funds comes from franchise fees the city collects from cable operators.

Individual programs the station airs are paid for, in whole or in part, by the city and private sponsors. Most of the private sponsors are non-profit entities, although occasionally small businesses will co-sponsor a program. Sponsors do not advertise, but are listed as sponsors at the end of the program.

You are a producer of programs aired on LATV. In addition, according to the station's website, you have directed, written, hosted and worked on camera and post-production for several programs. You indicate that you are compensated by the city and/or program sponsors for your production work.

You state that you will no longer produce "city related programming" in which you might receive "direct financial remuneration" from the city. You also state that a decision to upgrade the equipment will have no financial effects on your business, or if there is a financial effect, the effect is not distinguishable from its effect on the public generally. You ask whether the Act's conflict-of-interest provisions prohibit you from voting on the equipment upgrade if you limit your activities as a producer of LATV programs to programs that are not contracted for by the city and are not funded by the city.

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.

Steps 1 and 2. Are you a public official making, participating in making, or using your official position to influence a governmental decision?

The Act's conflict of interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18701.) "Public Official" is defined by the Act to include "every member, officer, employee or consultant of a state or local government agency," with some exceptions not relevant here. (Section 82048.) "Local government agency" means a county, city, or district of any kind, including a school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing." (Section 82041.) Your agency requires you to file a Form 700 as a member of the Cable Commission and as such, you are a public official and a designated employee subject to the Act's conflict of interest reporting and disqualification provisions.² In addition, you will be making or participating in making a governmental decision when voting on the equipment upgrade for the LATV. (Section 87100; Regulations 18702.1-18702.3.)

Step 3. What are your 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:

- 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.)

² Under section 82019(c), a designated employee "[i]s designated in a Conflict of Interest Code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest."

- 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 \$440 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.)

Under the facts you have presented, you have an economic interest in your production business entity as an owner and a source of income to you.³ (Section 87103(c) and (d).) Moreover, you have an interest in the clients of the business to the extent that your pro rata share in the income from the client through the business is \$500 or more. (We assume, for purposes of our analysis, that you own 100% of your business and income you receive from the city and from other individual clients is more than \$500.)

In addition, you have an economic interest in your personal finances. However, 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).) Accordingly, the personal financial effects rule does not appear to apply to your circumstances and we will not discuss it further.

Step 4. Will your economic interests be directly or indirectly involved in the decision you will make, participate in making or influence as a public official?

Business Entity and Source of Income

Under Regulation 18704.1(a), a person, including a business entity and source 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;

³ The definition of a business entity includes any business operated for profit, regardless of whether it is organized as, for example, a corporation, partnership or sole proprietorship. (Section 82005.) If you have an investment of at least \$2,000 in your production business entity, the business entity is an economic interest to you. (Section 871013(a); Regulation 18703.5.)

“(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.”

Your business has not initiated the Cable Commission’s vote on the equipment upgrade for LATV, nor is it a named party in, or the subject of, a proceeding to vote on the matter. Accordingly, your business is indirectly involved in the decision.

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.

The applicable materiality standards for governmental decisions involving business entities are found in Regulation 18705.1. Subdivision (c) sets forth the materiality standard for business entities indirectly involved in a governmental decision, including those that are sources of income. For relatively small businesses, (those with annual net income of \$750,000 or less), which we assume applies to your business, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will (i) increase/decrease the business entity’s annual gross revenues by \$20,000 or more, (ii) result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year, or (iii) increase/decrease the value of the business entity’s assets by \$20,000 or more. (Regulation 18705.1(c)(4).)

Step 6. Is it reasonably foreseeable that the financial effect of the governmental decision on your economic interests will meet the applicable materiality standards?

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 need not be certain or even substantially likely to be “reasonably foreseeable,” but it must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Nonetheless, the facts you have provided indicate that it is not reasonably foreseeable that a decision to finance an upgrade of the station’s equipment will have a material financial effect

on your business or sources of income (the City and the non-profits who are your clients). Accordingly, the Act does not prohibit you from voting on the decision.

Steps 7 and 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). You have not presented any facts indicating that either of these exceptions is applicable to your situation.

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