

March 25, 2013

Phaedra A. Norton
Turlock City Attorney
156 S. Broadway, Suite 240
Turlock, CA 95380-5456

Re: Your Request for Advice
Our File No. A-13-034

Dear Ms. Norton:

This letter responds to your request for advice on behalf of Turlock City Councilmember William DeHart regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)¹ 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.) Additionally, our advice is based solely on the provisions of the Act. We offer no opinion on the applicability, if any, of other conflict-of-interest laws.

QUESTION

Does the Act prohibit Councilmember DeHart from participating in decisions involving the Turlock Chamber of Commerce (the “TCC”) if he receives compensation from the TCC for providing services as an independent contractor?

CONCLUSION

Councilmember DeHart has a conflict of interest in decisions involving the TCC and he is, therefore, prohibited from participating in these decisions.

FACTS

Councilmember Hart is considering accepting a position as an independent contractor with the TCC selling memberships and other services to businesses in the Turlock area.

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.

The city and the TCC have a contract pursuant to which the TCC provides Convention and Visitor's Bureau services to the city and the city pays the TCC approximately \$211,445 annually for these services. The city council approves funding for the contracted services.

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: IS COUNCILMEMBER DEHART A "PUBLIC OFFICIAL" WITHIN THE MEANING OF SECTION 87100 AND WILL HE BE MAKING, PARTICIPATING IN MAKING OR INFLUENCING A GOVERNMENTAL DECISION?

As a city councilmember, Councilmember DeHart is a public official under the Act. (Sections 87200 and 82048.) If a public official who holds an office specified in Section 87200 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, orally 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), 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(c) and 18702.5(d) apply.

When voting on and considering city council decisions involving the TCC, Councilmember DeHart will be making, participating in making, or otherwise using his official position to influence a governmental decision.

STEP 3: DOES COUNCILMEMBER DEHART HAVE A FINANCIAL INTEREST IN THE DECISIONS AT ISSUE?

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, on any of the following economic interests. (Section 87103; 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.)
- 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.)

Business Entity

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

Source of Income

We assume that Councilmember DeHart receives at least \$500 annually from his business. Therefore, the business entity is a source of income to him. In addition, he has an interest in the clients of the business to the extent that his pro rata share in the income from the client through the business is \$500 or more. We assume, for purposes of our analysis, that Councilmember DeHart owns 100 percent of his business and income received from the TCC is more than \$500.

Personal Finances

A public official is considered to always have an economic interest in his or her personal finances. Councilmember DeHart has an economic interest in his personal finances if a decision will result in an increase or decrease in his “personal expenses, income, assets, or liabilities.” (Section 87103.) 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 Councilmember DeHart’s circumstances and we will not discuss it further.

STEP 4: WILL COUNCILMEMBER DEHART’S ECONOMIC INTERESTS BE DIRECTLY OR INDIRECTLY INVOLVED IN DECISIONS HE WILL MAKE, PARTICIPATE IN MAKING OR INFLUENCE AS A PUBLIC OFFICIAL?

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;

“(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.”

Councilmember DeHart’s business

Councilmember DeHart’s business will not be initiating any city proceeding involving the TCC nor will it be a named party in, or the subject of, any such proceeding. Accordingly, Councilmember DeHart’s business is indirectly involved.²

The TCC

The TCC is the subject of any city council decision involving services it provides to the city. Therefore, the TCC is a directly involved source of income in the decision.³

² If a public official’s economic interest is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704(a).)

STEPS 5 AND 6: WILL THERE BE A REASONABLY FORESEEABLE MATERIAL FINANCIAL EFFECT ON COUNCILMEMBER DEHART'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.

Councilmember DeHart's Business

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 that are *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 Councilmember DeHart's business, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will increase/decrease the business entity's annual gross revenues by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets by \$20,000 or more. (Regulation 18705.1(c)(4).)

The TCC

Regulation 18705.3 provides that "any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is *directly* involved in a decision before the official's agency, is deemed material." This standard for determining materiality for a directly involved source of income is known as the "one penny rule." If the source of income is affected by even one penny, the financial effect is deemed material.

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.)

³ Note that city council decisions may also materially affect TCC indirectly. In such circumstances you would apply Regulation 18705.1(c). Since you asked specifically about a decision in which TCC is directly involved, we do not further discuss the indirect standards.

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, based on the facts you have presented, it is reasonably foreseeable that city council decisions involving the TCC will meet the applicable materiality standard: The financial effect is deemed material if the source of income is affected by even one penny. The city pays the TCC approximately \$211,445 annually for the TCC's services. Therefore, Councilmember DeHart has a conflict of interest in city council decisions involving the TCC and he is prohibited from participating in decisions involving the TCC.

STEPS 7 & 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 Councilmember DeHart's 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