



FAIR POLITICAL PRACTICES COMMISSION

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April 16, 2013

Mark Owens, Senior Projects Counsel
California Health & Human Services Agency
Office of Systems Integration
2525 Natomas Park Drive, Suite 370
Sacramento, CA 95833

Re: Your Request for Informal Assistance
Our File No. I-13-040

Dear Mr. Owens:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature, we are treating your request as one for informal assistance.²

QUESTION

Are individuals who provide services to the California Health & Human Services Agency ("CHHS"), pursuant to the CHHS's contract with Accenture "consultants" under the Act and thus subject to the Act's provisions that apply to public officials and designated employees?

CONCLUSION

Absent duty statements and specific activities, we are unable to give you a definitive answer as to whether any of the individual employees are "consultants" under the Act. To assist

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

you in completing this analysis, we describe below the elements for determining whether an individual is a “consultant.”

FACTS

You are Senior Counsel for the California Health & Human Services Agency, Office of Systems Integration (“CHHS”). CHHS is entering to a contract with Accenture to assist in administering the Health Benefit Exchange. Accenture will be the Project Management team and its employees will work closely with employees and management at CHHS. You provided an analysis of your question from Accenture’s counsel that determined no Accenture employee is a “consultant” under the Act and therefore need not file a Statement of Economic Interests (“Form 700”).

The facts you provided do not list duty statements or involvement of the Accenture employees, but you have stated that many of the Accenture employees will have more involvement than others, will participate in meetings, will have the opportunity to influence decision-making, and will serve similar roles to CHHS’s staff.

ANALYSIS

The Act’s conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a “financial interest.” (Section 87100.) Section 87103 provides that a public official has a “financial interest” in a governmental decision “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, or on any of the official’s economic interests. In addition, state and local public officials must file periodic statements of economic interests (Form 700) disclosing those personal assets and interests that may be affected during the performance of their official duties. (Sections 87200 - 87350.)

Your request for advice on behalf CHHS relates to the interpretation of its conflict of interest code. The Fair Political Practices Commission (the “Commission”) is the code-reviewing body for CHHS. For this reason, we are able to provide advice regarding this code. (Section 83114(b) and Regulation 18329.5(a).)

The Act defines “public official” to include “every member, officer, employee or consultant of a state or local government agency.” (Section 82048.) In addition, the Act defines the term “designated employee” to likewise include “any officer member employee or consultant” of any agency who meets specified criteria. (Section 82019.) Therefore, not only are members, officers and employees of a government agency “public officials” and “designated employees” subject to the provisions of the Act, but so are consultants, who presumably would encompass a class of individuals who are not members, officers or employees but nevertheless perform services for a government agency.

Regulation 18701(a) defines, for purposes of Section 82048 (and Section 82019 which defines “designated employee”), a consultant:

“(2) “Consultant” means an individual who, pursuant to a contract with a state or local government agency:

“(A) Makes a governmental decision whether to:

1. Approve a rate, rule, or regulation;
2. Adopt or enforce a law;
3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
5. Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
6. Grant agency approval to a plan, design, report, study, or similar item;
7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

“(B) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Government Code Section 87302.”

(Regulation 18701(a)(2), copy enclosed.)

Therefore, under this regulation, an individual is a consultant for purposes of the Act if, pursuant to a contract with a government agency, he or she either makes governmental decisions for the agency (subparagraph (A)), or serves in a staff capacity for the agency and either participates in government decisions (as defined) or performs the same or similar job duties normally performed by an individual in a position listed in the agency’s conflict-of-interest code (subparagraph (B)).

Makes a Government Decision

As described above in Regulation 18701(a)(2)(A) above, if an individual is performing services under a contract with a government agency and “makes a government decision” for the agency as listed in that provision, he or she is a consultant. This is a relatively straightforward analysis and needs no further explanation.

Serves in a Staff Capacity and either Participates in Government Decisions or Performs the Same or Similar Job Duties Normally Performed by an Individual in a Position Listed in the Agency's Conflict-of-Interest Code

Under Regulation 18701(a)(2)(B), individuals who are working for Accenture pursuant to the contract could be considered consultants if they serve "in a staff capacity with the agency and in that capacity participate[] in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Government Code Section 87302."

This provision applies two separate tests: first, whether the individual serves in a staff capacity and in that capacity participates in making governmental decisions and second, whether the individual serves in a staff capacity with the agency and in that capacity performs all or substantially all the same duties of an individual holding a position specified in the agency's conflict of interest code.

Serves in a Staff Capacity

The *Randolph* Advice Letter (No. 1-95-045) illustrates how to determine whether a person serves in an agency staff capacity within the meaning of Regulation 18701(a)(2)(B). This advice letter notes that the "staff capacity" language generally excludes individuals who work on one project or a limited range of projects. Generally, "serving in a staff capacity" involves an on-going relationship between the agency and the contractor. (See *Wasko* Advice letter, *supra*; see also, *Travis* Advice Letter, No. A-96-053.) In the *Ferber* Advice Letter, for example, we found that "the length of a contractor's services to an agency is a significant factor where the contract is for a term of more than one year and the services are rendered on a regular and continuous basis for the duration of the contract." (See *Ferber*, Advice Letter, No. A-98-118.) To the extent, for example, your inquiry concerns high-level contractors who have broad project roles of a duration of more than one year, the first prong of regulation 18700(a)(2)(B) would be met.

The Commission has previously found that a term of more than one year is significant enough to meet this temporal qualifier, whereas nine months of regular and continuous work is not normally enough to qualify. (*Ferber*, *supra*, and *Smith* Advice Letter, No. 1-99-316.) For example, in the *Sanchez* Advice Letter, No. A-97-438, we advised a contractor who performed periodic biological and physical surveys of a project area over a two-year period for a local planning commission that he was not a "consultant" under the Act. In reaching that conclusion, we included the following caveat:

"Our only concern in reaching this conclusion is the duration of the contractual relationship, which will be over two years. However, in context, this duration is not indicative of an on-going relationship which

might otherwise lead to the conclusion that there is a staff relationship . . . although the term of the contract is over two years, this duration is attributable to the need for periodic monitoring, not to perform continuous work during that time. Under these circumstances, the duration of the contractual relationship does not preclude the conclusion reached above.”

The *Randolph* Advice Letter (No. I-95-045) sets out the criteria for determining whether a person serves in an agency staff position for purposes of Regulation 18700(a)(2)(B). This advice letter notes that the staff capacity language generally excludes from the scope of the regulation those individuals who work on one project or a limited range of projects for an agency. We have provided the same advice in subsequent letters. (*See, e.g., Karger* Advice Letter, No. A-97-253; *Sanchez* Advice Letter, *supra*; *Marks* Advice Letter, No. A-98-073).

Furthermore, we disagree with the conclusions set forth in the analysis of this issue you provided. First, it provides no substantive analysis of any particular individual’s duties under the contract. Second, the conclusion that if Accenture employees “serve in a staff capacity” CHHS would be in violation of the California Constitution is not relevant to the inquiry under the Act. As described above, the Act specifically includes “consultants,” in addition to officers, members and employees of a governmental agency, in the definition of individuals who are “public employees” (subject to the Act’s conflict-of-interest provisions; *see* Section 87100) and “designated employees” (required to be included in an agency’s conflict-of-interest code; *see* Sections 87300 – 87314). As mentioned, under these definitions, consultants are clearly considered a class of individuals who are not employees and the Commission, under its authority to define this term by regulation (Section 83112), has said such. Therefore, the conclusion that only agency civil service “employees” can be “consultants” under the Act or Commission regulations is not accurate. Also, in the context of the statutory definitions, it is clear that the language of Regulation 18701(a)(2)(B) is meant to reach a class of individuals who are not employees of an agency but who perform services for the agency in a manner that is similar to agency employees. The advice letters described above narrow this coverage based on issues, such as the length of the contract and the limited nature of the services performed, which would tend to suggest that the contracting individual is not serving the agency in a manner similar to agency staff.

Participates in Making a Governmental Decision or Performs Duties of an Individual in the Agency’s Conflict-of-Interest Code

As mentioned, if an individual “serves in a staff capacity” as described above, he or she is still not a consultant for purposes of the Act unless he also either participates] in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s conflict-of-interest code.

A person “participates in making a governmental decision” when he or she, acting within the authority of his or her position:

(A) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision referred to in Regulation 18701(a)(2)(A);

(B) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

“(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referred to in Regulation 18701(a)(2)(A); or
“(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, that requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referred to in Regulation 18701(a)(2)(A).”

(Regulation 18702.2.)

This language is fairly self-explanatory, although we note that, generally, we have narrowly construed the phrase “significant intervening substantive review” to require more than the mere review of the recommendations by superiors, but rather the independent checking of the results without solely relying on the data of the individual working in a staff capacity. (*Greenwald* Advice Letter, No. I-90-349.) In other words, an individual serving in a staff capacity participates in a decision even if his or her work is “reviewed” by several of his or her superiors, if those superiors rely on the data or analysis prepared by the person without checking it independently, if they rely on his or her judgment, or if he or she in some other way may influence the final decision. (*Gold* Advice Letter, No. A-93-059.)

Also, to determine whether an individual who “serves in a staff capacity” is performing the same or substantially similar duties that would otherwise be performed by an individual whose position is listed in the agency’s conflict-of-interest code, all one would need to do is see if the duties performed under the contract more or less match those performed by an employee whose position is already listed in the agency’s code.

Under the limited facts you have provided, it seems likely that most of the analysis under this prong of the consultant test is whether Accenture employees are “participating” in your agency’s decisions.

Additionally, we call your attention to Regulation 18734 (enclosed), which explains that interim disclosure applies until an agency amends its code to reflect the new consultant positions. People in these positions “shall file under the broadest disclosure category in the agency’s conflict of interest code.” (Regulation 18734(b).)

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

Sincerely,

Zackery P. Morazzini
General Counsel



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HMR:jgl