



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

February 14, 2014

Andrea S. Visveshwara
Assistant City Attorney
990 Palm Street
San Luis Obispo, CA 93401-3249

Re: Your Request for Informal Assistance
Our File No. I-13-067

Dear Ms. Visveshwara:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that 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.) Because your question is general in nature and not limited to a specific governmental decision, we are treating your request as one for informal assistance.²

In addition, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as Government Code Section 1090 or common law conflict of interest.

QUESTION

Do the Act's conflict-of-interest provisions prohibit Ms. Matheny from making, participating in making, or influencing a governmental decision made by the Human Relations Commission ("HRC") if one of her employer's clients appears as an applicant for grant-in-aid?

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).)

CONCLUSION

As a member of the HRC and an employee of an insurance firm, Ms. Matheny may not make, participate in making, or influence the governmental decisions of the HRC when to do so will have a foreseeable, material financial effect on her employer or her personal finances. However, the determination of whether decision has a reasonably foreseeable, material financial effect on her employer or personal finances can be made only after consideration of all facts available at the time of the decision. For example, the size of the grant, the size of the non-profit organization seeking the grant, and the volume of business between the non-profit and the insurance firm are all factors that must be considered in determining whether a financial effect is foreseeable and material.

FACTS

Ms. Matheny was appointed by the San Luis Obispo City Council (the "City Council") to serve as a member of the HRC. The HRC advises the City Council on matters concerning social problems affecting the residents of the City, assists in tenant/landlord problems, and reviews and recommends grants-in-aid to assist non-profit groups that provide human services programs.

Ms. Matheny is also employed as the Human Resources Director for a local insurance firm. Her primary responsibilities include managing her employer's internal human resources. Occasionally, clients may also consult with Ms. Matheny for advice on human resources issues. Ms. Matheny is a salaried employee and is eligible for an annual discretionary bonus, which depends upon her performance for the prior year, as well as the profitability of her employer.

While Ms. Matheny's employer does not appear before the HRC, she anticipates that some of her employer's clients may appear before the HRC as applicants for grants-in-aid. If the HRC denies a request for a grant-in-aid by a client of Ms. Matheny's employer, you have stated that it is "theoretically possible" that the client would have to lay off an employee, which may potentially decrease the amount of premiums paid to Ms. Matheny's employer. However, Ms. Matheny has no specific information at this time regarding the potential financial effect of a grant-in-aid decision on a client of her employer and does not typically have access to the client's financial information. In attempting to measure the financial effect on Ms. Matheny's employer, you have stated that the insurance firm has declined her request for information about its revenue for the purpose of analyzing whether any potential conflict-of-interest exists.

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 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 a given governmental decision.

Step One: Is the individual a "public official" within the meaning of the Act?

As a member of the HRC, Ms. Matheny is a public official. Public officials are defined as "every member, officer, employee, or consultant of a state or local government agency." (Section 82048.)

Step Two: Is the official 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.) A 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.) For a decision before the official's own agency, 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 the agency. (Regulation 18702.3.) Ms. Matheny is making, participating in making, or influencing a governmental decision by taking part in any HRC decision regarding a grant-in-aid including a recommendation to the City Council.

Step Three: What are the official's interests that may be affected by the decision?

Generally, to determine whether an official has a disqualifying conflict of interest in any particular governmental decision, the official must identify those interests that may be affected by the decision. Interests from which a conflict of interest may arise are set forth in Section 87103 and Regulations 18703-18703.5 and include:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An interest in a source of income to the official, including commission income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

- An interest in a source of gifts to the official if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An interest in the official's personal finances, including those of the official's immediate family. This is known as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Of the interests recognized in Section 87103, those interests that are implicated by your account of the facts are the following:

Insurance Firm:

As an employee of the insurance firm, Ms. Matheny has an interest in the firm as a business entity. (Section 87103(d); Regulation 18703.1(b).) If her income from the firm aggregates to \$500 or more in the 12 months prior to the decision, Ms. Matheny also has an interest in the firm as a source of income. (Section 87103(c); Regulation 18703.3.)

Clients of the Insurance Firm:

Generally, an official only has an interest in the customer or clients of a business entity if the official owns, directly, indirectly, or beneficially, a 10-percent interest or greater in the business entity. (Section 82030.) According to the facts provided, Ms. Matheny does not appear to own any interest in the insurance firm and, therefore, does not appear to have an interest in any client of the firm.³

Personal Finances:

A public official always has an interest in his or her personal finances. A governmental decision will have an effect on this 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 An official may also have an interest in a customer or client of a business entity if the customer or client is a source of incentive compensation. Incentive compensation is income, "over and above salary, which is either ongoing or cumulative, or both, as sales or purchases of goods or services accumulate" as calculated by a predetermined formula set by the employer correlating with conduct of the purchaser in direct response to the effort of the official. However, incentive compensation does not include "bonuses for activity not related to sales or marketing" or "payments for personal services which are not marketing or sales." (Regulation 18703.3(d).) Based upon the facts provided, it appears that any annual bonus Ms. Matheny may receive will be based upon her performance as a Human Resources Director as opposed to sales or marketing of the insurance firm. Therefore, Ms. Matheny does not appear to have an interest in any client of the firm as a source of incentive compensation.

Step Four: Are the official's interests directly or indirectly involved in the decision?

Insurance Firm:

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.”

Sources of income that are not directly involved in governmental decisions under the rules quoted above are regarded as indirectly involved. (Regulations 18704(a) and 18704.1(b).)

Ms. Matheny's question involves grant-in-aid proceedings initiated by clients of the insurance firm. The insurance firm is indirectly involved in these decisions.

Personal Finances:

An official's interest in his or her personal finances is deemed to be directly involved in the governmental decision if facts suggest any financial effect on the interest. (Regulation 18704.5.)

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official's interests?

Materiality

Having identified the interests involved, and determined whether each interest is directly or indirectly involved in the decision at issue, it is necessary to identify the materiality standard applicable to each interest.

Insurance Firm:

The materiality threshold applicable to Ms. Matheny's interest in the insurance firm is determined by the gross revenues of the firm. You have stated that Ms. Matheny's employer has refused to provide Ms. Matheny with financial information related to the firm. As noted above, in rendering advice, the FPPC is not the finder of fact. Ultimately, it is Ms. Matheny's responsibility to determine the applicable material standard. To the extent that Ms. Matheny

cannot determine the gross revenue of the firm, the only assistance we can offer is that Ms. Matheny can conservatively apply the lowest materiality threshold to ensure that the financial affect of a decision does not exceed the applicable threshold. The lowest materiality threshold is provided in Regulation 18705.1(c)(4), which states that the financial effect of a governmental decision on a small business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the value of 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.”

Personal Finances:

A financial effect on an official’s personal finances is material, as stated in Regulation 18705.5(a), which provides:

“A reasonably foreseeable financial effect on a public official’s personal finances is material if it is at least \$250 in any 12-month period.”

Foreseeability

Once a public official has determined the materiality standard applicable to each of his or her interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. For a material financial effect to be foreseeable on an official’s interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *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.*) 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.

Based upon the facts you provided, Ms. Matheny’s interests in her employer, the insurance firm, are indirectly involved in decisions by the HRC regarding grants-in-aid to clients of the insurance firm. Unless she is able to determine the gross revues of the insurance firm, Ms. Matheny may wish to apply the lowest materiality threshold to ensure she does not violate the Act’s conflict-of-interest provisions. If this is the case, Ms. Matheny may not take part in a decision by the HRC if it is reasonably foreseeable that the decision will increase or decrease the

insurance firms gross revenues for a fiscal year in the amount of \$20,000 or more, the insurance firm incurs or avoids additional expenses or reduces or eliminates existing expenses for a fiscal year in the amount of \$5,000 or more, or the insurance firm's assets or liabilities increase or decrease in the value of \$20,000 or more. Moreover, Ms. Matheny may not take part in a decision by the HRC if it is reasonably foreseeable that the decision will affect her personal finances by \$250 or more in any 12-month period including, but not limited to, her salary from the insurance firm or any foreseeable bonus.

You state that it is "theoretically possible" for the amount of premiums paid to the insurance firm to decrease if a client of the firm is denied a grant-in-aid by the HRC. Likewise, it would appear possible for the amount of premiums paid to the insurance firm to increase if the client is approved for a grant-in-aid by the HRC. However, Ms. Matheny has the final responsibility to determine whether it is reasonably foreseeable that the financial effect of a decision on her interests in her employer or personal finances will exceed the applicable materiality standard. The FPPC is unable to make this determination because it is necessarily a fact-specific determination based upon the facts available to Ms. Matheny at the time of a specific decision. For example, Ms. Matheny must consider all facts available to her in making this determination including, but not limited to, the size of the grant, the size of the non-profit seeking the grant, and the volume of business between the non-profit and the insurance firm.

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

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

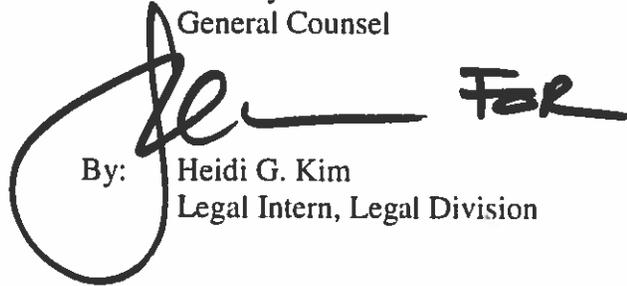
Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the "legally required participation" exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the "public generally" or the "legally required participation" exceptions are applicable to Ms. Matheny's circumstances, so we will not address them further.

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

Sincerely,

Zackery P. Morazzini
General Counsel

A handwritten signature in black ink, appearing to read 'Heidi G. Kim', with a large loop on the left side and a horizontal line extending to the right. The signature is written over the printed name and title of Heidi G. Kim.

By: Heidi G. Kim
Legal Intern, Legal Division

HGK:jgl