

September 5, 2013

Scott Warren
4230 Cedar Avenue
Long Beach, CA 90807

Re: Your Request for Informal Assistance
Our File No. I-13-112

Dear Mr. Warren:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based solely 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, nothing in this letter may be construed to evaluate any conduct that has already taken place.

Because your inquiry is general in nature and does not involve specific governmental decisions, we are treating it as a request for informal advice.²

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, common law conflict of interest, or the doctrine of incompatible offices.³

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).)

³ The consequence of holding an incompatible office is that the person is "deemed to have forfeited the first office upon acceding to the second." (Section 1099(b).) The doctrine of incompatible offices is outside the jurisdiction of the Fair Political Practices Commission, but the Attorney General's office has issued numerous opinions on the subject which are available on the Attorney General's web site. If you have a question about whether two public offices which you hold or seek to hold would be considered incompatible offices, contact the Attorney General's office (www.ag.ca.gov). State and local agencies are also authorized to adopt "statements of incompatible activities" that govern their employees' conduct. State and local agencies can prohibit their employees from engaging in any outside employment, activities, or enterprises, which are inconsistent or in conflict with their duties as agency employees. (Gov. Code Sections 19990 and 1126 et seq.) You should contact your agency counsel if you have questions about the agency's incompatible activities statement.

QUESTIONS

- 1) Does the Act prohibit you from holding a position as a director with the Water Replenishment District of Southern California (“WRD”) and being employed as a senior engineering geologist with the California Environmental Protection Agency (“CalEPA”) in the Department of Toxic Substances (“DTSC”)?
- 2) Will holding both positions, one as a Director at WRD, and one as an employee of CalEPA, create a conflict of interest under the Act?

CONCLUSION

- 1) There is nothing in the Act that prohibits an individual from holding two public positions concurrently. However, there may be other laws outside of our jurisdiction that may apply. You should check with the Attorney General’s office or your agency’s legal office to determine if there are other laws that may be applicable to the facts you have presented.
- 2) A position on the WRD Board and/or a position with the CalEPA/DTSC does not, in and of itself, create a potentially disqualifying conflict of interest under the Act. However, as a member of either the WRD Board or as a designated employee of CalEPA/DTSC, you would need to disqualify yourself from making, participating in making, or influencing any governmental decision that would have a reasonably foreseeable and material financial effect on one or more of your interests, as described below.

FACTS

You are a Senior Engineering Geologist and Team Leader with DTSC , a state agency within CalEPA. DTSC oversees the permitting of facilities that manage hazardous waste. In your role as the Agency Collaboration Leader with the DTSC Drinking Water Protection Team, you work with WRD staff, responsible parties, and other federal, state, and local agencies to oversee cleanups and to analyze potential impact sites overseen by DTSC and effects it may have on water managed by WRD.

WRD is a regional groundwater management agency that protects and preserves the quantity and quality of groundwater for two of the most utilized urban basins in California. The service area is home to over ten percent of the state’s population in 43 cities in southern Los Angeles County. WRD is a local government agency governed by a publicly elected Board of Directors.

As part of your duties at CalEPA, you are involved in the Brownfields Environmental Restoration Program. This program oversees assessment and cleanup of hazardous waste that has already been released to the subsurface soil, groundwater and potentially drinking water.

Generally, WRD is a potentially impacted party of hazardous waste rather than a generator of hazardous waste.

The death of one WRD board member has created a need for a replacement for the duration of that member's term. You are interested in applying for appointment to the WRD Board and would like advice regarding any potential conflict a possible appointment to the Board would cause. You would like to know whether serving on the Board is in conflict with your current position with DTSC.

ANALYSIS

It is important to note that the Act's conflict of interest rules apply on a decision by decision basis and depend on the specific facts of each case. Thus, we can only provide general guidance in this letter, but whether you actually have a conflict of interest in a given decision must be answered as the governmental decision arises.

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).) Specifically, 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 knows or has reason to know he or she 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 governmental 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 a standard, eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1) -(8).)

Step 1. Are you a public official?

The Act's conflict of interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) As a Senior Engineering Geologist and Team Leader with CalEPA, you are designated employee in your agency. Therefore you are a public official for purposes of the Act (Section 82048) and the conflict of interest laws apply to you. If you are appointed to become a member of the WRD board, you will also be a public official in that position for purposes of the Act, and the conflict of interest laws would apply to you with respect to WRD board decisions.

Step 2. Are you making, participating in making, or influencing a governmental decision?

The Act's conflict of interest provisions apply only where a public official "make[s], participate[s] in making or in any way attempt[s] to use his [or her] official position to influence

a governmental decision in which he or she knows or has reason to know he [or she] has a financial interest.” (Section 87100; Regulation 18700(b)(2).)

The Commission has adopted a series of regulations that define “making,” “participating in making,” and “influencing” a governmental decision, and provide certain exceptions. (Regulations 18702-18702.4.)

A public official is “making” a governmental decision by taking actions like voting on a matter or otherwise committing his or her agency to a course of action. (Regulation 18702.1.) “Participating in making” a governmental decision includes advising or making recommendations to decision makers at CalEPA or deliberating as a member of the WRD Board. (Regulation 18702.2.)

If appointed to the WRD Board, you would be making, and participating in making governmental decisions by deliberating and voting on decisions about various matters before the WRD Board. (Regulations 18702.1 and 18702.2.)

In addition to these more formal actions, the conflict of interest rules also apply to attempts by a public official to “influence” a governmental decision. “Influence” a decision means contacts, appearances before or other attempts by a public official to influence any member, officer, employee or consultant of the official’s agency. “Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.” (Regulation 18702.3.)

Step 3. What are the possible sources of a financial conflict of interest?

The Act’s conflict of interest provisions apply only to conflicts arising from financial interests. The interests from which conflicts of interest may arise are defined in Regulations 18703-18703.5. Identifying which, if any, of these interests are held by a public official is the third step in analyzing a potential conflict of interest under the Act. (See Regulation 18700(b)(3).) There are five types of interests:

- A public official has an 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)); or in which he or she holds any of the business relationships specified in Regulation 18703.1(b) through (e). (Section 87103(d); Regulation 18703.1.) *A government agency is not a “business entity” for purposes of the Act. (Section 82005.)*
- A public official has an 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 interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3). *However, salary, per diem, or reimbursement for*

expenses received from a state or local government agency is exempt from the Act's definition of "income." (Section 82030(b)(2) and Regulation 18232.)

- A public official has an interest in any source of gifts to him or her if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official has an interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family – this is known as the “personal financial effect” rule and includes possible financial effects on the amount of governmental salary received. (Section 87103; Regulation 18703.5 and 18705.5.)

Step 4. Are your interests directly or indirectly involved in the governmental decision?

Once a public official identifies an interest, the official must decide whether the interest is directly or indirectly involved in the decision. (Regulation 18700(b)(4); Regulations 18704-18704.5.)

Step 5. What is the applicable materiality standard?

The next step is identifying the appropriate standard for evaluating the “materiality” - that is, the importance - of the effect of the decision on your interest(s). (See Regulation 18700(b)(5); Regulations 18705-18705.5.) For example, when an interest in real property is directly involved in a decision, any reasonably foreseeable financial effect - even a penny's worth - on the real property is deemed material. (Regulation 18705.2(a).) On the other hand, if the interest is not directly involved, the materiality standard is more lenient because the indirectly involved interest presents less of a danger of a conflict of interest.

Step 6. Is it reasonably foreseeable that the governmental decision will have a material financial effect on one or more of your interests?

The sixth step is deciding if it is reasonably foreseeable that there will be a material financial effect on one or more of your interests. (Regulation 18700(b)(6); Regulation 18706.)

For a material financial effect to be foreseeable on an official's interest, it need not be certain or even 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* (1975) 1 FPPC Ops. 71) 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 after a complete consideration of all the facts before him.

I have enclosed the fact sheet "Holding Two Positions" for your information. If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl

Enclosure