

June 3, 2014

Mr. Frank S. Furtek  
Chief Counsel  
First 5 California  
2389 Gateway Oaks Drive, Suite 260  
Sacramento, CA 95833

Re: Your Request for Advice  
**Our File No. A-14-074**

Dear Mr. Furtek:

This letter responds to your request for advice on behalf of Commissioner Collis, a member of the First 5 California Commission, regarding conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

### **QUESTION**

Does First 5 California Commissioner Conway Collis, who is president and CEO of the nonprofit organization GRACE, have a conflict of interest if he (1) votes on positions on state legislation at First 5 California Commission meetings, or (2) serves on the legislative advisory committee of the Commission, and in that capacity recommends positions on legislation?

### **CONCLUSION**

Under the Act, Commissioner Collis would only have a conflict of interest if a decision on legislation would have a reasonably foreseeable material financial effect on the nonprofit organization GRACE. Commissioner Collis may also continue to participate in the First 5 Commission's Legislative Advisory Committee, however, he should recuse himself from making or participating in governmental decisions about specific bills that would have a material financial effect on GRACE.

Under the Act's regulations, a decision/recommendation on legislation will be considered to have a material financial effect on GRACE if it increases or decreases GRACE's gross annual

---

<sup>1</sup> 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.

receipts for a fiscal year or the value of its assets or liabilities in the amount of \$100,000 or more, or causes GRACE to incur or avoid expenses for a fiscal year of \$25,000 or more.

In addition, under the nexus test discussed below, the effect of a decision will be considered material if it has *any financial effect* on GRACE where it is a decision on legislation that GRACE is sponsoring.

## FACTS

You are counsel to “First 5 California,” a state commission that among other things, promotes and funds comprehensive programs centered on the child, parent, and teacher to improve early childhood outcomes. The First 5 California Commission has appointed a Legislative Advisory Committee (LAC) to assist in assessing bills and to make recommendations on whether to formally support bills in the State Legislature. The First 5 Commission has delegated to the Legislative Advisory Committee the work of reviewing legislation and determining what position to take on the legislation. The Legislative Advisory Committee acts for the Commission in regards to legislation.

You are requesting advice on behalf of Mr. Conway Collis, a state commissioner who sits on the Legislative Advisory Committee. Mr. Collis is the President and CEO of GRACE (Gather, Respect, Advocate, Change and Engage), a non-profit organization that seeks to make a positive difference in the lives of low-income families and their children. GRACE is funded by the Daughters of Charity Foundation that also funds several separate 501(c)(3) organizations that operate, among other things, an early childhood learning center and other programs serving low income families and their children. Although the foundation has a separate Board of Directors, the nonprofit organization GRACE, of which the commissioner is CEO, and the separate 501(c)(3) organizations funded by the foundation have essentially interlocking Boards of Directors.

GRACE receives its funding from the Daughters of Charity Foundation. Until approximately January 2015, GRACE also receives consulting fees from the Daughters of Charity Health System. GRACE does not operate any program nor does it seek or receive funding from any governmental entity to subsidize its own operating expenses. GRACE receives no direct or indirect benefit from the funding or lack thereof for any programs or services sponsored by or receiving funding from the Daughters of Charity Foundation or the Daughters of Charity Health System.

Two bills under review propose significant revisions to the early childhood system: Senator Steinberg’s transitional kindergarten bill (SB 837) and Senator Liu’s early start legislation (SB 1123). Those bills both contain language that provides that state funding will flow to local governments to provide services themselves or contract with private local providers to participate in the delivery of the early childhood services. Because nonprofit organizations affiliated with GRACE may potentially provide some of the services anticipated if the bills are

passed, you are inquiring about whether Commissioner Collis' participation in discussing the bills would give rise to a conflict under the Political Reform Act.

### **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 & 2. "Public official" making a governmental decision.**

Section 82048 defines a public official as "every member, officer, employee or consultant of a state or local government agency." As a member of the First 5 California Commission, which is a state agency, Commissioner Collis is a public official.

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 making a governmental decision" when, acting within the authority of his or her position, the official advises or makes recommendations to the decisionmaker to influence a governmental decision. (Regulation 18702.2.) When Commissioner Collis acts on the Legislative Advisory Committee to determine whether First 5 will take a "support" or "oppose" position on legislation, he will be making or participating in a governmental decision.

#### **Step 3. What are the commissioner's interests?**

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain interests enumerated in Section 87103:

- 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).)
- A public official has an 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 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, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an 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 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.)

The only interest implicated by the facts is Commissioner Collis’ interest in a source of income from the nonprofit organization GRACE. Mr. Collis confirmed that GRACE is a source of income to him of over \$500 per year. Pursuant to Section 87103(c), he has an interest in his nonprofit employer. Under the facts presented, the only source of income to him is his employer GRACE, not entities affiliated with GRACE.

**Step 4. Will the commissioner’s interests be directly or indirectly involved in decisions he will make, participate in making or influence as a public official?**

A person, including a 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 by filing an application, claim, appeal or similar request; or (2) is a named party in, or is the subject of, the proceeding. (Regulation 18704.1.) Because GRACE will not be initiating any proceeding before the First 5 California Commission, and is neither a named party in, nor the subject of the proceeding, the nonprofit organization is not directly involved. Therefore, it is indirectly involved in a decision First 5 Commissioners make regarding legislation. (See Regulation 18704.1(b).)

**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 interest is material. (Regulation 18700(a).)

Regulation 18705.3(b)(2)(A)-(F) sets forth different materiality standards for sources of income that are nonprofit entities, depending on the size of the entity. According to information provided by Commissioner Collis, GRACE’s annual budget is approximately \$1,600,000, so the following standards apply:

“(2) Sources of income which are non-profit entities, including governmental entities. The effect of a decision is material as to a nonprofit entity which is a source of income to the official if any of the following applies: . . .

(D) For an entity whose gross annual receipts are more than \$1,000,000 but less than or equal to \$10,000,000 the effect of the decision will be any of the following:

(i) The decision will result in an increase or decrease of the entity’s gross annual receipts for a fiscal year in the amount of \$100,000 or more.

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$25,000 or more.

(iii) The decision will result in an increase or decrease in the value of the entity’s assets or liabilities in the amount of \$100,000 or more. (Regulation 18705.3(b)(2)(D).)”

**Nexus Test.** In addition to the materiality standard described above, there is also a separate materiality standard that applies in cases where there is a “nexus” between duties owed to a source of income and to the official’s public agency. The “nexus test” is set out at Regulation 18705.3:

“(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.”

The rationale for the nexus test is that when an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official, we presume that the employer is benefiting from the actions of the employee in his or her official capacity. (*Yarnell* Advice Letter, No. A-00-161.) Typically, a “nexus” is found in situations where the official is also a high-level employee with direct influence and control over his or her employer’s management or policy decisions. (*Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-304.) The nexus provision would apply, for example, if Commissioner Collis were making a decision to support or oppose legislation that is sponsored by GRACE.

**Step 6. Is it reasonably foreseeable that the financial effect of the governmental decision on the commissioner’s interest will meet that applicable materiality standard?**

A material financial effect on an interest is reasonably foreseeable, under Section 87103, if it is substantially likely that one or more of the materiality standards applicable to that interest

will be met as a result of the governmental decision. A financial effect on an interest is presumed to be reasonably foreseeable where an official's interest is explicitly involved in a decision, i.e., if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency.

Here Commissioner Collis' interest, the nonprofit organization GRACE, is not explicitly involved in the First 5 subcommittee's decisions about legislation. Therefore, the question is whether it is reasonably foreseeable<sup>2</sup> that the First 5 subcommittee's decisions about legislation would affect GRACE by increasing or decreasing in its annual receipts or the value of its assets or liabilities by \$100,000, or changing its expenses by \$25,000.

You state that GRACE does not operate any program nor does it seek or receive funding from any governmental entity to subsidize its own operating expenses. Grace receives no direct or indirect benefit from the funding or lack thereof for any programs or services sponsored by or receiving funding from the Daughters of Charity Foundation or the Daughters of Charity Health System. Under these facts, it does not appear that the applicable materiality standard will be met.

**Steps 7 & 8. The "public generally" and "legally required participation" exceptions.**

Even if a material financial effect on a public official's 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 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 in this instance.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Hyla P. Wagner  
Senior Counsel, Legal Division

HPW:jgl

---

<sup>2</sup> A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. (Regulation 18706.)