

August 4, 2014

Douglas H. Hanson, Councilmember  
City of Indian Wells  
75362 Desert Park Drive  
Indian Wells, CA 92210

Stephen P. Deitsch, City Attorney  
City of Indian Wells  
2855 E. Guasti Road, Suite 400  
Ontario, CA 91761

Re: Your Request for Advice  
**Our File No. A-14-141**

Dear Mr. Deitsch and Mr. Hanson:

This letter responds to your requests for advice regarding Councilmember Hanson's responsibilities under the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Because we simultaneously received requests from the city<sup>2</sup> and from Councilmember Hanson with respect to the same decisions, we have merged the two requests. Please note that the Commission does not provide advice on other conflict of interest provisions, such as common law conflicts of interest. Moreover, the Commission does not act as the finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate. If this is not the case, then our advice could be different.

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<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.

<sup>2</sup> While the Act requires that the Commission provide formal written advice or informal assistance to any person whose duties under the Act are in question or to that person's authorized representative, the Commission does not provide formal written advice to a third party about a public official's duties under the Act. (Section 83114; Regulation 18329.)

## QUESTION

May Councilmember Hanson participate in the city council's discussion of a claim and possible litigation filed by persons who also are tenants of the councilmember that pay rent to him?

## CONCLUSION

The councilmember may not make, participate in making, or influence a decision which will have a foreseeable and material financial effect on the councilmember's source of income.

## FACTS

Council Member Doug Hanson owns rental property in the city and rents to Mr. and Mrs. Randall Nolens. In the councilmember's letter of July 28, 2014, he confirms that he receives more than \$500 a year from the Nolens.

The Nolens filed a claim against the City of Indian Wells alleging that a current and a former Council Member (neither was Councilmember Hanson) visited their home and subsequently harassed, defamed, and intimidated them. According to the city's facts, the claim is for damages in the amount of \$1 million from the city. The Nolens have not presently filed a lawsuit based on the claim, but may do so in the future.

## 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. To determine whether a public official has a "conflict of interest" in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

City councilmembers are "public officials" under the Act. You have stated that there are governmental decisions coming before the city council that the councilmember wishes to participate in. Thus, the first two steps are met and we begin at Step 3 of the eight-step analysis.

### **Step 3: What are the Councilmember's Interests?**

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, or on any one of five enumerated interests in Section 87103. (Regulations 18703-18703.5.) The applicable interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more (Section 87103(a), Regulation 18703.1(a)) or 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 a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. (Section 87103, Regulation 18703.5.)

Your question only implicates potential financial effects on a source of income to the councilmember, the Nolens. As noted by the councilmember, there are no facts to suggest that the decisions on the claims will have any foreseeable financial effect on him personally or his lease of his property to the Nolens, or the property itself. However, since the Nolens filed the claim for damages and they are a source of income to the councilmember, they are the basis for a potential conflict of interest.

**Step 4: Will the Nolens be directly or indirectly involved in the governmental decisions and will the decisions have a foreseeable and material financial effect on the Nolens?**

Regulation 18704.1 and 18706<sup>3</sup> provide that a person is directly involved in a decision before an official's agency when that person, either directly or by an agent, initiates the proceeding in which the decision will be made, is a named party, or is the subject of the proceeding concerning the decision before the official or the official's agency. Since in this case, a source of income is a named party in the claim and potential lawsuit, they are a named party and the subject of the proceedings. Therefore, the councilmember's interest in the Nolens as a source of income is directly involved in the decisions in question.

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<sup>3</sup> Regulation 18706(a) provides that "[a] financial effect on an economic interest is presumed to be reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official or the official's agency."

The materiality standard for a source of income that is directly involved in a governmental decision can be found in Regulation 18705.3. “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.” (Regulation 18705.3(a).) The Nolens are directly involved in the decision, therefore the financial effect on the source of income interest is deemed material.<sup>4</sup>

Councilmember Hanson asks whether the relevant inquiry is if the Council’s decision about the legal proceedings will affect the Nolens’ ability to continue paying rent to him. However, under the Act the applicable standard for a conflict of interest is whether it is reasonably foreseeable that the Council’s decision about the legal proceedings could have a material financial effect on the Nolens, and in this case it could. The Act restricts officials from making governmental decisions that will have a financial effect on someone who is a source of income to them.

### **Steps 7 & 8: Does any exception apply?**

Two exceptions apply to the standard eight-step analysis in cases where it is reasonably foreseeable that a materiality standard will be met as per a given public official. There are no facts suggesting either of these exceptions applies to your facts.

The first exception is the Public Generally Exception. 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).) In order for the exception to apply, the decision must effect a “significant segment” of the public in “substantially the same manner” as it financially affects his interest.

The other exception allows a public official to participate in a decision if it is “legally required.” (Section 87101.) In the case where a public official is otherwise disqualified to participate in a governmental decision, he or she may participate if the participation is legally required. (Section 87101; Regulation 18708.) This exception is narrowly construed and applies only when it is legally impossible for the decision to be made without the participation of a disqualified official, and where there is no “alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.” Typically, this exception is invoked when, due to disqualification, an agency is unable to convene a “quorum” of its members.

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<sup>4</sup> A city councilmember who has a conflict of interest in a decision noticed at a public meeting, must: (1) immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the 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.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
Counsel, Legal Division

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