



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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October 16, 2015

David E. Kendig  
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555 Anton Blvd., Suite 1200  
Costa Mesa, CA 92626-7670

Re: Your Request for Advice  
**Our File No. A-15-182**

Dear Mr. Kendig:

This letter responds to your request for advice regarding the financial disclosure provisions of the Political Reform Act (the “Act”).<sup>1</sup> 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 provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTIONS

1. Does the Act require the volunteer members of the Veterans Advisory Committee (the “Committee”) of the City of Tustin to file statements of economic interests (“SEIs”)?
2. At what point, if any, would the Act require the volunteer members of the Committee to file SEIs?

### CONCLUSIONS

1. No. The Act does not require the volunteer members of the Committee to file SEIs at this time because the Committee currently lacks “decisionmaking authority.” However, we caution that the Committee’s volunteer members will be required to file SEIs if the Committee gains decisionmaking authority in the future.
2. The Act would require volunteer members of the Committee to file SEIs upon the Committee demonstrating decisionmaking authority through its development of a history of making substantive recommendations that are regularly approved without amendment or modification over an extended period, as discussed further below.

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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.

## FACTS

You are an attorney for the law firm that serves as the City Attorney for the City of Tustin. The Committee was recently formed solely to make advisory recommendations on veterans' issues to the City Council. The Committee lacks the authority to make final decisions on matters before it. The Committee will meet monthly, or sometimes more frequently if an event or other need requires its input. The City Council plans for the Committee to be in existence for approximately one year. The Committee is made up of two of the City Council's five members and is likely to include one or more volunteer members who are military veterans. The membership of the Committee has yet to be determined, and the Committee has not yet made any recommendations to the City Council. Some potential volunteer members have expressed willingness to serve on the Committee, but only if they would not be required to file SEIs.

## ANALYSIS

### Does the Act require the volunteer members of the Committee to file SEIs?

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).) Toward that end, 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.

In furtherance of this prohibition, the Act requires every state and local government agency to adopt a conflict of interest code. (Section 87300.) A conflict of interest code enumerates the positions within the agency that make or participate in making decisions that may have a foreseeable and material effect on any financial interest. (Section 87302(a).) A "designated employee" includes any "officer, employee, member, or consultant" of an agency whose position involves making or participating in making decisions which may have a foreseeable material effect on any financial interest. (Section 82019(a)(3).) A "designated employee" does not include an unsalaried member of any board or commission that serves a solely advisory function. (Section 82019(b)(1).) Section 87302(a) requires the conflict of interest code to specify the economic interests a designated employee must report on his or her SEIs. And Section 87302(b) requires a designated employee to file SEIs at times and under circumstances as specified.

A conflict of interest exists whenever a public official makes, participates in making, or uses his or her official position to influence a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her interests specified in Section 87103. A public official is subject to the Act's conflict of interest provisions and financial disclosure requirements. (*Haggerty* Advice Letter, No. A-15-018; *Haughy* Advice Letter, No. I-13-122; *Roskopf* Advice Letter, No. A-89-709.)

Thus, the threshold inquiry in determining if the Act requires the volunteer members of the Committee to file SEIs is whether those members are "public officials" who will be making, participating in making, or influencing a governmental decision. Section 82048 defines "public official" as every member, officer, employee or consultant of a state or local government agency.

For the purpose of further defining “public official,” Regulation 18701(c)(2) defines “member” as follows:

“(2) “Member” does not include an individual who performs duties as part of a committee, board, commission, group, or other body that does not have decisionmaking authority.

“(A) A committee, board, commission, group, or other body possesses decisionmaking authority whenever:

“(i) It may make a final governmental decision;

“(ii) It may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

“(iii) It makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency.

“(B) A committee, board, commission, group, or other body does not possess decisionmaking authority if it is formed or engaged for the sole purpose of researching a topic and preparing a report or recommendation for submission to another public official or governmental agency that has final decisionmaking authority, and does not meet any of the criteria set forth in subsection (2)(A)(i-iii).”

Thus, a committee, board, or commission may be deemed to have decisionmaking authority whenever it has the ability to (1) make a final decision, (2) compel or prevent a decision, or (3) make substantive recommendations that are, over an extended period, regularly approved without significant amendment or modification. If the Committee has decisionmaking authority under any of these tests, its volunteer members would be considered public officials who must be designated in the agency’s conflict of interest code and would be required to file SEIs. Alternatively, if the Committee does not have decisionmaking authority, its volunteer members are not considered public officials under the Act and are not required to file SEIs as a result of their membership on the Committee.<sup>2</sup>

Based on the facts provided, the Committee was established to make advisory recommendations to the City Council on veterans’ issues and lacks the authority to make final decisions on matters before it. (Regulation 18700(c)(2)(A)(i).) Moreover, there is no indication that the Committee can compel or prevent any government decision. (Regulation 18700(c)(2)(A)(ii).) Accordingly, the question of whether the Committee has decisionmaking authority under the Act turns on whether the Committee will make “substantive recommendations” that are “regularly approved without significant amendment or modification” by the City Council “over an extended period of time.” (Regulation 18700(c)(2)(A)(iii).)

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<sup>2</sup> A member of the Committee who is also a member of City Council is a “public official” under the Act due to being a member of the City Council, regardless of whether the Committee exercises decisionmaking authority.

We have previously “advised new advisory bodies that they are in fact solely advisory until a history of recommendations has been established.” (*Connors* Advice Letter, No. I-14-054; *Simon* Advice Letter, No. I-04-014, citing the *Traverso* Advice Letter, No. I-01-124 and *Ball* Advice Letter, No. I-89-671.) We have also advised that a single instance in which an advisory body’s recommendation was accepted does not establish a record of regularly approved recommendations. (*Connors* Advice Letter, supra.) Your facts indicate that the membership of the Committee has yet to be determined, and that the Committee has not yet made any recommendations to the City Council. Lacking a history of substantive recommendations being approved without amendment or modification by the City Council, the Committee is solely an advisory committee without decisionmaking authority at this time.

Accordingly, we conclude that the Act does not require the volunteer members of the Committee to file SEIs at this time because the Committee currently lacks decisionmaking authority. However, we caution that the Committee’s volunteer members will be required to file SEIs if the Committee gains decisionmaking authority in the future.

At what point, if any, would the Act require the volunteer members of the Committee to file SEIs?

Whether an advisory body has decisionmaking authority under the Act based on its history of recommendations is a fact-based determination that also takes into consideration the circumstances and characteristics of the advisory body. Factors that have been considered in a determination that the history of an advisory body did not indicate it had decisionmaking authority include: (1) an advisory body reporting recommendations to an intermediary (such as city staff) that in turn presented the recommendations as the intermediary saw fit to the decisionmaking body (such as a city council), (2) the decisionmaking body deciding an issue in opposition to the advisory body’s recommendation, and (3) the characteristics of the advisory body and its members being more akin to those interested in decisions of the decisionmaking body rather than involved in making them (e.g., advisory body members did not have special expertise in the subject matter of the advisory body). (See *De Berry* Advice Letter, No. A-99-221.)

Although we cannot provide a precise quantification of when an advisory body becomes a decisionmaking body under the Act, we find the wording of Regulation 18700(c)(2)(A)(iii) and the term of art “rubber stamping” informative. If an advisory body (such as the Committee) has a history of making “substantive recommendations” that are “regularly approved without significant amendment or modification” by the decisionmaking body (such as the City Council) “over an extended period of time,” that advisory body has gained decisionmaking authority. (Regulation 18700(c)(2)(A)(iii).) Moreover, if the decisionmaking body regularly approves the recommendations of the advisory body without amendment or modification, thereby rubber-stamping the advisory body’s recommendations, that advisory body has gained decisionmaking authority.

Thus, we conclude that the Act would require volunteer members of the Committee to file SEIs as a result of the Committee demonstrating decisionmaking authority through its development of a history of making substantive recommendations that are regularly approved by the City Council without amendment or modification over an extended period of time.

We suggest that you monitor the Committee's recommendations and the City Council's actions with regard to these recommendations over time, with particular attention to the risk of the City Council rubber-stamping the recommendations of the Committee, and amend the City's conflict of interest code as required.

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

Sincerely,

Hyla P. Wagner  
General Counsel

/s/

By: Matthew F. Christy  
Counsel, Legal Division

MFC:jgl