



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 15, 2016

Brian A. Pierik
Burke, Williams & Sorensen, LLP
2310 East Ponderosa Drive, Suite 25
Camarillo, California 93010

Re: Your Request for Informal Assistance
Our File No. I-16-040

Dear Mr. Pierik:

This letter responds to your request for informal assistance on behalf of Thomas O'Malley, the mayor of the City of Atascadero, regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please note that we are only providing assistance under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest, Section 1090 or incompatible offices pursuant to Section 1099. Moreover, 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 you seek general guidance, we are providing informal assistance, rather than formal advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

QUESTIONS

May Mayor O'Malley, who owns a lodging business located within the Atascadero Tourism Business District (the "District") and serves on the District's Advisory Board, address the City Council on matters regarding the District as follows:

1. Give a status update regarding the District, including Board discussions, while remaining at the dais?
2. Give the update after recusing himself, leaving the dais and speaking as a member of the general public on matters related solely to his personal interests?
3. Remain at the dais while a city staff member gives the update?

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.

4. Speak on other matters involving the District after recusing himself, leaving the dais and speaking as a member of the general public on matters related solely to his personal interests?
5. Speak on such matters not as an individual but, rather, as a member of the Board after leaving the dais and speaking from the same area as members of the general public?

CONCLUSIONS

1. If it is determined that Mayor O'Malley has a conflict of interest in a decision regarding the update, he would not be permitted to give the update from the dais.
2. No. He may not give the update on or off the dais.
3. No. Under the disqualification requirements of Regulation 18707, Mayor O'Malley would have to recuse himself and leave the room.
4. Yes, if he follows the procedures in Regulation 18707(a)(3)(C), including limiting his remarks to matters related solely to his personal interests.
5. No. Mayor O'Malley may only address the City Council to represent his personal interests and not those of any other person or group.

FACTS

Mayor O'Malley, who serves as a member of the Atascadero City Council, owns a business, together with his wife, that operates a bed-and-breakfast establishment and also provides event-planning services. He also serves on the District's Advisory Board.

The District was established by ordinance in 2013 to promote tourism by promotions, marketing programs and activities for the purpose of increasing stays at the City's lodging establishments. The District encompasses the entire city and imposes on each lodging business an assessment equal to two percent of the rent charged per occupied room or space per night for transient occupancies.

The District's Advisory Board is composed of five members, all of whom must be lodging business owners, their employees or authorized representatives. Members are appointed by the City Council, following a nomination process facilitated by lodging businesses. Board members serve at the pleasure of the City Council and receive no compensation. The City Council approves the funding of programs recommended by the Board.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.)²

Section 87103 defines interests from which a conflict of interest may arise. They include the following:

- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material.

Foreseeability

The standard for foreseeability differs depending on whether an interest is *explicitly* involved in the decision. Regulation 18701 provides: "A financial effect ... is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency." A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest. (Regulation 18701(a).) While you have not identified any specific decisions pending before the City Council, we can infer from the facts that decisions regarding the District generally that are not specific to Mayor O'Malley's business would not be "explicitly involved" in the decisions. In the future, as decisions come before the City Council, Mr. O'Malley will need to apply Regulation 18701 to the specific facts regarding that decision.

When the interest is "not explicitly involved" in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical.

² You have not identified any specific decision pending before the City Council. Without the factual context and an identified specific decision, we are unable to reach a conclusion as to whether Mayor O'Malley may have a conflict and, if so, any exception that might apply. However, for purposes of our analysis we will assume that when you refer to Mayor O'Malley "giving a status update" or speaking on other "matters of the District" you mean that the City Council will be taking action on these items. We also note that each governmental decision must be analyzed independently to determine whether there will be a conflict of interest. In the future, as each decision regarding the District comes before the City Council, Mayor O'Malley will need to determine whether he has a disqualifying conflict of interest as to that decision.

It is apparent that many, if not all, of the City Council's decisions regarding the District would affect all members of the District, albeit some more than others. For example, decisions setting the amount of the assessment would affect all members, including Mayor O'Malley's business. Another example would be where the City Council might approve a promotion that favors one type of lodging business, such as hotels with conference facilities, over others, such as bed-and-breakfast establishments. Thus, it appears that the financial effect of decisions regarding the District on Mayor O'Malley's business can be recognized as a realistic possibility and are, therefore, reasonably foreseeable.

Materiality

Generally, as applied to Mayor O'Malley's interest in his business, the reasonably foreseeable financial effect of the decisions regarding the District is material if a "prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity." (Regulation 18702.1.) Without identifying a specific decision pending before the City Council, we are unable to determine whether the decision will affect the value of Mayor O'Malley's business. When a specific decision comes before the City Council involving the District, he will need to analyze the foreseeability and materiality of any effect on his business.

Exceptions

You have asked us to specifically address whether the exception to the general conflict of interest rules found in Regulations 18704(d)(2) would apply to Mayor O'Malley's facts.

Under this exception, Mayor O'Malley may appear as a member of the general public during a public meeting to represent himself on matters related solely to his personal interests. The exception applies to a business entity owned entirely by the official, members of his or her immediate family, or the official and members of his or her immediate family exercise full direction and control as well as sources of income to the official. You state that Mr. O'Malley and his wife co-own the business.

This exception is interpreted narrowly and does not allow the official to provide general comments regarding the matter. Care should be taken to clarify that the official is not acting in an official capacity.³ Thus, the exception does not permit Mayor O'Malley to represent any other person's interests or the interests of any group.

To qualify for the exception, the official must follow the procedures set forth in Regulation 18707. The official must publicly identify each type of financial interest involved in the decision that gives rise to the disqualifying conflict of interest. The identification must be made after the announcement of the agenda item to be discussed or voted on, but before the discussion or vote commences. The official must also recuse himself or herself from voting on the matter, leave the

³ *McHugh* Advice Letter, No. I-98-324; *Gallagher* Advice Letter, No. I-94-279 and *Larsen* Advice Letter, No. A-87-151.

dais to speak from the same area as the members of the public and limit his or her remarks solely to the official's personal interests.

Question 1: May Mayor O'Malley give a status update regarding the District, including Board discussions, while remaining at the dais?

If Mayor O'Malley determines that he has a disqualifying conflict of interest in a decision regarding the update, he would not be permitted to give the update from the dais.

Question 2: May Mayor O'Malley give the update after recusing himself, leaving the dais and speaking as a member of the general public on matters related solely to his personal interests?

We do not see how it is possible to segregate matters relating to Mayor O'Malley's personal interests from all matters in the update. Therefore, he is not permitted to give the update on or off the dais.

Question 3: May Mayor O'Malley remain at the dais while a city staff member gives the update?

The disqualification requirements which appear in Regulation 18707 specify that after making the required disclosures, the public official with a conflict of interest must recuse himself or herself and leave the room. Therefore, Mayor O'Malley would have to leave the dais and the room while the update was under discussion.

Question 4: May Mayor O'Malley speak on other District matters after recusing himself, leaving the dais and speaking as a member of the general public on matters related solely to his personal interests?

Mayor O'Malley may address the City Council under the personal interest exception provided that he limits his remarks to matters related solely to his personal interests and follows the procedures in Regulation 18707(a)(3)(C).

Question 5: May Mayor O'Malley speak on such matters not as an individual but, rather, as a member of the Board after leaving the dais and speaking from the same area as members of the general public?

As stated above, under Regulation 18707(a)(3)(C) Mayor O'Malley may only represent himself on matters related solely to his personal interests. Therefore, he may not address the City Council as a representative of the Board.

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

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, appearing to read "Valentina Joyce", with a long horizontal flourish extending to the right.

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl