



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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Re: Your Request for Advice
Our File No. A-16-019

Dear Mr. Gale and Ms. Sidley:

This letter responds to your request for advice regarding the disclosure and conflict of interest provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when rendering advice. (*In re Oglesby* (1975), 1 FPPC Ops. 71.)

QUESTION

Under the Act, is the Alameda Corridor Operating Committee a “local government agency” required to adopt and promulgate a conflict of interest code?

CONCLUSION

Yes. The Operating Committee is a local government agency under the Act. Therefore, it is required to adopt a conflict of interest code for its members or be included within an existing code.

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.

FACTS

The Alameda Corridor Project is an approximately \$2.4 billion freight cargo rail system (“Rail Corridor”) linking the Port of Los Angeles and the Port of Long Beach (collectively, “Ports”, and “POLA” and “POLB,” respectively) with the transcontinental rail lines and yards near downtown Los Angeles. The Rail Corridor is approximately 20 miles long, includes multiple tracks, and went into service in 2002. Union Pacific Railroad Company (“UP”) and the Burlington Northern and Santa Fe Railway Company (“BNSF”) (collectively, “Railroads”) are the sole operators of freight cargo trains using the Rail Corridor. The Project is a public-private infrastructure project, involving the Alameda Corridor Transportation Authority (“ACTA”), the Ports, and the Railroads.

By way of background, in 1989, the Cities of Los Angeles and Long Beach established ACTA, a joint powers authority created under the State’s Joint Exercise of Powers Act (Section 6500, et seq.) to undertake designing, constructing, and financing the Project. ACTA has adopted a local conflict of interest code, and its governing board members are subject to regulation under the Act. ACTA’s conflict of interest code, however, does not include references to the Operating Committee or its members.

In 1994, the Ports purchased the rights-of-way, land, and improvements necessary to construct and operate the Project through separate purchase and sale agreements with UP, Southern Pacific Rail Transportation Company (which later merged with UP), and Atchison Topeka and Santa Fe Railway Company (which later merged with Burlington Northern Railroad to form BNSF)(collectively, the “precursor railroads”). Each Port used available funds on hand in its respective harbor fund to purchase the property underlying the Project. The POLB also issued promissory notes to the precursor railroads for a portion of the purchase price.

Contemporaneous with those purchase and sale agreements, the Ports and the precursor railroads executed the December 22, 1994 Memorandum of Understanding for Joint Operating Agreement (“MOU”). The MOU set forth certain basic terms and conditions for the design, construction, financing, use, operation, maintenance, and repair of the Project, and the parties’ agreement to negotiate in good faith and execute a definitive agreement on these matters on terms consistent with those set forth in the MOU as soon as practical.

Thereafter, ACTA, the Ports, and the Railroads negotiated the terms of the October 12, 1998 Alameda Corridor Use and Operating Agreement, as amended (the “UOA”) that gave rise to the Project and remains in effect today. The Project is principally governed by, and operated pursuant to, the UOA.

The terms of the UOA allocate certain responsibilities with respect to the Project among the parties. The UOA requires ACTA, among other things, to obtain the financing necessary to construct, and to construct, the Project. In 1999, ACTA issued revenue bonds (“ACTA Bonds”) for the purpose of designing and constructing the Project.² The ACTA Bonds are secured by, and

² On March 3, 2016, Mr. Charles M. Gale, Principal Deputy City Attorney for the Long Beach City Attorney, submitted a letter to supplement your facts containing information relating to the funding of the Operating Committee.

payable from, Use Fees and Container Charges paid by the Railroads to ACTA pursuant to the UOA.

In the event that Use Fees and Container Charges are insufficient to repay debt service and related costs on the ACTA Bonds, then the Ports are obligated to pay up to 40% of those costs due in any year. These payments are referred to in the UOA as “Shortfall Advances,” they may only be applied to ACTA Bonds’ debt service and related costs, and they must be repaid by the Railroads through future Use Fees and Container Charges.

The UOA requires the Railroads to pay to ACTA all operations and maintenance expenses for the Rail Corridor through a separate stream of payments referred to as M&O Charges. The M&O Charges are not pledged for, and may not be applied to, the repayment of the ACTA Bonds. Thus, there are two separate streams of payments from the Railroads to ACTA: Use Fees and Container Charges which are applied to repay the ACTA Bonds (and any subsequently issued bonds) and other costs, and M&O Charges which are applied to pay operations and maintenance expenses of the Rail Corridor.

The UOA also requires ACTA to perform certain administrative duties with respect to the Project after its construction. Those administrative duties include among others: the receipt, holding, and expenditure of User Fees, Container Charges, and M&O Charges from the Railroads; payment of principal, interest, and other costs associated with the Project’s financing; and reimbursement of a portion of the Ports’ costs to purchase the property underlying the Project.

The UOA established the four-member Operating Committee. The POLA, POLB, UP, and BNSF each appoint one representative to the Operating Committee who serves at the pleasure of the appointing party. The principal purpose of the Operating Committee is to coordinate and facilitate rail-related operations and maintenance on the Alameda Corridor. The UOA charges the Operating Committee with the following duties, among others: establish, update, and ensure compliance with rules and regulations for rail operations; select and set general contract terms for rail operations and maintenance service providers; determine annual capital expenditures and adjust the target for reserve funds; create an annual operation and maintenance budget; and hold meetings at least once a year.

You stated that: The Operating Committee is not a legal entity formed, registered, or otherwise existing under the laws of the State of California, nor is it a subcommittee of the governing bodies of ACTA or the Ports. The Operating Committee does not receive any funds from a governmental entity, its members receive no compensation for their work on its behalf, and all primary matters within its purview are funded by the Railroads. And the Operating Committee voluntarily complies with the State’s Brown Act (Section 54950, et seq.).

ANALYSIS

The Act prohibits a public official from making or participating in making a governmental decision in which the official knows or has reason to know he or she has a financial interest. (Section 87100.) The conflict of interest provisions of the Act apply only to “public officials.” The Act defines a “public official” as every member, officer, employee, or consultant of a state or local government agency. (Section 82048.)

In addition, Section 87300 of the Act provides that “[e]very agency shall adopt and promulgate a Conflict of Interest Code” that applies to its “designated employees.” The Act defines “agency” as any state or local government agency. (Section 82003.) A “local government agency” is “a county, city, or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission, or any other agency of the foregoing.” (Section 82041.)

You ask whether the members of the Operating Committee are public officials subject to the disclosure requirements of the Act and whether they are obligated to file Statements of Economic Interest. The answer turns on whether the Operating Committee is a local government agency under the Act that is required to adopt a separate conflict of interest code for its members (and employees, if any) under Section 87300 or be included within an existing code.

The Commission established criteria for determining whether an entity fits within the definition of “local government agency” in its opinion *In re Siegel* (1977) 3 FPPC Ops. 62. Based on that opinion, the Commission applies the following four-part test in order to make that determination: (1) whether the impetus for formation of the entity originated with a government agency; (2) whether the entity is substantially funded by, or its primary source of funds is, a government agency; (3) whether one of the principal purposes for which the entity was formed is to provide services or undertake obligations that public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and (4) whether the entity is treated as a public entity by other laws.

The Commission’s subsequent advice letters and an opinion state that it is not necessary that all four of the *Siegel* factors be satisfied for an entity to be considered a local government agency. (*In re Vonk* (1981) 6 FPPC Ops. 1; *O’Shea* Advice Letter, No. A-91-570.) It is only necessary that the entity satisfy enough of the four factors for its overall character to correspond to that of a local government agency. (*Rasih* Advice Letter, No. A-01-020.) Therefore, the *Siegel* factors are not intended to be a definitive litmus test for determining whether an entity is public for purposes of the Act. Ultimately, the test must still be a factual analysis on a case-by-case basis. (*In re Vonk*, supra.)

We apply the *Siegel* test to the facts you have provided to determine whether the Operating Committee is a “local government agency” under the Act.

1. *Did the impetus for formation of the entity originate with a government entity?*

Generally, the first factor has been met where an entity is created by some official action of another governmental agency. For example, in the *Siegel* Opinion, although the agency was created as a nonprofit corporation, the city council was intimately involved in creating the entity in question.

In 1989, the Cities of Los Angeles and Long Beach established ACTA to undertake the design, construction, and financing of the Alameda Corridor Project. Thereafter, the POLA, POLB, Railroads, and ACTA negotiated the terms of the UOA that remains in effect to this day. The UOA defines the “Operating Committee” for its purposes as “a committee comprised of representatives of POLA, POLB, UP and BNSF, which committee is hereby established by such entities for specific purposes described in this agreement.” The POLA, POLB, and ACTA are government agencies;

each was intimately involved in negotiating the UOA; and the UOA created the Operating Committee. Therefore, we conclude that the *Siegel* formation criterion is met.

2. *Is the entity substantially funded by, or is its primary source of funds, a government agency?*

You state that the Operating Committee does not receive any funds from a governmental entity, its members are appointed by their respective contracting entities and receive no compensation for their work on behalf of the Operating Committee, and all primary matters within the purview of the Operating Committee are funded by the Railroads.

The Ports and ACTA Advanced Substantial Funding

The property and the financing that gave rise to the Project, and therefore the Operating Committee, were provided by the Ports and ACTA, respectively.

Prior to the formation of ACTA, the Ports purchased the rights-of-way, land, and improvements necessary to construct and operate the Project through separate agreements with the precursor railroads. Each Port used available funds on hand in its respective harbor fund to purchase the property underlying the Project. The POLB also issued promissory notes to the precursor railroads for a portion of the purchase price paid to those railroads. The Recitals to the UOA state that the Ports purchased the property for the purpose of constructing the Rail Corridor, and that they would not have acquired the property if the Railroads had not agreed to use the Rail Corridor as set forth in the UOA. This term indicates that the benefit of the bargain to the Ports, at least in part, was the repayment of their investment in the Project through fees due from the Railroads under the UOA. Therefore, the Ports advanced substantial funding for the Project.

The UOA requires ACTA, among other things, to obtain the financing necessary to construct the Project and to cause the Project to be constructed. ACTA issued the ACTA Bonds to finance constructing the Project in 1999, ACTA then constructed the Project, and the Project went into service in 2002. ACTA has fulfilled its obligations to finance and construct the Project, and is fulfilling its remaining obligations, under the UOA. Therefore, ACTA also advanced substantial funding for the Project.

The Ports and ACTA Continue to Provide Substantial Funding

Aside from advancing the property and financing necessary to construct the Project, the Ports and ACTA also continue to provide substantial funding for the Project, and therefore the Operating Committee, under the terms of the UOA.

(1) Section 7.3(b) of the UOA requires ACTA to use the Use Fees and Container Charges from the Railroads to pay certain Project expenses, specifies the order of priority for the payment of those expenses, and provides that the first and highest prioritized payment is the debt service on the ACTA Bonds and related costs.

(2) Section 7.3(h) of the UOA obligates the Ports to pay Shortfall Advances to ACTA of up to 40 percent of the debt service on the ACTA Bonds and related costs due in any year if the Use Fees and Container Charges paid by the Railroads are insufficient to cover those costs. Although

Shortfall Advances must be repaid by the Railroads through future Use Fees and Container Charges, the Ports' obligation to bear the potential liability to pay up to 40 percent of the debt service on the ACTA Bonds and related costs due in any year under the UOA is ongoing substantial funding of the Project by the Ports.

(3) Section 7.1(a) of the UOA provides as follows:

“In consideration of ACTA’s obligation to construct, finance and administer activities in connection with the Rail Corridor and the execution and entering into of this Agreement, the Permit and the Master Trust Indenture, ACTA (or any trustee for Bonds issued by ACTA) shall have the sole right and obligation to receive, hold and expend in accordance with the terms of this Agreement all M&O Charges, Use Fees, Container Charges and Port Advances and all other funds, assets or amounts to which it may be entitled hereunder (“ACTA Revenues”). Except as expressly provided in this Agreement, no entity (including the Railroads, POLA, POLB, or any entity in which POLA and POLB are members other than ACTA) shall have any right to receive, hold and expend ACTA Revenues to which ACTA is entitled under this Agreement.”

Thus, under the UOA, ACTA has the sole right and obligation to receive, hold, and expend all M&O Charges, Use Fees, and Container Charges, and no other entity, including any entity in which POLA and POLB are members other than ACTA, such as the Operating Committee, has any right to receive, hold, and expend those revenues. These M&O Charges fund the activities and operations under the discretion of the Operating Committee. Because ACTA has the exclusive right to receive, hold, and expend all M&O Charges under the UOA, ACTA must delegate or grant its authority over that revenue to the Operating Committee, as the Operating Committee could not have any discretion over that revenue otherwise under the UOA. This delegation of ACTA’s authority over the expenditure of M&O Charges to the Operating Committee further supports the conclusion that ACTA is providing ongoing substantial funding to the Operating Committee.

(4) Furthermore, the Operating Committee must incur some expenses in conducting its duties, including, but not limited to, administrative assistance costs, information technology costs, the cost for a physical location for meetings, and the cost of voluntary compliance with the State’s Brown Act. The facts presented are silent as to a funding source for these costs. Therefore, a reasonable inference may be made that these Operating Committee expenses may be paid out of M&O Charges or other revenues to which ACTA is exclusively entitled, and this further supports ACTA providing ongoing substantial funding for the Operating Committee.

To summarize, the Ports advanced substantial funding for the Project through their purchase and provision of the property underlying the Project. And ACTA advanced substantial funding for the Project by financing and constructing it. Neither the Project, the UOA, ACTA, nor the Operating Committee would exist in their current incarnations but for the Ports’ and ACTA’s advances of substantial funding for the project. Therefore, we find that the Use Fees, Container Charges, and M&O Charges paid by the Railroads to ACTA under the UOA are in actuality the repayment of the Ports and ACTA’s advances of substantial funding for the Project, and therefore fund the Operating Committee.

The Ports also provide ongoing substantial funding for the Project, and therefore the Operating Committee, by bearing the potential liability for Shortfall Advances under the UOA. And ACTA provides ongoing substantial funding for the Operating Committee by delegating it discretion over the expenditure of M&O Charges, and if ACTA covers any of the Operating Committee expenses the Operating Committee incurs in carrying out its duties. For all these reasons, we find that the Operating Committee is substantially funded by the Ports and ACTA.

3. *Is one of the principal purposes for which the entity is formed to provide services or undertake obligations that public agencies are legally authorized to perform and which, in fact, they traditionally have performed?*

In the *Siegel* Opinion, this third criterion is a two-part inquiry that examines whether an entity performs a public function, and whether the service provided is one that is traditionally performed by public agencies. (*Stark* Advice Letter, No. A-03-015.)

A. Public Function:

We first look at factors considered by the *Siegel* Opinion to be relevant to determining whether an entity performs a public function. One such factor is the degree to which government actors control or are involved in its operations. The Operating Committee has four members. The POLA, POLB, UP, and BNSF each appoint one representative who serves at the pleasure of the appointing party. Because the Ports and their representatives on the Operating Committee are government actors, the degree to which government actors control or are involved in the Operating Committee's operations is significant.

Furthermore, the UOA charges the Operating Committee with the duty to establish, update, and ensure compliance with rules and regulations for the Project's rail operations, and those duties are traditionally public functions. For these reasons, we find that this factor is met.

B. Service Traditionally Performed by Public Agencies:

Secondly, we look at factors considered by the *Siegel* Opinion to be relevant in determining whether an entity performs a service that has traditionally been performed by public agencies. You argue that the facilitation of freight cargo rail service is not a traditional government service. We concede this point. Given the high volume of traffic of items to and from the Ports prior to the construction of the Project, however, we note that one can only assume that the Ports or ACTA had some involvement in the administration of freight cargo rail service between the Ports prior to the consummation of the UOA and the resultant inception of the Operating Committee.³

Facilitation of freight cargo transportation is a service traditionally performed by the Ports, and by other government-administrated entities throughout the United States. Therefore, we find

³ Also, while it is somewhat novel for a government entity to be involved in the facilitation of rail-related operations and maintenance, it is not unprecedented. For example, the National Railroad Passenger Corporation, doing business as "Amtrak," is a partially government-funded passenger railroad service, originally conceived as a hybrid public-private entity in 1971.

that freight cargo transportation is a service that government agencies have a role in and have performed.

Based on the facts presented, it appears that the Operating Committee is performing some public functions with significant input and involvement from representatives of the Ports, and it is providing a service, the facilitation of freight cargo transportation, that government agencies have a role in and have performed. Therefore, this factor is also met. Accordingly, we conclude that the Operating Committee meets the third criterion of the *Siegel* test.

4. *Is the entity treated as a public entity by other statutory provisions?*

The final factor in evaluating an entity's status under the Act is whether the entity is treated as a public entity by other provisions of law. The Operating Committee voluntarily complies with the State's Brown Act. Consistent with prior advice, the requirement to follow the open meeting laws weighs in favor of the fourth criterion of the *Siegel* analysis. (*van Hoften* Advice Letter, No. A-15-141; *Kranitz* Advice Letter, No. A-03-204.) Thus, we conclude that the Operating Committee meets the fourth criterion of the *Siegel* test.

Conclusion:

In applying the *Siegel* test to the facts presented, we find that all four factors are met. Thus, we conclude that the Operating Committee is a local public agency within the meaning of the Act, it is required to have a conflict of interest code for its members or be included within a code pursuant to Section 87300, and its members are subject to regulation under the Act.

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