



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Remke, Commissioners Audero, Casher, Wasserman, and Wynne

From: Hyla Wagner, General Counsel
John Wallace, Assistant General Counsel
Heather Rowan, Senior Commission Counsel

Subject: Legal Division's Monthly Report

Date: November 5, 2015

A. Pending Litigation

Frank J. Burgess v. Fair Political Practices Commission.

Frank J. Burgess filed a writ of mandate in Riverside Superior Court on October 4, 2015 seeking relief from the Commission's decision and order in *In re Frank J. Burgess*, Case No. 12/516. Following an administrative hearing in front of an administrative law judge, Mr. Burgess challenged that decision to the Commission. After oral argument before the Commission on March 19, 2015 and a thorough review of the record, the Commissioner rejected the ALJ's decision and decided the case based on the record, oral argument, and the parties' supplement briefing on the "governmental decision" element of the case. The Commission found that Mr. Burgess violated Section 87100 of the Political Reform Act¹ and imposed a \$5,000 fine July 7, 2015. Mr. Burgess challenges that decision as an excess of the Commission's jurisdiction, an abuse of discretion, and a denial of due process rights. A status conference was scheduled to be held on November 3, 2015 but was continued by the court to December 9th.

B. Outreach and Training

Assistant General Counsel John Wallace conducted state-mandated sexual harassment prevention training (SHPT) for FPPC supervisors on October 28, 2015. Legal Division will conduct SHPT training for all FPPC staff early next year. The all-staff training is not state mandated, but is best practices.

¹ The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code. The Commission's regulations are contained in sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to this source.

C. Probable Cause Decisions

* Please note, a finding of probable cause does not constitute a finding that a violation has actually occurred. The respondents are presumed to be innocent of any violation of the Act unless a violation is proven in a subsequent proceeding.

None to report.

D. Legal Advice

In October 2015, the Legal Division attorneys responded to the following requests for legal advice:

- **Email & Telephone Requests for Advice:** Responded to 75 email and telephone requests for legal advice.
- **Advice Letters:** Received 14 advice letter requests and issued 15 advice letters.
- **Section 1090 Letters:** Legal Division received three advice letter requests concerning Section 1090 and issued six advice letters. This year to date we have received 46 requests regarding Section 1090 (not including conflict of interest letters that incidentally deal with Section 1090 issues).

E. Advice Letter Summaries

Campaign

Greg Dale

A-15-210

The Act does not prohibit a Commissioner of the Humboldt Bay Harbor, Recreation and Conservation District from using campaign funds to pay for legal services related to defense of a civil lawsuit alleging that the Commissioner and the District violated Section 1090 because there is a direct relationship between the expenditure for legal services and the Commissioner's status as an elected officer.

Conflict of Interest

Shayna M. van Hoften

A-15-141

Under the Act, a non-profit corporation formed with municipal participation and funding to support technology entrepreneurs in the Livermore Tri-Valley region is a local governmental agency. Therefore, it is required under Section 87300 to adopt a conflict of interest code for its employees and board members or be included within an existing code.

Lauren C. Valk

A-15-159

Governmental decisions regarding a new library to be built in the same location as the previous library will not have a reasonably foreseeable material financial effect on a Planning Commissioner's business, property, or source of income.

Larissa Seto

A-15-177

Proposed project replacing an existing church with 27 new single-family homes and expanding an existing 120-student private school to 298 students would not have a reasonably foreseeable material effect on councilmember's interest in his residence approximately 1,890 feet from the project and within a gated community. Accordingly, the Act does not prohibit the councilmember from taking part in decisions regarding the project.

Bill Horn

I-15-185

Under the Act a county supervisor who owns 36.8 acres of property 1.3 miles away from a major housing development project has a conflict of interest in decisions involving the project because the decisions will have a reasonably foreseeable material financial effect on the official's real property interest. The proposed plan, which is the largest, and among the densest developments in the area, would result in a substantial increase in population. The facts indicate that the project would affect the rural character and development potential of nearby parcels.

Jannie L. Quinn

A-15-195

Since traffic, parking, and the intensity of use of property near the councilmember's home will not be substantially affected by the decisions on the new Master Plan for the Transit Center and Caltrain Station, it is not foreseeable that the decisions in question will materially affect the value of the councilmember's property.

Gifts

Alan Seem

I-15-189

A trip to China provided to public officials for the purpose of improving business cooperation between China and the Silicon Valley, to help create jobs and increase economic activity in both China and the Silicon Valley, to facilitate investment and international trade, and to promote communications between China and the Silicon Valley region and paid for by local Chinese governments is not subject to the gift limits of the Act. However, the payments must be reported and may lead to conflicts of interest.

Racquel Vasquez

A-15-203

An official's fundraising on behalf of a nonprofit organization or public school is not prohibited by the Act and does not implicate the gift provisions. However, where a payment is made to the official and accepted and received by the official or her daughter (or relieves a debt of the official or her daughter) Regulation 18943(c) could apply and the gift may be considered a gift to the official.

Revolving Door

James M. McManus, P.E.

A-15-178

A former state official was advised that the one-year ban does not apply to him because he stopped performing the duties of his position over a year ago. He was also advised that the permanent ban would apply if any of the actions in which he may engage with any potential employer or contractor involve a proceeding in which he participated while working for Caltrans.

Richard D. Land, P.S.

A-15-187

The Act's permanent ban on certain post-governmental employment is applicable to the former Chief Deputy Director at Caltrans, but does not prohibit him from working on specified state construction inspection contracts for his private employer. The former Chief Deputy Director expressly stated that he had "no involvement whatsoever in the contracts at issue while working at Caltrans." Because the former Chief Deputy Director did not participate in these proceedings prior to separating from state service, the permanent ban does not prohibit him from working on them for his private employer.

Phil Wowak

A-15-188

A former county sheriff is not prohibited from communicating with his former employer's office on behalf of his new private employer when there is no administrative or legislative action that he might influence, nor is there any contractual arrangement between the former public employer and the new private employer.

Section 1090

Steven L. Dorsey

A-15-154

A Councilmember is not prohibited under the Act from participating in a vote to create a tourism marketing district where she owns property within 500 feet of a hotel that will be part of the district. There will be no reasonably foreseeable measurable impact on her property. She is not prohibited under Section 1090 from entering into contracts relating to the district because she does not have a financial interest in such contracts.

Steven L. Dorsey

A-15-158

The Act does not prohibit a public official from participating in decisions related to a hotel occupancy tax based on his glass business that contracts with the hotel's parent company. The parent company's primary business is in amusement parks and it is not reasonably foreseeable that there will be a material financial effect on the parent. Section 1090 does not prohibit the public official's participating in the decisions because he does not have a financial interest in the contracts related to the hotel tax.

David Roose

A-15-167

Section 1090 prohibits a former Chief of Utility Operations for a state agency from participating in a series of contracts that are (1) based on his forensic fire investigation identifying needed fire

system improvements, (2) all awarded near in time, and (3) which all had similar parties and subject matter. However, the Chief may participate in a different contract since he did not participate in the contract proceeding. Section 1090 and the permanent ban would not apply, and, for purposes of the one-year ban, Regulation 18746.1(c) would allow “[s]ervices performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement.”

J. Christine Dietrick

A-15-174

The Act prohibits a San Luis Obispo City Councilmember from taking part in the decision on whether to enter an agreement with a local housing cooperative (the “Co-op”) to stabilize a hillside undergoing severe erosion because the councilmember owns shares in the Co-op. The erosion of the hillside threatens sidewalks, parking and the road at the base of the hillside, putting at risk the safety of the public. Although Section 1090 also applies, the City Council may enter the agreement with the cooperative to stabilize the hillside pursuant to the rule of necessity because the risk to public safety.

Dr. Charity Dean, MD, MPH

A-15-193

The Act requires the Health Officer of the Santa Barbara County Public Health Department to file statements of economic interests because she is a “public official” under the Act. If the regional health authority offers the Health Officer payment of her outstanding student loans in exchange for a three-year work commitment and the fulfillment of related conditions, that payment is “income” and not a “gift” under the Act. Section 1090 does not prohibit the Health Officer from accepting the payment because she did not make or participate in making a contract for purposes of Section 1090.

Alan Smith

A-15-194

Section 1090 does not prohibit a police department from selling obsolete Taser devices to its officers. For purposes of Section 1090, the officers will not be making or participating in making the sales contracts.

SEI

David E. Kendig

A-15-182

The Act currently does not require the volunteer members of the City of Tustin’s Veterans Advisory Committee to file statements of economic interests because those members have not yet exercised “decision-making authority.” However, the volunteer members of the Committee would be required to file statements of economic interests if they develop a history of making substantive recommendations that are regularly approved without amendment or modification over an extended period.

F. Upcoming Regulations

The proposed regulations schedule for the upcoming three months, subject to modification, is set forth below.

December 17, 2015

- **Regulation 18944.1: Gifts.** Agency Provided Tickets or Passes. Eliminate the requirement that an agency must file a report with the Commission reporting any distribution of tickets or passes for recreational events to certain agency officials for posting on the Commission's website. Require the agency to instead post the report on its website and provide the link to the Commission for posting on the Commission's website.
- **Regulation 18313.5: Online Posting.** Amend subdivision (c) to permit the FPPC to use the standard retention periods for forms posted on the website (including filed Form 700s, behested payments reports, and warning, advisory and closing letters) and not require Commission approval before each removal. The proposal sets a minimum posting period and does not require removal.
- **Regulation 18996: Scope of Audits and Investigations.** Last year Section 90002(c) was completely deleted to authorize the Commission to make preelection audits of specific transactions. Subsection (c) of Section 90002 stated what the audits will cover and what the audit period is for candidate controlled, primarily-formed, and measure committees, as well as general purpose committees. Regulation 18996 still refers to Section 90002(c). In light of the repeal of Section 90002(c), amend Regulation 18996 to state clearly what the mandatory audits pursuant to 90001 will cover.

January 21, 2016

- **Lobbying Regulations.** Require more detailed disclosure of "other payments to influence" to show more specifically who these payments are made to and what they are used for. Exclude certain payments such as administrative overhead (rent) from other payments to influence because they unnecessarily inflate the "other payments to influence" amount.

February 18, 2016

- **New Board and Commission Form 700 Requirements (Regulation 18754).** Staff has advised that Section 87302.6 requires a new board or commission to comply with the regulation even if the new entity is under the direction of an existing agency. Agency attorneys have read the statute and regulation to only apply to a brand new agency. The key difference is that agency members may not file a Form 700 for a significant time under the latter interpretation as the filing would not be required until an agency code amendment is in effect.
- **New Regulation to address Form 700 postings by state and local agencies.** Section 87500.3(e) specifically states that the Commission can adopt a regulation on redaction requirements for Form 700s that are posted on an agency website. A standard statewide policy would be helpful.