



FAIR POLITICAL PRACTICES COMMISSION

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March 19, 2004

Guy D. Petzold, Deputy City Attorney
City of Stockton
Office of the City Attorney
425 North El Dorado Street
Stockton, CA 95202-1997

**Re: Your Request for Advice
Our File No. A-04-050**

Dear Mr. Petzold:

This letter is in response to your request on behalf of Diana Lowery for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ You may wish to consider whether Government Code section 1090, the law prohibiting public officials from having an interest in certain contracts within their own agencies, may also be implicated by your situation. The Commission is charged with interpreting and enforcing the provisions of the Act, and may provide advice only with respect to those provisions (section 83114), so we refer you to the Attorney General's office for questions regarding Government Code section 1090.

QUESTION

Will proceeds from the sale of Ms. Lowery's business to governmental entities be considered governmental salary and so excluded from the definition of "income" under the Act?

CONCLUSION

The proceeds from the sale of the business will not fall under the exception for governmental salary and, if Ms. Lowery is elected to city council, will be potentially disqualifying if the source of income appears before Ms. Lowery in her official capacity.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS²

Diana Lowery is a candidate for the Stockton City Council. Ms. Lowery currently is a water conservation consultant under contract with the City of Stockton, the County of San Joaquin, the Stockton East Water District, and the California Water Company, a private water company regulated by the Public Utilities Commission that provides water to the citizens of Stockton. Ms. Lowery's contract with these entities consists of a program teaching water saving awareness using the copyrighted character of Sally-Save-Water. Ms. Lowery is in the process of selling use of her water awareness program and the character of Sally-Save-Water to all of the above listed entities and intends to receive installment payments from them over the next few years.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests" (Section 81001.) Specifically, 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. A public official has a "financial interest" in a governmental decision within the meaning of the Act if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; regulation 18700(a).) Among other things, an economic interest is any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); regulation 18703.3.)

As you note in your letter, "income" under the Act does not include "[s]alary and reimbursement for expenses or per diem received from a state, local, or federal government agency."³ (Section 82030(b)(2).) "'Salary' from a state, local, or federal government agency means any and all payments made by a government agency to a public official, or accrued to the benefit of a public official, as consideration for the public official's services to the government agency. Such payments include wages, fees paid to public officials as 'consultants' as defined in California Code of Regulations, Title 2, section 18701(a)(2), pension benefits, health and other insurance coverage, rights to compensated vacation and leave time, free or discounted transportation, payment or indemnification of legal defense costs, and similar benefits." (Regulation 18232(a).)

² The facts of this letter are from your request for advice and a telephone conversation with Ms. Lowery.

³ In your letter requesting advice, you ask whether payments from California Water Company would meet the exception for governmental salary. As the facts in your letter indicate California Water Company is a private company, it is unclear how payments from it to Ms. Lowery would be considered to be from a governmental entity.

When Ms. Lowery sells the use of her water awareness program to a governmental entity, we assume that the payment she receives is not consideration for her service to the agency, but, rather, is income for the sale of a product. Thus, proceeds from the sale are not considered governmental salary and will not meet the exception from the definition of income. Therefore, if a governmental entity pays Ms. Lowery \$500 or more in a calendar year, that entity will be a potentially disqualifying source of income to her.

The "Public Generally" Exception.

Under the "public generally" exception, codified in regulation 18707, an official may still participate in a decision despite a conflict of interest if the effect of the decision on the official's interest is not distinguishable from the effect on the public generally. (Section 87103.) In other words, the exception would apply if the decision will affect a significant segment of the public in substantially the same manner as it would affect the public official's interests. Among the variety of specialized rules that have been created construing the "public generally" exception, the one that is most relevant to your set of facts concerns the application of regulation 18707.1 (copy enclosed). Regulation 18707.1(b)(1)(D) allows a public official to participate in decisions that affect a federal, state or local government entity in which the public official has an economic interest, if "the decision will affect all members of the public under the jurisdiction of that governmental entity." The comment to regulation 18707.1 provides that "[t]he term 'affect all members of the public' is intended to cover decisions affecting the public in general but to exclude decisions which uniquely benefit a public official." Thus, if the public generally exception applies, Ms. Lowery would be able to participate in a decision from which she might otherwise have been disqualified. If Ms. Lowery believes the exception may apply to her, she should seek further written advice regarding the particular governmental decision in question.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Adrienne Korchmaros (cw)
Political Reform Consultant

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cc: Diana Lowery

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