



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

June 7, 2021

Eric Vanderbilt
Senior Hazardous Substances Engineer
California Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, CA 95826

Re: Your Request for Advice
Our File No. I-21-067

Dear Mr. Vanderbilt:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because your question seeks general guidance and is not limited to a specific governmental decision, we are treating your request as one for informal assistance.² Please note that we are only providing advice 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 or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Under the Act, may you take part in your normal job duties, providing technical revisions and recommendations for project applications/reports prepared, in part, by your wife’s employer on behalf of its clients?

CONCLUSION

Where your wife’s employer is involved in submitting an application or report on behalf of a client to your agency, the employer will be considered “explicitly involved” in the decision and you will be disqualified from taking part in related governmental decisions. To the extent that your

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

wife's employer is not involved in submitting the application or report to your agency but you are aware that the employer assisted in the work underlining an application or report, you may also be disqualified from taking part in the decision. However, your ability to take part in the relevant governmental decisions can only be determined on a case-by-case basis.

FACTS AS PRESENTED BY REQUESTER

You are a Senior Hazardous Substances Engineer for the California Department of Toxic Substances Control ("DTSC"). You work within a unit of consulting engineers whose duties include performing technical review of engineering reports submitted to DTSC and providing advice on those reports to other staff who manage individual projects. Your work involves noting deficiencies in the reports' engineering analyses and providing this information to the Project Manager for the site in question. You are one of several technical support staff who will provide input to the Project Manager on the accuracy of the report.

You do not make any decisions regarding the outcome of the report; such decisions are made by the Project Manager and their management. Your technical comments are peer reviewed by the Unit Chief of Engineering Services – North or another Senior Engineer before they are transmitted to the Project Manager. Your unit includes six engineers in a branch separate from the branches of the Project Managers who directly oversee individual projects. Your unit's role is advisory and final decisions on how the remediation should proceed are made by the Project Manager or the head of their Program. You do not participate in any contract oversight/award and the reports you review are not part of any bid on a contract for services to DTSC. You do not approve any expenditures.

Your wife is an employee of Jacobs Engineering, Inc. ("Jacobs"). She also owns approximately \$100,000 of Jacobs common stock in her 401k. A significant percentage of the reports your unit reviews are submitted by Jacobs or an affiliated entity, to the point that the Unit Chief assigning reports submitted by Jacobs to other engineers is becoming infeasible. Consolidation of remediation firms has been occurring for several years and seems to be accelerating. You seek to review Jacobs reports on portions of projects proposed to the State by Jacobs' clients. You state "[i]t is safe to say that the valuation of any of those portions of projects never exceeds \$5 million to a Jacob's client" and rarely more than \$500,000. According to a Google search you performed, the annual revenue for Jacobs is over \$12 billion.

In a follow-up email, you clarified that there have been rare instances in which Jacobs has been contracted to receive an incentive payment for an early contract completion. Your wife could recall only one example in her 25 years with Jacobs. In more than 99% of the firm's work, Jacobs is paid by the hour. You further reiterated that your duties at DTSC never include approving or rejecting any application. Your duties at DTSC are merely to recommend revisions to documents that would make them consistent with regulations. Additionally, you clarified that the financial effects specified above—that is, rarely more than \$500,000 and never exceeding \$5 million—refer to the effect on the Jacobs client, not on Jacobs itself. Finally, your wife works at Jacobs as a Scientific Technologist Professional Specialist and her job duties include air quality permitting, regulatory review, health risk assessment, and environmental compliance.

ANALYSIS

Under Section 87100 of the Act, “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests are “[a]ny business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more,” and “[a]ny source of income . . . aggregating five hundred dollars (\$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.” (Section 87103(a), (c).) You have a source of income interest in Jacobs as your wife’s employer.

Applications/Reports Submitted by Jacobs

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest 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, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Likewise, the reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a source of income is material if the source is a named party in, or the subject of, the decision including a claimant, applicant, respondent, or contracting party. (Regulation 18702.3(a)(1).) Where Jacobs is involved in the filing of an application or report with DTSC on behalf of a client, both Jacobs and the client are considered named parties or the subject of the DTSC decision. (See, e.g., *Kitchen Advice Letter*, No. A-18-212 [“Where the Firm has filed the application for an entitlement on behalf of a client, the Firm is explicitly involved, and it is reasonably foreseeable that a decision on the application will have a material financial effect on your husband’s firm, a source of income.”].) Accordingly, in such scenarios, Jacobs is explicitly involved, and it is reasonably foreseeable that a decision on the application or report will have a material financial effect on your wife’s employer, a source of income. Under the Act you are prohibited from taking part in the decisions.³

³ “A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.” (Regulation 18704(b).) “Significant intervening substantive review” has been interpreted to require more than the mere review of recommendations by superiors, but rather the independent checking of the results without solely relying on the data of the official. As a senior engineer and despite your work being peer-reviewed, it does not appear it is subject to significant intervening substantive review.

Applications/Reports Submitted Subsequent to Work Performed by Jacobs, in which Jacobs is Not Involved in Filing the Applications/Reports

Where an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, "[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable." Where Jacobs has merely performed engineering work that subsequently allows its client to submit an application or report to DTSC without Jacobs' involvement, Jacobs is not explicitly involved in the relevant governmental decisions.

Because disqualification under the Act is determined on a decision-by-decision basis and we do not have a specific governmental decision to analyze, we are unable to provide any broad advice or determination as to whether the Act prohibits you from taking part in any and all decisions not explicitly involving Jacobs. It appears that the most relevant standards for determining the materiality of a reasonably foreseeable financial effect on Jacobs would likely be as follows:

The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a source of income is material if the source is a business entity that will be financially affected under the materiality standards in Regulation 18702.1. (Regulation 18702.3(a)(4).) Under Regulation 18702.1, the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity is material if the decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or greater than: (A) \$1,000,000; or (B) five percent of the entity's annual gross revenues and the increase or decrease is at least \$10,000. (Regulation 18702.1(a)(2).) The reasonably foreseeable financial effect on a business entity is also material if the decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or greater than: (A) \$250,000; or (B) one percent of the entity's annual gross revenues and the change in expenses is at least \$2,500. (Regulation 18702.1(a)(3).)

In the future, if you have questions regarding your potential disqualification under the Act or the applicability of the above standards with respect to an assignment, please reach out to the FPPC for additional advice. If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

KMC:dkv