

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

77-08-060

In the Matter of: )  
 )  
Opinion requested by: )  
Anthony Saul Alperin )  
Deputy City Attorney )  
City of Los Angeles )

No. 76-084  
Aug. 18, 1977

BY THE COMMISSION: We have been asked the following questions by Anthony Saul Alperin, Deputy City Attorney of the City of Los Angeles:

(1) To what extent, if any, does Government Code Section 81013 permit the designation of positions, pursuant to a conflict of interest code, which do not entail the "making or participation in the making" of governmental decisions as provided in Government Code Section 87302 and 2 Cal. Adm. Code Section 18700?

(2) To what extent, if any, does Government Code Section 81013 permit the Los Angeles City Council, as code reviewing body, to approve a conflict of interest code which contains provisions requiring disclosure of financial interests which may not foreseeably be affected materially by decisions made or participated in by designated employees?

CONCLUSION

Government Code Section 81013 does not permit, and more particularly Section 87309(c) prohibits, a code reviewing body from going beyond the requirements of Section 87302 and approving a conflict of interest code which designates positions that do not entail the "making or participation in the making of governmental decisions" or which requires disclosure of financial interests that may not foreseeably be affected materially by the decisions made or participated in by employees holding any designated position.

2-B.P

ANALYSIS

The Political Reform Act of 1974 requires that "every agency shall adopt and promulgate a Conflict of Interest Code...." Government Code Section 87300.<sup>1/</sup> "Agency" is defined in Section 82003 as "any state agency or local government agency." Article 7, Chapter 3 sets out specific requirements concerning the procedures for adoption and promulgation of the codes, as well as substantive criteria for the provisions of each code. Section 87302(a) provides that a conflict of interest code shall contain "[s]pecific enumeration of the positions within the agency which involve the making or participation in the making of decisions which may foreseeably have a material financial effect on any financial interest." With respect to each such position, a code is required to list the specific types of investments, interests in real property and income which must be disclosed. Section 87302(b) provides:

... An investment, interest in real property or income shall be made reportable by the Conflict of Interest Code if the business entity in which the investment is held, the interest in real property, or the income or source of income may foreseeably be affected materially by any decision made or participated in by the designated employee by virtue of his position....

The responsibility for determining if a code meets these specifications rests with the "code reviewing body." Section 87303. The Los Angeles City Council is the code reviewing body for all city agencies within the City of Los Angeles. See Section 82011. On behalf of the city council, the Los Angeles City Attorney's office asks if the council may go beyond the requirements of Section 87302 and approve codes which designate employees and impose disclosure obligations to a degree not provided for in the Act.

Two statutory provisions bear on this question. First, Section 81013 of the Act addresses generally the authority of local agencies to impose obligations beyond those set forth in the Act. Section 81013 provides in relevant part:

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<sup>1/</sup> All statutory references are to the Government Code unless otherwise noted.

Nothing in this title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title....

Secondly, Section 87309 provides that a code reviewing body may not approve a conflict of interest code that:

- (a) Fails to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented;
- (b) Fails to provide to each affected person a clear and specific statement of his duties under the Code; or
- (c) Fails to adequately differentiate between designated employees with different powers and responsibilities.

Section 81013 makes clear that the Political Reform Act is not intended to so occupy the field it regulates that state and local government agencies are powerless to enact additional regulations.<sup>2/</sup> But the question posed here is not whether the Los Angeles City Council may impose obligations on its employees additional to those set forth in the Political Reform Act. Instead, the question is whether such additional obligations may be included in a conflict of interest code and made subject to all the enforcement sanctions contained in Chapter 11 of the Act. Section 81013 assures that the legislative authority of local jurisdictions is not unduly restricted by the Political Reform Act, but it does not endow local jurisdictions with the power to convert local violations into state violations through the vehicle of a conflict of interest code.

We turn, therefore, to Section 87309, which states what a conflict of interest code must contain before it may be approved by a code reviewing body. Paragraph (c) of that section provides that a code may not be approved if it "[f]ails to adequately differentiate between designated employees with different powers and responsibilities." This provision is intended to ensure, first, that a conflict of interest code

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<sup>2/</sup> See opinion requested by Edwin L. Miller, 2 FPCC Opinions 91 (No. 75-125, July 6, 1976).

require financial disclosure only from employees required to be designated by Section 87302(a) and, second, that a code relate disclosure to the specific duties of such designated employees. Thus, a code reviewing body would fail to fulfill its obligation under Section 87309(c) if it allowed designation of positions in a code which, to quote the language of Section 87302(a), do not entail the "making or participation in the making" of governmental decisions. It would be equally improper for a code reviewing body to require disclosure of interests which may not foreseeably be affected materially by decisions made or participated in by designated employees. Such action would necessarily impose the same or similar disclosure requirements on persons with quite different responsibilities, and Section 87309(c) holds such a course to be impermissible.<sup>3/</sup>

We do not mean to suggest that a code reviewing body must adhere rigidly to all the definitions contained in the Act when it passes upon a conflict of interest code. In fact, in our capacity as code reviewing body, we have approved codes that deviated in certain respects from the Act's definitions of income and investments in order to ensure that the mandate of Section 87309(a), that all potential conflicts be disclosed, was met.<sup>4/</sup> These deviations were the result of our attempts to bring a code into compliance with Section 87309(a), however, and did not cause us to approve a code which failed to comport with the companion requirements of Section 87309(c).

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<sup>3/</sup> See also Section 81002(d) which states that one of the purposes of the Act is that "[a]ssets and income of public officials which may be materially affected by their official actions should be disclosed...." This provision may also be read to mean that, to the extent feasible, assets and income of public officials which may not be materially affected by their official actions should not be disclosed.

<sup>4/</sup> For example, we approved a provision in the code adopted by the California Tahoe Regional Planning Agency that required disclosure of real property located in Nevada proximate to Lake Tahoe. We have also approved disclosure by certain employees in the Controller's Office of bonds issued by local government agencies. Neither of these interests fall within the Act's definitions of "interests in real property" or "investments." But we approved their disclosure in these two cases because it was reasonably foreseeable that such interests might be affected materially by the decisions made by some of the employees of these agencies.

The course of conduct suggested by Mr. Alperin's questions, on the other hand, would not more fully accomplish the Act's purpose of exposing and preventing conflicts and, in fact, would go beyond what is necessary to accomplish that purpose. Such a course would cause a code reviewing body to act contrary to the dictates of Section 87309(c).

While our conclusion herein is based on an interpretation of the Act, we also are influenced by a concern that the right of privacy interests of public officials not be unduly invaded.<sup>5/</sup> The California Supreme Court has made it clear that although a properly drawn financial disclosure law meets constitutional standards, overbreadth must be avoided and a statute will be invalid if it:

... intrude[s] alike into the relevant and the irrelevant private financial affairs of the numerous public officials and employees covered by the statute and is not limited to only such holdings as might be affected by the duties or functions of a particular office.

County of Nevada v. MacMillen,  
11 Cal. 3d 662, 671 (1974),  
quoting City of Carmel-by-the  
Sea v. Young, 2 Cal. 3d 259,  
272 (1970).

The Political Reform Act was drafted to meet these constitutional standards, and in our role both as code reviewing body and as principal interpreter of the provisions of the Act, we have consistently sought to adhere to that objective. As code reviewing body under Section 82011(a), we have required that agencies drafting codes scrutinize closely the duties, responsibilities and authority of each designated position in order to ensure that disclosure is specifically tailored and limited to those types of financial interests which "may foreseeably be affected materially by any decision made or participated in by the designated employee by virtue of his position." Section 87302(b). In addition, we have adopted

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<sup>5/</sup> The doctrine is well established that statutes should be interpreted so as to avoid possible constitutional infirmities. Braxton v. Municipal Court, 10 Cal. 3d 138 (1973); San Francisco Unified School District v. Johnson, 3 Cal. 3d 937 (1971).

a regulation which limits the level of authority and responsibility at which a person can be found to be making or participating in a governmental decision in a way which is intended to accord with both the language of the Act and the constitutional backdrop we have described. See 2 Cal. Adm. Code Section 18700.<sup>6/</sup>

In this case, we interpret Section 87309(c) in a similar fashion to ensure that the Act operates within applicable constitutional boundaries. We find, accordingly, that a conflict of interest code may not designate positions which do not involve the making or participation in the making of governmental decisions and may not require disclosure of financial interests which may not foreseeably be affected materially by the decisions made or participated in by an employee who holds a designated position.

Adopted by the Commission August 18, 1977. Concurring: Lapan, Lowenstein, MacAndrews and Quinn. Commissioner Remcho was absent.



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Daniel H. Lowenstein  
Chairman

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<sup>6/</sup> This regulation applies not only to questions of disqualification under Article 1 of Chapter 7, but also to the level of responsibility at which designation may be required under a conflict of interest code adopted pursuant to Article 3 of Chapter 7.