

87100

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

May 13, 1977

77-05-242

John D. Flitner
City Attorney
City of Rohnert Park
6750 Commerce Blvd.
Rohnert Park, California 94928

Dear Mr. Flitner:

This is in response to your two letters of May 5, 1977. The first was addressed to me and concerns your observations regarding the effect of the Political Reform Act's conflict of interest provisions as they relate to consultants to governmental agencies. The second is addressed to Mr. Richard Carpenter, formerly a member of the Fair Political Practices Commission, and relates to the effect of the conflict of interest provisions of the Political Reform Act upon city employees who are negotiators for city employee organizations.

With respect to the coverage of consultants within the concept "public official" as it appears in Government Code Sections 82048 and 87100, the Commission has issued a regulation, 2 Cal. Adm. Code Section 18700(a)(2). This regulation provides:

"... (a) 'Public official at any level of state or local government' means every natural person who is a member, officer, employee or consultant of a state or local government agency.

... (2) 'Consultant' shall include any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided however, that 'consultant' shall not include a person who:

(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and

(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel."

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As you will note, the definition excludes numbers of relationships between governmental entities and services contractors. It was the Commission's intent in drafting this regulation to exclude all service contract consultants except those (1) who have significant day to day operational contact with agency officials and (2) who have some authority with respect to the agency decision. Thus, the Commission, as a code reviewing body, has often removed from the coverage of conflict of interest codes such positions as special counsel, EIR consultants, financial consultants, and bond counsel. However, there are situations in which certain consultancy relationships would indeed satisfy the requirements of 18700(a)(2) and would thus be subject to the disqualification provisions of 87100 and the provisions of a conflict of interest code adopted pursuant to Government Code Section 87302(a). The Commission considered this issue without reaching a formal determination in the opinion request of Mr. James Botz, County Counsel of Sonoma County, (Opinion Request #75-159). I am including a copy of the last draft of the Botz opinion for your information. The opinion was not issued by the Commission since Mr. Botz asked that it be withdrawn because the essential information he sought with respect to the opinion request had been supplied during the Commission deliberations.

With respect to your letter addressed to Mr. Carpenter, you ask whether the Commission has considered the question of conflict of interest relative to city employees who are also negotiators for employee organizations under the Meyers-Milias-Brown Act. Please be advised that the Commission has not considered such a question in the sense you raise the issue. Of course pursuant to Commission regulations, participating in the making of a governmental decision or in any way attempting to use one's official position to influence a government decision does not include "...actions by public officials, employees or employee representatives relating to their compensation or the terms or conditions of their employment or contract." See, 2 Cal. Adm. Code Sections 18700(c)-(f).

On the other hand, where a member of an employee organization sits on the decision-making body deciding matters at issue between the decision-making body and the Board member's employee organization, a different result might obtain. The Commission has had no such opportunity to resolve this question. But with respect to your disclosure Category 4, the employee organization, though non-profit in nature, can permissibly be a "source of income" under Section 87103 and, where decision-making Board members decide issues related to members of employee organizations, the source of income may establish a potential basis of disqualification.

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In your letter to Mr. Carpenter, you also ask whether the Commission publishes its opinions. The answer is yes. The opinions are published in a CEB volume that also contains opinions and various miscellaneous documents and publications of the Commission. I trust that this response has been helpful to you.

If you have further questions, please feel free to call me at 916/322-6444 in Sacramento.

Sincerely,



Delbert L. Spurlock, Jr., Chief
Conflicts of Interest Division

DLS:mfa
enclosure

CITY OF ROHNERT PARK
6750 COMMERCE BOULEVARD
ROHNERT PARK, SONOMA COUNTY, CALIFORNIA 94928
TELEPHONE 795-5416

May 5, 1977

Richard Carpenter, Esquire
Fair Political Practices Commission
P.O. Box 807
Sacramento, California 95814

Dear Mr. Carpenter:

The purpose of this letter is twofold:

1. I note by FPPC Bulletin of April 18, 1977, (Volume 3, No. 5) that the Commission issues a fair amount of opinions. Since many of these questions arise in other jurisdictions, is it possible that the Commission will begin publishing these opinions and distributing them to local public agencies or otherwise make them available to local public agencies?
2. The Rohnert Park Conflict of Interest ordinance has four (4) disclosure categories as follows (1) investments within the city (2) investments outside the city but which do business with the city (3) investments in any business that has contracted with the city within the last 2 years or may contract with the city within the foreseeable future and (4) income received by an officer of a labor organization or employee organization which negotiates with the city as a representative of city employees regarding wages, hours and working conditions.

This latter category is my own thinking and arises from the Moscone-Mazzola Confrontation in San Francisco.

I have two questions regarding this latter category.

1. Has the Fair Political Practices Committee considered the question of conflict of interest relative to city employees who are also negotiators for employee organizations under the Meyers-Milias-Brown Act?
2. If the Commission has considered the question, who would be designated as employees required to file disclosure statements?

With personal regards, I am

Very truly yours,


JOHN D. FLITNER
City Attorney

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CITY OF ROHNERT PARK
6750 COMMERCE BOULEVARD
ROHNERT PARK, SONOMA COUNTY, CALIFORNIA 94928
TELEPHONE 795-5416

May 5, 1977

Delbert L. Spurlock, Esquire
Chief, Conflict of Interest Division
Fair Political Practices Commission
P.O. Box 807
Sacramento, California 95814

Dear Mr. Spurlock:

Could you advise me of the position of the Fair Political Practices Commission relative to the duty of consultants to file disclosure statements. Enclosed is a copy of my opinion relative to this matter.

Very truly yours,


JOHN D. FLITNER
City Attorney

JDF/jes
Encl.

CITY OF ROHNERT PARK
6750 COMMERCE BOULEVARD
ROHNERT PARK, SONOMA COUNTY, CALIFORNIA 94928
TELEPHONE 795-5416

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Philip D. Asaf, Esquire
Wilson, Jones, Morton & Lynch
Attorneys and Counsellors at Law
630 North San Mateo Drive
P.O. Box 152
San Mateo, California 94401

re: Conflict of Interest Political Reform Act of 1974
Government Code §81000 et.seq.

Dear Mr. Asaf:

Please pardon my delay in responding to your letter of inquiry dated December 27, 1976, regarding your responsibilities as a consultant to the City of Rohnert Park under the Political Reform Act of 1974 with specific reference to the Conflict of Interest question and financial reporting requirements under Chapter 7 of the Act (Government Code §87100, et.seq.)

Government Code §82048 defines a "Public Official" as ". . . every member, officer, employee or consultant of a state or local government agency."

Government Code §87100 prohibits any "public official" from making or participating in making or in any way attempting ". . . to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Government Code §87102 provides that the requirements of the above section (Government Code §87100) ". . . are in addition to the requirements of Articles 2 and 3 of this chapter and any Conflict of Interest Code adopted thereunder."

As you no doubt know, "Articles 2 and 3" referred to above refer to disclosure requirements and conflict of interest codes and their minimum required contents, respectively.

Stated and reasoned another way, regardless of whatever else follows or whatever else is adopted by a local public agency in the nature of a conflict of interest code, a public official is enjoined by law from making, participating in the making or in any way attempting to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

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Government Code §82032 tells us that "'Influencing legislative or administrative action' means promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including but not limited to the provision or use of information, statistics, studies or analyses."

For the purposes of this discussion "An official has a financial interest in a decision within the meaning of Government Code §87100 if it is reasonably foreseeable that the decision will have a material financial effect, . . . on"

" Any source of income, . . . aggregating two hundred fifty dollars (\$250) or more received by or promised to the public official . . .". (Government Code Section 87103).

A bond counsel, an engineering consultant, an environmental impact report preparer, a planning consultant and all of the other consultants or advisors are selected by the city to utilize their knowledge, skill and expertise in guiding the city through the particular process involved. If advocacy is involved often the city itself is more the advocate or proponent of the proposed "governmental decision" than the consultant himself.

Thus it is my opinion that any consultant or advisor retained by the city is a public official. Government Code §82048. As a public official he or she has a statutory mandatory duty to refrain from making, participating in the making or in attempting to influence a governmental decision. Government Code §87101. The governmental decision may have an effect upon the amount, frequency or obligation to pay the consultants fee. If the fee is over \$250 the consultant comes within the scope of Government Code §87103 if there is reasonable foreseeability and if there is material financial effect.

I believe foreseeability is present even though the project or proposal must be approved before the fee is earned or ascertainable. What determines material financial effect is, I suppose, the impact of the source of income upon the recipient as compared with his or her total earnings, financial net worth, etc. For example, I would assume a \$10,000 consultant's fee would have a more material financial effect upon a consultant earning \$20,000 per year whose net worth was \$5,000 than it would upon a consultant earning \$500,000 per year whose net worth was \$1,000,000. However, my own view is if the financial interest is foreseeable, the material effect in most circumstances must be conceded.

Thus it is my opinion that an outside consultant must always refrain from attempting to influence a city decision in any manner whatsoever

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if his or her fee is contingent upon a given course of action by the City. The consultant's obligation I believe, in this circumstance, is to present the facts and refrain from making recommendations, one way or the other.

It might also be prudent for the consultant to prepare a written declaration which would be read at the outset of his or her report and which would be filed in the proceeding which would state:

- (1) He or she was retained as a consultant
- (2) The fee arrangement
- (3) The conditions under which the fee is earned
- (4) If earning the fee is contingent upon the Council taking a certain course of action, that no specific recommendation regarding the course of action the City Council should take is made in the written report nor will any such recommendation be made at any hearings, public or otherwise, to be conducted thereon.

If, on the other hand, the consultant is hired to make a recommendation and his or her fee is due and payable regardless of what his or her recommendation is, then I believe he or she is not covered by Government Code §87100 since the condition of his or her employment was to make independent findings or recommendations. 2 California Administrative Code §18700(a)(2)(B) appears to support this conclusion by its provision that ". . . 'Consultant shall not include a person who . . . Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel."

With regard to disclosure requirements under Articles 2 and 3 (Government Code §87200), I do not believe consultants are required to comply with disclosure requirements since these Articles do not refer to "public officials" but to certain clearly defined state or local officers as set forth therein. Government Code §87200.

Rohnert Park City Ordinance No. 326 does define a public official as ". . . every member, officer, employee or consultant of the City of Rohnert Park." Thus, by ordinance definition, a consultant is a public official. However, the consultants are not made part of the "designated positions" for reporting purposes as designated by Section 2.60.030 of the Ordinance.

Thus, it is my opinion (1) that consultants need not file statements of disclosure, (2) that they must refrain from attempting to influence governmental decisions or action if hired on the basis that their fee is earned only if a certain governmental course of action is taken and (3) that if the consultant is hired to make specific recommendations and is paid the fee regardless of the recommendations made as in the cas

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of a "fact finder" or "independent consultant", then such report in and of itself does not constitute an illegal attempt to influence a governmental decision within the terms of the Political Reform Act of 1974. If the consultant goes further and offers unsolicited opinions then a violation may result. It is also my opinion in this third situation that no financial disclosure need be made.

Very truly yours,


JOHN D. FLITNER
City Attorney

JDF/jes

cc: City Manager Peter M. Callinan