



California Fair Political Practices Commission

November 28, 1989

Ronald R. Ball
Assistant City Attorney
City of Carlsbad
1200 Carlsbad Village Drive
Carlsbad, CA 92008-1989

Re: Request for Informal Assistance
Our File No. I-89-671

Dear Mr. Ball:

Thank you for giving us the opportunity to review your draft of a memorandum to the city clerk regarding financial disclosure by designated employees under the Political Reform Act.^{1/} Your memorandum essentially sets out your opinion on what boards or commissions should be covered by the conflict of interest code.

We did find an area in your memorandum which needs correction. On page 2 you indicate that "No amount of solely advisory decision made by a member of a solely advisory commission whether that advice or recommendation is routinely or regularly followed can convert the status of the member from a member to a "designated employee."

Commission Regulation 2 Cal. Code of Regs. Section 18700(a)(1) provides that the definition of a "member" shall include, but not be limited to, salaried or unsalaried members of board or commissions with decision-making authority. A board of commission possesses decision-making authority whenever:

- (A) It may make a final governmental decision;
- (B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

Page Two
November 28, 1989

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency. (Emphasis added)

The definition of a designated employee is any officer, employee, member or consultant of any agency whose position with the agency is designated in a conflict of interest code because the position entails the making or participation in the making of decision which may foreseeably have a material effect on any financial interest.

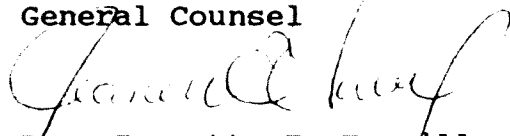
Once there is a history of a particular advisory board's recommendations being routinely accepted without amendment or modification, the board does convert from a solely advisory function to one making or participating in the making of a governmental decision and would be covered by the conflict of interest codes. We have in the past advised new advisory commissions that they are in fact solely advisory until a history of recommendations has been established.

With regard the various board or commissions in your opinion, since we have no information concerning those boards, we are not able to determine if your conclusion is appropriate.

If you need further advice with regard to each of those boards or commissions, please write with more specifics. Please feel free to call me at (916) 322-5901 if you wish to discuss this further.

Sincerely,

Kathryn E. Donovan
General Counsel



By: Jeanette E. Turvill
Political Reform Consultant
Legal Division

KED/JET/jt

CITY OF CARLSBAD

1200 CARLSBAD VILLAGE DRIVE
CARLSBAD, CALIFORNIA 92008-1989
(619) 434-2891



VINCENT F. BIONDO, JR.
CITY ATTORNEY

RONALD R. BALL
ASSISTANT CITY ATTORNEY

October 6, 1989

Jeanette V. Turvill
Political Reform Consultant
Legal Division
Fair Political Practices Commission
P. O. Box 807
Sacramento, California 95804-0807

RE: YOUR INFORMAL ASSISTANCE ADVICE FILE NO. I-89-319

Dear Ms. Turvill:

I have reviewed your advice letter of June 23, 1989 referred to above wherein you conclude that you were not provided enough facts to provide specific advice to the City of Fowler regarding its Parks and Recreation Commissioners, however, you offered general guidelines regarding their obligation to file statements of economic interests under the Act. Your letter does not discuss Fowler's ordinance organizing its Parks and Recreation Commission nor the specific powers and functions delegated to it, if any, beyond a solely advisory function making its members designated employees pursuant to Section 82019 of the Act. I think we agree that one cannot provide specific advice unless one analyzes the powers and functions of the specific committee or commission under review. In that regard, I enclosed a draft opinion discussing this issue for the various boards and commissions in the City of Carlsbad. I understand you will be out of the office until Tuesday, October 10, 1989 and would like to discuss this issue with you after that time and once you have had an opportunity to review the enclosed draft opinion.

I appreciate your cooperation and courtesy in this regard.

Very truly yours,

A handwritten signature in black ink that reads "Ronald R. Ball".

RONALD R. BALL
Assistant City Attorney

rmh
enclosure

c: City Clerk

CITY OF CARLSBAD

1200 CARLSBAD VILLAGE DRIVE
CARLSBAD, CALIFORNIA 92008-1989
(619) 434-2891



VINCENT F. BIONDO, JR.
CITY ATTORNEY

RONALD R. BALL
ASSISTANT CITY ATTORNEY

October 6, 1989

Oct 11 9 05 AM '89
FPPC

Jeanette V. Turvill
Political Reform Consultant
Legal Division
Fair Political Practices Commission
P. O. Box 807
Sacramento, California 95804-0807

RE: YOUR INFORMAL ASSISTANCE ADVICE FILE NO. I-89-319

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I appreciate your cooperation and courtesy in this regard.

Very truly yours,

A handwritten signature in black ink that reads "Ronald R. Ball". The signature is written in a cursive style with a large initial "R".

RONALD R. BALL
Assistant City Attorney

rmh
enclosure

c: City Clerk

CITY OF CARLSBAD

1200 CARLSBAD VILLAGE DRIVE
CARLSBAD, CALIFORNIA 92008-1989
(619) 434-2891



VINCENT F. BIONDO, JR.
CITY ATTORNEY

RONALD R. BALL
ASSISTANT CITY ATTORNEY

November 1, 1989

Jeanette V. Turvill, Esq.
Political Reform Consultant
Legal Division
Fair Political Practices Commission
P. O. Box 807
Sacramento, California 95804-0807

RE: YOUR INFORMAL ASSISTANCE ADVICE FILE NO. I-89-319

Dear Ms. Turvill:

As you will recall, I wrote to you on October 6, 1989 enclosing a copy of my draft opinion regarding the question of whether or not boards and commissions which act in a solely advisory capacity must file conflict of interest forms. (Copies enclosed). If you have had an opportunity to review this matter, would you be kind enough to give me a call so that we may discuss it further.

I appreciate your prompt attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Ronald R. Ball".

RONALD R. BALL
Assistant City Attorney

rmh

c: City Clerk

Nov 3 7 54 AM '89
FPPC

PERSONAL CONFIDENTIAL
(INTEREST)

DRAFT

October 6, 1989

TO: City Clerk

FROM: City Attorney

FINANCIAL DISCLOSURE OF DESIGNATED EMPLOYEES UNDER THE POLITICAL REFORM ACT OF 1974

Thank you for your memorandum of August 10, 1989 regarding the above referenced matter. The "Political Reform Act of 1974" (Government Code §87100 et. seq. hereafter referred to as "The Act") prohibits participation by a public official in governmental decisions in which he has a financial interest and requires disclosure of certain investments, property and income. The disclosure requirements apply to mayors, members of city councils, planning commissions, city managers and city attorneys by virtue of Government Code Section 87200. Other "designated employees" are required to file financial disclosure forms by virtue of government Code Section 87300 which requires every agency to:

"...adopt and promulgate Conflict of Interest Code pursuant to the provisions of this article. A Conflict of Interest Code shall have a force of law and any violation a Conflict of Interest Code by a designated employee shall be deemed a violation of this chapter." (Emphasis added).

The Act's requirements for conflicts of interest and disclosure are distinctly different. Metropolitan Water District of Southern California v. Fair Political Practices Commission (1977) 73 Cal.App.3d 650, 141 Cal.Rptr.8. The general prohibition of participation in governmental decisions where the public official has a financial interest is contained in Article 1 of Chapter 7 of the Act, while the disclosure requirements are contained in Article 2 of Chapter 7 of The Act. Under this scheme, a public official may be prohibited from participating in a decision as a result of a financial interest which is disclosed, however, the converse is not true whereby a financial disclosure automatically disqualifies a public official from participation. Therefore, it is not particularly productive to look to the administrative regulations interpreting the prohibition provisions of the Act, when deciding who is subject to its disclosure requirements. It is sufficient to recognize that the legislature intended these two requirements to remain separate and the Fair Political Practices Commission has acknowledged this scheme in its regulations interpreting the Act:

"The requirements of a Conflict of Interest Code are in addition to other requirements of the Political Reform Act such as the general prohibition against conflicts of interest contained in Government Code Section 87100, and to other state or local laws pertaining to conflicts of interest ..."
(See 2 California Code of Regulations (CCR) §18730(a)).

The Fair Political Practices Commission has adopted definitions of the undefined terms in the Act. Specifically, Regulation 18700 defines the terms that appear in Government Code Section 87100 prohibiting public officials from participating in governmental decision in which the public official has a financial interest. Specifically, the Commission defines the phrase "public official at any level of state or local government." It does not define the term "designated employee" and cannot promulgate a definition of "designated employee" contrary to the one already supplied by the legislature in Government Code Section 82019. No amount of solely advisory decision made by a member of a solely advisory commission whether that advice or recommendation is routinely or regularly followed can convert the status of the member from a member to a "designated employee."

The designated employees which the local Conflict of Interest Code applies to are defined in Government Code Section 82019 as:

"...any officer, employee, member, or consultant of any agency who's position with the agency: ...(c) is designated in a Conflict of Interest Code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest..."

Designated employee does not include an elected state officer, any unpaid member of any board or commission which serves a solely advisory function, any public official specified in Section 87200 ..." (Gov't Code §82019). (Emphasis added).

Under our local Conflict of Interest Code, the Design Review Board, Building Advisory and Appeals Board, and the Housing and Redevelopment Advisory Committee are required to file financial disclosure forms. For the reasons discussed below, it is my opinion that other boards or commissions whose decisions are solely advisory are not required to make financial disclosures.

The only reported case construing the definition of designated employee contained in Government Code Section 82019 involved the Little Hoover Commission. In Commission on California State Government Organization and Economy v. Fair Political Practices Commission (1977) 75 Cal.App.3d 716, 142 Cal.Rptr.468, the appellate court determined that the Little Hoover Commission was such an important commission which possessed powers and influences far beyond its solely advisory capacity, it was not entitled to an exemption under the Fair Political Practices Commission's rules and regulations. (2 CCR §18751). In that case, the court went to great lengths to emphasize both the express and implied powers and influence of the Little Hoover Commission which went beyond its solely advisory capacity. Indeed, the appellate court stated:

"The indirection (of the Little Hoover Commission) is only nominal and theoretical. Executive agencies are vulnerable to charges of abuse, inefficiency or waste, will tend to anticipate public criticism by voluntary self-improvement. The more vulnerable the agency, the greater the sensitivity to the Commission's investigatory power. Like a biological organism, the complex and interdependent array of executive agencies responds to external stimuli and to internally secreted adrenalin. In real life, the Commission's investigations are not all indirect and advisory. They are capable of directly altering the activities, that is, the decisions of executive agencies, resulting in tangible effects which far outdistance the soft inducements of good counsel." (At pg.722).

What is particularly telling about the court's decision involving the Little Hoover Commission is its description of its statutory duties which are clearly more than just advisory. The description of the Little Hoover Commission's statutory duties set out in Government Code Section 8541 include the power to meet at such times and places as it deems proper, hold hearings on its own volition at times and places it deems proper, to issue subpoenas and compel attendance of witnesses and production of books, records, papers, accounts, reports and other documents, to employ employees such as clerical, legal and technical assistants, to contract with such other agencies, public or private, it deems necessary, etc. As will be shown below, the boards and commissions in Carlsbad possess none of these powers and their uncompensated, part-time members act solely in an advisory capacity to the City Council or the City Manager. There is little relationship between the state agency involved in the Commission on California State Government Organization and Economy case and any of the boards and commissions in the City which act solely in an advisory capacity.

Turning our attention to the commissions established under Title 2 of the Carlsbad Municipal Code, we are able to determine the following:

1. Planning Commission. The Planning Commission is the final decision making body on numerous decisions in addition to its' role as advisory to the City Council. As such, its' members must make financial disclosure. In addition, the Planning Commission is specifically required by The Act to make financial disclosure. (Government Code Section 87200).
2. Design Review Board. The Design Review Board is the final decision making body on certain items, in addition to its' advisory capacity to the City Council pursuant to CMC Chapter 21.35. It must make financial disclosure.

3. Child Care Commission. The Child Care Commission's function is solely advisory to the City Council pursuant to the CMC Section 2.30.070.
4. Parks and Recreation Commission. The Parks and Recreation Commission is solely advisory to the City Council pursuant the CMC Section 2.36.110. In this regard, this opinion is contrary to the informal advice rendered by the California Fair Political Practices Commission in its' letter of June 23, 1989. (see copy attached). That opinion did not deal at all with the local organic ordinance under which the Parks and Recreation Commission in the City of Fowler was organized. Nor did it deal with the regulations under Article 2 dealing with disclosure requirements or the threshold question of whether or not Fowler's parks and recreation commissioners were "designated employees" under its own ordinances. Without an analysis of the City of Fowler ordinance organizing its' Parks and Recreation Commission, we do not know whether or not it is similar to Carlsbad's and we should not necessarily consider this informal advice as applying to us.
5. The Carlsbad Housing and Redevelopment Advisory Committee. The Housing and Redevelopment Advisory Committee acts solely in an advisory capacity to the City Council pursuant to CMC Section 2.40.060. Although not required by the Act, a City can adopt a local Conflict of Interest Code that applies to officials that are not designated employees. Carlsbad has done so far this committee even though it is not legally compelled to do so.
6. The Personnel Board. The Personnel Board acts solely in an advisory capacity to the City Council pursuant to CMC Section 2.44.027.
7. Board of Library Trustees. The Board of Library Trustees acts in more than a solely advisory capacity since it may make and enforce all rules, regulations and by-laws necessary for the administration of libraries under its management and all property belonging to it. (CMC §2.16.050). In addition, the Board of Library Trustees may purchase necessary books, journals, publications and other personal property pursuant to the monies budgeted to it by the City Council. (CMC §2.16.065). Finally, the Board of Library Trustees has the authority to purchase real property or erect or rent and equip its buildings. As such, it has express and implied powers to enter contracts, expend public monies and to perform other acts and make decisions which may foreseeably have a material effect on any financial interest on board

members' investments, interests in real property or sources of income.

8. Carlsbad Arts Commission. The Carlsbad Arts Commission possesses many powers by virtue of Carlsbad Municipal Code Section 2.18.100 that are similar to those possessed by the Little Hoover Commission in the Commission on California State Government Organization and Economy, supra. Specifically, the Arts Commission possesses the power to develop the concept of contracting for cultural services with local arts organization and individual artists, provide financial assistance wherever feasible to groups or individuals who provide public arts programming to citizens, recognize and assist those who have special knowledge and skills in the arts, develop cooperative arrangements between the City and other agencies to provide needed arts facilities for the cities and to provide for the selection, installation and maintenance of works of art within public facilities. It has the power to spend public monies from a fund established by the City Council. Since its powers are more than solely advisory, its members must make financial disclosure.
9. Senior Commission. The Carlsbad Senior Commission functions solely in an advisory capacity to the City Council by virtue of Carlsbad Municipal Code Chapter 2.38. Its responsibility is to make recommendations to the City Council and to advise the City Council on the special needs and concerns of seniors, including the creation, operation, maintenance, management and control of senior programs, activities and facilities. Under the provisions of that chapter, its solely advisory functions are not to be construed as a delegation of any discretionary powers possessed by the City Council.
10. Traffic Safety Commission. The Traffic Safety Commission functions solely in an advisory capacity to the City Council pursuant to Carlsbad Municipal Code Chapter 2.28. It is empowered to study all matters referred to it by the City Council and to make written recommendations to it regarding measures that should be taken to promote traffic and pedestrian safety within the City.

In order to determine the Fair Political Practices Commission's position in regard to the above, I recommend that we seek an opinion from it as to whether or not the committees and commissions referred to above must be included under our local conflict of interest code prior to revising or amending it.

After you have had a chance to review this issue, would you please let me know how you wish to proceed.

Should you need additional information regarding the above, please do not hesitate to contact me.

A handwritten signature in black ink, appearing to read 'R. Ball'.

RONALD R. BALL
Assistant City Attorney

rmh
attachments

CA's Spring Meeting, 1st week in March 1990



League Spring Meeting May 1980
California Fair Political Practices Commission

RECEIVED

AUG 24 1989

CITY OF CARLSBAD
CITY ATTORNEY

June 23, 1989

Thomas Hemphill
City Administrator
City of Fowler
P.O. Box 99
Fowler, CA 93625

Re: Your Request for Informal
Assistance
Our Advice File No. I-89-319

Dear Mr. Hemphill:

This is in response to your request for advice under the conflict of interest provisions of the Political Reform Act (the "Act").^{1/} Your letter does not contain sufficient facts for us to provide specific advice. Accordingly, we have provided you with general guidance, pursuant to Regulation 18329(c) (copy enclosed).^{2/}

QUESTION

You have asked us whether the City of Fowler's Recreation Commissioners should be filing statements of economic interests pursuant to the Political Reform Act.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000 et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

^{2/} We consider your letter to be a request for informal assistance under Regulation 18329(c). Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

CONCLUSION

If the recreation commissioners participate in decisions which may affect their economic interests, they should be covered by the city's conflict of interest code. After the city amends its conflict of interest code, the recreation commissioners would begin filing statements of economic interests.

FACTS

The City of Fowler originally adopted its conflict of interest code in 1976 and appears to have amended it in July of 1980. Your February 10, 1989 letter includes the list of positions designated in the code. The recreation commissioners are not among those on the list.

ANALYSIS

Since the conflict of interest code for the City of Fowler does not include the recreation commissioners as designated employees, they do not at present have any filing obligation with the city. The conflict of interest code may need to be amended to include those positions.

Government Code Section 87300 requires that every agency adopt and promulgate a conflict of interest code. Each conflict of interest code must contain a specific enumeration of the positions within the agency which, make or participate in the making of decisions which may foreseeably have a material effect on any financial interest and for each such enumerated position, the specific types of investments, business positions, interests in real property, and sources of income which are reportable. The types of interests which are reportable are those which may foreseeably be affected by any decision made or participated in by the designated employee. (Section 87302.)

A public official makes a governmental decision when, acting within the authority of his or her office, he or she:

- (1) Votes on a matter;
- (2) Appoints a person;
- (3) Obligates or commits his or her agency to any course of action;

Thomas Hemphill
June 23, 1989
Page Three

- (4) Enters into any contractual agreement on behalf of his or her agency; or
- (5) Determines not to act on any of the above because of his or her financial interests.

Regulation 18700(b).

A **public official** participates in the making of a governmental decision when, acting within the authority of his or her position, he or she:

- (1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or
- (2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:
 - (A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or
 - (B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(c).

If the recreation commissioners participate in decisions which may affect their economic interests, they should be covered by the code. For instance, if the commissioners decide such things as appropriate insurance carriers for insurance for city parks or land, make recommendations or decisions on purchasing, make recommendations to the city council or planning commission on leases which recommendations are routinely accepted, or make any other similar decisions, then they should be covered by the code.

In your May 18 letter you mentioned a February 10 letter which has gone unanswered. Our records do not show receipt of that letter. It appears that the letter was being sent to us to

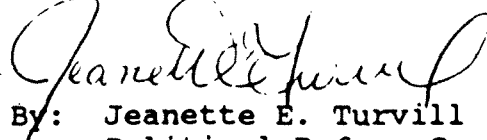
Thomas Hemphill
June 23, 1989
Page Four

get approval on the proposed amendments to the code. The Fair Political Practices Commission is not the proper code reviewing body for your code. Any amendments to your code must be submitted to your city council for approval. (Section 82011(c).)

I hope this has been helpful to you. If I can answer any further questions, please call me at (916) 322-5901.

Very truly yours,

Kathryn E. Donovan
General Counsel



By: Jeanette E. Turvill
Political Reform Consultant
Legal Division

JET/jt

CITY OF FOWLER



MAY 22 1989

May 18, 1989

Technical Assistance and
Analysis Division
Fair Political Practices Commission
P. O. Box 907
Sacramento, CA 95804

Gentlemen:

Could you please indicate whether the City of Fowler's Recreation Commissioners should be filling out statements of economic interest pursuant to Fair Political Practices Commission Guidelines?

Also, our letter of February 10, 1989, still has not been answered. We have attached a copy of that letter to today's correspondence in hopes that the older letter could be answered soon.

Very truly yours,

A handwritten signature in cursive script that reads "Thomas Hemphill".

Thomas Hemphill
City Administrator

TH:jn

Attachment

February 10, 1989

MAY 22 1989

RECORDED

Technical Assistance and
Analysis Division
Fair Political Practices Commission
P. O. Box 907
Sacramento, CA 95804

C
Gentlemen:

It is our understanding that according to Government Code Section 87306, whenever changes occur among those City of Fowler personnel designated to file statements of economic interest, then the City's conflict of interest code is to be changed accordingly.

O
Therefore, could your agency please review these following proposed changes.

P
Please note that on October 5, 1976, Resolution 980 was enacted. This adopted the City of Fowler's Conflict of Interest Code which was then approved by the Fair Political Practices Commission on December 16, 1976. City Resolution 1133 was adopted on July 1, 1980. This designated those City officials who are to file financial disclosure statements. Parts I and II of the appendix of that resolution are attached (p. 12 through 14).

Y
Since that time,

- . I have been hired as City Administrator,
- . The position of City Superintendent has been abandoned,
- . Mr. Jeff Viau has been hired as the Director of Public Works,
- . The position of Assistant Building Inspector has been abandoned, and
- . The City's hospital was sold last month to a nonprofit foundation.

Therefore, the following change is proposed for Part I of the Appendix:

<u>Position</u>	<u>Disclosure Category Assigned</u>
<u>FWLER GENERAL OPERATIONS</u>	
City Clerk	3, 5, 6
City Attorney	All categories
City Administrator	All categories

Technical Assistance and
Analysis Division
February 10, 1989
Page Two

MAY 22 1989

City Treasurer	7
Public Works Director	1, 2, 3, 5, 6
Police Chief	1, 2, 3, 5, 6
Fire Chief	1, 2, 3, 5, 6
Planning Commission Members	1, 2, 5, 6
Consultants:	
Contract Planning & Zoning Administration	1, 2, 5, 6
Contract Engineering Services (City Engineer)	1, 2, 5, 6

C

We appreciate your assistance.

O

Sincerely,

Thomas Hemphill
City Administrator

P

TH:jn

Y



California Fair Political Practices Commission

May 24, 1989

Thomas Hemphill,
City Administrator
P.O. Box 99
Fowler, CA 93625

Re: Letter No. 89-319

Dear Mr. Hemphill:

Your letter requesting advice under the Political Reform Act was received on May 22, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5662.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to the information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Jeanne Pritchard".

Jeanne Pritchard
Chief Technical Assistance
and Analysis Division

Handwritten initials in cursive script, possibly "JP" or "JPH".

JP:plh