



California Fair Political Practices Commission

January 4, 1991

Honorable Barbara Thomas
1118 Paru Street
Alameda, CA 94501

Re: Your Request for Informal Assistance
Our File No. I-90-518

Dear Councilmember Thomas:

This letter is in response to your request for advice regarding your duties and responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Your letter does not address a decision pending before your agency but rather seeks general guidance. Accordingly, we are providing you with informal assistance pursuant to the provisions of Regulation 18329(c) (copy enclosed).²

Your facts include matters over which the Commission has no jurisdiction. We do not provide advice concerning provisions of law other than the Act. You may wish to consult with the Attorney General's Office regarding other provisions of law over which the Commission has no jurisdiction. For example, Section 1090 which prohibits government officials from having an interest in contracts with their agencies, Section 1126 regarding incompatible offices, and Section 54953 regarding open meetings may be applicable to your facts.

QUESTION

You are a City of Alameda councilmember. Does your employment as an attorney give rise to a disqualifying conflict of interest under the provisions of the 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 Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c).)

CONCLUSION

Under the provisions of the Act, your employment as an attorney with a law firm requires you to disqualify from participating in decisions which will have a foreseeable material financial effect upon the law firm.

FACTS

You are a councilmember for the City of Alameda. You are also a practicing attorney. In January, 1990, you became associated with the law firm of Meyer and Mitchell. You work as an independent contractor for this law firm. You select your own cases and are compensated on an hourly basis for the work performed. For purposes of our discussion, we assume that the law firm of Meyer and Mitchell has been a source of income to you of at least \$250 in the preceding 12 months. You do not recruit clients for the firm and have brought no clients to the firm. In your capacity as an attorney with Meyer and Mitchell, you have not performed any work for the City of Alameda and have not participated in cases involving City of Alameda police officers.

Meyer and Mitchell performed work on a contract basis for the City of Alameda until November, 1989. Meyer and Mitchell's representation of the city was terminated on November 7, 1989, effective immediately, although the firm continued to represent the city in one motion pending in federal court. It is your belief that this motion was heard in early December, 1989. The firm currently represents several City of Alameda police officers in a malicious prosecution case.

ANALYSIS

Section 87100 prohibits a public official from making, participating in making, or in any way attempting to influence a governmental decision in which the official has a financial interest. Councilmembers are public officials. (Section 82048; Regulation 18700(a), copy enclosed.)

An official has a financial interest in a decision 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, on a member of the official's immediate family³ or on:

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received

³ An official's "immediate family" are his or her spouse and dependent children. (Section 82029.)

by or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103(c).

As stated previously for purposes of this analysis, we assume that Meyer and Mitchell is a source of income to you pursuant to Section 87103(c). Therefore, you will be deemed to have a financial interest in any decision of the city council which will foreseeably have a material financial effect on Meyer and Mitchell. You have stated in your request for advice that Meyer and Mitchell no longer performs services for the City of Alameda. However, issues related to the law firm might come before the Alameda City Council at a later date. This would be the case, for example, if the city council approved payment of sums owed to the firm. Similarly, the firm represents the interests of City of Alameda police officers in a malicious prosecution case. Issues related to this lawsuit may come before the city council. If it is reasonably foreseeable that any such decision will have a material financial effect upon the law firm, you are required to disqualify yourself from participating in the decision.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Comm. (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

Issues related to Meyer and Mitchell may come before the city council from time to time. For example, because the firm is representing the interests of city police officers in a malicious prosecution case, the council may be called upon to determine whether to pay Meyer and Mitchell for the work performed on behalf of these officers. It is foreseeable that such a decision would have a financial effect on Meyer and Mitchell. If the effect of such a decision is material, your disqualification is required.

Materiality

Regulation 18702 (copy enclosed) sets forth the guidelines for determining whether the effect of a decision on an official's source of income is "material" as required by Section 87103. If the official's source of income is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality. If on the other hand a business entity which has been a source of income to the official would be indirectly affected by the decision, then Regulation 18702.2 (copy enclosed)

would apply to determine whether the effect of the decision is material.

The effect of a decision is deemed material when a source of income to a public official is directly involved in a decision before the official's agency or there is a nexus between the purpose for which the official receives income and the governmental decision. (Regulation 18702.1(a).)

A business entity is directly involved in a decision before an official's agency when that business entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

Regulation 18702.1(b).

A decision to authorize payment of sums due to the law firm would be one in which the law firm would be the subject of the decision before the city council. In such an event, the law firm which has been a source of income to you of \$250 or more in the preceding 12 months would be directly before your agency and you would be disqualified from participating in the decision.

Additionally, you will be required to disqualify yourself if there is a "nexus" between the purpose for which you received income and the governmental decision. A nexus situation exists if an official receives income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision. (Regulation 18702.1(d).) Let us assume, for purposes of our discussion, that you perform work on appeal in the malicious prosecution lawsuit for affirmative relief initiated by certain police officers in the City of Alameda. If issues related to this case appear before the city council for approval, you will be in a position to approve the legal work performed on behalf of the police officers for which you received income. Thus, there would be a disqualifying nexus because you would be using your official position to accomplish that for which you received income to accomplish in your private capacity. Under such circumstances, you

could not participate in the decision to approve matters related to the lawsuit.

When a business entity which has been a source of income to a public official in the preceding 12 months is indirectly affected by a decision, the appropriate standard for determining materiality is that of Regulation 18702.2. Except for the largest business entities, the provisions of subdivision (g) of Regulation 18702.2 would apply if the decision will impact the business entity which has been a source of income to the public official as follows:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

Regulation 18702.2(g).

If any decision before the city council will affect the law firm indirectly in the amounts specified above, you must disqualify yourself from participating in the decision.

For example, Meyer and Mitchell had been retained by the city to defend the city in a malicious prosecution case. At a later date, the city terminated its relationship with Meyer and Mitchell and settled the case on behalf of all parties. You believe the city had no authority to settle the case on behalf of the police officers. Although Meyer and Mitchell is no longer employed by the city in the matter of the malicious prosecution lawsuit, the law firm represents the interests of city police officers on appeal. Should the police officers seek reimbursement from the city for their legal costs, you must disqualify yourself from participating in such decision. Any such decision may indirectly affect Meyer and Mitchell because it may result in an increase or decrease in the legal fees received by the law firm.

In addition, if the police officers are unsuccessful in their appeal, they may file suit against the City of Alameda. In this event, Meyer and Mitchell, as the representative of the police officers, would also be indirectly affected by any decision regarding this potential lawsuit. This is so because decisions regarding the lawsuit will result in an increase or decrease in

the legal fees payable to Meyer and Mitchell. If any such decision will affect Meyer and Mitchell in the sums specified above, you must disqualify yourself from participating in the decision.


A public official who is disqualified from participating in a decision because of a financial interest cannot participate in discussions, vote on the matter, or otherwise try to influence members of his or her agency. (Section 87100; Regulations 18700 and 18700.1; Levinger Advice Letter, No. I-88-328; West Advice Letter, No. A-88-413, copies enclosed.) Prohibited attempts to influence a decision include contacting any member, officer, or employee of the official's agency. (Regulation 18700.1(a).) Therefore, if you are disqualified from participating in a decision, when issues relating to the law firm come before the city council you must abstain from participating in the decision or influencing others in reaching a decision.

In addition, a disqualified public official may not attend a closed session where the council meets to discuss litigation related to the disqualified official's area of conflict. (Hamilton v. Los Gatos (1989) 213 Cal.App.3d 1050.) Therefore, you may not attend any closed session or obtain information regarding a closed session if you are otherwise disqualified from participating in the particular decisions to be discussed at the closed meeting.

We trust this letter adequately responds to your inquiry. Should you have any further questions regarding this matter, do not hesitate to call me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel


By: Blanca M. Breeze
Counsel, Legal Division

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Enclosures