



California Fair Political Practices Commission

September 23, 1991

Eleanor M. Egan
City Attorney
City of Culver City
4095 Overland Avenue
Culver City, CA 90232-0507

Re: Your Request for Informal Advice
Our File No. I-91-111

Dear Ms. Egan:

You have requested advice concerning the application of the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your request seeks general guidance about the city's course of conduct, we are treating your request as one for informal assistance.²

QUESTIONS

1. May a city require a developer to pay for the cost of the preparation of an environmental impact report ("EIR") for the developer's project without creating a conflict of interest for the consultants to the city who prepare the EIR and who are paid from the developer's funds?

2. Is the conclusion above different if the city's staff has extensive input into, and exercises considerable control over, the content of the EIR, or if the consultant is not the ultimate decision maker on either the project or on the adequacy of the EIR?

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)(3).)

CONCLUSIONS

1. The Act does not prohibit developer fees being used by the city to pay costs associated with the processing of a developer's application. However, if the developer, by paying for the cost of the consultant who prepares the EIR, becomes a "source of income" to the consultant, the consultant may have a conflict of interest when he or she prepares the EIR. To avoid the "source of income" problem, the city must adhere to the criteria set forth in Regulation 18704.6 which, until its adoption by the Commission, represents the policy of the Commission as enumerated in the Alperin Advice Letter, No. I-91-324.

2. The conflict-of-interest provisions of the Act do not apply to all consultants who prepare EIRs. That determination depends on whether the specific person who prepares the EIR is considered to be a "public official" under the Act. For example, consultants who provide information, advice, recommendation or counsel to the city, are subject to the city's control and direction, or possess authority with respect to any city decisions are consultants irrespective of the way the relationship is structured. Thus, generally speaking, if the city's staff has extensive input into, and exercises considerable control over, the content of the EIR, or even if the consultant is not the ultimate decision maker on the project or on the adequacy of the EIR, the conclusion may remain the same.

FACTS

You state that it is common practice for cities to require developers to pay the cost of preparing an EIR for the developer's project. This may be done in one of two ways. First, the developer may pay for the cost pursuant to a three-way contract between the developer, the city and the consultant chosen by the city to prepare the EIR. Second, the developer may pay pursuant to two contracts, one between the developer and city, and a second between the city and the consultant. In either case, the developer deposits the estimated cost of the EIR preparation in advance with the city. The city uses the money to pay the consultant, or in some cases, the developer reimburses the city after the city pays the consultant pursuant to the developer's contract.

ANALYSIS

1. Source of Income

Section 87100 sets forth the conflict-of-interest provision of the Act:

No 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" is defined in Section 82048 to include every member, officer, employee or consultant of a state or local government agency. "Financial interest" is defined in Section 87103 and includes "sources of income" to a public official of more than \$250 in the 12 months prior to a decision.

An 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, . . . on:

* * *

(c) Any source of income, other than gifts and other than loans . . . , aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

* * *

Section 87103(c).

Underlying these provisions is one of the most fundamental purposes of the Act: "Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).)

The question here is whether the developer who pays monies to a public agency so that the city may hire consultants to process the developer's EIR is a "source of income" to the consultants. The answer will depend on the particular facts at hand. The question is especially important in the context of EIRs, since under California Environmental Quality Act (Public Resources Code Sections 21000, et seq.) an EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." Laurel Heights Improvements Assn. v. Regents (1988) 47 Cal. 3d 376, 392.

An obvious conflict of interest arises if the consultant preparing the EIR is beholden, or has a financial tie, to the developer. Clearly where the consultant is a paid employee of the developer, the developer would be a "source of income" to the consultant. (Russell Advice Letter, No. A-88-484.)

On the other hand, payments to consultants in the form of salary and reimbursement for expenses or per diem received from a state, local, or federal government agency are exempted from the definition of "income." (Section 82030(b)(2).)

While "income" is defined in the Act, "source" is not. Whether a person or entity is a "source of income" to a public official depends largely upon the facts of the particular case. Consistent with the purposes of the Act, the Commission has not hesitated to pierce through intermediaries or other entities to find the true source of income or gifts in order to prevent the impartiality and bias condemned by the Act. Thus we have concluded that customers of a company who can control the amount of commission a company salesperson can receive from the company are "sources of income" to the salesperson. (Anaforian Advice Letter, No. I-90-312; Larsen Advice Letter, No. I-89-555.) We have also said that a corporation's president or major shareholder who effectively controls the corporate employee may be considered a source of income to the employee for conflicts purposes. (Hentschke Advice Letter, No. A-80-03-069.) In the context of gifts, we have said that donors of gifts who utilize intermediary organizations for channeling donations to officials are the donors to the officials and must be disclosed. (Katz Advice Letter, No. I-90-269; Harper Advice Letter, No. A-87-088.)

You make reference to a past Commission enforcement action against the Folsom City Council. (FPPC No. 78-242.)³ In the Folsom action, the developer paid money into a special city account which was earmarked for the hiring and compensation of planning consultants. The consultants were hired solely for the developer's project, devoted their time only to reviewing the developer's applications, and were paid only with money provided by the developer. Normally, where a city pays compensation to a public official, the compensation is not an economic interest that must be disclosed or will cause a conflict of interest. However, under the facts in the Folsom case, the city, rather than the source of compensation for the public official, was merely a conduit for the developer. The arrangement threatened the impartiality of the consultants and, at a minimum, created the unseemly appearance of a conflict of interest. The consultants

³ The November 7, 1990 letter you refer to is a closure letter issued by the Commission's Enforcement Division; it is not an "opinion letter," and should not be relied upon for guidance. The closure letter in the action does not constitute a published opinion by the Commission, formal written advice, or informal assistance. A closure letter by the Enforcement Division neither provides immunity nor is it a statement of the policy of the Commission. (Section 83114, Regulation 18329.)

were being paid by the developer to make governmental decisions affecting the developer's project. The developer thus was the true "source of income" to the consultants.

In the Savage Advice Letter, No. I-90-662a, we considered a system whereby a developer's funds were conveyed to a city to pay costs associated with evaluating the developer's proposed project. In that letter, while recognizing that cities currently need additional revenue from persons proposing developments to cover the costs of processing applications, approvals and other discretionary actions of a city, we expressed concern that if the developer controlled the employment relationship between the city and the consultant the city may be acting as a mere conduit for the developer.

The advice contained in the Savage letter was superseded in the Alperin Advice Letter, No. I-91-324, which considered the identical issue in connection with a city ordinance. The criteria contained in the Alperin letter was subsequently incorporated into proposed Regulation 18704.6 (copy enclosed), which is noticed for adoption at the Commission's October 2, 1991 meeting. The proposed regulation creates standards and procedures for cities to follow so that a fee-paying project applicant, such as a developer, will not be considered a "source of income" to employees and consultants of the city who work on the applicant's project and who are paid from these fees. As long as the practice of the city is in compliance with criteria set forth in the Alperin letter, and when adopted, with the regulation, compensation paid to the consultant from developer fees paid to the city will not be considered a "source of income" to the consultant.

The regulation creates buffers between the developer whose fees pay for the employment of additional agency staff and the employed individuals whose work consists of approving or rejecting the developer's project. The purpose of the buffers is to ensure that it is the agency, and not the developer or person who pays fees to the agency, that has control over the project. The agency, therefore, must be the entity that has control over the flow of income to the public official and over the decisionmaking of the public official. The regulation provides that the developer will not be considered a "source of income" to employees or consultants retained by the agency, even if the developer pays the fees for employing this additional agency staff, if certain criteria are satisfied:

1. The agency must control the hiring, supervision and compensation of the employees and consultants it hires and assigns to work on the developer's project on behalf of the agency. Any compensation the employees and consultants receive must in no way

be controlled by the developer. To avoid the appearance that the developer is paying the employees and consultants who are reviewing the developer's project, the public officials who process the developer's application should be paid only from agency accounts. Furthermore, with respect to the work for which the employees and consultants were hired, the agency must be the only source of compensation. The funds must be disbursed from an agency account under the exclusive control of the agency or of the city entity with budgetary control over the agency.

2. The terms and conditions of the relationship between the agency and the consultant it hires to work on the developer's project must be the subject of a written agreement.⁴ Any compensation paid to the consultant by the agency cannot be tied to the ultimate outcome of the developer's project.

3. The terms and conditions of the relationship between the agency and the developer must be the subject of a written agreement and available for public scrutiny. Any payments made by the developer to the city cannot be tied to the ultimate outcome of the project or be contingent upon the hiring of any specific individual.

2. Public Officials

Government Code Section 82048 provides, in pertinent part, that every member, officer, employee or consultant of a state or local government agency is a public official. While all employees of an agency are deemed to be "public officials" under the Act, this is not necessarily true for consultants. Consultants are considered to be "public officials" subject to the conflict-of-interest provisions of the Act only if they meet the definition set forth in subdivision (a)(2) of Regulation 18700. Consequently, the determination of whether a project applicant is a "source of income" to a consultant is only relevant for those consultants who qualify as public officials under the Act.

Regulation 18700 (copy enclosed) defines "consultant" as follows:

"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 rendi-

⁴ The regulation includes optional language which, if adopted by the Commission, would make the agreement available for public scrutiny.

tion of information, advice, recommendation, or counsel independent of control and direction of the agency or 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.

Regulation 18700(a)(2).

The Commission has interpreted the definition of "consultant" broadly. Under Regulation 18700(a)(2)(A), the Commission has found that contractors are consultants when they, in essence, act like "employees" and provide general advice on an ongoing basis with duties like those normally performed by agency staff. (In re Leach (1978) 4 FPPC Ops. 48; Russell Advice Letter, supra; and Hsu Advice Letter, No. I-89-485.) Thus, persons⁵ who provide information, advice, recommendation or counsel to the city, who are subject to the city's control and direction, or who possess authority with respect to any city decisions are consultants irrespective of the way the relationship is structured.

Under Regulation 18700(a)(2)(B), a person is a consultant if he not only offers his professional opinion on specific questions or on requests for information regarding specific factual issues, but also engages in actual governmental decision-making. (In re Maloney (1977) 3 FPPC Ops.; In re Leach, supra.)

On the other hand, where the person performs services on a specific matter without review or direction by the agency, the person is more akin to a vendor who contracts to deliver a finished product, and thus is not a consultant under the Act. (In re Maloney, supra; Crouch Advice Letter, No. A-83-069.) Under those circumstances, the person uses his or her expertise to render professional services according to the specifications of a contract, and his or her judgment is not subject to review or direction. Thus, persons who are independent of agency control and direction and possess no authority with respect to any agency decisions beyond the rendition of information, advice, recommendation or counsel are not consultants under the Act.

⁵ A "consultant" as defined in Regulation 18700(a)(2) must be a natural person and cannot be a corporation. Consequently, firms that provide services to the city will not be consultants, although the firm employees who actually perform the work may be.

The question here is whether the person who prepares the EIR, regardless of his or her employer, is a public official under the Act. The standard applied by the Commission to determine which persons who prepare EIRs qualify as consultants under the Act, and which do not, must be addressed on a case by case basis. In this regard, please note that the standard applied by the Commission as set forth in Regulation 18700(a)(2) is separate and distinct from the standard applied by the courts in determining whether an agency sufficiently exercised independent review, analysis, and judgment when using EIR materials submitted by an applicant's consultant for purposes of compliance with state environmental laws. (Friends of La Vina v. Los Angeles County, 91 Daily Journal D.A.R. 9519.)

If, after reviewing this letter in light of an EIR consultant's duties, you determine he or she is a public official under the Act, you must then determine whether the official has a conflict of interest when he or she prepares, or works on, the EIR. (Lewis Advice Letter, No. I-90-485.)

The Act provides a four-part test to determine whether a public official has a conflict of interest in a particular governmental decision. First, is the official making, participating in making, or using his official position to influence a governmental decision? (Section 87100.) Second, is it reasonably foreseeable that the decision will affect the official's economic interests? (Section 87103.) Third, is the effect of the decision on the official's economic interests material? (Id.) Fourth, is the effect of the decision on the official's economic interests distinguishable from its effect on the public generally? (Id.)

A. Making or Participating In A Governmental Decision

Regulation 18700 defines "making a governmental decision." "Making a governmental decision" includes obligating or committing an agency to any course of action or entering into any contractual agreement on behalf of an agency. (Regulation 18700(b)(3),(4).)

A public official or designated employee "participates in the making of a governmental decision" when he or she:

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)(2).

The standard for determining whether the advice is given "without significant intervening substantive review" is a narrow one. (See Kaplan Advice Letter, A-82-108.) If the decision maker relies on the data or analysis prepared by the consultant without checking it independently or if the consultant in some other way actually influences the final decision, the consultant is participating in making a governmental decision. (Kaplan Advice Letter, supra.)

B. Foreseeable Effect On Economic Interest

The second issue is whether the decision will foreseeably affect an economic interest of the official. The parameters of a public official's economic interests are set forth in Section 87103. For the purposes of the matter at hand,

An 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 . . . on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

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

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

* * *

Section 87103.

The relevant inquiry then becomes whether decisions by the consultant will have a reasonably foreseeable financial effect on any of the economic interests of the public official. The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. To be foreseeable, the effect of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817.)

C. Materiality

The next issue is whether the financial effect is material. To determine if a decision's effect is material, we must first determine whether the official's economic interest is directly or indirectly involved in the decision. (Regulation 18702.)

D. Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from its effect on the public generally. (Section 87103.)

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If you have any further questions regarding this matter,
please feel free to contact me at (916) 322-5901.

Sincerely,

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By: Deanne Stone
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Enclosure