



# California Fair Political Practices Commission

November 9, 1993

Shelley Morrison  
Deputy County Counsel  
County of Humboldt  
825 Fifth Street  
Eureka, CA 95501

Re: Your Request for Advice  
Our File No. A-92-515

Dear Ms. Morrison:

This is in response to your letter requesting advice on behalf of the County of Humboldt concerning application of the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter will confirm our telephone conversation of October 8, 1992, in which I advised you that a consultant who is contractually retained by a developer to prepare an Environmental Impact Report ("EIR") for the county under the procedure you propose is not a consultant under the Act.<sup>2</sup>

## QUESTION

A developer wishes to employ a consultant who will prepare an EIR. The developer will then submit the report to the county. The preparation of the EIR will be the subject of a written agreement between the county and the developer. Do the conflict-of-interest provisions of the Act apply to an individual who prepares an EIR under contract with the developer and pursuant to a contract between the developer and the county? In other words, does an individual who prepares an EIR under this type of an arrangement come within the definition of a "consultant" under the Act?

---

<sup>1</sup> 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 Sections 18000-18954. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

<sup>2</sup> I apologize for any inconvenience the protracted delay in providing you with the written confirmation of our advice for your files may have caused.

### CONCLUSION

The conflict-of-interest provisions of the Act only apply to individuals who are considered "public officials." An individual who has not entered into a contract with a state or local government agency does not come within the definition of a "consultant" under the Act and, as such, is not a "public official."

Please note, however, that the Commission is currently considering extensive amendments to the regulation which defines a "consultant." Accordingly, the law upon which this advice is based may change in the near future.

### FACTS

The California Environmental Quality Act ("CEQA") requires counties in certain circumstances to prepare and certify environmental documents known as draft and final environmental impact reports. CEQA sets forth five permissible methods for the preparation by an agency of such documents. These include: having its staff do the work; contracting with another entity, public or private; accepting a draft prepared by the applicant, the applicant's consultant, or any other person; or executing a third party contract or memorandum of understanding to govern preparation of the document by an independent contractor. (Public Resources Code § 21082.1; CEQA Guidelines, § 15084.) Before using a draft prepared by someone else, however, the lead agency must subject the document to its own review and analysis, so that the draft EIR sent out for public review reflects its own independent judgment. (CEQA Guidelines, § 15084, subdivision (e).)

Generally, the County of Humboldt has prepared EIR's by contracting directly with a consultant to prepare the EIR, and contracting with the developer to reimburse the county for the costs of the EIR. Under this approach, the consultant who prepares the EIR is a consultant to the county, and therefore a public official within the meaning of the Act.

The County of Humboldt is now considering using the following method for the preparation of environmental documents: executing a memorandum of understanding with a developer, who will then contract with a person to prepare the environmental documents according to the "Scope of Work" prepared by the county. The documents will be subject to the review and approval of the county, either performed "in-house" or by a consultant retained by the county. Under this approach, the applicant developer would retain the person to prepare the environmental documents, negotiate the fee, and make payments directly to the person. The person's work would be directly controlled by the developer, but the work product would be subject to the review and approval of the county. The county could reject, in whole or in part, the environmental reports, or could require their modification.

ANALYSIS

Section 87100 prohibits public officials from making, participating in making, or otherwise using their official position to influence a governmental decision in which they have 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. Therefore, a consultant is a public official and governed by the provisions of the Act.

Regulation 18700 defines the term "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 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.

(Regulation 18700(a)(2) [emphasis added].)

The definition of a consultant provides that a consultant is a natural person who provides certain services to a state or local government agency under contract with the agency. Thus, when a natural person provides services under contract to a private party, and is not under contract with a state or local agency, this person is not considered a "consultant" under Regulation 18700(a)(2). (Olsen Advice Letter, No. I-90-451.)

For that reason, we have advised that when a developer employs an individual to prepare an EIR, this individual is under contract with the developer, not with the government agency, and, as such, is not a consultant for purposes of the Act.<sup>3</sup> (Burns Advice Letter, No. A-91-485.)

Under your facts, the individual to be selected to prepare the EIR will not be a signatory to the contract between the county and the applicant developer. Since the county is not contracting

---

<sup>3</sup> Compare, the Pendelton Advice Letter, No. I-93-283, where the individual being retained to prepare the EIR was a signatory to the contract between the local government agency and the applicant.

with the individual who will prepare the EIR, this individual is not a consultant of a government agency within the meaning of Regulation 18700(a)(2). As such, the individual is not a "public official" for purposes of the Act and is not subject to the Act's conflict-of-interest provisions.

The fact that the contract between the county and the applicant developer provides for the scope of work to be performed by the individual who will be preparing the environmental documents does not lead us to reach a different conclusion. The county is merely instructing the applicant developer that it must retain a person to prepare the environment documents and that the environmental documents must address certain issues and contain specific provisions required by applicable statutory and case law.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.<sup>4</sup>

Sincerely,

Steven G. Churchwell  
General Counsel



By: Deanne Stone  
Senior Commission Counsel

---

<sup>4</sup> Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.