



California Fair Political Practices Commission

December 3, 1992

Boyd Gibbons
Director
Department of Fish and Game
1416 Ninth Street
P.O. Box 944209
Sacramento, CA 94244-2090

Re: Your Request for Informal Assistance
Our File No. I-92-621

Dear Mr. Gibbons:

This is in response to your letter requesting advice regarding your responsibilities pursuant to the provisions of the Political Reform Act (the "Act").¹ Since your advice request is general in nature we are treating your request as one for informal assistance.²

QUESTION

Will your private conduct in authoring a book and promoting the sale of the book create a conflict of interest under the Act, or trigger other Political Reform Act restrictions?

CONCLUSION

You will have a conflict of interest in decisions that will have a material financial effect on the publisher of your book, which is a source of income to you. However, the Act does not restrict your private conduct in writing and promoting the book, or in receiving royalty payments for the sale of the book.

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).)

FACTS

Effective January 1, 1992, you were appointed to the position of Director of the Department of Fish and Game. Prior to assuming office you authored a book, "The Retriever Game," which was published by Stackpole Books of Harrisburg, Pennsylvania. Stackpole Books has paid you an advance toward royalties on the book, and will be paying you royalties based on the book's sales.

You stated that sportsmen and retriever clubs may also be interested in the book. The Department of Fish and Game regulates sport hunting and has a limited role in field trials for retrievers.

Stackpole Books has asked that you assist in promoting the book. You anticipate the publisher will arrange to have you attend book-signing ceremonies and interviews with media. For example, you may be asked to participate in an interview or other event pertaining to the book on your own time while in other cities on state business.

You are seeking advice as to how you can best avoid conflicts of interest and other problems that might arise in performing your governmental duties and marketing your book in your off time.

ANALYSIS

Conflicts of Interest

The conflict-of-interest provisions of the Act (Section 87100 et seq.) prohibit public officials³ from making, participating in making, or otherwise using their official position to influence a governmental decision in which the official has a financial interest. Thus, the conflict-of-interest provisions of the Act do not restrict or prohibit any specific private conduct--rather they regulate official conduct, where this conduct may have a foreseeable and material financial effect on any of your economic interests.

Section 87103 specifies that a public official will have a conflict of interest in any decision which will reasonably foreseeably and materially affect the official, or a member of his or her immediate family, or:

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

³ A "public official" is defined in Section 82048 and Regulation 18700 (copy enclosed) as every natural person who is a member, officer, employee, or consultant of a state or local government agency.

(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.

An "indirect investment or interest" means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.)

1. Sources of Income

In your letter you stated that you have been paid an advance on royalties for your book from Stackpole Books and expect future royalty payments. Any person or business that has made any payment to you in the past 12 months is considered a source of income for the purposes of Section 87103. Thus, Stackpole Books is a source of income to you, and will continue to be a source of income to you for 12 months after the final royalty payment is made.

However, having an economic interest that may be financially affected is not sufficient in itself to require disqualification. For a conflict of interest to exist, the governmental decision must have a reasonably foreseeable⁴ and material financial effect

⁴ An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

on the official's business interest. The standard for materiality differs depending on whether Stackpole Books is directly or indirectly involved in the decision. However, application of these rules is necessarily dependent on the specific facts surrounding a decision. We have enclosed general material pertaining to analyzing both direct and indirect material financial effects on a business entity for your information.

2. Nexus

In addition, an official is considered to have a conflict of interest in a decision if there is a nexus between the purpose for which he or she receives income in his or her private capacity and the decision. (Regulation 18702.1(a)(1).) There is a nexus between the purpose for which an official receives income and a decision if the official receives income to achieve a goal or purpose which would be achieved or aided by the decision. (Regulation 18702.1(d).) In essence, the regulation prevents a public official from accomplishing in his or her public capacity that which the official is paid to accomplish in his or her private capacity. (Best Advice Letter, No. A-81-032.)

For example, in the Suess Advice Letter, No. A-88-468, we advised:

There is a nexus between the purpose for which Dr. Murphy receives income and his decision to refer a student to ALRIA if Dr. Murphy receives or is promised income from ALRIA for a purpose which is achieved or aided by the decision. (Regulation 18702.1(d).) Dr. Murphy expects to receive royalties and fees for seeing clients to be fitted with lenses. Arguably, such royalties and fees will increase as more clients are fitted with lenses. Thus, Dr. Murphy has a financial interest in attempting to have more clients fitted with these lenses. There is, therefore, a nexus between the purpose for which he receives income from ALRIA -- the fitting and sale of lenses, and the decision he makes in referring students to ALRIA to be fitted with lenses. The effect of the decision, referring students to be fitted with the lenses, is thus material and Dr. Murphy must disqualify himself from participating in the decision.
[Footnote omitted.]

You stated that you will not use your position as Director nor any public time to promote your book. Thus, you would not have a nexus in the conduct of your public duties as director of the Department of Parks and Recreation.

Gifts and Honoraria

A second issue is whether any of the payments you receive from Stackpole Books constitutes a gift or honoraria, both of which are now regulated by the Act.

1. Gifts

Section 89505 provides:

(a) No member of a state board or commission, and no designated employee of a state agency, shall accept gifts with a total value of more than two hundred fifty dollars (\$250) in a calendar year from any single source, if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interest. This paragraph shall not apply to any part-time member of the governing board of any public institution of higher education, unless the member is also an elected official.

A "gift" is defined as any payment to the extent that consideration of equal or greater value is not received from the donor.⁵ (Section 82028.) Payment received by a public official for which full and adequate consideration was provided would be considered income, rather than a gift. Thus, the royalties you receive as payments for your book would be income, not a gift.

2. Honoraria

Section 89503 provides in a pertinent part:

(a) No member of a state board or commission, and no designated employee of a state agency, shall accept an honorarium from any source, if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interest. This section shall not apply to any part-time member of the governing board of any public institution of higher education, unless the member is also an elected official.

Section 89503.

⁵ However, a payment provided to an elected official for which consideration of equal or greater value is not received would be presumed to be a contribution, unless it is clear from the surrounding circumstances that the payment was received for personal purposes unrelated to his or her candidacy or status as an officeholder. (Section 82015; Regulation 18215.)

An "honorarium" means any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.⁶ (Section 89502.)

Regulation 18931.2(a) defines "article published" as a nonfictional written work which is published in a periodical, journal, newspaper, newsletter, magazine, pamphlet, or similar publication. However, "article published" does not include books, plays, or screenplays. (Regulation 18931.2(c).) Thus, the royalties you receive are not considered prohibited honoraria.

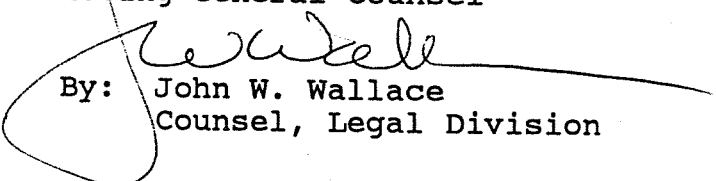
Other Laws

Other laws may also affect your conduct of private and public business. You may wish to contact the Attorney General's Office with respect to the parameters of managing public and private business. Moreover, your agency may also have a list of incompatible activities that may restrict your private activities. The Commission does not have jurisdiction over either of these potential restrictions.

I trust this letter has addressed your concerns. Should you have any further questions regarding this matter or a specific decision that you would like advice on, please feel free to contact me at (916) 322-5901.⁷

Sincerely,

Scott Hallabrin
Acting General Counsel


By: John W. Wallace
Counsel, Legal Division

SH:JWW

⁶ An "honorarium" does not include earned income for personal services which are customarily provided in connection with the individual's business or practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, unless the sole or predominant activity of the business, trade, or profession is making speeches. (Section 89502(c).)

⁷ 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.