



California Fair Political Practices Commission

June 25, 1993

Mark W. Gilbert
Chief Legal Counsel
Sacramento Regional Transit District
P.O. Box 2110
Sacramento, CA 95812-2110

Re: Your Request for Informal Assistance
Our File No. I-93-217

Dear Mr. Gilbert:

This is in response to your request for advice on behalf of the Sacramento Regional Transit District (the "RT") under the conflict-of-interest provisions of the Political Reform Act, (the "Act").^{1/} Since you are merely seeking a general interpretation of the Act and not inquiring about a specific decision, we are treating your letter as a request for informal assistance.^{2/}

QUESTIONS

1. Does the rule of legally required participation apply to board members disqualified under a Section 84308 proceeding?
2. Are only monetary contributions of \$250 subject to disqualification under Section 84308?
3. If an absent RT board member informs you prior to a meeting that he or she will be absent and is also disqualified from participating on an issue, may RT apply the rule of legally required participation to reinstate sufficient board members to achieve a quorum?

^{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. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

4. Must you obtain written disclosure from the absent board member describing the disqualifying interest, or may he or she disclose the required information to you by telephone?

5. For reinstatement purposes, does the Commission distinguish between the degree of the financial interests which disqualifies board members?

CONCLUSIONS

1. The rule of legally required participation applies to board members disqualified under a Section 84308 proceeding.

2. Any monetary or nonmonetary payment valued at \$250 for political purposes are contributions subject to disqualification under Section 84308.

3. Regional Transit may apply the rule of legally required participation in order to achieve a quorum. However, the names of all disqualified board members, including the name of the absent member, must be included in the random drawing. If the name of the absent board member is selected, the decision must be put over to an agenda when the absent member will be present.

4. Written disclosure of the disqualifying interest is not required. If the absent member informs you of the disqualifying interest, you may, on the member's behalf, disclose that disqualifying financial interest on the record.

5. The Act does not mandate a specific method to select board members who are legally required to participate. The Commission recommends that agencies use a random method of selection, that does not take into account the degree of conflict.

FACTS

The Sacramento Regional Transit District was formed pursuant to Public Utilities Code Section 102000 et seq. The seven member board is comprised of appointees from the Sacramento County Board of Supervisors and the Sacramento City Council. The board is a legislative body which establishes policy for RT.

The members of RT also serve in elected capacities and receive campaign contributions. In addition to general conflicts under Section 87100, the campaign contributions may be disqualifying under Section 84308. You anticipate situations where you are unable to achieve a four-member quorum and seek guidance in applying the rule of legally required participation.

ANALYSIS

Conflicts of Interest Under Section 87100 - General Rule

Section 87100 prohibits public officials from making, participating in, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest.

An official has a financial interest in a governmental decision within the meaning of Section 87100 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, or on a member of the official's immediate family,^{3/} or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.^{4/}

(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.

^{3/} An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

^{4/} A nonprofit organization is not a business entity. However, if a nonprofit entity has been a source of income to a public official, the provisions of Subdivision (c) of Section 87103 would apply.

For purposes of this section, 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, footnote added.

Accordingly, a public official may not make, participate in making, or attempt to use his or her official position to influence a governmental decision if the decision will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on the official, or on a member of the official's immediate family, or on any of the official's economic interests specified in Section 87103 above.

However, Section 82030 specifically excludes the receipt of campaign contributions from the definition of "income."

Conflicts of Interests Under Section 84308 - General Rule

Section 84308 provides that no officer of an agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than \$250 within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the decision as used in Section 87100.

Contributions as used in Section 84308 includes contributions to candidates and committees in federal, state, or local elections. (Section 84308(a)(6).) The term "contribution" means any monetary or nonmonetary payment made for political purposes for which full and adequate consideration is not made to the donor.^{5/} (Regulation 18215.) "Payment" means a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible. (Section 82044.)

^{5/} The term "contribution" does not include volunteer personal services, payments made by a person for his or her own travel, or a fundraising event held in an occupant's home or office if the costs are less than \$500. (Regulation 18215.)

Accordingly, campaign contributions under Section 84308 proceedings, are not limited to monetary contributions of \$250.

If a board member has a disqualifying interest under either Section 87100, or under Section 84308, the board member is prohibited from participating in that decision. Further, once the member determines a conflict of interest exists, disclosure of the financial interest shall be made part of the agency's official records. (Regulation 18730(b)(10) - conflict of interest code for RT.)

You asked if the rule of legally required participation would apply to board members disqualified from participating under Section 84308 proceedings. If you were unable to achieve a quorum, the rule of legally required participation set forth in Section 87101, as discussed later in this letter, is permissible. (Thatch Advice Letter I-89-222, Andrus Advice Letter, No. A-84-296.)

Disclosure of Conflicts of Interest Under Section 84308

You asked how such disclosure can be accomplished when a board member intends to be absent but apprises you that a certain agenda item posed a conflict. Due to his or her absence, the member would not be personally available to state the disqualifying interest on the record.

One of the primary purposes of the Act is to obtain disclosure of public officials' financial interests and when necessary, require disqualification from participating in decisions which may affect those interests. If a public official is not personally available to make such a disclosure on the record, due to an absence for reasons not related to the conflict, then the public official should apprise agency counsel of the conflict.

Accordingly, when a board member notifies you of an intended absence at a meeting and informs you of a disqualifying financial interest, you should, on that member's behalf, disclose the disqualifying economic interest on the record during the meeting.

Legally Required Participation

You further inquired into the rule of legally required participation if additional board members have disqualifying economic interests on the same issue as the absent board member. You asked if you are unable to achieve a quorum, may you impose the rule of legally required participation to achieve a quorum.

Section 87101 and Regulation 18701 provide a limited exception if the official's participation is legally required:

Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made.

Section 87101.

(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

* * *

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Government Code Section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Government Code Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code Section 87100, whether or not such other members are actually present at the time of the disqualification.

Regulation 18701.

This exception has been narrowly interpreted to permit the participation of the fewest financially interested persons possible in any decision. (In re Hudson (1978) 4 FPPC Ops. 13; Hill Advice Letter, No. I-89-160.) This is because "the purposes of the Act are best served by a rule which minimizes participation in government decisions by officials with a conflict of interest." (In re Hudson, supra.)

You would be permitted to bring in only the number of disqualified members which would be needed to achieve a quorum. The names of all disqualified board members, including the name of the absent board member, are used to randomly select the member(s)

who would be legally required to participate. If the name of the absent board member is drawn, you would not be permitted to redraw another member's name to replace the absent member. (Regulation 18701(c)(2).) The decision would have to be put over to a future agenda when the board member would be available.

This rule exists even when you have an absent board member who does not have a conflict, but you were not able to achieve a quorum due to conflicts with the remaining members. You would not be permitted to randomly select a previously disqualified member to participate in place of the absent member. (Regulation 18701(c)(2).)

Finally, you have asked if we distinguish between the degree of conflict in determining who should be placed in the pool of disqualified members to be randomly selected. The Commission, in its Berris Advice Letter, No. A-80-073, advised that neither the Hudson opinion, supra, nor the Act would prevent a city from adopting a procedure which would attempt to determine which board member has the least financial interest in the decision.

However, the Commission stressed in Hudson that the preferred means of selection is by lot or other means of random selection. The Commission has consistently advised that the random selection process is preferred (Skousen Advice Letter, No. A-88-162, Churton Advice Letter, No. I-91-321, and Cosgrove Advice Letter, No. I-89-438.) It is our recommendation that all members who are disqualified, either under Section 87100 or Section 84308, be pooled together and randomly selected or drawn by lots or by some other impartial random method.

I believe this answers all of your inquiries. If you have additional questions, please feel free to contact the Commission's Legal Division at (916) 322-5901.

Sincerely,

Jeff Marschner
General Counsel



By: Jeanette E. Turvill
Political Reform Consultant
Legal Division

JM/JET/jt