



California Fair Political Practices Commission

July 1, 1994

Robert McKenchnie
Staff Counsel
California Trade and Commerce Agency
801 K Street, Suite 1600
Sacramento, CA 95814

Re: Your Request for Informal Assistance
Our File No. I-94-190

Dear Mr. McKenchnie:

The California Trade and Commerce Agency (the "Agency") proposes to establish a written gift acceptance policy and procedure (the "policy"). You have asked for our comments regarding your draft memorandum as it relates to the "gift" provisions of the Political Reform Act (the "Act").¹ Since your request does not pertain to a specific set of facts or named officials, we are providing you informal assistance.²

A. GENERAL COMMENTS

Generally, the policy attempts to distinguish between gifts to the Agency and gifts to the officials of the Agency. However, the proposed draft states that the "policy does not deal with restrictions on the acceptance of gifts by individual officers and employees" because these are contained in the Agency's Incompatible Activities Statement. While this may be the case, we suggest the inclusion of a cautionary statement that payments which appear to be gifts to the Agency could, under some circumstances, result in the making of a gift (reportable and/or prohibited) to an official.

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, Sections 18000-18954. 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).)

In addition, with respect to the Act, it appears that the proposed policy seeks to incorporate the concepts of In re Stone (1977) 3 FPCC Ops. 52. The Stone Opinion outlined when gifts of travel, meals, and accommodations were deemed a gift to a public official's agency for purposes of the Act, rather than to the official using the gift.

The Stone Opinion was recently superseded by Regulation 18944.2 (copy attached). Although the regulation codifies several of Stone's requirements, it also differs in several significant respects. Thus, we suggest that the policy incorporate all of the requirements of Regulation 18944.2.

B. SPECIFIC COMMENTS REGARDING THE APPLICABLE LAWS AND THE DEFINITIONS CREATED BY THE POLICY

The comments below are intended to provide guidance concerning specific changes we suggest to the proposed policy. Our comments are not intended to comment on any part of your memorandum that is outside our jurisdiction.

A public official is subject to the Act's disclosure and disqualification requirements, and gift limits, when an official receives a payment that is considered a "gift," as defined in Section 82028. (Also, see, Sections 82027, 87103, and 89501-89506.)

The Agency's proposed policy would establish an Agency definition of the term "gift." In defining that term, the Agency incorporates, in part, the definitions of "gift" and "payment" from the Act. (Sections 82028 and 82044.) However, the Agency's "gift" definition differs from the statutory definition under the Act. For example, to be deemed a "gift" to the Agency under the proposed policy, the Agency would require that the gift is "intended for the use or benefit of the Trade and Commerce Agency or other state office or agency on whose behalf the Trade and Commerce Agency is acting."

This requirement is consistent with one of the factors of the Stone Opinion.³ However, Regulation 18944.2 does not require that

³ The four factors considered under the Stone Opinion include the following: (1) The donor intended to donate the gift to the city and not to the official; (2) The city exercises substantial control over use of the gift; (3) The donor has not limited use of the gift to specified or high level employees, but rather has made it generally available to city personnel in connection with city business without regard to official status; and (4) The making and use of the gift is formalized in a resolution of the city council (a written public record will suffice for administrative agencies not possessing the legislative power of adopting resolutions) which embodies the standards set forth above.

a donor have a specific intent concerning a gift to a public agency which subsequently is used by a public official. Therefore, under the new regulation, a donor's intent is not determinative of whether an agency official, as opposed to the Agency, has received⁴ a gift.

The Agency also defines "accept" and creates an exclusion from the definition of "gift" for marketing and promotional items provided to the Agency for distribution to the public and for specified funds. Under the Act, any tangible item may be a "gift" to a public official. (Section 82028; Section 82044.) Thus, for example, a "marketing and promotional item" could be a "gift" under the Act. Therefore, we believe the establishment of new definitions may create confusion for officials and donors in a variety of contexts. We suggest that the Agency memorandum state that the Agency definitions represent the Agency's internal policy concerning gifts made to the Agency, or that the Agency simply include the actual statutory definitions.

The Agency may, at a minimum, want to note that under its policy, it has added a requirement that before a gift used by an Agency official is considered a gift to the Agency, it will require that the gift is "intended" for the use or benefit of the Agency or other agency, as specified.

Also, we suggest the policy include a cautionary note regarding the Act as follows: (1) it is each official's responsibility to ascertain when he or she has received a gift under the Act's provisions; (2) any gift, as defined in Government Code Section 82028, made to an official by a third party may be reportable and may subject the recipient of such a gift to disqualification from participation in decisionmaking related to the third party; and (3) an official may be subject to gift limits under the Act.

C. DUTIES OF OFFICE OF ADMINISTRATION

Under the proposed policy, the Agency's Office of Administration and legal adviser must determine whether the specified factors discussed below are met before the Agency accepts a gift.

⁴ Please note that where a payment to an official's agency which is used by an official does not meet the requirements of Regulation 18944.2, Regulation 18941 sets out the general rules concerning the receipt, promise, and acceptance of gifts by a public official under the Act. In addition, Regulation 18945 provides when a third party is deemed the "source" of the gift.

1. DETERMINE WHETHER THE PROPOSED GIFT IS INTENDED FOR THE BENEFIT OF THE GOVERNMENT, OR FOR THE BENEFIT OF AN INDIVIDUAL OFFICIAL OR OFFICIALS.

This factor requires Agency staff to determine whether a proposed gift is intended for the benefit of the government, or for the benefit of an individual official or officials.

The language in this part of the memorandum appears to suggest that the donor's intent may exonerate a public official who incidentally benefits from a gift where the donor labels the gift with the name of an "office." Under Regulation 18944.2(a)(3), a donor may identify a specific purpose for a public agency's use of the payment, so long as the donor does not designate the specific official or official who may use the payment. Thus, the labeling of an office by the donor, such as the "Secretary's European Trade Mission," could constitute a gift made to a "specified official or officials" under the Act, depending on the facts. Therefore, we suggest that the cautionary note on page two of the Agency's policy memorandum (the use of individual names or titles in description of programs or solicitations is strongly discouraged) remain in the memorandum as part of the policy.

In addition, we recommend that the policy not be definitive as to whether this portion of the test is met, since it would not be possible to determine if the test is met without applying it to a specific set of facts.

2. DETERMINE THAT THE AGENCY SHALL EXERCISE DOMINION AND SUBSTANTIAL CONTROL OF THE USE OF THE GIFT.

This factor would require Agency staff to determine that the Agency shall exercise dominion and substantial control of the use of the gift. The proposed Agency policy again refers to a factor in the Stone Opinion.

Regulation 18944.2(a)(1) requires that the agency receive and control the payment. We suggest that the proposed policy memorandum clarify that the Agency must also "receive" a payment for the requirements of subdivision (a)(1) of Regulation 18944.2 to be met.

This part of the policy also refers to an "identifiable" officer, while the regulation refers to a "specific official or officials." We recommend that a conforming change be made to include the language of Regulation 18944.2.

3. DETERMINE THAT THE DONOR HAS NOT LIMITED THE GIFT BY SPECIFYING IT BE USED BY DESIGNATED OFFICERS OR OTHER HIGH LEVEL OFFICIALS.

Agency staff must further determine that the donor has not limited the gift for use by designated officers or high level officials. This factor is also consistent with the Stone Opinion concerning the "earmarking" of a gift.

Regulation 18944.2(a)(3) provides that a public agency, in its sole discretion, must determine the specific official or officials who shall use the payment. A donor may identify a specific purpose for a public agency's use of the payment, so long as the donor does not designate the specific official or officials who may use the payment. It is recommended that this factor be modified to be consistent with the language in the regulation.

In addition, Regulation 18944.2(a)(2) requires that a gift be "used" for official agency business. The language in this part of the policy refers to the test as "whether use or benefit is consistent with the normal scope of the official's business." Therefore, it would appear appropriate to refer to the "official agency business" requirement under this factor.

4. DETERMINE IF THE TRADE AND COMMERCE AGENCY IS AUTHORIZED BY STATUTE TO ACCEPT THE GIFT.

The Agency staff must also determine if the Agency is authorized by statute to accept the gift. Therefore, this part of the policy refers to other statutes. We provide no specific comment regarding this part of the memorandum.

5. AGENCY MEMORIALIZATION

The Office of Administration is to prepare a written record memorializing receipt of the gift, each of the foregoing determinations, and the use of the gift. The form refers to Exhibit A, which is to be filed with a specified officer within 30 days of receipt of the gift.

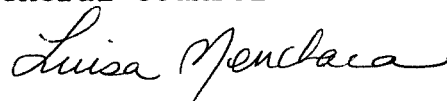
Exhibit A, however, describes the process, but does not embody the requirements of Regulation 18944.2(a)(1) to (a)(3). In addition, some of the information required in Regulation 18944.2(a)(4) is not included in the exhibit.

We recommend that Exhibit A, or a separate form, state that the requirements of Regulation 18944.2 (a)(1) to (a)(3) have been considered and have been met. In addition, we suggest the exhibit or form: (1) identify the specific purpose for use of the payment, if any; (2) include the names and titles of the official or officials using the payment; (3) describe the official agency use of the payment; and (4) include the date the payment was received and the date the document memorializing the payment was filed.

I trust this letter has provided you with the guidance you requested. If you have further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Steven G. Churchwell
General Counsel

A handwritten signature in cursive script that reads "Luisa Menchaca".

By: Luisa Menchaca
Counsel, Legal Division

Attachments