

RAVI MEHTA  
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

April 8, 1996

Will Travis  
Executive Director  
San Francisco Bay Conservation  
and Development Commission  
Thirty Van Ness Avenue, Suite 2011  
San Francisco, California 94102-6080

Re: Your Request for Advice  
Our File No. A-96-021

Dear Mr. Travis:

This is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

QUESTIONS

1. Will salary from the California Department of Transportation (Caltrans) constitute income within the meaning of Section 87103(c)?
2. Will employment with Caltrans subject a Caltrans engineer to the prohibition of Section 87104 while the state employee serves as a member of an advisory committee of the San Francisco Bay Conservation and Development Commission?

CONCLUSIONS

1. No. Salary from Caltrans does not constitute income within the meaning of Section 87103(c).
2. Yes. The prohibition applies if the Caltrans employee is compensated to influence action on a Caltrans contract, grant, loan, license, permit, or other entitlement for use.

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<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 18000-18995.

### FACTS

The San Francisco Bay Conservation and Development Commission (the "SFBCDC") is a state agency that regulates the placement of fill, the excavation of materials, and any substantial change in use within the jurisdiction of the SFBCDC, which includes the San Francisco Bay, a shoreline band 100 feet wide that extends around the Bay, managed wetlands, salt ponds, and certain named waterways that empty into the Bay. Among other activities, the SFBCDC issues permits as appropriate for regulated activities, amends general and specific plans concerning certain types of activities around the Bay, and operates an enforcement program.

For approximately the last fifteen years, the SFBCDC has had an advisory board entitled the Engineering Criteria Review Board (ECRB). The ECRB consists of not more than 11 members, at least one of which must be (1) a soils engineer, (2) a structural engineer, (3) a geologist, or (4) an architect. The ECRB advises the SFBCDC and its staff on engineering matters that relate to the safety of fill in the Bay and safety of structures constructed on fill in the Bay. The SFBCDC makes all final decisions regarding permit applications and permit conditions, including engineering- and seismic safety-related matters.

Caltrans often has projects that require a permit issued by the SFBCDC. These types of projects include bridge land highway construction, widening, and other improvements, and currently, the seismic retrofitting of bridges and overpasses. These projects often raise engineering concerns that require review by the ECRB. The SFBCDC relies heavily on ECRB advice when it reviews a Caltrans project.

The SFBCDC would like to invite Caltrans to nominate one of its engineer employees to sit on the ECRB. The Caltrans employee would be expected to participate in ECRB decisions pertaining to Caltrans projects.

### ANALYSIS

Your letter raises two potential Political Reform Act issues: is a Caltrans employee subject to the Act's conflict-of-interest provisions, Sections 87100-87103, and are members of the ECRB subject to the prohibition of Section 87104.

#### Conflicts of Interest Pursuant to Section 87100 - 87103

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. In addition, the Act requires every public official to disclose all his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c), 87200-87313.)

"Public official" is defined in Section 82048 and Regulation 18700(a)(1) to include members of boards and commissions:

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decisionmaking authority. A board or commission possesses decisionmaking authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

According to the information you have provided, members of the ECRB do not make final governmental decisions and, presumably, do not have the power to compel decisions or veto them. However, it appears the ECRB's substantive recommendations have been regularly approved by the SFBCDC without significant amendment or modification over an extended period of time, approximately fifteen years. Therefore, the members of the ECRB qualify as public officials pursuant to Regulation 18700(a)(1)(C), and the disclosure and disqualification requirements of the Act apply to ECRB members.

Section 87103 provides that a public official has a financial interest in a decision 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 a member of his or her immediate family or on:

(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.

Section 87103(c).

Sources of income are potentially disqualifying economic interests. For example, if a public official receives income from a business entity, that source of income would be an economic interest of the employee. (Section 87103(c).) However, salary and reimbursement for expenses or per diem received from a state, local, or federal government agency, are not regarded as income for purposes of the Act. (Section 82030(b)(2).) Therefore, the salary of a Caltrans employee from that state agency will not constitute a disqualifying source of income within the meaning of Section 87103(c).

#### Section 87104

The main thrust of your question pertains to new Section 87104, which became effective January 1, 1995. This section provides:

(a) No public official of a state agency shall, for compensation, act as an agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance before, or by making any oral or written communication to, his or her state agency or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing action on a contract, grant, loan, license, permit, or other entitlement for use.

Section 87104(b) provides a broader definition of "public official" for purposes of this section. A "public official" is any person defined in Section 82048, and every member of any advisory committee of a state agency, whether the committee is created by statute or otherwise. Thus, for purposes of Section 87104, the Caltrans employee would be considered a public official subject to that section's prohibition, even if the ECRB were purely advisory to the SFBCDC.

Therefore, Section 87104 will limit the conduct of ECRB members. For example, the Caltrans employee would be prohibited from acting as an agent or attorney for, or otherwise representing, any other person by making any formal or informal appearance before, or by making any oral or written communication to, the ECRB or any officer or employee of the ECRB, if the appearance or communication is made to influence the agency's action on a contract, grant, loan, license, permit, or other entitlement for use.

"Person" is broadly defined in Section 82047 to include any individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert. This definition has been construed to include public agencies within its scope. (Geismar Advice Letter No. A-95-407, citing In re Witt (1975) 1 FPCC Ops. 1 and Evans Advice Letter,

No. I-86-117.) Therefore, we have advised that the prohibition in Section 87104 applies to members of the Employment Training Panel Advisory Research Council where the members are employed by public agencies to represent them before the panel. (Geismar Advice Letter, supra.)

The question you present is whether Section 87104 should be restricted to compensation made to public employees by private parties, not to compensation made by public agencies. We conclude that Section 87104 is not restricted to compensation made by private parties, as discussed below.

In the interpretation of a statute where the language is clear, its plain meaning should be followed. (Great Lakes Properties v. City of El Segundo (1977) 19 Cal.3d 152, 155.) In the instant case, the plain language of Section 87104 is not limited to compensation made by private parties.<sup>2</sup>

We note, however, that one of the primary purposes of Section 87104 is to prohibit conflicts of interest by members of state advisory committees. (See generally, Legislative Counsel's Digest of Senate Bill 1705, filed with the Secretary of State on September 1, 1994.) These persons are not subject to the conflict-of-interest rules of Section 87100-87103. It also appears that another primary purpose is to bring within the Act's purview, the conduct of such state advisory committee members when they are paid by private parties to lobby before the committee on which they serve. For example, a Senate Committee analysis on the provisions of the statute states:

This bill would continue to exclude these advisory committee members from the regular conflict of interest rules and reporting obligations governing public officials, but would prohibit these advisory committee members from being paid to lobby the committee on which they serve.

According to the author, this bill closes a glaring and scandalous loophole in state conflict-of-interest rules that allow appointed members of

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<sup>2</sup> When it is contended that a provision of an act must not be applied according to the natural or customary meaning of its language, it must be shown either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning. (Great Lakes Properties, Inc., Ibid.)

state advisory committee to lobby their own board  
as paid advocates of a private party.

Sen. Comm. on Elections and Reapp.,  
Comm. Analysis of AB 3444,  
June 10, 1994 (emphasis added).<sup>3</sup>

However, the purposes of the statute cannot be effectuated and harmonized with other provisions of the applicable law. Section 87406, contains language similar to that of Section 87104, but it has a specific exclusion for public employees. In subdivision (e), Section 87406 provides that specified prohibitions do not apply to any individual subject to the section who is or becomes an officer or employee of another state agency, board, or commission. (The Legislative Counsel's Digest of Senate Bill 1705 summarizes Section 87406 in describing existing law.) In addition, Section 87406.1, also chaptered in 1994, has a separate subdivision with a specific exclusion for public agency representatives. Section 87104 has no similar exclusion. Consequently, we interpret Section 87104 to have the meaning that its language clearly dictates.

Therefore, if the Caltrans employee receives compensation from Caltrans to act as an agent or attorney for, or otherwise represent, Caltrans (by making any appearance or oral or written communication to the ECRB or any officer or employee of the ECRB) for the purpose of influencing the actions of the ECRB regarding a Caltrans contract, grant, loan, license, permit, or other entitlement for use, the specific prohibition of Section 87104 would apply.

If you have any further questions regarding this matter, please contact me at 916/322-5660.

Sincerely,

Steven G. Churchwell  
General Counsel



By: Luisa Menchaca  
Counsel, Legal Division

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<sup>3</sup> The bill analysis on SB 1705 of the Assembly Committee on Health, hearing date of July 5, 1994, states that the provisions of SB 1705 which chaptered Section 87104 into law, relating to the testimony of public officials, is contained in AB 3444.