

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

July 8, 1996

Ms. Judith Allen
Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102-3298

Re: Your Request for Advice
Our File No. A-96-181

Dear Ms. Allen:

This is in response to your request for advice on behalf of Public Utilities Commissioner Daniel Fessler regarding the gift and travel provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. May Commissioner Fessler accept reimbursement for transportation, meals and lodging associated with the "7th Annual National Power Conference" to be held in Melbourne, Australia?
2. If so, would payments for transportation, meals and lodging be reportable on his statement of economic interests?
3. What type of facts would be required to show that the reimbursement for travel is "income" rather than a "gift"?

CONCLUSIONS

1. Under Regulation 18950.3, Commissioner Fessler may accept reimbursement for necessary lodging and subsistence provided "directly in connection" with his speech at the conference, as discussed below. Any reimbursement for Commissioner Fessler's flight to Australia or for additional accommodations and meals, however, will constitute a gift from the conference sponsor subject to the \$280 gift limit.

¹ Government Code Sections 81000-91015. Commission regulations appear at Title 2, Sections 18000-18995 of the California Code of Regulations.

2. Pursuant to Regulation 18950.3, payments for meals and lodging "directly in connection" with Commissioner Fessler's speech are not reportable on his statement of economic interests. Any other travel reimbursements in connection with the Australia conference are reportable as a gift on his statement of economic interests.

3. If an official claims that a payment for travel is income and not a gift, the official has the burden of proving that he or she provided equal or greater consideration in return for the travel payment. In general, merely giving a speech does not constitute providing consideration of equal or greater value for travel payments.

FACTS

Public Utilities Commissioner Daniel Fessler has been invited to be a keynote speaker at the "7th Annual National Power Conference" to be held in Melbourne, Australia from August 6 to August 8, 1996. Commissioner Fessler will speak on the regulatory environment in California. The conference sponsor is AIC Conferences, a commercial conference company located in Sydney, Australia. AIC has offered to pay for Commissioner Fessler's airfare, meals and lodging.

ANALYSIS

As a Public Utilities Commissioner, Mr. Fessler is required by the Act to report income and gifts over certain amounts on his statement of economic interests. (See Sections 87200, 87202-87205 and 87207.) In addition, California Public Utilities Commissioners are subject to the Act's gift limits of \$280 per calendar year from a single source. (Section 89503.)

1. Income or Gift? Section 82028 of the Act defines a "gift" as "any payment to the extent that consideration of equal or greater value is not received" Payments for travel provided to a public official generally constitute gifts to the official subject to the \$280 limit, unless an exception applies. In limited situations, payments for travel may constitute "income" to an official, if the official provides equal or greater consideration in return. This means that the benefit the official provides to the third party through the official's work or provision of services, is equal to the payment for his or her travel.

If an official claims that a payment for travel is income and not a gift, the official has the burden of proving that he or she provided consideration of equal or greater value in return. (Section 82028; Fessler Advice Letters Nos. A-95-188 and I-93-408; Chang Advice Letter, No. I-92-410; Riddle Advice Letter, No. A-89-200; Quan Advice Letter, No. A-89-182.) You ask what facts would be required to show that an official provided equal or greater

consideration, such that the reimbursement for travel would be considered "income" rather than a "gift"?

With respect to equal or greater consideration, we advised in the Chang Advice Letter, supra, as follows:

Equal consideration means that each party receives benefits of equal value. (In re Burciaga (1975) 2 FPPC Ops. 17.) While we have no exact formula to determine whether consideration of equal or greater value has been provided by an official, the following general guidelines may be of assistance. The value of services rendered may be proven by evidence as to the customary rate of compensation for such services, irrespective of official status. (Tassi v. Tassi (1958) 160 Cal.App.2d 680, 690-691.) Also relevant in the determination might be the length of time spent rendering the services, or whether the services are of the type not readily available from others. Ultimately, however, the determination of whether equal consideration has been provided is necessarily a factual one.

In the Fessler Advice Letter, No. I-93-408, the University of Chicago provided payments for airfare and lodging to Commissioner Fessler for his work on an advisory commission to the university president. Commissioner Fessler assessed how well laboratory staff researchers working on nuclear waste disposal were following protocols established by the Nuclear Regulatory Commission and the federal Department of Energy. He conducted site visits at the laboratories, read protocols and other preparatory data, and prepared a report to the university president and laboratory director. We advised that based on Commissioner Fessler's work on the advisory commission, payments from the University of Chicago for his airfare and lodging would constitute income, not gifts.

In the Glaser Advice Letter, No. A-96-045, we advised that per diem payments received by members of the board of directors of the Association of California Healthcare Districts, for providing services as members of the association's board of directors, constituted income. The board of directors met on a quarterly basis to govern the association, and handle its budget and personnel matters. The directors were providing ongoing substantive services, and the \$200 per meeting payments they received did not exceed the usual compensation for similar services.

In addition, in the Simmerman Advice Letter, No. I-94-131, we advised that travel payments received by the mayor of San Diego from USAID funding constituted income, not a gift, where she provided services as an election observer

in Russia. She monitored the election administration, met with political parties, candidates, election commissions, and representatives of the executive and legislative branches of government, media and voters.

In this case, Commissioner Fessler will not be providing services such as these, he will be making a speech. You state that Commissioner Fessler will speak at the Australian National Power Conference, on the topic of the current regulatory environment in California.

In contrast to the situations discussed above, merely giving a speech, does not constitute providing equal or greater consideration for travel payments. For one reason, the honoraria ban of Section 89502, prohibits public officials from receiving any payment made in consideration for any speech given. If you argue that Commissioner Fessler's speech at the conference is in consideration for payments for his travel to Australia, he would be receiving an honorarium, which is prohibited under the Act.

In addition, Commission Regulation 18950.3 and Government Code Section 89506 contain express exceptions to the gift limits for travel to make speeches within California, and within the United States, respectively. If an official's making a speech was considered ample consideration for his or her receipt of travel payments from a third party, then such payments would always be considered income rather than a gift, and these express exceptions to the gift limit would be redundant.

Accordingly, any payments for Commissioner Fessler's travel to Australia by AIC Conferences will be considered a gift, not income.

2. Exceptions to Gift Limits. Given that the travel payments will be considered a gift, we now examine whether any exceptions to the gift limits apply.

Regulation 18950.3 provides as follows:

Free admission, and refreshments and similar non-cash nominal benefits provided to a filer during the entire event at which the filer gives a speech, participates in a panel or seminar, or provides a similar service, and actual intrastate transportation and any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar, or service, including but not limited to meals and beverages on the day of the activity, are not payments and need not be reported by any filer.

The exclusion for meals and beverages under this regulation is limited to those provided on the day of the speech. What constitutes "necessary accommodations" within this exception is generally limited to the day of the speech, but may include the day before or after, if necessary due to travel arrangements. (Allen Advice Letter, No. I-94-270.) Under this Regulation, payments for meals and lodging received by Commissioner Fessler directly in connection with his speech, are not subject to gift limits and are not reportable on his statement of economic interests.

Section 89506 contains another exception to the gift limits for certain travel to speak within the United States, or for travel provided by a government or certain nonprofit entities. That section provides, in part:

(a) Payments, advances, or reimbursements, for travel, including actual transportation and related lodging and subsistence which is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, are not prohibited or limited by this chapter if either of the following apply:

(1) The travel is in connection with a speech given by the elected state officer, local elected officeholder, candidate for elected state office or local elected office, an individual specified in Section 87200, member of a state board or commission, or designated employee of a state or local government agency, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the speech, and the travel is within the United States.

(2) The travel is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, a nonprofit charitable or religious organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States which substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

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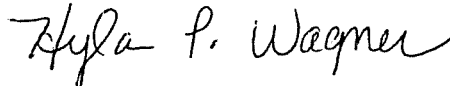
In this case, the exception in Section 89506(a)(1) does not apply because the travel is not within the United States. Further, the exception in Section 89506(a)(2) does not apply

because the travel would be paid for by a commercial conference company. Therefore, any travel payments other than those exempt under Regulation 18950.3, will be considered gifts subject to the \$280 limit, and should be reported on Commissioner Fessler's statement of economic interests.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Hyla P. Wagner
Counsel, Legal Division

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