

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

December 2, 1996

Gary L. Bradus
Weintraub, Genshlea & Sproul
400 Capitol Mall, Eleventh Floor
Sacramento, California 92412

**Re: Your Request for Advice
Our File No. A-96-278a**

Dear Mr. Bradus:

This letter is a response to your request for advice on behalf of Mr. Ken Press, an employee of the Office of the State Controller (SCO), regarding his duties and responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

Based upon the new information provided in your letter of October 28, 1996, is any revision to the conclusion stated in our Advice Letter No. A-96-278 necessary?

CONCLUSION

In response to your letter of October 28, 1996, the advice stated in our Advice Letter No. A-96-278 is modified to this extent: if no person at SCO exercises any discretion whatsoever with regard to the processing of the reports that Mr. Press intends to pre-screen for his clients, then no "governmental decision" within the meaning of the Act is involved and the Act's conflict-of-interest provisions do not apply. If, however, any person at SCO exercises any judgment or discretion with regard to the processing of the reports, then the conclusion stated in our Advice Letter No. A-96-278 stands.

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

FACTS

Please refer to the statement of facts in my letter of October 23, 1996, our Advice Letter No. A-96-278. You stated additional facts in your October 28, 1996, letter. I will refer to these additional facts as they become relevant in the course of the analysis below.

ANALYSIS

Your letter of October 28, 1996, raises three issues about the conclusion in Advice Letter No. A-96-278; each issue is addressed below.

The 'audit report.'

As you point out, I indeed interpreted Mr. Press' original letter to state that the 'audit report' would be submitted by the client to the SCO. I accept, of course, the representation in your October 28, 1996, letter that this is not so.

However, it is clear that the conclusion in our Advice Letter No. A-96-278 did *not* rest on this mistaken interpretation. After concluding that *any* participation by Mr. Press, even *anonymous* participation, would constitute an impermissible attempt to influence the outcome in the Unclaimed Property Division, I stated that "[t]his is especially true" because I understood that Mr. Press would be expressly identified in the submission. Thus, there is no reason to change the original conclusion based upon whether the 'audit report' is submitted to SCO.

The Attorney General opinion.

You cite 64 Ops.Atty.Gen. 795 (the "*Dremann* opinion") to support your contention that Mr. Press does not have a disqualifying conflict of interest. As explained below, that opinion is not relevant to an analysis of Mr. Press' obligations under the Act.

The Commission interprets and enforces only the Act. We do not consider other conflict-of-interest provisions that exist in state and local law. The *Dremann* opinion focuses on another state law conflict-of-interest provision, Section 1126. It only incidentally addresses the Act's conflict-of-interest provisions. Moreover, the *Dremann* opinion is factually distinguishable from Mr. Press' situation.

The *Dremann* opinion indeed concluded that Section 87100 was not applicable to the county supervisor/real estate agent in question. But, the *reason* that Section 87100 was not applicable highlights the critical factual difference between that opinion and our case. In reaching its conclusion about the (non)applicability of Section 87100, the Attorney General

"...presupposes that the supervisor will in no way participate in or attempt to

influence any county officer or employee with respect to the application. It also presupposes that if the matter should come before his own board he will disclose his interest and abstain from any influence or action in the matter." (64 Ops.Atty.Gen. 795 (emphasis added).)

Based upon this presupposition, the Attorney General concluded,

"[t]hat Section 87100 of the Political Reform Act of 1974 would be inapplicable since such requires for a conflict of interest to arise that a public official participate in or influence a governmental decision in which he has a financial interest." (64 Ops.Atty.Gen. 795.)

After thus incidentally disposing of Section 87100, the Attorney General turned to the real focus of the *Dremann* opinion, section 1126.

Unlike the supervisor in the *Dremann* opinion, who was presupposed *not* to be influencing any governmental decision related to his real estate clients, Mr. Press would be influencing the outcome in the Unclaimed Property Division by ensuring the accuracy of his clients' submissions. This crucial factual distinction eliminates any persuasive value the *Dremann* opinion might otherwise have.

Because the *Dremann* opinion (1) only incidentally addresses Section 87100, and (2) is, any event, clearly factually distinguishable, it is not relevant to an analysis under the Act of Mr. Press' proposed business activities.

Discretion.

The Act prohibits a public official from making, participating in making, or attempting in any way to use his or her official position to influence a *governmental decision* in which he knows or has reason to know he has a financial interest. (Section 87100.) Thus, by definition, if a governmental decision is not involved, the Act's conflict-of-interest provisions are not relevant.

"Governmental decision" is not defined in the Act itself. Commission regulations interpret the phrase "[m]aking or participating the making of a governmental decision" to exclude "solely ministerial, secretarial, manual, or clerical" actions. (Regulation 18700(d)(1).) This exception for ministerial decisions is construed narrowly. (*Torrance* Advice Letter, No. A-94-093.) However, previous Commission advice letters establish that, if an action is *truly* nondiscretionary, then no "governmental decision" is involved. For example, we have advised,

"When the act is ministerial, the agency has no discretion. In fact, we have previously said that when an agency issues permits subject to clear objective criteria as set forth in a statute, ordinance or regulation, the action taken is

ministerial in nature" (*Miller* Advice Letter, No. I-93-098.)

In the same vein, we have advised that even "complex calculations" may be ministerial if there is only one right answer to the calculation. *Kaplan* Advice Letter, No. A-82-108. However, if there is more than one possible "right" answer from which one must be chosen, then the task is not ministerial. *Ibid.*

In the October 28, 1996, letter, you state:

"All of the information and instructions which businesses require to make an unclaimed property report are public information. The State Controller's Office publishes and provides to all reporting entities Holder Reporting Instructions. These publications detail step-by-step the requirements and format for the an unclaimed property report."

You go on to state (emphasis added),

"... there really is no decision to be influenced here. Once the report is submitted, *the Unclaimed Property Division employee does not exercise any discretion.* ... Thus, Mr. Press' involvement with clients who will submit such reports will not affect the ultimate decision maker."

The Commission does not act as a finder of fact when it renders advice. This advice is applicable and confers immunity (see Section 83114) only to the extent that the facts provided to us are correct and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.) The facts stated in your October 28, 1996, are assumed to be definitive, and I disregard any conflicting statements of fact in Mr. Press' earlier letter. I also disregard any inferences which might be drawn from the facts stated in Mr. Press' earlier letter, no matter how reasonable they seem to be, if they conflict with the statement of facts in your letter of October 28, 1996. For example, in Mr. Press' original letter he referred to the "analyst's duties for the Magnetic Tape Program for the Unclaimed Property Division." From this reference to an "analyst," I inferred that the processing of the reports required "analysis," a distinctly non-ministerial function. Also, as expressly stated in our Advice Letter No. A-96-278, I inferred from his potential clients' willingness to pay him for these services that they had value beyond mere ministerial service. If a secretary or clerk could indeed perform these functions, why would a client be willing to hire Mr. Press to do them? Whatever the validity of these inferences, they are disregarded to the extent they conflict with your express statement that the Unclaimed Property Division "does not exercise any discretion."

In response to your letter of October 28, 1996, the advice stated in our Advice Letter No. 96-278 is modified to this extent: if no person at SCO exercises any discretion whatsoever with regard to the processing of the reports which Mr. Press intends to pre-screen for his clients, then

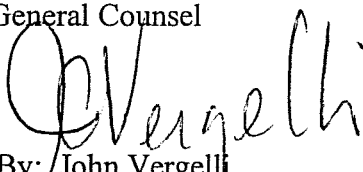
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no "governmental decision" within the meaning of the Act is involved and the Act's conflict-of-interest provisions do not apply. If, however, any person at SCO exercises any judgment or discretion with regard to the processing of the reports, then the conclusion stated in Advice Letter No. A-96-278 stands.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel


By: John Vergelli
Staff Counsel, Legal Division

SGC:JV:ak