



FAIR POLITICAL PRACTICES COMMISSION

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July 7, 1998

Phillip S. Cronin
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2220 Tulare Street, Fifth Floor
Post Office Box 1549
Fresno, California 93716

**Re: Your Request for Advice
Our File No. I-98-155**

Dear Mr. Cronin:

This letter responds to your request for advice on behalf of the Fresno County Public Works and Development Services Department, and a local school district, regarding provisions of the Political Reform Act (the "Act").¹ Because your question is general in nature, we provide you with informal assistance as required by Regulation 18329.

QUESTION

Must a consultant be designated as such in a government agency's conflict of interest code when he or she "participates in making" a governmental decision, but does not actually "make" such decisions or serve as *de facto* agency staff?

CONCLUSION

If an individual is properly classified as a "consultant" under Regulation 18700(a)(2), he or she is a "public official" within the meaning of Section 87100, and must be designated in the agency's conflict of interest code, even if the consultant's role is limited to "participation" in governmental decisions. But not all persons advising government agencies are "consultants" within the meaning of the Act. Persons who do not actually make governmental decisions, or function as *de facto* agency staff, may not be "consultants" under the Act even if they do

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

occasionally advise government agencies. Persons who are not "consultants," and who are not otherwise public officials, should not be designated in an agency's conflict of interest code.

FACTS

The Fresno County Counsel has been asked by two county agencies for advice regarding their obligations under the Act, and specifically whether they may be required to list certain persons as "consultants" in their conflict of interest codes. The county counsel's office does not feel that it can provide a definitive answer to these agencies and, since the potential reporting burdens are substantial, county counsel seeks informal advice to resolve uncertainties growing out of the following fact patterns.

The Public Works and Development Services Department is responsible for contracts between the County of Fresno (the "county") and various engineering firms, architects, and other consultants. The county needs a feasibility analysis for a sewer or water treatment plan. An engineering firm, under contract, would furnish qualified individuals to analyze various siting, equipment, processing, and construction options, and the resulting report would be presented directly to the board of supervisors (the "board"). The board would decide whether to proceed at a particular site, and in a particular manner, based on the report.

For purposes of this letter, it is presumed that neither the engineering firm nor the individuals working on the project would "make" a governmental decision, but that individuals employed by the engineering firm would "participate in making" the decision through the influence of their reports. In addition, individuals on the firm's staff might be working on other projects for the county concurrently, or they might have previously worked on other county projects. Individuals employed by this firm tend to provide a significant amount of advice to the county.

The school district uses consultants in insurance, legal matters, collective bargaining, environmental assessments, school design and construction, independent audits, and a variety of special studies. Each of these consultants provide advice within his or her area of expertise directly to the decisionmaker in the district but, again by hypothesis, they do not "make" governmental decisions or stand in the shoes of a district employee.

ANALYSIS

Chapter 7 of the Act (Sections 87100-87500) governs conflicts of interest. Article 3 of Chapter 7 (at Sections 87300-87313) requires that every government agency adopt a conflict of interest code identifying all persons who, in the course of their duties with the agency, might

affect the outcome of governmental decisions.² Persons designated by a conflict of interest code are required to disclose economic interests that could foreseeably be affected by agency decisions. (See generally Section 87302; *Marks* Advice Letter, No. A-98-073.) The conflict of interest codes required of governmental agencies support the Act's general prohibition against decisionmaking on matters that might pose conflicts of interest, stated at Section 87100:

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

Section 82048 and Regulation 18700(a) provide definitions of the term “public official,” as used Chapter 7, to mean a “member, officer, employee, or *consultant* of a state or local government agency.” (Emphasis added.) Regulation 18700(a)(2) defines “consultant” as:

“[A]n individual who, pursuant to a contract with a state or local government agency:

(A) Makes a governmental decision whether to:

1. Approve a rate, rule, or regulation;
2. Adopt or enforce a law;
3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract which requires agency approval;
5. Grant agency approval to a contract which requires agency approval and in which the agency is a party or to the specifications for such a contract;
6. Grant agency approval to a plan, design, report, study, or similar item;
7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

(B) Serves in a staff capacity with the agency and in that capacity performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code.”

As statute and regulation make clear, one who qualifies as a consultant under the foregoing criteria is a public official governed by, among other provisions, Section 87100.

² With the exception of a few officials not pertinent to this letter.

Section 87100 prohibits all public officials from making, *or* participating in, *or* using their positions to influence, governmental decisions in which they have a financial interest.

Regulation 18730 provides guidance as to those persons (or "positions") that must be designated in an agency's conflict of interest code. Subdivision (b)(2) provides that persons to be designated include those who make or participate in making governmental decisions which may foreseeably have a material effect on their financial interests. This subdivision has also been construed by the Commission to include persons who use their official position to influence a governmental decision. (*Brewton* Advice Letter, No. I-96-126.) Thus public officials who "participate" in governmental decisions, *including consultants*, must be designated in conflict of interest codes along with those who actually "make" the decisions.

You refer in your letter to the 1994 amendment to the regulatory definition of "consultant," observing that the regulation, in its present form "no longer clearly excludes" consultants who do *not* actually make governmental decisions or act in an agency staff capacity "on an ongoing basis." Your ultimate concern is that any engineer or attorney who provides a single item of advice to an agency thereby participates in a governmental decision (assuming a decision related to the advice) and that large numbers of occasional advisors would accordingly have to be listed in local agency conflict of interest codes. Such a conclusion is unwarranted.

The analytical problem you present does not grow out of the 1994 amendment to Regulation 18700. A consultant, properly so called, has always been regarded as a public official subject to the restrictions of Section 87100, which prohibits *all* public officials, among other things, from participating in a governmental decision foreseeably affecting their financial interests. The problem you raise is one of classification. An individual³ under contract to make even a single governmental decision may be a consultant by virtue of Regulation 18700(a)(2)(A). Persons who do not make, but who participate in governmental decisions under contract, may be classified as consultants only under Regulation 18700(a)(2)(B), that is, if they serve in an agency staff capacity.

The *Randolph* Advice Letter (No. I-95-045), to which you allude, sets out the criteria for determining whether a person serves in an agency staff position for purposes of Regulation 18700(a)(2)(B). This advice letter notes that the staff capacity language generally excludes from the scope of the regulation those individuals who work on one project or a limited range of projects for an agency. We have provided the same advice in subsequent letters. (See, e.g., *Karger* Advice Letter, No. A-97-253; *Sanchez* Advice Letter, No. A-97-438; *Marks* Advice Letter, *supra*).

³ A public official must be a natural person. (Section 82048.)

Under Regulation 18700(a)(2)(B), a person who provides advisory services related to a single project, or to a limited range of projects, may not be classifiable as a consultant. This is true even if his or her services amount to participation in one or a few related governmental decisions. If such a person is not otherwise a public official, he or she need not be designated in an agency's conflict of interest code.

To summarize, your inquiry presumed a distinction — for purposes of designation on conflict of interest codes — between consultants who “make,” and consultants who merely “participate in,” governmental decisions. The significant distinction, however, is between those persons whose “participation” defines them as consultants, and those persons who are not classifiable as consultants, even though they may participate in governmental decisions.

All consultants, as defined by Regulation 18700, must be designated in agency conflict of interest codes. But not all persons under contract to public agencies are “consultants,” even if they do on occasion “participate in” governmental decisions. The dispositive question, for persons who “participate in” but do not “make” governmental decisions, is the *extent* of the services provided to the agency.

If you need assistance in determining the proper legal classification of particular persons “participating in” decisions of county agencies, or if you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Lawrence T. Woodlock
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