



FAIR POLITICAL PRACTICES COMMISSION

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Brian W. Maas
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**Re: Your Request for Advice
Our File No. A-98-261**

Dear Mr. Maas:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹

QUESTION

Under the Act, is the California Travel and Tourism Commission a "state agency" required to promulgate a conflict of interest code?

CONCLUSION

The California Travel and Tourism Commission is an agency required to promulgate and adopt a conflict of interest code under the Act.

FACTS

You represent the California Travel and Tourism Commission ("CTTC"), an entity created under the California Tourism and Marketing Act, Government Code Sections 15372.60 *et seq.* The CTTC is a nonprofit mutual benefit corporation whose bylaws were formally

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

adopted on March 16, 1998.² There are 37 commissioners; the Secretary of the California Trade and Commerce Agency is chairperson *ex officio*, twelve members are appointed by the governor, and twenty four are elected to represent specific segments of the tourism industry. You seek advice on behalf of Lee Grissom, Secretary of Trade and Commerce and chair of the CTTC.

In establishing CTTC, the Legislature determined that California tourism vitally affected the welfare of the state's economy, that promotion of tourism was in the public interest, and that promotional activities arising under the statute were entitled to the privileges and protections of government speech. (Section 15372.61.)³ The CTTC was designated one of two official state representatives of California tourism, the other being the Office of Tourism within the Trade and Commerce Agency. (Section 15372.70.)

The statute provides that commission members are subject to the Political Reform Act of 1974, and that commission meetings are subject to the Bagley-Keene Open Meeting Act (*Id.*), although the CTTC is exempted from compliance with the Administrative Procedures Act. (Section 15372.72.) The statute also recites that commission members appointed or elected on the basis of membership in a particular industry segment are appointed or elected expressly to serve the economic interests of that industry segment, and the economic interests of those members are deemed to be those of the "public generally." (*Id.*)

The Secretary of Trade and Commerce, sitting as chairperson, has veto power over certain actions of the CTTC in matters relating to travel and expense costs, in matters where the secretary believes a conflict of interest exists, as defined by the Political Reform Act, where there is a dispute over the use of state funds, and in matters relating to contracts between CTTC and one of its commissioners. (Section 15372.86.)

The CTTC is expected to be self funding, generating revenues through assessments on specified segments of the tourist industry. (Sections 15372.66, 15372.111.) The revenues generated through these assessments may be used to pay CTTC expenses as well as to fund tourism marketing campaigns. (See, e.g. Section 15372.73, providing that "the entire salary and all benefits of the executive director shall be paid from assessments." The same statute provides that the executive director is an employee of the state.) Because the marketing of California tourism is affected with the public interest, the CTTC is authorized to use the police powers of the state to collect assessments not paid by the prescribed deadline. (Section 15372.85.)

² You emphasize that CTTC should not be confused with the California Tourism Commission, which you describe as a preexisting state agency.

³ All references are to the Government Code unless otherwise noted. The statutory background given in your letter is supplemented to include all provisions bearing on your question.

ANALYSIS

Section 87300 of the Act requires every state and local agency to adopt a conflict of interest code applicable to its “designated employees.” For purposes of Section 87300, “agency” is understood to mean any state agency or local government agency. The Commission has adopted a four-part factual test to determine if an entity qualifies as such a governmental agency. (See *In re Siegel* (1977) 3 FPPC Ops. 62; *In re Leach* (1978) 4 FPPC Ops. 48; *Moser* Advice Letter, No. A-97-400.)

Strictly speaking, the *Siegel* and *Leach* opinions treat *local* government agencies. However, the Commission has applied what has become known as the “*Siegel* test” to identify *state* agencies as well. (*Moser* Advice Letter, *supra*, citing *In re Vonk* (1981) 6 FPPC Ops. 1.) Since *all* governmental agencies (state and local) are obligated under Section 87300 to adopt a conflict of interest code, there is no need to preserve distinctions between state and local agencies and, in fact, the fundamental purpose of the “*Siegel* test” is to distinguish governmental from *non*-governmental agencies, without regard to more incidental characteristics.

In your letter, you urge a conclusion that the CTTC is not obligated to adopt a conflict of interest code because it does not meet one of the definitional criteria (state funding) of a state agency given in Regulation 18249. The question is framed too narrowly, and the regulation invoked is expressly applied only to identify an *official* of a state agency, and in connection with the lobbying provisions of the Act. The state funding issue will be addressed in any event, but the correct framework for analysis under Section 87300 is the four part *Siegel* test, as follows:

1. Is the impetus for formation of the entity a government agency?

Generally, this first prong of the test is met where an entity is created by statute or ordinance. (*Moser* Advice Letter, *supra*.) As recited above, the CTTC was created by Sections 15372.60 *et seq.* of the Government Code.

2. Is the entity substantially funded by, or is its primary source of funds, a government agency?

Although the Legislature stated an intent to appropriate a minimum of \$7,300,000 each fiscal year to promote tourism in cooperation with CTTC (Section 15372.111), the Legislature did not authorize any appropriation for CTTC from any existing governmental fund. The Legislature did, however, authorize CTTC to levy assessments to fund its activities, and to collect those assessments under color of the state’s police power. (Section 15372.85.) In effect, the Legislature provided CTTC with taxing authority over its limited jurisdiction.

Under these circumstances, we conclude that the Legislature — a government agency — is the primary source of funds within the meaning of the *Siegel* analysis. A contrary conclusion would be little short of absurd, exempting an entity from classification as a governmental agency because it employed the state's police power to levy and collect taxes from persons within its jurisdiction — a quintessential marker of governmental authority.

We note too that similar self-funding mechanisms exist among entities subject beyond question to Section 87300. For example, more than two dozen “marketing councils and commissions” are described at Food and Agriculture Code Sections 64001 *et seq.* Most, if not all, of these bodies are structured like CTTC in all material respects, exist to promote the public interest in important elements of the California economy, and are funded by assessments on segments of the affected industries. These entities are governed either by the conflict of interest code of the Department of Food and Agriculture, or have adopted their own codes.

3. *Is one of the principal purposes for which the entity is formed to provide services or undertake obligations that public agencies are legally authorized to perform and which, in fact, they traditionally have performed?*

Public agencies are legally authorized to promote the economic well-being of the state by furthering its economic interests and, specifically, by promoting tourism to and within California. Thus the Office of Tourism, within the Trade and Commerce Agency, works cooperatively with CTTC to that very end. (Section 15372.111.) The state of California has traditionally sought to foster its economy through promotion of tourism. You took particular note, in your letter, of “the pre-existing California Tourism Commission, a pre-existing state agency” with exactly that purpose.

4. *Is the entity treated as a public entity by other statutory provisions?*

Commission members are subject to the Political Reform Act of 1974, and commission meetings are subject to the Bagley-Keene Open Meeting Act, which applies only to meetings of public entities. (Section 15372.70.)

CONCLUSION

The CTTC meets all the criteria of a governmental agency under the *Siegel* test, and is therefore required by Section 87300 to adopt a conflict of interest code. Indeed, in your analysis of Regulation 18249, you found that CTTC met three of the four identifying criteria given in that regulation, arguing against classification of CTTC as a “state agency” solely on the ground that CTTC was not supported by state funding. As noted above, we cannot construe an effective grant of taxing authority as suggesting that an entity is non-governmental in character. The

Legislature fully provided for the funding of CTTC. Thus even under the criteria of Regulation 18249, the CTTC must be classed as a "state agency."

Finally, you argue that there is evidence that the Legislature did not intend to subject the CTTC to all of the conflict of interest provisions of the Act. Without commenting on the particulars of that argument, it does not purport to show that the Legislature intended to exempt the CTTC from the specific obligations of Section 87300, which is the issue here. We find no evidence in the organic legislation indicating that the Legislature wished to exempt the CTTC from the requirement to adopt a conflict of interest code like those governing similar councils and commissions.

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

Sincerely,

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By: Lawrence T. Woodlock
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