



FAIR POLITICAL PRACTICES COMMISSION

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April 27, 2000

Jack L. White
City Attorney, City of Anaheim
200 South Anaheim Boulevard, Suite 356
Anaheim, California 92805

**Re: Your Request for Advice
Our File No. A-00-070**

Dear Mr. White:

This letter responds to your request for advice on behalf of yourself, Mayor Tom Daly, and Councilmembers Shirley McCracken and Frank Feldhaus about the Political Reform Act (the "Act").¹

I. QUESTIONS

1. May Mayor Daly and Councilmembers McCracken and Feldhaus participate in city council decisions concerning the claim for damages filed by Councilmember Feldhaus' campaign committee against the city arising from the charges filed by the special prosecutor?
2. Since you are appointed by, and serve at the pleasure of, the city council, may you advise and make recommendations to the city concerning the claim?

II. CONCLUSIONS

1. Mayor Daly and Councilmembers McCracken and Feldhaus do not have conflicts of interest under the Act in this decision.
2. You do not have a conflict of interest under the Act in the decision.

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

III. FACTS

On September 23, 1997, the city council hired special legal counsel to advise the council on issues concerning the validity of the local campaign finance ordinance and possible violations of campaign laws by various persons during the 1996 election. Special counsel was hired because of an actual or perceived conflict of interest the appointed city attorney might have in enforcing the local ordinance against members of the city council. On October 21, 1997, the city council appointed this special counsel to act as the city's "special prosecutor" for purposes of investigating and prosecuting possible violations of the local ordinance.

Following investigations, the special prosecutor filed misdemeanor criminal complaints against Mayor Daly and former Councilmember Irv Pickler relating to alleged violations of the local ordinance and the Political Reform Act relating to the 1996 election. The special prosecutor also filed complaints against Councilmembers McCracken and Feldhaus (and others) relating to other alleged violations of the local ordinance and/or the Political Reform Act.

On November 25, 1997, Councilmember McCracken compromised and settled the complaint filed against her by stipulating to judgment and thereafter paying a civil penalty of \$6,500 to the City of Anaheim. The stipulated penalty and attorneys' fees related to the matter were paid from campaign funds.²

On January 28, 1998, Frank Feldhaus, who was not a member of the city council at the time, settled the complaint filed against him by stipulating to judgment and thereafter paying a civil penalty of \$10,000 to the City of Anaheim. Councilmember Feldhaus used campaign funds to pay the stipulated penalty and attorneys' fees for the case.

Mayor Daly and former Councilmember Pickler demurred to the special prosecutor's complaint filed against each of them in municipal court. The judge sustained the demurrer and dismissed the charges on the grounds that the city council did not have the authority to hire a special prosecutor to prosecute violations of either the city's local ordinance or state law. The special prosecutor then handling the case (who had some time earlier replaced the prosecutor originally appointed) appealed the judgment dismissing the complaint. Thereafter, the Appellate Department of the Orange County Superior Court affirmed the municipal court judgment dismissing the complaint. The judgment in this case is now final. Mayor Daly used campaign funds to pay attorneys' fees related to the matter.

² Although Councilmember McCracken loaned funds to her campaign committee to cover part of the stipulated penalty and attorneys' fees, the campaign committee has already repaid this loan. Neither Councilmember Feldhaus nor Mayor Daly made personal loans to their respective campaign committees with regard to these matters.

Recently, the city received a claim for damages from Councilmember Feldhaus' campaign committee for recovery of the \$10,000 penalty previously paid to the city and an additional \$5,000 in attorneys' fees relating to the stipulated civil judgment entered into with the special prosecutor.

The Anaheim City Charter requires the city council to approve or reject any claim for damages within 45 days after the claim is presented to the city. Filing a claim for damages is a legal prerequisite to filing any lawsuit against the city which relates to such alleged damages.

IV. ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Specifically, Section 87100 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*.

A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission uses a standard, eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.³ (Regulation 18700(b)(1)-(8).)

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) As mayor, members of the city council, and city attorney, respectively, Mayor Daly, Councilmembers McCracken and Feldhaus, and you are "public officials," for purposes of the Act (see Sections 82048, 82041), and the conflict-of-interest rules apply.

The Act's conflict-of-interest provisions apply only where a public official "make[s], participate[s] in making, or in any way attempts 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 87100; Regulation 18700(b)(2).) By deliberating and voting upon Councilmember Feldhaus' campaign committee's claim, Mayor Daly and Councilmembers McCracken and Feldhaus would be making governmental decisions. (Regulation 18702.1(a)(1).) By advising

³ The eighth step, which pertains to the "legally required participation" rule (see Regulation 18708), applies only in rare cases where several public officials in the same agency are simultaneously disqualified. It is not relevant to this advice request, and is not mentioned further.

the mayor and council on this matter, you would be participating in making governmental decisions. (Regulation 18702.2(b).) This conduct is subject to the Act's conflict-of-interest rules.

The Act's conflict-of-interest provisions apply only to conflicts arising from *economic interests*. The economic interests from which conflicts of interest may arise are defined in Regulations 18703-18703.5. Identifying which, if any, of these economic interests are held by a public official is the third step in analyzing a potential conflict of interest under the Act. (See Regulation 18700(b)(3).) There are five kinds of such economic interests:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*⁴ of \$1,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a *director, officer, partner, trustee, employee, or holds any position of management* (Section 87103(d); Regulation 18703.1(b));
- A public official has an economic interest in *real property* in which he or she has a direct or indirect interest of \$1,000 or more (Section 87103(b); Regulation 18703.2);
- A public official has an economic interest in any *source of income*, including *promised income*, which aggregates to \$250 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- A public official has an economic interest in any *source of gifts* to him or her if the gifts aggregate to \$300 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family—this is sometimes known as the “personal financial effects” rule (Section 87103; Regulation 18703.5).

Mayor Daly and Councilmembers McCracken and Feldhaus.

It does not appear that Mayor Daly, Councilmember McCracken, or Councilmember Feldhaus has an economic interest implicated in this governmental decision. In Councilmember Feldhaus' case, his campaign committee is the claimant. However, ordinarily, a candidate does not have an economic interest in his or her campaign committee. A campaign committee is not a “business entity” within the meaning of the conflict of interest rules because it is not operated for profit. (See Sections 87103(a), (d), and 82005.) Also, the payments for campaign travel and

⁴ An indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.)

other campaign expenses a candidate may receive from his or her campaign committee do not constitute income or gifts to candidate. (Regulation 18727.5.) Finally, it appears that the council's decision will not have any effect on Councilmember Feldhaus' personal finances, because the claim is in the name of the committee, and recovery will be had, or not had, by the committee, not him personally.

Similarly, although Mayor Daly's and Councilmember McCracken's campaign committees may soon file claims similar to the claim filed by Councilmember Feldhaus' campaign committee, they do not appear to have an economic interest implicated by the present governmental decision for the same reasons as Councilmember Feldhaus does not.

Since a conflict of interest under the Act arises only if a governmental decision will have a reasonably foreseeable material financial effect on a public official's economic interest, and since Mayor Daly, Councilmember McCracken, or Councilmember Feldhaus do not appear to have such an economic interest, we advise that they do not have conflicts of interest under the Act in the decision to approve or disapprove Councilmember Feldhaus' committee's claim.

City Attorney White.

You have asked whether you have a conflict of interest in advising the city council about these matters because you are appointed by, and serve at the pleasure of the council. As explained above, conflicts of interest under the Act arise only from certain, defined economic interests. There is no conflict of interest in a governmental decision unless it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one of these economic interests.

In terms of your advisory role in the council's decision about the claim filed by Councilmember Feldhaus' campaign committee, we assume that you do not have an economic interest in that committee (e.g., as a source of income to you). The only other possible economic interest is your economic interest in your personal finances. (Section 87103; Regulation 18703.5.) "Personal finances" means the income, assets, liabilities and expenses of you and your immediate family. (Regulation 18703.5.) However, the Act's definition of "income" *excludes* salary, reimbursement for expenses or per diem from a local government agency. (Section 82030(b)(2).) The Commission has interpreted Section 82030(b)(2) to cover income received from a government entity as part of the employment "compensation bargain." (See, e.g., *In re Moore* (1977) 3 FPPC Ops. 33 (pension benefits covered by Section 82030(b)(2) exclusion).)

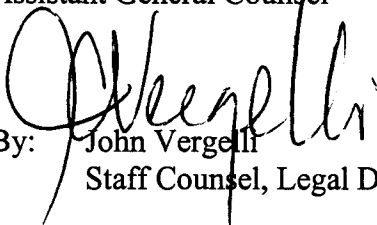
Arguably, your economic interest in your personal finances could be implicated by a given council decision if you give the "wrong," or undesired, advice, leading to adverse consequences at the hands of the council. However, vague apprehensions or possibilities of retribution, without more, do not rise to the level of a reasonably foreseeable financial effect. (*Galante* Advice Letter, No. A-98-228; *Stepanicich* Advice Letter, No. A-96-217.) Moreover, even if it did, the financial impact of such retribution would be on "government income," which cannot trigger a conflict under the Act for the reasons explained in the preceding paragraph.

Therefore, you do not have a conflict of interest in the council's decision to approve, or disapprove, Councilmember Feldhaus' campaign committee's claim.

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

Sincerely,

Luisa Menchaca
Assistant General Counsel


By: John Vergelli
Staff Counsel, Legal Division

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