



FAIR POLITICAL PRACTICES COMMISSION

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April 26, 2001

Joe Nation, Assemblyman, Sixth District
State Capitol
Post Office Box 942849
Sacramento, CA 94249-0006

**Re: Your Request for Advice
Our File No. A-01-091**

Dear Assemblyman Nation:

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

QUESTION

May you author Assembly Bill 1081, where the bill contains a budget augmentation for the California State University system, when the California State University system has been a source of income to you of \$500 or more in the past 12 months?

CONCLUSION

You may author the Assembly Bill if the decision to augment the budget of the CSU system will benefit faculty at the campuses and will not uniquely affect you.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18996, of the California Code of Regulations.

FACTS

You became a member of the Assembly on December 4, 2000. Currently, and beginning three years prior to becoming a member of the Assembly, you have operated under an agreement with the Rand Corporation in which the corporation owns a 75% interest and you own a 25% interest in an Internet web site known as Rand California. The web site provides statistical and other information that is used by many different governmental and private entities. The web site is generally accessible only on a contractual basis, whereby users pay a fee for access. Based on your agreement with the Rand Corporation, you receive a monthly fee paid by the corporation, plus 25% of the net profits from fees paid by users of the web site after start-up costs have been completely paid. The California State University (CSU) system is a subscriber to the Rand California web site and, under your agreement with the Rand Corporation, you have personally received \$500 or more in income within the past 12 months as a result of subscription fees paid by CSU.

You are currently the author of Assembly Bill 1081. This bill would, under certain conditions, provide that temporary faculty in the CSU system who work 40% of full-time or more shall not be excluded from membership in the Public Employees' Retirement System. If the bill becomes law, it will require an augmentation of the CSU system's budget from the State General Fund. However, you are not a faculty member of the CSU system and have no current plans to become a faculty member of CSU. In addition, you will receive no personal benefit from the passage of this bill.

ANALYSIS

Section 87100 of the Act prohibits a 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. Section 87103 specifies that an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official, a member of his or her immediate family or on certain specified economic interests. Thus, all public officials, including members of the Legislature, will have a conflict of interest in any decision that will have a reasonably foreseeable material financial effect on their economic interests. (See generally, *Isenberg* Advice Letter, No. I-89-343.)

In order to determine whether the prohibition in Section 87100 applies to a given decision, Regulation 18700 provides an eight-step analysis. The first step in the analysis (whether you are a "public official") is not at issue in your letter. Legislators are public officials under the Act.

Step Two: Making, Participating, and Influencing a Governmental Decision.

Your question acknowledges that you wish to make, participate in making, and/or influence a governmental decision in your role as a legislator. (Regulations 18702, et

seq.) Please note that despite being public officials subject to the Act's conflict of interest rule in Section 87100, members of the Legislature are only subject to administrative penalties for violations of the conflict-of-interest provisions in connection with the decisions specified in Section 87102.5. Section 87102.5(a) specifies these decisions as follows:

“(1) Any state governmental decision, other than any action or decision before the Legislature, made in the course of his or her duties as a member.

“(2) Approval, modification, or cancellation of any contract to which either house or a committee of the Legislature is a party.

“(3) Introduction as a lead author of any legislation that the member knows or has reason to know is nongeneral legislation.

“(4) Any vote in a legislative committee or subcommittee on what the member knows or has reason to know is nongeneral legislation.

“(5) Any rollcall vote on the Senate or Assembly floor on an item which the member knows is nongeneral legislation.

“(6) Any action or decision before the Legislature in which all of the following occur:

“(A) The member has received any salary, wages, commissions, or similar earned income within the preceding 12 months from a lobbyist employer.

“(B) The member knows or has reason to know the action or decision will have a direct and significant financial impact on the lobbyist employer.

“(C) The action or decision will not have an impact on the public generally or a significant segment of the public in a similar manner.

“(7) Any action or decision before the Legislature on legislation that the member knows or has reason to know will have a direct and significant financial impact on any person, distinguishable from its impact on the public generally or a significant segment of the public, from whom the member has received any compensation within the preceding 12 months for

the purpose of appearing, agreeing to appear, or taking any other action on behalf of that person, before any local board or agency.”

Of the various decisions described in the statute, Section 87102.5(a)(3) applies to your facts because you will be introducing as a lead author legislation that is nongeneral legislation. Section 87102.6 provides legislation is “nongeneral” if it is reasonably foreseeable that the legislation will have a direct and significant financial impact on one or more identifiable persons, or one or more identifiable pieces of real property; and it is not be reasonably foreseeable that the legislation will have a similar impact on the “public generally” or on a “significant segment” of the public. (Section 87102.6(a).)

The first part of this definition is clearly met. The legislation will have an impact on the CSU system. Public agencies are considered persons as defined in Section 82047. (*In re Witt* (1975) 1 FPPC Ops. 1.)

With respect to the second criterion, Section 87102.6(b) defines these terms. Section 87102.6(b) provides, in pertinent part:

“(2) The term ‘public generally’ includes an industry, trade, or profession.

“(3) Any recognized subgroup or specialty of the industry, trade, or profession constitutes a significant segment of the public.

“(4) A legislative district, county, city, or special district constitutes a significant segment of the public.

“(5) More than a small number of persons or pieces of real property is a significant segment of public.

“(6) Legislation, administrative action, or other governmental action impacts in a similar manner all members of the public, or all members of a significant segment of the public, on which it has a direct financial effect, whether or not the financial effect on individual members of the public or the significant segment of the public is the same as the impact on the other members of the public or the significant segment of the public.”

None of these definitions of “public generally” apply under your facts. Thus, the legislation is considered nongeneral legislation.

Step Three: Do you have economic interests?

The third step is to identify the economic interests that you have that may be impacted by the decision. Under Section 87103 of the Act, there are six different types of economic interests that may result in a conflict of interest for a public official. The economic interests pertinent to your question are as follows:

1. A public official has an economic interest in a business entity where the public official has an investment interest of \$2,000 or more or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)

2. A public official has an economic interest in any person from whom he/she has received income aggregating \$500 within 12 months prior to the time when the relevant governmental decision is made. (Section 87103(c).) Thus, all of your customers are considered potentially disqualifying economic interests under the Act.

3. A public official has an economic interest in his or her personal finances (expenses, income, assets, or liabilities), as well as those of his or her immediate family. (Section 87103.)

Step Four: Are your economic interests directly or indirectly involved in the decision?

In the fourth step you must determine whether your economic interests are directly or indirectly involved in the decision. Regulation 18704.1(a) provides that

“A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Your question concerns legislation that directly involves the CSU system and includes an augmentation to their budget. Thus, the CSU system is directly involved in the decision.

Steps Five and Six: Will the reasonably foreseeable financial effect of the decision on your economic interests be material?

In steps five and six, the public official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on one of those economic interests. This determination takes two steps. First, in step five, the official must find and apply the applicable materiality standard set forth in Commission regulations. (Regulation 18700(b)(5); Regulation 18705, et seq.) After finding the applicable materiality standard, the official must then decide in step six whether it is reasonably foreseeable that the standard will be met. (Regulation 18700(b)(6).) Generally, where the economic interest is directly involved in a decision, both the materiality and the foreseeability of the financial effect is certain. Regulation 18705.3(a) provides: “[a]ny reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official’s agency, is deemed material.” Thus, your authorship of the legislation falls squarely within the conflict of interest prohibition in Section 87102.5.

Step Seven: The “Public Generally” Exception.²

Under the “public generally” exception, the official may still participate in a decision despite a conflict of interest if the effect of the decision on the official’s interest is not distinguishable from the effect on the public generally. (Section 87103.) The “public generally” exception is codified in Regulation 18707, which provides that the exception will apply if the decision will affect a significant segment of the public generally in substantially the same manner as it would affect the public official’s interests. There are a variety of specialized rules that have been created construing the “public generally” exception. Your question concerns the application of new Regulation 18707.1(b)(1)(D). This section provides:

“Governmental Entities. For decisions that affect a federal, state or local government entity in which the public official has an economic interest, the decision will affect all members of the public under the jurisdiction of that governmental entity.”

The comment to Regulation 18707.1 provides:

“The term ‘affect all members of the public’ is intended to cover decisions affecting the public in general but to exclude decisions which uniquely benefit a public official.”

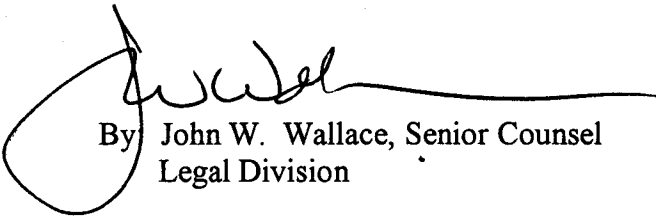
² We have not discussed step 8 in the analysis pertaining to the application of legally required participation, since the “public generally” exception appears to apply to allow you to participate in the decision.

Your facts indicate that the decision to augment the budget of the CSU system will benefit temporary faculty at the campuses and will not uniquely affect you. Thus, the public generally exception would apply and you may participate in the decision.

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

Sincerely,

Luisa Menchaca
General Counsel



By John W. Wallace, Senior Counsel
Legal Division

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