



## FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

April 17, 2002

Scott Vurbeff  
5063 Ciardi Court  
Carlsbad, CA 92008

**Re: Your Request for Advice  
Our File No. A-02-075**

Dear Mr. Vurbeff:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note that this advice is applicable and confers immunity 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; Govt. Code § 83114.)

### QUESTIONS

1. Do the conflict-of-interest provisions of the Act bar you, a public official, from accepting employment as an independent consultant to an environmental consulting firm which is engaged in preparing documents for review and approval by your city employer?
2. If you accept the environmental consulting firm as a private client, will you have a conflict of interest disqualifying you from the city's governmental decisions concerning the freeway interchange project Environmental Impact Report ("EIR"), a report that will be prepared and finalized by your private client without your assistance?

### CONCLUSIONS

1. The Act does not bar public officials from accepting private employment. However, unless an exception applies, the Act disqualifies a public official from participating in governmental decisions which can reasonably be foreseen as having a material financial effect upon the public official's economic interests, including

---

<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

economic interests associated with private employment. (Sections 87100 and 87103.) In addition, there may be other bodies of law affecting such employment.<sup>2</sup>

2. If it is reasonably foreseeable that the city's governmental decisions concerning the EIR will have a material financial effect upon either your independent consulting business or the environmental consulting firm (should it qualify as a "source of income" to you at the time of decision<sup>3</sup>), you will have a disqualifying conflict of interest barring your participation in those decisions.

## FACTS

You are employed as an environmental coordinator for a municipality in Southern California (the "City"). Your primary responsibilities for the City involve reviewing private and public development projects for consistency with the California Environmental Quality Act ("CEQA"). In a telephone conversation with Commission staff you disclose that you currently operate a small environmental consulting business as a sole proprietorship. You are the sole employee of that business.

A local environmental consulting firm has expressed an interest in having you work for them as a part-time independent contractor. This firm is presently a subcontractor for an engineering firm under contract with the City to redesign a freeway interchange in the City. The local environmental consulting firm has been hired by the general contractor engineering firm to prepare the EIR for the freeway interchange project. In your capacity as an independent contractor, you would not be asked to take part in the subcontractor's preparation of the freeway interchange project EIR. Indeed, you state in your letter that you will not provide any consulting for any project within the City (which necessarily precludes consulting on any aspects of the freeway interchange project, not just the EIR).

You anticipate that the freeway interchange project will not be brought before the City for at least three or four years. At that future time, you would ordinarily be required, as the City's environmental coordinator, to review this EIR for consistency with the CEQA. Your review and recommendations in this regard would assist the City in its role as the lead agency under CEQA in its decision whether to adopt the EIR.

---

<sup>2</sup> This letter is limited solely to the provisions of the Act and should not be taken as advice or an opinion regarding any other area of the law potentially raised by your letter (for example, Government Code Sections 1090, et seq., may also apply.) The conflict-of-interest provisions of the Act and of Government Code Sections 1090, et seq., are two distinct statutory schemes, each imposing its own compliance obligations. For information regarding Government Code Sections 1090, et seq., please consult with your city attorney or the state Attorney General's office.

<sup>3</sup> As discussed further below, to qualify as a "source of income" it is not necessary that the source be providing income to the public official at the time of decision. It is enough that the source has provided income of \$500 or more within the 12-month period immediately preceding the date of the decision. (Regulation 18703.3(a).)

## ANALYSIS

Nothing in the conflict-of-interest provisions of the Act prevents a public official from holding a second position, whether it be in public or private employment.<sup>4</sup> In principle then, there is no barrier under the Act to your acceptance of the environmental consulting firm as a client of your private consulting firm. Once that principal/client relationship is formed, however, you may become limited by the conflict-of-interest provisions of the Act in the extent to which you can participate in or influence the City's governmental decisions.

The remaining part of this letter provides you general guidance regarding the conflict-of-interest provisions of the Act.

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. Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the economic interests set forth in the Act (sections 87103(a) –(e)) and our regulations thereunder (regulations 18703 – 18703.5).

Since you are a City employee charged as the principal review officer for CEQA compliance, you are a public official who will be participating in or influencing governmental decisions within the meaning of the Act. (Section 87100; regulations 18701, 18702.2 and 18702.3.) Your economic interests recognized under the Act which may potentially be affected by the City's governmental decisions are twofold: i) an interest in a business entity (e.g., your sole proprietorship environmental consulting business), and ii) an interest in clients of that business as sources of income to you.

Business Entity: Regulation 18703.1 states that a public official has an economic interest in a business entity if he or she: a) has a direct or indirect investment of \$2,000 or more in the business entity, or b) is a director, officer, partner, trustee, employee or holds any position of management in the business entity. Section 82005 of the Act defines a business entity as "any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture...." In this case, you are the sole owner and employee of an environmental consulting firm. (Section 87103(d).) As the principal of such a business entity, you exercise a position of management in this business and it is, therefore, an economic interest to you. It is not apparent whether you have an investment of \$2,000 or more in this business entity under Section 87103(a). If so, this would be a separate cause for finding that you have an economic interest in this business.

---

<sup>4</sup> For a fuller discussion, we enclose with this letter our fact sheet, "Holding Two Positions."

Source of Income: A public official also has an economic interest in any person from whom he or she has received income<sup>5</sup>, including promised income, which aggregates to \$500 or more within 12 months prior to the governmental decision. (Section 87103(c); regulation 18703.3.)

In addition, when a public official owns, directly, indirectly or beneficially, a 10-percent interest or greater of any business entity or trust, the public official's income also includes a pro rata share of the business entity or trust's income. (Sections 82030 and 87103.) Thus, clients of your environmental consulting firm, from whom you receive \$500 or more within 12 months prior to a specific government decision you will make as a City employee, constitute sources of income to you and number among your economic interests.

You point out that some three or four years in the future, an EIR for the freeway interchange project most likely will be presented to the City for approval and that you will be involved in reviewing that EIR for compliance with CEQA. You state that the EIR will be prepared, in part, by an environmental consulting firm which you are considering as a potential client.

Should you now accept this consulting firm as a client, it is not clear from your description whether this client relationship will extend into the future, to the point that you will have received income (presumably \$500 or more) from this client during the 12-month period immediately preceding your anticipated involvement some 3 or 4 years hence in reviewing the freeway interchange project EIR. If you, as an independent consultant, will not have received (or have been promised, but not yet received) \$500 or more from this consulting firm during that 12-month period, it will not be a source of income to you. Absent any other circumstances, you will not be disqualified under the Act from participating in decisions regarding the EIR on the basis of your former consultant-client relationship with this entity. Significantly, you are inquiring about a decision anticipated a number of years from this date. Given this timing, the relevant circumstances could change during the intervening years. You should re-examine this issue as the date of your involvement in the freeway interchange EIR draws near and re-determine whether this local environmental consulting firm numbers among your economic interests at that time.

To determine whether your economic interests will be materially affected by the City's governmental decisions, it is necessary to determine whether these interests will be directly or indirectly involved in the decision, and then to examine whether the economic thresholds (materiality) applicable to that interest's degree of involvement, will be triggered by the decision.

The general rule is that a business entity or source of income in which a public official has an economic interest is directly involved in a governmental decision if it

---

<sup>5</sup> Income, however, does not include salary and reimbursement for expenses or per diem received from a state, local, or federal government agency. (Section 82030(b)(2).) Thus, your salary paid to you by your municipal government employer does not constitute a source of income to you.

initiates the proceeding by filing an application, claim, appeal or similar request, or is a named party in, or is the subject of the proceeding concerning the decision before the official or the official's agency. A business entity or source of income in which a public official has an economic interest 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. (Regulation 18704.1(a)(1)-(a)(2).) If a business entity or source of income is not directly involved, then it is deemed to be indirectly involved in the governmental decision. (Regulation 18704.1(b).)

You indicate that the EIR will be offered to the City for its approval. If the local environmental consulting firm offers the EIR, it will be directly involved in the matter. (Regulation 18704.1(a)(1).) If the City's decisions on the EIR have any financial effect at all upon that firm, it will be considered a material financial effect. In this regard, should you, as a private environmental consultant,<sup>6</sup> engage other clients with City business, you should consider whether the governmental decisions you participate in as a City employee directly or indirectly involve **any such client** (not necessarily the **project** for which you are retained). Please note that for the purpose of this test, as long as it can reasonably be foreseen that the City's decision regarding a project will have a material financial impact upon that client, you may be disqualified from making, participating in, or influencing, that decision, independent of whether "your" project is implicated by the decision.

Not all governmental decisions by a public official which impact his or her economic interests give rise to a conflict of interest. It is when the reasonably foreseeable impact on his or her economic interests is material (or important) that a conflict may arise.

Under regulation 18706, an effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

The determination of foreseeability and materiality is necessarily a factual question. In this regard, we are not finders of fact and our analysis is dependent upon the facts which you supply. In the absence of specific facts, we can only render general advice as to the applicability of our regulations. It is particularly important to note in this case, where the decision about which you inquire is one that will not be made for 3 or 4 years hence. Given the timing, the facts relevant to the future decision are incapable of being known at present.

Business Entity: When a business entity which is an economic interest to a public official is directly involved in a governmental decision, it is presumed that any reasonably foreseeable financial effect of that decision upon the business entity will be material, even if the effect is no more than one penny. (Regulation 18705.1(b)(1).)

---

<sup>6</sup> In your telephone conversation with our staff you stated that your consulting business currently serves a number of clients.

Generally, materiality is triggered if the financial effect of a decision on an indirectly involved business entity meets certain dollar amounts, applied to increases or decreases in gross revenue, value of assets or liabilities, or in terms of additional or avoided expenses, or reductions in or elimination of existing expenses. (Regulation 18705.1(c).)

Source of Income: When a source of income to a public official is directly involved in a governmental decision, the materiality standard is strict: any financial effect at all on the source of income is deemed material. (Regulation 18705.3(a).) Thus, you may have a disqualifying conflict of interest prohibiting your participation in a City decision if a source of income to you is directly involved in the underlying proceeding and it is reasonably foreseeable that the decision will have a financial effect upon that source. For a source of income<sup>7</sup> which is indirectly involved in the underlying governmental proceeding, the materiality standard generally is the same as that applicable to indirectly involved business entities, above. (Regulation 18705.3(b)(1).)

Moreover, given that your City job responsibilities and your proposed independent environmental consulting business share similar subject areas, they may potentially overlap on the same project. Thus, you should be aware of our “nexus” test and consider how it might apply to any participation you may be asked to provide in City governmental decisions. This test is found at regulation 18705.3(c):

“(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the [private] income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the [public official’s participation in the governmental] decision.”

Basically, this test means that a public official is prohibited from accomplishing a result in his or her official capacity which he or she is being paid by a private employer to obtain. Thus, if an official receives private income to achieve a goal or purpose which the public official would also achieve, defeat, aid or hinder when making, participating in making, or influencing a governmental decision, a nexus exists between the official's governmental conduct and private income. Any financial effect at all on the indirectly involved source of income could give rise to a disqualifying conflict of interest.

You may find our enclosed publication, “Can I Vote?” helpful in answering any future questions you might have regarding the obligations of public officials under the Act’s conflict-of-interest rules. In this regard, should you have a question concerning a specific future decision you may face as a public official, please write for our further advice.

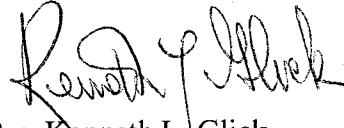
---

<sup>7</sup> For instance, your independent consulting firm and any business entity clients of the firm which meet the \$500 income threshold would fall under regulation 18705.3(b)(1).

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

Sincerely,

Luisa Menchaca  
General Counsel

A handwritten signature in black ink, appearing to read "Kenneth L. Glick". The signature is written in a cursive style with a large initial "K".

By: Kenneth L. Glick  
Counsel, Legal Division

Enclosures

KLG:jg

I:\AdviceLtrs\02-075