



FAIR POLITICAL PRACTICES COMMISSION

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September 20, 2002

Orry P. Korb, Town Attorney
Town of Los Gatos
Civic Center
Post Office Box 949
Los Gatos, CA 95031

**Re: Your Request for Informal Assistance
Our File No. I-02-224**

Dear Mr. Korb:

This letter is in response to your request for advice on behalf of Steven Glickman regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your question is general in nature, we are providing you with informal assistance.²

QUESTION

May Councilmember Glickman participate in the discussion and vote regarding the application for a permit to locate a wireless communication facility in the Town of Los Gatos?

CONCLUSION

Yes, as long as the wireless communication companies would not have a reasonably foreseeable material financial effect on Councilmember Glickman's hardwired communication business or its clients.

FACTS

Steven Glickman is a member of the Los Gatos Town Council and is the sole owner of a company that develops computer software on a contractual basis for multiple clients. The programs developed by Councilmember Glickman are used for hardwired telephone systems. One client manufactures computerized telephone equipment for both hardwired and wireless

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

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed.)

communications providers. Councilmember Glickman provided consulting services to this client from July 2000 to November 2001, but not to the applicants.

The applicants in question are companies seeking to locate wireless communication facilities, including antennas and electrical equipment, over which their subscribers' communications are transmitted. While some of these companies could have done business with the company that used Councilmember Glickman's services, none would have use for the software developed by Councilmember Glickman. As a consequence, no company that has applied for a permit to locate wireless communication facilities in the Town of Los Gatos would directly or indirectly purchase the software manufactured by Councilmember Glickman.

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. (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. The Commission has adopted a standard eight-step analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700 (b)(1) - (8).)

Steps One and Two: Is Councilmember Glickman a public official "making," "participating in making" or "influencing" a governmental decision?

Under the Act, a "public official" is defined, in part, as a "member, officer, employee or consultant of a state or local government agency." (Section 82048.) As a member of the Los Gatos Town Council, Councilmember Glickman is a public official and subject to the conflict-of-interest provisions of the Act. This request for advice presupposes that he will at least participate in making governmental decisions regarding the applicants seeking to locate wireless communication facilities in Los Gatos. Having disposed of these preliminaries, we advance to the third step of the analysis, identifying Councilmember Glickman's economic interests.

Step Three: Does the public official have an economic interest?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. There are six kinds of such economic interests:

1. A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*³ of \$2,000 or more (section 87103(a); regulation

³ 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.)

18703.1(a));

2. A public official has an economic interest 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));
3. A public official has an economic interest in *real property* in which he or she has a direct or indirect interest of \$2,000 or more (section 87103(b); regulation 18703.2);
4. A public official has an economic interest in any *source of income*, including *promised* income, which aggregates to \$500 or more within 12 months prior to the decision. This includes income to any business entity or trust when the public official owns a 10-percent interest or greater and his or her pro rata share is valued at \$500 or more (section 87103(c); regulation 18703.3);
5. A public official has an economic interest in any *source of gifts* to him or her if the gifts aggregate to \$320 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
6. 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 known as the "personal financial effects" rule (section 87103, regulation 18703.5).

Councilmember Glickman's economic interests recognized under the Act which may potentially have an effect on the governmental decision are twofold: 1) an interest in a business entity (e.g. the sole proprietorship business), and 2) an interest in clients of that business as sources of income to him.⁴

Sole ownership of the software development company qualifies the business as a business interest for Councilmember Glickman. (Section 87103(a) & (d), regulation 18703.1.) An official has an economic interest in anyone, whether an individual or an organization, from whom the official has received (or by whom the official has been promised) \$500 or more in income within the 12 months prior to the decision. (Section 87103(c), regulation 18703.3.) Since Councilmember Glickman has an ownership interest in his company, the business is a source of income to him. In addition, clients of Councilmember Glickman's software development company, from whom he receives \$500 or more within 12 months prior to the specific governmental decision, constitute sources of income to him. (Sections 82030 & 87103.) No facts are presented indicating that the applicants are sources of income to Councilmember Glickman's business.

⁴ A public official always has an economic interest in his or her personal finances and those of his or her immediate family. However, regulation 18705.5 states that when the public official's economic interests include a business entity, then the effect on personal finances is not evaluated.

Step Four: Are the public official's economic interests directly or indirectly involved in the decision?

The next step is determining whether the economic interests will be involved directly or indirectly in the decision. (Regulation 18700(b)(4).) The general standard is that a person, including a business entity or source of income, 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.”
(Regulation 18704.1(a).)

Under the Commission's regulations, business entities and sources of income which are not directly involved under the rules stated above are considered indirectly involved for purposes of choosing the materiality standard. (Regulation 18704.1(b).) Councilmember Glickman's business is indirectly involved in the decision, so the applicable materiality standard is regulation 18705.1(c). Councilmember Glickman's clients are also indirectly involved in the decision.

Steps Five and Six: Will the financial effect of the decision on the official's economic interest be materiality and reasonably foreseeable?

Once Councilmember Glickman identifies his relevant economic interests, he must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests by ascertaining the applicable materiality standard (regulations 18700(b)(5), 18705 - 18705.5) and then determine whether it is reasonably foreseeable that the standard will be met. (Regulations 18700(b)(6), 18706.) An effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required, but the effect must be more than a mere possibility. (*Downey Cares v. Downey Community Development Comm.* (1987) 196 Cal.App.3d 983, 989; *Witt v. Morrow* (1977) 70 Cal.App.3d 817, 822; *Harper* Advice Letter, No. A-96-298.)

If there is a substantial likelihood that Councilmember Glickman's clients will have a material financial effect, then Councilmember Glickman has a conflict of interest. This is because the clients are economic interests of Councilmember Glickman. So, if the clients could be affected enough to meet the materiality standard, and it is more likely than a mere possibility, then how Councilmember Glickman votes on the governmental

decision will impact his clients. Therefore, if any of his clients meet the appropriate materiality standard test, then they are materially affected and would create a conflict of interest in the governmental decision for Councilmember Glickman.

To meet this step, the impact of the financial effect on the clients must meet the threshold amount set forth in regulation 18705.1(c). (Copy enclosed.) The threshold amount of financial effect is dependent on the size of the client's business. For a smaller-sized business or one not listed on a financial exchange, the financial effect of a governmental decision is material if it is reasonably foreseeable that:

- “(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,
- (B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,
- (C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.” (Regulation 18705.1(c)(4).)

Although this threshold seems unlikely to have been met in these circumstances, since we do not have the specific facts regarding Councilmember Glickman's clients, he will have to apply this standard to determine the result himself.⁵ This materiality standard is applied to Councilmember Glickman's clients because, as discussed above, Councilmember Glickman has an economic interest in his sources of income, which in this case includes the clients to his business. (Regulation 18703.3(a).)

Also, if this effect on Councilmember Glickman's own business meets the thresholds stated above, then there is a material financial effect and Councilmember Glickman would have a conflict of interest. However, if those standards of effect are not met, then Councilmember Glickman does not have a conflict of interest. Since we also do not have the information necessary regarding Councilmember Glickman's business to make this determination, he can apply the standards provided to the facts to make this determination.

Steps Seven and Eight

We have not gone on to discuss the latter two steps in the standard conflict-of-interest analysis. Step seven is an exception that applies where the reasonably foreseeable and material financial effect on the official's economic interest is not

⁵ The additional facts to be considered when applying this analysis would include the size of the clients' businesses and the possible effect of the decision on those businesses. These considerations could include whether the clients are financially benefited from the installation of this new technology, or adversely affected by the new competition found in the applicants.

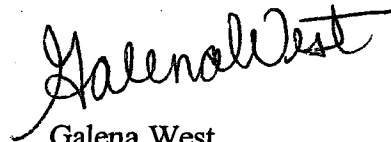
distinguishable from the effect on the public generally, and step eight is an exception that applies when the official is legally required to participate in the decision. The facts provided do not indicate that these rules are applicable to this situation.

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

Sincerely,

Luisa Menchaca
General Counsel

By:



Galena West
Counsel, Legal Division

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