



FAIR POLITICAL PRACTICES COMMISSION

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September 25, 2002

Clothilde V. Hewlett, Interim Director
Department of General Services
Post Office Box 989052
West Sacramento, CA 95798-9052

Re: Your Request for Informal Assistance
Our File No. I-02-234

Dear Ms. Hewlett:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your question, in part, concerns past conduct, we are providing you with informal assistance as was discussed in a phone call with your office on September 18, 2002.² The Commission does not provide advice relating to past conduct. (Regulations 18329(b)(8)(A) and (c)(4)(A).) Also, please note that the Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.) We encourage you to consider whether other laws, such as Government Code 1090 or your agency's Statement of Incompatible Activities, may also be implicated by your situation. The Commission is charged with interpreting and enforcing the provisions of the Act, and may provide advice only with respect to those provisions. (Section 83114.)

ANALYSIS

The general question you pose is whether a consultant has a conflict of interest because of his or her concurrent employment with two entities working on the same project.

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 financial interests.

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.)

(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. Although we cannot provide you with specific advice, we have furnished the standard eight-step analysis the Commission has adopted for you to apply to your situation. (Regulation 18700 (b)(1) - (8).) The Act does not include Government Code 1090 nor do we advise regarding the principles of incompatible activities.

Step One: Is the consultant a “public official”?

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.) “Consultant” is defined by regulation 18701(a)(2) as:

“[A]n individual who, pursuant to a contract with a state or local government agency:

(A) Makes a governmental decision whether to:

1. Approve a rate, rule, or regulation;
2. Adopt or enforce a law;
3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
5. Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
6. Grant agency approval to a plan, design, report, study, or similar item;
7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

(B) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Government Code Section 87302.”

Step Two: Is the public official “making,” “participating in making” or “influencing” a governmental decision?

The Act’s conflict-of-interest provisions apply only to disqualify a public official from “making,” “participating in making,” or “influencing” a governmental decision. If

the determination is made that the public official is not engaging in any of these actions, then the conflict-of-interest rules are not implicated and the analysis ends. Therefore, the threshold question in any analysis is whether the public official is “making,” “participating in making,” or “influencing” a governmental decision.

Apply the following standards for determining whether the public official is “making,” “participating in making,” or “influencing” a governmental decision.

Making a Governmental Decision

Under the analysis prescribed by step two, a public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; regulation 18702.1(a).)

Participating in Making a Governmental Decision

A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Section 87100; regulation 18702.2.)

Influencing a Governmental Decision

There are two rules as to whether a public official uses or attempts to use his or her official position to influence a governmental decision. The first rule applies when the governmental decision is within or before the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency, but the public official is not a decision-maker per se. (Regulation 18702.3(a).) In that case, if “the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency” then he or she is attempting to influence a governmental decision. This includes, but is not limited to, “appearances or contacts by the official on behalf of a business entity, client, or customer.” (*Ibid.*)

The second rule applies when the governmental decision is within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(b).) Under this rule, the official cannot act or purport “to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency” to influence a decision. (*Ibid.*)

Step Three: What are the public official's economic interests?

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 official's economic interests. There are six possible 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 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 (section 87103(c); regulation 18703.3)⁴;
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).

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

The next step is to determine whether the economic interests will be involved directly or indirectly in the decision. (Regulation 18700(b)(4).) 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:

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.)

⁴ Please note that income continues to disqualify public officials for 12 months after its receipt. (Section 87103(c), regulation 18703.3.)

“(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).)

Steps Five and Six: Will the financial effect of the governmental decision be material and reasonably foreseeable?

Once the public official identifies his relevant economic interests, he then 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 determining 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.)

Regulation 18705 defines standards to be used when determining whether a financial effect of an economic interest is material. Regulation 18705.1 gives materiality standards for finding a financial effect on business entities and regulation 18705.3 gives the standards for sources of income. (Copies enclosed.)

Because we cannot make this necessarily factual determination, the public official, using a reasonable and objective method, must assess whether it is reasonably foreseeable that his business will be materially financially affected according to the monetary thresholds identified above.

Steps Seven and Eight: “Public Generally” and “Legally Required Participation” Exceptions

Step seven is an exception that applies where the reasonably foreseeable and material financial effect on the official’s economic interest is not distinguishable from the effect on the public generally. Step eight is an exception that applies when the official is

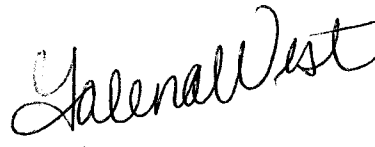
legally required to participate in the decision. General information on both of these exceptions is in the, "Can I Vote? Conflicts of Interest Overview" pamphlet, which is enclosed.

I hope this information was helpful and provided some guidelines to follow. 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

Enclosures

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