



## FAIR POLITICAL PRACTICES COMMISSION

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December 9, 2002

Mary R. Casey  
Marin Municipal Water District  
220 Nellen Avenue  
Corte Madera, CA 94925-1169

**Re: Your Request for Informal Assistance  
Our File No. I-02-247**

Dear Ms. Casey:

This letter is in response to your request for advice on behalf of District Board Member William Kier regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Because your question is general in nature and does not designate a specific decision, we are providing you with informal assistance.<sup>2</sup> 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, 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.)

### QUESTION

Does Mr. Kier, a newly appointed district board member, have a conflict of interest because of his consultant employment with a nonprofit entity that contracts with governmental entities regarding water and environmental issues?

### CONCLUSION

Mr. Kier has a potential conflict of interest with respect to his economic interests if there will be a reasonably foreseeable material financial effect on those interests.

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

<sup>2</sup> 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.)

## FACTS

William Kier is a newly appointed member of the Marin Municipal Water District ("District") Board of Directors. Issues that typically come before the District board include, but are not limited to, water supply contract negotiations, environmental issues, and other concerns related to the Sonoma County Water Agency ("SCWA") and/or the Russian River water supply.

Marin Municipal is a special district formed pursuant to Water Code Section 71000. The District supplies water to 185,000 residents of Marin County. Seventy-five percent of the District's water comes from the District's seven reservoirs. Since 1975, the District has contracted with the Sonoma County Water Agency for supplemental water supply from the Russian River. As of the year 2002, 25% of the District's water is supplied by the Russian River under provisions of this contract with the SCWA. The District has two contracts with SCWA: the Off Peak Water Supply Agreement and the As-Available Water Supply Agreement. Both contracts remain in effect until June 30, 2014.

Mr. Kier solely owns his own consulting practice called Kier Associates and is a member of a partnership called the KRIS Software Partnership. Agencies and firms hire Mr. Kier by contracting with the Institute of Fisheries Resources (IFR), an IRS section 501(c)(3) organization. Both the California Department of Forestry and Fire Protection (CDF) and the SCWA have contracted with IFR to secure the services of Kier Associates. Expansion of the SCWA-related IFR project is possible.

During a telephone conversation with Mr. Kier on November 1, 2002, he stated that the contract between IFR and SCWA will conclude May 2003, regardless of any District board findings. He also stated that he will have no future contracts or extensions of contracts beyond that date.

The following is a list of additional facts confirmed on October 22, 2002:

1. Mr. Kier does not know the value of his KRIS partnership because it has not been valued. He is not sure if his investment is beyond the \$2,000 threshold, but has agreed for the purposes of this advice letter that his investment meets this threshold.
2. Mr. Kier receives his consultant pay from Institute for Fisheries Resources (IFR), a nonprofit, and not from Sonoma County Water Agency (SCWA).
3. Mr. Kier has no investment in IFR.
4. Mr. Kier has no position of control in IFR, including a board position or officer.
5. Mr. Kier is the sole owner of the consulting practice, Kier Associates.
6. Mr. Kier will be faced with decisions in the upcoming year regarding Marin Municipal Water District's contract with SCWA. These contracts are in a state of ongoing negotiations and will continue to be addressed by the board in the first few months of the new year.

## 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 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. 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 Mr. Kier 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.) As a district board member, Mr. Kier is a public official.

### 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. Since your question asks if Mr. Kier may participate and vote in decisions regarding on-going contract negotiations with SCWA and contemplation of alternate water sources, we will consider this step fulfilled.<sup>3</sup>

### 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*<sup>4</sup> of \$2,000 or more (section 87103(a); regulation

<sup>3</sup> Disqualification is determined on a decision-by-decision basis, so each decision is considered separately for its potential impact on a public official's economic interests.

<sup>4</sup> 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 (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).

Mr. Kier is the sole owner of the consulting practice, Kier Associates, and therefore has an economic interest in his own business entity. (Regulation 18703.1(a) & (b).) Kier Associates is assumed to provide an income to Mr. Kier and Kier Associates’s clients are also considered sources of income to Mr. Kier. (Regulation 18703.3.) Even though Mr. Kier does not know the value of his KRIS partnership, he has agreed for the purposes of this advice letter that his investment meets this threshold and therefore, he also has an economic interest.<sup>5</sup> (Regulation 18703.1(a).) Mr. Kier receives consultant pay from IFR, but has no investment in IFR. (Regulation 18703.3.) Mr. Kier also holds a position of management in Kier Associates.<sup>6</sup>

Therefore, for the purposes of this letter, Mr. Kier has economic interests in the Kier Associates and the KRIS partnership as business entities, as well as IFR and Kier Associates as sources of income.

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

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<sup>5</sup> As a public official, Mr. Kier must make a good faith effort to assess the value of his partnership by using some reasonable and objective method of valuation. (*Moock Advice Letter*, No. A-01-150, enclosed.) The Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)

<sup>6</sup> 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.

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).) According to your facts, SCWA is the applicant and the entity involved in the negotiations and not IFR, Kier Associates or the KRIS partnership. Mr. Kier's economic interests are then considered indirectly involved in the proposed governmental decisions and the materiality standard of regulations 18705.1(c) and 18705.3(b) are applicable.

Steps Five and Six: What is the applicable materiality standard and will it be reasonably foreseeable that the materiality standard will be met?

First, regulation 18705 is applied to define the standards to be used when determining whether a financial effect of an economic interest is material. For those that are indirectly involved, regulation 18705.1(c) gives materiality standards for finding a financial effect on business entities and regulation 18705.3(b) gives the standards for sources of income. (Copies enclosed.)

Next, the public official 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, 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.)

Since we do not have the necessary financial information regarding the size of Kier Associates, the KRIS partnership and IFR, nor do we have the specific decision to estimate financial effect, the public official must assess whether it is reasonably foreseeable that the following materiality standards are met.

If the financial effect on Kier Associates or the KRIS partnership meets the applicable standard found in regulation 18705.1(c) (see enclosed copy), then the effect of the decision is material and Mr. Kier may not participate in the decision. If the financial effect does not meet these standards, then Mr. Kier may participate in the governmental decision.

Since Kier Associates is an indirectly involved source of income, regulation 18705.3(b)(1) applies. This regulation, however, cross-references to the same standards applied in the business entity analysis above. Therefore, if Kier Associates is a disqualifying business interest, then it is also a disqualifying source of income and vice versa.

For IFR, regulation 18705.3(b)(2) (see copy enclosed) applies since IFR is a nonprofit entity. This regulation gives materiality standards based on the size of the nonprofit entity. If the financial effect of the decisions on IFR meets these standards, then Mr. Kier may not participate in the governmental decision.<sup>7</sup>

Steps Seven and Eight: "Public Generally" and "Legally Required Participation" Exceptions

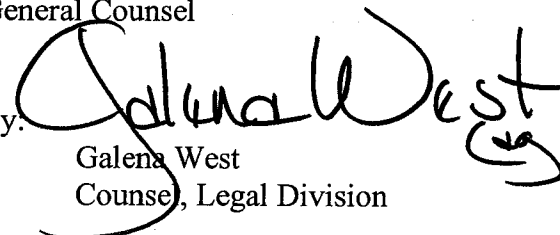
Step seven is an exception that applies where the reasonably foreseeable and material financial effect on the official's economic interest is not distinguishable from the effect on the public generally. Step eight is an exception that applies when the official is legally required to participate in the decision. General information on both of these exceptions is in the, "Can I Vote? Conflicts of Interest Overview" pamphlet, which is also enclosed.

I hope this information was helpful and provided some guidelines for you to follow. Also, if you are presented with a specific decision and you need advice on whether the thresholds of each category are met, please write in again with the specific facts. 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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<sup>7</sup> Please note that if Mr. Kier is disqualified under regulation 18705.3 because of a source of income, then the income is disqualifying for 12 months. (Regulation 18703.3.)