



FAIR POLITICAL PRACTICES COMMISSION

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April 3, 2003

Milan "Pete" Petrovich
Vice Mayor
City of Brentwood
City Hall – 708 Third Street
Brentwood, CA 94513-1396

**Re: Your Request for Informal Assistance
Our File No. I-02-289**

Dear Mr. Petrovich:

This letter is in response to your request for assistance regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that nothing in this letter should be construed to evaluate any conduct that may have already taken place. The Commission does not act as the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code § 83114.)² Please note that the Commission does not have jurisdiction over other laws that may be applicable to your facts, such as Government Code section 1090. You should consult the Attorney General's office for further guidance regarding Government Code section 1090.

QUESTIONS

1. Do you have an economic interest in CybAirCorp?
2. Do you have a conflict of interest disqualifying you from making, participating in making, or influencing decisions of the Brentwood City Council concerning CybAirCorp?
3. Does your involvement with CybAirCorp cause the balance of the Brentwood City Council to have a conflict of interest voting on this issue?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All statutory references are to the Government Code unless otherwise indicated.

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.)

4. If and when the Brentwood City Council acts on this issue and if a cable television franchise is granted, are you prohibited from representing CybAirCorp?

CONCLUSIONS

1. Yes, you have an economic interest in CybAirCorp.
2. Yes, you have a disqualifying conflict of interest prohibiting you from making, participating in making or influencing any decision of the Brentwood City Council concerning CybAirCorp.
3. We are unable to answer this question. Under regulation 18329, Commission staff does not provide third party advice.
4. Nothing in the Act prohibits you from seeking and obtaining outside employment. However, as discussed below, you would need to disqualify yourself from making, participating in making, or influencing any decision of the Brentwood City Council concerning CybAirCorp.

FACTS

You are currently serving a 4-year term as a member of the city council for the City of Brentwood. CybAirCorp ("CAC"), a Nevada corporation, has submitted an application to the City of Brentwood for a cable television franchise. CAC is currently a client of Pacific Communications Associates, Inc. ("PCA") and Petrovich & Associates ("PA"), both of which are consulting companies of which you are currently both president and owner. PCA and PA do not own any portion of CAC. You have not participated in any official capacity as a council member regarding CAC and their application to the city.

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. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest (regulation 18700, subdivisions (b)(1) – (8)), which is discussed below. The general rule, however, is that a conflict of interest may occur whenever a public official makes a governmental decision which may have a reasonably foreseeable and material financial effect on one or more of his or her financial interests.

Steps One and Two: Are you a “public official” and will you be “making,” “participating in making,” or “influencing” a governmental decision?

As a member of the Brentwood City Council, you are a “member, officer, employee or consultant of a state or local government agency.” Therefore, you are a “public official,” and you are subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).) As a council member deliberating and voting on decisions before the council or committing your agency to any course of action, including entering into a contract, you will make governmental decisions. (Section 87100; regulation 18702.1.) A public official is participating in making a governmental decision if the official, acting within the authority of his or her position, advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by conducting research or making any investigation, or prepares or presents any report, analysis, or opinion, orally, or in writing which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in regulation 18702(a)(2)(A). (Section 87100; regulation 18702.2.) “With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, *the official contacts, or appears before, or otherwise attempts to influence*, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.” (Section 87100; regulation 18702.3.) (Emphasis added.)

Step Three: Do you have economic interests?

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.

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (section 87103(a); regulation 18703.1(a)). An indirect investment or interest means any investment or interest owned by the spouse of an official or by a member of the official's immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.) “Immediate family” is defined at section 82029 as an official's spouse and dependent children.
- A public official has an economic interest in a *business entity* 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)). 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, syndicate, corporation, or association.” (Section 82005.)

- 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);
- 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.) “Income of an individual also includes a pro rata share of any income of any *business entity* or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater.”(Section 82030(a).)(Emphasis added.) Thus, to the extent that the official's pro rata share of the income is \$500 or more, then the business and clients of the business are sources of income to the official.
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
- A public official has an economic interest in his or her personal finances. A governmental decision has a personal financial effect on a public official if the decision will result in the personal expenses, income, assets, or liabilities of the public official, as well as those of his or her immediate family, increasing or decreasing by an amount of \$250 or more. This is known as the “personal financial effect” rule. (Section 87103; regulations 18703.5 and 18705.5.)

Your facts reveal several economic interests:

- You own two corporations, Pacific Communications Associates, Inc. (“PCA”) and Petrovich & Associates (“PA”). We assume each ownership interest is worth more than \$2,000.
- You are an officer of two corporations, Pacific Communications Associates, Inc. (“PCA”) and Petrovich & Associates (“PA”).
- You have an economic interest in a source of income, including *promised income*, both from the two corporations and the clients of the two corporations within 12 months prior to the decision. It is assumed that this source of income aggregates to more than \$500.³

³ In addition to economic interests separately listed in section 87103, a public official always has an economic interest in his or her personal finances and may have a conflict of interest in any decision foreseeably resulting in an increase or decrease in the personal expenses, income, assets or liabilities of the official or his or her immediate family, in the amount of \$250 or more over a 12-month period. (Regulation 18703.5.)

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

Your facts indicate that a client of two of your consulting firms is an applicant before your agency. A person, including a business entity or an individual, 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).)

Steps Five & Six: What is the Applicable Materiality Standard and is it Reasonably Foreseeable that the Financial Effect of the Governmental Decision upon your Economic Interest will Meet this Materiality Standard?

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests. This determination takes two steps. First, the official must find and apply the applicable materiality standard set forth in Commission regulations. (Reg. 18700(b)(5), regulation 18705, et seq.) After finding the applicable materiality standard, the official must then decide whether it is reasonably foreseeable that the standard will be met. (Reg. 18700(b)(6).)

Your questions concern a source of income to two corporations, both of which you own and in which you hold a management position; a source of income which has applied for a cable television franchise from the city council. This source of income, based on the analysis in step 4, is directly involved in a governmental decision. It is clearly foreseeable that under such circumstances, the source will be financially affected. Further, regulation 18705.3(a) provides: “Directly involved sources of income. Any 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, the foreseeable financial effect under your facts is material.

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

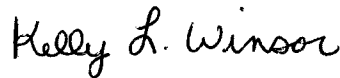
We have not gone on to analyze the latter two steps. Step 7 is an exception that applies where the reasonably foreseeable and material financial effect on the official's

economic interest is not distinguishable from the effect on the public generally. This exception generally does not apply in cases where economic interests are directly involved in a decision. Step 8 is an exception that applies when the official is legally required to participate in the decision. The information you have provided does not implicate Step 8, and we do not address it further.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Kelly L. Winsor
Legal Analyst

LM:KLW:jg

Enclosure: Regulation 18329

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