



FAIR POLITICAL PRACTICES COMMISSION

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September 12, 2003

James P. Mayer
Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814

**Re: Your Request for Informal Assistance
Our File No. I-03-171**

Dear Mr. Mayer:

This letter is in response to your request for informal assistance regarding the reporting and conflict of interest provisions of the Political Reform Act (the "Act").¹

QUESTION

Are potential consultants and panel members who will advise the Little Hoover Commission required to file financial disclosure forms pursuant to your conflict of interest code and follow conflict of interest rules?

CONCLUSION

The answers to these questions depend on a fact-specific analysis. The applicable rules and guidelines are discussed below which you can use to apply to the specific positions contemplated by the Little Hoover Commission.

FACTS

In 2002, the Legislature and the Governor – in SB 1951 (Figueroa) and AB 1943 (Chu) asked the Little Hoover Commission to review specific aspects of the regulation of acupuncturists. The Little Hoover Commission's report will be considered by the Legislature and the Acupuncture Board should they decide to modify the examination of other aspects of the regulatory framework. The report is advisory and any change in the

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 indicated otherwise.

policy or practice would require deliberation and action by the Legislature or the regulatory board.

From conversations with the legislative staff, it became clear that the Legislature anticipated the Little Hoover Commission would need to contract for technical assistance. The Center for the Health Professions at the University of San Francisco provided you with that technical assistance.

The proposal calls for consultants at UCSF and associated with California State University, Sacramento to perform specific research necessary to inform the Little Hoover Commission's deliberations on the issues raised in legislation. These consultants will be providing work similar to your analytical staff members, who are not designated employees in the Little Hoover Commission's conflict of interest code.

The proposal also calls for certain analysis regarding the scope of practice and other aspects of the profession to be reviewed by a panel of stakeholders and experts. This process is considered the best methodology for analyzing information that requires subject matter expertise, but also involves a degree of subjectivity. Some of these experts might also be considered "stakeholders," and so the process is intended to balance perspectives rather than rely on "interest-free" perspectives.

The work product from the consultants will be considered – along with other information received, testimony from public hearings and discussions in other open meetings – by the Little Hoover Commission when it prepares its report to the Legislature.

ANALYSIS

Fundamental to an understanding of the conflict of interest laws under the Act is that there are two distinct parts: 1) disclosure (§§ 87200-87210); and 2) disqualification (§§ 87100-87105). As a result of this duality, regardless of whether a public official has an obligation to disclose something on his or her Form 700 Statement of Economic Interests ("SEI") under the first part, the public official may nevertheless be disqualified under the second part from making decisions that will financially affect his or her economic interests. In other words, a conclusion that a given official may not have a disclosure obligation does not end the inquiry as to whether a conflict of interest exists for that official. Because your letter implicates both components of the conflict of interest analysis, each is discussed generally below.

Before discussing the specific groups of individuals referred to in your letter, it is helpful to that discussion to have some information in the background to inform the analysis implicated in the issues raised in your letter.

Conflict of Interest Codes

Public officials, such as elected state officers, judges, members of planning commissions, members of the board of supervisors, members of city councils of cities, and other public officials who manage public investments are specifically required under the Act to publicly disclose their financial interests. (See § 87200.) Other public officials, such as employees, boards, commissions or consultants of a state or local government agency, disclose their financial interests in accordance with the conflict of interest code developed by their respective agency. (See §§ 87300 et seq.)

A conflict of interest code is a rule or regulation adopted by a government agency which designates the positions in the agency which make, participate in making, or use their official position to influence governmental decisions. A conflict of interest code requires designated positions to disclose their investments, interests in real property, sources of income and business positions which the designated employee may materially affect in his or her decisionmaking on behalf of the agency. (§§ 87100 and 87302.)

Regulation 18730, promulgated by the Commission to interpret and implement the conflict-of-interest provisions of the Act, provides guidance as to those positions in the agency that must be included in a conflict of interest code. Subdivision (b)(2) of this regulation provides that persons to be designated in an agency's conflict of interest code include those persons who make or participate in making governmental decisions which may foreseeably have a material effect on financial interests.

"Consultants" in a Conflict of Interest Code

Typically, conflict of interest codes include designations for consultants to the agency. The term "consultant" is defined in regulation 18701, subdivision (a)(2), as an 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." (Emphasis added.)

"Consultants" and the Importance of "Serving in a Staff Capacity"

The concept of "serving in a staff capacity" under subpart (B) quoted above has been construed by the Commission to include only those individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental entity. (*Conley* Advice Letter, No. A-96-192; *Randolph* Advice Letter, No. I-95-045.) There exists a quantitative and temporal quality to this evaluation in that persons who perform limited projects for an agency over a limited period of time would not be deemed to be serving in a staff capacity. (See discussion below.) Additionally, a person qualifying under subpart (B) must perform tasks substantially the same as those of individuals whose positions at the agency are described in the agency's conflict of interest code. (*Id.*) As referenced above, a person must be included in an agency's conflict of interest code if that person makes or participates in making a governmental decision.

Consultant Involvement in Governmental Decisions

Various regulations interpret "making, participating in making" a governmental decision. Regulation 18702.1, subdivision (a), provides that a public official will be "making a governmental decision" when he or she votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, enters into any contractual agreement on behalf of the agency, or determines not to act (unless such a determination is made for conflict of interest reasons). Regulation 18702.2, subdivision (c), provides that a public official will "participate in making a governmental decision" when he or she negotiates (without significant substantive review) a governmental decision, or when he or she advises or makes recommendations to the decisionmaker (either directly or without significant substantive review) by 1) conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision, or 2) preparing or presenting 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.

Are Consultants to the Little Hoover Commission and Panel Members on the Acupuncturist Review Required to Make Financial Disclosures?

As discussed above, regulation 18701, subdivision (a)(2), establishes **two** criteria for qualification as a consultant; an individual who satisfies *either* criterion is a consultant for purposes of the Act. First, an individual may be a "consultant" if he/she

performs, pursuant to contract, any of the actions described in subdivisions (a)(2)(A)(1)-(7). Alternatively, an individual may be a consultant if he/she "serves in a staff capacity with the agency" under subdivision (a)(2)(B).

The second prong of the test adds an additional condition: the tasks of the quasi-staff member over this period of time must be substantially the same as one of the individuals whose position at the agency is described in the conflict of interest code.

You must apply these criteria to the individual consultant and panel positions. If you find that either criterion is met by the particular circumstances of a given case, then that individual will be a "public official" and must disclose his or her financial interests. If the criteria are not met, then the individual(s) need not file financial disclosure statements under the Act. While you state in your letter that the consultants will perform duties of employees who are *not* required to make disclosures under your code, we do not have sufficient information to determine whether in fact those particular employees are properly excluded from the agency's code. Moreover, we do not know what duties the consultants and panel members will perform that are similar to the ones performed by agency staff. Thus, we cannot say in all instances that this fact alone, absence from the code, always will exempt consultants from having to make disclosures.

Regarding the critical issue of whether an individual will qualify as a consultant because he or she "serves in a staff capacity," we have said that the standard does not include individuals who work on one project or a limited range of projects for the agency. (*Parry* Advice Letter, No. I-95-064; *Randolph* Advice Letter, No. A-95-045; *Travis* Advice Letter, No. A-96-053; *see also* March 28, 1994, Memorandum to the Commission regarding Regulation 18700, page 4). For instance, we have advised that the test is not met where the relationship between the agency and the potential consultant would last only 12-16 months and that no ongoing relationship was contemplated. (*Harris* Advice Letter, No. A-02-239.) It is possible given the expected date of completion of your project (May, 2004) that this test would not be met given the duration (less than a year) if the individuals hired are not contemplated to work on other projects for the agency.

Conflicts of Interest

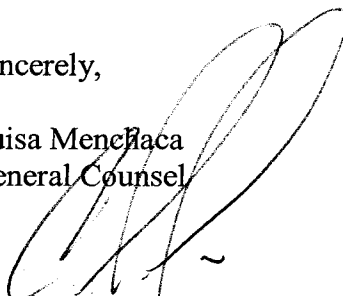
The issue of avoiding conflicts of interest is separate from the issue of disclosure, discussed above. The disqualification portion of the conflict-of-interest provisions apply to all public officials, regardless of their disclosure obligations under sections 81002(c) and sections 87200-87313. (*Davidson* Advice Letter, No. I-95-111.) I have enclosed a copy of the fact sheet entitled, "Can I Vote? Conflicts of Interest Overview." This pamphlet discusses the various steps in the conflicts analyses and instructs how the rules are to be applied. Because conflict of interest analysis is deeply fact-specific, it is not possible to advise, merely on the basis of the study design you have enclosed, whether and under what circumstances Ms. Dower would or would not have a conflict of interest.

Should more specific circumstances arise in the future in which you require more tailored advice, please feel free to write in for additional advice.²

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

Sincerely,

Luisa Menefaca
General Counsel



By: C. Scott Tocher
Counsel, Legal Division

Enclosure

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² Your letter also asks about potential conflicts of Catherine Dower, but do not describe any particular governmental decisions at issue. We encourage you to pass along the brochure enclosed regarding conflicts analysis, which also is available on our website (www.fppc.ca.gov). In any event, the Commission does not give third-party advice regarding the obligations of others under the Act.