



## FAIR POLITICAL PRACTICES COMMISSION

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November 17, 2003

Casey Gwinn  
City of San Diego  
Office of the City Attorney  
1200 Third Avenue, Suite 1100  
San Diego, CA 92101

**Re: Your Request for Informal Assistance  
Our File No. I-03-217**

Dear Mr. Gwinn:

This letter is in response to your request for informal assistance on behalf of the San Diego City Attorney's office regarding the campaign provisions of the Political Reform Act (the "Act").<sup>1</sup> We treat your request as one of informal assistance because you ask about several unnamed public officials and you name one official, but do not indicate you are authorized to request advice on behalf of that official.<sup>2</sup> Moreover, nothing in this letter is intended to address the propriety of any past conduct.

### QUESTIONS

1. May a council member lawfully participate in a municipal decision to increase contribution limits for legal defense fund purposes if it is reasonably foreseeable that the official would use contributions obtained by that increase to pay his or her legal expenses?
2. At what point does a council member with an outstanding personal loan to his or her campaign committee have a legal obligation to recuse himself or herself from participating in a municipal decision that involves contribution limits?

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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 immunity conferred by formal written assistance. (Reg. 18329, subd. (c)(3), copy enclosed.)

3. May the mayor lawfully participate in a municipal decision that involves raising the mayoral race contribution limit by \$50 if his campaign committee for an upcoming election would be able to accept larger contributions as a result of that decision?

## CONCLUSIONS

1. City council members may participate in decisions regarding contribution limits for legal defense funds, assuming the ordinance does not contravene the similar provisions of the Act, provided the decisions do not have a personal financial effect on the public official or members of his or her immediate family.

2. A council member must recuse himself or herself prior to participating in discussions of an item which constitutes a conflict of interest for the official.

3. Yes, the mayor may participate in discussions on the contribution limits in mayoral races.

## FACTS

It is your understanding that the City of San Diego's Election Ethics Commission has drafted amendments to the City of San Diego's Election Campaign Control Ordinance and will soon be presenting these amendments to the mayor and city council for their consideration.

### *Legal Defense*

In the City of San Diego, a contribution limit of \$250 per election restricts the amount of campaign contributions an official may raise from any one individual.

One of the proposed ethics commission amendments would allow the creation of a "legal defense fund" that effectively raises the contribution limit for any elected city official or candidate for elective city office who is involved in a civil, criminal or administrative proceeding arising out of the conduct of an election campaign, the electoral process, or the performance of official city activities and duties.<sup>3</sup> Contributors would be able to contribute \$250 per year to a campaign committee for legal defense fund purposes, over and above the city's contribution limits.

At the present time, three members of the city council have been criminally indicted by a federal grand jury and have retained legal counsel to represent their interests

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<sup>3</sup> We note, for instance, that the Commission has advised that a state Senator could use campaign funds to defend against a federal indictment. (*In re Montoya*, 12 FPPC Ops. 7.) We do not have information about the indictments at issue in the circumstances of your request and therefore render no opinion about the propriety of the expenditure of campaign funds to defend against these indictments. (See § 89514.)

in that matter. In your letter, you assert that they are entitled to use campaign contributions to pay their expenses. The proposed amendment to the city's campaign laws would enable these council members to deposit additional contributions into their campaign accounts for the sole purpose of paying legal expenses. Your first inquiry, therefore, concerns whether these three council members would have a disqualifying conflict of interest in the decision to amend your local campaign control ordinance to allow legal defense fund contributions where it is reasonably foreseeable that they would use legal defense fund monies to pay their legal expenses.

#### *Contribution Limits for City Council Race*

Another proposed amendment pertains to the city's contribution limits. Currently, individuals running for city council office are subject to a \$250 per election contribution limit. The ethics commission is not proposing to raise or lower this limit. However, it is substantially likely that raising the limit could be a topic of discussion during a discussion of the amendments. For this reason, your second inquiry pertains to any disqualifying interest a council member may have in discussing the contribution limit, particularly if the council member has a personal loan that could be paid with funds obtained by raising the limit.

At the present time, two council members have outstanding personal loans to their campaign committees. In addition, because four council members will be seeking re-election in 2004, there is a significant possibility that additional personal loans will be made while the ethics commission's amendments are being considered.

#### *Contribution Limits for Mayoral Race*

Although the ethics commission is not proposing an increase in the contribution limits for candidates seeking a council district office, it is recommending a modest increase for the mayoral race. If its amendments are adopted, candidates for the office of mayor will be allowed to accept contributions of up to \$300 per election, an increase of \$50 over the existing contribution limit. Mayor Dick Murphy will be seeking re-election in 2004, but has not made any personal loans to his campaign committee, and does not have any campaign debt for which a collection action has been filed.

### **ANALYSIS**

We note at the outset of our analysis that your advice request did not ask us to consider, nor have we reviewed any drafts of, proposed amendments to the campaign finance ordinances to which you refer. Therefore, the analysis below should not be read to reach a conclusion on the legality of the proposed amendments.<sup>4</sup>

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<sup>4</sup> We note, for instance, that in the *Ross Advice Letter*, No. A-03-040, we advised that the City of San Diego that a proposed ordinance providing for a separate bank account for legal defense funds would conflict with state law permitting only one bank account per election.

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 or the financial interests of persons who have supported them." (§ 81001, subd. (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. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, when it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (§ 87103; reg. 18700, subd. (a).) The Commission has adopted an eight-step analysis for determining whether the Act's conflict-of-interest restrictions apply to a given individual with regard to a specific governmental decision. (Reg. 18700, subd. (b).)<sup>5</sup>

Members of city councils are public officials under the Act. (§ 82048.) A public official has a financial interest in a governmental decision (or a "conflict of interest") when the decision will have a reasonably foreseeable material financial effect on one or more of the official's economic interests, described at § 87103 as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment<sup>6</sup> of \$2,000 or more (§ 87103(a); Reg. 18703.1(a));
- A public official has an economic interest in any business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (§ 87103(d); Reg. 18703.1(b));
- 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 (§ 87103(b); Reg. 18703.2);
- A public official has an economic interest in any source of income<sup>7</sup>, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (§ 87103(c); Reg. 18703.3);
- A public official has an economic interest in any source of gifts if the gifts aggregate to \$340 or more within 12 months prior to the decision (§ 87103(e); Reg. 18703.4);

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<sup>5</sup> The standard eight-step process includes: (1) Public official?; (2) "Making," "participating in making," or "influencing" a governmental decision?; (3) Economic interests?; (4) Are they directly or indirectly involved?; (5) Are they materially affected?; (6) Is it reasonably foreseeable?; (7) Does it effect the public generally the same way? and (8) Is participation legally required? (Reg. 18700.)

<sup>6</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." (§ 87103.)

<sup>7</sup> The definition of "income" includes a pro rata share of any income of any business entity in which the official owns a 10-percent interest or greater. (§ 82030, subd. (a).)

- 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 the “personal financial effects” rule (§ 87103; Reg. 18703.5).

*Question Number One.*

On numerous occasions, we have advised that the receipt of campaign contributions does not give rise to a conflict of interest since the Act expressly exempts campaign contributions from the definitions of “income” and “gift.” (§§ 82028, 82030; See *Rudnansky* Advice Letter, No. A-03-113; *Larocque* Advice Letter, No. I-99-161; *Stafford* Advice Letter, No. A-97-177.)

The receipt of contributions, however, might result in an impermissible personal financial effect on public officials in certain situations where a committee has debt. We have advised that a reasonably foreseeable material financial effect may arise, for instance, in the following circumstances: 1) where the public official (or member of his or her immediate family) makes a personal loan to his or her committee and intends to pay off the loan with additional contributions; and 2) when a public official’s committee has an outstanding debt that he intends to pay with the additional contributions *and* the creditor has filed a collection action to recover \$250 or more. (*Larocque* Advice Letter, *supra.*) Since neither the first nor the second circumstance above seem to present in the situations you describe, then there likely is no reasonably foreseeable material financial effect on the basis of the “personal financial effect” rule.

*Question Number Two.*

The second question pertains to council member or members who have outstanding personal loans and therefore have a disqualifying conflict of interest as described above. Your second question inquires as to the timing of disqualification for certain officials when and if the issue of raising contribution limits arises during council discussion. Once again, section 87100 prohibits a public official from “making, participating in making or in any way attempt to use his official position to influence a governmental decision” in which the official has a financial interest. (§ 87100.) For your convenience, we enclose copies of regulations 18702 through 18702.5, to assist in determining when and if a city council member is making, participating in making or attempting to use his or her position to influence a government decision. When an official participates in discussions involving the prohibited subject matter, the official is “participating” in making the governmental decision. (Reg. 18702.2; *Savaree* Advice Letter, No. A-02-268.) In addition, “... 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.” (Reg. 18702.3, subd. (a).) Therefore, unless an official unequivocally and irrevocably renounces the use of future contributions *prior* to a discussion of the contribution limits, then the official risks violating the conflict of interest provisions in the Act. Thus, prior to participating in such discussions, the

official must determine whether he or she will renounce use of the contributions in the manner described in the answer to your first question *or* must recuse himself or herself from the discussions entirely.<sup>8</sup>

*Question Number Three.*

The same analysis as set forth in the first question applies here with regard to the mayor's ability to participate in discussions pertaining to the increase of contribution limits for mayoral campaigns. We said that receipt of campaign contributions could not give rise to a conflict of interest, since the Act expressly exempts campaign contributions from the definitions of "income" and "gift." However, there was a possibility that decisions regarding a campaign finance ordinance could have a personal financial effect on a public official who had outstanding campaign debt including personal loans to the campaign or loans from third parties secured by the official's personal assets. You have told us that Mr. Murphy does not have any outstanding campaign debt, and in that case decisions on the mayoral contribution limits will not have a reasonably foreseeable material financial effect on Mr. Murphy.

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

Sincerely,

Luisa Menchaca  
General Counsel

By: C. Scott Tocher  
Counsel, Legal Division

Enclosures

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<sup>8</sup> If a public official is enumerated in section 87200 (87200 filer) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest as discussed in regulation 18702.5, subdivision (b)(1)(B), on the record of the meeting, (2) recuse himself or herself, and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5, subdivisions (c) and (d) apply. (§ 87105.) Since a city council member is an 87200 filer these requirements apply to him or her.