



FAIR POLITICAL PRACTICES COMMISSION

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April 16, 2004

Brad Castillo
1599 East Roberts
Fresno, CA 93710

Re: Your Request for Advice
Our File No. A-04-069

Dear Mr. Castillo:

This letter is in response to your request for advice regarding the gift provisions of the Political Reform Act (the "Act").¹

QUESTION

Would the provision of services related to LASIK eye surgery, and the surgery itself, at no cost to you, for purposes of filming the process and procedure for future use by the laser company and/or a local Spanish television station, constitute a gift, income or a prohibited honorarium?

CONCLUSION

Because you would be receiving a personal benefit which is not available to members of the public without regard to official status, the surgery and related services would constitute a gift to you, unless you can prove that you provided consideration of equal or greater value. If you will make an oral presentation as part of the documentary, you may not receive the payment unless it constitutes earned income.

FACTS

You are a local city council member for the City of Fresno, Council District 4. You have been contacted by a company that does laser correction (LASIK) eye surgery. They, in conjunction with a local Spanish television station, want you to participate in having the eye surgery done, if you are a good candidate. They want a Spanish speaking individual who wears glasses and have asked you to participate. The laser company plans

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

on documenting this on film as you go through the pre-examination, surgery and post-examination and no cost will be incurred by you.

ANALYSIS

Gift or Income

Section 89503(a) provides:

“No elected state officer, elected officer of a local government agency, or other individual specified in Section 87200 shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars (\$250).”

As a member of a local city council, you are an elected officer of a local government agency. Thus, the prohibition on accepting gifts over the statutorily determined value from a single source is applicable to you. The current gift limit is \$340 per year.

For purposes of this letter, we have assumed that the cost of the LASIK eye surgery being offered to you is in excess of \$340.

Section 82028 states, in pertinent part:

“(a) ‘Gift’ means . . . any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.”

Under section 82028, anything of value given to a public official without cost, including the professional services of an eye surgeon, is a gift unless it is expressly exempted from the definition of “gift”. (See, e.g., *Baker* Advice Letter, No. A-01-187; *Kolkey* Advice Letter, No. I-95-134; and *Connor* Advice Letter, No. A-94-247, concerning legal services; *Gould* Advice Letter, No. I-95-320 (copies enclosed).) Exemptions to the definition of “gift” are set forth in regulation 18942 (copy enclosed). Your situation does not fall into any of the categories of exceptions listed.

Presumably, you were asked to be the subject of the LASIK documentary because you are well known within the local Spanish-speaking community due to your official status as a city council member, not simply because you are a Spanish-speaking individual who wears glasses. Therefore, because this offer is not available in the regular

course of business to members of the public without regard to official status, the rebate or discount exception does not apply.

Thus, the LASIK surgery would constitute a gift under the Act, unless you could prove that you provided consideration of equal or greater value. (Section 82028.) If you were able to prove that you provided the laser company and/or the television station, if the television station is bearing any of the costs of the surgery or pre- or post-operative care, then the cost of the surgery and any related care would constitute reportable income. (Section 82030, copy enclosed.)

Honorarium

Under your facts, the laser company plans on documenting the surgery on film, presumably for showing to a broader audience at some future date. If you will be making an oral presentation as part of the documentary, you may not receive the payment at all. Section 89502 prohibits any elected officer of a local government agency from accepting any honorarium. "Honorarium" is defined in section 89501(a) as follows:

"(a) For purposes of this chapter, 'honorarium' means, except as provided in subdivision (b), any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering."

Regulation 18931.1 (copy enclosed) defines "speech given," in pertinent part, as "a public address, oration, or other form of oral presentation, and includes participation in a panel, seminar, or debate." Mere participation in a discussion group, even with advance preparation, does not qualify as a "speech given." (*Attwater* Advice Letter, No. A-95-168; *Hoehn* Advice Letter, No. I-92-392, (copies enclosed).)

However, "honorarium" does not include "earned income," which is defined in section 82030.5 as follows:

"(a) For purposes of this title, 'earned income' means, except as provided in subdivision (b), income from wages, salaries, professional fees, and other amounts received or promised to be received as compensation for personal services rendered."

The factors that except "earned income" from the definition of "honorarium" are set forth in regulation 18932:

"(a) 'Honorarium' does not include income earned for personal services if:

“(1) The services are provided in connection with an individual's business or the individual's practice of or employment in a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, pursuant to California Code of Regulations, Title 2, Sections 18932.1 through 18932.3; and

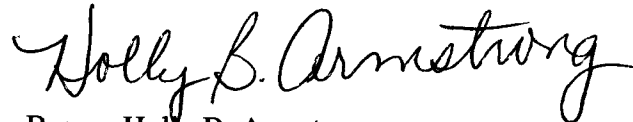
“(2) The services are customarily provided in connection with the business, trade, or profession.”

Based on the facts that you have provided, there is nothing to suggest that your situation fits within any earned income exception.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Holly B. Armstrong
Staff Counsel, Legal Division

Enclosures

HBA:jg

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