



## FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

August 20, 2004

William Lepowsky  
544 Santa Clara Avenue  
Berkeley, CA 94707

**Re: Your Request for Advice**  
**Our File No. A-04-126**

Dear Mr. Lepowsky:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note laws outside the Act may be implicated by your question. The Commission cannot provide advice regarding laws outside of the Act. Further, the Commission is not the finder of fact when it provides advice. This advice is applicable and confers immunity (see Section 83114) only to the extent that the facts provided to us are correct and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)

### QUESTION

May you communicate with other faculty members concerning using the textbook you authored as the required textbook within your department despite receiving royalties for the sale of the textbook?

### CONCLUSION

The Act does not restrict your communication concerning the textbook.

---

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

## FACTS

You are asking for further advice related to the question posed and answered in the *Lepowsky* Advice Letter, No. A-04-096. The facts of that letter were as follows:

“You are an instructor at a California community college. You have just completed the revision of a math textbook you wrote. This textbook has been adopted by the faculty of your math department as the required course textbook and will be used at your college.

“The revised textbook will be printed at a local copy store where it will be sold as a reader. The copy store is the only place where your book may be purchased, and it provides no free copies of the book. All copies, including desk copies for instructors, must be purchased. You will receive a royalty of approximately five or ten dollars on each copy of the textbook which is purchased.

“Should an instructor or the library need a desk copy, a faculty member in your department will purchase the textbook from the copy store and deliver it to the appropriate source. You contemplate that perhaps two faculty members per semester will need a copy of the textbook.

“The faculty member will then request reimbursement from the administration for the cost of the book. The faculty member would thus be a go-between for the copy store (the seller) and the college (the buyer). There may be two to three such reimbursement requests per year and reimbursements would come from available college funds. No faculty member may receive reimbursement unless the administration provides its written authorization.

“Since 1969, when you began teaching at your college, you have not been required to submit a Form 700 statement of economic interests.”

Your current question pertains to a statistics textbook that you authored which is now eligible for consideration as the choice for a required textbook within your department. The faculty will engage in the process of choosing a single textbook to be used by every instructor (not just yourself) who teaches sections of a particular course. You seek clarification as to whether you are permitted to freely communicate with your colleagues about aspects of the textbook selection.

## ANALYSIS

As we noted in our prior letter, Government Code 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. The Commission has adopted an eight-step process to determine whether a

public official may participate in the decision-making process when the question of a conflict arises.

***Step 1. Are you a public official?***

The conflict-of-interest provisions of the Act apply only to “public officials.” A “public official” is defined to include “every member, officer, employee or consultant of a state or local government agency ....” (Section 82048.) As a community college professor you are an employee of a government agency; therefore, you are a public official within the meaning of the Act.

***Step 2. Will you be participating in a governmental decision?***

The Act’s conflict-of-interest provisions come into play only when a public official makes, participates in making, or in some way attempts to use his or her official position to influence a governmental decision in which the official knows - or has reason to know - that he or she has a financial interest. (Section 87100.) Commission regulations describe in detail what constitutes making, participating in making, or influencing a governmental decision. (Regulations 18702.1, 18702.2, and 18702.3, respectively.)

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public 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 any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) The conduct you described would clearly be considered “influencing” because you will be contacting other employees of the agency for the purpose of influencing their decision on the textbook.

However, regulation 18702.4 provides exceptions to these definitions. Specifically, regulation 18702.4(c) provides:

“(1) Except as provided in subsection (c)(2), neither disclosure of financial interests nor disqualification is required under Government Code sections 87100, 87302, or any Conflict of Interest Code, in connection with:

“(A) Teaching decisions, including the selection by a teacher of books or other educational materials for use within his or her own school or institution, and other decisions incidental to teaching; ...

“(B) Decisions made by a person who has teaching or research responsibilities at an institution of higher education to pursue personally a course of academic study or research, to apply for funds to finance such a project, to allocate financial and material resources for such academic study or research, and all decisions relating to the manner or methodology with which such study or research will be conducted. Provided, however, that the provisions of this subsection (c)(1)(B) shall not apply with respect to any decision made by the person in the exercise of institution- or campus-wide administrative responsibilities respecting the approval or review of any phase of academic research or study conducted at that institution or campus.”

In a 1981 staff memorandum to the Commission concerning the exception (formerly numbered 18705), staff wrote: “The first part of section 18705 deals with decisions made by professors in the course of teaching. This includes decisions as to the textbooks or other teaching materials to use in a teacher’s courses.... It is an integral part of the nature of a college or university professor’s job to decide how to teach a course.”

Pursuant to this exception, for example, we have advised that a teacher is not prohibited by section 87100 from choosing his or her own book to use as a textbook for his or her class. This is because this is a *teaching decision*.<sup>2</sup>

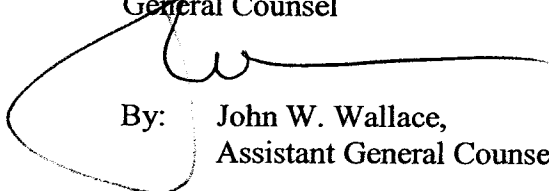
***Steps 3-8.***

Since we have concluded you are not making, participating in making, or influencing a government decision (step 2), we do not go on to discuss the latter steps under the Act.

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

Sincerely,

Luisa Menchaca  
General Counsel



By: John W. Wallace,  
Assistant General Counsel

LM:JWW:jg  
I:\AdviceLtrs\04-126

---

<sup>2</sup> Please note that there are limitations to these “academic” exceptions. See e.g., regulation 18702.4(c)(1)(B) which excludes decisions made by the person in the exercise of institution- or campus-wide administrative responsibilities respecting the approval or review of any phase of academic research or study conducted at that institution or campus from the exception.