



FAIR POLITICAL PRACTICES COMMISSION

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August 20, 2004

Edgar W. Reece, CEO
ISN Global Enterprises, Inc.
Post Office Box 1391
Claremont, CA 91711-8391

Re: Your Request for Informal Assistance
Our File No. I-04-135

Dear Mr. Reece:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ We encourage you to consider whether other laws, such as Government Code section 1090, may also be implicated by your situation. You should consult your city attorney regarding other laws that may be applicable to you. The Commission is charged with interpreting and enforcing the provisions of the Act, and may provide advice only with respect to those provisions. (Section 83114.) Because the facts you have presented are not sufficient to render formal advice, we are treating your request as one for informal assistance (regulation 18329(b)(2)(B)).²

QUESTIONS

- (1) Are there any restrictions that would prevent you, a chief executive officer of a corporation that provides telecommunications consulting services to the City of Claremont, from applying for and being appointed to the Police Commission?
- (2) What are the rules and procedures regulating conflicts of interest that may occur during your possible term on the Police Commission?

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

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.)

CONCLUSIONS

(1) Nothing in the Act would prevent you from applying for and being appointed to the Police Commission. As noted above, we do not comment on other laws outside the Act.

(2) A pamphlet explaining the general rules and procedures regulating any conflicts of interest has been enclosed for your review. If you have specific questions regarding any of the information provided, please request further written advice or call the FPPC help line at 1-866-ASK-FPPC.

FACTS

You wish to be appointed to the Police Commission for the City of Claremont ("city"). The responsibilities of the Police Commission are to review and comment on police department policies, procedures, and practices, and to assist in setting goals for the department that reflect community values. The Police Commission also provides a public forum to address concerns, complaints, and commendations regarding the police department.

You are the chief executive officer of a corporation that provides telecommunications consulting services (voice and data services, systems and infrastructure) to all departments of the city. This contract is signed by you as the chief executive officer of the corporation, and much of the consulting services are directly influenced by you. The contract is currently managed by the administrative services department of city hall.

ANALYSIS

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 financial interests. (Section 81001(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. Although we cannot provide you with specific advice since your questions are general in nature, we have furnished the standard eight-step analysis the Commission has adopted for you to apply when more specific questions arise. (Regulation 18700 (b)(1) - (8).)

The Act does not include Government Code section 1090, nor do we advise regarding the activities that may be incompatible with particular offices. The Act itself does not prohibit you from holding multiple public positions, either within a single agency or in different agencies. The conflict-of-interest provisions of the Act (section 87100 et seq.) only prohibit a public official from participating in a decision that will have a financial effect on his or her economic interests.

Step One: Are you a “public official”?

Under the Act, a “public official” is defined, in part, as a “member, officer, employee or consultant of a state or local government agency.” (Section 82048.)³ It is unclear if the Police Commission is a “local government agency,” defined in section 82041 as:

“a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.”

Since the provisions of the Act only apply to public officials, if the Police Commission is not a “local government agency” under the Act, then you will not be a public official if elected to the Commission and the conflict-of-interest provisions of the Act would not apply to you. If the Police Commission is a “local government agency,” then you are a public official and you would proceed to the next step of the standard eight-step analysis once you were faced with a specific governmental decision. We do not have the necessary facts to make this determination.

Step Two: Are you “making,” “participating in making” or “influencing” a governmental decision?

The Act’s conflict-of-interest provisions apply only to disqualify a public official from “making,” “participating in making,” or “influencing” a governmental decision. If the determination is made that the public official is not engaging in any of these actions, then the conflict-of-interest rules are not implicated and the analysis ends. Therefore, the threshold question in any conflict of interest analysis is whether you are “making,” “participating in making,” or “influencing” a governmental decision. When you are faced with a governmental decision, apply the following standards for determining whether you are “making,” “participating in making,” or “influencing” a governmental decision.

Making a Governmental Decision

Under the analysis prescribed by step two, 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, appoints a person, 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. (Section 87100; regulation 18702.1(a).)

³ To determine if you are a consultant under the Act, you would apply the standards outlined in regulation 18701(a)(2).

Participating in Making a Governmental Decision

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 decision-maker regarding the governmental decision. (Section 87100; regulation 18702.2.)

Influencing a Governmental Decision

There are two rules as to whether a public official uses or attempts to use his or her official position to influence a governmental decision. The first rule applies when the governmental decision is within or before the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency, but the public official is not a decision-maker per se. (Regulation 18702.3(a).) In that case, if “the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency” then he or she is attempting to influence a governmental decision. This includes, but is not limited to, “appearances or contacts by the official on behalf of a business entity, client, or customer.” (*Ibid.*)

The second rule applies when the governmental decision is within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(b).) Under this rule, the official cannot act or purport “to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency” to influence a decision. (*Ibid.*)

Step Three: What are your economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests. The possible economic interests are:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*⁴ of \$2,000 or more (section 87103(a); regulation 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* (section 87103(d); regulation 18703.1(b));

⁴ 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.” (Section 87103.)

- 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*⁵, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3);
- 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 expenses, income, assets, or liabilities, as well as those of his or her immediate family⁶ - this is the "*personal financial effects*" rule (section 87103; regulation 18703.5).

Since we have no detailed facts regarding a specific decision, we discuss the remaining steps only generally.

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

The next step is to determine whether the economic interests will be involved directly or indirectly in the decision. (Regulation 18700(b)(4).) A person, including a business entity or source of income, 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).)

⁵ 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. (Section 82030(a).)

⁶ "Immediate family" includes the official's spouse and dependent children. (Section 82029.)

Under the Commission's regulations, business entities and sources of income which are not directly involved under the rules stated above are considered indirectly involved for purposes of choosing the materiality standard. (Regulation 18704.1(b).)

Steps Five and Six: Will the financial effect of the governmental decision be material and reasonably foreseeable?

Once you identify your relevant economic interests, you then must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests by ascertaining the applicable materiality standard (regulations 18700(b)(5), 18705 - 18705.5) and then determining whether it is reasonably foreseeable that the standard will be met. (Regulations 18700(b)(6), 18706.) An effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required, but the effect must be more than a mere possibility. (*Hewlett* Advice Letter, No. I-02-234; *Casey* Advice Letter, No. I-02-247.)

Regulation 18705 defines standards to be used when determining whether a financial effect of an economic interest is "material." Regulation 18705.1 gives materiality standards for financial effects on business entities, and regulation 18705.3 gives the standards for sources of income. (Copies enclosed.) Once you encounter a governmental decision, you will make this factual determination by using a reasonable and objective method to assess whether it is reasonably foreseeable that your economic interests will be materially financially affected according to the monetary thresholds established by the appropriate regulation.

Steps Seven and Eight: "Public Generally" and "Legally Required Participation" Exceptions

Step seven 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. Step eight is an exception that applies when the official is legally required to participate in the decision. General information on both of these exceptions is included in the "Can I Vote? Conflicts of Interest Overview" pamphlet, which is enclosed.

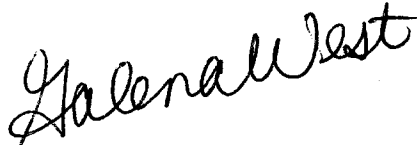
If you determine that you are a public official and encounter a governmental decision, you may wish to contact our office regarding potential conflicts of interest by requesting further written advice or calling the FPPC help line at 1-866-ASK-FPPC.

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

Sincerely,

Luisa Menchaca
General Counsel

By:



Galena West
Counsel, Legal Division

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Enclosures

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