



## FAIR POLITICAL PRACTICES COMMISSION

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November 18, 2004

Larry Myers  
Executive Secretary  
Native American Heritage Commission  
915 Capitol Mall, Room 364  
Sacramento, CA 95814

**Re: Your Request for Informal Assistance  
Our File No. I-04-213**

Dear Mr. Myers:

This letter is in response to your request for advice regarding provisions of the Political Reform Act (the "Act").<sup>1</sup> We offer you informal assistance because your question is general in nature and does not refer to a specific governmental decision.<sup>2</sup>

### QUESTION

You ask whether the Act, or other provisions of state law, prohibit you from accepting outside employment with a development corporation while you continue to serve as executive secretary to the Native American Heritage Commission.

### CONCLUSION

Your account of the facts implicates the Act's conflict of interest provisions, which we outline below for your general guidance. We are unable to offer you advice on bodies of law that may also be relevant to your plans, but which lie outside the Act and are therefore beyond our jurisdiction. We can suggest, however, that you review your agency's statement of incompatible activities, and that you seek guidance from the Office of the Attorney General regarding Government Code section 1090 in the event you or your business associates contemplate entering into any contractual arrangement with your agency.

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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 a Commission opinion or formal written advice. (Regulation 18329(c)(3).) (Copy enclosed.)

## FACTS

You are the executive secretary of the Native American Heritage Commission, an agency of the State of California charged with the protection of Native American cultural resources. Your job involves day-to-day administration of the agency between meetings of the commission, which occur every three months. In your capacity as executive secretary you make governmental decisions, although matters of policy are reserved for the commission. You are responsible for all actions of commission staff. You may make decisions regarding "likely descendants" after the discovery of Native American remains, or designate "appropriate groups" who will enter into contracts to monitor construction work in areas where archaeological sites may be uncovered.

You have had a general discussion with an attorney who proposes to start a development corporation which would solicit money from investors in an effort to build an Indian gaming casino. Although specific details have not been discussed, this person proposes to employ you in the enterprise, where you would be compensated for contacting tribal groups and persuading them to sign agreements with the proposed corporation. You anticipate that your efforts on behalf of the corporation would be conducted during the evening hours and on weekends. You believe it likely that some of the tribal groups solicited to sign an agreement with the corporation would have matters before the commission.

## ANALYSIS

The Act does not prohibit public officials from accepting paid employment in the private sector, in addition to their public offices. Such employment may, however, give rise to conflicts of interest that disqualify the official from governmental decision-making. 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 general rule, in short, is that a conflict of interest exists when a public official makes a governmental decision which will have a reasonably foreseeable, material financial effect on one or more of the official's financial interests. Thus it is possible that in accepting the proposed employment you will acquire financial interests that could involve you in a conflict of interest which would disqualify you from making governmental decisions affecting those financial interests. Since we do not know the details of your proposed employment, and you have not asked us about potential conflicts of interest in any particular governmental decision, we can only provide you with general advice on the Act's conflict of interest provisions, most particularly sections 87103 and 87104 (copies enclosed). We also include our publication "Can I Vote?" to furnish you with a general overview of the Act's conflict of interest provisions.

In applying section 87103, the Commission employs an eight-step analytical framework to assist in determining whether a public official has a disqualifying conflict

of interest. (Regulation 18700(b)(1) – (b)(8), copy enclosed.) We review the circumstances you describe within this eight-step framework.

***Steps 1 & 2. Are you a public official who may make, participate in making, or use your official position to influence a governmental decision?***

The Act's conflict of interest rules apply only to public officials. As executive secretary of the Native American Heritage Commission, a state agency, you are a "public official" within the meaning of the Act's conflict of interest provisions, who may make, participate in making, or use your official position to influence a governmental decision, as these terms are defined at regulations 18702 -18702.5 (copies enclosed).

***Step 3. What are your economic interests?***

The Act's conflict of interest provisions refer only to *economic* interests, defined at regulations 18703.1 through 18703.5 (copies enclosed). You have not described any specific economic interests you presently have or may acquire through new employment – such as interests in a business entity through shared ownership, employment, investment, or as a source of income, as well as economic interests in other persons or groups who may also become sources of income to you. The attached regulations should assist you in identifying such economic interests. If you have specific questions on this topic, we urge you to contact our office for further assistance.

***Step 4. Are these interests directly or indirectly involved in a governmental decision?***

The next step is to determine whether any of your economic interests will be involved directly or indirectly in a governmental decision. You can answer this question by consulting regulations 18704.1 through 18704.5, (copies enclosed) which prescribe the circumstances under which particular kinds of economic interests are directly involved, or indirectly involved, in a governmental decision.

***Steps 5 & 6. Will the decision have a reasonably foreseeable material financial effect on your economic interest(s)?***

Once having classified your economic interests as directly or indirectly involved in a governmental decision, you must next identify the materiality standard appropriate to each economic interest. Regulations 18705.1 – 18705.5 (copies enclosed) establish materiality thresholds for every type of economic interest. When you have found the materiality standards applicable to each economic interest, the next step is to determine whether it is "reasonably foreseeable" that the decision will have an effect defined as "material" for any of your economic interests. A material financial effect on an economic interest is "reasonably foreseeable" if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered "reasonably foreseeable," but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) If a material financial effect on any of your economic interests is "reasonably foreseeable,"

you have a conflict of interest that prohibits you from taking any decision-making role in that decision – unless the “public generally” or “legally required participation” rules apply.

### ***Steps 7 and 8. Exceptions***

An official who otherwise would have a conflict of interest in a decision may still participate in that decision if the circumstances are such that the “public generally” rule might be invoked. This rule applies when the reasonably foreseeable financial effect of a decision upon a public official's economic interests is “material,” but not distinguishable from foreseeable effects on a significant segment of the public generally. (Section 87103; regulation 18707(a).) We do not now have reason to believe that the “public generally” rule would apply in your case, but mention it for the sake of completeness.

Finally, an official with a conflict of interest in a decision may still participate in that decision if the “legally required participation” rule is applicable. (Section 87101; regulation 18708.) This is an exception that typically applies when an agency is unable to assemble a quorum of its members or otherwise make a governmental decision without the participation of an official who has a conflict of interest. Here again, we have no basis for concluding that this rule has application in your case.

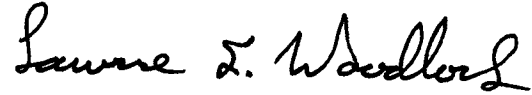
In addition to the Act's general conflict of interest provisions, section 87104 prohibits any public official of a state agency from acting as an agent or attorney for, or otherwise representing, any other person for compensation before his or her agency, or before an officer or employee thereof, if the object is influencing action on a contract, grant, loan, license, permit, or other entitlement for use.

We close by reminding you that we have authority only to provide legal advice on provisions of the Political Reform Act. Other bodies of law may also be implicated by your proposed employment. For example, Government Code section 19990 provides for each state agency to develop a statement of incompatible activities, which includes specific enterprises or employment “clearly inconsistent, incompatible, in conflict with, or inimical to” the duties of the agency’s officials and employees. You must refer to your agency’s statement of incompatible activities for further details. Similarly, Government Code section 1090 regulates, and generally prohibits, contractual relationships between state agencies and persons employed by those agencies. The Attorney General’s office can provide you with assistance in determining your duties under section 1090.

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

Sincerely,

Luisa Menchaca  
General Counsel

A handwritten signature in black ink, appearing to read "Lawrence T. Woodlock". The signature is written in a cursive style with a large initial 'L'.

By: Lawrence T. Woodlock  
Senior Counsel, Legal Division

Enclosures  
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