



FAIR POLITICAL PRACTICES COMMISSION

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August 28, 2007

Robert A. Halpin
Planner II
Tehama County Planning Department
444 Oak Street, Room I
Courthouse Annex
Red Bluff, CA 96080

**RE: Your Request for Advice
Our File No. A-07-133**

Dear Mr. Halpin:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Also, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTION

Do you, as an employee of the Tehama County Planning Department, have a disqualifying conflict of interest that precludes you from processing certain use permits for natural gas wells and performing environmental analyses pursuant to the requirements of the California Environmental Quality Act?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

As a public official employed by the Tehama County Planning Department, you may not make, participate in making or in any way attempt to use your official position to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on your wife's employer, Irani Engineering.

FACTS

You are a planner for Tehama County. As a planner, it is your task to process use permits for natural gas wells. The task requires you to review use permit applications and perform an environmental analysis of the project pursuant to the requirements of the California Environmental Quality Act. This process involves a site visit to determine if there are any characteristics of the site that would require conditions or mitigations such as the existence of vernal pools and endangered species or the close proximity of a dwelling unit where the residents may be impacted by noise. You then complete an Initial Study by utilizing an approved checklist, the information gathered during the site visit and any information provided by responsible and trustee agencies.

The Initial Study and a Negative Declaration are filed with the County Clerk and Recorder and copies are distributed through the state clearinghouse. Notice is given to all adjoining land owners within 1,000 feet of the project parcel and to at least ten resident owners in the area that the filing has occurred and that the matter is set for a public hearing before the Planning Commission.

It is then your task to prepare a staff report for the Planning Commission. The staff report contains a brief review of the project setting, responses to comments, if any, received from concerned citizens, subfindings and findings that the Planning Commission may use if they choose to approve the project and a set of conditions and/or mitigation measures recommended by the Technical Advisory Committee. The staff reports do not recommend approval or denial to the Planning Commission; in addition to subfindings and findings, the staff reports contain a set of requirements that the project would need to meet if the Planning Commission chooses to approve the project in light of all the information and public testimony that it received.

As part of your duty to process the gas well applications, you usually work with the applicant or their representative. Your wife, Mary, works for Irani Engineering. Irani Engineering does consulting for natural gas well operators and exploration companies. The depth of the company's consultation may vary depending on the client. One of the consulting services is to prepare the applications and deliver them to the permitting agency. The preparation of the applications for use permits in Tehama County is done by another employee of Irani Engineering. Mary, as a notary, witnesses the signature of the person preparing the application. Mary then delivers the application and fees to the Tehama County Planning Department. Mary may then appear before the Planning

Commission at the public hearing to answer any questions the Planning Commission may have regarding the specific project.

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 own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) 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 a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) The general rule, however, is that a conflict of interest exists whenever a public official makes or participates in making a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Step 1: Are you a public official?

The Act's conflict-of-interest provisions apply only to public officials, defined as "every member, officer, employee or consultant of a state or local government agency." (Section 82048.) As a planner for the County of Tehama, a local government agency, you are a public official.

Step 2: Are you making, participating in making or influencing a governmental decision?

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 a governmental decision" when the official either negotiates a governmental decision (without significant substantive review), or by advising or making recommendations to the decisionmaker (either directly or without significant intervening substantive review). (Regulation 18702.2.)

A public official "advises or makes recommendations to the decisionmaker" in one of two ways: (1) conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision, or (2) preparing or presenting any report, analysis, or opinion, orally, or in writing which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision. (Reg. 18702.2(b).)

A public official is attempting to use his or her official position to influence a governmental 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 his or her agency. (Regulation 18702.3.)

The facts you provided indicate that, as your role of planner for Tehama County, you participate in making governmental decisions.

Step 3: What is your economic interest?

The economic interests that might give rise to a conflict of interest are defined in regulations 18703-18703.5. The specific economic interest that applies to you relative to this question is a source of income, 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's "income" for conflict-of-interest purposes includes his or her community property interest in the income of his or her spouse. (Section 82030(a).) Accordingly, if your wife has received \$1,000 or more from Irani Engineering within 12 months prior a governmental decision, Irani Engineering will be a source of income to you.² Your wife does not have an ownership interest in Irani Engineering so therefore the clients of the firm are not considered sources of income to you. (Section 82030(a).)

You have an economic interest in Irani Engineering because your wife is employed by the company and presumably will have received income from it aggregating \$1,000 or more within 12 months before any relevant decision. (Section 87103(c).) Accordingly, as a public official, you may not make, participate in making, or use your official position to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on the Irani Engineering.

Step 4: Will your economic interest be directly or indirectly involved in the decision?

Any person, including a business entity, which is a source of income in which a public official has an economic interest, is directly involved in a governmental decision if that person, either directly or by an agent, initiates a proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or is the subject of a proceeding before the official or the official's agency. (Regulation 18704.1(a)(1)-(a)(2).) A business entity or source of income is the subject of a proceeding concerning a decision before the official or the official's agency if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the source of income. (Regulation 18704.1(a)(2).)

² The payment to your spouse would be \$1,000 in order for your community property share to reach the \$500 threshold of Section 87103(c).

Since Irani Engineering is a source of income to you, we must determine whether Irani Engineering appears before your agency when it represents its clients. We conclude that it does not. Irani Engineering is acting as the agent for its clients who are the applicants. As applicants in a proceeding, the clients of Irani Engineering would be directly involved in the decisions. (Regulation 18704.1(a).) If a business entity or source of income is not directly involved in a governmental decision, it is considered to be indirectly involved.

Steps 5 and 6: What are the applicable materiality standards and is it reasonably foreseeable that the financial effects of the governmental decisions upon your economic interest will meet this materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effects of a governmental decision on a public official's economic interests are material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

A. Material Financial Effect

When a business entity that is a source of income to a public official is indirectly involved in a governmental decision, the financial effect deemed material varies in amount in direct relationship to the size of the business entity. Regulation 18705.1(c) sets out four tiers that rank business entities by size, using either the business entity's public listing status (i.e., among Fortune 500, listed on the New York Stock Exchange, American Stock Exchange, or NASDAQ) or, if not listed, the business entity's earnings before taxes (or in certain instances net income) over the most recent fiscal year.

In a telephone conversation with Commission staff on August 15, 2007, you indicated that your wife's employer is not of sufficient size to be publicly traded or meet the eligibility criteria to be publicly traded. Thus, due to its small size, this entity falls under the ranking provided in Regulation 18705.1(c)(4). The materiality standard appropriate to that ranking and applicable to this entity is:

“(A) The governmental decision will result in an increase or decrease to the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of business entity's assets or liabilities of \$20,000 or more.”

(Regulation 18705.1(c)(4)(A) - (C).)

The question now becomes whether it is reasonably foreseeable that any decisions you make will have any of the above-listed financial effects on your wife's employer. If so, the effect will be deemed material and you will have a conflict of interest with respect to these decisions.

B. Reasonably Foreseeable

An effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPCC Ops. 198.)

For example, if, as a result of the approval of a natural gas permit submitted by Irani Engineering, it was substantially likely that the engineering firm would gain additional engineering work developing that natural gas field resulting in fiscal year earnings to the firm of \$20,000 or more, you could not participate in the approval of that permit.

Steps 7 and 8: Public Generally and Legally Required Participation

An official who otherwise has a conflict of interest in a decision may still participate under the "public generally" exception. This exception applies when the financial effect of a decision on a public official's economic interests is substantially the same as the effect on a significant segment of the public. The "legally required participation" rule applies when the official's participation in a governmental decision is legally required. (Section 87101; Regulation 18708.) You have not presented any facts indicating that either the "public generally" or "legally required participation" exceptions would be applicable herein. Accordingly, we have not provided an analysis involving those steps.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Trish Mayer
Political Reform Consultant
Technical Assistance Division

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