



FAIR POLITICAL PRACTICES COMMISSION

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

(916) 322-5660 • Fax (916) 322-0886

August 29, 2008

Barbara Coler
14 Ace Court
Fairfax, California 94930

Re: Your Request for Informal Assistance
Our File No. I-08-111

Dear Ms. Coler:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your inquiry is general in nature and does not involve any particular governmental decision, we are treating your request as one for informal assistance.² 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, Government Code Section 1090 or Public Contract Code Section 10410. Also, Government Code Section 19990, which is not part of the Act, allows 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. As we do not offer advice beyond the confines of the Act, we must refer you to your agency's counsel and statement of incompatible activities to ensure that your activities do not violate conflict-of-interest laws outside the Act or are otherwise incompatible with your responsibilities to the agency.

QUESTION

As a supervising hazardous substances scientist for the State of California at the Department of Toxic Substances Control, may you take a second job providing consulting services to a private company that purchases, investigates, performs cleanups of and redevelops contaminated properties outside of California?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Regulation 18329(c), enclosed.)

CONCLUSION

The Act does not bar a public official from being employed by a private business while also being a public official. However, being employed by a private business while employed as a public official may give rise to conflicts of interest that disqualify the official from governmental decision-making. A conflict of interest under the Act may arise within the context of specific governmental decisions that have a reasonably foreseeable material financial effect on one or more of an official's economic interests, including the official's business interests and sources of income. Because conflicts of interest can only arise in the context of a governmental decision, and your question does not relate to your participation in a governmental decision, no conflict of interest is apparent at this time.

FACTS

For the past year you have been employed at the Department of Toxic Substances Control ("DTSC") as a supervising hazardous substances scientist. Prior to that, you were in a Career Executive Assignment appointment for about 13 years at DTSC. You are now contemplating taking a second job working for a friend who has started a company that purchases, investigates, performs cleanups of and redevelops (or sells for redevelopment) contaminated properties or "brownfields." You would use your investigation and cleanup expertise to assist this company in regulatory interface, investigation and cleanup. The properties in question would all be outside of California and would have no relationship with DTSC or other California regulatory agencies. All work would be performed on personal time outside California, and you will report all income in accordance with the Act.

ANALYSIS

Conflict of Interest under Section 87100

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 an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Step 1. Are you a “public official” within the meaning of section 87100?

Section 82048 defines a public official as “every member, officer, employee or consultant of a state or local government agency.” As a supervising scientist at DTSC, which is a state government agency, you are a public official. Therefore, you may not make, participate in making, or otherwise use your position to influence any decisions that will have a reasonably foreseeable material financial effect on any of your economic interests.

Step 2. Will you be 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, 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 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 have provided do not indicate that you will be making, participating in making or influencing any governmental decision. Hence, our analysis stops here. The process of investigating and performing cleanups of contaminated properties, including interfacing with regulatory agencies, all occurring outside of California, will not give rise to a conflict of interest under the Act.

If, however, you are faced with a governmental decision in the future, we provide you the following information to assist you with your analysis. Essential to determining whether you may have a disqualifying conflict of interest is the identification of your economic interests that may be affected by a governmental decision. There are six kinds of economic interests from which conflicts of interest may arise. They are defined in Section 87103 and Regulations 18703-18703.5 and include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).
- Any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)

- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2).
- Any source of income, including promised income, to the public official which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$390 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Employment by a private business may implicate some of the economic interests identified above. The most obvious economic interests implicated are your (i) interest in the business entity, and (ii) the source of income the company provides.

If you have an economic interest which may be financially affected by a governmental decision, it would then be necessary to determine whether you were indeed making, participating in making, or influencing a governmental decision, whether it was foreseeable that the decision would impact one of your economic interests, and whether any such impact would amount to a “material financial effect,” as defined by statute and regulation. (Regulations 18700-18708.) Please feel free to consult us if a specific issue arises for you under these provisions.

Conflict of Interest under Section 87104

Finally, Section 87104 prohibits a public official in a state agency, for compensation, from acting as an agent or otherwise representing any other person by making a formal or informal appearance before, or oral or written communication to, the agency or any officer or employee thereof for the purpose of influencing an agency decision on a contract, grant, loan, license, permit or other entitlement for use. As with the application of Section 87100 above, the facts you present indicate that you do not presently contemplate engaging in outside employment involving decisions made by your agency. Therefore, Section 87104 is not now applicable, but we suggest that you contact us if a specific issue arises under this provision.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in cursive script that reads "Valentina Joyce". The signature is written in black ink and is positioned above the typed name.

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl
Enclosure