



FAIR POLITICAL PRACTICES COMMISSION

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February 5, 2009

Aaron P. Noble
Department of General Services
Division of the State Architect
1102 Q Street
Sacramento, California 95811

Re: Your Request for Informal Assistance
Our File No. I-09-005

Dear Mr. Noble:

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.

We also note that you ask about the applicability of an Attorney General Opinion interpreting Section 19990 to your situation. 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 not otherwise incompatible with your responsibilities to the agency.

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.)

QUESTIONS

1. As a senior architect at the Division of State Architect, whose duties include recommending initial opinions and participating in votes on appeals brought by architects whose projects have been denied, may you conduct private training seminars for architects who may later bring an appeal before you and your agency?

2. Do your duties as a senior architect conducting accessibility seminars, on behalf of your agency, for architects, engineers, building department personnel, and building code consultants preclude you from conducting similar private seminars for profit?

CONCLUSIONS

1. While the Act does not bar a public official from operating a private business while also being a public official, doing so may give rise to conflicts of interest that disqualify the official from governmental decisionmaking. 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. For example, if an architect who has paid you \$500 or more within 12 months prior to your participation in a decision to grant or deny his or her appeal and if, at the time you will be participating in the decision, the decision will have a reasonably foreseeable material financial effect on the architect, you may not participate in that decision.

2. The Act does not bar a public official from operating a private business. As we do not offer advice beyond the confines of the Act, we refer you to your agency's counsel to ensure that your activities are not incompatible with your responsibilities to the agency under Government Code Section 19990, which is not part of the Act.

FACTS

You are employed as a senior architect by the Department of General Services, Division of the State Architect ("DSA"). A small part of your duties at DSA includes providing interpretive opinions on appeals to DSA headquarters and participating in votes on these appeals. The appeals are brought by architects whose projects have been rejected by a regional DSA office on the basis that the projects do not comply with the accessibility provisions of the California Building Code. After you have submitted an initial opinion to the DSA appeal committee, a vote is taken to grant or deny the appeal. You are one of four voting committee members. If the committee cannot reach consensus, the State Architect renders the final decision.

Another small part of your job consists of conducting accessibility seminars to architects, engineers, building department personnel, and building code consultants. Seminar fees are paid to DSA.

You are contemplating starting your own business providing accessibility seminars similar to the ones you are now providing as part of your job with DSA. You intend to offer these seminars primarily to California licensed architects. You would do so during your off-duty time and would include in all seminar materials a statement that the state does not endorse, sponsor or approve the seminar.

ANALYSIS

Question 1.

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 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" 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 senior architect at DSA, 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.)

When you prepare and submit an interpretive opinion for consideration by a DSA committee for the purpose of deciding an appeal, you are participating in a governmental decision. Also, when you vote on an appeal in your capacity as a member of the decisionmaking committee, you are making a governmental decision.

Step 3. What are your economic interests?

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a 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).)
- 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.)
- An official has an economic interest in any source of income, including promised income, totaling \$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 total \$420 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 family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

When you start your seminar business, you will have an economic interest in that business entity, both as an investment (if you invest \$2,000 or more in the business) under Section 87103(a) and Regulation 18703.1(a) and as a manager of the business entity under Section 87103(d) and Regulation 18703.1(b).

Both the business entity and any clients from whom you receive income totaling \$500 or more within 12 months prior to your making or participating in a governmental decision will be a source of income to you. (Section 87103(c); Regulation 18703.3.)

Your employer, the Department of General Services, is not considered a source of income because the Act's definition of "income" excludes salary, reimbursement for expenses, social security, disability and other similar benefit payments from, among others, a state agency. (Section 82030.)

Finally, a public official always has an economic interest in his or her personal finances under Section 87103 and Regulation 18703.5.

Step 4. Will your economic interests be directly or indirectly involved in decisions you will make, participate in making or influence as a public official?

The governmental decisions in which you are involved consist of making recommendations and voting on appeals by architects whose projects have been rejected for failure to comply with the accessibility requirements of the California Building Code.

Business Entities and Sources of Income. Under Regulation 18704.1(a) a person, including business entities and sources 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.”

From the facts you have provided, it appears that appeals to DSA are filed by the architects of building projects. Because they are initiating the appeals proceedings, they are directly involved in the governmental decisions. In contrast, your business will not be initiating or be a named party in any proceeding and, therefore, would not be directly

involved. A business entity or source of income that is not directly involved in a governmental decision is considered indirectly involved.

Personal Finances

A public official or his or her immediate family is deemed to be directly involved in a governmental decision that has any financial effect on his or her personal finances or those of his or her immediate family.

Step 5. What is the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is 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.

Business Entity

Regulation 18705.1(c) sets forth the materiality standard for economic interests in business entities that are *indirectly* involved in a governmental decision, including those that are sources of income. This is the standard that would apply to your business under the facts you have described. For relatively small businesses, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will increase/decrease its annual gross revenues by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets by \$20,000 or more. (Regulation 18705.1(c)(4).)

Sources of Income

Under Regulation 18705.3, any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official's agency, is deemed material. (The "one penny" rule.) This would be the applicable materiality standards for those persons who are income to you and are bringing appeals before your agency.

Personal Finances

A reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least \$250 in any 12-month period. (Regulation 18705.5(a).)

Step 6. Is it reasonably foreseeable that the financial effect of the governmental decisions on your economic interests will meet the applicable materiality standard?

An effect is considered “reasonably foreseeable” if the effect is “substantially likely.” (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

You have suggested that a future private student of yours may initiate an appeal before DSA. If you received income of \$500 or more from that student within 12 months prior to the decision coming before you, that student would be a source of income to you. If that is the case, in all likelihood, you would not be permitted to participate in that decision because, under Regulation 18705.3, any reasonably foreseeable financial effect on the appellant (i.e. your source of income) is deemed to be material. Because we have no facts regarding a particular governmental decision or a particular appellant/student, a determination cannot be made whether a decision will have a reasonably foreseeable material financial effect on an appellant.

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra*, at 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*, at 71), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Steps 7 & 8. The “public generally” and “legally required participation” exceptions.

Even if a material financial effect on a public official’s economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official’s economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to your situation.

Conflict of Interest under Section 87104

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 operating a business 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.

Question 2.

As stated above, 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 not otherwise incompatible with your responsibilities to the agency.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

Enclosure