



FAIR POLITICAL PRACTICES COMMISSION

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May 18, 2009

Will Kempton, Director
Department of Transportation
1120 N Street
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-09-113

Dear Mr. Kempton:

This letter responds 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 may have already taken place, and any conclusions contained in this letter apply only to prospective actions. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

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 the Act's conflict-of-interest provisions prohibit you from making, participating in, or using your position to influence a governmental decision that may have a financial effect on your adult son or the company for which he works?

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

Generally, a public official does not have a conflict of interest under the Act solely because the official makes, participates in, or influences a governmental decision that has a financial effect on his or her adult child or a company for which the adult child works. For the Act's conflict-of-interest provisions to apply, the official must have a specific economic interest in the child or in the company for which the child works.²

FACTS

You are the Director of the California Department of Transportation ("Caltrans") and are ultimately responsible for all activities of the entire department including management, operations, and maintenance of the State highway system. Your position is designated in the Caltrans' conflict-of-interest code.

Your son Mark Kempton is 38 years old and has accepted employment with Skanska International. His position is located in New York City, and his job title is "process manager." Skanska is a Swedish-owned Fortune 500 company with 60,000 employees around the world. Skanska bills itself as a "leading international project development and construction company." Skanska, and/or its wholly own subsidiary, does business with Caltrans.

ANALYSIS

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. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Step One: Are you a "public official?"

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency" (Section 82048.) As the director of Caltrans, you are a public official within the meaning of the Act.

² We emphasize that this conclusion is limited to the provisions of the Act. Your participation in the decisions you have described may be prohibited by other provisions of law including common law conflict-of-interest laws and Government Code Section 1090. We suggest you consult with your department's counsel or the Attorney General's Office on these issues.

Step Two: 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, acting within the authority of his or her position and without significant intervening substantive 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 decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) You are making, participating in making, or influencing a governmental decision if you take part in a decision relating to your son’s company Skanska in your role as the director of Caltrans.

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, described as follows:

- 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)); or 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).)
- 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 economic interest in 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.)
- An economic interest in a source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

While an official may have a disqualifying conflict of interest in a decision if the decision has a financial effect on a member of the official's "immediate family," Section 82029 defines "immediate family" as the official's "spouse and dependent children." Furthermore, we have previously advised that "dependent children" are those children who are under 18 and whom the official can claim as a dependent for federal income tax purposes. (See, e.g. *Tremlett* Advice Letter, I-89-386.) Accordingly, you do not have a disqualifying conflict of interest in a decision that has a financial effect on your 38-year old son or the company for which he works solely because he is your son. Instead, you would only have a potential conflict of interest in the decision if the decision affected one of the five economic interests identified above.³

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

Sincerely,

Scott Hallabrin
General Counsel



By: Brian G. Lau
Counsel, Legal Division

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³ Note that you are subject to disqualification from a decision if you have an economic interest in your son such as an economic interest in your son as a source of income. (Section 87103(c); Regulation 18703.3.) You are not, however, subject to disqualification from a decision based upon an economic interest in your son as a source of gifts because the term "gift," as defined by the Act, does not include payments from "an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of any such person" (Section 82028(b)(3).) As for reporting obligations, the Act requires certain public officials to file statements of economic interest (Form 700) disclosing their financial interests. (Sections 87200, 87300, and 87302.) Because your position with Caltrans is designated in its conflict-of-interest code, you must report economic interests under Section 87302. However, your reporting obligations are limited to those economic interests recognized under the Act. Thus, you are only required to disclose your son or your son's company if you have an economic interest in your son or his company as identified above.