



FAIR POLITICAL PRACTICES COMMISSION

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July 7, 2009

Tom Tobin
19230 Sonoma Highway
Sonoma, California 95476

Re: Your Request for Advice
Our File No. A-09-150

Dear Mr. Tobin:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ 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. Also, we do not provide advice regarding application, if any, of the Public Contract Code or your activities that may be affected by the California Sex Offender Management Board's statement of incompatible activities, as discussed below. We suggest you consult with your agency's counsel or the Attorney General's office regarding these issues.

QUESTIONS

1. As an appointed member of the California Sex Offender Management Board ("SOMB"), and a co-owner of a business that contracts with the California Department of Corrections and Rehabilitation ("CDCR") to provide evaluation and treatment services for sex offenders, may you participate in a CDCR conference regarding in-prison treatment programs for sex offenders in CDCR facilities without violating the conflict-of-interest provisions of the Act?

2. May your business bid on CDCR contracts if, as a SOMB member, you have advocated for sex offender treatment, provided information to SOMB regarding the nature and value of such treatment, and made recommendations and voted on issues relating to sex offender treatment?

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.

CONCLUSIONS

1. Yes. You may attend the conference so long you are not participating in the conference to represent your company in influencing CDCR's decisions to award contracts to your company.
2. The Act does not prevent you from participating in these activities as a member of SOMB, an advisory board, so long as your participation is not an attempt to influence CDCR's decisions on contracts regarding your company.

FACTS

You are an appointed member of SOMB. SOMB is a statutorily-created advisory committee whose purpose is to address issues related to the community management of the state's adult sex offenders by conducting an assessment of current management practices, submitting a report of the assessment to the Legislature, and developing recommendations to improve management practices for offenders. Two members of SOMB must be appointed to represent California professionals providing sex offender treatment. This requirement is the basis for your appointment to SOMB. You also co-own a business, Sharper Future, which provides evaluation and treatment services for sex offenders. From time to time, your company has contracted with CDCR to provide such services.

You were recently invited by a CDCR administrator to attend a CDCR conference at which participants will gather and reflect on ideas related to a potential in-prison treatment program for sex offenders in CDCR facilities. It is possible that if such a program is created, your business will be an interested bidder for providing services under the program. No decisions will be made by participants at the conference.

In our telephone conversation of June 25, 2009, you advised that SOMB does not employ staff but is served, instead, by CDCR staff. Also, SOMB's budget is controlled by CDCR. The operations of SOMB, in your opinion, are controlled by the SOMB members. These activities include conducting research, preparing reports, and controlling the agendas for meetings of SOMB members in accordance with SOMB's legislative mandate.

ANALYSIS

General Rules

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.

As we stated in our previous advice letter (*Tobin Advice Letter No. I-08-192*), SOMB members are not "public officials" defined in Section 82048 for purposes of Section 87100 because they act only in an advisory capacity and do not make final government decisions and do not have the power to compel decisions or to veto them.² Therefore, the conflict-of-interest provisions of Section 87100 do not apply to you as a member of SOMB.

Section 87104

However, as explained in our prior letter, when your company bids on a contract with the state, your conduct is governed by Section 87104 of the Act:

"(a) No public official of a state agency shall, for compensation, act as an agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance before, or any oral or written communication to, his or her state agency or any officer or employee thereof, if the appearance or communication is for the purpose of influencing a decision on a contract, grant, loan, license, permit, or other entitlement for use."

Accordingly, Section 87104 prohibits you from appearing before or communicating with your agency as a representative of your company if the appearance or communication is for the purpose of influencing a decision on a contract, grant, loan, license, permit, or other entitlement for use.³

² There is an exception under which members of advisory boards are considered public officials if their substantive recommendations are regularly approved without significant amendment or modification over an extended period of time. Your facts suggest that this exception does not apply in this instance.

³ The broad definition of "person" applicable to Section 87104 would include your company, "Sharper Future." (See page 5 of our prior letter).

A threshold question in applying Section 87104 is to identify “your” agency. In the context of the Act’s post-governmental employment restrictions, (Sections 87401 and 87402), we have concluded that an official’s “state administrative agency” is the body that controls the budget, personnel and other operations of the entity where the employee worked. (*Corum* Advice Letter, No. A-02-258; *Grimm* Advice Letter, No. I-96-114.) It is appropriate to use the same factors to identify your agency under Section 87104. You have advised that CDCR controls SOMB’s budget and personnel. Applying these factors, we conclude that CDCR is “your” agency and your conduct is governed by the prohibitions of Section 87104 with respect to appearances or communications with any officer or employee of CDCR.

Influencing a Governmental Decision

An official is attempting to influence a governmental decision within the official’s agency when the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer (Regulation 18702.3(a).)

Question 1

Because CDCR officials will be present at the conference, you should avoid making any reference to your company as a potential provider of in-facility treatment while attending the conference as this could be construed as attempting to influence a member, officer, employee or consultant of CDCR.

Question 2

Advocating for sex offender treatment, providing information to SOMB regarding the nature and value of such treatment, and making recommendations and voting on issues relating to sex offender treatment, as a member of SOMB, is not prohibited by the Act and, therefore, your company may bid on CDCR contracts *unless* you have engaged in these activities “for the purpose of influencing a decision...” by CDCR to award a contract to your company. Your conduct in these matters should be guided by the rules discussed above.

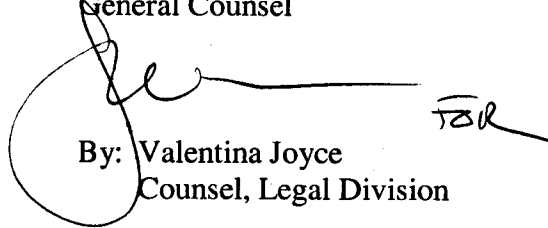
We also bring to your attention Government Code Section 19990, which is not part of the Act but may be applicable to your situation. Generally, Government Code Section 19990 requires each state agency to develop a statement of incompatible activities, which includes specific enterprises or employment “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 SOMB’s attorneys or the Attorney General’s Office to ensure that your activities are

not incompatible with your responsibilities to SOMB or do not otherwise implicate provisions of law outside the Act.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in black ink, appearing to be 'S. Hallabrin', is written over the typed name. To the right of the signature is a small, stylized handwritten mark that looks like 'FAR'.

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl