



FAIR POLITICAL PRACTICES COMMISSION

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December 18, 2009

Josie Flores-Clark
City of National City
1243 National City Blvd.
National City, CA 91950

**Re: Your Request for Informal Assistance
Our File No. I-09-225**

Dear Ms. Flores-Clark:

This letter is in response to your request regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your question seeks general guidance, we are treating your request as one for informal assistance.² In addition, we are only advising as to State law contained in the Act.

QUESTION

Must the positions of Executive Assistant III and IV be included in the City of National City's conflict-of-interest code?

CONCLUSIONS

As explained below, except in those instances when the Commission is the code reviewing body, which it is not in this case, the Commission will not render advice regarding the interpretation of an agency's conflict-of-interest code or the application of that code to a specific individual until the person first requests a determination from the agency and the agency's code reviewing body pursuant to Regulation 18329.5 (copy enclosed). Therefore, you must first request a determination from the city and the City Council of National City as to whether the

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. (Section 83114; Regulation 18329(c)(3).)

positions of Executive Assistant III and IV should be included in the city's conflict-of-interest code.

FACTS

You hold the position of Executive Assistant III for the City of National City and you work directly under the supervision of the Mayor. You state that your position is solely ministerial, secretarial, manual or clerical, and that you have no authority or opportunity to make governmental decisions. On September 15, 2009, the City Council passed Resolution 2009-224 adopting an amended conflict-of-interest code to include your position of Executive Assistant III and the position of Executive Assistant IV that report to the Mayor, City Manager, and City Attorney. You have included with your request for advice a copy of Resolution 2009-224 and accompanying staff report, and class specification descriptions for the Executive Assistant III and Executive Assistant IV positions.

ANALYSIS

In appropriate circumstances, the Act requires public officials³ to disqualify themselves from acting in order to avoid a conflict of interest. (Section 81002(c)) To accomplish this purpose, the Act requires that certain public officials disclose their financial interests in accordance with the conflict-of-interest code. This conflict-of-interest code both enumerates the positions within the agency that make or participate in making decisions that may have a foreseeable and material effect on the financial interests of the official filling the position and prescribes a level of disclosure for the official commensurate with the official's duties. Section 87301 provides that a conflict-of-interest code should be formulated at the "most decentralized level possible," which means the conflict-of-interest code is developed by the official's agency. (See Sections 87300-87313.)

Under Regulation 18329.5, the Commission will not render advice regarding the interpretation of an agency's conflict-of-interest code or the application of that code to a specific individual unless certain requirements are met. In those instances in which the Commission is not the code reviewing body for the conflict-of-interest code in question, the Commission will not render advice until the person requesting the advice, or the person's authorized representative, first requests a determination from the agency for which the person provides services *and* that agency's code reviewing body.⁴ (Regulation 18329.5(a)(3)(A).) The code reviewing body for the city's conflict-of-interest code is the City Council for the City of National City. (Section 82011(c).)

³ Section 82048 states that "public official" means "every member, officer, employee, or consultant of a state or local government agency."

⁴ When the Commission is the code reviewing body for the conflict-of-interest code in question, the Commission will not render advice until the person requesting the advice, or the person's authorized representative, first requests a determination from the agency for which the person provides his or her services. (Regulation 18329.5 (a)(2).) The Commission is the code reviewing body for all state agencies, other than an agency in the judicial branch of government, or any local government agency with jurisdiction in more than one county. (Section 82011(a).)

As the "code reviewing body" the City Council of the City of National City makes the determination regarding whether or not its employees are "designated employees" subject to the city's conflict-of-interest code.

The term "designated employee" means any officer, employee, member, or consultant of any agency whose position with the agency is designated in a Conflict of Interest Code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. (Section 82019(a)(3).)

Pursuant to Regulations 18702.1 and 18702.2, this determination will be based on whether or not the employee makes or participates in making governmental decisions:

"(a) A public official 'makes a governmental decision,' except as provided in 2 Cal. Code Regs. Section 18702.4, when the official, acting within the authority of his or her office or position:

"(1) Votes on a matter;

"(2) Appoints a person;

"(3) Obligates or commits his or her agency to any course of action;

"(4) Enters into any contractual agreement on behalf of his or her agency;

"(5) Determines not to act, within the meaning of subdivisions (a)(1), (a)(2), (a)(3), or (a)(4), above, unless such determination is made because of his or her financial interest. When the determination not to act occurs because of the official's financial interest, the official's determination may be accompanied by an oral or written disclosure of the financial interest." (Regulation 18702.1.)

A public official 'participates in making a governmental decision,' except as provided in Title 2, California Code of Regulations, section 18702.4, when, acting within the authority of his or her position, the official:

"(a) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

"(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

"(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 referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); 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 referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A)." (Regulation 18702.2.)


You are required by law to file the Form 700 within 30 days following the effective date of the City of National City's Conflict of Interest Code. Additionally, pursuant to Regulation 18329.5(a)(3)(A), you must first request a determination from both the city⁵ and the city council as to whether the Executive Assistant III position is required to be included in National City's Conflict-of-Interest Code.

Section 87307 (copy enclosed) sets out the procedures for an individual to petition the agency and the code reviewing body for an amendment to the city's conflict-of-interest code. Regulation 18737 (copy enclosed) allows the code reviewing body to suspend or modify disclosure when an individual appeals his or her designation in the code.

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

Sincerely,

Scott Hallabrin
General Counsel

By: 
MaryJo Tobola
Political Reform Consultant
Technical Assistance Division

MJT:jgl
Enclosure

⁵ We suggest that you prepare a written petition to the legal counsel of the city.