



## FAIR POLITICAL PRACTICES COMMISSION

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October 22, 2009

Susan Klein-Rothschild  
Santa Barbara Public Health Department  
Community Health Administration  
300 North San Antonio Rd.  
Santa Barbara, CA 93110-1332

Re: Your Request for Advice  
**Our File No. A-09-232**

Dear Ms. Klein-Rothschild:

This letter is in response to your request on behalf of Dr. Ron Faoro for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based solely on the facts presented; the Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Nothing in this letter may be construed to evaluate any conduct that has already taken place. Please bear in mind also that our advice is limited to obligations arising under the Act, and does not consider other bodies of law such as common-law conflict of interest.

### QUESTION

Does Ron Faoro, a doctor of veterinary medicine presently serving as Chairman of Santa Barbara County's Spay/Neuter Task Force, have a disqualifying conflict of interest in advocating that the Board of Supervisors adopt the ordinance as recommended by the Task force?

### CONCLUSION

No. Because Dr. Faoro is a member of a temporary body consisting of eleven uncompensated members appointed for their interest or expertise relevant to the task of drafting a model ordinance to be submitted to the Board of Supervisors, which retains full power to accept,

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<sup>1</sup>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.

modify or reject recommendations of the Task Force, he sits on a purely advisory body and is not a "public official" subject to the Act's conflict of interest rules.

### FACTS

You request formal written advice as the authorized representative of Ron Faoro, D.V.M., in connection with testimony that Dr. Faoro will present to the Santa Barbara Board of Supervisors (the "Board") on November 3, 2009. Doctor Faoro owns and operates a local veterinary clinic. Last year the Board considered a spay/neuter ordinance, but deferred final action on that ordinance in the face of opposition to mandated spay/neutering requirements. The Board then decided to solicit volunteers for a citizens' Spay/Neuter Task Force (hereafter the "Task Force"), a temporary body consisting of eleven uncompensated members appointed for their interest and/or subject-matter expertise bearing on the task of formulating a draft ordinance to be submitted to the Board for its consideration. Because the Board envisioned the Task Force as a purely advisory body, its members were not made subject to a Conflict of interest code.

Over the past five months, Dr. Faoro has served as Chairman of the Task Force, which has conducted regular public meetings in the course of its deliberations. During its drafting process, controversy surfaced around the question of exemptions to a proposed requirement that dogs and cats be spayed or neutered. The draft ordinance currently provides that an owner of a covered animal consult with a licensed veterinarian, and if the veterinarian concludes that the pet and owner are best served by authorizing the owner to purchase an "unaltered animal" license, a certificate is granted and there is no requirement for spaying or neutering the animal. For those who do not have such a certificate, there is a mandate that the animal be spayed or neutered. The Task Force itself is narrowly divided on the issue of this "spay/neuter mandate," which is vigorously opposed by groups like the Santa Barbara County Dog Owners, the Channel City Kennel Club, the American Sporting Dog Alliance, purebred breeders, and similar organizations.

The Task Force has received a complaint whose gravamen is that Dr. Faoro's veterinary practice could profit financially from requiring owners to obtain veterinarian certificates to avoid spaying or neutering their animals, and would likely benefit from increased business in required surgical procedures. Since the Board has full discretion to accept, modify or reject recommendations of the Task Force and, as Chairman Dr. Faoro would be the spokesman for the Task Force, the point of the complaint is that a conflict of interest in any decision on the proposed ordinance bars Dr. Faoro from addressing the Board in his official capacity when the Board begins its deliberations on the proposed ordinance on November 3, 2009.

### ANALYSIS

The Act prohibits a "public official" from "making," "participating in making" or using their official position to "influence" a governmental decision in which the official has a financial interest. (Section 87100.) To further this goal, the Act requires that every public official disclose all of his or her economic interests which could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c) and 87200-87313.)

Generally, public officials, such as employees of state or local governmental agencies, members of boards or commissions, or consultants of a governmental agency, must disclose their financial interests in accordance with a conflict of interest code developed by the controlling governmental agency.<sup>2</sup> (Sections 87300 – 87313.) A conflict of interest code is adopted by an agency to designate positions within the agency that make or participate in making governmental decisions which may have a foreseeable and material effect on any economic interest. (Section 87302.) The conflict of interest code requires the occupant of a designated position to disclose investments, interests in real property, sources of income and business positions which may be materially affected by his or her decision-making on behalf of the agency. (Section 87302.)

Regulation 18730 provides guidance on those positions that must be included in a conflict of interest code. For purposes of Section 87100, Regulation 18730(b)(2) specifies that persons designated in an agency's conflict of interest code include persons who make or participate in making governmental decisions which may foreseeably have a material effect on their economic interests:

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” (Section 87100.)

Persons designated in the conflict of interest code are “designated employee[s],” a term that includes any “officer, employee, member, or consultant of an agency” whose position involves making or participating in making decisions that may have a foreseeable and material effect on any economic interest. (Section 82019(c), Regulation 18701(a).) “Designated employees” are “public officials” under Section 82048.

To determine whether a public official “makes” a governmental decision, we are guided by Regulation 18702.1, which provides in pertinent part:

“(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.”

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<sup>2</sup> Though not strictly relevant here, it is well to bear in mind that public officials listed in Section 87200 are required to disclose their financial interests regardless of whether they are listed in their agency's conflict of interest code.

Similarly, Regulation 18702.2 specifies when a public official "participates" in making a governmental decision, as follows:

"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)."

A public official is also prohibited from using or attempting to use his or her official position to influence a governmental decision, as these activities are defined at Regulation 18701.3(a):

"(a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the 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 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."

The term "designated employee" does not, however, include an unsalaried "member" of any board or commission that serves a *solely advisory function*. (See Section 82019(b)(1).) Regulation 18701(a)(1) further specifies that:

"'Member' shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions with decisionmaking authority. A committee, board or commission possesses decisionmaking authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

(C) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.”

Because the power to make, compel, or prevent a decision to adopt the ordinance in question rests with the Board of Supervisors, the Task Force cannot be said to have decisionmaking authority under Regulation 18701(a)(1)(A) or (B).

The Task Force *does* have the authority to make “substantive recommendations” within the meaning of Regulation 18701(a)(1)(C), recommendations associated with the draft ordinance it will submit to the Board of Supervisors for its consideration. However, the plain language of Regulation 18701(a)(1)(C) further requires that we assess the impact of these “recommendations” by considering the extent to which the Task Force’s recommendations have been accepted “over an extended period of time” in the past. When the recommendations of a nominally “advisory” body can be shown to have had a significant impact on the ultimate outcome of another body’s prior governmental decisions, that “advisory” body will be considered to possess *de facto* decisionmaking authority, and not a purely advisory body whose members are exempt from the Act’s disclosure and disqualification provisions. (*In re Rotman* (1987) 10 FPPC Ops. 1.)

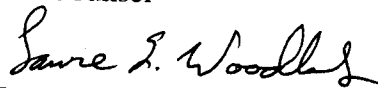
Because the Task Force is a body recently created for sole purpose of providing the Board of Supervisors with a proposed ordinance, the Task Force not only has no power to pass or compel passage of its proposal, there is no “track record” to support a finding that the Task Force is a body that in reality possesses *de facto* decisionmaking authority. We must conclude, therefore, that there is no basis for a finding that the Task Force is anything other than a purely advisory body.

A member of a purely advisory body, like Dr. Faoro, is not a “public official” subject to the Act’s conflict of interest rules. The public controversy generated during the drafting process supports – rather than argues against – this conclusion, since it appears likely that the Board of Supervisors will consider the proposed ordinance in the face of substantial public opposition, suggesting that the Board of Supervisors will reach its decision independently from the recommendations of the Task Force.

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

Sincerely,

Scott Hallabrin  
General Counsel



By: Lawrence T. Woodlock  
Senior Counsel, Legal Division

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