



FAIR POLITICAL PRACTICES COMMISSION

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March 27, 2014

Rod A. Attebery
Attorney at Law
Neumiller & Beardslee
509 West Weber Avenue, Fifth Floor
Stockton, CA 95203

Re: Your Request for Informal Assistance
Our File No. I-14-041

Dear Mr. Attebery:

This letter responds to your request for advice on behalf of Ken Vogel regarding the campaign contribution and conflict of interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when rendering advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We also note that we do not provide advice on past conduct and our advice is based solely on the provisions of the Act. (Section 83114(b); Regulation 18329(a).)

Because your question is general in nature and not limited to specific proceedings or contributions, we are treating your request as one for informal assistance.²

QUESTION

What is Boardmember Vogel's duty when a participant in a LAFCO proceeding "involving a license, permit, or other entitlement for use" has made a contribution of \$250 or more to his campaign for the state legislature?

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).)

CONCLUSION

Boardmember Vogel must disclose the contribution, recuse himself from the decision, or return the contribution within 30 days from the time he knows or should have known about the contribution and the proceeding.

FACTS

You represent the San Joaquin County Local Agency Formation Commission (“LAFCO”) and Ken Vogel, a member of the San Joaquin County Board of Supervisors and an alternate member of the San Joaquin LAFCO. Supervisor Vogel’s second and final term as a County Supervisor will end in December, 2014. Supervisor Vogel will be running for the California State Legislature in the November 2014 election. As part of his election campaign, he will be seeking campaign contributions from his constituents and other donors. The boundaries of the legislative district for which Supervisor Vogel will be running overlap with the boundaries of the South San Joaquin Irrigation District which has an application pending before San Joaquin LAFCO. As an irrigation district, South San Joaquin Irrigation District (“SSJID”) is authorized by Division 11 of the Water Code to provide retail electricity service within and outside its boundaries. The SSJID territory covers approximately 113 square miles and includes almost all of the land within the incorporated Cities of Manteca, Ripon, and Escalon, and portions of unincorporated San Joaquin County.

Currently, SSJID’s electric power services are a “latent power.” This means that the District’s electric power services have to be “activated” by LAFCO. SSJID plans to exercise its latent powers to provide retail electric service within its boundary by purchasing the electric distribution facilities currently owned and operated by PG&E. This is set forth in detail in SSJID’s Plan to Provide Retail Electric Service, which is part of SSJID’s application filed with LAFCO in September 2009 and supplemented in 2010. As a retail electricity provider, SSJID would eliminate PG&E as a service provider within the District and consolidate electricity, water, and drainage service under one service provider. PG&E would continue providing retail electricity service to its remaining customers in San Joaquin County. If SSJID’s application is approved, it is anticipated that SSJID will be able to provide electric power services to its customers at reduced rates compared to those currently offered by PG&E.

The LAFCO Commissioners are expected to vote on whether to approve SSJID’s application sometime this year. The SSJID’s project application is composed of four parts, each of which will come before the LAFCO.

ANALYSIS

Section 84308 was added to the Act to ensure that appointed members of boards or commissions would not be biased by campaign contributors or potential contributors who might

appear before them in a proceeding involving a license, permit, or other entitlement for use. Section 84308 applies to all appointed officers of any state or local government agency, with the exception of the courts or agencies in the judicial branch of government, the Legislature, the Board of Equalization, and constitutional officers. (Section 84308(a)(3).)

Generally, Section 84308 applies to all elected or appointed officers (including alternates and candidates for elective office) of state or local government agencies. (Section 84308(a)(3) & (a)(4).) Section 84308 does not apply to the courts or any agency in the judicial branch of government, local government agencies whose members are directly elected by the voters, the Legislature, the Board of Equalization, or constitutional officers. (Section 84308(a)(3).) Section 84308 does apply to persons who are members of an exempted agency, but are acting as voting members of another agency. (*Ibid.*) The San Joaquin County LAFCO is one such agency.

Section 84308 states that “no officer of an agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars (\$250), from any party, or his or her agent, or from any participant, or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the officer knows or has reason to know that the participant has a financial interest . . .” (Section 84308(b); Reg. 18438.7 [discussing prohibitions and disqualifications]; see Section 84308(d) [describing how similar prohibitions are enforced against parties, participants, and their agents].)

A “party” is “any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.” (Section 84308(a)(1).) A “participant” is:

“any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision as described in Article 1 (commencing with Section 87100) of Chapter 7. A person actively supports or opposes a particular decision in a proceeding if he or she lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency.”

(Section 84308(a)(2); see also Reg. 18438.4 [defining what constitutes lobbying, testifying and acting to influence].)³

³ The enumerated financial interests under the Act include: (1) An 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).) (2) An 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.) (3) An interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.) (4) An interest in any source of gifts to him or her if the gifts aggregate to \$440 or more within 12 months prior to

You have provided an analysis of your client's facts as applied to Section 84308. We do not disagree with your analysis. Your question focuses not on the factors under Section 84308, but on what Boardmember Vogel's obligations are under the "know or has reason to know" standard.

If an officer of an agency receives a contribution exceeding \$250 from a party or participant within the 12 months prior to rendering a decision in a proceeding involving a license, permit, or other entitlement for use, the officer must disclose that fact on the record of the proceeding. (Section 84308(c); see 84308(d) [describing how similar disclosure obligations are placed upon a "party" and his or her agents].) Moreover, if an officer has willfully or knowingly received such a contribution during that time period from a party or his or her agent, or from a participant, or his or her agent, if the officer knows or has reason to know that the participant has a "financial interest" in the decision, the officer cannot make, participate in making, or in any way attempt to use his or her official position to influence the decision. (Section 84308(c); see also *Faust* Advice Letter, No. I-88-066 [regarding knowledge of the financial interest].) The disqualification requirement is specifically conditioned on knowing or having reason to know of the participant's financial interest. This prohibition will not apply if the officer returns the contribution within 30 days from the time he or she knows, or should have known, about the contribution and the proceeding. (Section 84308(c), last paragraph.)

Many counties have a disclosure form that any party or participant (as defined above) in a LAFCO (for example) proceeding completes to comply with Section 84308(d).⁴ Section 84308(d) requires that parties disclose their contributions, and many counties include participants in their disclosure forms. The form allows the party or participant to inform the LAFCO members whether the party participant has contributed \$250 or more to a member. Combined with the member's own contribution record, the member can then determine what his responsibility is under Section 84308(c).

The Act states that an officer must disclose, recuse himself, or return the contribution when he "knows or has reason to know" about the contribution and the proceeding. Regulation 18438.7 defines when an officer 'knows or has reason to know.'

- "(a) An officer knows or has reason to know that a person has a financial interest in the decision in a proceeding if:
- (1) The person is a party; or

the decision. (Section 87103(e); Regulation 18703.4.) (5) An interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

⁴ See, for example, San Francisco Board of Supervisor's "Lobbying Disclosures and Policies" here: <http://www.sfbos.org/index.aspx?page=4156>. Or the El Dorado LAFCO's similar form here: <http://www.edlafco.us/ApplicationPDFs/DisclosureofGiftstoLAFCOCommissioners.pdf>.

(2) The person is a participant and reveals facts in his or her written or oral support or opposition before the agency which make the person's financial interest apparent.

(b) An officer knows, or should have known, about a proceeding pending before the agency if either:

(1) The officer has received notice of the license, permit or other entitlement proceeding. Notice includes receipt of an agenda or docket identifying the proceeding and the party or other persons affected by name; or

(2) The officer has actual knowledge of the proceeding.

(c) An officer knows, or should have known about a contribution if:

(1) The contribution has been disclosed by the party pursuant to Section 84308(d); or

(2) The officer has actual knowledge of the contribution.”

Actual knowledge of the contribution includes any contribution that Boardmember Vogel’s candidate committee has reported on applicable forms. In the case of a contribution that has not yet been reported because the reporting period has not ended, the issue of whether the contribution was “willfully or knowingly received” would be a question of fact. (See Section 84308(c).) If an officer did not have any actual knowledge of the receipt of the contribution, then it could not have been “willfully or knowingly received.”⁵ To ensure compliance with Section 84308, however, Boardmember Vogel would be advised to review an up-to-date list of contributors to his campaign against the names of participants in the SSJID application proceeding before LAFCO.

Additionally, while the SSJID application is pending and for three months thereafter, Boardmember Vogel may not solicit or receive a contribution of \$250 or more from a party or participant to the proceeding, and a party or participant is prohibited from giving a contribution of \$250 or more to his campaign during that time. (Section 84308(b).)

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl

⁵ The proceeding before the San Joaquin County LAFCO is on-going and we assume that Boardmember Vogel has actual knowledge of the proceeding.