



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

To: Chair Ravel and Commissioners Eskovitz, Garrett, Montgomery and Rotunda

From: Zackery P. Morazzini, General Counsel

Subject: Monthly Report on Legal Division Activities

Date: September 22, 2011

It has been a very busy past few months for the Legal Division. Since the last Commission Meeting in Los Angeles on June 9, 2011, the Legal Division has conducted interested persons meetings on five different regulatory projects (Regulation 18215.3 Behested Payment Exception; Regulation 18404.1 Reopening Committees for Refunds; Regulation 18421.31 Text Contributions; multiple Gift Regulations; multiple Enforcement Regulations). The meetings were just one facet of the Commission's new focus on public outreach in the regulation process. The complex gift regulation revision project, with a goal toward simplifying the Act's gift regulations, has been an especially work-intensive project. The project is being handled by Senior Commission Counsel William Lenkeit and has involved general outreach to the public through Interested Persons meetings, as well as targeted outreach to the California Political Attorneys Association, Assembly Ethics Committee, the League of California Cities, and many local ethics commissions and other interested parties.

During the same period, the Legal Division has received 40 Public Record Act Requests, and issued 60 advice letters. Summaries of the advice letters are set forth below.

Advice Letter Summaries for Letters Issued Between May 2, 2011 and July 29, 2011

Campaign

Rita Copeland

A-11-043

A terminated local ballot measure committee received a refund in 2011 for advertising during the 2009 election. The terminated committee must be re-opened to accept the refund and disburse the funds. In some limited cases, the Commission has allowed a committee to endorse the refund to a debtor and not has not required the re-opening of the bank account.

John St. Croix

A-11-084

Absent a legislative change to the Act, a local jurisdiction may not allow for electronic-only filings of campaign statements of local candidates or committees. The local Ethics Commission may not establish that electronic statements are the official version of filings for audit and other legal purposes.

David Bauer

A-11-088

An elected official's terminated 2006 Senate committee must submit a request to the Commission's Executive Director to reopen a committee to apply for unclaimed funds being held at the State Controller's Office, which the treasurer was just notified about, consisting of five \$1,000 contributions made before the 2006 elections.

Jennifer Hill

A-11-090

A terminated 2010 state candidate controlled committee received a refund in 2011 from another committee. The terminated 2010 committee must be re-opened to accept the refund and transfer the funds to the candidate's 2012 re-election committee.

Christina Avila

I-11-091

Explains to a City Filing Clerk that the required retention period for a copy of the Form 410 (Statement of Organization) filed with a local filing officer is 4 years. Further explains that Original Form 501s for elected mayors, city council members, and county supervisors must be retained indefinitely. Form 501s for candidates not elected to these offices must be retained for not less than five years. Form 501s filed by all other persons (e.g. candidates for school boards, water boards, college boards, etc.) must be retained for a period of not less than 7 years.

Charles H. Bell, Jr., Audrey Perry Martin I-11-102

A joint fundraising arrangement between participating county central committees and the California Republican Leadership Fund is permissible under the Act. The California Republican Leadership Fund will qualify as a political committee under Section 82013(a) and be required to file periodic reports, and the money transferred from the California Republican Leadership Fund to participating county central committees will be considered contributions from the original donors, delivered via the Fund, which qualifies as a committee acting as an intermediary.

Toffer Grant

I-11-111

Campaign committees may use the PEX prepaid expense card for staff payments for supplies and business travel purchases. However, they must continue to comply with all applicable reporting and recordkeeping provisions of the Act and must itemize PEX card expenditures amounting to \$100 or more.

Conflict of Interest

Charles Gee

I-11-025

A city council member who owned real property that would have been affected by general plan decisions before the council, and who also represented clients who owned property that was involved in general plan decisions before the council, was advised that he had a conflict of interest. However, if all separate decisions related to the general plan affecting the entire jurisdiction are finalized without his participation he would be able to participate in the final vote to adopt or reject the general plan.

Renee A. Stadel

A-11-040

Member of Los Angeles Employee Relations Board (ERB) is also a private arbitrator and is paid arbitration fees by union locals that may be a party to an ERB matter. We advised on several scenarios and advised on identifying the source of income in the transaction. A local that paid the fee would be a source of income to the member. However, other locals, operated separately and independently, would not be treated as a source of income, even if they were affiliated with the same “umbrella” organization/union or were represented by the same attorney.

Michael Kathleen Self

I-11-042

Because a councilmember’s property is more than 500 feet from the nearest boundary of a project development site at issue before the council, there is a presumption that the property will not be materially affected by the council’s decisions on the project. However, this presumption is rebuttable. It appears from the facts that some of the decisions in question will have a material financial effect on the official’s property despite the presumption. Thus, absent an exception, the councilmember may not participate in the decisions.

Jennifer Martin-Gallardo

I-11-047

A premature distribution of funds from a defined contribution profit sharing plan was not an economic interest under Section 87100. The income at the time those plans were funded was a reportable economic interest. Distributions from a defined-contribution profit sharing and 401(k) plan that are rolled over into IRAs are not required to be reported as income at the time of rollover. A rollover or transfer of funds from one tax exempt retirement account to another would not create a conflict of interest under Section 87450.

Kathy Bennett

I-11-056

A councilmember may not participate in governmental decisions involving a development project located within 500 feet of his property because there would be a reasonably foreseeable material financial effect upon his real property. However, he may be able to participate in future

decisions once the land that is within 500 feet of his property is removed from the development project.

Stacy A. Roscoe

A-11-058a

President of a 501(c)(3) non-profit group that receives city funds to operate and manage a city-owned museum sought reconsideration as to whether the non-profit is a “local public agency” for purposes of the Act. Requestor presented additional facts indicating that the organization is not subject to the Brown Act. Advised that this fact alone is not determinative, and that the nonprofit is still considered a local government agency under the Act. Therefore, the non-profit is required under Section 87300 to adopt a conflict of interest code for its employees and board members, or be included within the city’s code.

Geri Graham Mehia

A-11-061

A city councilmember may participate in decisions involving a revitalization area in which she operates a manicurist business and rents space for her business from a salon on an “as needed” basis. The informal rental arrangement is not an economic interest in real property. In addition, it is not reasonably foreseeable that city council decisions regarding the revitalization area will have a material financial effect on her economic interest in her business as an investment or as a source of income.

Dendra Dengler

I-11-066

A local official may appear before the board of directors as a member of the public to advocate for a resolution to a problem that affects her personal interests. She may not, however, make, participate in the making, or use her official position to influence a governmental decision affecting her property located within 500 feet of the property which is the subject of the decision unless she can show that the governmental decision will have no financial effect on her property. So long as the governmental decision does not concern the use of the real property for which she has the conflict of interest, and she has no other economic interest that may be materially financially affected by the decision, she may participate in future decision regarding the upkeep of the property. Nothing in the Act prevents her from serving on a district Recreation, Parklands and Community Center Commission. However, the Act’s conflict-of-interest provisions also apply to her while acting in that capacity.

Brian Hildreth

I-11-067

A member of a board of supervisors may participate in governmental decisions related to the approval of development plan, so long as there would be no reasonably foreseeable material financial effect upon any of his economic interests, specifically his real property that was located over 500 feet away from the development plan in question.

Jennifer Mizrahi

I-11-069

A city council member has a 50% interest in his spouse’s income. Where commission income (compensation that is based on a particular sale or transaction) reaches the threshold level under the Act, it creates a potentially disqualifying economic interest. No particular decision was presented in the request and staff could not determine whether there would be a conflict of interest without more information.

Timothy Ford

A-11-070

A state official does not have a conflict of interest merely by holding public employment or serving as house counsel for the WIC program. She only has a conflict of interest if she will be making, participating in making, or otherwise using her official position to influence a governmental decision in which she has a financial interest involving her husband's business. Under the facts presented, because the official's decisionmaking is not involved in the selection of vendors participating in the program, she is not making, participating in, or using her official position to influence a governmental decision that could affect the stores in question.

Anthony Lewis

I-11-072

General advice relating to conflict of interest rules as they apply to economic interests in investments of public officials.

Teri Patterson

A-11-073

A state contractor could participate as a preferred contractor for the California adopt-a-highway program. The contractor was not a governmental official and there was no governmental decision that was more than ministerial involved and, therefore, no conflict of interest.

John Truxaw

A-11-074

A city attorney inquired whether a city councilmember may participate in decisions involving proposed revisions to the city's Flood Damage Prevention Ordinance, when the ordinance would impact property that is within 500 feet from the councilmember's residence. The neighboring property is the subject of another government decision that the official already is prohibited from participating in due to a conflict of interest. Advised that the public official cannot make, participate in making, or in any way attempt to use her official position to influence the ordinance amending the city's Flood Damage Prevention Ordinance unless the decision can be broken down into two separate decisions that are not inextricably interrelated to the decision in which she has a conflict of interest.

Jennifer A. Mizrahi

A-11-079

A city attorney sought advice as to whether a councilmember may participate in city council decisions and closed session discussions regarding a joint powers authority, which is a local government agency that employs the official. The requestor was advised that based on the facts presented in the request, the councilmember does not have an economic interest that will be affected by city council decisions involving the joint powers authority because of the exception in the definition of "income" for an official's "[s]alary and reimbursement for expenses or per diem received from a state, local, or federal government agency." Therefore, participating in decisions about the joint powers authority would not give rise to a conflict of interest for the official under the Act.

Anthony Lewis

I-11-080

An agency counsel sought advice regarding conflict-of-interest provisions of the Act. The official wished to know whether an agency chief would have a conflict of interest due to his stock investments in companies that do business with the agency. The requestor was advised that a conflict of interest in a given situation is necessarily a fact-sensitive question, and because his inquiry was general in nature and did not involve specific governmental decisions, the Commission will only provide general guidance. Three prior advice letters were provided for reference.

Daniel J. McHugh

A-11-082

Planning Commissioner has a disqualifying conflict of interest if he participates in a planning commission vote on the specific plan for the downtown area because he leases real property for his commercial business office which is located within 460 feet from the boundaries of the proposed specific plan and it is reasonably foreseeable that the planning commission's decision on the specific plan will affect the value of his leasehold interest.

Shellie Clack

A-11-086

Two local officials do not have a conflict of interest in participating in a governmental decision regarding a sale of property that would result in a payment to the State Teacher's Retirement Fund in the amount of \$300 million over 50 years, when one is a state teacher and the other is married to a state teacher. State retirement benefits are not included within the definition of income. Accordingly, there would be no reasonably foreseeable material financial affect on the officials' economic interests by the decision.

J. Christine Dietrick

A-11-087

A councilmember's economic interest in the property leased by his spouse's business within a downtown assessment district is directly involved in a decision to hire an association to provide services to the district. The financial effect of the decision on this economic interest is presumed to be material. Accordingly, the councilmember may not make, participate in making, or use his official position to influence the decision unless he can (1) rebut the presumption of materiality by showing that it is not reasonably foreseeable the decisions will have *any* financial effect on his real property interest and (2) determine that there will be *no* reasonably foreseeable material financial effects on any other economic interest he may have.

Robin Gray

A-11-089

Nothing in the Act prevents a public employee from accepting outside employment. However, the employee may not make, participating in the making, or use his or her official position to influence a governmental decision that will have a reasonably foreseeable material financial effect on the employee's outside employer.

Robert R. Challinor

I-11-096

A board member of a school district may participate in board decisions involving Charter School A, which is in the district, even though she is employed by Charter School B, which is in a different school district, and each school (i) operates under the same charter, and (ii) has the ability to significantly influence the management and operating policies of the other. Neither school is a source of income to the board member. Any compensation received from a charter

school is not income within the meaning of the Act because the school is a local government agency and compensation received from a local government agency is not income under the Act.

Blair Farley

A-11-097

A city planning commissioner may participate in governmental decisions involving individuals with whom he has personal relationships, so long as there would be no reasonably foreseeable material financial effect upon any of his economic interests. It did not appear that any of the official's economic interests would be affected by the governmental decisions at hand.

Scott Holmquist

A-11-105

A retired annuitant who is a public official had his own private business and received income from an outside company that also did business with his state agency employer. He was advised that he may participate in governmental decisions as chairman of an interview panel for his state agency employer even though he had received income from a company that also does business with his agency, so long as there would be no reasonably foreseeable material financial effect upon any of his economic interests. The interview panel was unrelated to the business that the state agency did with this outside company.

Jonady Hum Sun

A-11-110

PUC attorney asked whether a class-action lawsuit award from a former employer would be considered income for conflict of interest and revolving door purposes. Staff advised that the payment was accrued for the work performed for the former employer at the time, and therefore did not extend the revolving door period. The payment would have to be reported on the employee's Form 700.

Tom Butt

A-11-115

City councilmember has an interest in a business entity that is "otherwise related" under the Act to an entity that owns property that is the subject of a governmental decision. Due to the "otherwise related" standard, the city councilmember has a conflict of interest based on that economic interest and should recuse himself from the decision.

Tom O'Gorman

A-11-117

Explains the operation of the Act's "public generally" provisions when an official with an economic interest in a business entity and commercial real property would otherwise have a conflict of interest in a governmental decision. The official has a right to address the decisionmakers as a member of the public representing his own personal interests as a landowner and as the proprietor of a business.

Kim Holliday

A-11-119

A member of the Russian River Redevelopment Oversight Commission does not have a conflict of interests in decisions of the Oversight Commission to approve redevelopment funds for capital projects before the county board of supervisors votes to approve such funding when she (1) serves without pay on the board of a grass roots nonprofit organization that recommends capital projects for funding from redevelopment funds, or (2) petitions the county to combine two

adjacent properties she owns for tax assessment purposes. She has no economic interest in the nonprofit organization because she receives no compensation from the organization. She may petition the county regarding her property so long as any communications with county staff are made in her private capacity and not as a member of the Oversight Commission.

Mike Hudson

A-11-124

A city's vice mayor may vote on matters involving a business improvement district, where he is a member of the business improvement district and owns a business located within 500 feet of a proposed redevelopment project. City council decisions involving the redevelopment of property located across the street from his business will not have a reasonably foreseeable material financial effect on any of his economic interests. He operates his business on a month-to-month lease and, therefore, does not have a real property economic interest. Redevelopment of the property will have little or no effect on his business.

Thom Bogue

A-11-126

A city council member may participate in a decision regarding proposed uses of city-owned real property located within 500 feet of his automotive repair business. The decision will not have a reasonably foreseeable material financial effect on his economic interests. He operates his business under a month-to-month lease and, therefore, does not have a real property economic interest. The facts indicated that any proposed use of the city property would not increase his business.

Conflict of Interest Codes

Stacy A. Roscoe

A-11-058

A 501(c)(3) non-profit group that receives city funds to operate and manage a city-owned museum is considered a local government agency under the Act. Therefore, it is required under Section 87300 to adopt a conflict-of-interest code for its employees and board members, or be included within another agency's code.

Robert A. Ryan Jr.

I-11-094

County remote-access board established under Penal Code Section 11112.4 is a local government agency that is required to adopt a conflict-of-interest code. Accordingly, members of the board must file statements of economic interest, as required by the conflict-of-interest code ultimately adopted, and are subject to the Act's conflict-of-interest provisions.

Gifts

Matthew R. Feaster

I-11-062

Donations made by close family friends and members of an official's church to assist the official in adopting an orphaned child indicate a charitable purpose, wholly unrelated to the official's position as a governmental official. However, because this issue presents questions related to the Act's gift rules that require an important policy interpretation, staff believes the decision is best

left to the Commission. It is anticipated that Commission Staff will present a regulatory proposal addressing these questions in the near future.

Ashlee Titus

I-11-076

Discussion of gift rules in connection with a training program for mid- and upper-level management personnel employed by government regulatory agencies, where the program would be administered by a non-profit corporation using funds from its general treasury. Travel and subsistence costs for the officials selected to participate in the program would be gifts from a bona fide 501(c)(3) corporation that qualify for the exemption provided by Section 89506(a)(2) for gifts from 501(c)(3) corporations.

Daniel M. Gounder and Marie Ziegler **A-11-083**

There is no gift when a bar allows public employees to use open space for a retirement party, so long as anyone can use the space free of charge, without regard to his or her official status, and the area is not closed off for purposes of the party.

Lobbying

John T. Unger

A-11-081

Compensation packages paid to placement agents (through an external manager) that are contingent on the agents' success is prohibited by the Act. Because placement agents are now "lobbyists" under the Act, and contingency fees are prohibited for lobbyists, this form of compensation is also prohibited.

Steven G. Churchwell

I-11-108

An individual contacting a legislator for assistance in influencing a state agency, other than the Legislature, to issue a new request for proposals would not be considered "influencing a legislative or administrative action." Thus, the lobbyist provisions of the Act are not triggered if an individual, who is hired by a private company, contacts legislators solely to urge the legislators to influence a state agency to issue a new request for proposals.

Mass Mailing

Peter Sturges

I-11-078

For the purposes of Regulations 18420.1 and 18901.1, a mailing strictly limited to a letter on agency letterhead to senior citizens, potentially eligible for the parcel tax exemption, explaining the exemption, offering the agency's assistance in applying for the exemption, and providing the exemption form, is generally informational and does not constitute campaign material. To the extent that this mailing also describes the purposes of a ballot measure following the description of the purposes expressly provided in the measure itself, the mailing may still be considered informational. However, this general conclusion does not apply to additional descriptions or material that may be provided in or with the letter, and the entirety of the letter must be considered in determining whether the letter can be reasonably characterized as campaign material.

Revolving Door

Robert E. Lytle

A-11-053

The “permanent ban” does not bar a former state official from: (a) advising a client on matters involving licensing in states other than California because the official did not participate in matters involving other states while employed by the state; (b) advising the client on compliance matters if the client obtains a license and the public official participated in a prior decision to deny the application because once a license is granted, a compliance proceeding is a new proceeding; and (c) testifying in a judicial proceeding in which the denial of the application is at issue because the former official will receive no compensation for testifying.

J. Mike Vivas

A-11-093

A former designated employee of CalEPA, who works as a consultant for his new employer in preparing work plans to be submitted to CalEPA for approval, does not violate the Act’s one-year ban on appearing before or communicating with CalEPA for the purpose of influencing certain actions, so long as the consultant is not identified in any documents submitted to the agency. The consultant is permanently barred, however, from participating in or assisting his new employer in connection with any CalEPA proceeding, including the clean up of a contaminated site, at which he was project manager. A cleanup project is a “proceeding” under the Act.

Mike Hill

A-11-122

The Act’s revolving door provisions do not prohibit a former state employee from applying for and obtaining a permit from his former governmental agency for the temporary collection of wildlife nor from reporting the occurrences of sensitive species as required by his former governmental agency employer. However, the former employee is prohibited for a period of one year after leaving state employment from appearing before or communicating with his former agency to discuss a project for which his private employer will seek a permit from his former agency. The permanent ban also prohibits him from participating in a judicial or quasi-judicial proceeding involving the State of California, such as a project for which his private employer will seek a permit from his former agency, and from assisting others in the proceeding if the proceeding is one in which he participated while employed by the state.

Statements of Economic Interests

David Aranda

I-11-059a

Free meals provided by public-entity employers to board members at the public entity’s board meetings are not considered gifts if the member provided consideration of equal or greater value for the payment. Payment for meals is not considered income under Section 82030(b)(2) since it is part of salary and per diem from a government agency.