



FAIR POLITICAL PRACTICES COMMISSION

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

(916) 322-5660 • Fax (916) 322-0886

July 30, 2013

Diane Fishburn
Olson, Hagel & Fishburn
555 Capitol Mall, # 1425
Sacramento, CA 95814

**Re: Your Request for Exemption
Our File No. O-13-002**

Dear Ms. Fishburn:

You represent Mr. Davis Riemer, a member of the AC Transit District Retirement System. You have requested an exemption from the requirement that Mr. Riemer disclose certain sources of income required by Section 87207 of the Political Reform Act (the "Act").¹

The purpose of this letter is to inform you that I have reviewed the filed Assuming Office Statement of Economic Interests (hereafter "SEI") and your explanation of the legal basis for withholding the names of certain of Mr. Riemer's clients from disclosure. I have determined that nondisclosure is justified in this limited case based on the facts you have provided.

In your letter of May 24, 2013, you stated:

- Mr. Riemer owns an investment advisory business, DHR Investment Counsel, Ltd. (DHR). DHR is a registered investment advisor with the Securities and Exchange Commission (SEC) under the Investment Advisers Act of 1940.
- Mr. Riemer's clients are individuals and families. He has one corporate client, but that client is located, and doing business, outside the District's jurisdiction and would not otherwise come within the disclosure requirements applicable to Mr. Riemer.
- Mr. Riemer assumed office as a Board Member of the AC Transit District Retirement Plan on April 15, 2013. On May 15, 2013, Mr. Riemer filed his Assuming Office SEI.

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.

- In lieu of identifying the clients of his business who might otherwise meet the disclosure threshold in the law, he attached the following statement:

"I am not disclosing the identities of the individual clients of my business, DHR Investment Counsel, Ltd. (DHR). DHR provides investment advisory services, and I am a registered investment advisor with the Securities and Exchange Commission (SEC). As a registered investment advisor, I am subject to the SEC privacy rules promulgated under Section 504 of the Gramm Leach-Bliley Act. Under these rules, registered investment advisors are prohibited from disclosing any non-public personal information about their individual clients without those customers' prior express permission. Since DHR is compensated for its services based upon a percentage of a client's investments under management with the firm, disclosing that an individual is a client of DHR would disclose that the client had at least a certain amount of assets under management with the firm. This is non-public personal information that DHR is prohibited from disclosing under the SEC rules.

I can also certify that, to the best of my knowledge, I have not and will not make, participate in making, or in any way attempt to use my official position to influence any decision of the Retirement System when to do so constituted or would constitute a violation of Government Code Section 87100 and related statutes."

As you note, since Mr. Reimer is a 100% owner of DHR, the Act and the conflict of interest code of the AC Transit District Retirement Plan would require him to disclose the name of every client from whom the business entity received payments of \$10,000 or more. You argue that this requires Mr. Reimer to disclose confidential information about these clients in violation of these Federal law requirements (the identities of the individual clients and the disclosure of the approximate amount of the client's assets under management with DHR since client's fees are based on a percentage of those assets).

Based on the information you provided, I conclude that the names of Mr. Reimer's investor clients who are individuals are protected under federal law and protected from disclosure under Regulation 18740. However, pursuant to Regulation 18740(d) and (e), my recommendation must be reviewed by the Commission and an opinion must be issued by the Commission under Government Code Section 83114. Therefore, your request for exemption will be presented to Commission at its August 22, 2013 Commission meeting.

Please note the following:

1. Pursuant to Regulation 18740(e), this notice will also be sent to the Attorney General and the district attorney and city attorney of the jurisdiction in which Mr. Reimer resides and which includes his principal place of business (Alameda County and the City of Oakland).

2. Commission staff will prepare a memorandum, draft opinion, and draft order regarding this issue for the members of the Commission to review at the August Commission meeting. The materials will be made available to the public 10 days in advance of the meeting. You and Mr. Riemer may submit additional material you deem relevant regarding the opinion request.
3. In addition, you and Mr. Riemer may present oral testimony at the hearing concerning your request. Any other interested party may also provide oral testimony on the hearing on this matter.
4. Should the Commission reject my recommendation and order Mr. Riemer to disclose the names of the sources of income required to be disclosed under Section 87207(b)(2), you must do so within 14 days of the order.

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

Sincerely,



Zackery P. Morazzini
General Counsel

Enclosures

Regulation 18740

May 24, 2013 Request Letter

Form 700 (Assuming Office) -- Assumed on April 15, 2013.

cc: Kamala D. Harris, Attorney General
Attorney General's Office
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

Nancy E. O'Malley, District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Suite 900
Oakland, CA 94612

Barbara Parker, Oakland City Attorney
Oakland City Attorney
City Hall, 6th Floor
1 Frank Ogawa Plaza
Oakland, California 94612

(Regulations of the Fair Political Practices Commission Title 2, Division 6, California Code of Regulations.)

§ 18740. Privileged Information: Statement of Economic Interests.

An official or candidate need not disclose under Government Code section 87207(b) the name of a person who paid fees or made payments to a business entity if disclosure of the person's name would violate a legally recognized privilege under California law. Such a person's name may be withheld in accordance with the following procedure:

(a) An official or candidate who believes that a person's name is protected by a legally recognized privilege may decline to report the name, but shall file with his or her Statement of Economic Interests an explanation for such nondisclosure. The explanation shall separately state for each undisclosed person the legal basis for assertion of the privilege and, as specifically as possible without defeating the privilege, facts which demonstrate why the privilege is applicable.

(b) With respect to each undisclosed person, the official or candidate shall state that to the best of his or her knowledge he or she has not and will not make, participate in making, or in any way attempt to use an official position to influence a governmental decision when to do so constituted or would constitute a violation of Government Code section 87100.

(c) The Executive Director may request further information from the official or candidate and, if no legal or factual justification sufficient to support assertion of the privilege is shown, may order that the disclosure required by the Act be made. The official or candidate shall, within 14 days after receipt of an order from the Executive Director, either comply with the order or, if he or she wants to challenge the determination of the Executive Director appeal the determination, in writing, to the Commission.

(d) If the Executive Director determines that nondisclosure is justified because of the

existence of a privilege, the matter shall be referred to the Commission.

(e) The Commission shall review an appeal filed under paragraph (c) or a recommendation made by the Executive Director under paragraph (d) at a meeting held no less than 14 days after notice of the meeting is mailed to the official or candidate, the Attorney General and both the district attorney and the city attorney of the jurisdictions in which the official's or candidate's residence and principal place of business are located. The Commission shall decide whether nondisclosure is warranted by issuing an opinion under Government Code section 83114 and shall treat the explanation for nondisclosure accompanying the official's or candidate's Statement of Economic Interests as an opinion request. The procedures set forth in 2 Cal. Code Regs. sections 18320- 18324, however, shall not apply to opinions issued pursuant to this regulation.

(f) If the Commission orders an official or candidate to disclose, the official or candidate must comply within 14 days. The Executive Director may, for good cause, extend any of the time periods established in this regulation.

Comment: A person's name is not ordinarily protected from disclosure by the law of privilege in California. Under current law, for example, a name is protected by the attorney-client privilege only when facts concerning an attorney's representation of an anonymous client are publicly known and those facts, when coupled with disclosure of the client's identity, might expose the client to an official investigation or to civil or criminal liability. See, e.g., *Brunner v. Superior Court*, 51 Cal. 2d 616, 618 (1959); *Ex parte McDonough*, 170 Cal. 230 (1915); *Baird v. Koerner* 279 F.2d 623, 630 (9th Cir. 1960); and cases compiled in *re Grand Jury Proceedings*, 517 F.2d 666, 670-71 (5th Cir. 1975). A patient's name has been protected by the physician-patient privilege only when disclosure of the patient's name would also reveal the nature of the

treatment received by the patient because, for example, the physician is recognized as a specialist. See, e.g., *Marcus v. Superior Court*, 18 Cal. App. 3d 22, 24-25 (1971) and *Ascherman v. Superior Court*, 254 Cal. App. 2d 506, 515-16 (1967). The names of business customers are not protected by the trade secret privilege unless, because of surrounding circumstances, disclosure of a particular customer's identity would also result in disclosure of special needs and requirements of the customer that are not generally known to competitors. See, e.g., *King v. Pacific Vitamin Corp.* 256 Cal. App. 2d 841, 846-49 (1967) and *Peerless Oakland Laundry Co. v. Hickman*, 205 Cal. App. 2d 556, 559-60 (1962).

Note: Authority cited: Section 83112, Government Code. Reference: Section 87207(b), Government Code.

HISTORY

1. New section filed 7-28-76; effective thirtieth day thereafter (Register 76, No. 31).
2. Amendment of subsections (c)-(f) filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).
3. Amendment filed 4-28-82; effective thirtieth day thereafter (Register 82, No. 18).
4. Amendment of first paragraph, subsection (e) and Note filed 10-23-96; operative 10-23-96 pursuant to Government Code section 11343.4(d) (Register 96, No. 43).
5. Amendment filed 10-26-2004; operative 11-25-2004 (Register 2004, No. 44).

May 24, 2013

VIA E-MAIL

Ms. Tina Bass
Interim Executive Director
Fair Political Practices Commission
428 J Street, Suite 600
Sacramento, CA 95814

**RE: Request for Determination and Commission Opinion pursuant to
Regulation 18740 Davis Riemer, Board Member, AC Transit District
Retirement System**

Dear Ms. Bass:

On behalf of our client, Mr. Davis Riemer, we submit this request for determination pursuant to the procedures set forth in Regulation 18740. This request relates to the disclosure of the clients of his business, DHR Investment Counsel, Ltd., and the requested exemption from disclosure is based on the privacy obligations imposed on his business by Federal securities law.

Background

Mr. Riemer owns an investment advisory business, DHR Investment Counsel, Ltd. (DHR). DHR is a registered investment advisor with the Securities and Exchange Commission under the Investment Advisers Act of 1940. Mr. Riemer's clients are individuals and families. He has one corporate client, but that client is located, and doing business, outside the District's jurisdiction and would not otherwise come within the disclosure requirements applicable to Mr. Riemer.

Mr. Riemer assumed office as a Board Member of the AC Transit District Retirement Plan on April 15, 2013. On May 15, 2013, Mr. Riemer filed his Assuming Office Statement of Economic Interests. In lieu of identifying the clients of his business who might otherwise meet the disclosure threshold in the law, he attached the following statement:

I am not disclosing the identities of the individual clients of my business, DHR Investment Counsel, Ltd. (DHR). DHR provides investment advisory services and is a registered investment advisor with the Securities and Exchange Commission (SEC). As a registered investment advisor, DHR is subject to the SEC privacy rules promulgated under Section 504 of the Gramm-Leach-Bliley Act. Under these rules, registered investment advisors are

Ms. Tina Bass, Interim Executive Director
May 24, 2013
Page 2

prohibited from disclosing any non-public personal information about their individual clients without those customers' prior express permission. Since DHR is compensated for its services based upon a percentage of a client's investments under management with the firm, disclosing that an individual is a client of DHR would disclose that the client had at least a certain amount of assets under management with the firm. This is non-public personal information that DHR is prohibited from disclosing under the SEC rules.

I also certify that, to the best of my knowledge, I have not and will not make, participate in making, or in any way attempt to use my official position to influence any decision of the Retirement System when to do so constituted or would constitute a violation of Government Code Section 87100 and related statutes.

An endorsed copy of Mr. Riemer's Assuming Office Statement is enclosed.

Request

Pursuant to FPPC Regulation 18740, on behalf of our client, we respectfully request that the Executive Director determine that Mr. Riemer is exempt from the Act's disclosure requirements for the identities of the individual clients to his business and further that the Executive Director seek confirmation of that determination by the Commission.

Basis for Request

Under the financial disclosure provisions of the Act and the Conflict of Interest Code of the AC Transit District Retirement Plan, when an official has an interest of 10% or more in a business entity, that official is required to disclose "the name of every person from whom the business entity received payments if the filer's pro rata share of gross receipts from that person was equal to or greater than ten thousand dollars (\$10,000)." Gov. Code sections 82030(a) and 87207(b).

FPPC Regulation 18740 provides for an exemption to this disclosure requirement in relevant part as follows:

An official or candidate need not disclose under Government Code section 87207(b) the name of a person who paid fees or made payments to a business entity if disclosure of the person's name would violate a legally recognized privilege under California law. Such a person's name may be withheld in accordance with the following procedure:

(a) An official or candidate who believes that a person's name is protected by a legally recognized privilege may decline to report the name, but shall file with his or her Statement of Economic Interests an explanation for such nondisclosure. The explanation shall separately state for each undisclosed person the legal basis for assertion of the

privilege and, as specifically as possible without defeating the privilege, facts which demonstrate why the privilege is applicable.

(b) With respect to each undisclosed person, the official or candidate shall state that to the best of his or her knowledge he or she has not and will not make, participate in making, or in any way attempt to use an official position to influence a governmental decision when to do so constituted or would constitute a violation of Government Code section 87100.

The basis for our client's request is the prohibition in the federal securities laws on the disclosure of public information by financial institutions. As a registered investment advisor, DHR is subject to these requirements. See Section 211 of the Investment Advisers Act, 15 U.S.C. 80b-11, 15 USC section 6809(3), and 12 USC 1843(k)(4)(A-E). The Gramm-Leach-Bliley Act (GLBA) (15 USC section 6802) states in pertinent part as follows:

“(a) Notice requirements. Except as otherwise provided in this subtitle, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 503 [15 USC section 6803].

(b) Opt out.

(1) In general. A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless—

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 504 [15 USCS section 6804], that such information may be disclosed to such third party;

(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and

(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.”

If the Executive Director and the Commission do not approve this exemption request, my client would be required by state law to disclose confidential information about these clients in violation of these Federal law requirements. In addition to the identities of the individual clients from whom my client receives fees of \$10,000 or more, the disclosure would also involve the disclosure of the approximate amount of the client's assets under management with DHR since my client's fees are based on a percentage of those assets, and this percentage is publicly disclosed as part of the information he provides on his website.

Regulation 18740 does not on its face address the federal privacy rules applicable to persons regulated by the Federal securities laws, and it therefore arguably does not apply to exempt the disclosure of sources of income on this basis. However, there is precedent for this

Ms. Tina Bass, Interim Executive Director
May 24, 2013
Page 4

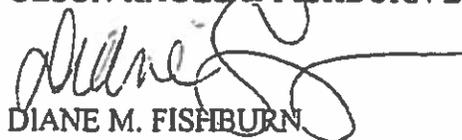
determination based on an almost identical situation considered by the Commission in 2012. In 2012, the Commission received an exemption request from newly appointed California State Teachers' Retirement System Board Member Paul Rosenstiel with respect to the disclosure of the individual customers of an investment company in which he had an ownership interest of 10% or greater. In that proceeding, the staff advised and the Executive Director and the Commission concurred that, while FPPC Regulation 18740 did not expressly cover the federal privacy rule cited above, it was certainly an appropriate application of the regulation, and the request for exemption was granted. We would respectfully request that you consider the Commission's determination in that matter in reviewing this request. It is our view that the same analysis should apply to these circumstances, and an exemption from disclosure should be granted on the same grounds.

In the Rosenstiel matter, the staff memorandum also addressed the issue of whether the Commission should require the official to seek client consent for the disclosure of the information as part of seeking the exemption from disclosure. The Commission declined to do so in that matter, and we would request the same determination in these circumstances.

Thank you for your time and attention to this matter. Please feel free to contact me if you have any questions or require additional information.

Very truly yours,

OLSON HAGEL & FISHBURN LLP



DIANE M. FISHBURN

DMF/sjg
Enclosures
cc: Mr. Davis Riemer

STATEMENT OF ECONOMIC INTERESTS
 COVER PAGE

RECEIVED
 Date Received
 Office Use Only
MAY 15 2013
AC TRANSIT RETIREMENT SYSTEM

NAME OF FILER (LAST) (FIRST)
Riemer Davis

1. Office, Agency, or Court

Agency Name
AC Transit District Retirement System
 Division, Board, Department, District, if applicable
 Your Position
Board Member

> If filing for multiple positions, list below or on an attachment.

Agency: _____ Position: _____

2. Jurisdiction of Office (Check at least one box)

- State Alameda and Contra Costa Judge or Court Commissioner (Statewide Jurisdiction)
 Multi-County Counties County of _____
 City of _____ Other _____

3. Type of Statement (Check at least one box)

- Annual: The period covered is January 1, 2012, through December 31, 2012.
 - or -
 The period covered is ____/____/____, through December 31, 2012.
 Assuming Office: Date assumed 4 / 15 / 2013 Leaving Office: Date Left ____/____/____
 (Check one)
 The period covered is January 1, 2012 through the date of leaving office.
 The period covered is ____/____/____, through the date of leaving office.
 Candidate: Election Year _____ and office sought, if different than Part 1: _____

4. Schedule Summary

Check applicable schedules or "None."

> Total number of pages including this cover page: 3

- Schedule A-1 - Investments - schedule attached Schedule C - Income, Loans, & Business Positions - schedule attached
 Schedule A-2 - Investments - schedule attached Schedule D - Income - Gifts - schedule attached
 Schedule B - Real Property - schedule attached Schedule E - Income - Gifts - Travel Payments - schedule attached
 - or -
 None - No reportable interests on any schedule

5. Verification

MAILING ADDRESS STREET CITY STATE ZIP CODE
(Reside or Agency Address Recommended - Public Document)
1600 Franklin Street Oakland CA 94612
 DAYTIME TELEPHONE NUMBER E-MAIL ADDRESS (OPTIONAL)
(510) 891-7257

I have used all reasonable diligence in preparing this statement. I have reviewed this statement and to the best of my knowledge the information contained herein and in any attached schedules is true and complete. I acknowledge this is a public document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date Signed May 14, 2013 Signature [Signature]
(month, day, year) *(File the originally signed statement with your filing office.)*

Schedule A-2

Investments, Income, and Assets of Business Entities/Trusts (Ownership Interest is 10% or Greater)

CALIFORNIA FORM 700
 PRINTED FROM THE CALIFORNIA STATE BOARD OF EQUALIZATION

Name
Davis Riener

1. IDENTIFY THE BUSINESS

DHR Investment Counsel, Ltd.
 Name
5435 College Ave., Ste 200, Oakland, CA 94618
 Address (Business Address Acceptable)

Check one
 Trust, go to 2 Business Entity, complete the box, then go to 2

GENERAL DESCRIPTION OF BUSINESS ACTIVITY

Investment advisory services

FAIR MARKET VALUE IF APPLICABLE, LIST DATE:
 \$0 - \$1,999
 \$2,000 - \$10,000 / / / /
 \$10,001 - \$100,000 ACQUIRED DISPOSED
 \$100,001 - \$1,000,000
 Over \$1,000,000

NATURE OF INVESTMENT
 Partnership Sole Proprietorship Corporation
Other

YOUR BUSINESS POSITION Owns

2. IDENTIFY THE INVESTMENT PROPERTY

\$0 - \$499 \$10,001 - \$100,000
 \$500 - \$1,000 Over \$100,000
 \$1,001 - \$10,000

3. IDENTIFY THE PROPERTY TYPE

None
 See attached statement.

4. IDENTIFY THE PROPERTY TYPE

Check one box:
 INVESTMENT REAL PROPERTY

5435 College Avenue, Ste. 200
 Name of Business Entity, if Investment, or
 Assessor's Parcel Number or Street Address of Real Property

Oakland, CA 94612
 Description of Business Activity or
 City or Other Precise Location of Real Property

FAIR MARKET VALUE IF APPLICABLE, LIST DATE:
 \$2,000 - \$10,000
 \$10,001 - \$100,000 / / / /
 \$100,001 - \$1,000,000 ACQUIRED DISPOSED
 Over \$1,000,000

NATURE OF INTEREST
 Property Ownership/Deed of Trust Stock Partnership
 Leasehold 4 / / / /
Yrs. remaining
 Other

5. IDENTIFY THE PROPERTY TYPE

Check one box:
 INVESTMENT REAL PROPERTY

Name of Business Entity, if Investment, or
 Assessor's Parcel Number or Street Address of Real Property

6. IDENTIFY THE PROPERTY TYPE

Description of Business Activity or
 City or Other Precise Location of Real Property

FAIR MARKET VALUE IF APPLICABLE, LIST DATE:
 \$2,000 - \$10,000
 \$10,001 - \$100,000 / / / /
 \$100,001 - \$1,000,000 ACQUIRED DISPOSED
 Over \$1,000,000

NATURE OF INTEREST
 Property Ownership/Deed of Trust Stock Partnership
 Leasehold / / / /
Yrs. remaining
 Other

7. IDENTIFY THE PROPERTY TYPE

Check one box:
 INVESTMENT REAL PROPERTY

Name of Business Entity, if Investment, or
 Assessor's Parcel Number or Street Address of Real Property

Description of Business Activity or
 City or Other Precise Location of Real Property

FAIR MARKET VALUE IF APPLICABLE, LIST DATE:
 \$2,000 - \$10,000
 \$10,001 - \$100,000 / / / /
 \$100,001 - \$1,000,000 ACQUIRED DISPOSED
 Over \$1,000,000

NATURE OF INTEREST
 Property Ownership/Deed of Trust Stock Partnership
 Leasehold / / / /
Yrs. remaining
 Other

Comments: _____



Davis Riemer

ATTACHMENT TO FORM 700

AC Transit District Retirement System

ASSUMING OFFICE STATEMENT

Board Member

Schedule A-2

STATEMENT OF FILER:

I am not disclosing the identities of the individual clients of my business, DHR Investment Counsel, Ltd. (DHR). DHR provides investment advisory services, and I am a registered investment advisor with the Securities and Exchange Commission (SEC). As a registered investment advisor, I am subject to the SEC privacy rules promulgated under Section 504 of the Gramm-Leach-Bliley Act. Under these rules, registered investment advisors are prohibited from disclosing any non-public personal information about their individual clients without those customers' prior express permission. Since DHR is compensated for its services based upon a percentage of a client's investments under management with the firm, disclosing that an individual is a client of DHR would disclose that the client had at least a certain amount of assets under management with the firm. This is non-public personal information that I am prohibited from disclosing under the SEC rules.

I can also certify that, to the best of my knowledge, I have not and will not make, participate in making, or in any way attempt to use my official position to influence any decision of the Retirement System when to do so constituted or would constitute a violation of Government Code Section 87100 and related statutes.

Dated:

May 14, 2013

A handwritten signature in black ink, appearing to read "D. Riemer", written over a horizontal line.

Davis Riemer

Registered Investment Advisor

5435 College Avenue • Oakland, California 94618-1502 • Tel: 510.596.2580 • Fax: 510.596.2590 • E-mail: dhr@dhrcounsel.com