

February 6, 1990

REPORT TO THE COMMITTEE ON RULES, LEGISLATION,
AND INTERGOVERNMENTAL RELATIONS
CONFLICT OF INTEREST REQUIREMENTS FOR CITY BOARDS AND COMMISSIONS

On January 9, 1990, during deliberations on the appointment of the City of San Diego's Ad Hoc Open Space Committee, the City Council discussed conflict of interest requirements for all City boards, commissions and advisory committees (hereafter "boards and commissions"). Specifically, the Council questioned which policy determines whether a particular board or commission is required to file an economic interest disclosure form and to adopt a conflict of interest code.

The issue was referred to the Rules Committee for further discussion. On January 31, 1990, the Mayor by memorandum asked this office to provide a report to the Rules Committee outlining the legal determinations which play a role in determining which boards and commissions must have conflict of interest codes and must file disclosure forms. This report is in response to that request.

To assist us in preparing this report, we obtained a copy of the City Clerk's register of the City's boards and commissions (copy attached as Exhibit A) and a list of those boards and commissions that are required to file statements of economic interests (SEI's) (copy attached as Exhibit B). Note on Exhibit B that all but the Planning Commission file what is known as a "730" disclosure form. The Planning Commission files a "721" disclosure form similar to those filed by elected officials since it is equated to elected officials by statute. California Government Code section 87200.

The reason why some boards file SEI's and others do not is based in part on statute and case law, in part on Fair Political Practices Commission (FPPC) regulations and opinions, and in part on the law (statute, charter, ordinance, or resolution) that creates a particular board or commission and defines a particular board or commission's duties.

The following outlines the statutory, case and regulatory law that governs this area.

Statutory and Case Law

A. Statutes

The chief source of law requiring boards and commissions to adopt conflict of interest codes and file disclosure forms is the

Political Reform Act, as codified in Government Code section 87100 et seq. ("Act"). The object of the Act is to promote impartial and ethical behavior among public officers in the conduct of public affairs by both state and local government officials. Government Code section 81000. The FPPC has primary responsibility for administering and interpreting the Act. Government Code section 83111.

One of the Act's requirements is for local governments to adopt conflict of interest codes covering "designated employees," which is defined to include certain governmental advisory groups. (Government Code section 82019; 87300). Each conflict of interest code adopted by the local governing body is required to designate which "decision-making" positions ("designated employees") are required to file SEI's. The term "designated employee" as defined in the statute excludes "any unsalaried member of any board or commission which serves a solely advisory function" from the category of "designated employees." Emphasis added. (Government Code section 82019.) The statutory definition of the term "designated employees" is critical to the determination of which advisory boards and commissions must have conflict of interest codes and, therefore, must file disclosure forms.

Note that, according to the statute, an advisory body that is "solely" or purely advisory does not have to have a conflict of interest code and does not have to file disclosure forms. This information was confirmed by John Wallace, Staff Attorney, FPPC, Legal Division, by telephone on February 5, 1990.

B. Case Law

As construed by the court in *Commission on Cal. State Gov. Org. Econ. v. Fair Political Practices Com.*, 75 Cal. App. 3d 716 (1977), the phrase "solely advisory" as used in Government Code section 82019 is a description of "function."

The word advisory denotes indirect relatively passive, hortatory and nonbinding counsel or guidance, as contrasted with active

management, decision-making and imposition of obligatory orders or decrees citations omitted.

. . . The exemption provision section 82019 is part of a statutory structure aimed at preventing conflict of interest. The objective is to enhance the purity of decision-making by excluding participants who have a personal financial stake in the decision. The statutory exemption exists

because solely advisory officials are not decision-makers; they only recommend. The presence or absence of decision-making power is thus an important factor in identifying the wielder of a solely advisory function.

Commission on Cal. State Gov. Org. Econ. v. Fair Political Practices Com., 75 Cal. App. 3d at 721.

In deciding whether the Commission on California State Government Organization and Economy was solely advisory and therefore exempt from the Act's disclosure requirements, the court examined the statute creating that commission. In so doing, the court found the commission had investigatory powers (e.g., to hold hearings, to issue subpoenas) in addition to its prime mission, which was to make recommendations to the Governor and State Legislature for structural and operational changes to state government, an admittedly advisory function. The court found that the investigatory functions were to be used only to make its recommendations. Nonetheless, the court concluded that the investigatory duties rendered the function of the commission to be more than "solely advisory." Therefore, the court found the commission not exempt from the definition of "designated employee." Consequently, the court found that this commission had to have a conflict of interest code that required filing of disclosure forms.

In making its decision, the court articulated the public policy underlying the legislatively imposed duty on some boards and commissions to file disclosure forms and to adopt conflict of interest codes:

The conflict of interest laws operate without regard to actual corruption or actual governmental loss; they establish an objective standard 'directed not only at dishonor, but at also at conduct that tempts dishonor;' they are preventive, acting upon tendency as well

as prohibited results. Citations omitted.

A violation occurs not only when the official participates in the decision, but when he influences it, directly or indirectly.

Citations omitted. Thus, a public official outside the immediate hierarchy of the decision-making agency may violate the conflict of interest law if he uses his official authority to influence the agency's decision.

75 Cal. App. 3d at 723.

In making its decision the court acknowledged that requiring certain advisory boards to file disclosure forms would possibly impair privacy and discourage membership on citizen advisory boards. In making this finding, however, the court stated that the exemption from the term "designated employee" was well within the purview of the state legislature. The court stated that:

The law was designed to induce citizens to accept uncompensated, parttime public service without vulnerability to periodic financial disclosures. Financial disclosure laws exact a cost in terms of impaired privacy. Citation omitted. Many citizens would rather hang onto their privacy than damage it through public service. The damage to privacy is inflated by enterprising journalists who mistake gossip for news. The cost, at any rate, is a concern of the legislative branch, not the courts. The statutory exemption is limited to boards and commissions which are solely, that is, exclusively advisory.

75 Cal. App. 3d at 724.

C. Statute Governing Planning Commission

There is a special statutory rule governing planning commissions. While the question of whether other boards and commissions must file disclosure forms turns on whether those boards and commissions are "solely advisory," the Planning Commission is required by separate statute (Government Code section 87200) to file a "721" form. This is the same form as is filed by the Mayor, Council, City Attorney, and City Manager. Note that the Planning Commission is the only board or commission to file a "721," as opposed to a "730" form.

FPPC Regulation and Opinion

Since the 1977 court case described above, the FPPC has adopted a regulation in an attempt to further define which boards and commissions are "decision-makers" as opposed to "solely advisory." 2 Cal. Code of Regulations 18700(a)(1). The relevant portion of this regulation defines a "decision-making" type of board or commission to be one which:

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- (A) May make a final governmental decision;
 - (B) May compel a governmental decision; or it may prevent a governmental either by reason of an exclusive power to initiate the decision or by reason of a veto

which may not be overridden; or

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

In a 1987 opinion, the FPPC construed this regulation to determine whether redevelopment project area committee (PAC's) were the type of board or commission that required filing of disclosure forms. In the Matter of Opinion Requested by Doreet Rotman, et al, 10 FPPC Ops. 1 (1987). In construing this regulation, the FPPC decided that redevelopment PAC's were indeed the type that had to file disclosure forms ("730 type") because of recent legislative changes in redevelopment law. The FPPC found that, although these PAC's could not make a final governmental decision and could not compel or prevent a final government decision, they were in a position to make "substantive recommendations" within the meaning of regulation 18700(a)(1)(C), because a two-thirds vote of a city council was required to overrule a PAC recommendation to deny a proposed redevelopment plan or deny an amendment to a plan. The FPPC decided that it was not necessary to consider how regularly or over how long a time a PAC's recommendations were approved by a city council to reach its conclusion. Indeed, the FPPC appeared to ignore that part of the regulation and found that redevelopment PAC's are simply the type of decision-making body required to adopt conflict of interest codes and to file disclosure forms. 10 FPPC Ops. at 7.

Body of Law Creating Particular Board or Commission

It is apparent from analysis of the above statutes, case law, and FPPC regulation and opinions that it is necessary to examine the law (statute, charter, ordinance or resolution) that creates a particular board or commission to determine whether that board or commission is required to adopt a conflict of interest code and file a disclosure statement.

Some of the City of San Diego's boards and commissions are clearly the "decision-making" type. Looking at the attached Exhibits A and B, there are several entities that are corporations or bodies that are created by statute, charter, or ordinance, with clear and explicit "decision-making" powers (i.e., power to contract, to sue and be sued, etc). (See, e.g., Centre City Development Corporation Inc., San Diego Convention Center Corporation Inc.) These types are clearly the types that are covered by the Act and will require adoption of a conflict of

interest code and the filing of disclosure forms.

Other boards and commissions are clearly "solely advisory." The International Affairs Board and Quality of Life Board are good examples of this type. These boards will not be required by law to adopt a conflict of interest code and will not be required by law to file disclosure forms, because their functions do not rise to the level of "decision-making."

Many boards and commissions' functions fall in the gray area between clearly "decision-making" and "solely advisory" type. In each case, the City Attorney's office has examined the law creating the board or commission and has made a judgment as to whether that board or commission is a "decision-maker" or "solely advisory" within the meaning of the law. The City Attorney's judgment is made in the form of a recommended proposed conflict of interest code and resolution put forward to the City Council for its adoption. The City Attorney's recommendation to the Council is based on a case by case analysis of each board or commission in light of the then existing law. Hence, there is no bright line as to which board or commission will be required to have a conflict of interest code or to file a disclosure form.

Additionally, as a matter of policy, the City Council has required some "solely advisory" boards and commissions to abide by adopted conflict of interest codes, but has not required them to file disclosure statements. Having more stringent conflict of interest standards than is required by state law is acceptable legally.

The City Attorney's office recognizes the need for review of the current conflict of interest codes. Many are out of date. Some were adopted at a time when a particular board's functions were designed to be more of the "decision-making" type (e.g., the Commission for Arts and Culture) and since the time of their creation, their powers have become "solely advisory." Hence, the City Attorney's office will work in conjunction with the City Clerk's office to review and update the conflict of interest codes to ensure that the boards and commissions have the required conflict of interest codes and disclosure forms when necessary as required by state law.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachments
RC-90-8