

**Fair Political Practices Commission  
Memorandum**

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

**From:** Zackery P. Morazzini, General Counsel  
John W. Wallace, Assistant General Counsel

**Date:** October 31, 2011

**Subject:** *In re Costanza* Opinion Request, O-06-193

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**I. STAFF RECOMMENDATION**

Staff recommends the Commission decline to issue an opinion in this case for the following reasons:

- (1) The question raised is covered by Commission regulations.
- (2) The question raises no substantial question of interpretation and, therefore, requires only a routine reply more appropriately made by staff.

**II. PROCEDURAL AND FACTUAL BACKGROUND**

Section 83114 provides:

“(a) Any person may request the Commission to issue an opinion with respect to his duties under this title. The Commission shall, within 14 days, either issue the opinion or advise the person who made the request whether an opinion will be issued. No person who acts in good faith on an opinion issued to him by the Commission shall be subject to criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request. The Commission’s opinions shall be public records and may from time to time be published.

“(b) Any person may request the Commission to provide written advice with respect to the person’s duties under this title. Such advice shall be provided within 21 working days of the request, provided that the time may be extended for good cause. It shall be a complete defense in any enforcement proceeding initiated by the Commission, and evidence of good faith conduct in any other civil or criminal proceeding, if the requester, at least 21 working days prior to the alleged violation, requested written advice from the Commission in good faith, disclosed truthfully all

the material facts, and committed the acts complained of either in reliance on the advice or because of the failure of the Commission to provide advice within 21 days of the request or such later extended time.”

On September 20, 2011, an opinion request was received from Neal Costanza, City Attorney for the City of Selma, concerning the application of the Political Reform Act’s (the “Act”)<sup>1</sup> conflict-of-interest provisions to two Selma City Council members, Mayor Kenneth Grey and Council Member Michael Derr

The facts provided with respect to Mayor Grey were as follows:

- On July 18, 2011, the City Council of the City of Selma had a regular meeting. On the closed session agenda, there was one item of potential litigation under Section 54956.9 for the purpose of allowing the Council to consider whether to begin the process of initiating eminent domain proceedings aimed at acquiring the assets, infrastructure and operation of the company that provides water service within the City, California Water Service Company (“Cal Water”), a public utility regulated by the California Public Utilities Commission.
- Following the meeting, Council Member Dennis Lujan made statements to the local press indicating that Mayor Grey had a financial conflict of interest with respect to votes taken or participation in matters considered by the City Council relating to Cal Water.
- According to the City Manager’s August 1, 2011, report (attachment D to Requestor’s September 20, 2011, request), Mayor Grey has an ownership interest in and operates BVI Construction, Inc., a corporation that is a licensed construction contractor and does work on specific projects for public and private entities. In the past, BVI has provided construction services for Cal Water pursuant to a contract.

The facts provided with respect to Council Member Michael Derr were as follows:

- Also included on the agenda for July 18, 2011, was approval of the fiscal year 2011-2012 budget for the City of Selma.
- Following that meeting, statements were made to the local press, the Selma Enterprise, by Council Member Dennis Lujan to the effect that with respect to the vote on the approval of the budget as reflected in the July 18, 2011, minutes, Council Member Derr had a disqualifying financial conflict of interest under the provisions of the Act.

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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.

- According to the City Manager's August 1, 2011, report (attachment D to Requestor's September 20, 2011, request), the budget included a \$14,000 appropriation to the Selma Chamber of Commerce.
- The council member's spouse is employed on a part-time basis with the chamber.

Once an opinion request is received, the Executive Director determines whether to grant or deny the opinion request. (Regulation 18320(d).) Among the criteria upon which denial of an opinion request may be based are the following:

“(1) The question raised is covered by Commission regulations.

“(2) The question raises no substantial question of interpretation and, therefore, requires only a routine reply more appropriately made by staff.

On October 4, 2011, the General Counsel and Acting Executive Director denied the request for an opinion. He stated:

“It appears that the main issue raised in your letter is whether two of your council members voted on past decisions in which they had conflicts of interest. Conflict-of-interest issues are covered in great detail by several Commission regulations, and the Commission has been giving advice regarding conflicts of interest through formal written advice for many years. Our regulations and advice letters (in a searchable database) are available to the public at our web site: <http://www.fppc.ca.gov>.

There is no justification in your facts or in your questions that would elevate these traditional, though fact-dependent, conflict-of interest questions to the status of a Commission opinion. While it is true that Commission staff advice would be declined in this case because staff does not generally advise on past conduct, this in itself would not be a basis to justify a Commission opinion. For these reasons, I am denying your request for an opinion.

“Pursuant to Regulation 18321, you have the right to seek a review of this denial at the next Commission meeting following the issuance of this letter. Since the legal notice period for the October meeting has passed, you would need to request a review of the denial at the November Commission meeting. Your request must be received no later than October 24, 2011, to allow time for processing for the November meeting. If a majority of the Commission decides to grant your request, this denial will be rescinded and an opinion will issue as provided in Regulations 18322 and 18324.”

Mr. Costanza timely requested the Commission's review of the decision to decline the opinion. This matter is before the Commission now, only with respect to the procedural issue of whether the Acting Executive Director's determination should be reversed. It is not a discussion of whether conflicts of interest existed for the two council members or whether they complied with the Act.

### III. DISCUSSION

*(1) The question raised is covered by Commission regulations.*

The conflict-of-interest rules are not new or novel. Sections 87100 and 87103 were original provisions of the Act and the various regulations interpreting the conflict-of-interest rules have been around since the late 1980s in one form or another. Even assuming the request was a prospective one, the questions raised are standard conflict of interest questions that have been addressed in a multitude of advice letters since the Commission began providing advice.

(1) Did councilmember Derr have a conflict of interest in voting on or participation in matters relating to the fiscal year (FY) 2011-2012 budget based on his spouses' employment with the Selma District Chamber of Commerce and the fact that the budget included a \$14,000 allocation to the chamber?

(2) Did councilmember Grey have a conflict of interest in voting on or participating in matters relating to Cal Water based on the fact that the councilmember has a business relationship with Cal Water's owner?

The regulations and the statutes could have (and should have) been consulted before either councilmember made, participated in making, or influenced any governmental decision. The Legal Division also would have been able to provide advice and assistance on the application of these statutes and regulations based on the facts provided *prior to any decisions*. But other than application of the existing rules, this request brings no novel or wide-reaching issues for the Commission to consider.

Moreover, what also makes this Opinion request unusual is that other procedural regulations -- not directly relevant to the conflict-of-interest analysis -- also lead us to the conclusion that the opinion should be declined. The most relevant fact in this case is that the facts and circumstances all relate to past conduct.

As you are aware, the Commission has delineated staff into separate divisions with respect to enforcement of the Act (past conduct) and advice (prospective conduct). This delineation is evidenced in Regulation 18329(b)(8)(a) and (c)(4)(A), which provides that formal advice will be declined in cases involving past conduct, and in Commission policy and practice of declining to advise in past conduct situations.

Moreover, Regulation 18360 et seq. establishes a system whereby the public can complain about potential violations of the Act to the Enforcement Division, and the Enforcement Division will investigate. Such a complaint could have been initiated by the Selma council member that initially challenged the votes (Councilmember Lujan), or the council members who were the ones who voted (Council members Derr and Grey) through self-reporting.

These regulations, when considered together, serve a very important policy purpose. Past conduct should never be a subject for immunizing advice from the Legal Division, nor is it appropriate for an immunizing Commission Opinion. (Regulation 18320(a)(2).)

***(2) The question raises no substantial question of interpretation and, therefore, requires only a routine reply more appropriately made by staff.***

Generally, the Commission reserves its opinion power for substantial or novel questions of interpretation. Over the past 10 years, the Commission has only issued six Commission opinions, and none since 2006. Historically, Commission opinions related to conflicts of interest that dealt with novel or unusual fact patterns. For example, more recent conflict-of-interest opinions dealt with the following:

- ***In re Roberts (2004) 17 FPPC Ops. 9; O-04-093:*** Mr. Roberts requested an opinion as to whether his registered domestic partner would be considered a “spouse” for purposes of the Act’s reporting and disqualification provisions. The Commission determined that since it had applied family law concepts in analyzing when a public official has a community property interest in his or her spouse’s income, consideration was given to Assembly Bill 205, which extended the rights and obligations of spouses to registered domestic partners as of January 1, 2005. Therefore, the Commission concluded that, if elected, as of January 1, 2005, Mr. Roberts would have an economic interest arising from his registered domestic partnership as a result of his domestic partner’s investments and real property, and resulting from any personal financial effects on his domestic partner. The Commission also stated that its conclusion is limited to the provisions of the Act, and that the issuance of this opinion did not create a marriage nor confer the status of being married upon any person.
- ***Hanko, Terilyn, Member, Mills Peninsula Healthcare District Board of Directors (2002) 16 FPPC Ops. 1; O-02-088:*** Incentive compensation payments received by a member of a healthcare district board from her employer were attributed to the purchaser of the employer’s products where: (1) the board member was employed to purposefully direct sales or marketing activity toward the purchaser; (2) the board member had direct contact with the purchaser intended by the board member to generate sales or business; and (3) there was a direct relationship between the purchasing activity of the purchaser and the amount of the incentive compensation received by the board member. Because

these requirements were met under the facts of this opinion, both the purchaser and the employer were found to be sources of income to the board member, and the board member was not permitted to participate in decisions that might have a reasonably foreseeable material financial effect on the purchaser.

- ***Galligan, Joe, City Councilmember, Burlingame (2000) 14 FPPC Ops. 1; O-00-04:*** On the facts presented, it was not reasonably foreseeable that a decision whether to certify an environmental impact report would have a material financial effect on a city council member's economic interest in the bank that held the mortgage on the subject property. Additionally, the Commission decided not to interpret Regulation 18706, which requires that the material financial effect occur as a result of the governmental decision, to require that the effect be one that would not occur but for the decision. Instead, the only causation required is that enunciated in *In re Thorner*: that a material financial effect be substantially likely. ((1975) 1 FPPC Ops. 198.)

These were much more substantial issues than the matters raised in this request, changing the application of the law to all public officials. These differ dramatically from the resolution of the Selma Council Members personal conflict-of-interest issues based upon routine facts.

In Mr. Costanzo's appeal of October 21, 2011, he states:

“One of the criteria for denying the requested opinion - that the question raised is covered by Commission regulations - does not appear to be applicable. The regulations define reasonable foreseeability in relative terms only. An effect on a financial interest is defined as reasonably foreseeable if it is substantially likely to occur (Regulation 18706). Similarly, while the regulations seem to make clear that the financial interests of Michael Derr with respect to the Selma Chamber of Commerce is under the regulations only an indirect financial interest (Regulation 18704), the regulations provide that the determination of whether an indirect interest is nonetheless material is dependent upon whether the effect on the financial interest is reasonably foreseeable. (Id). Materiality, therefore, is, like foreseeability, a highly factually specific inquiry to be made on a case by case basis.

“It is precisely because these questions raise the factually dependent issue of reasonable foreseeability that a ‘substantial question of interpretation’ is presented. Statutes provides that any person may request a formal opinion of the FPPC with respect to the duties of that person under Government Code §83114(a). A request for advice, concerning the foreseeability question, would require FPPC to speculate or forecast on resolution abstract or hypothetical situations involving the effect of a governmental decision not yet made. Here, by contrast, this is a request for

an opinion based upon known facts that are set forth in detail in the request. The resolution of the foreseeability question, and the application of the exception with respect to decisions which do not affect the decision maker in a manner that is distinguishable from the effect on the public at large, can be determined in an opinion without the necessity of speculating or forecasting the effects of the governmental decision because the facts bearing on those effects have crystalized to a point where those effects can be evaluated with certainty. The matter is ripe for an opinion. (See *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1583-1584). This is why the Commission regulations setting forth the criteria for denying advice requests provide that the Commission does not provide advice on matters relating to past occurrences or conduct, while regulations dictating the criteria for denying an opinion request do not preclude the issuance of an opinion that relates to such past events or conduct. The questions raised here present a substantial issue of interpretation of the conflict of interest rules and requirements because these cases provide the Commission with an avenue for defining, by reference to specific facts, what it is that amounts to a foreseeable effect on a financial interest of a given governmental decision.”

In response, staff would make two points:

(1) Irrespective of the “past conduct” nature of the question, the question that the requestor presents to the Commission is one of foreseeability -- this question arises and must be addressed in every conflict of interest analysis. This is step 6 in the standard 8-step analysis. Nothing in the requestor’s facts, other than the fact they have already participated in the decisions in question, differentiates this case from all other conflict cases.

(2) While it is true that in this case the facts have become clear -- since, as previously noted, they have already occurred -- this would be true for every enforcement complaint filed with the Commission. There is no justification to elevate this matter to formal Commission opinion status merely because the conduct has already occurred. The requestor is correct -- the facts are set -- and the Enforcement Division has the role and the staff (investigators) to determine exactly what the facts are and to determine if a conflict of interest existed.

The acting Executive Director’s decision to deny the request for a Commission opinion is fully supported. Therefore, staff recommends that the Commission reject this request for an opinion.