3/5/80

Memorandum 80-25

Subject: Conflict of Interest Code

The Political Reform Act of 1974 (see Gov't Code § 81000 et seq.) provides that each state agency must adopt a conflict of interest code which requires the disclosure of financial interest that may foreseeably be materially affected by the agency's decisions and the disqualification from participation in decisions affecting financial interests. See Gov't Code §§ 87100-87313. Financial statements must be filed upon assuming office, annually during the term of office, and upon leaving office. Gov't Code § 87302.

Pursuant to regulations of the Fair Political Practices Commission (FPPC), the Law Revision Commission requested an exemption from the code adoption requirement in 1977. The exemption claim was based in general on the argument that any possible material financial effects of Commission decisions would not be foreseeable at the time a financial statement was required to be filed. The argument has also been made to the FPPC that the Commission's work is essentially advisory since the Legislature must pass a Commission proposal before it can have an effect and that any effect eventually resulting from the passage of a Commission recommendation would be unlikely to benefit a Commissioner or staff member to any greater extent than other large groups of persons in the state.

Our exemption request was considered by the FPPC in April 1977 and in December 1978, but no final action was taken. On March 3, 1980, the FPPC held a hearing on the exemption request and denied it. As a result, the Commission will be required to submit a proposed conflict of interest code to the FPPC on or before June 30, 1980. This requirement may be satisfied (1) by Commission adoption of a proposed code under the procedures of the Administrative Procedure Act or (2) by FPPC promulgation of a code for the Commission. The staff recommends that we follow the second course of action since it will save time and expense. The FPPC staff has indicated that they will cooperate with us in preparation of a conflict of interest code.

The staff needs some general guidance on the approach the Commission wishes to take in the preparation of a proposed conflict of interest code. Two questions need to be resolved: (1) Which Commission personnel (Commissioners, staff, consultants) should be required to file financial statements? (2) What degree of disclosure should be required of designated employees?

Discussions with the FPPC staff and at the recent hearing indicate that Commissioners (other than legislative members who are already subject to disclosure requirements) and the legal staff would be subject to the code. The staff believes that we should not require disclosure by consultants, although it is possible that the FPPC will not accept this position. We think that the following portion of FPPC Regulation 18700 justifies exclusion of Commission consultants:

"Consultant" . . . shall not include a person who:

> (A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and
>
> (B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.

The more difficult question involves the degree of disclosure of financial interests to be required. An agency's conflict of interest code is supposed to be designed to suit the agency's particular functions and different disclosure categories are to be created to coincide with the special duties of each person covered. For example, a purchasing agent would only have to disclose interests in persons or entities from whom purchases may be made. Unfortunately, the nature of the Commission's business does not lend itself to any simple or precise way to limit the financial interests to be disclosed. Under the Political Reform Act, if specific disclosure categories cannot be devised to the satisfaction of the FPPC because the duties of affected persons are too "broad or indefinable," such persons are required to disclose all investments, interests in real property, and income that are reportable under the board standard applicable to elected officials. (See Gov't Code § 87310; a copy of the relevant statutes governing disclosure by elected officials is attached hereto as Exhibit 1.) Under this broad disclosure requirement, reportable interests are not tied to any standard of foreseeability of effect nor to any particular responsibilities involved in the person's position. Discussions with the FPPC staff and at the recent hearing indicate that they do not think it is possible to devise a sufficiently precise standard to limit the areas of disclosure and, therefore, that broad disclosure will be necessary. We agree with this conclusion. In the past the staff has attempted to develop a code with a limited disclosure standard but we have not been satisfied with the results. If the Commissioners have any concrete ideas on how to draft a limited disclosure standard we will pursue the matter with the FPPC. Otherwise, we will proceed with work on a conflict of interest code that adopts the broad disclosure requirement.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel