

August 10, 2001

TO: ALL CLIENT AGENCIES

Re: Summary Guide to Frequently Asked Questions
About Outside Contracts and the Political Reform Act

Dear Clients:

By now, you should have received my August 3, 2001, letter regarding basic legal issues surrounding which outside personal services contractors' personnel are considered to be "consultants" under the Political Reform Act. As noted therein, once an individual is determined to be a "consultant," he or she is subject to the conflict-of-interest code adopted by your agency. While most contractors are likely not "consultants," those who are must file financial disclosure statements and are subject to disqualification and other requirements under the Political Reform Act just like any other "public official." Additional requirements under other laws may also apply such as Government Code section 1090.

We thought it would be helpful to lay out the steps that a state agency should take to determine who may be covered as "consultants" and what steps to take to avoid conflicts of interest from occurring in agency decision making. This memo provides you with some basic guidance. Your attention is also directed to the website of the Fair Political Practices Commission ("FPPC") < <http://www.fppc.ca.gov> > for general information regarding conflicts-of-interest and disclosure issues. Your attention is also directed to the Attorney General's website <<http://ag.ca.gov/ethics/>> _____ for the basic "Ethics Orientation for State Officials" interactive course.

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I trust that this summary guide will be helpful to your agency's efforts to understand the Political Reform Act. However, it is no substitute for in-depth review and legal advice from your agency counsel and from the FPPC.

Sincerely,

/s/

PETER SIGGINS
Chief Deputy Attorney General
Legal Affairs

FOR BILL LOCKYER
Attorney General

Enclosure

**SUMMARY GUIDE
(POLITICAL REFORM ACT)
Determining Which Outside Contractors Qualify as “Consultants”**

1. Does the term apply only to individuals?

Yes. You must look at the individual who will be performing the services. If the individual works for a business, it is the individuals who actually perform the services who may be a “consultant.” It is never the business entity itself. (Note: If the business entity is a sole proprietorship, the sole proprietor as an individual is the potential “consultant.”)

2. Is the individual acting pursuant to a contract with your agency?

The FPPC regulation requires that the services be provided pursuant to a contract with the government agency. The term contract may be broadly defined, if you are in doubt whether an arrangement involves a contract, you should consult with the FPPC on that threshold question.

3. Does the individual have the authority to make governmental decisions?

As a general rule, if an individual under contract has been delegated the authority to make significant governmental decisions, then the individual becomes a “consultant.” The FPPC regulation specifies the types of decisions which are at issue. Those are decisions to:

- (a) Approve a rate, rule or regulation.
- (b) Adopt or enforce a law.
- (c) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement.
- (d) Authorize your agency to enter into, modify, or renew a contract (provided it is that requires your agency’s approval).
- (e) Either grant agency approval to a contract that requires your agency’s approval and to which your agency is a party; or grant approval to the specifications for such a contract.
- (f) Grant agency approval to a plan, design, report, study, or similar item.
- (g) Adopt or grant agency approval of, policies, standards, or guidelines for the or for any subdivision of the agency.

As previously stated, if your agency has, by contract, delegated authority for any of these decisions to an individual, then that individual is likely a “consultant.” If you have any questions, direct them to the FPPC.

4. What if the individual does not make governmental decisions, can they still be a “consultant”?

Yes. You must also consider the other factors, even if the individual is not delegated any authority to make governmental decisions.

5. What other factors apply to determine if an individual is a consultant?

If the individual “serves in a staff capacity” he or she may still be considered a consultant; provided either one of two additional factors are also satisfied.

6. What does it mean to “serve in a staff capacity”?

There is no short answer to this question, as you can see from our recent memorandum that chronicled past FPPC advice on this topic. But a few criteria may be distilled as an initial tool to determine whether further analysis is necessary.

(a) *Is there an “ongoing relationship” between the individual serving under contract and the agency?*

Factors to be considered include:

(i) *Scope of services.* Are they narrow or broad? Are they confined to “one project or a limited range of projects” for your agency? If so confined, the individual may not be “serving in a staff capacity” under FPPC guidance. On the other hand, if the scope of services is broad, or involves a number of projects, the individual may be deemed to be “serving in a staff capacity.” You must also consider whether this is a singular contractual arrangement or whether the individual has performed services with the agency previously, or expects to perform future services for the agency. Again, specific situations should be analyzed by agency counsel in consultation with the FPPC.

(ii) *Length of service to the agency.* Length of service is a particularly important factor if the work is on a single project or a limited range of projects and the length of service exceeds one year. If the length of service exceeds one year, even though the scope is very limited, the FPPC has admonished that the individual could, in certain circumstances, be considered “serving in a staff capacity.” The FPPC has several advice letters that discuss this factor. Those letters were chronicled in my earlier memorandum and also discuss the frequency and quantity of services.

(iii) *Frequency and quantity of services.* Are the services sporadic or regular? Are they occasional, or part-time, or are they full-time, and are they continuous for an extended time-frame. The more frequent and continuous the services are, the more likely that the individual will be considered “serving in a staff capacity” by the FPPC.

7. Assuming an “ongoing relationship” exists, what other standards must be met?

The individual must either participate in making decisions or serve as a quasi-staff person and perform the same or substantially all the same duties as a staff person whose position is included in your agency’s conflict of interest code.

(a) *Quasi-staff position.* Is the individual serving in a quasi-staff position? Is he or she really stepping into the shoes of a position previously held by a staff person (or a new position that would be filled by a staff person) or performing the same or substantially all the same duties as a staff person would otherwise perform? If so, the individual is “serving in a staff capacity.” If he or she is performing substantially all the same duties and the position is one that is “designated” in your agency’s conflict of interest code, then the individual will be considered a “consultant.”

(b) *Participates in making governmental decisions.* Even if an individual is not filling a position designated in your agency’s conflict of interest code, if the individual meets the “serves in a staff capacity” standard discussed above, and the individual also “participates in making governmental decisions” then that individual will be considered a “consultant.”

8. What does “participates in making a governmental decision” encompass?

This is a phrase defined in FPPC regulation 18702.2. Again, there are essentially two standards, if either alternate standard is met, the individual “participates in making a governmental decision” and if he or she does so acting in a staff capacity he or she is a “consultant.”

(a) An individual “participates” if he or she “negotiates, without significant substantive review” with someone other than your agency regarding a governmental decision that is on the list set out under number 3, above. In other words, even though the decision making may not be delegated, the negotiations have been delegated to the individual under the contract.

(b) An individual “participates” if he or she “advises or makes recommendations to the decision maker either directly or without significant intervening substantive review” by conducting research or an investigation or preparing or presenting a report or analysis, which requires the individual to exercise judgment, and which is intended to influence a governmental decision listed in number 3, above.

A key component of each of these standards is whether “substantive review” occurs as to the actions of the contract individual. These issues are very fact-specific and we urge you to consult with legal counsel and the FPPC to determine how to apply these standards in any given situation. If the individual is communicating with agency decision makers either orally (i.e., in a meeting, on the phone, etc.) or in writing (i.e., via memoranda, reports, etc.), then the individual is “participating” *if* the decisions at issue are listed in number 3 and there is no “significant intervening substantive review” by other agency staff.

9. Assuming an individual is determined to be a “consultant” what steps should an agency take?

First, notify the individual that you have concluded they are a “consultant” and, therefore, will be subject to the conflict of interest provisions of California law (this includes not only the Political Reform Act, but Government Code section 1090 and other provisions.) Provide appropriate materials to educate them about the law (such as the interactive Ethics Orientation on the AG’s website < <http://caag.state.ca.us/ethics/ethifram.htm> >.

Second, determine what disclosure category in your conflict of interest code will apply to their duties. Under state agency conflict of interest codes there should be a provision for each agency director to make case-by-case determinations regarding the duties of “consultants” and the disclosure appropriately applied given those duties. The “default” disclosure category is the broadest category otherwise assigned to agency officials. (For a discussion, *see* the FPPC’s “fact sheet” entitled “Consultants in a Conflict of Interest Code,” another copy of which is attached.) Such a determination needs to be promptly made so that the individual may be informed of his or her disclosure obligations. Then provide them with the FPPC Form 700 and accompanying instruction manual so they may discharge those obligations in a timely manner. Generally, those who start work (“assume office”) have 30 days in which to file their Form 700; however, the agency must inform them of their obligations and their disclosure category.

Third, when the Form 700 is filed, have your staff review its contents to see if there are any apparent potential conflicts based upon the disclosures. If any are discovered, there are several actions available to your agency, depending on all the factual circumstances.

(a) Terminate the contract for services, if the contract so permits. This is an extreme solution, but – depending upon all the circumstances – it may be the only logical one.

(b) Advise the individual to disqualify themselves from specific decisions where they may have a conflict of interest. Generally, disqualification – if effectuated pursuant to FPPC regulations – is sufficient to eliminate the conflict of interest. But disqualification must be complete – the individual must have no involvement with the decision making process once they have disqualified themselves.

(c) Ask the individual to dispose of the conflicting interest. This is feasible (although perhaps not desirable on the individual's part) if the economic interest is a liquid asset, such as stocks. It is much less feasible if the economic interest is in real property, and it may well be impossible if the economic interest is a source of income within the preceding 12 months. Thus, this solution will not fit all circumstances. Disposing of the interests is, obviously, something you may only request, as a less severe alternative to (a).

10. How do we know if an individual's economic interests present potential conflicts?

Because the answers to these inquiries are fact-specific, we direct you to your agency counsel and the FPPC. < <http://www.fppc.ca.gov> > The FPPC has numerous materials discussing the analysis of when an individual has a disqualifying conflict of interests and the Attorney General's Office website and its interactive course on "Ethics Orientation for State Officials."

CONSULTANTS IN A CONFLICT OF INTEREST CODE

WHO IS A CONSULTANT?

The Political Reform Act (Gov. Code Section 81000-91015) provides that "no public official at any level of state or local government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Section 87100.) In addition, the Act requires every public official to disclose those economic interests that could foreseeably be affected by the exercise of his or her duties. (Sections 87200-87313.)

The term "public official", includes consultants: "Public official at any level of state or local government' means a member, officer, employee, or consultant of a state or local government agency." (2 Cal. Code of Regs. Section 18701(a).)

Regulation 18701(a)(2) defines "consultant" as an individual who, pursuant to a contract with a state or local government agency:

(A) Makes a governmental decision whether to:

- (i) Approve a rate, rule, or regulation;
- (ii) Adopt or enforce a law;
- (iii) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
- (iv) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract which requires agency approval;
- (v) Grant agency approval to a contract which requires agency approval and in which the agency is a party or to the specifications for such a contract;
- (vi) Grant agency approval to a plan, design, report, study, or similar item;
- (vii) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof;

-OR-

(B) Serves in a staff capacity with the agency and in that capacity performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code.

CONSULTANTS

CONSULTANTS ARE INDIVIDUALS

It is not the business or firm providing services to your agency that is considered the consultant. The *individual(s)* working for the firm who provide the services are considered the consultants. These individuals must file statements of economic interests based on their *personal* financial interests and are subject to disqualification and other laws affecting public officials.

SERVING IN A STAFF CAPACITY

The regulation includes only those individuals who are performing substantially all the same tasks that normally would be performed by staff members of a governmental entity. In most cases, individuals who work on just one project or a limited range of projects for an agency are not considered to be working in a "staff capacity." The length of the individual's service to the agency is relevant. For example, suppose an individual contracted with a city to study noise at a specified intersection. If the individual took the noise measurements in one day, and issued a report to the planning commission before its next meeting, the individual normally would not be serving in a staff capacity. If, however, a firm's contract provided that it would provide all plan checking services for a city for five years, it is much more likely that individuals performing these services would be in a quasi-staff capacity. In addition, the tasks of the quasi-staff member over this period of time must be substantially the same as a position that is, *or should be*, specified in the agency's conflict of interest code. (Memorandum to the Commission dated March 28, 1994, regarding Regulation 18700, pp. 3-4.) (*Kalland* Advice Letter, No. I-96-078.)

An individual who makes a governmental decision listed above or serves in staff capacity with the agency is considered a public official who must file a statement of economic interests. The individual is subject to the Act's gift limits and conflict of interest provisions.

EXAMPLES

The California Coastal Commission hired an engineering firm to review a hydrological study involving wetlands restoration. Employees of the firm would not be considered consultants under the Act, because they are not making governmental decisions and are only providing services on a sporadic basis for one project. If over time, the firm provides consulting services to the Coastal Commission on a regular basis, or performs substantially the same duties as would otherwise be performed by an individual designated in the Commission's conflict of interest code, employees of the firm would be considered consultants. (*Parry* Advice Letter, No. I-95-064.)

CONSULTANTS

EXAMPLES

An attorney hired to perform ongoing legal services for an agency would usually be considered a consultant. Attorneys generally have broad powers to affect decisions which could foreseeably and materially affect their financial interests. These powers include the authority to represent and bind the agency to a course of action in litigation and contract matters. Attorneys often make governmental decisions listed in Regulation. 18701(a)(2)(A) and/or observe in a staff capacity with the agency. However, an attorney hired to work on one discrete litigation matter, who was not making any governmental decisions listed above, would not be considered to be working in a "staff capacity" and, therefore, would not be a consultant.

The Milton Marks Commission on California State Government hired a research firm to conduct a study on gaming in California. The firm's responsibilities were to create and coordinate advisory committee meetings, create a public hearing, and produce an in-depth report about the Commission's findings; they did not make any governmental decision, nor did they provide advice or make recommendations. Although members of the firm "performed all the duties normally carried out by staff," their duties did not include those listed above which would qualify them as consultants. (*Karger and Scher* Advice Letter, No. A-97-253.)

CalPERS entered into a limited partnership with a real estate development firm to implement an investment program for residential subdivisions. The firm is the general partner and runs the business. Although this is a single project, it requires regular work over an extended period of time; the work is the sort that staff would normally provide. Therefore, the firm's employees are consultants and must report their economic interests. (*Thomas* Advice Letter, No. I-98-185.)

CONSULTANTS

LISTING CONSULTANTS IN A CONFLICT OF INTEREST CODE

The Commission realizes that not all consultants participate in making decisions on behalf of public agencies. Rather than amend your code each time you retain a consultant who is in a decision-making capacity, you may use a specialized disclosure category which provides that the disclosure required of consultants shall be determined on a case-by-case basis by the chief executive officer. The chief executive officer may make a determination as to what disclosure, if any, is required by any particular consultant.

This consultant disclosure category should be part of the code. You should add the position “consultant” as a designated position in the appendix of the code with a footnote as shown in the following example:

Consultant*

**Consultants shall be included in the list of designated employees and shall disclose pursuant to the broadest disclosure category in the code subject to the following limitation:*

The (executive director or executive officer) may determine in writing that a particular consultant, although a “designated position,” is hired to perform a range of duties that is limited in scope and thus is not required to comply fully with the disclosure requirements described in this section. Such determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The (executive director's or executive officer's) determination is a public record and shall be retained for public inspection in the same manner and location as this conflict of interest code.



This fact sheet highlights provisions of the Act concerning consultants. You should not rely on the fact sheet alone to ensure compliance with the Act. If you have any questions, consult the Act and regulations or contact the Fair Political Practices Commission at (916) 322-5660.