



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
1102 Q Street • Suite 3050 • Sacramento, CA 95811  
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November 15, 2023

Jill D.S. Maland  
Senior Counsel  
Chula Vista  
960 Canterbury Place, Suite 330  
Escondido, CA 92025-3870

Re: Your Request for Advice  
**Our File No. A-23-139**

Dear Ms. Maland:

This letter is in response to your request for advice regarding conflict-of-interest provisions of the Political Reform Act<sup>1</sup> (the Act) and Section 1090, et seq. Please note that we are not providing advice under any other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code. Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, then you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the San Diego County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

### QUESTION

Whether the Act or Section 1090 would prohibit City of Chula Vista (the City) Deputy Mayor Preciado from taking part in discussions and decisions regarding lease agreements between the City and Deputy Mayor Preciado's employer, San Diego State University (SDSU).

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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 18104 through 18998 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.

## CONCLUSION

Under the Act, Deputy Mayor Preciado would not be prohibited from taking part in contracting discussions and decisions between the City and SDSU as he does not have a prohibited source of income interest because he receives a government salary from SDSU which is not “income” as defined in the Act. Under Sections 1090 and 1091.5, Deputy Mayor Preciado would have a “noninterest” in prospective contracts between two government entities, thus neither he nor the City Council would be prohibited from discussions and decisions to enter lease agreements with SDSU. However, Deputy Mayor Preciado must disclose his employment with SDSU to the City Council at the time a contract is considered, and that interest must be noted in the City Council’s official record.

## FACTS AS PRESENTED BY REQUESTER

Since September 2019, City staff has been in collaborative discussions with SDSU, a public, non-profit university, regarding a potential expansion of SDSU’s Television, Film, and New Media (TFM) program to Chula Vista. This potential partnership contemplates moving the current TFM program into the City in order to provide a new state-of-the-art facility for the TFM program and expand access to higher education for students who live in or near Chula Vista and have no proximate higher education institution.

The City and SDSU entered a non-binding memorandum of understanding (MOU) in September 2022 to identify the general terms of a potential partnership to bring SDSU’s TFM program to the City as a tenant in the City’s new Cinematic Arts Academic Library (Library), which is under construction in the City’s University Innovation District (University District). In May 2023, the parties agreed to extend the MOU through December 2023.

The City Council has not taken any action with respect to the MOU or the discussions with SDSU for the TFM program expansion. If the City and SDSU reach agreement on the terms of the proposed expansion, the City Council would be asked to approve an agreement with SDSU. In addition, it is likely that the City Council will be asked to take action on other documents related to the expansion, including with respect to financing options, and that there will be ongoing discussions between the City and SDSU, which may include the involvement of certain City Council members. Furthermore, the parties may identify other SDSU programs that could utilize the Library space and/or other property within the University District.

Deputy Mayor Preciado was elected to the Chula Vista City Council in November 2022 and took office in December 2022. He is employed by SDSU as an Assistant Dean for Undergraduate Studies. This employment pre-dated Deputy Mayor Preciado’s election to the City Council. In his position, Deputy Mayor Preciado is responsible for supervising, leading, administering, supporting, and developing curriculum-based student academic success efforts. He also collaborates with academic units and student services offices to design curriculum, select teaching personnel, and sustain the programs as student academic-related retention and success initiatives. The Deputy Mayor reports to SDSU’s Associate Vice President for Faculty Advancement and Student Success. He has program-level responsibilities and no real authority over SDSU resources. The Deputy Mayor’s duties at SDSU do not include responsibility for real property matters or the TFM

program; he has not had any involvement with the MOU or related discussions between the City and SDSU.

There is a potential that the City Council may be requested to take action in the future to approve a contract with SDSU for expansion of the TFM program, or other similar programs, into the Library building. In addition, there is potential for the City and SDSU to enter into discussions and agreements regarding SDSU's use of other property within the University District.

## ANALYSIS

### A. The Act.

Under Section 87100 of the Act, “[a] public official at any level of state or local government shall not make, participate in making, or in any way attempt to use the public official’s official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of the official’s immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests is:

Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

(Section 87103(c).)

Here, Deputy Mayor Preciado receives government salary income from SDSU, a public university. The definition of income under the Act expressly excludes “salary and reimbursement for expenses and per diem received from state, local or federal government agency ....” (Section 82030(b)(2).) Regulation 18232(a) states that, for purposes of Government Code section 82030(b)(2):

“Salary” from a state, local, or federal government agency means any and all payments made by a government agency to a public official, or accrued to the benefit of a public official, as consideration for the public official’s services to the government agency. Such payments include wages, fees paid to public officials as “consultants” as defined in Regulation 18700.3, pension benefits, health and other insurance coverage, rights to compensated vacation and leave time, free or discounted transportation, payment or indemnification of legal defense costs, and similar benefits.

Under the Act, therefore, Deputy Mayor Preciado’s salary from SDSU is not income and he does not have a disqualifying conflict of interest.

**B. Section 1090.**

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is “concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.)

A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) An officer is conclusively presumed to be involved in the making of agency contracts when the officer is a member of a board or commission that has the authority to execute the contract at issue. (*Id.* at pp. 645 and 649.) Significantly, when Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering the contract. (*Id.* at pp. 647-649.)

However, the Legislature has created various statutory exceptions to the Section 1090 prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. Relevant here is Section 1091.5(a)(9), which provides that an officer or employee shall not be deemed to be interested in a contract where the officer’s interest is:

That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

In *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081, the California Supreme Court determined that this exception applies when “the contract involves no direct financial gain, does not directly affect the official’s employing department, and is only with the general government entity for which the official works.” Thus, an official or employee has a noninterest in the government-entity employer under Section 1091.5(a)(9), provided that: (1) the contract at issue involves no direct financial gain to the official or employee, (2) the contract does not affect the official’s or employee’s department, (3) the interest is disclosed to the body or board at the time the contract is considered, and (4) the interest is noted in the body or board’s official record.

Here, based on the facts provided, the contract at issue involves no direct financial gain to Deputy Mayor Preciado. The contract also does not involve the Deputy Mayor’s Undergraduate Studies department at SDSU; he reports to SDSU’s Associate Vice President for Faculty Advancement and Student Success, and his duties at SDSU do not include responsibility for real property matters or the TFM program. Thus, as long as Deputy Mayor Preciado’s employment with SDSU is disclosed to the City Council at the time the contract is considered and that interest is noted in the City Council’s official record, Section 1090 does not prohibit Deputy Mayor Preciado or the City Council from discussions and decisions to enter lease agreements with SDSU.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge  
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.  
Senior Counsel, Legal Division

JF:aja