

March 13, 2012

Gerald L. Hobrecht
City Attorney
City of Vacaville
650 Merchant Street
Vacaville, CA 95688-6908

Re: Your Request for Advice
Our File No. A-012-030

Dear Mr. Holbrecht:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) There are other bodies of law, separate and apart from the Act's conflict-of-interest provisions that may apply to the situation you have described.

QUESTION

Does the Act prohibit Councilmember Harris, who is employed by the Solano County Library Foundation (the "Foundation") as its executive director, from participating in a city council decision to award a contract if members of the Foundation's Board of Directors, who are also donors to the Foundation, are employed by companies that have bid on the city contract?

CONCLUSION

No. The individual board members do not control the Foundation and, therefore, are not a "source of income" to Councilmember Harris.

¹ 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.

FACTS

You are the City Attorney for the City of Vacaville (the “City”) and are requesting advice on behalf of Councilmember Dilenna Harris. Councilmember Harris, who has served as a councilmember since November 2008, is employed as the Executive Director of the Solano County Library Foundation (the “Foundation”). The Foundation is a nonprofit organization organized under Section 501(c)(3) of the Internal Revenue Code. The mission of the Foundation is to support the programs of the Solano County Library and the literacy and lifelong learning needs of the community.

Councilmember Harris has served as the Foundation’s Executive Director since December 2009. She is a salaried employee and will be paid more than \$500 in the twelve months preceding the City Council decision that is the subject of your inquiry. Her hiring was approved by the Foundation’s Board of Directors (the “Board”).

The Executive Director of the Foundation works closely with the Board and the Solano County Library Director and is responsible for the overall management of the Foundation, including: vision and strategy; fundraising; campaign management; program development; public and community relations; administration; fiscal oversight; legal and fiduciary compliance to grantors; accounting and budgeting; management of part-time staff and volunteers; and Board relations and development.

The Foundation is overseen by the Board, which is composed of sixteen regular members and three honorary members. Honorary members do not participate in Board discussions, nor do they vote on Board actions. Such discussions and decisions are made by the regular Board members.

The Board includes Tom Phillips, who is the General Manger of Recology, Inc. (“Recology”) and Jim Dunbar, who is the District Manager of the Potrero Hill Landfill, Inc. (“Potrero”). The honorary board members include Sue Vaccaro, who is the Northern California Area Municipal Services Manager for Republic Services, Inc. (“Republic”).

Recology and Republic are privately owned waste management companies doing business in California. Potrero is a privately owned solid waste and recycling business in Solano County and is a wholly owned subsidiary of Waste Connections, Inc. (“Waste Connections”). Waste Connections is also a privately owned waste management company.

The City currently provides waste management services within its boundaries through a contract with Recology Vacaville Solano, which expires on June 30, 2013. The City has issued a Request for Proposal (“RFP”) soliciting proposals for waste management services upon expiration of the current contract. The City anticipates that Recology (or its subsidiary, Recology Vacaville Solano), Waste Connections, and Republic will submit proposals in response to the RFP. The RFP will be awarded to the proposer with the “most advantageous” proposal,

which may not necessarily be the lowest bidder. The award will be based on a variety of criteria, including experience, qualifications, responsibility, references and price.

Messrs. Phillips and Dunbar and Ms. Vaccaro personally make financial donations to the Foundation. Their employers, Recology, Waste Connections, and Republic, also make donations to the Foundation. The contributions have been made both prior to and during Councilmember Harris' tenure as Executive Director. The contributions do not directly fund Councilmember Harris' compensation. Rather, the contributions are made to the Foundation generally. The contributions are not designated or earmarked to pay her compensation.

The Foundation's annual budget is prepared by Councilmember Harris and submitted to the Board for approval. The annual budget includes a line item for all employees' compensation and payroll taxes, including Councilmember Harris' compensation and payroll taxes. By approving the annual budget, the Board annually approves Councilmember Harris' compensation.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Regulation 18700(a).)

Steps 1 and 2. Is Councilmember Harris a "public official" within the meaning of Section 87100 and will she be making, participating in making, or using her official position to influence a governmental decision?

Under Section 87200, members of a city council are public officials. When Councilmember Harris votes to award a new waste management contract, she will be making a governmental decision. (Regulation 18702.1).

Step 3. What are Councilmember Harris' economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)

- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- A public official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

The Foundation

A source-of-income economic interest is the only economic interest implicated by the facts. A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision at issue. (Section 87103(c); regulation 18703.3.) The salary paid to Councilmember Harris for her duties as the Foundation’s executive director exceeds the \$500 threshold. Thus, the Foundation is a source of income to her. Because you are only asking about a potential conflict of interest in connection with individual board members, and not the Foundation itself, we will not discuss this economic interest further.

Individual Board Members of the Foundation

In certain instances, when the relationship between a public official and his or her employer is controlled by one, or a few, individuals who also effectively control the decisions of that entity, we have advised that these individuals are considered to be sources of income and an economic interest to the official. For example, in *Hentschk*, (Advice Letter, No. A-80-069), we advised that the majority shareholder of a closely held corporation effectively controlled the commissioner’s employment relationship and, therefore, was a source of income to the commissioner, even though the decision affecting the shareholder would have no effect on the corporation itself.

We have also advised that members of a nonprofit organization are not considered to be sources of income to an official unless one, or a few, of the nonprofit organization’s members

financially affected by the governmental decision actually controlled the organization's decisions. (*Lucas* Advice Letter, No. A-96-248.)

In addition, in the *Fazio* Advice Letter, No. A-93-442, we said that neither a donor to a nonprofit foundation, nor an individual member of the Board of Directors of the foundation, is considered a source of income to a public official employed by the foundation in a governmental decision to award a contract either to the donor or the board member.

You indicate that the Foundation's Board approved the hiring of Councilmember Harris. The Board, consisting of sixteen voting members, makes its decisions, including decisions to employ Councilmember Harris and set her salary, by majority vote. Thus, no single, nor the three individual board members identified above, controls the decisions of the Foundation. Based on these facts, it is not appropriate to pierce through the Foundation's corporate structure to any single member of its board.

Accordingly, the individual board members of the Foundation identified above are not an economic interest to Councilmember Harris by virtue of their board membership² and Councilmember Harris is not prohibited from participating in a city council decision regarding the subject contract.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

² Since we conclude that Councilmember Harris does not have an economic interest in the board members of the Foundation, we do not further analyze the impacts of these decisions. Of course, an individual board member may have a separate business or other arrangement with Councilmember Harris that establishes an independent basis, apart from the board members status as a board member, for determining that board member to be an economic interest to Councilmember Harris. This is a factual question for Councilmember Harris to decide and is beyond what we are asked to consider in our advice.