

July 8, 2014

Melissa M. Crosthwaite
Assistant City Attorney
455 126th Street
Hawthorne, CA 90250

Re: Your Request for Advice
Our File No. A-14-109

Dear Ms. Crosthwaite:

This letter responds to your request for advice on behalf of the City of Hawthorne under the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹

Please also note that there are other bodies of law, separate and apart from the Act’s conflict-of-interest provisions that may apply to your situation. Our advice is based solely on the Act. We therefore offer no opinion on the application of other incompatible activities and conflict-of-interest laws that may apply including, but not limited to, common law conflict of interest and Government Code Section 1090. We also note that we do not provide advice on past conduct. (Section 83114(b); Regulation 18329(a).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

May the elected City Treasurer for a City encourage staff to draft and members of the City Council to adopt an ordinance or resolution to change his position from part-time to full-time, with a commensurate increase in pay?

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.

ONCLUSION

Yes. The elected City Treasurer may negotiate his compensation and the terms and conditions of his employment by encouraging staff to draft, and members of the City Council to adopt, an ordinance or resolution to change the City Treasurer position from part-time to full-time, with a commensurate increase in pay.

FACTS

- The City Treasurer in Hawthorne is an elected Treasurer. The Treasurer was elected to his position in November of 2013.
- On or about May 2, 2014, the Treasurer provided a memorandum to the City Manager and Mayor reporting on the status of his office, including his obligations as City Treasurer. In the communication, he made a recommendation that the City Treasurer's position be full-time (like Carson and Redondo Beach) with an adequate support staff. It is your understanding that he also informally asked a member of the City Council to direct the City Attorney's Office (CAO) to draft a memorandum regarding a potential "expansion of the City Treasurer's duties." As required by our Code, the councilmember placed the matter on a regular city council agenda and made an official directive that the CAO prepare such a memorandum. At no time has the City Treasurer indicated to the CAO that he desired an increase in salary.
- A CAO memorandum was provided to the City Council regarding the office of the City Treasurer, including their statutory duties. The City Council was advised to not discuss the contents of that memorandum with the City Treasurer. The City Treasurer was similarly advised that, in an abundance of caution he should refrain from discussing the matter of his office with staff or the City Council.
- Hawthorne is a general law city. You noted that in general law cities, compensation of the City Treasurer must be fixed by resolution or ordinance of the City Council. The elected City Treasurer currently receives approximately \$9,000/year. Full-time Treasurers in surrounding cities have salaries ranging from \$90-120,000/year.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 provides:

"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.”

The Commission has adopted an eight-step standard analysis for deciding whether an official has a “financial interest” in a decision. (Regulation 18700(b).) However, your letter raises only a question under the second step of the standard analysis: Will the public official be making, participating in making, or using his or her official position to attempt to influence a government decision?

A public official is subject to the Act’s conflict-of-interest rule in Section 87100 if he or she makes, participates in making, or uses his or her official position to attempt to influence a government decision. Under Regulation 18702.1, an official “makes” a government decision when he or she, among other things, votes on a matter, enters into a contract on behalf of his or her agency, or obligates or commits his or her agency to any course of action. (Regulation 18702.1(a).) Under Regulation 18702.2, an official “participates” in a government decision when, generally, he or she negotiates, without significant substantive review, regarding a government decision, or advises or makes recommendations to the decisionmaker directly or without significant substantive review. (Regulation 18702.1(a) and (b).) Under Regulation 18702.3, an official “uses his or her official position to influence” a government decision when he or she contacts, appears before or otherwise attempts to influence a member, officer, employee or consultant of the official’s own agency or, when appearing before another government agency, the official acts or purports to act on behalf of his or her own agency. (Regulation 18702.3(a) and (b).)

Under your facts, the Treasurer would be participating in and influencing a decision to make the Treasurer’s position full-time, since he would be contacting, appearing before, or otherwise attempting to influence a member, officer, employee, or consultant of the official’s own agency.

However, the Commission has adopted regulations that create some limited exceptions. For example, Regulation 18704.2 provides an exception, which permits public officials or government employees to negotiate their compensation or the terms and conditions of their employment or contract. In these instances, the official is considered not to be “making or participating in the making” or “attempting to use his or her official position to influence” an agency decision.

The conflict of interest provisions do not define “negotiates.” However, a review of some of the prior letters that apply the exception helps to refine the scope of the exception. In most cases, the exception has been applied to multimember bodies that vote to effect the terms and conditions of their employment that would be applicable to all current members and all future holders of a position on the board. For example:

- “[T]he issue of expense claim reimbursement that he raises pertains to his ‘compensation or terms or conditions’ of employment. (See *Schectman* Advice Letter, A-87-226.) This

brings both parts of your inquiry within the excepting language of Regulation 18702.4(a)(3). Therefore, the board member is not precluded under the Act from placing the matter of expense claim reimbursement, or the policy committee's concerns on the issue, on the board agenda; nor is he prohibited from revealing his own difficulties with expense claim reimbursement at the agency.” (*Robb* Advice Letter, No. A-01-135.)

- In contrast, in the *Steentofte* Advice Letter, No. I-08-047, a school district that employed 20 management employees proposed a one-time severance package for persons who do not wish to work for the district after it was merged with two other districts in the county. The advice letter found that the exception would not apply: “[U]nder the facts you present, the officials in question apparently, on their own, conceived of, analyzed and prepared the severance package while acting in their official capacities and, also in their official capacities, presented the package for approval to the school district board in the form of a staff proposal to the board. Under these circumstances, we think these officials were doing more than merely negotiating the terms of their compensation. Here, they were actually participating in the school district's deliberations on their own severance package.” The severance package decision would only apply to current board members and employees of the district.

In more limited circumstances, the exception has been applied to individual officials that are members of appointed boards. Generally, with the exception of defense and indemnification decisions,² the advice has concluded that official action is still prohibited.

- “[A] staff attorney in the City Attorney's Office, seeking an appointment to the City Attorney position by the city council, is not prohibited from discussing the appointment or the specific parameters of his or her potential employment with other city council members in his or her private capacity. However, we caution that this conclusion does not apply to the extent that an official seeking the position makes, participates in making, or influences a decision relating to the position in an official capacity such as, but not limited to, taking part in a general decision regarding the parameters of the City Attorney position or attempting to influence the decision of a subordinate city employee. If an official seeking the position attempts to take part in a decision relating to the position in his or her official capacity, it is likely that the official has a disqualifying conflict-of-interest in the decision based upon a reasonably foreseeable and material financial effect on the official's personal finances . . .” (*Russo* Advice Letter, No. A-11-052.)

² At least three justifications for the special rule for defense and indemnification decisions have been offered. We have advised that indemnification for general and special damages awarded against public employees acting within the scope of their employment was a matter subject to collective bargaining, and was therefore a term or condition of employment. We have also advised that a defense and indemnification were “fringe benefits” of the type normally considered to be part of an employee’s compensation under the Act. And finally we have advised that defense for and indemnification against general or special damages claims was part of the terms and conditions of public employment because a public employer is obligated to provide such if the employee was acting within the scope of his or her employment. (*Cronin* Advice Letter, No. A-97-579). However, this approach has generally been limited to these specific types of decisions.

Your question presents a hybrid fact pattern. Your facts are most like those in *Schechtman*, and unlike *Steentofte* (which sought to create a one-time change in benefits for incumbents). Like *Schechtman*, the changes in question would be in place for all future Treasurers. Moreover, while only one person could benefit currently, the one person in question here is in fact the entire class of persons that hold the Treasurer position currently. In other words, it is the same as all councilmembers benefiting from a more generous reimbursement rate.

Therefore, the step 2 exception would apply to your facts. Thus, the Treasurer could seek the change in the terms and conditions of his employment as described.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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