

September 30, 2014

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Re: Your Request for Advice  
**Our File No. A-14-138**

Dear Ms. Glover:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code Section 1090, et seq.<sup>1</sup> Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Santa Clara 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

Does Section 1090 prohibit the spouse of a school district board member from entering into an employment agreement with a nonprofit organization which contracts with the school district?

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<sup>1</sup> All further statutory references are to the Government Code, unless otherwise indicated.

## CONCLUSION

No. Based on the facts you have provided and as explained more thoroughly below, Section 1090 does not prohibit the spouse of a school district board member from entering into an employment agreement with a nonprofit organization which contracts with the school district.

## FACTS

Your firm represents the Oak Grove School District in San Jose, California. Music for Minors, a nonprofit 501(c)(3) organization, has been providing music services to schools within the District. Dennis Hawkins is a District Board Member and his spouse, Marie Alberry-Hawkins, is currently a volunteer with Music for Minors. Ms. Alberry-Hawkins, who is passionate about the music services provided, recently received an employment offer from the nonprofit.

On September 17, 2014, you provided additional facts by email, which are provided verbatim as follows:

Music for Minors has provided services at Miner Elementary School in the Oak Grove School District, where Ms. Alberry-Hawkins volunteered, for at least 7 years.

Through the end of the 2013-2014 school year, the program has been funded through Title I or other grants and scholarships, and therefore there was no contract between the District and Music For Minors during that period. With the commencement of the 2014-15 school year, Music for Minors has expanded its program to include other elementary schools within the District. On May 22, 2014, prior to Ms. Alberry-Hawkin's offer of employment from Music for Minors, the Board approved a contract with Music for Minors for Oakridge Elementary School, which runs through April 20, 2015. Another contract for five elementary schools (Christopher, Stipe, Edenvale, Miner, and Ledesma) will be presented to the Board this year and will be scheduled to be renewed on an annual basis.

Ms. Alberry-Hawkins began volunteering for Music for Minors in the fall of 2010. Initially, for the 2010-11 school year, she was not assigned to the Oak Grove School District. Instead, she was assigned to one elementary school in the San Jose Unified School District and one elementary school in the Campbell Union School District. Starting in the 2011-12 school year through the present, Ms. Alberry-Hawkins has been assigned to volunteer at Miner Elementary School in the Oak Grove School District.

Finally, you confirmed that the offer of employment has no relation to the recent contract between the District and Music for Minors at the Oakridge Elementary School or the potential future contracts with the five other elementary schools in the District. Indeed, Music for Minors has a history of offering paid positions to long-term volunteers based on their qualifications and the skills that they have proven during service as a volunteer.

### ANALYSIS

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 financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We employ the following six-step analysis to determine whether Board Member Hawkins has a conflict of interest under Section 1090.<sup>2</sup>

#### **Step One: Is Board Member Hawkins subject to the provisions of Section 1090?**

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members.” School boards and their members are covered by this prohibition. (See Educ. Code, § 35233.) Therefore, Board Member Hawkins and the Oak Grove School District Board are subject to the provisions of Section 1090.

#### **Step Two: Does the decision at issue involve a contract?**

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

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<sup>2</sup> We note that the Section 1090 inquiry focuses on Board Member Hawkins based on his spousal relationship to Ms. Alberry-Hawkins and his status as a public official.

Here, the decisions at issue involve a contract between the District and Music for Minors that was approved on May 22, 2014, and a contract between the same two entities that will be presented to the District Board later this year.

**Step Three: Is Board Member Hawkins making or participating in making a contract?**

As mentioned, Board Member Hawkins already participated in making a decision to enter a contract with Music for Minors on May 22, 2014. He will participate in making a decision whether to enter into another contract with Music for Minors sometime later this year.

**Step Four: Does Board Member Hawkins have a financial interest in the contracts?**

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig, supra*, at p. 333.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

*May 2014 Contract*

According to your facts, the District entered into a contract with Music for Minors in May of 2014 to provide services to one of its schools. Not long thereafter, Music for Minors offered an employment contract to the spouse of Board Member Hawkins who has been a volunteer for the nonprofit since 2010. To begin, it is well-settled that a member of a board or commission always has a financial interest in his or her spouse’s source of income for purposes of section 1090. (See, e.g., 78 Ops.Cal.Atty.Gen. 230, 235 (1995).) Thus, Board Member Hawkins would have a financial interest in the employment contract between Ms. Alberry-Hawkins and Music for Minors. Although Board Member Hawkins did not have a financial interest in the May of 2014 contract at the time the Board approved it, this does not necessarily preclude finding that he will violate Section 1090 should his spouse accept the offer of employment from Music for Minors. Indeed, Section 1090 takes into account the temporal relationship between the financial interest and the contract in order to prevent self-dealing. Thus, in determining whether self-dealing has occurred, the timing of events may prove crucial:

If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and effecting a final contract which would be available only to himself and then present the matter to the council,

resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit nor the intent of the law which precludes an officer from involving himself in the making of a contract.

(*City Council v. McKinley* (1978) 80 Cal.App.3d 204, 212)

In 81 Ops.Cal.Atty.Gen. 317, 318 (1998), a council member participated in the “planning, discussions, and approval necessary to implement a loan program for developing businesses within the city.” After leaving office, the council member decided to establish a business and attempted to obtain a city loan under the program he had helped to create. (*Ibid.*) In finding that Section 1090 prohibited such action, the opinion noted that the council member “had the opportunity and did participate in the policy decision to create the government program under which the contract would later be executed.” (*Id.* at p. 319.)

In another opinion, the Attorney General was asked whether county employees could propose to the county that it contract out the administration of its federal community development block grant program and thereafter leave county service and become the private administrators of the program. (66 Ops.Cal.Atty.Gen. 156, (1983).) These individuals, while still county employees, advised the county on most details of the proposed contract such as the scope of services and other important provisions. (*Id.* at p. 159.) In finding that Section 1090 prohibited such activity, the opinion stated:

The circumstances in the instant case present a most pertinent illustration of what might transpire with impunity at other times and places, should the construction insisted upon by defendants prevail. A council member could participate in all negotiations giving a contract its substance and meaning, be instrumental in establishing specifications and schedules most advantageous to his or his firm’s particular mode of operation, participate in the selection of his or his firm’s offer, resign just prior to formal acceptance of that offer and execute the contract as the other party thereto.

(*Ibid.* quoting *Stigall v. Taft, supra*, 58 Cal.2d at p. 570.)

Although there may be some similarities, we view the present situation in a different light from these opinions. To be sure, these opinions focus on officials who participate in multiple facets of the contracting process such as the preliminary discussions, contract provisions and approval, only then to leave their government positions and attempt to take advantage of the same contracts from the outside. In the present situation, Board Member Hawkins does not intend to leave his governmental position so that he can take advantage of the May of 2014 contract. Instead, it is his spouse, who has been a volunteer with Music for Minors since 2010,

who has been offered employment. Moreover, the facts state that the offer of employment has no relation to the May 2014 contract or the potential future contracts with the five other elementary schools in the District. Indeed, the facts state that Ms. Alberry-Hawkins is very passionate about the music services the nonprofit provides, which is evidenced by her long tenure as a volunteer. And importantly, it is not uncommon for Music for Minors to offer paid positions to long-term volunteers, such as Ms. Alberry-Hawkins, who have aptly demonstrated their qualifications and skills during service as a volunteer.

We recognize the enduring policies underlying Section 1090 that “no man can serve two masters,” and that officials making contracts must not be distracted by personal financial gain but give absolute loyalty and undivided allegiance to the best interest of the agency they serve. (See, e.g., *Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569; *City of Imperial Beach v. Bailey*, *supra*, 103 Cal.App.3d at p. 196; *City Council v. McKinley*, *supra*, 80 Cal.App.3d at p. 212.) However, we do not believe the facts in this matter rise to the same level as those in the opinions just discussed. And given the specific facts in the matter before us, we do not believe the policies underlying Section 1090 were meant to prohibit the present activity.

Accordingly, should Ms. Alberry-Hawkins accept the employment offer, there will be no resulting violation of Section 1090 arising from the District’s contract with Music for Minors in May of 2014. However, once she becomes an employee, Board Member Hawkins and the entire District Board will have a prohibitory Section 1090 financial interest in any future contracts (or renewals, modifications etc.) entered into with Music for Minors unless one of the exceptions discussed below applies.

#### **Step Five: Does either a remote interest or non-interest exception apply?**

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. Instead, the entire governing body is precluded from entering into the contract. (*Thomson*, *supra*, at pp. 647-649; *Stigall*, *supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

However, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5.

If a “remote interest” is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity’s official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a “noninterest” is present, the contract may be made without the officer’s abstention, and generally, a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

Under the circumstances presented, we turn to the “remote interest” specified in Section 1091(b)(1):

That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)), pursuant to Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(5)), or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

In the present situation, Board Member Hawkins would have a remote interest in any contract between the District and Music for Minors if he were an officer or employee of the nonprofit 501(c)(3) organization. However, it is Ms. Alberry-Hawkins that would be an employee<sup>3</sup> of Music for Minors so the question is whether the “remote interest” exception under Section 1091(b)(1) would extend to also apply to Board Member Hawkins. We believe that it does.

Instructive on this issue is an Attorney General opinion (78 Ops.Cal.Atty.Gen 230 (1995)) that is squarely on point. In that matter, a city council member’s spouse was a partner in a law firm which represented a developer in various matters. (*Id.* at p. 231.) The developer came before the city council to enter into a development agreement with the city. (*Ibid.*) One of the central issues in the matter was whether the financial interest of the spouse in the development agreement would be attributed to the council member such that he would then have a “remote interest” in the development agreement:

Under settled case law and opinions of this office, a member of a board or commission always is financially interested in his or her spouse’s source of income for purposes of section 1090. This is true even if the husband and wife have an agreement that their own earnings are to be treated as their separate property, since each spouse is liable for the necessities of life for the other. (See *Reece v. Alcoholic Bev. Etc. Appeals Bd.* (1976) 64 Cal.App.3d 675, 683; *Nielsen v. Richards* (1925) 75 Cal.App. 680, 685-687; 73 Ops.Cal.Atty. Gen. 191, 194-195 (1990); 69 Ops.Cal.Atty.Gen. 102, 106 (1986).)

Accordingly the council member here would be financially interested in the development agreement by virtue of his wife’s status as a partner in a law firm handling matters for the developer,

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<sup>3</sup> We note that because Ms. Alberry-Hawkins is not yet an employee of the nonprofit, we did not apply the remote interest exception under Section 1091(b)(1) to the May of 2014 contract because the exception applies only to employees of nonprofits, not prospective employees. We assume that she will be an employee of Music for Minors when the next contract is voted on by the Board.

even though the firm does not represent the developer regarding the proposed development. However, since no fees will be generated for the firm with respect to the development, the spouse's (*and thus council member's*) financial interest would meet the statutory definition of being "remote."

(*Id.* at p. 235, emphasis added.) As a result, because the spouse's interest in the development agreement met the requirements for the "remote interest" exception under Section 1091(b)(6), the council member would thus have the same "remote interest." (See also 81 Ops.Cal.Atty.Gen. 169.) In other words, since a spouse's property is attributed to the official, exemptions that would be applicable if the official possessed the interest directly also apply to the spouse's property.

Here, Board Member Hawkins will have the same financial interest as his spouse in Music for Minors once she becomes an employee. Accordingly, he will have a "remote interest" under Section 1091(b)(1) in any contract the School Board enters into with Music for Minors. Thus, so long as Board Member Hawkins does not participate in future School Board decisions on contracts with Music for Minors and follows the other procedural steps outlined above, the board can make future contracts with Music for Minors.<sup>4</sup>

Because we conclude that Board Member Hawkins will have a "remote interest" in future contracts between the District and Music for Minors, we do not apply the remaining steps in the analysis. Additionally, because the remedy in this situation is for him to abstain from any participation in the approval of such contracts (see Section 1091(a)), we do not analyze the conflict of interest under the Act as the remedy for conflicts under the Act would not differ from the action already required.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Jack Woodside  
Senior Counsel, Legal Division

JW:jgl

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<sup>4</sup> This includes any decision to modify, extend, or renegotiate any existing contract with Music for Minors. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)