

October 8, 2014

Zakhary Mallet  
Director District 7  
c/o San Francisco Bay Area Rapid Transit District  
300 Lakeside Drive 23<sup>rd</sup> Floor  
Oakland CA 94612

Re: Your Request for Informal Assistance  
**Our File No. I-14-144**

Dear Mr. Mallet:

This letter responds to your request for advice regarding conflict of interest restrictions that may apply to you if you go to work for a transportation consulting firm or form your own firm while serving as an elected board member of the San Francisco Bay Area Rapid Transit District (the “BART District.”) Please note that we only provide advice under the Political Reform Act (the “Act”)<sup>1</sup> and Government Code Section 1090. We do not provide advice on other conflict of interest restrictions, if any, that could arise such as those governed by the common law.

Because your inquiry is general in nature and does not involve specific governmental decisions, we are treating it as a request for informal advice. For purposes of the Act, informal assistance does not provide the requestor with the immunity set forth in Sections 83114(a) or (b). (See Regulation 18329(b).) Also, for purposes of Section 1090, because your request concerns future actions and does not provide sufficient information regarding a government contract and your possible financial interest in the contract, we do not deem this letter to meet the requirements to permit the requestor to offer the letter into evidence in a Commission enforcement proceeding regarding Section 1090. (See Section 1097.1(c)(5).)

Also, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and your local District Attorney’s Office, which we

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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 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.

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 the following advice is not admissible in a criminal proceeding brought under Section 1090 against any individual other than the requestor. (See Section 1097.1(c)(5).)

### **QUESTIONS**

1. As a member the BART District's board of directors, are you prohibited from working for a firm that does not provide services to the BART District but, rather, provides services to contractors that occasionally have contracts with the BART District, so long as your work will be limited to matters that do not involve the BART District?
2. If you form your own consulting firm, would your firm be prohibited from providing services to firms contracting with the BART District where your services will be limited to non-BART matters?

### **CONCLUSIONS**

1. and 2. Because your questions involve future actions, we cannot provide a definitive answer to them. However, the discussion below should provide guidance so that you can avoid future conflicts of interest and possibly seek guidance from us on specific BART District contracts.

### **FACTS**

You are an elected member of the board of directors of the BART District. You wish to work for a transportation consulting firm in your area of expertise of transportation planning or, in the alternative, start your own transportation consulting firm. The firms with which you seek employment do not contract with the BART District. They do, however, provide services to other firms that contract with BART. If, instead, you form your own consulting firm, you anticipate providing services to firms regarding non-BART matters. In either situation, you would only provide services on non-BART matters. Virtually all transportation consulting firms in the San Francisco bay area compete for contracts with the BART District, either as prime consultants or sub-consultants. All such contracts must be approved by the BART District board.

### **ANALYSIS**

Your questions raise potential issues under both the standard conflict of interest provisions set forth in Section 87100 of the Act and Section 1090's specific prohibition against public officials making contracts in which they are financially interested. Since your questions are prospective in nature and do not involve specific government decisions or contracts, we offer general guidance below to assist you in determining if you may have an issue under Section 87100 or Section 1090 if you go to work with a consulting firm that is not a BART contractor

but does work for a firm that is a BART contractor, or form your own consulting firm and provide services to a firm that is a BART contractor.

### **Conflicts of Interest under the Act**

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has an interest specified in Section 87103. A public official has a “financial interest” in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a conflict of interest under Section 87100.

#### **Step One - Is the individual a public official? (Section 87100; Regulation 18700(b)(1).)**

The Act’s conflict-of-interest provisions apply only to public officials. (Sections 87100, 87103; Regulation 18700(b)(1).) A public official is “every member, officer, employee or consultant of a state or local government agency....” (Section 82048.) As an elected member of the BART District, a local government agency, you are a public official for purposes of Section 87100. (Sections 82003, 82041 and 82048(a).)

#### **Step Two - Will the public official be making, participating in making, or using his or her official position to attempt to influence a government decision? (Section 87100; Regulation 18700(b)(2).)**

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).)

Although you have not identified any specific government decision, it is clear that you are asking about any contract with the BART District that would come before the board.

**Step Three – Identify the public official’s interests that may be affected by the government decision. (Sections 87100 and 87103; Regulation 18700(b)(3).)**

Section 87103 sets forth several types of interests held by a public official that, when affected by a government decision, may expose the official to a possible conflict of interest. Your facts implicate interests in a business entity and sources of income.<sup>2</sup>

Working as an employee.

Section 87103(c) provides that, for purposes of Section 87100, an official has an interest in any source of income of \$500 or more provided or promised to, or received by the official during any 12-month period prior to the official’s participation in a government decision. Presumably the firm will be a source of income to you of \$500 or more in any 12-month period. Therefore, the firm would be a source of income to you, and thus is an interest that may be affected by government decisions for purposes of Section 87100. A public official can also have an interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds a position of management. (Section 87103(d); Regulation 18703.1(b).) Therefore, you would have an interest in the employer as a business entity.

Providing services as a sole proprietor.

A public official can have an interest in a business entity by having a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or, as stated above, 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).) Thus, if you form your own consulting firm, the firm will be an interest that may be affected by a government decision for purposes of Section 87100. Also, your firm would be a source of income to you. Under certain circumstances, a public official has an interest in the customers of the official’s business entity. If a public official owns a 10-percent or greater interest in the business, customers who are sources of income to that business are also considered sources of income to the public official. If income derived from any particular client or customer aggregates to \$500 or more in the 12 months prior to the government decision, you will have an economic interest in the client or customer as a source of income. (Section 87103(c).)

Applying the foregoing summary concerning your potential financial interests to the facts provided, it would appear that, regardless of whether you were employed by, or an independent contractor with, a company that provided services to a BART District contractor, that company would be a source of income to you for purposes of the Act.

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<sup>2</sup> Three other types of financial interests that could expose a public official to a conflict of interest under Section 87100 are set forth in Section 87103 and explained in more detail in Regulations 18703 – 18703.5. Since none of these other interests are raised by your questions, we do not address them here.

**Steps Four, Five and Six – Is the public official’s interest directly or indirectly involved in the government decision (Sections 87100 and 87103; Regulation 18700(b)(4)) and is it reasonably foreseeable that the decision will have a material financial effect on that interest (Sections 87100 and 87103; Regulation 18700(b)(4), (5) and (6))?**

As mentioned above, an official does not have a conflict of interest under the Act unless the government decision in which he or she participates will have a “reasonably foreseeable material financial effect” on his or her interests. (Sections 87100 and 87103.) Steps 4, 5, and 6 assist in making this determination by first classifying the government decision in issue as “directly” or “indirectly” involving the official’s interest and, based on that classification, determining whether it is “reasonably foreseeable” that the decision’s financial effect on the official’s interest is “material.”

Under Regulation 18704.1(a), a person, including a business entity and source of income, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Under the facts you have provided, the company that would be your source of income as discussed above would not be initiating, or a named party in, any proceedings before the BART District, but only providing services to a Bart contractor. Therefore, that company would be indirectly involved in decisions involving the BART District. (See Regulation 18704(a).)

Having identified the interest involved, and determined that the interest would be indirectly involved in the decisions at issue, it is necessary to identify the materiality standard applicable to that interest and whether it is reasonably foreseeable that the financial effect of the BART District’s decision will meet the applicable standard of materiality.

Materiality

Regulation 18705.1(c) prescribes the materiality standard for business entities that are indirectly involved in a governmental decision, including those that are sources of income. For relatively small businesses, (those with annual net income of less than \$750,000), the financial effect of a government decision on the business entity is material if it is reasonably foreseeable that the government decision will increase/decrease the business entity’s annual gross revenues

by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets by \$20,000 or more. (Regulation 18705.1(c)(4).)<sup>3</sup>

### Foreseeability

The next step in the analysis is to determine whether that effect is “reasonably foreseeable.” (Regulation 18700(b)(6).) Generally, for a government decision to have a “reasonably foreseeable” material financial effect on an official's interest, the effect need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.) Since, as discussed above, your future employer/source of income would be indirectly involved in any BART District contracting decision, Regulation 18706(b) would apply to determine whether it is reasonably foreseeable that such a decision would have the material financial effect discussed above on your future employer or firm. As applied to the facts you describe, the regulation essentially requires that a government decision has a reasonably foreseeable material financial effect if the effect can be recognized as a “realistic possibility.”

Because your questions concern future decisions on unknown BART District contracts with unknown financial impacts, we cannot provide a definitive answer as to whether there is a realistic possibility that any particular contract will have the described material financial effect on your future employer or firm. However, we can offer general advice on situations where possible conflicts could occur under the Act.

You indicate that, as a future employee of or independent contractor with a transportation consulting firm, you would not be working on any matters involving contracts with the BART District, your employer/source of income will not be a party to any such contracts and the only connection between your employer/source of income and the BART District would be that it provides services to businesses that contract with the BART District. You also state that the services you would provide to your employer/source of income would not involve BART District contracts in any way.

For purposes of the analysis under the Act, you have stated that you will not be working on BART District related matters. The relevant question then is whether there is a realistic possibility that a decision on a particular BART District contract will have the material financial effect described above on your employer or source of income to your business. This determination will be dependent on the circumstances of each particular BART District contract that comes before you. If there is a realistic possibility that the primary contractor with the BART District will retain as a subcontractor the company for which you are either employed or that is a source of income to your own business, and the financial impact on that company meets the applicable materiality threshold, you would be prohibited from participating in the BART District contracting decision. For example, if the contract requirements specify services of the

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<sup>3</sup> Under Regulation 18705.1, the materiality standards differ if the annual net income of the business is over \$750,000. Consult the regulation if that is the case.

type that your employer/source of income has historically provided for the BART District contractor, or your employer/source of income is the only feasible subcontractor to perform the work, it is likely that the contractor will hire that company to provide these services and there would be a realistic possibility that the contract would have a material financial effect on that company. If there is no prior history or other reason to expect that the contractor will hire your potential employer/source of income for this purpose, it is unlikely that a decision you make as a BART District board member will have a material financial on your financial interest in your employer. Beyond this general admonition, we cannot advise further without additional information on a particular contract.

**Steps Seven and Eight -- “Public Generally” and “Legally Required Participation” (Regulation 18700(b)(7) and (8)).**

These last two parts of the conflict of interest analysis under the Act are essentially exceptions that would be analyzed if it is found that you have a conflict of interest.

**Application of 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 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. City of 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 an official has a disqualifying conflict of interest under Section 1090.

**Step One: Is the official 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 any body or board of which they are members.” The BART District is plainly covered by this prohibition. As a member of the board of the BART District, you are an official under Section 1090.

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

Your question presupposes that there will be contracts coming before the Bart District board.

**Step Three: Is the official making or participating in making a contract?**

Section 1090 applies to officials who participate in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft, supra* at p. 569.) Notably, in relation to a public body such as a District's board of directors, when members of a public board, commission or similar body have the power to execute contracts, each member is deemed involved in the making of all contracts by the body regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen 49 (2006).)

If you are financially interested in a contract, the entire board is prohibited from making the contract even if you disqualify yourself from participation in making the contract, unless an exception applies as set forth in Section 1091.

**Step Four: Does the official have a financial interest in the contract?**

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), and 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. (*Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

More recently, in *Eden Township Healthcare Dist. v. Sutter Heath* (2011) 202 Cal.App.4th 208, the court of appeal held that "to be prohibited under section 1090, the public official's financial interest must be related to the contract . . . . The purpose of the prohibition is to prevent a situation where a public official would stand to gain or lose something *with respect to the making of a contract* over which in his official capacity he could exercise some influence." (*Id.* at p. 225 (emphasis in original; internal citation and quotations omitted).) In analyzing the "financial interest" element of Section 1090, the court noted that in prior cases where a prohibited conflict was found, "the party who was found to have had a prohibited financial interest received a tangible benefit that arose out of the contract at issue." (*Id.* at 226.)

Importantly, the court held that “if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract . . .” (*Id.* at 228.)

The courts have also generally held that, unless an exception applies, an official is financially interested in a contract under Section 1090 if he or she participates in the making of the contract and later benefits directly or indirectly under the contract. (*Stigall v. City of Taft* (1962) 58 C.2d 565; *City Council v. McKinley* (1978) 80 C.A.3d 204, 212.)

Under Section 1090, you cannot participate in making a BART District contract that will provide a tangible financial benefit to you at the time the contract is made, and, unless an exception applies under Section 1091, the BART District board itself cannot make the contract. Also, you cannot participate in making a contract and later receive tangible benefits from working directly or indirectly under the contract. Our analysis above concerning the foreseeability of any financial effect on your employer/source of income under the Act serves as a backdrop for analyzing your Section 1090 issues. As stated in that analysis, whether there is a conflict of interest under the Act is dependent on the circumstances of the particular contract before the BART District. That statement is equally applicable to an analysis under Section 1090. Each contract would have to be separately analyzed to determine whether you have a financial interest for Section 1090’s purposes.

Under Section 1090, however, the mere fact that some financial benefit will flow from the contract to your employer/source of income is not sufficient in and of itself to conclude that you have a financial interest in the contract under Section 1090. Instead, as stated in the *Eden* case discussed above, you would have a financial interest under Section 1090 only if you receive a tangible benefit as a result of the contract. For example, if you were employed by a company that entered into a subcontract to perform services under a BART District contract with the original contractor and all company employees received a year-end bonus based on the company’s annual profits, you would be financially interested in the BART District contract and, unless some remote interest exception applied under Section 1091, you could not participate in the contracting decision and the BART District board could not make the contract. The same would apply if the subcontract resulted in providing a substantial portion of the company’s income and likely resulted in your continuing employment with the company, even if you did not work on that subcontract. However, as with the analysis under the Act above, beyond these general admonitions, we cannot advise further without additional information on a particular contract.

We therefore conclude our analysis at this point and invite you to contact us with specific information in the future if a particular contract comes before the BART District board that raises the issues we have discussed.

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