



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 12, 2015

Glen R. Googins
City Attorney
276 Fourth Avenue
Chula Vista, CA 91910

Re: Your Request for Advice
Our File No. A-15-207

Dear Mr. Googins:

This letter responds to your request for advice on behalf of City Councilmember Steve Miesen regarding conflict of interest provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

Does the Act prohibit the Councilmember from taking part in the governmental decision on whether to approve the Third & K development project (the “TKDP”) because the decision will have a reasonably foreseeable material financial effect on his employer, Republic Services, Inc. (“Republic”)?

CONCLUSION

Yes. The Act prohibits the Councilmember from taking part in the decision because the decision will have a reasonably foreseeable material financial effect on Republic due to the nexus between his income from Republic and the additional revenue to Republic that would result from the approval of the TKDP.

FACTS

You are the City Attorney for the City of Chula Vista and the authorized representative of City Councilmember Steve Miesen. Councilmember Miesen was appointed to the City Council in January of 2015, filling the seat vacated when a sitting Councilmember was elected Mayor in

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.

November 2014 in the middle of her four-year term. Councilmember Miesen assumed that seat, and his term expires in December 2016.

Republic is a publicly traded waste disposal and recycling company, with \$8.79 billion in annual revenue, \$3.47 billion in annual profit, and approximately 30,000 employees. Republic serves approximately 2,700 municipalities in 39 states and Puerto Rico.

Republic of Chula Vista (“RCV”) is a wholly owned subsidiary of Republic. RCV holds the exclusive right to provide waste disposal and recycling services within the City, to the exclusion of all others, pursuant to its Franchise Agreement with the City. The Franchise Agreement sets forth standards for services to be provided, and maximum rates to be charged, to customers. The Franchise Agreement was renewed in September 2014, prior to the Councilmember joining the City Council, and its term is ten years, from September 2014 through June 30, 2024. RCV’s estimated annual gross revenue under the Franchise Agreement is \$30 million, consisting of \$15.5 million in residential services and \$14.5 million in commercial services.

Republic employs the Councilmember as a Division Manager for RCV. As the Division Manager, the Councilmember is responsible for overseeing day-to-day operations, maximizing productivity, optimizing profitability, approving expenses, and managing the budget, among other responsibilities. The Councilmember receives a salary from Republic for serving as a Division Manager, and in addition to his salary, he is also eligible for a performance bonus from Republic. The performance bonus may be up to 25% of the Councilmember’s salary and is determined based on several weighted components. These components include the following:

- Operating Income of Region (20%). This component focuses on meeting the budget for the Southwest Region of Republic, which includes business operations in Southern California and Arizona and those of RCV.
- Operating Income of Area (40%). This component focuses on meeting the budget for the San Diego Area, including the Chula Vista Subarea.
- Net Price Increase (20%). This component focuses on obtaining agreements on rates within other subareas the San Diego Area. Rates for customers in the City are determined according to the Franchise Agreement.
- Workers Compensation Occurrence Frequency (10%). This component focuses on workers compensation claims within the Chula Vista Subarea.
- Workplace Safety Occurrence Frequency (10%). This component focuses on workplace safety violations within the Chula Vista Subarea.
- Service Commitment. This component increases or decreases the amount of the performance bonus based upon whether RCV meets the service standards associated with the components described above throughout the year. If the standards are met the total bonus may be increased up to a maximum of 15%; if not the total bonus may be reduced as much as 15%.

The Councilmember currently holds no stock or other ownership in Republic or any of its affiliates.

The City Council will soon consider whether to approve the TKDP, a mixed-use project consisting of 80 residential condominium units, a common area, commercial space, and parking. If the TKDP is approved and constructed, owners and occupants of the new residential and commercial units will require waste disposal and recycling services, and RCV has the exclusive right to provide these services pursuant to the Franchise Agreement. As a result of the additional customer base from the TKDP, Republic would earn \$20,172 in additional annual revenue under the Franchise Agreement.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official’s interests. Section 87103 also sets forth the financial interests from which a conflict of interest may arise under the Act, and of those interests, the Councilmember’s interests implicated by the decision on whether to approve the TKDP² are:

- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87013(d).)
- Any source of income amounting to a total of at least \$500, provided or promised to, and received by the public official within 12 months before the decision is made. (Section 87103(c).)
- A public official’s personal finances, including those of his or her immediate family. (Section 87103.)

The Councilmember has an interest in Republic,³ both as a business entity in which he holds a management position (Section 87103(d)) and as a source of income due to his salary and performance bonus (Section 87103(c)), and an interest in his personal finances (Section 87103).

² You have also asked whether the fact that the number of residential units proposed for the TKDP has already been authorized under the City’s General Plan and applicable Specific Plan is a factor in our analysis of whether the Act prohibits the Councilmember from participating in the decision on whether to approve the TKDP. It is not. The decision is: independent of the authorization of additional residential units under the General Plan and applicable Specific Plan; discretionary because it contemplates numerous governmental decisions beyond the number of residential units authorized; and prerequisite to proceeding with the development project. (See Regulation 18704.1.)

³ For the purpose of determining whether the Councilmember has a conflict of interest under the Act, we consider Republic to be the business entity and source of income at issue, rather than RCV or another intermediate entity, because Republic pays the Councilmember’s salary and performance bonus, and the Councilmember’s performance bonus is based in part on the performance of Republic.

Foreseeability:

We now examine whether the financial effect of the decision on whether to approve the TKDP on the Councilmember's interests is reasonably foreseeable. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. (Regulation 18701.) The Councilmember's interests are not explicitly involved in the decision. Therefore, the foreseeability standard that applies is: "A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable." (Regulation 18701(b).)

If the City Council approves the TKDP, Republic will earn \$20,172 in additional annual revenue under RCV's Franchise Agreement with the City, and the Councilmember will be more likely to receive a higher performance bonus from Republic based on that additional revenue. Thus, these financial effects of the decision on the Councilmember's interests are reasonably foreseeable.

Materiality:

Regulation 18702.3 provides the standards for determining whether a reasonably foreseeable financial effect of a decision on a public official's interest in a source of income is material.⁴ Regulation 18702.3(c) provides as follows:

"(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision."

The rationale for the nexus test is that when an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official, we presume that the employer is benefiting from the actions of the employee in his or her official capacity. (*Furtek* Advice Letter, No. A-14-074; *Yarnell* Advice Letter, No. A-00-161.) Typically, a "nexus" is found in situations where the official is also a high-level employee with direct influence and control over his or her employer's management or policy decisions. (*Furtek* Advice Letter, *supra*; *Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-304.) For example, we have advised that if an official receives income to advocate the policies of an individual or group, he or she may not then participate in a governmental decision promoting or defeating those policies. (*Yarnell* Advice Letter, *supra*; *Brue* Advice Letter, No. A-93-336.)

Here, Republic employs the Councilmember as a Division Manager, pays him a salary, and makes him eligible for a performance bonus. As a Division Manager, the Councilmember is responsible for overseeing day-to-day operations, maximizing productivity, optimizing profitability, approving expenses, and managing the budget, among other responsibilities. The performance bonus is based on several weighted components that consider, among other things, the budgetary

⁴ In light of the conclusion that the nexus rule applies and prohibits the Councilmember from taking part in the decision, it is unnecessary to consider whether the foreseeable effect on the Councilmember's interest in Republic is material under Regulation 18702.1(b), which provides the general materiality standard for interests in business entities (including business entities that are a source of income) that are not explicitly involved in the decision.

performance of the Southwest Region, the San Diego Area, and the Chula Vista Subarea of Republic. Therefore, the Councilmember receives income from Republic based on the budgetary performance, productivity, and profitability of RCV and Republic.

If the TKDP is approved, RCV and Republic will receive \$20,172 in additional annual revenue pursuant to the Franchise Agreement with the City, and as a result the budgetary performance of both RCV and Republic would improve, the Councilmember's job performance would be improved, and the Councilmember would be more likely to receive a higher bonus from Republic. Thus, under the nexus test, the reasonably foreseeable financial effect of the decision on Republic, a source of income to the Councilmember, would be material.⁵

Accordingly, we conclude that the Act prohibits the Councilmember from taking part in the decision on whether to approve the development because the decision will have a reasonably foreseeable material financial effect on his interest in Republic.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl

⁵ You have also asked whether our analysis under the nexus test would change if the components of the performance bonus related to the revenue of RCV and Republic were removed or if the Councilmember's compensation from Republic did not include a performance bonus at all. These potential changes to the Councilmember's compensation from Republic would not affect the analysis. It is not the form of the Councilmember's income but rather the nexus between his income and the financial effect on RCV and Republic that gives rise to the determination that the governmental decision at issue would result in a reasonably foreseeable material financial effect on RCV and Republic.