STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 16, 2020

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Re: Your Request for Advice
Our File No. A-20-020

Dear Dr. Hayashida:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").[1] 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. Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Is the Community Advisory Board a government agency and thus required to adopt a Conflict of Interest Code under the Act?

CONCLUSION

No. The Community Advisory Board is a not a government agency under the Act and is not required to adopt a conflict of interest code or be included within an existing code.

FACTS

You are a retired physician and member of the Community Advisory Board (CAB), a 12-member body which currently advises the owners and operators of four elder care facilities in Los

[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.

Angeles County and are seeking guidance on your responsibilities under the Act with respect to your participation on the CAB.[2] In 2016, Keiro Services (a California nonprofit public benefit corporation) sold the four elder care facilities to Pacifica Companies, LLC, and its affiliated entities (together, "Pacifica") and provided advance notice to the Attorney General's (OAG) of the planned sale as required by law.[3] Notice was also provided of Pacifica's subsequent plans to lease the elder care facilities to other operators. The OAG approved the sale but imposed 13 conditions on the transaction. "Condition X" requires that, for five years from the closing date of the transaction, the owners and operators of the four elder care facilities consult with a "Community Advisory Board" before making any changes to its community benefit programs, making any determination of which tax-exempt entity will receive deficiency amounts if the actual amount of community benefit services provided at the elder care facilities for any year is less than that required for such year, and making any changes to "culturally sensitive" matters as those matters are described in OAG's condition "VIII". With OAG's conditional approval, the sale of the elder care facilities closed on February 8, 2016 and the Community Advisory Board (CAB) was formed in 2016 to satisfy Condition X.

CAB 's "Governing Rules," adopted on June 29, 2016, and provided to OAG as required under Condition X, define CAB's purpose and responsibilities as follows:

> The purpose of CAB is to support the Operators with advice and feedback which will assist them in providing a consistent experience and ensure continuity during and after the sale and up to five years thereafter and quality care for the residents of the facilities. Volunteers serving on CAB are the link between the Operators and the Japanese and Japanese American community, and will act as a check to ensure that the residents of the elder care facilities continue to receive the quality care they have received in the past and deserve.

The OAG's conditions also require that CAB approve all reports submitted to the OAG regarding compliance with the OAG's 13 conditions.

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[2] The four elder care facilities include: Kei-Ai Los Angeles, a skilled nursing facility located at 2221 Lincoln Park Avenue, Los Angeles, Kei-Ai South Bay, a skilled nursing facility located at 15115 South Vermont Avenue, Gardena, Sakura Intermediate Care Facility, an intermediate care facility located at 325 S. Boyle Ave., Los Angeles; and Sakura Gardens at Los Angeles, a senior assisted living facility also located at 325 S. Boyle Ave., Los Angeles. Three of the elder care facilities are currently leased to and operated by Aspen Skilled Healthcare, Inc., and one is leased to and operated by Northstar Senior Living, Inc.

[3] Section 5913 of the California Corporations Code requires all California public benefit corporations to provide advance notice to, or request waiver of notice by, the Attorney General for the sale or disposition of all or substantially all of the corporation's assets. Likewise, California law requires the OAG to review and approve any sale or transfer of a health care facility owned or operated by a nonprofit corporation. (See Cal. Corp. Code Sections 5914-5925, 10820, 10821; Title 11 California Code of Regulations Section 999.5; Health & Safety Code Section 340 et seq.). Approval is often subject to conditions, such as a requirement that the buyer continue to provide existing levels of charity care and community benefits.

CAB's Governing Rules set forth the conditions and terms of CAB membership, which include: (1) CAB shall have no fewer than nine and no more than twelve members, (2) the term of CAB membership shall commence on the date of appointment and shall continue until five years after the closing date of the sale of the elder care facilities—at which point CAB shall cease to exist, (3) CAB members shall be uncompensated volunteers, (4) CAB will primarily be composed of members from the Japanese and Japanese American community, representing residents of the elder care facilities, their families, and the supporting community and (5) the members shall be appointed by Keiro Services, with the approval of Pacifica.

With respect to meetings, in addition to requiring that meetings be held at the elder care facilities, CAB's Governing Rules provide: "CAB shall meet on at least a quarterly basis, and such meetings shall be held at the elder care facilities [...]. Regular meetings of CAB may be held without call or notice at such dates and times as shall be fixed from time to time in advance by CAB. Members of CAB may elect to participate in meetings electronically or via telephone and will be counted as if physically present for a quorum and will possess full voting rights." The Governing Rules further provide that "Any action that may be taken at a board member meeting may be made by written consent of the majority of the members of CAB. Said written consent may be communicated electronically or by any other form of writing."

Finally, the Governance Rules state that any vacancies "may be filled by Keiro Services, with the approval of Pacifica Companies, LLC," and imposes on each CAB member a duty of "Confidentiality and Loyalty" throughout his or her term. All of CAB's abovementioned Governance Rules were submitted to, and approved by, OAG.

Based on publicly-available data you have compiled, three out of the four elder care facilities receive substantial funding from government sources, including Medicare and Medi-Cal. However, you have also indicated that CAB itself has no separate budget or funding, and its membership is comprised entirely of unpaid volunteers who conduct meetings on the premises of the various elder care facilities and use their own personal funds to pay for transportation, communication, and "other administrative incidentals."

As a CAB member, you now seek clarification as to whether, based on these facts, CAB is a public entity under the Act, and whether you are subject to the Act's conflict of interest provisions and must file a Statement of Economic Interests (Form 700).

ANALYSIS

A. Conflict of Interest Requirements.

The Act prohibits a public official from making or participating in making a governmental decision in which the official knows or has reason to know he or she has a financial interest. (Section 87100.) The conflict of interest provisions of the Act apply only to "public officials." The Act defines a "public official" as every member, officer, employee, or consultant of a state or local government agency. (Section 82048.)

In addition, Section 87300 of the Act provides that "[e]very agency shall adopt and promulgate a Conflict of Interest Code" that applies to its "designated employees." The Act defines "agency" as any state or local government agency. (Section 82003.) A "local government agency" is "a county, city, or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission, or any other agency of the foregoing." (Section 82041.)

A nonprofit corporation may also meet the definition of a local government agency if it meets certain factors establishing that its "overall character" is that of a local government agency. (*In re Siegel* (1977) 3 FPPC Ops. 62, *Rasiah* Advice Letter, No. A-01-020.) At the same time, agencies that are determined to be "solely advisory" are not required to adopt a Conflict of Interest Code, as the definition of "public official" does not include individuals who perform duties as part of a body that does not exercise decision-making authority. (Regulation 18700(c)(2), and see *Kendig* Advice Letter, No. A-15-182.)

B. Applying the *Siegel* Test.

The Commission uses a four-part factual test to distinguish governmental from non-governmental entities. (*In re Siegel* (1977) 3 FPPC Ops. 62.) In the *Siegel* opinion, the issue was whether the Pico Rivera Water Development Corporation (Pico), a nonprofit corporation, should be considered a local government entity. Pico was founded to acquire, maintain, and operate a water system. In analyzing whether Pico was a governmental entity, the Commission set forth the four criteria listed below. Below, we apply these criteria to CAB.

1. Did the impetus for formation of the entity originate with a government entity?

The first criterion of the *Siegel* test is generally met where an entity is created by statute or ordinance or by some official action of another governmental agency. (*Maas* Advice Letter, No. A-98-261.) For example, in the *Siegel* Opinion, the Commission determined that the impetus for the formation of a nonprofit corporation originated with a government entity because the city council was intimately involved in creating the nonprofit. Here, CAB was formed at the direction of the OAG, a state government entity. Specifically, CAB was formed as one of the 13 conditions of OAG's approval of the sale and transfer of Keiro's assets to Pacifica (Condition X). Therefore, the first prong of the *Siegel* test is met.

2. Is the entity substantially funded by, or is its primary source of funds, a government agency?

While you have indicated that three of the four elder care facilities receive substantial funding from government sources, CAB itself receives no funding, instead relying entirely on volunteer time and the personal resources of its members. Therefore, the second prong of the Siegel test is not met.

3. Is one of the principal purposes for which the entity is formed to provide services or undertake obligations that public agencies are legally authorized to perform and which, in fact, they traditionally have performed?

In the *Siegel* Opinion, the third criterion is a two-part inquiry that examines whether an entity performs a public function, and whether the service provided is one that is traditionally performed by public agencies. (*Stark* Advice Letter, No. A-03-015, *Gale* Advice Letter, No. A-16-019.)

A. Public Function:

We first look at factors considered by the *Siegel* opinion to be relevant to determining whether an entity performs a public function. One such factor is the degree to which public agencies control or are involved in its operations. In the *Siegel* opinion, the Commission looked at whether public officials were members of the board of the nonprofit corporation in question and considered the fact that the city council had a right to disapprove the name of anyone submitted to serve on the board. (*In re Siegel*, *supra*.)

Here, CAB's membership is comprised exclusively of private citizens, all of whom are appointed by Keiro with Pacifica's approval—not by a public agency. Likewise, vacancies may be filled by Keiro with Pacifica's approval alone, a factor that indicates limited involvement by government actors over CAB's operations at present. However, CAB was formed pursuant to the OAG's conditions on the sale of the elder care facilities, and CAB's purpose includes ensuring compliance with those conditions and approving the elder care facilities' required annual reports to the OAG. CAB's governing rules were also submitted to, and approved by, the OAG.

We therefore find that CAB has at least some degree of involvement from OAG. However. it appears CAB controls its own operations as it is ultimately controlled by private citizen volunteers.

B. Service Traditionally Performed by Public Agencies:

Next, we look at factors considered by the *Siegel* opinion to be relevant in determining whether an entity performs a function that has traditionally been performed by public agencies. In *Siegel*, a significant fact was that the corporation in question provided a service commonly provided by municipalities in their public capacities: the operation of a water system. For this reason, the Commission determined that the corporation in *Siegel* was clearly involved in a traditionally public activity.

In this case, CAB's stated purpose is to ensure continuity and quality care for the elder care facilities' residents for up to five years after the sale of the elder care facilities to Pacifica, including serving as the link between Pacifica and the Japanese and Japanese American communities. In addition, CAB is charged with approving "any changes involving 'culturally sensitive' matters," as well as all reports submitted to the OAG regarding compliance with the OAG's 13 conditions. The Los Angeles County Department of Public Health, Health Facilities Inspection Division is a government agency that also has the authority and responsibility of evaluating the quality of care provided to the patients and residents of Los Angeles County's nearly 2,000 health care facilities, including nursing homes.[4]

However, merely providing some public service does not mean that an entity will be found to be a governmental agency per se. (*In re Leach* (1978) 4 FPPC Ops. 48.) Moreover, neither the Health Facilities Inspection Division, nor any other public agency, is legally authorized to oversee the cultural sensitivity of elder care facilities. Similarly, while the OAG routinely imposes conditions upon the sale of nonprofit health care facilities—including requiring the creation of a community advisory board—the OAG has approved the creation of advisory bodies of citizen volunteers as opposed to tasking the duty to ensure conditions are met to an existing public agency.

Under the facts presented, it appears that CAB may be performing a semi-public function on behalf of the elder care facilities and their operators (with some input and involvement from OAG). However, it is primarily providing services that a public agency has not traditionally performed. Thus, we conclude the third *Siegel* factor is not met.

4. Is the entity treated as a public entity by other statutory provisions?

The OAG, whose own conditions on the transaction between Keiro and Pacifica required the establishment of CAB, has advised you that the Community Advisory Board was created by the Asset Purchase Agreement between Keiro and Pacifica and thus not a state body and not subject to the Bagley-Keene Open Meeting Act. We are unaware of a CAB being treated as a public entity by any other statutory provisions. Thus, the fourth prong of the *Siegel* test is not met.

It is not necessary that all four of the criteria be satisfied for an entity to be considered a government agency. (*O'Shea* Advice Letter, No. A-91-570.) It is only necessary that the entity satisfy enough of the four criteria for its overall character to correspond to that of a local government agency. (*Rasiah* Advice Letter, No. A-01-020.)

We find that, based on the facts presented, three out the four factors of the *Siegel* test are not met. Thus, we conclude that CAB is not a public agency within the meaning of the Act, and thus is not required to have a conflict of interest code for its members or be included within a code pursuant to Section 87300, and its members are not subject to regulation under the Act.

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[4] The 14 district offices of the California Department of Public Health Field Operations Branch ordinarily survey facilities and investigate complaints against elder care facilities to ensure compliance with state laws and standards. However, Los Angeles County is contracted to conduct its own inspections of health facilities (including nursing homes), including investigating complaints of inadequate care and other violations of state law.

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

Sincerely,

Dave Bainbridge
General Counsel

By: Toren Lewis
Counsel, Legal Division

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