



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 18, 2021

David M. Snow
City Attorney
City of Yucaipa
350 South Grand Avenue, 37th Floor
Los Angeles, CA 90071

Re: Your Request for Advice
Our File No. A-21-064

Dear Mr. Snow:

This letter responds to your request for advice regarding the conflict of interest provisions under the Political Reform Act (the “Act”) and Government Code section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code. 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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the San Bernardino 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).)

QUESTIONS

1. Do the Act’s conflict of interest provisions prohibit Councilmember Thorp from participating in recommendations by an ad hoc committee or decisions by the City Council relating to law enforcement matters given that the City of Yucaipa contracts with San Bernardino County to have the San Bernardino County Sheriff’s Department, where he is employed, provide law enforcement services?

2. Does Section 1090 prohibit Councilmember Thorp from participating in recommendations by an ad hoc committee or decisions by the City Council with respect to

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.

amending the existing contract between the City and San Bernardino County for the provision of law enforcement services?

CONCLUSIONS

1. To the extent that the recommendations and decisions would not require or result in an amendment to the contract, or a subsequent contract, between the City and San Bernardino County, the Act generally does not prohibit Councilmember Thorp from participating in recommendations by an ad hoc committee or decisions by the City Council relating to law enforcement matters even though his government employer provides law enforcement services to the City.²

2. Yes. Councilmember Thorp has a remote interest in any potential amendment to the existing contract between the City and San Bernardino County, but the City Council may approve the amended contract provided that Councilmember Thorp discloses his interest in the contract to the City Council, the interest is noted in the City Council's official records, and he abstains from any participation in making or approving the contract, as explained below.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Yucaipa, and you have been authorized by Councilmember Jon Thorp to request this advice. Councilmember Thorp was elected to the Yucaipa City Council in November of 2020 and assumed office in December of that year. Councilmember Thorp is also a law enforcement officer who is employed as a Deputy with the San Bernardino County Sheriff's Department.

Since its incorporation in 1989 to the present, the City has contracted with County of San Bernardino for law enforcement services within the City to be provided by the County Sheriff's Department. The Department serves over 2.1 million residents and maintains 22 patrol stations throughout the County, including the Yucaipa Station.

Councilmember Thorp is employed in the Employee Resources Division of the Sheriff's Department, and his primary duties consist of conducting background checks for businesses that require such checks prior to operating within San Bernardino County. Other responsibilities of his position include performance of threat assessments of County buildings, Sheriff Department facilities, and non-profit entities such as schools and churches. Councilmember Thorp also teaches classes to non-sworn county employees, performs law enforcement security functions at various County meetings, and handles workplace violence reports from County employees.

The Employee Resources Division has no role in contract negotiations for any cities that contract with the County for law enforcement services, including Yucaipa, or in the administrative oversight or management of any of the activities of the Yucaipa Station. The Employee Resources Division is involved with personnel transfers between Sheriff Department divisions and stations;

² We caution that the scope of the recommendations and decisions has not been identified at this time. Whether Councilmember Thorpe is disqualified from any particular recommendation or decision will depend on the nature of the recommendation or decision. If Councilmember Thorpe needs additional assistance regarding any particular recommendation or decision that may relate to a contract between the City and the County of San Bernardino, he should seek additional advice describing the nature of the recommendation and decision.

however, Councilmember Thorp is not involved in any aspect of this function of the Employee Resource Division. Further, Councilmember Thorp's current position does not involve contracts with any cities, costs or rates for any such contracts, or anything related to the staffing or oversight of any individual stations, including the Yucaipa Station.

Out of an abundance of caution, Councilmember Thorp has recused himself from all discussions related to policing that have come before the City Council since assuming office in December of 2020. In the coming weeks, the City's Public Safety Ad-Hoc Committee ("Committee") will be reviewing and studying models for police services in the City of Yucaipa pursuant to a recent City Council decision to prioritize police related matters, in which Councilmember Thorp did not participate. Issues that the Committee may consider include staffing levels, policies regarding policing (community-based policing, etc.), staffing distributions among different divisions (e.g., traffic, patrol, detectives, homeless outreach, etc.), and issues regarding equipment for the Yucaipa Police Station. As a result of the Committee's review and any recommendations, the City Council may consider amending the City's contract with the Sheriff's Department, or potentially forming its own police department.

The Committee, which is comprised solely of two City Council members, was originally formed in 2013 to address issues related to fire services. In December 2020, the City Council expanded the Committee's scope to include policing as well. The Committee has no decision-making authority; rather, it analyzes issues as requested by the City Council from time to time and provides recommendations to City Council. The Committee does not have a regular meeting schedule, and only meets on an as-needed basis as specific issues arise. Councilmember Thorp is one of the two ad hoc Committee members. As noted previously, Councilmember Thorp's role as a Committee member would be to analyze methods of policing and provide any pertinent recommendations to the City Council. Councilmember Thorp would like to understand the extent to which he lawfully can participate in police-related discussions before the Committee and ultimately at the City Council level.

ANALYSIS

The Act

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 provides that an official has a "financial interest" in a 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 official's interests identified in that section.

Section 87103 identifies interests from which a conflict of interest may arise. Most pertinent to the analysis are the following:

- An interest in any source of income to the official aggregating \$500 or more in value provided to, received by, or promised to, the public official within 12 months prior to the decision.

- An interest in a business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Councilmember Thorp is a law enforcement officer who is employed as a Deputy with the San Bernardino County Sheriff's Department in its Employee Resources Division. While he receives income as a government official, under Section 82030(b)(2) salary, reimbursement for expenses, and per diem from a governmental agency are not considered income for purposes of the Act. Additionally, a government agency, such as the San Bernardino County Sheriff's Department, is not an organization or enterprise operated for profit. Therefore, Councilmember Thorp does not have an interest in his agency as either a source of income or a business entity. Barring any other interest in a particular decision, he is not prohibited from taking part in the decisions related to the City's police-related matters before either the Public Safety Ad-Hoc Committee or the City Council provided the recommendation or decision will not require or result in an amendment of the existing contract, or a subsequent contract, between the City and the County of San Bernardino.³

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) 103Cal.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.) Finally, when Section 1090 applies 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).)

In this instance, it is not contested that Councilmember Thorp is a public officer subject to the provisions of Section 1090 and that any agreement between the City and San Bernardino County regarding law enforcement services is a contract for purposes of Section 1090. Additionally, as a member of the Yucaipa City Council, Councilmember Thorp is presumed to be involved in the making of all contracts by the City irrespective of whether he actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the primary question is whether Councilmember Thorp has an interest in any amended contract between the City and San

³ While we note that an official also has a financial interest in their personal finances (Section 87103 & Regulation 18702.5), there is also no indication that the types of potential decisions at issue would foreseeably affect Councilmember Thorpe's personal finances.

Bernardino County regarding law enforcement services and, if so, whether his interest is a “remote interest” or a “noninterest” as defined in Sections 1091 and 1091.5.

Of the statutory exceptions established for a remote interest and noninterest, two exceptions for contracts between government agencies are potentially applicable. First, under Section 1091(b)(13), an agency board member that receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. However, under Section 1091.5(a)(9), an officer or employee of a government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies “unless the contract directly involves the department of the governmental entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.” (Section 1091.5(a)(9).)

Here, Councilmember Thorp is employed as a Deputy by the San Bernardino County Sheriff’s Department, so any amended contract for law enforcement services between the City and San Bernardino County necessarily involves the department that employs him.⁴ Accordingly, his interest in any amended contract between the City and San Bernardino County is a remote interest under Section 1091(b)(13), and the Yucaipa City Council may approve the contract provided that Councilmember Thorp discloses his interest in the amended contract to the City Council, the interest is noted in the City Council’s official records, and he abstains from any participation in making or approving the contract including any recommendation by the ad hoc committee that necessitated the contract or amendment.⁵ (Section 1091(a).)

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:dkv

⁴ Note that a decision to amend a contract constitutes involvement in the making of a contract under Section 1090. (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191.)

⁵ We caution that participation in the making of a contract is defined broadly as any act involving 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.) To the extent the Public Safety Ad-Hoc Committee reviews the City’s law enforcement services and makes potential recommendations to the City Council concerning amendment to the current contract or a subsequent contract, Councilmember Thorp must also abstain from any such participation as a Committee member. (See 82 Ops.Cal.Atty.Gen. 126, 130 (1999) [“an advisory committee may perform its responsibilities as long as the interested member abstains and does not participate in the giving of advice”].)