



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

July 1, 2021

Scott E. Porter
Attorney
Jones & Mayer
3777 North Harbor Boulevard
Fullerton, California 92835

Re: Your Request for Advice
Our File No. A-21-088

Dear Mr. Porter:

This letter responds to your request for advice on behalf of the City of Whittier (“City”) and its Mayor Pro Tem, Cathy Warner, regarding the conflict of interest provisions of the Political Reform Act (“Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

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 Los Angeles 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 Mayor Pro Tem Cathy Warner have a conflict of interest under the Act or Section 1090 in decisions involving the award of a City franchise agreement to a solid waste hauling company that employs her adult child?

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.

CONCLUSION

No. Where Mayor Pro Tem Warner does not have a financial relationship with her adult child and has not identified any other financial interest related to the decisions, neither the Act nor Section 1090 prohibits her from participating in City decisions to enter a franchise agreement with the solid waste hauling company that employs her adult child.²

FACTS AS PRESENTED BY REQUESTER

The City will be considering entering into a contract, specifically a franchise agreement, with a solid waste hauling company, Athens Services, one of the City 's solid waste haulers. Athens Services currently employs one of Mayor Pro Tem Warner's adult children. Her child's income from his employer would not be affected by the contract. Mayor Pro Tem Warner does not have an interest in the company. Mayor Pro Tem Warner does not have a financial relationship with her son, except to the limited extent that Mayor Pro Tem Warner receives holiday-related gifts from him in a gift exchange such as the gifts typically given during Christmas or on a birthday. The gifts are not contingent upon any action by Mayor Pro Tem Warner or the City regarding the contract.

ANALYSIS

Conflicts of Interest under the Act

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of the official's immediate family, or on any of the official's following interests:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more (Section 87103(b)), including a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly, or beneficially, a 10-percent interest or greater (Section 82033).

² We caution that this conclusion is limited to the provisions of the Act and Section 1090. The Fair Political Practices Commission cannot provide advice outside of these provisions. Accordingly, we express no opinion regarding the potential application of common law conflict of interest provisions.

- An interest in a source of income to the official, or promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c)) including any community property interest in the income of a spouse and a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest (Section 82030(a).).
- An interest in the donor of a gift or gifts aggregating \$520 or more within 12 months prior to the time of the decision being made (Section 87103(e)).

Under the Act, an “immediate family member” does not include an adult child. (Section 82029.)³ And the term “gift” does not include gifts from a child, so long as the child is not acting as the agent of or intermediary for any other person. (Section 82028(b)(3).) Mayor Pro Tem Warner’s facts, therefore, do not identify any financial interest related to the franchise agreement decisions that would prohibit her participation under the Act’s conflict of interest provisions.

Conflicts of Interest under Section 1090

Section 1090 provides that public officials “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 a member.” 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.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) 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; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

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.) 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. (See e.g., *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002).)

As noted in a previous advice letter to Mayor Pro Tem Warner, *Warner Advice Letter*, No. A-15-062) involving a similar contract between the City and the solid waste hauling company that at the time employed her two adult children, Section 1090 does not specifically address the parent-adult child relationship. However, past Attorney General Opinions have found that absent a

³ Under Section 82029 “immediate family” means the spouse and dependent children. “Dependent children,” is defined as “a child . . . of a public official who is under 18 years old and whom the official is entitled to claim as a dependent on the official’s federal tax return.” (Regulation 18229.1.)

financial relationship between adult relatives (such as a legal obligation to support an adult child, a parent's incapacity, or a shared ownership interest) the official does not have a "financial interest" under Section 1090 when the contract involves an official's adult relative.⁴ Under the facts provided, Mayor Pro Tem Warner does not have a financial relationship with her adult child. Therefore, under Section 1090, she does not have a financial interest in the franchise agreement with her adult child's employer that would prohibit her participation in the City's decisions.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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⁴ 92 Ops. Cal. Atty. Gen. 19, (2009) [official did not have a financial interest under Section 1090 in agency's loan to son's solely-held corporation despite parent-adult child relationship and shared apartment rental where there were no circumstances showing a legal duty for either party to support the other]; and citing 28 Ops. Cal. Atty. Gen. 168, 169 (1956) [family relationship between county supervisor and his adult brother did not result in a violation of Section 1090 where the brother sold automobiles to the county but there was not a proprietary interest or entitlement for contribution or support between the adult brothers].