



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 15, 2021

Maria Sullivan
Deputy County Counsel
Tuolumne County
2 S. Green Street
Sonora, CA 95370

Re: Your Request for Advice
Our File No. A-21-136

Dear Ms. Sullivan:

This letter responds to your request for advice regarding the Political Reform Act (the “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 Tuolumne 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

Do the conflict of interest provisions of the Act or Section 1090 prohibit Tuolumne County Supervisor Anaiah Kirk from taking part in governmental decisions relating to a nonprofit organization given that he is the President of the nonprofit?

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 18109 through 18998 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. Neither the Act nor Section 1090 prohibit Supervisor Kirk from taking part in decisions concerning the nonprofit.

FACTS AS PRESENTED BY REQUESTER

Your office represents the County of Tuolumne. One of the County Supervisors, Anaiah Kirk, is currently the President of Tuolumne Safe, a 501(c)(3) nonprofit organization.² Supervisor Kirk is not compensated for his service, nor does he receive any reimbursement from the nonprofit for expenses incurred in providing services. His service on the board of the nonprofit is completely voluntary.

Tuolumne Safe has purchased Outdoor Audible Alert Systems (“OAAS”) to notify residents when there is an active emergency, such as wildfire. The nonprofit has plans to install the sirens, but it will not be able to operate them effectively without an agreement with the County to integrate them with the Sheriff’s office and/or Office of Emergency Services. The Office of Emergency Services Coordinator is recommending that this issue come before the Board of Supervisors in order to receive direction on how the board wishes to direct staff and prioritize the project.

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. Pertinent to your facts, the Act’s conflict of interest provisions apply to financial interests based on the following:

- An interest in a business entity³ 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 a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- The official’s interest in his or her personal finances and those of immediate family members. (Section 87103.)

According to the facts, Supervisor Kirk does not receive any compensation for his services as President of Tuolumne Safe, and he receives no reimbursements from the nonprofit for any expenses he incurs in providing those services. Therefore, he does not have an interest in Tuolumne

² According to its website, the mission of Tuolumne safe is “[b]uilding community partnerships and raising money to complete critical projects that keep Tuolumne County residents safe.” (See <https://www.tuolumnesafe.org>.)

³ Section 82005 defines a “business entity” as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.

Safe as a source of income. Additionally, Supervisor Kirk does not have a business interest in Tuolumne Safe because, as a nonprofit organization, it is not a “business entity” as defined by the Act. (Section 82005.) Finally, there are no facts suggesting decisions related to Tuolumne Safe will have any financial effect on his personal finances. Therefore, based on the facts provided, Supervisor Kirk does not have a disqualifying conflict of interest under the Act in future City Council decisions related to Tuolumne Safe.

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).)

Here, Tuolumne Safe purchased sirens to notify residents of active emergencies, such as a wildfire. In order to operate the sirens effectively after installation, Tuolumne Safe needs to enter an agreement with the County to integrate the sirens with the Sheriff’s office and/or Office of Emergency Services. You therefore ask whether Section 1090 would prohibit Supervisor Kirk from taking part in these contract decisions based on his affiliation with Tuolumne Safe. Importantly, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the interest involved is deemed a “remote interest,” as defined in Section 1091 or a “noninterest,” as defined in Section 1091.5. If a noninterest is present, the public official’s abstention is generally not required, and the contract may be made by the agency.

Pertinent to the present situation, Section 1091.5(a)(8) establishes that an officer is not interested in a contract if his or her interest is:

That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is “noncompensated” even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

According to the facts, Supervisor Kirk is the President of Tuolumne Safe. In this position, he does not receive any compensation for his services, nor does he receive any reimbursement for any expenses he incurs in providing those services. In addition, based upon the description of issues it addresses, the primary purpose of pursuing and completing projects that will keep County residents safe supports an important function of the County. Based on these facts, Supervisor Kirk would have a noninterest in an agreement between Tuolumne Safe and the County concerning the sirens. However, should he participate in decisions on the agreement, he must disclose his interest in the County Board of Supervisor’s official records.

Accordingly, for purposes of the Act, Supervisor Kirk does not have a disqualifying conflict of interest in County Board of Supervisor decisions concerning Tuolumne Safe and, for purposes of Section 1090, he has a noninterest in any County contracts involving Tuolumne Safe.

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