



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

February 26, 2020

Scott Loggins  
Assistant Executive Director  
Standards and Development Division  
CA Commission on POST  
Scott.Loggins@post.ca.gov

Re: Your Request for Advice  
**Our File No. A-20-158**

Dear Mr. Loggins:

This letter responds to your request for advice regarding the Political Reform Act (“Act”, conflict of interest provisions, and Government Code Section 1090, et seq.<sup>1</sup> Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions including common law conflict of interest and the Public Contract Code. This inquiry is general in nature as it does not relate to a specific official, and, therefore, does not provide immunity to a particular official.<sup>2</sup> We recommend you seek additional, specific advice for a particular matter, if necessary, in the future.

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, which we have done. (Section 1097.1(c)(3).) We did not receive a written response. (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. Does Section 1090 prohibit the California Commission on Peace Officer Standards and Training (“POST”) from approving training contracts between POST and a Commission member’s local agency?

---

<sup>1</sup> 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.

<sup>2</sup> The immunity provided by Section 83114(b) is limited to the person(s) identified as the subject(s) of the request, and to the specific facts set forth in the formal written advice. (Section 83114; Regulation 18329(b)(4).)

2. Does Section 1090 prohibit contracts between the POST Commission and a presenting organization that result in a Commission member receiving funds as an independent contractor instructor?

3. Does the Act prohibit a Commission member's participation in a decision to reimburse their local agency for training costs pursuant to a regulation or statute?

4. Does the Act prohibit a Commission member's participation in a contract decision involving a Commission member's source of income financial interest?

### **CONCLUSIONS**

1. No, under Section 1091(b)(3), the Commission member will have a remote interest in the contract decision and the Commission member must abstain from any participation in the process, as discussed below.

2. Yes, unless a remote interest or noninterest exception applies to a particular situation, Section 1090 prohibits the Commission from making contracts that result in a financial interest for the Commission member. Please seek additional advice for specific contracts that involve a Commission member's past, current or potential source of income.

3. While, the Act does not define a government salary as "income" and does not prohibit a Commission member's participation in regulatory training reimbursement decisions involving their local agency, Section 1090 may require recusal from decisions involving the member's local agency.

4. As a general matter, where the Commission member is prohibited from any participation in contract decisions involving a financial interest under Section 1090, we need not further analyze the issue under the Act. Please seek additional advice for specific contract decisions as noted in item 2, above.

### **FACTS AS PRESENTED BY REQUESTER**

The Commission on Peace Officer Standards and Training (POST) was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement. The POST organization, with more than 130 staff members, functions under the direction of an Executive Director appointed by the Commission. POST funding comes from the General Fund and the State Penalty Fund. More than 600 agencies participate in the POST Program and are eligible to receive the Commission's services and benefits.

The POST Commissioners include city and county administrators, law enforcement professionals, educators, and public members. (Penal Code section 13500.) The Governor appoints 15 of the Commissioners, with the advice and consent of the Senate, for three-year overlapping terms. The Speaker of the Assembly and the Senate Pro Tempore each appoint one

Commissioner. The Attorney General is an ex-officio member and serves as the 18<sup>th</sup> POST Commissioner. The Commission meets three times a year to establish standards, regulations, and to direct POST staff. Commissioners serve without pay but are reimbursed for their expenses for attending meetings.

Each year the Commission distributes approximately \$20 million in contracts to provide law enforcement training that may be mandated by law, or elective, throughout the state. The contracts may be with a college, local law enforcement agency, or a private company, all of which are referred to as “presenters.” POST also provides reimbursements, under its regulations and procedures, paid directly to local law enforcement agencies for authorized training expenses such as travel, subsistence, and tuition.

As noted above, POST training contracts are formed between the Commission and a presenter. The presenter organization is responsible for hiring its own instructors, usually on an independent contractor basis, subject to the requirement that the instructors be POST qualified. Due to the mandated make-up of the Commission, some Commission members are POST qualified instructors. Specifically, the POST Commission includes one member, holding the “Educator Position” under Penal Code section 13500(b)(7), which requires that this Commissioner “shall be an educator or trainer in the field of criminal justice.” While the Commission votes to approve the spending authority for the Executive Director to enter into contracts for specific training programs with approved entities, it does not approve the terms and conditions of each contract, the selection of the approved entity to contract with, or the instructors.

The process is as follows: The Commission votes to delegate spending authority to the Executive Director to enter into contracts that exceed \$175,000 for specific training programs, such as detective, supervisory, management, and emergency vehicle operations training. The contract process starts with recommendations by POST staff regarding contract requests. A Finance Committee, composed of several Commissioners, reviews a description of each entity POST contracts with, but they do not vote on the specific contracts. Rather, they vote on the cumulative amount to be paid to allow the Executive Director to enter into contracts for a specific program, such as the ICI detective training program, discussed below. The Finance Committee presents its recommendations to the Commission, who then vote on the recommendations. Commissioners who have a possible conflict of interest recuse themselves from this process.

POST does not, and has not, contracted directly with any Commissioner related to trainings. POST Commissioners do not make instructor selections, set the salary and/or benefits for instructors, or engage in any similar conduct. The choice as to what instructor will be used by any presenter is made by the presenter, subject only to POST’s guidelines to ensure that instructors are qualified. A presenter could potentially later employ a Commissioner to teach courses funded by the Commission. However, at the time of spending authority approval by the Commission, the Commission does not approve or examine the names of instructors that any given presenter may intend to employ.

Once spending authority has been approved by the full Commission, the POST Executive Director’s staff coordinates the contract process. The contracts specify a specific scope of work, which includes instructional staff as well as hourly rates for instructors, facilitators, program managers, and other staff necessary to perform the contract. Under these contracts, the instructor,

facilitators, program managers, and other staff are all independent contractors for the course presenter. They are not employees of POST, nor is there any employee/employer relationship with POST. It is up to the presenter to staff the courses from a list of qualified POST instructors.

For an example, the Commission recently approved the training contracts for the Robert Presley Institute of Criminal Investigation (detective) training or “ICI.” The ICI program consists of three phases of approximately 200 hours of training to qualify for an ICI Certificate in one of 16 specialty areas. The contracts provide for course presentation costs, equipment acquisition, and course research and development. The Commission authorized the Executive Director to enter into contracts for the ICI program with qualifying entities in an amount not to exceed \$5,058,937.98. The Commission was provided with a list of all the entities that will enter into contract with POST to provide the training. These entities include community colleges, police departments, and sheriff departments.

## ANALYSIS

### Section 1090

Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under this section, “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, and the prohibition applies 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.)

#### *Making the Contract*

Board members are conclusively presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified himself or herself from any and all participation in the making of the contract. When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency’s contracts irrespective of whether he or she actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649; *Fraser-Yamor Agency, Inc. v. County of DelNorte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen 49 (2006).) Generally, when Section 1090 is applicable to one member of a governing body of a public entity, the entire governing body is precluded from entering into the contract. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) And a board may not avoid a Section 1090 conflict by delegating decision-making authority to another individual or body. (87 Ops.Cal.Atty.Gen. 9 (2004); 88 Ops.Cal.Atty.Gen. 122 (2005).) The contracts at issue are under the jurisdiction of the POST Commission, and subject to its general approval. All POST Commission members are presumed to be involved in the making of all contracts by the Commission, irrespective of whether the member actually participates in the making of the contract or the Executive Director executes the contract.

### *Financial Interest*

The phrase “financially interested” broadly encompasses anything that would tie a public official’s fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1335.) The 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. A financial interest may include a board member’s prospect of future business opportunities related to the contract or his desire to maintain a favorable ongoing relationship with the contracting party. (86 Ops. Cal. Atty. Gen. 187, 189 (2003).) Where a contract would directly or indirectly impact the financial health of an official’s source of income interest, even though the contract would not result in commissions to the official, the court has found a financial interest. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 215.)

### *Remote and Noninterest Exceptions*

Section 1091 and 1091.5 establish exceptions to Section 1090 for a financial interest in a contract that is a “remote interest” or “noninterest.” If an official’s interest is a “remote interest,” an agency may execute a contract if (1) the officer in question discloses his or her financial interest in the contract to the agency, (2) the interest is noted in the agency’s official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005).) If the official’s interest is a “noninterest,” an agency may execute the contract and the official is not required to abstain from the decision. Except in limited circumstances, a noninterest does not require any disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

### *POST Training Contracts with a Commission Member’s Local Agency including Decisions to Reimburse a Local Agency.*

First, we examine training contracts between POST and a Commission member’s local agency including decisions to reimburse a Local Agency, and whether the member’s 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. 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. 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).)

Where the contract involves the department that employs the member, the member’s interest in a contract between the POST Commission and the Commission member’s police or sheriff department is a remote interest under Section 1091(b)(13). The POST Commission may approve the contract provided that Commission member discloses their interest in the contract to the Commission, the interest is noted in the Commission’s official records, and the member abstains

from any participation in making or approving the contract. (Section 1091(a).) Where the contract involves the member's agency, but not their department (for example a contract with the city, not the city police department, and the member is a city police department employee) the member will have a noninterest in the contract. No disclosure or abstention is required.

### *POST Training Contracts That Result in Commission Member Receiving Funds as an Instructor*

Second, we examine contracts between the POST Commission and a presenting organization that thereafter result in a Commission member receiving funds as an independent contractor instructor. Whether particular statutory exceptions established for a remote interest and noninterest apply will depend upon the specific facts involved. Absent a specific statutory exception, the contract will likely result in a Commission member having a prohibitory financial interest in a contract made by the POST Commission. We recommend that you seek further advice in the event that a Commissioner may potentially receive funds as a result of a POST training contract. Please note that an officer's "financial interest" includes situations where the officer has the prospect of future business opportunities related to the contract or has a desire to maintain a favorable ongoing relationship with the contracting party. (86 Ops. Cal. Atty. Gen. 187, *supra* at p.189.)<sup>3</sup>

### **The Act**

The Act is a separate body of law and requires a separate and distinct analysis. The Act's conflict of interest provisions prohibit 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 87100.) 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 one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Relevant to these facts, Section 87103 defines a financial interest to include:

- Any source of income, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
- Personal finances, including those of the official's immediate family. (Section 87103.)

Under the Act, "income" does not include salary received from a state, local, or federal government agency. (Section 82030(b)(3).) A Commissioner does not have a financial interest

---

<sup>3</sup> You ask if a POST policy or regulation expressly stating that "a Commissioner may not, during the duration of any POST contract, later be employed as a contract employee for any presenter in any course supported by means of POST funding approved during the time the Commissioner was a member," would assist the POST Commission in complying with the Section 1090 prohibitions. However, we can provide advice only regarding the requirements of the Act. While we generally note that Section 1090 already broadly prohibits this behavior by a Commission member and voids any such contract unless a remote interest or noninterest exception applies, we can express no opinion regarding POST policies or regulations to safeguard against potential Section 1090 violations.

under the Act where the official's only interest is in their government salary. Therefore, contract decisions, including decisions to reimburse a Commission member's local agency costs, do not present a potential "source of income" conflict of interest for a Commission member under the Act. However, as discussed above, Section 1090 may require recusal from these decisions if it involves the member's local agency.

For contract decisions involving a non-government source of income interest to a Commission member, we provide the following general advice. A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. A financial effect is presumed reasonably foreseeable, and the effect is material, where a source of income interest is a named party to a contract. (Regulations 18701(a) and 18702.3(a)(1).) Therefore, the Commission member would have a prohibited financial interest in the decision under the Act, if it involved any source of income within the twelve months prior to the decision. As noted above, we recommend you seek additional advice under Section 1090 and the Act for specific 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

LKH:aja