



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 02, 2022

David P. Hale
City of Grover Beach
1233 W. Shaw Ave., Ste. 106
Fresno, CA. 93711

Re: Your Request for Informal Assistance
Our File No. I-21-174

Dear Mr. Hale:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090.¹ Please note that we are only providing advice under the Act, as we cannot provide advice under Section 1090 absent a specific contract. Moreover, we do not provide advice under other bodies of law 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. As you have sought general advice and have not yet identified specific decisions before the officials, we are providing informal assistance.²

QUESTION

1. Under the Act, may Councilmember Rushing take part in City Council decisions involving contracts between the City and business entities he has solicited donations from in his capacity as a nonprofit employee?
2. What obligations, if any, does Councilmember Rushing have to determine whether a matter before the City Council involves an individual or entity that has donated to his employer?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

1. Such a determination will require additional facts and must be considered on a decision-by-decision basis. More generally, however, it appears unlikely that Councilmember Rushing would be disqualified from taking part in a governmental decision involving a party that has made small donations to his employer in the preceding 12 months. For instance, we have previously advised that it is not reasonably foreseeable that prior donations of less than \$500 to a nonprofit would have a material effect on an official's interest in the nonprofit or personal finances even if the official previously solicited the donations, provided the official does not promise the donor his vote on the decision in exchange for the donor's contribution. (*Berger Advice Letter*, No. A-21-127.) Nonetheless, Councilmember Rushing should request additional advice where the official is uncertain whether a specific governmental decision would have a reasonably foreseeable, material financial effect on an economic interest.
2. Regarding Councilmember Rushing's obligations to determine whether a matter before the City Council involves an individual or entity that has donated to his employer, the applicable standard is provided in Section 87100, which prohibits an official from taking part in a decision "knows or has reason to know he has a financial interest." Again, this determination can be made only on a case-by-case basis and will depend on all facts known to Councilmember Rushing at the time of the decision. Absent a specific governmental decision, we can only advise that Councilmember Rushing should practice due diligence in identifying potential donors coming before the City Council.

FACTS AS PRESENTED BY REQUESTER

Daniel Rushing is a member of the Grover Beach City Council. He works as a salaried employee for Boys & Girls Club of Mid Central Coast ("Boys & Girls Club"), a 501(c)(3) nonprofit organization. His responsibilities include the solicitation of contributions or grants for Boys & Girls Club from business entities and individuals within the community to fulfill the purposes and objectives of Boys & Girls Club. Councilmember Rushing is one of a couple individuals hired by Boys & Girls Club to solicit contributions. As the Annual Fund Manager, Councilmember Rushing is specifically responsible for donors who contribute under \$10,000 per year.

Councilmember Rushing may also receive bonuses based on performance factors, including the number of contacts he makes. This aspect of his pay is a "work in progress" and has not yet been firmly established. Rather, there are plans to incentivize achievement of specific goals based on key performance indicators. These indicators would be directly related to the number of donor contacts Councilmember Rushing makes, new donors he is able to bring to Boys & Girls Club, and donors he is able to convert to recurring donors.

The contributions and grants received by Boys & Girls Club, many being solicited by Councilmember Rushing, are revenues used to fund the organization's operational expenses, including Councilmember Rushing's salary. Boys & Girls Club has average annual receipts of approximately \$4 million. Individual donations range between \$25 and thousands of dollars per year on average.

Many of the corporations or business entities that Councilmember Rushing solicits are entities that occasionally appear before the City Council requesting approval of contracts with the City. Councilmember Rushing has no affiliation with the business entities requesting contracts from the City other than the potential increase in revenue they may afford Boys & Girls Club by their contributions which can or may be used to pay his salary. Councilmember Rushing does not have immediate knowledge as to which companies may be making donations to Boys & Girls Club after being solicited by other employees of the nonprofit, but he does have the ability to research those companies or entities and could obtain the pertinent information of any contributors to his employer. Donations are not made with contingencies, but it is not uncommon for business entities to donate to specific funds operated by the nonprofit, such as funds dedicated to specific Club sites or programs.

ANALYSIS

Under Section 87100 of the Act, “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 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 his or her immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests is “[a]ny source of income . . . aggregating five hundred dollars (\$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.” (Section 87103(c).)

Councilmember Rushing has an economic interest in his personal finances, as well as a source of income interest in his employer Boys & Girls Club, a 501(c)(3) nonprofit organization. As such, he will be disqualified from governmental decisions that would have a reasonably foreseeable, material financial effect on his personal finances or Boys & Girls Club.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Where, as here, an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

Under Regulation 18702.5, a governmental decision's reasonably foreseeable financial effect on a public official's financial interest in his or her personal finances or those of immediate family, also referred to as a "personal financial effect," is material if the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision. (Regulation 18702.5(a).)

The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a source of income is material if the source is a nonprofit organization and the decision may result in an increase or decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than \$10,000. (Regulation 18702.3(a)(3)(A).) Additionally, under Regulation 18702.3's "nexus test," any reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source [of income] and the official or the official's spouse receives or is promised the income for achieving the purpose or goal. (Regulation 18702.3(b).)

Given the decision-by-decision nature in which potential conflicts of interest are analyzed under the Act, along with the lack of a specific governmental decision to analyze here, we are unable to provide a definitive conclusion as to the exact circumstances in which Councilmember Rushing would be permitted or prohibited from taking part in a governmental decision involving a party that has donated to his nonprofit employer. For instance, if it is reasonably foreseeable that the decision may result in further donations from the person or party, implicating any bonus Councilmember Rushing may receive or additional income, Councilmember Rushing is potentially prohibited from taking part in the decision based on the financial effect on his personal finances. However, such a determination would be dependent on all facts surrounding the decision including, but not limited to, the timing of any solicitation by Councilmember Rushing or his nonprofit employer and the amount donated or solicited. Accordingly, Councilmember Rushing should request additional advice specific to the decision before the City Council if he is uncertain about his ability to take part in a specific governmental decision.

More generally, however, where a donation occurred prior to a governmental decision and was for a small amount, it is unlikely reasonably foreseeable that such an amount could have a material financial effect on Councilmember Rushing's personal finances or his employer as a source of income interest. For instance, in the *Berger Advice Letter*, No. A-21-117, we previously advised it is not reasonably foreseeable that prior donations of less than \$500 to a nonprofit would have a material effect on an official's interest in a nonprofit or personal finances even if the official previously solicited the donations, provided the official does not promise the donor his vote on the decision in exchange for the donor's contribution. Likewise, we can generally advise that it is not reasonably foreseeable that a decision will have a material financial effect on Councilmember Rushing's personal finances or his nonprofit employer, where the donation of a comparable amount was made prior to the proceeding before the City.

Additionally, you have inquired regarding any obligations Councilmember Rushing may have to ascertain whether a party before the City Council has donated to Boys & Girls Club, even if he has not solicited a donation from the party. As noted above, under Section 87100, "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows *or has*

reason to know he has a financial interest.” We have previously advised that, generally, an official “has reason to know” that a decision will affect a source of income whenever a reasonable person, under the same circumstances, would be likely to know the identity of the source of income and would be aware of the decision’s probable impact on the source. (*Trembley* Advice Letter, No. I-17-217; *Ewing* Advice Letter, No. I-03-291.)

Generally, Councilmember Rushing would have reason to know that a proceeding may impact the Boys and Girls Club or his personal finances anytime he has previously solicited a donation from a participant in a proceeding. Other indicators that a participant in a proceeding is a donor (or potential donor) must also be considered prior to taking part in a decision. Such indicators include whether the person’s or entity’s donation is generally known throughout the organization; whether the person or entity has acknowledged a previous, pending, or forthcoming donation; and any other information Councilmember Rushing has received as a result of his position with the Boys and Girls club that might indicate a person or entity is a donor to the organization. However, absent a specific governmental decision, we can only advise that Councilmember Rushing must make this determination on a case-by-case basis and should practice due diligence in identifying potential donors coming before the City Council.


Section 1090

Given the lack of a specific contract to analyze, we are unable to provide advice with respect to Section 1090. In *Schroeter* Advice Letter, No. A-20-062, we provided Section 1090 advice related to a city councilmember’s potential participation in a contracting decision involving a business that had made, but had not yet completed, a donation to the councilmember’s nonprofit employer. In that case, we determined that the councilmember did not have an interest in the contract resulting from the contribution pledged to the nonprofit, notwithstanding the fact that the councilmember worked as the nonprofit’s Director of Philanthropy, raising funds for various projects. However, without a specific contract to analyze, we cannot advise that the analysis or conclusion in Councilmember Rushing’s circumstances would be the same. If Councilmember Rushing has a question regarding a specific contract in the future, he should request additional advice from the Commission.

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Kevin Cornwall
Counsel, Legal Division