



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 20, 2023

Karl H. Berger
City Attorney
City of Monterey Park
444 South Flower Street, Suite 2400
Los Angeles, CA 90071-2953

Re: Your Request for Advice
Our File No. A-23-035

Dear Mr. Berger:

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 and 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).)

FACTS AS PRESENTED BY REQUESTER

On January 21, 2023, a gunman killed eleven people and injured nine others in the City of Monterey Park (the “City”) in a mass shooting (the “Shooting”). Ten days later, the City partnered with the California Community Foundation (“CCF”)² to establish the Monterey Park Community

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 18104 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 CCF is a 501(c)(3) charitable foundation established in 1980 (EIN: 95-3510055) whose purpose is strengthen communities in Los Angeles County through charitable grantmaking.

Healing Fund (the “Fund”),³ in order to provide aid to community members affected by the Shooting as well as support for programs, initiatives, and organizations designed to help the City heal and rebuild.

The Fund is an official charitable fund within CCF, with CCF providing technical and administrative support and serving as the City’s Authorized Liaison.⁴ As Authorized Liaison, CCF is tasked with: (1) “provid[ing] a single vehicle to receive Donations (sic);” (2) “provid[ing] the infrastructure to coordinate the collection, administration and distribution of these funds in a manner consistent with the City’s interest in assisting the victims of the attacks with financial and other restitution; (3) “act[ing] as a central resource to allow those affected by the [shooting] to find appropriate and reputable services; and (4) “maintain[ing] the infrastructure in coordination with the City Monterey Park that would allow it to respond immediately to city needs in the event of a similar tragedy, in order to lessen the burdens of government.”⁵

The Fund is overseen by a Fund Administrator—a position currently occupied by the elected City Treasurer in an unpaid volunteer capacity— and an Oversight Board, comprised of community members nominated by the City and selected by independent nonprofit partners, including CCF. Other than the City Treasurer, no other elected or appointed City official (or employee) serves on the Oversight Board, in CCF management, as a CCF employee, or is otherwise involved in the day-to-day administration of the Fund or CCF. However, all City Officials are either directly involved in soliciting donations for the Fund (from their respective employers, for example) or are involved in directing people who inquire about helping victims of the Shooting to donate to the Fund.

QUESTIONS AND CONCLUSIONS

Question 1: Are donations solicited by public officials for the Fund “contributions” for purposes of Section 84308?

Conclusion: No. Payments made in connection with a legislative, governmental, or charitable purpose are not considered contributions. However, where such a payment is made at the behest of an elected officer, the payment may be reportable as a behested payment.

The Act’s “pay to play” restrictions, contained in Section 84308, prohibit “an officer of an agency” from taking part in an entitlement for use proceeding if the officer has received a contribution exceeding \$250 from a party or participant in the proceeding within the preceding 12 months. Section 84308 also prohibits an officer from accepting, soliciting, or directing a contribution exceeding \$250 from a party or participant in the proceeding for twelve months after a

³ Originally called the Monterey Park Victim and Family Support Fund.

⁴ Per a letter agreement with the City dated January 26, 2023 (see, Emergency Executive Order, January 31, 2023, Monterey Park Mass Casualty Incident).

⁵ Emergency Executive Order, January 31, 2023, Monterey Park Mass Casualty Incident.

final decision regarding the proceeding.⁶ (Section 84308(b). An “agency” for purposes of Section 84308 is defined as any state or local government agency. (Sections 84308 and Section 82003.) Meanwhile, Section 84308 defines “officer” to include “any elected or appointed officer of an agency.” (Section 84308(a)(4))

While the prohibitions of Section 84308 apply to the City Treasurer and all other elected or appointed City officials, Section 84308 only applies to the extent the officials receive a contribution. Thus, the determinative issue is whether a donation solicited for the Fund by an officer of a City agency is a “contribution” for purposes of Section 84308.

The Act defines “contribution” as a payment made for political purposes, for which a donor does not receive full and adequate consideration. (Section 82015.) Regulation 18215 provides that a payment is “made for political purposes” if it is: (1) made for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or (2) received by or made at the behest of a candidate. In this context, “candidate” is defined to include an “elected officer,” (Section 82007(a)(3)), defined as “any person who holds an elective office or has been elected to an elective office but has not yet taken office.” (Section 82020.) In this case, the elected City Treasurer, as well as other elected officers, will be soliciting donations on behalf of the Fund. In other words, the payments will be made to the Fund at the behest of the City’s elected officers.

A payment made at the behest of an elected officer is considered a contribution unless it is clear from the surrounding circumstances that the “payment was made for purposes unrelated to the officer’s seeking or holding of elective office.” (Section 82004.5(c).) Certain payments are presumed to be for purposes unrelated to an elected officer’s seeking or holding of elective office, including those made principally for a charitable purpose. (Section 82004.5(c)(4); emphasis added.) Here, the payments being made at the behest of the City’s elected officers are being made principally for a charitable purpose—namely, charitable donations to the Fund. Thus, donations solicited by the City’s elected officers for the Fund are not “contributions” for purposes of Section 84308. Instead, depending on the amount of the payment, City officials may need to report these payments as behested payments, discussed further below.

Question 2: Must City officials who solicit donations totaling \$5,000 or more from one source complete a Form 803 Behested Payment Report?

Conclusion: Yes. An elected official who solicits payments for charitable purposes totaling \$5,000 or more in the aggregate from the same source in the same calendar year must report these payments within 30 days. (Section 84224.)

The Act defines a “behested payment” as a payment that is made at the request, suggestion, or solicitation of; or made in cooperation, consultation, coordination, or concert with an elected officer, where it is clear from the “surrounding circumstances that the payment was made for

⁶ Prior to the passage of SB 1439 in 2022, Section 84308 applied only to members of appointed boards and commissions. Effective January 1, 2023, Section 84308 now also applies to officers of local government agencies whose members are directly elected by voters, including city councilmembers and elected city treasurers.

purposes unrelated to the officer's seeking or holding of elective office." (Sections 82004.5. and 82041.3) Payments made principally for charitable, legislative, or governmental purposes by a person other than a state, local, or federal governmental agency are presumed to be unrelated to an elected officer's seeking or holding of elective office. (Section 82004.5(c)(5).)

Where a behested payment is made principally for a legislative, governmental, or charitable purpose by a person other than a state, local, or federal governmental agency the behesting officer must file a Behested Payment Report (Form 803) for payments that equal or exceed \$5,000. (Section 84224.)⁷

Whether any particular payment was made at an elected officer's behest depends on the factual circumstances of each payment. For example, where an elected officer agrees to be "featured" in a charitable a charitable organization's mailed fundraising solicitation, the official is making a behest for payments in the solicitation and will have a reporting duty for resulting payments that meet the threshold. (Regulation 18424.2.)⁸

In this case, it is unclear how exactly City elected officers will solicit donations on behalf of the Fund. If elected officers solicit donations through means other than mailed solicitations—such as telephone calls, emails, or in person conversations—whether a particular solicitation "features" an elected officer must be determined on a case-by-case basis. However, we can generally advise that payments to the Fund received in response to solicitations that do not identify or reference the elected officers in any way would not result in reportable behested payments merely because the elected officers assisted in establishing the Fund.

Finally, please note that an official's general call to the public for help or payments to community groups in which the official does not identify or suggest an intended recipient will typically not result in a behested payment.

Question 3: Must the elected City Treasurer – who is acting as the Fund Administrator in a volunteer capacity – complete a Form 803 for amounts of \$5,000 or more from one source?

Conclusion: Yes. Payments of \$5,000 or more from one source received in response to a solicitation from the Treasurer are also reportable behested payments.

The Act's conflict-of-interest provisions do not prohibit public officials from working or doing volunteer work for private entities. Therefore, it is permissible under the Act for the Treasurer to simultaneously serve as Treasurer and act as the Fund Administrator in a volunteer capacity.

⁷ Note that the general rule for reporting the payment for the communications are to report the fair market value of the payment. Under Section 82025.5, "[w]henver the amount of goods, services, facilities, or anything of value other than money is required to be reported under this title, the amount reported shall be the fair market value, and a description of the goods, services, facilities, or other thing of value shall be appended to the report or statement."

⁸ A solicitation "features" an official if: the solicitation includes the official's photograph, signature, or singles out the name or office of the official by manner of display in the solicitation's layout, or if the solicitation lists the official in a roster or letterhead listing of its governing board, and the board includes a majority of elected officials or PUC members. (Regulation 18424.2(b).)

However, an elected official who solicits donations for a charity on a volunteer basis is still subject to the behested payments reporting requirements explained in Question 2 above. (see, e.g., the *Connors* Advice Letter, A-14-091.) As explained above, any elected official who solicits payments for charitable purposes totaling \$5,000 or more in the aggregate from the same source in the same calendar year must report these payments within 30 days. (Section 84224.)

Thus, payments received at the at the request, suggestion, or solicitation of; or made in cooperation, consultation, coordination, or concert with the Treasurer are reportable behested payments. As discussed above, whether any particular payment was made at an elected officer's behest will depend on the factual circumstances of each payment, including whether the Treasurer is featured on a mailed solicitation for the Fund. However, payments to the Fund received in response to solicitations that do not identify or reference the Treasurer in any way would not result in reportable behested payments merely because the Treasurer serves as the Fund Administrator.

Question 4: Do the Act's conflict of interest provisions permit City officials to participate in City decisions that directly or indirectly involve CCF?

Section 87100 of the Act 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. Here, the public officials at issue are the City's Treasurer—who serves in an uncompensated volunteer capacity as the Fund Administrator—and an unspecified number of other City officials, who also raise money for the Fund on a volunteer basis. The governmental decisions in question are City decisions concerning (directly or indirectly) CCF, the 501(c)(3) charitable foundation with whom the City established the Fund, and which provides technical and administrative support to the Fund.

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

- 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 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, neither the City Treasurer, nor other City officials who fundraise for the Fund, are employed by CCF or receive any compensation from CCF. Therefore, neither the Treasurer nor other City officials have an interest in CCF as a source of income. Nor do they have a business interest in the CCF because, as a nonprofit organization, CCF is not a "business entity" as defined by the Act. (Section 82005.) Finally, there are no facts suggesting decisions related to CCF will have any financial effect on the Treasurer or any other City officials' personal finances. Therefore, based on the facts provided, neither the City Treasurer nor other City officials would appear to have a disqualifying conflict of interest under the Act in the City's decisions concerning CCF, barring any other economic interest in the decision.

Question 5: Does Section 1090 prohibit the City from entering into an agreement with CCF for any purpose?

Section 1090 generally prohibits public officers while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local level. (Gov. Code Section 1090(a).) 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 case, CCF serves as the City's Authorized Liaison for the Fund, managing the Fund's day-to-day administration, including acceptance of donations and disbursement of charitable funds on behalf of the City and residents affected by the Shooting. You therefore ask whether Section 1090 would prohibit the City officials from taking part in City decisions concerning CCF due to the Treasurer's volunteer role as Fund Administrator.

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.

Thus, as the Fund's unpaid volunteer Fund Administrator, the City Treasurer is a noncompensated officer of the Fund. CCF is a nonprofit 501(c)(3) organization with a primary purpose of serving communities in Los Angeles County through charitable grantmaking. In the case of the Fund specifically, CCF's administrative and technical support supports the important City

functions of providing aid to community members affected by the Shooting as well as support for programs, initiatives, and organizations designed to help the City heal and rebuild.

Based on these facts, the City Treasurer serves as a noncompensated officer of the Fund and would have a noninterest in City decisions concerning CCF. Section 1090 would therefore not prohibit the City from entering into any further agreements (or modifying existing agreements) with CCF.

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

Sincerely,

Dave Bainbridge
General Counsel

A handwritten signature in black ink, appearing to read 'Toren Lewis', written over a horizontal line.

By: Toren Lewis
Counsel, Legal Division

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