



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 24, 2023

Jason Zaragoza
Deputy City Attorney
City of Oxnard
305 West Third Street, Suite 100E
Oxnard, CA 93030

Re: Your Request for Advice
Our File No. A-23-071

Dear Mr. Zaragoza:

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 Ventura 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 the Act or Section 1090 prohibit City of Oxnard Councilmember Teran from taking part in, or the City from entering into, contracts with school districts that employ the Councilmember as a paid consultant?

CONCLUSION

Councilmember Teran has a financial interest in those contracts under Section 1090 due to his status as a paid consultant for the school districts. However, as explained below, the remote

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.

interest exception under Section 1091(b)(13) applies to allow the City to enter into such contracts so long as he does not take part in the decisions. Additionally, the Councilmember must leave the room during the consideration of any such contracts pursuant to the Act's recusal requirements.²

FACTS AS PRESENTED BY REQUESTER

You are a Deputy City Attorney for the City of Oxnard seeking advice on behalf of Gabe Teran, a member of the Oxnard City Council.

The City enters into agreements with school districts in the City for various purposes, including stationing school resources officers from the Oxnard Police Department at district campuses, operating after school programs, and establishing joint campus uses.

Councilmember Teran was appointed to fill the District 2 vacancy on the City Council in February 2021, elected in November 2021 and re-elected to serve a four year term in November 2022. He recently started a consulting business wherein he works directly with the school districts to provide training to students and school staff on health and wellness initiatives such as mental health and substance use prevention. Councilmember Teran's fees thus far have been paid by the districts with grant funds – in total, he has been paid \$1,250 by one district and \$14,640 by another.

ANALYSIS

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.) 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, 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 typically 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.)

As a member of the City Council, Councilmember Teran is a public officer subject to the provisions of Section 1090. Additionally, due to his status as a councilmember, he is presumed to be involved in the making of all contracts by the City Council irrespective of whether he actually

² We caution that this conclusion is limited only to future contracts between the City and the districts that currently employ Councilmember Teran. We express no opinion regarding Councilmember Teran's previous consulting contracts with the districts, including the discussions and negotiations for these existing contracts while serving as a City Councilmember. The Commission cannot provide advice related to past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).) Furthermore, to the extent the Councilmember takes part in any discussion of a subsequent contract with a school district not currently employing the Councilmember, Section 1090 may restrict the Councilmember from accepting future employment with the district. Accordingly, Councilmember Teran should seek additional advice should he seek employment with a district after taking part in any city decisions involving a contract with the district.

participated in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the determinative question is whether he has a financial interest in contract decisions involving the school districts where he is a paid consultant and the City and, if so, whether his interest is a “remote interest” or a “noninterest” as defined in Sections 1091 and 1091.5.

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. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) 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, supra* at p. 569.)

Although no specific contracts between the City and the school districts are identified, a contract may involve an increase or decrease in school district funds which could indirectly or directly impact a school district’s ability to enter into contracts with the Councilmember for his services. Therefore, he will have a financial interest in contracts between the City and the school districts where he has an existing contract for services based on the information provided.

However, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091 or a “noninterest,” as defined in Section 1091.5. If a remote interest is present, the contract may be made if: (1) the officer discloses the interest in the contract to his or her public agency; (2) that 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).) If a noninterest is present, the contract may be made without the officer’s abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.)

The Legislature has addressed the issue of a public officer’s involvement in a contract between two government agencies, where the public officer is employed by one agency and serves as a member of a body or board contemplating a contractual relationship, and defined circumstances where the interest may be deemed a “noninterest” or a “remote” interest.

Under Section 1091(b)(13), an agency board member who receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. However, 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).)

Sections 1091(b)(13) and 1091.5(a)(9) expressly refer to a “person receiving salary,³ per diem, or reimbursement for expenses from a government entity,” which has generally been interpreted to cover such payments to an officer or employee of a government entity. Because the exceptions make no mention of paid consultants of government entities, we must determine if they are subject to the same remote interest and noninterest exceptions as any other officer or employee of a government entity. In a similar situation, the Commission examined whether the remote interest exception under Section 1091(b)(1), which expressly applies to “an officer or employee of a nonprofit entity” would also apply to an independent contractor of a nonprofit entity. (*Nerland Advice Letter*, No. A-19-014.) In concluding that it would, the Commission stated:

While an independent contractor is distinguishable from a business’s regular employees, an independent contractor is still employed by the contractual employer under a broad definition of “employment.” Moreover, there is no reason to categorically exclude independent contractors from the remote interest exception in Section 1091(b)(1). In many cases, an independent contractor is performing essentially the same work that an employee might perform for a 501(c)(3) organization, and generally an independent contractor’s interest in his or her contractual employer is more attenuated than a regular employee’s interest. Accordingly, there is no public interest served in excluding an independent contractor from Section 1091(b)(1) and there is no reason to believe that the Legislature intended to do so in promulgating Section 1091.

(*Nerland Advice Letter*, *supra*.)

For the same reasons, we believe the Legislature did not intend to categorically exclude paid consultants of a government entity from coming within the scope of the two government salary exceptions.”⁴ Here, any City Council contract decision involving a school district where the Councilmember provides consulting services will affect the school district, and thus will affect the “department” that employs Councilmember Teran as a paid consultant. His interest does not meet

³ The term “salary” is not defined under the provisions of Section 1090. However, under the Act, “salary” from a government entity such as a school district is broadly defined to mean “any and all payments made by a government agency to a public official ... as consideration for the public official’s services to the government agency.” (Regulation 18232(a).) We note that “it is well established that Section 1090 and the Act are “in pari materia.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91.) “Statutes ‘in pari materi’ should be construed together so that all parts of the statutory scheme are given effect.” (*Ibid.*, citing *People v. Lamas* (2007) 42 Cal.4th 516, 525.)

⁴ This conclusion is consistent with the legislative history regarding these statutory exceptions (Stats. 1991, ch. 382, § 1), which expressed a general concern that “government employees who also serve as local elected officials are often prohibited from voting on a broad range of issues, rather than just those bills that affect their employers. For example, a peace officer who is also an elected official may be prohibited from voting on contracts dealing with any city agency, rather than only those contracts affecting the police department. (See report of Assembly Committee on Elections, Reapportionment and Constitutional Amendments, May 9, 1991.) It is also generally consistent with previous advice letters where we have extended application of Section 1091’s remote interest exceptions when, as here, the official’s interest is even more remote than the interest specified in the exception. (See, e.g., *Schons Advice Letter*, No. A-17-129; *Raymond Advice Letter*, No. A-21-003; *Whitham Advice Letter*, No. A-19-129.)

the noninterest exception in Section 1091.5(a)(9). Therefore, he will have a remote interest under Section 1091(b)(13) in any contract decisions between the City and school districts that employ him as a paid consultant.

Because Councilmember Teran will have a remote interest in any contract decisions involving school districts where he provides consulting services, the City may nonetheless enter into those agreements; however, he must disclose his interest in any contract to the City Council; the interest must be noted in the City Council's records; and he must abstain from any participation in the making of the contract. (Section 1091(a).) Additionally, because the remedy in this situation is for Councilmember Teran to abstain from any participation in the making of such contracts, we do not analyze the conflict of interest under the Act as the remedy for conflicts under the Act would not differ from the action already required, except to note that he must leave the room during the consideration of any such contracts pursuant to the Act's recusal requirements.

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:aja