



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 7, 2025

Andrew B. Gagen
General Counsel
Yorba Linda Water District
Corporate Park, Suite 300
Irvine, California 92606

Re: Your Request for Advice
Our File No. A-24-139

Dear Mr. Gagen:

This letter is in response to your request for advice regarding the Political Reform Act¹ and Section 1090. 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, 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 Orange 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).)

QUESTIONS

Does the Act or Section 1090 prohibit a current member of the Board of Directors (the Board) of the Yorba Linda Water District (the District), who was the former General Manager of the District, from participating in a Board decision to waive the attorney-client privilege attached to a legal opinion regarding the Board Member's ability to serve under the District's severance agreement?

CONCLUSIONS

Under the Act, the facts provided indicate that the decision to waive the District's attorney-client privilege regarding the legal opinion will not have an effect on the Board Member's income, as the Board stipend is excluded from the definition of income under the Act. Additionally, there is

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.

no indication that the decision would result in the Board Member receiving a financial benefit or loss. Therefore, the Board Member does not have a potentially disqualifying source of income interest or personal financial interest in the decision and the Act does not prohibit him from taking part in the decision regarding the legal opinion.

Under Section 1090, the decision to waive the District's attorney-client privilege regarding the legal opinion does not constitute the making of a contract. Thus, the Board Member is not prohibited from taking part in the decision under Section 1090.

FACTS AS PRESENTED BY REQUESTER

The subject Board Member previously served as the District's General Manager. The now-Board Member voluntarily resigned from the position of General Manager as memorialized in a severance agreement, which prohibited the former General Manager from future employment with the District. Subsequently, the former General Manager was elected to the District Board of Directors.

Prior to the Board Member's election, General Counsel for the District wrote a legal opinion regarding whether the former General Manager could serve on the Board of Directors notwithstanding the provision in the severance agreement that prohibited future employment. District Board Members currently receive a stipend of \$157.50 for each meeting attended in their capacity as a Board Member. The Board seeks to discuss and vote to waive attorney-client privilege attached to the legal opinion regarding the Board Member.

ANALYSIS

A. The Act.

The Act's conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's financial interests, distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) The financial interests that may give rise to an official's disqualifying conflict of interest under the Act are set forth in Section 87103 and include an interest in the official's personal finances or those of immediate family, also referred to as a "personal financial effect," or an interest in a source of income, aggregating five hundred dollars (\$500) or more in value provided or promised to, or received by, the public official within 12 months prior to the time when the decision is made. (Section 87103.)

Under the Act, the definition of "income" does not include "[s]alary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency" (Section 82030(b)(2).) Here, the District is a special district and a local government agency. The Board Member receives a stipend for meetings attended while serving on the Board. A stipend is a fixed sum given to someone outside of normal wage or salary for a specific role, task, or benefit, and it is excluded from the definition of "income" under the Act. Thus, the decision at issue will not have an effect on the Board Member's income and he does not have a potentially disqualifying interest in the District as a source of income.

Regulation 18702.5(a) sets forth the materiality standard applicable to a decision's reasonably foreseeable financial effect on an official's personal finances. Also referred to as a "personal financial effect," it provides that such an 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).) Here, there is no indication that the decision at issue would result in the official receiving any financial benefit or loss, regarding the stipend or otherwise. Thus, the Board Member does not have a disqualifying personal financial interest in the decision. Accordingly, the Act does not prohibit him from taking part in the decision regarding the legal opinion.

B. Section 1090.

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Here, the initial question is whether the decision about the legal opinion involves a contract. To determine whether a contract is involved in a decision under Section 1090, we examine general principles of contract law, while keeping in mind that "specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*People v. Honig* (1996) 48 Cal.App.4th 289, 351, citing *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 571). "It is essential to a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and 4. A sufficient cause or consideration." (Civ. Code, Section 1550.)

Based on the facts provided, the decision regarding the legal opinion does not constitute the making of a contract. It is merely a decision to waive the privilege. Thus, Section 1090 does not apply to this decision.²

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

Sincerely,

Dave Bainbridge
General Counsel

/ s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

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² We caution, however, that we are not providing advice under general conflict of interest prohibitions such as common law conflict of interest. We encourage you to further review whether that body of laws or any other outside of the Commission's purview may apply.