



FAIR POLITICAL PRACTICES COMMISSION

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October 8, 2014

Marilyn Craft
4280 St Paul Circle
Pittsburg, CA 94565

Re: Your Request for Advice
Our File No. A-14-168

Dear Ms. Craft:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code Section 1090.¹ Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

In regards to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Contra Costa 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

Do the provisions of Section 1090 prohibit you from taking a seat on the Pittsburg City Council where you and your spouse are employees of nonprofits that have existing contracts with government entities?

CONCLUSION

No. As explained below, the provisions under Section 1090 do not prohibit you from taking a seat on the Pittsburg City Council where you and your spouse are employees of nonprofits that have existing contracts with government entities.

¹ All statutory references are to the Government Code, unless otherwise indicated.

FACTS

You are the Executive Director for Open Opportunities, Inc., a 501(c)(3) non-profit organization that oversees the day-to-day operations of a pre-apprentice training program for Future Build. In your capacity as an employee for Open Opportunities, you are a Program Manager for Future Build and receive a salary for this position, which is funded by the Contra Costa County Workforce Development Board. The contract for this job is between Open Opportunities and the Pittsburg Power Company who is the Fiscal Agent and administrator of Future Build under an agreement with the Contra Costa County Workforce Development Board.

Your spouse, Jim Craft, is the Executive Director of Craft Community Care, a 501(c)(3) nonprofit organization. One of its subsidiaries, STS Academy, has a contract with the City of Pittsburg for \$80,000 for a one year period. This contract involves the provision of youth and teen services throughout the community that were previously provided by the City's Recreation Department. Craft Community Care has over 100 employees and Jim is a salaried employee.

In addition, Craft Community Care also has a contract with the Pittsburg Unified School District to provide afterschool programs on its elementary and junior high school campuses. That contract has a one-year term for \$1,255, 000. Finally, Craft Community Care has a contract with the State of California for the 21st Century High School ASSETs program. The term of the contract is from 2014-2019 and the funding comes from a grant that provides \$350,000 annually. You also state that your daughter, Kolette Simonton, is a Senior Administration Analyst for the City of Pittsburg (Pittsburg Power Company).

You are currently a candidate for a seat on the Pittsburg City Council. You would like to know if there will be any conflict of interest problems under Section 1090 that would arise if you are elected.

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. 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.)

We employ the following six-step analysis to determine whether, if elected, you will have a conflict of interest under Section 1090.

Step One: Will you be subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members.” City Councils and their members are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) Therefore, if elected, you and the Pittsburg City Council would be subject to the provisions of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), 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, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

You have identified four contracts to which the nonprofit entities run by you and your spouse are parties. This step is thus satisfied. However, the only contract that would appear to raise any Section 1090 concerns, based on the Pittsburg City Council’s authority to approve it, would be the contract between STS Academy and the City of Pittsburg. Thus, we do not address the others identified by your letter.²

Step Three: Will you be making or participating in making a contract?

As mentioned above, you are currently only a candidate for the Pittsburg City Council and, therefore, you did not make or participate in making the contract between STS and the City of Pittsburg (or any of the other contracts) while in an official capacity as a council member. The question then is whether the prohibitions under Section 1090 preclude you from taking a seat on the Pittsburg City Council subsequent to the execution of that contract. We do not believe they do.

For example, in 85 Ops.Cal.Atty.Gen. 176 (2002), a city council entered into a 40-year property lease with a nonprofit corporation. Eleven years into the lease, the nonprofit’s salaried executive director was elected to the city council. (*Id.* at p. 177.) In determining whether the city could continue leasing the property to the nonprofit, the Attorney General’s opinion noted:

At the time of the lease’s execution, no one on the city council had a personal financial interest in the terms of the agreement.

² In the event the Pittsburg City Council does have the authority to approve any of the remaining contracts, the analysis in this letter can equally be applied to them.

Accordingly, section 1090 had no application when the contract was executed. Because section 1090 is directed at the time a contract is “made,” it has no application now merely because the corporation’s executive director has become a council member. (See *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 194-196; *People v. Darby* (1952) 114 Cal.App.2d 412, 426; 84 Ops.Cal.Atty.Gen. 34, 35-36 (2001); 76 Ops.Cal.Atty.Gen. 118, 119-120 (1993); 73 Ops.Cal.Atty.Gen. 191, 194-195 (1990).)

(*Ibid.*) We agree with the reasoning and conclusion of this opinion.

The facts here are similar in that the contract at issue was executed prior to your potential election to the Pittsburg City Council, and the provisions under Section 1090 will therefore not prohibit the continuation of the contract should you be elected. But if you are elected, you (and the entire City Council) may then have a prohibitory financial interest under Section 1090 in any modification, extension or renegotiation³ of that existing contract (or any new contract in which you have a financial interest) that the Pittsburg City Council must vote to approve, as discussed in the next step.

Step Four: Do you have a financial interest in the contract?

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig, supra*, at p. 333.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) 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).)

Your spouse is the Executive Director (and salaried employee) of a nonprofit organization that currently has a contract with the City of Pittsburg. The question then is whether you will have a financial interest in any contract between your spouse’s nonprofit organization and the City of Pittsburg if you are elected to the City Council. As a general rule, a member of a board or commission always has a financial interest in his or her spouse’s source of income for purposes of Section 1090. (See, e.g., 78 Ops.Cal.Atty.Gen. 230, 235 (1995).) Thus, if elected, both you and the City Council will have a prohibitory financial interest in such contracts unless an exception applies.

³ (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)

Step Five: Does either a remote interest or non-interest exception apply?

When Section 1090 is applicable 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).)

However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed 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 in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity'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); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a "noninterest" is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require 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).)

Under the circumstances presented, we turn to the "remote interest" specified in Section 1091(b)(1):

That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)), pursuant to Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(5)), or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

If elected, you would have a remote interest in any contract between the City of Pittsburg and STS Academy if you were an officer or employee of the nonprofit 501(c)(3) organization. However, it is your spouse that is the Executive Director of STS Academy so the question is whether the "remote interest" exception under Section 1091(b)(1) would extend to also apply to you. We believe that it does.

Instructive on this issue is an Attorney General opinion (78 Ops.Cal.Atty.Gen 230 (1995)) that is squarely on point. In that matter, a city council member's spouse was a partner in a law firm which represented a developer in various matters. (*Id.* at p. 231.) The developer came before the city council to enter into a development agreement with the city. (*Ibid.*) One of the central issues in the matter was whether the financial interest of the spouse in the development agreement would be attributed to the council member such that he would then have a "remote interest" in the development agreement:

Under settled case law and opinions of this office, a member of a board or commission always is financially interested in his or her spouse's source of income for purposes of section 1090. This is true even if the husband and wife have an agreement that their own earnings are to be treated as their separate property, since each spouse is liable for the necessities of life for the other. (See *Reece v. Alcoholic Bev. Etc. Appeals Bd.* (1976) 64 Cal.App.3d 675, 683; *Nielsen v. Richards* (1925) 75 Cal.App. 680, 685-687; 73 Ops.Cal.Atty. Gen. 191, 194-195 (1990); 69 Ops.Cal.Atty.Gen. 102, 106 (1986).)

Accordingly the council member here would be financially interested in the development agreement by virtue of his wife's status as a partner in a law firm handling matters for the developer, even though the firm does not represent the developer regarding the proposed development. However, since no fees will be generated for the firm with respect to the development, the spouse's (*and thus council member's*) financial interest would meet the statutory definition of being "remote."

(*Id.* at p. 235, emphasis added.) As a result, because the spouse's interest in the development agreement met the requirements for the "remote interest" exception under Section 1091(b)(6), the council member would thus have the same "remote interest." (See also 81 Ops.Cal.Atty.Gen. 169.) In other words, since a spouse's property is attributed to the official, exemptions that would be applicable if the official possessed the interest directly also apply to the spouse's property.

Here, if elected, you will have the same financial interest as your spouse in STS Academy. Accordingly, you will have a "remote interest" under Section 1091(b)(1) in any contract the Pittsburg City Council enters into with STS Academy.⁴ Thus, so long as you do not participate in future City Council decisions on contracts with STS Academy and follow the other procedural steps outlined above, the board can make future contracts with STS Academy.⁵

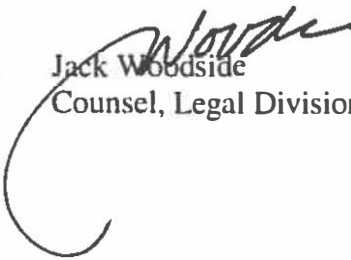
⁴ Of course, you would also have the same "remote interest" in any contracts between the City of Pittsburg and your nonprofit, Open Opportunities, Inc., and you would be required to follow the same procedural steps described above.

⁵ As noted above, this includes any decision to modify, extend, or renegotiate any existing contract with Music for Minors. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)

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

Sincerely,

Zackery P. Morazzini
General Counsel

By:  Jack Woodside
Counsel, Legal Division

JW:jgl