



FAIR POLITICAL PRACTICES COMMISSION

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October 15, 2014

Diane Gibson-Gray
Executive Director
Arts & Cultural Foundation of Antioch
PO Box 613
809 West 1st Street
Antioch, CA 94509

Re: Your Request for Advice
Our File No. A-14-172

Dear Ms. Gibson-Gray:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act")¹ as well as Government Code Section 1090 ("Section 1090"). 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.

We are required to forward your request for advice under Section 1090 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 brought against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

If you are elected to a position on the Antioch City Council, will Section 1090 preclude the City from maintaining contracts with the non-profit at which you are the Executive Director?

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 18110 through 18997 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.

CONCLUSION

No. Your election to the Antioch City Council would not preclude the City from maintaining existing contracts with your non-profit. Also, there is an exception that applies to Section 1090 that allows the city to enter into (or modify) a contract with the non-profit for which you work while you are on the city council, but you would be required to recuse yourself from any such decision.

FACTS

You are the paid Executive Director for the Arts & Cultural Foundation of Antioch (the "Foundation"). The Foundation provides a civic arts program for the city of Antioch in exchange for \$63,000 per year and rent-free use of the city's Lynn House Gallery. You plan to run for a seat on Antioch's City Council. If you win the election, you could be in a position to make decisions that directly affect the Foundation. You received an analysis from a private attorney who cautioned that there could be prohibitive conflicts of interest under either the Act or under Section 1090 and encouraged you to seek our advice.

ANALYSIS

Section 1090

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.) 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) 103 Cal.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 you would have a conflict of interest under Section 1090.

Step One: Are you 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.” Councilmembers of the City 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.)

Steps Two and Three: Does the decision at issue involve a contract and will you participate?

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.)

Here, the decisions at issue involve contracts between the City and the Foundation. The contracts are already in place but will be subject to changes or renewal during your potential City Council term. The City Council will vote on the contract. There is therefore a contract at issue and you will be called upon to participate in the decision.

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

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).)

One California court has recently held that “to be prohibited under Section 1090, the public official’s financial interest must be related to the contract The purpose of the prohibition is to prevent a situation where a public official would stand to gain or lose something with respect to the making of a contract over which in his official capacity he could exercise some influence.” (*Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, at 225, citations omitted.) In analyzing the “financial interest” element of Section 1090, the court noted that in prior cases where a prohibited conflict was found, “the party who was found to have had a prohibited financial interest received a tangible benefit that arose out of the contract at issue.” (*Id.* at p. 226.)

You are the paid Executive Director of the Foundation, receiving a salary and other benefits. In your request, you stated that the City funds the non-profit through its contract for services and free gallery space. Because a contract with the City is a direct benefit to you as the paid Executive Director, you have a financial interest in the contract for purposes of Section 1090.

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

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).) The Legislature has, however, 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" applies, 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" 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.

As the Executive Director of the Foundation, you are "an officer or employee of a nonprofit entity" and as such, your financial interest is considered "remote" for purposes of Section 1090. As stated above, if elected to the City Council and contracting decisions regarding the Foundation arise, you must disclose your interest and recuse yourself from participating, but the City Council would not be precluded from entering into the contract or modifying an existing contract.

The Political Reform Act

Because you must recuse yourself from any decision involving contracting with the Foundation, and the restrictions under the Act would, at most, require recusal, we do not analyze any potential conflict under the Act.

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl