



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

May 15, 2015

James C. Harrison
Remcho, Johansen & Purcell, LLP
201 Dolores Avenue
San Leandro, CA 94577

Re: Your Request for Advice
Our File No. A-15-073

Dear Mr. Harrison:

This letter responds to your request for advice on behalf of California Institute for Regenerative Medicine (“CIRM”) and Governing Boardmember Dr. Francisco Prieto regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Section 1090. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance.² This letter is based on the facts presented.

Pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General’s Office and the San Francisco District Attorney’s Office concerning potential issues raised under Section 1090 and we did not receive a written response from either entity.

Please note that our advice is based solely on the provisions of the Act and Section 1090. We therefore offer no opinion on the application, if any, of other conflict of interest laws such as common law conflict of interest. Finally, the following advice is not admissible in a criminal proceeding against any individual other than the requestor.³

QUESTIONS

1. Under the Act, may CIRM Boardmember Prieto or a prospective employee who volunteers her time at a non-profit institution that applies for, or receives CIRM research funds, participate in decisions relating to the research awards?

2. Under Section 1090, may CIRM Boardmember Prieto or a prospective employee who volunteers her time at a non-profit institution that applies for, or receives CIRM research funds, participate in decisions relating to the research awards?

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.

² *In re Oglesby* (1975) 1 FPPC Ops. 71.

³ Section 1097.1(c)(5).

CONCLUSIONS

1. Yes. Dr. Prieto and the prospective employee receive no compensation or other financial benefits from the University of California where they serve as voluntary clinical faculty members. These governmental entities would not be potentially disqualifying sources of income for purposes of the Act. Therefore, CIRM Boardmember Prieto and the prospective employee do not have a conflict of interest under the Act involving decisions to award research grants to UC institutions where they provide voluntary services.

2. Yes. Your facts indicate CIRM Boardmember Prieto and the prospective CIRM employee receive no salary, compensation, financial or other benefits from the University of California, where they serve as voluntary clinical faculty members. Therefore, they would not have a financial interest in decisions to award CIRM research grants to the University of California.

FACTS

You represent CIRM, a state agency created by California voters in 2004 to make grants and loans to fund stem cell research in order to accelerate the delivery of therapies and cures to patients with unmet medical needs.

CIRM is governed by a 29-member board composed of representatives of the University of California campuses with medical schools, other California universities and California medical research institutions, California disease advocacy groups, and California experts in the development of medical therapies. In addition, CIRM has approximately 50 employees, many of whom have advanced degrees, including medical degrees.

A member of CIRM's Governing Board, Dr. Francisco Prieto, serves as voluntary clinical faculty member at the School of Medicine at the University of California, Davis, ("UCD") where he sees patients and teaches medical students. UCD is a nonprofit, governmental entity. CIRM has awarded research grants to investigators at UCD and researchers from the university routinely apply for research funds when CIRM issues new requests for applications. Dr. Prieto receives no compensation from UCD and is not involved in research at the university. He receives neither income nor any other benefit from the award of a research grant to the UCD School of Medicine.

In addition, a prospective CIRM employee who holds a medical degree currently serves as a voluntary clinical faculty member at the School of Medicine at the University of California, San Francisco ("UCSF"). UCSF is a nonprofit, governmental entity. Like Dr. Prieto, she sees patients and teaches medical students, but receives no compensation and is not involved in research. She receives neither income nor any other financial benefit from the award of a research grant to the UCSF School of Medicine. CIRM is considering the applicant for a position as a designated employee who will make, or participate in making governmental decisions.

ANALYSIS

Conflict of Interest under the Act:

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has an interest specified in Section 87103.

In your request, you indicate that Boardmember Dr. Prieto is a public official. In addition, you state that a job applicant is being considered for a position as a designated employee who will make, or participate in making governmental decisions.

As public officials, Dr. Prieto and the prospective employee have a “financial interest” in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests.⁴

Your facts indicate the Dr. Prieto and the prospective employee receive no compensation or other financial benefits from the University of California where they serve as voluntary clinical faculty members. Therefore, these governmental entities would not be sources of income, nor would they be potentially disqualifying sources of income for purposes of the Act.

Additionally, neither Dr. Prieto nor the prospective employee will experience a personal financial effect as the result from any decision to award CIRM grants to the University of California. Because neither individual receives compensation or benefits from UC, these decisions would not result in a measurable financial benefit or loss to Boardmember Prieto or the prospective CIRM employee.⁵

Accordingly, Boardmember Prieto and the prospective employee will not have a conflict of interest under the Act involving decisions to award CIRM grants to UCD and UCSF where they provide voluntary services.

Government Code Section 1090:

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties.⁶ Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from

⁴ Section 87103.

⁵ Regulation 18702.5(a) states that “A personal financial effect means the financial effect of a governmental decision on the personal finances of a public official or his or her immediate family. The financial effect is material if the official or the official’s immediate family member will receive a measurable financial benefit or loss from the decision.”

⁶ *Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.

exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies.

We employ a six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090.

Step One: Are CIRM Boardmember Prieto and the prospective designated employee subject to the provisions of Section 1090?

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed.

As a governing Boardmember of a state agency, Dr. Prieto is subject to the provisions of Section 1090. The job applicant, who is being considered for a position as a state designated employee at CIRM, is also 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,⁸ 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.’”⁹

Here, the decisions at issue involve research grants, which are written agreements between CIRM and the grant recipients. Grants are generally “contracts” under Section 1090.¹⁰ Accordingly, decisions to award CIRM research grants are decisions involving contracts under Section 1090.

Step Three: Would CIRM Boardmember Prieto or the prospective employee be making or participating in making a contract?

Boardmember Prieto would be making or participating in making a contract if he votes or participates in awarding a CIRM research grant. As a CIRM Boardmember, Dr. Prieto’s participation in awarding grants is presumed under Section 1090, regardless of whether he actually participates in the decision.¹¹ If a boardmember is financially interested in the contract, and no exception applies, Section 1090 prohibits the contract from being made.

⁷ *Stigall v. Taft* (1962) 58 Cal.2d 565, 569.

⁸ 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).

⁹ *People v. Honig* (1996) 48 Cal.App.4th 289, at p. 351 citing *Stigall, supra*, at pp. 569, 571.

¹⁰ *People v. Honig, supra*, 48 Cal.App.4th 289. The court rejected a claim that a grant was not a contract within the meaning of Section 1090.

¹¹ When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is presumed to be involved in the making of his or her agency’s contracts irrespective of whether he or she actually participates in the

The prospective employee would be making or participating in making a contract if she in any way participates in the process of awarding a CIRM research grant. Participation in a contract is broadly defined. It includes any act involving preliminary discussions, negotiations, compromises, reasoning, planning, or drawing of plans and specifications.¹² When an employee (as opposed to a boardmember), has a financial interest in a contract, the employee's agency may still enter into the contract, so long as the employee plays no role whatsoever in the contracting process.

Step Four: Do Boardmember Prieto and the prospective CIRM employee 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."¹³ Officials are deemed to have a financial interest in a contract if they might profit from it in any way.¹⁴

While Section 1090 does not define "financial interest," the courts have issued decisions applying this provision. In a recent case, an appellate court stated: "The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting." (*Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal. App. 4th 208, 221.)

The court in the *Eden Township* case found that although an employee has a financial interest in his salary, where a contract would have no direct or indirect effect on or nexus with the public official's salary, there is no financial interest under Section 1090.

The Attorney General's office has also issued an opinion regarding volunteer services and whether there is a financial interest under Section 1090.¹⁵ In that matter, the Attorney General found that a city council member who was senior partner in a law firm would have a conflict under Section 1090 if his law firm entered into a pro bono contract with the City. The opinion concluded that even if the firm did not receive any fees for its legal services, success in litigation could provide financial advantages to the law firm and be of personal benefit to the councilmember by enhancing the value of his interest in the firm. The firm was the primary source of income to the councilmember.

The facts outlined in your advice request are distinguishable from the facts in the Attorney General's Opinion because neither Boardmember Prieto nor the prospective CIRM employee

making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen 49 (2006).)

¹² *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.

¹³ *People v. Honig, supra*, at p. 333.

¹⁴ *Ibid.*

¹⁵ 86 Ops. Cal.Atty 138 (2003).

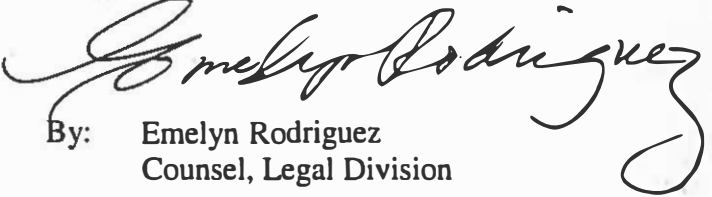
receive any compensation from the potential CIRM grant recipients, and therefore would not receive any financial benefit from the awards.

CIRM Boardmember Prieto and the prospective CIRM employee receive no salary, compensation, financial or other benefits from the University of California, where they serve as voluntary clinical faculty members. Therefore, they would have no financial interest in decisions to award CIRM research grants to the University of California.

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

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, appearing to read "Emelyn Rodriguez", written in a cursive style. The signature is positioned to the right of the typed name and title.

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl