



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 14, 2017

Gary S. Winuk
Kaufman Legal Group
A Professional Corporation
777 S. Figueroa Street, Suite 4050
Los Angeles, CA 90017

Re: Your Request for Advice
Our File No. I-17-110

Dear Mr. Winuk:

This letter responds to your request for advice on behalf of Greg Pettis and Adam Rush, member and alternate member to the Mobile Source Air Pollution Reduction Review Committee (“MSRC”), regarding conflict of interest provisions of the Political Reform Act (the “Act”) and Section 1090, et al.¹

Formal written advice is the application of law to a given set of facts provided by the requestor and has the purpose of conferring immunity to the requestor. (Section 83114; Regulation 18329(b)(7).) The Act requires the Commission to provide written advice to any person whose duties under the Act are in question or to that person’s authorized representative. (Section 83114(b); Regulation 18329(a).) However, the Commission may decline to provide written advice if it would be inappropriate or otherwise not in the public interest to do so. (Regulation 18329(b)(8)(F).)

After a careful review of the facts provided, we decline to provide written advice regarding Mr. Rush. Your request for advice on his behalf involves an analysis of general issues, which relate to decisions which have already occurred. Issuing advice to Mr. Rush would relate to past conduct and, therefore, would not further the impartial, effective administration of the Act mandated by Section 83111.

Because your questions are general in nature, we are treating your request as one for informal assistance for Mr. Pettis. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Nothing in this letter should be construed to apply to past conduct. (Regulation 18329(b)(8)(A) and (c)(4)(A).)

This advice letter is based upon the information provided in your letters dated May 15, 2017 and June 13, 2017 as well as the information provided by Sheri Hanizavareh, counsel for the South Coast Air Quality Management District (“SCAQMD” or “District”) in her June 6, 2017 letter. The

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.

MSRC is a subdivision of SCAQMD. We are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes these facts are complete and accurate. We have noted your comments in response to SCAQMD's counsel's letter where appropriate.

Please note: We do not provide informal assistance on Section 1090 issues.² We provide a general overview of the law for your further review. As required by state law, we forwarded your request and all pertinent facts relating to the request to the Attorney General's Office and the Los Angeles County District Attorney's Office. (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 any advice provided is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

FACTS

Greg Pettis has served on the MSRC since 2009. He is the chair of the MSRC and the representative member for the Riverside County Transportation Authority ("RCTC"). Mr. Pettis is also Mayor pro tem of Cathedral City, and an independent contractor for California Consulting LLC ("California Consulting"), a private grant writing advisory firm. This firm assists California local municipalities clients in developing and submitting grant applications to the MSRC and other entities. He has worked for California Consulting since August 2014, and he has received more than \$500 in annual income from the firm. You state that he has no economic stake in the firm and he is not an employee or manager.

At California Consulting, Mr. Pettis' duties include new client recruitment, business development, and attending meetings with elected officials, city managers, and city councils as a representative of the firm. Mr. Pettis is paid a 10% commission of the annual contract amount for all contracts he secures.³ In your June 13, 2017 letter, you state that in some instances he is also retained by the signed clients "as a client relations person" at a rate of \$250 per month. The contract you provided is silent as to this additional monthly payment arrangement. We note that SCAQMD's counsel, Sheri Hanizavareh in her June 6, 2017 letter states, "Pettis has alleged . . . [i]f a client is a 'monthly retainer' client (which entitles the client to unlimited grant writing services), Pettis receives \$500 per month."

Adam Rush has served on the MSRC since 2011. He is the alternate member of the MSRC representing RCTC. He is also a City Council member for the City of Eastvale, and has been an independent contractor for California Consulting since October, 2015.

² Please refer to <http://www.fppc.ca.gov/advice/formal-advice.html>; Guidelines for Advice on Government Code Section 1090, for information on requesting advice, and those requests that will be declined.

³ No payment is made until the client pays a one month retainer and Mr. Pettis must repay the payment to California Consulting on a prorated basis if the client cancels the contract in the initial twelve months. (See Pettis' Contract for Services, dated August 25, 2014, provided with your letter dated June 13, 2017.)

Mobile Source Air Pollution Reduction Review Committee ("MSRC")

Assembly Bill 2766, c. 1705 of 1990 enacted an annual per vehicle registration surcharge to fund air quality programs and projects related to the California Clean Air Act of 1988. (Health & S.C. Section 44220-44247.) Under this legislation, the SCAQMD is authorized to deposit thirty cents of every dollar collected in the "Discretionary Fund" to implement or monitor programs to reduce motor vehicle air pollution. The Discretionary Fund contains approximately \$14 million annually. (See the MSRC web site: www.cleantransportationfunding.org.)

The MSRC was created by this same legislation to determine which projects are to be funded by the Discretionary Fund. The MSRC members must be elected officials and are subject to the Air Quality Management District's conflict of interest code. The MSRC develops a Work Program for evaluating programs, evaluates said programs, and makes a final recommendation to the SCAQMD Governing Board as to which programs and/or projects are to be funded. (Health & S.C. Section 44244; and see http://www.cleantransportationfunding.org/who_we_are/history; see also http://www.cleantransportationfunding.org/media_center/news/view/help-determine-where-the-msrcs-millions-in-funding-for-clean-transportation.)

MSRC's "Work Program"

To determine funding, the MSRC develops and adopts a "Work Program" which sets the available funding categories (such as alternative fuel vehicles and infrastructure) for a two-year period. The MSRC is assisted in developing the Work Program by a technical advisory committee ("TAC"), that includes representatives of agencies in the MSRC, and representatives from the cities and counties within the South Coast District, as well as a trained expert in air pollution control, and a mechanical engineer. (See www.cleantransportationfunding.org/who_we_are/responsibilities.) The MSRC is charged with establishing the TAC, and adopting policies and procedures to perform its duties. These policies and procedures include the development of Requests for Proposals ("RFP"), guidelines for the submittal and evaluation of proposals, and selection criteria. (http://www.cleantransportationfunding.org/who_we_are/mission.) The TAC reviews and evaluates all funding proposals to the MSRC. MSRC members do not sit on both committees, apart from the California Air Resources Board representative.

The Work Program is adopted by the majority vote of the MSRC members and submitted to the SCAQMD Governing Board for approval. The Work Program consists of a list of projects to be funded, description of each project and emissions reductions anticipated, the amounts of funding, and conditions for each project. The SCAQMD Governing Board has sixty days to approve the Work Program or it is deemed-rejected. (Health & S.C. Section 44244(b)(2).) It may be returned to the MSRC for amendments and resubmission. (*Id.*)

SCAQMD counsel provided additional information in her June 6, 2017 letter on the roles of the MSRC and the SCAQMD, as clarified and determined in Attorney General Opinion No. 92-1214.⁴ This Opinion states that the MSRC is not vested with the power to contract, and that power

⁴ In your June 13, 2017 letter, you state that the role of the MSRC in the approval of grants "is not well stated" by SCAQMD's counsel, and refer to the September 2, 2016 removal of the South Gate grant as an "accurate example of how the District operates in terms of its authority over MSRC recommendations." Please see discussion below.

resides with the SCAQMD. (Attorney General Opinion No. 92-1214, p. 3.) However, while the MSRC must “defer to reasonable requests” by the SCAQMD in developing or renegotiating contractual terms, the process of developing and adopting the Work Program is the sole province of the MSRC. (Id., p.4.) As the Opinion states:

The District [SCAQMD] may not usurp or infringe upon the authority of the Committee [MSRC’s] to define the work program in the first instance. For example, the process whereby project bids are solicited must be subject to the priorities established by the Committee [MSRC], rather than by the District [SCAQMD].

(Attorney General Opinion No. 92-1214, p. 6.)

California Consulting’s Clients and MSRC Funded Projects

Mr. Pettis’s Clients:

SCAQMD is aware of the following California Consulting clients of Mr. Pettis with grant applications before the MSRC during his employment as a consultant (2014 to present) and a while serving as a member the MSRC (2009 to present):

- ***City of Ontario:***
Client of California Consulting as of December 2015, with Mr. Pettis on a monthly retainer.

MSRC contracts: two executed in November 2015.

- ***City of Eastvale:***
Client of California Consulting as of May 2016, with Mr. Pettis on a monthly retainer.

MSRC contract: approved by the MSRC in September 2015; and currently pending final execution.

- ***City of Palm Springs:***
Client of California Consulting at an unknown date, with Mr. Pettis on a commission/per grant basis.⁵

MSRC contracts: approved by the MSRC in August and September 2015. Mr. Rush voted as Mr. Pettis’ alternate on this decision. SCAQMD approved the contracts in September 2015.

⁵ You specify that the city “signed” after the above MSRC approval; and for work on a grant application before another agency. You did not provide the date of the contract.

Other California Consulting Clients:

- **City of South Gate:**
Client of California Consulting as of “over one year ago;” hired Mr. Rush on an hourly basis specifically to prepare a grant application for MSRC funding.

MSRC grant application approved by MSRC in August 2016; it appears this grant application was pulled from approval at the September 2, 2016 SCAQMD meeting.

- **City of Coachella:**
Client of California Consulting as of March 2016. Mr. Rush has worked on over 20 grants for the City of Coachella on a monthly retainer, including the MSRC grant noted below. You note that Mr. Rush no longer works on this client’s account.

MSRC grant: revised 2012 MSRC grant application submitted July 2016, withdrawn by the City on August 17, 2016.

- **City of Downey:**
Client of California Consulting as of July 2013, on a monthly fee basis.

MSRC contract approved in January 2016. Mr. Rush voted as Mr. Pettis’ alternate on this decision in August 2015.

- **City of Fountain Valley:**

Client of California Consulting as of May 2015.

MSRC contract approved in January 2016. Mr. Rush voted as Mr. Pettis’ alternate on this decision in August 2015.

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 governmental decision in which the official has a financial interest. The Act defines “public official” as every member of a state or local government agency that has decisionmaking authority. (Section 82048 and Regulation 18700(c)(2).) Regulation 18700(c)(2) provides the following to determine when a body possess this authority:

(A) A committee, board, commission, group, or other body possesses decisionmaking authority whenever:

(i) It may make a final governmental decision;

(ii) It may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

(iii) It makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency.

(B) A committee does not possess decisionmaking authority if it is formed or engaged for the sole purpose of researching a topic and preparing a report or recommendation for submission to another public official or governmental agency that has final decisionmaking authority, and does not meet any of the criteria set forth in subsection (2)(A)(i-iii).

Here, the MSRC has a unique role, in that it was given the authority and independence in developing and adopting the Work Program, but SCAQMD was given the role of executing the MSRC contracts generated as a result. SCAQMD's counsel describes the SCAQMD role in executing these contracts as "ministerial" or non-discretionary, and this description is supported by Attorney General Opinion No. 92-121 addressing the authority of the two bodies. Because the MSRC is solely authorized to define the Work Program, and SCAQMD can only approve or return it to the MSRC to amend, readopt and resubmit, the MSRC is able to compel a government decision. Therefore, the MSRC is a decisionmaking body under Regulation 18700(c)(2).

While you offer one instance in which a grant was individually removed from the SCAQMD's agenda, we note that the circumstances involving the removal of the South Gate grant have not been provided. Based on the facts that were provided and the timelines involved, this removal may have related to the city learning of Mr. Rush's MSRC membership following its August 2016 MSRC grant approval.⁶ Additionally, Health and Safety Code Section 44244 does not permit the SCAQMD to do anything other than approve or disapprove the Work Program as a whole. (See also Attorney General Opinion No. 92-1214, p. 6.)

In his role as a member of the MSRC, Mr. Pettis is a public official. No government decision is currently at issue in your advice request, and your request is general as to Mr. Pettis' future activities on the MSRC.

Section 87103 defines financial interests to include:

- Any business entity in which the public official has a direct or indirect investment worth at least \$2,000 and any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)

⁶ The City of South Gate's grant application was approved by the MSRC in August, 2016, and then pulled from the SCAQMD agenda at its September 2, 2016 meeting. SCAQMD counsel states in her letter that "South Gate was unaware of Rush's involvement with the MSRC until after the grant was submitted." You state that California Consulting had to waive its fee to the City of South Gate after it learned that Mr. Rush was an alternate MSRC board member.

- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)
- Any source of income, such as a business entity, from which the official has received income of \$500 or more within 12 months before the decision.⁷ This also includes income from any client of the business entity of at least \$500, provided to and received by the public official within 12 months before the decision is made. (Section 87103(c).) Regulation 18700.1(a)(1) explicitly includes commission income and incentive compensation, aggregating \$500 or more within 12 months prior to the time when the relevant governmental decision is made.

...
“Commission income” means gross payments received by a public official as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. Commission income is received when it is paid or credited. The sources of commission income to a retail or wholesale salesperson in a specific sale or similar transaction include for each of the following:

...
(i) The person, store or other business entity that provides the salesperson with the product or service to sell and for which the salesperson acts as a representative in the transaction; and

(ii) The person who purchases the product or service.

- An interest in the official’s personal finances, including those of the official’s immediate family. This is known as the “personal financial effects” rule. (Section 87103.)

Mr. Pettis has a source of income interest in California Consulting, and in any client of the firm from whom he has received at least \$500 in the past 12 months.

Foreseeability and Materiality:

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official’s interests is material. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. The standard for determining foreseeability is set forth in Regulation 18701, and depends upon whether the financial interest is “explicitly involved” in the government decision. Your request is of a general nature and does not involve a specific decision. Therefore, we examine both standards and their possible application to your general facts.

⁷ In addition, a public official’s income includes income that has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income.

Clients of the California Consulting firm named or subject of MSRC funding application

Regulation 18701(a) states that a financial effect is explicitly involved and presumed reasonably foreseeable if the financial interest is a named party or subject of the government decision. Where Mr. Pettis's client is named in, or a party to, an application to MSRC, this is the appropriate standard to determine foreseeability. As to materiality, Regulation 18702.3(a) states that the financial effect is material where the income is from the sale of goods or services and the source is an applicant, contracting party, or otherwise named or the subject of the proceeding.

Where Mr. Pettis's client meets the \$500 income threshold, and is a named party or subject of the MSRC funding decision, a financial effect is presumed reasonably foreseeable and the financial effect is material. Mr. Pettis may not participate in any MSRC decisions involving a California Consulting client who is a source of income of \$500 or more to him within 12 months of any decision by MSRC.

California Consulting firm

Regulation 18701(b) sets out the appropriate standard to determine foreseeability where the financial interest is not explicitly involved in the decision. Regulation 18701(b) states that a financial effect is reasonably foreseeable where it "can be recognized as a realistic possibility and more than hypothetical or theoretical . . . absent extraordinary circumstances beyond the public official's control." A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).) Where California Consulting is not named in, or a party to, the application to MSRC, this is the appropriate standard to determine foreseeability.

Regulation 18701(b) provides some general guidelines to consider to determine foreseeability:

- (1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.
- (2) Whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care.
- (3) Whether the public official has a financial interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has a financial interest.
- (4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's financial interest might

compromise a public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision.

(6) Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position.

The standard to determine materiality in regards to California Consulting as a source of income is set forth in Regulation 18702.1(b).⁸ Materiality is found if "a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change . . . in the value of a privately-held business entity." (Regulation 18702.1(b).) "Applicable decisions" include those that:

(1) Authorize, prohibit, regulate or otherwise establish conditions for an activity in which the business entity is engaged;

...

(Regulation 18702.1(b).)

California Consulting is in the business of developing and submitting grant applications, which include grant applications before the MSRC. The MSRC adopts policies and procedures which include guidelines for the submittal and evaluation of proposals, and selection criteria, in addition to selecting client projects for funding. Therefore, Mr. Pettis as a member of the MSRC makes decisions that establish conditions for developing and submitting grant applications to the MSRC, in addition to selecting funding categories and projects under its Work Program.

Where a financial effect on California Consulting is reasonably foreseeable as the result of a MSRC decision, and would foreseeably contribute to a change in the value of the business, the financial effect is material. In such an event, Mr. Pettis may not participate in the MSRC decision involving a California Consulting client.

Please contact our office for additional advice when a specific decision is at issue.

⁸ Where the source of income is a business entity, Regulation 18702.3(a)(4) refers to the standard applied in 18702.1 for business entities.

Section 1090 overview

The analysis of a financial interest under Section 1090 is separate and distinct from that applied under the Act. As noted above, it is the Commission's policy not to provide informal Section 1090 advice. Therefore, we merely set forth the applicable statutes and notable case law for your information.

- Section 1090 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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) 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. A contract that violates Section 1090 is void. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.)
- As a general rule, 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; the entire governing body is precluded from entering into the contract. However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest" and involves a public body or board as defined in Section 1091, or is deemed a "noninterest" as defined in Section 1091.5.
- Where a remote interest is present, the contract may be lawfully executed provided: (1) the officer discloses his or her financial interest in the contract to the public agency; (2) the interest is noted in the public body's official records; and (3) the officer completely abstains from any participation in the making of the contract. (Section 1091.)
- Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) For purposes of Section 1090, "participating in making a contract" is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall, supra*.) It is well settled that changes to existing contracts are themselves "contracts" under section 1090. (98 Ops.Cal.Atty.Gen.102 (2015).) When an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency's contracts irrespective of whether he or she actually participates in the making of the contract. (*Thomson, supra*, pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).) Please note that Section 1090 applies to members of advisory bodies if they participate in the making of a contract through their advisory function. (*City Council v. McKinley, supra*, 80 Cal.App.3d 204; 82 Ops.Cal.Atty.Gen. 126 (1999), see also "Conflicts of Interest," California Attorney General's Office, 2010, p. 57)
- 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*), and officials are

deemed to have a financial interest in a contract if they might profit from it in any way. (*Id.*) Although Section 1090 nowhere specifically defines 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. (*Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerger* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002). It cannot be interpreted in a restricted and technical manner. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.) The phrase "financially interested" broadly encompasses anything that would tie a public official's fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1335.)

Please contact our office for additional advice when a specific decision is at issue.

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

Sincerely,

Jack Woodside
General Counsel



By: L. Karen Harrison
Counsel, Legal Division

LKH:jgl

CC: Sheri Hanizavareh, Deputy District Counsel II
South Coast Air Quality Management District