



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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May 22, 2017

Bill Nicholson  
Executive Officer  
San Benito LAFCO  
2301 Technology Parkway  
Hollister, CA 95023

Re: Your Request for Advice  
**Our File No. A-17-132**

Dear Mr. Nicholson:

This letter responds to your request for advice regarding your duties as the Executive Officer of the San Benito Local Agency Formation Commission under the conflict of interest provisions of the Political Reform Act (the "Act")<sup>1</sup> and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

In regard 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 San Benito 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." (Section 1097.1(c)(5).)

### QUESTION

Do you have a disqualifying conflict of interest under the Act or Section 1090 with respect to negotiations with the San Benito Local Agency Formation Commission (LAFCO) to modify your current employment contract with the LAFCO to incorporate the employment of your spouse for clerical support in performing your job duties?

### CONCLUSION

Yes. Moreover, Section 1090 would require you to abstain from any modification, extension, or renegotiation of the existing contract if the negotiations encompass the employment of your spouse with LAFCO.

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<sup>1</sup> 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.

## FACTS

You are the sole Executive Officer with the San Benito Local Agency Formation Commission (LAFCO), and you serve in a part-time capacity (approximately seven hours per week). In this position, you file a Form 700. Under your current contract, you prepare the budget, staff reports, and make recommendations to the LAFCO. As you indicated, you are the LAFCO's only staff member for all intents and purposes.

Under your current employment contract, you are entitled to access to several administrative staff members of San Benito County for clerical support with respect to your duties, and the San Benito County Clerk's Office provides support for public hearings and noticing. However, due to staff shortages, you have not been receiving the level of clerical staff support for preliminary processing applications and maintaining LAFCO records as specified in your current employment contract.

You are contemplating proposing a modification to your contract to have your wife perform some of these functions since she previously worked in a similar role with another public agency. You entered into your current employment contract under your name and did not indicate that you would use any employees. However, you now contemplate entering into a modified contract using your firm's title "William R. Nicholson Consulting" and negotiating employment for your spouse.

## ANALYSIS

### *Section 1090:*

Section 1090 generally prohibits public officials, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than non-interests or remote 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.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

### *Step One: Are you subject to the provisions of Section 1090?*

Section 1090 applies to virtually all state and local officers, employers, and multi-member bodies, whether elected or appointed. We have concluded that public agency employees are subject to Section 1090. (Kohn Advice Letter, No. A-14-136; *People v. Vallerga* (1977) 67 Cal.App.3d 847.) Because you are an employee of the San Benito Local Agency Formation Commission, you would be subject to Section 1090.<sup>2</sup>

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<sup>2</sup> Courts have also found independent contractors serving in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125.)

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

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 Section 1090 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, supra*, 58 Cal.2d at page 571.) There is no dispute that you and the LAFCO are currently in a contractual relationship, and a modification of the contract will be the subject of the future decisions you describe.<sup>3</sup>

*Step Three: Are you making or participating in making a contract or contracts?*

Section 1090 reaches beyond officials who actually execute the contract. 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.) Therefore, for purposes of Section 1090, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; *Honig, supra*, 48 Cal.App.4th at page 329; *Stigall, supra*, 58 Cal.2d at page 569.)

You stated that as an Executive Officer of the LAFCO you intend to propose to modify your current employment contract to have your spouse perform some of the clerical functions she previously performed in a similar role with a public agency. This form of contract negotiations would constitute "participation in making a contract" for purposes of Section 1090. (*Bailey, supra*, 103 Cal.App.3d 191 at page 197 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)

We note that the Office of the Attorney General has stated that Section 1090 does not apply to an employee (in contrast to members of multimember boards where participation is presumed) absent actual participation. (80 Ops.Cal.Atty.Gen. 41 (1997) [No Section 1090 violation where two firefighters, in their individual capacities, enter a contract with the city (upon recommendation of the fire chief) for the purchase of protective masks developed entirely on their own time and without the use of city materials].)

"When an employee, rather than a board member, is financially interested in a contract, the employee's agency is prohibited from making the contract only if the employee was involved in the contract-making process. Therefore, as long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested." (Conflicts of Interest (2010), p. 62.)

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<sup>3</sup> Please note that for purposes of Section 1090 analysis, a modification or renewal of an existing contract is considered a "new" contract.

Therefore, if you are financially interested in modifying the contract, so long as you completely abstain from making or participating in the making of that modification in your official capacity, Section 1090 would not prohibit the LAFCO from entering into that modified contract.

*Step Four: Would you have a financial interest in potential future contracts between your spouse and LAFCO if your spouse were employed by LAFCO?*

"[T]he term 'financially interested' in section 1090 cannot be interpreted in a restricted and technical manner." (*Honig, supra*, 48 Cal.App.4th at page 315.) Thus, whether the interest "might be small or indirect is immaterial so long as it is such as deprives the [people] of [the official's] overriding fidelity to [them] and places [the official] in the compromising situation where, in the exercise of [the] official[s] judgment or discretion, [the official] may be influenced by personal considerations rather than the public good." (*Terry v. Bender* (1956) 143 Cal. App. 2d 198, 208; *Call, supra*, 38 Cal.3d at page 645 [direct and indirect interests are equally prohibited]; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1075.)

You have a financial interest in your potential modified employment contract with the LAFCO because that contract will secure income-generating work for you and your spouse. Thus, Section 1090 would prohibit you from making or participating in the making of a modification with the LAFCO. However, if you abstain from making or participating in the making of the modified contract in your official capacity, Section 1090 would not prohibit the LAFCO from entering into that contract.

*Steps Five and Six: Does either a remote or non-interest exception or the rule of necessity apply?*

Based on the facts presented, no statutory exception to Section 1090 would apply nor would the rule of necessity.

*Section 87100:*

The Act's conflict of interest provisions ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. An official has a "financial interest" in a governmental 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 official's economic interests. (Section 87103.)

Of the financial interests recognized under Section 87103 of the Act, those implicated by your account of the facts are the following:

- **Business Entity – Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more. (Section 87103(a).)**
- **Business Entity – Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)**
- **Personal Finances – A public official always has an interest in his or her personal finances. A decision has a personal financial effect on a public official if the decision will result in the personal expenses, income, assets, or liabilities of the official (or the official's immediate family) increasing or decreasing. (Section 87103.)**

Thus, with respect to the decision at issue, you have financial interests in your business and your personal finances.

*Foreseeability and Materiality:*

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) If the interest is "not explicitly involved" in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. (Regulation 18701(b).)

Regulation 18702.1(a)(1) provides that a decision's reasonably foreseeable effect on an official's financial interest in a business entity is material if the business entity initiates the proceeding in which the decision will be made by a requesting government action concerning the business entity. Therefore, if you or your business requests that the LAFCO modify the terms of your employment contract to provide for your wife's employment under the contract, the decision's effect would be reasonably foreseeable and material.<sup>4</sup>

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

Sincerely,

Hyla P. Wagner  
General Counsel



By: Ryan P. O'Connor  
Counsel, Legal Division

RPO:jgl

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<sup>4</sup> Because we have already determined that the decision at issue would have a reasonably foreseeable material financial effect on your interest in your business, we do not analyze that decision's effect on your personal finances.