



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 12, 2018

Sonia R. Carvalho
City Attorney
20 Civic Center Plaza, M26
P O Box 1988
Santa Ana, CA 92702

Re: Your Request for Advice
Our File No. A-17-282

Dear Ms. Carvalho:

This letter responds to your request for advice on behalf of Santa Ana City Councilmember Vince Sarmiento regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

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 Orange 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

May Councilmember Sarmiento participate in decisions before the Santa Ana City Council regarding marijuana related ordinances when his law firm has provided legal advice and consulting services to public agencies in other jurisdictions considering marijuana-related regulations and procedures?

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

Yes, Councilmember Sarmiento may participate in the decisions because there is no reasonably foreseeable material financial effect upon his financial interests under that Act. There is also no conflict under Government Code Section 1090 because there is no contract at issue.

FACTS AS PROVIDED BY REQUESTOR

You are the City Attorney for the City of Santa Ana. Councilmember Sarmiento was appointed to the City Council in January 2017 and has served as a duly elected member since November 2008. Councilmember Sarmiento is also a licensed attorney and principal owner of the Law Offices of Vincente F. Sarmiento. This law office was incorporated in 2002 and is an active California corporation.

Councilmember Sarmiento's office has represented and provided legal advice to public agencies in jurisdictions outside of Santa Ana considering adoption of regulations, policies and procedures of marijuana-related businesses.

Currently, the City of Santa Ana is considering the addition of ordinances to its municipal code and approval regarding the following four items:

- Regulation of commercial cannabis.
- Updates to municipal code definitions regarding marijuana to comply with state law and relevant sections of the City's municipal code.
- Approval of template in lieu fee agreements.
- Approval of merit based criteria for commercial cannabis applicants.

You would like to know whether the Councilmember may participate in the decisions regarding the four items above.

ANALYSIS

Conflicts Under the Act

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. Section 82048 defines "public official" as every member, officer, employee, or consultant of a state or local government agency, including city councilmembers. Interests from which conflicts of interests may arise are defined in Section 87103 and include:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)) or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)

“Income” is defined to include any community property interest in the income of a spouse and a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest. (Section 82030(a).)

- 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.)²

Based on your facts, Councilmember Sarmiento has an interest in his law firm as a business entity and a source of income. Additionally, Under Section 82030(a), if a public official owns a 10-percent or greater interest in a business, a source of income to that business is also a source of income to the official. Therefore, the clients of Councilmember Sarmiento’s law firm are sources of income to him if income from the client totals \$500 or more within 12 months prior to the decision.

The issue then distills to whether the decisions before the city council involving marijuana will have a reasonably foreseeable and material financial effect on Councilmember Sarmiento’s law firm or his sources income.

Foreseeability and Materiality

A financial effect is presumed to be reasonably foreseeable when it is explicitly involved in a decision. Financial interests that are explicitly involved include an interest that is a named party in, or subject of, a governmental decision. (Regulation 18701(a).) Based on the facts you have provided Councilmember Sarmiento’s interests in his business and its clients are not explicitly involved in the governmental decisions at issue. For interests that are not explicitly involved, as here, the effect need not be likely to be considered reasonably foreseeable. “In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable.” (Regulation 18701(b).)

Regulation 18702.3(a)(4) provides that the materiality standard for a decision’s effect on a business entity that is a source of income to the official is determined pursuant to Regulation 18702.1. Regulation 18702.1(b) sets forth the materiality standard applicable to a decision’s effect on an official’s interest in a business entity that is not, as here, explicitly involved in the decision. Regulation 18702.1(b) provides that such an effect is material if a prudent person with sufficient information would find it reasonably foreseeable that the effect would contribute to a change in the value of the business entity.³

You have stated that Councilmember Sarmiento’s law firm has provided services to other jurisdictions that have sought to implement marijuana regulations and procedures. There are no facts to suggest that Councilmember Sarmiento’s participation in the governmental decisions before the city council will in any way contribute to a change in the value of his law firm simply because

² Effects on an official’s personal finances are not considered separately from the effect on an official’s interest in a business entity. (Regulation 18702.5(c).) Thus, we do not consider the personal financial effects rule further.

³ Regulation 18702.1(b) also provides examples of decisions that may have a material effect on a business entity.

the firm has provided advice to other public agencies in other jurisdictions. Therefore, there is no reasonably foreseeable material financial effect upon this financial interest and no conflict of interest with respect to Councilmember Sarmiento's law firm.

Regulation 18702.3 provides the materiality standards for sources of income such as the clients of Mr. Sarmiento's law firm. The only clients you have identified are other public agencies. However, it is not foreseeable that the decisions will materially affect these public agencies.⁴ Thus, Councilmember Sarmiento does not have a disqualifying conflict of interest with respect to public agencies that are clients of his law firm.⁵

Conflicts Under Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. 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.)

Generally, the marijuana ordinances you have identified are not decisions involving a contract to which Section 1090 would typically apply. Moreover, even if an ordinance involves a contract, advising other public agencies regarding marijuana-related issues does not establish a financial interest in the contract.

Accordingly, based on these facts, Section 1090 does not prohibit the city council or Councilmember Sarmiento from participating in the decisions.

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

Sincerely,

Brian G. Lau
Assistant General Counsel



By: Sukhi K. Brar
Senior Counsel, Legal Division

SKB:jgl

⁴ Even if an official otherwise has a conflict of interest, the official is not disqualified from the participating in the decision if the "public generally" exception applies. The public generally exception applies when the financial effect on a public official or the official's interests is indistinguishable from its effect on the public generally. Regulation 18703(e)(7) provides that the public generally exception applies to a decision that affects a federal, state, or local governmental entity in which the official has an interest when there is no unique effect on the official's interest. In this case, to the extent that the decisions may affect other public agencies, there is no unique effect on any of Councilmember Sarmiento's interests in a public agency and the public generally exception would also apply.

⁵ If Councilmember Sarmiento's law firm has clients that are involved in the marijuana industry in the city, Councilmember Sarmiento should seek further advice regarding those clients.