



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

February 22, 2019

Lynn Tracy Nerland
City Attorney
City Attorney's Office, Bldg 2
13831 San Pablo Avenue
San Pablo, CA 94806

Re: Your Request for Advice
Our File No. A-19-014

Dear Ms. Nerland:

This letter responds to your request for advice 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.

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 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 against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTIONS

1. With regard to Section 1090, would the remote interest exception established by Section 1091(b)(1)—pertaining to officers and employees of 501(c)(3) nonprofit organizations—also apply to Councilmember Elizabeth Pabon-Alvarado, who is paid by Weigh of Life as an independent contractor?
2. Under the Act, can the San Pablo City Council award the nonprofit organization Weigh of Life a grant if Councilmember Elizabeth Pabon-Alvarado discloses her source-of-income interest in the organization and recuses herself from the governmental decision?

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.

CONCLUSIONS

1. Yes, the Section 1091(b)(1) remote interest exception applies to Councilmember Pabon-Alvarado, who performs the same work that an employee typically might perform, despite the fact that she is an independent contractor.
2. Yes, as long as Councilmember Pabon-Alvarado satisfies the Act's recusal provisions set forth in Section 87105 and Regulation 18707, Weigh of Life may still receive a grant.

FACTS AS PRESENTED BY REQUESTOR

San Pablo City Councilmember Elizabeth Pabon-Alvarado was elected to the City Council in November 2018. For two years, she has helped a local 501(c)(3) nonprofit organization, Weigh of Life, by providing financial/bookkeeping services. Each year, the organization's Board of Directors has voted to pay Councilmember Pabon-Alvarado a \$1,500 stipend for her services as an independent contractor documented on an IRS Form 1099. Councilmember Pabon-Alvarado has indicated that this is a discounted fee and that she is paid only if there are non-restricted funds available.

In prior years, Weigh of Life has competed for and received a grant from the City of San Pablo through the City's Annual Community Grant Program. The nonprofit's mission is consistent with the City's Health Element of its General Plan and the City's efforts to reduce childhood obesity through its Active Living Healthy Eating program. The past few years, the nonprofit has received a \$5,000 grant annually, which has been used to subsidize the rental of space at the local middle school. Councilmember Pabon-Alvarado has indicated that these grant funds are "restricted" for the purpose in the grant and not used to provide her stipend.

ANALYSIS

Section 1090

Section 1090 provides 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 any body or board of which they are members." "The prohibition is based on the rationale that a person cannot effectively serve two masters at the same time." (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 298.) Section 1090 applies to officials who participate in any way in making of the contract, including involvement in matters such as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) A contract that violates Section 1090 is void, and the prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (See *Thomson v. Call* (1985) 38 Cal.3d 633, 646.) Grants are generally considered contracts for Section 1090 purposes. (See *People v. Honig* (1996) 48 Cal.App.4th 289, 349-53 [rejecting a claim that a grant was not a contract within the meaning of Section 1090].)

Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions indicate that the term is to be liberally interpreted. The 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. “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.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1075.) “Thus, that the interest ‘might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good.’” (*Ibid.*)

Here, Councilmember Pabon-Alvarado has received, and may continue to receive, a \$1,500 stipend for her work as an independent contractor providing bookkeeping and financial services. She has indicated that she is only paid if Weigh of Life has non-restricted funds available, and the grant funds that the organization receives have been “restricted” to the purpose of the grant. Thus, the grant funds are not used to provide her stipend. However, the receipt of an additional \$5,000 increases the likelihood that the organization would have \$1,500 in non-restricted funds that could be used to pay Councilmember Pabon-Alvarado’s stipend. In other words, the facts indicate that the councilmember has at least an indirect financial interest in the potential grant agreement between the City and Weigh of Life.

Remote Interest Exception

Under Section 1091(a), “[a]n officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.” Further, under Section 1091(b)(1), a “remote interest” includes “[t]hat of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code”

Section 1091(b)(1) expressly refers only to an “officer” or an “employee” of a nonprofit organization, and makes no mention of independent contractors. For the purposes of this analysis, we must determine if an independent contractor for a nonprofit is subject to the same remote interest exception as any other employee of the nonprofit. While an independent contractor is distinguishable from a business’s regular employees, an independent contractor is still employed by the contractual employer under a broad definition of “employment.” Moreover, there is no reason to categorically exclude independent contractors from the remote interest exception in Section 1091(b)(1). In many cases, an independent contractor is performing essentially the same work that an employee might perform for a 501(c)(3) organization, and generally an independent contractor’s interest in his or her contractual employer is more attenuated than a regular employee’s interest. Accordingly, there is no public interest served in excluding an independent contractor from Section

1091(b)(1) and there is no reason to believe that the Legislature intended to do so in promulgating Section 1091.

Accordingly, the remote interest exception contained in Section 1091(b)(1) applies to Councilmember Pabon-Alvarado. So long as she discloses her interest to the City Council, the interest is noted in the Council's official records, and Councilmember Pabon-Alvarado abstains from taking part in the contract(s) at issue, the City Council may still enter into a grant agreement with Weigh of Life.

The Act

In addition to Section 1090, the conflict of interest provisions in Section 87100 of the Political Reform Act prohibit a public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has an interest. As applied to the facts you have provided, you are correct that the City's decision on whether to enter into a grant agreement with Weigh of Life implicates Councilmember Pabon-Alvarado's potentially disqualifying source-of-income interest in the nonprofit organization. (See Section 87103(c).) However, by following the abstention requirements of Section 1090 and additionally leaving the room during the decision(s), Councilmember Pabon-Alvarado will satisfy the Act's recusal provisions set forth in Section 87105 and Regulation 18707. As such, we do not analyze the Act's conflict of interest provisions further.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

KMC:jgl