



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 5, 2019

Krishan Chopra
Senior Assistant City Attorney
City of Mountain View
500 Castro Street, PO Box 7540
Mountain View, CA 94039-7540

Re: Your Request for Advice
Our File No. A-19-117

Dear Mr. Chopra:

This letter responds to your request for advice on behalf of City of Mountain View City Councilmember Ellen Kamei regarding Government Code Section 1090 and the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please note that we are only providing advice under Section 1090 and the conflict of interest provisions of the Act and not under any other conflict of interest laws. 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 it to the Office of the Attorney General and the Santa Clara County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We are also required to specify whether we have received a written response from either entity: we have not. (Section 1097.1(c)(4).) Finally, we are 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).)

QUESTIONS

(1) Would Section 1090 prohibit Councilmember Kamei from making or participating in the making of contracts between the City of Mountain View and a large international telecommunications company (the "Company") if she accepts the Company's formal employment offer to be its "Area Manager External Affairs"?

(2) Do the Act's conflict of interest provisions prohibit the Councilmember from taking part in decisions relating to the Company?

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) If the Councilmember accepts the Company's employment offer, Section 1090 would apply to the Councilmember with respect to, and generally prohibit the City Council from entering into, a contract between the City and the Company.²

(2) If the Councilmember is "negotiating," or has "any arrangement concerning," prospective employment with the Company, Section 87407 prohibits her from taking part in any decision directly relating to the Company. If the Councilmember becomes an employee of the Company, the Act's conflict of interest provisions would also prohibit her from taking part in a decision involving the Company if it is reasonably foreseeable that the decision would have a material financial effect on one or more of her financial interests including her interests in the Company as a source of income or business entity.

FACTS AS PRESENTED BY REQUESTOR

You are a Senior Assistant City Attorney for the City of Mountain View and the authorized representative of Mountain View City Councilmember Ellen Kamei. A large international telecommunications company (the "Company") has made a formal employment offer to the Councilmember to become the Company's "Area Manager of External Affairs," a position responsible for advancing the Company's legislative and regulatory agenda.

More specifically, if hired as the Company's Area Manager of External Affairs, the Councilmember's job duties would include: advocating on behalf of the Company; establishing and maintaining relationships with elected officials and key stakeholders to support Company objectives; collaborating on and contributing to state legislative affairs efforts and policy objectives; collaborating and communicating with internal business units regarding the impact of pending local ordinances and legislation; promoting the Company's policy agenda during public hearings and before third-party organizations and key audiences within the region; and serving as a spokesperson for the Company at public hearings and community events. The Councilmember has not accepted the Company's employment offer at the time you submitted this request for advice, but the offer remains open.

The City and the Company have a number of existing contracts in place, and are also actively negotiating a contract, each of which is described below:

- The City has three active telephone service contracts with the Company for general telephone service, voice and data services, and wireless subscription services. These contracts are reviewed either annually or every several years and may be amended from time to time.

² As you have identified multiple existing contracts, as well as possible future contracts, between the City and the Company, we can only generally conclude that Section 1090 prohibits the City Council from amending or renewing those existing contracts, or entering into those future contracts, with the Company. We have not been provided sufficient facts to determine if any exception to Section 1090, such as the remote interest exception for competitively bid contracts set forth in Section 1091(b)(3) or the rule of necessity, may apply to any specific contract between the City and the Company.

- The City has three active telecommunications facility agreements for the Company's deployment of various telecommunications facilities infrastructure, which is necessary for the company to provide services to its customers, within the City's public right-of-way. Pursuant to Public Utilities Code Sections 7901 and 7901.5, the Company is allowed to install telecommunications facilities within the public right-of-way, and the City is obligated to permit such installations, subject to limited conditions.
- The City and the Company are currently negotiating a master license agreement for the siting of telecommunications installations, which could include the installment of facilities necessary for the deployment of new 5G cellular network transmission facilities at multiple locations within the City's public right-of-way. In connection with the Company's deployment of its own telecommunications facilities, various permits and land-use approvals must be obtained from the City, including excavation and encroachment permits, each of which involve the execution of a written contract.
- The City and the Company entered into a cable television franchise agreement, but that agreement was subsequently replaced by a state-wide franchise agreement administered by the Public Utilities Commission. As part of the initial franchise agreement between the City and the Company, however, the City agreed to construct and maintain an "intranet" fiber-optic network, and this portion of the agreement is still in effect.

You note the City may amend any of its existing contracts with the Company; the City Council has adopted a resolution delegating contracting authority to various City departments and employees; and the making of the contracts described above is primarily performed by City employees or departments, as opposed to those contracts being directly approved by the City Council. If the Councilmember accepts the Company's employment offer, her compensation from the Company would exceed five percent of her total annual income. The Councilmember was not an employee or agent of the Company for at least three years prior to joining the City Council.

ANALYSIS

Section 1090

Section 1090 generally prohibits a public officer or employee from making or participating in the making of a contract in which he or she is financially interested. 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.) 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 made in violation of Section 1090 is void (*Thomson v. Call* (1985) 38 Cal.3d 633, 646), and an official with a prohibited interest in such a contract is subject to civil penalties (Sections 1097.1 and 1097.3), as well as criminal penalties if the violation was willful (Section 1097).

The California Supreme Court has stated that the purpose of Section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." (*Thomson v. Call, supra*, at p. 650.)

Eliminating temptation for public officers and employees, obtaining their undivided loyalty, and avoiding the perception of impropriety are important public policy goals in California. (*Id.* at p. 648.) Consequently, Section 1090 applies without regard to whether actual fraud or dishonesty is involved in the contracting process, the contract is fair to the public agency, or the public agency loses money from the contract. (*Id.* at pp. 648-649.)

Because Section 1090 applies to city councilmembers (*Id.* at p. 633), the Councilmember is subject to Section 1090. The decisions at issue involve multiple active contracts and a potential contract between the City and the Company. Because a public officer generally has a financial interest in a contract between his or her public entity and his or her private employer for purposes of Section 1090 (89 Ops.Cal.Atty.Gen. 278, 280 (2006); 88 Ops.Cal.Atty.Gen. 106, 108-110 (2005); 58 Ops.Cal.Atty.Gen. 670, 677-678 (1975)), the Councilmember would have a financial interest in the Company if she accepts its employment offer.

We now consider whether the Councilmember would make or participate in the making of the contracts between the City and the Company at issue. Under Section 1090, a member of a public agency's governing body is conclusively presumed to participate in the making of a contract under the governing body's authority, irrespective of whether he or she actually participates in the making of that contract. (*Thomson v. Call, supra*, at pp. 649-650.) Therefore, Section 1090 prohibits the entire body from entering into a contract in which a member of the body is financially interested, even if that member abstains from participating in the making of the contract or fully discloses his or her financial interest in the contract.

Thus, if the Councilmember accepts the employment offer from the Company, Section 1090 would apply to the Councilmember with respect to, and generally prohibit the City Council from entering into, a contract between the City and the Company based on the limited facts presented.

The Act

Section 87407

We first consider whether Section 87407 prohibits the Councilmember from taking part in decisions directly relating to the Company. Designed to ensure that a public official does not use his or her official position to make any governmental decision that unduly benefits a prospective private-sector employer, Section 87407 provides as follows:

No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.

Thus, once an official has begun negotiating, or has made an arrangement regarding, prospective employment, Section 87407 prohibits the official from making, participating in making, or using his or her official position to influence any decision relating directly to the prospective employer.

For purposes of Section 87407, an official is “negotiating” prospective employment when he or she interviews or discusses an offer of employment with an employer; has an “arrangement” concerning prospective employment when he or she accepts an employer’s offer of employment; and is not “negotiating” and does not have an “arrangement” concerning prospective employment if he or she rejects or is rejected for employment. (Regulation 18747(c)(1)-(3).)

Thus, the Councilmember would be “negotiating” prospective employment with the Company if she discusses or has discussed the Company’s employment offer with the Company, and she would have an “arrangement” concerning prospective employment if she accepts the Company’s employment offer. The Councilmember, however, would not be “negotiating” or have an “arrangement” concerning prospective employment if she rejects or if the Company retracts the employment offer. Accordingly, if the Councilmember is negotiating, or has any arrangement concerning, prospective employment with the Company, Section 87407 would prohibit her from taking part in any decision directly relating to the Company.

Sections 87100 and 87103

The Act’s conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official’s financial interests distinguishable from the decisions’ effect on the public generally. (Sections 87100 and 87103.) An official’s interests that may give rise to a disqualifying conflict of interest are identified in Section 87103. Of those interests, the Councilmember would have the following with respect to the decisions at issue if she accepts the Company’s employment offer: a business interest in the Company under Section 87103(d) due to being an employee of the Company, or under Section 87103(a) if she obtains an investment in the company worth \$2,000 or more; a source of income interest in the Company under Section 87103(c) if she aggregates \$500 or more in value from it in the 12 months prior to the decision at issue; and an interest in her personal finances and those of immediate family members under Section 87103.

Thus, if the Councilmember accepts the Company’s employment offer, and if it is reasonably foreseeable that a decision relating to the Company would have a material financial effect on one or more of her interests in the Company or her interest in her personal finances, the Act’s conflict of interest provisions would prohibit her from taking part in that decision. If the Act prohibits the Councilmember from taking part in a decision, she must recuse herself from that decision pursuant to Section 87105 and Regulation 18707. If the Councilmember obtains an interest in the Company, and if a specifically identifiable decision relating to the Company is thereafter scheduled to come before the City Council which may have a disqualifying effect on one or more of her interests in the Company, the Councilmember should seek additional advice regarding whether the Act’s conflict of interest provisions would prohibit her from taking part in that decision.

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

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Sincerely,

Dave Bainbridge
General Counsel

A handwritten signature in blue ink, appearing to read "Matthew F. Christy / aja".

By: Matthew F. Christy
Counsel, Legal Division

MFC:aja