



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 26, 2019

Donna Mooney
City Attorney
City of Pittsburg
65 Civic Avenue
Pittsburg, CA 94565

Re: Your Request for Advice
Our File No. A-19-168

Dear Ms. Mooney:

This letter responds to your request for advice on behalf of the City of Pittsburg regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090 and the conflict of interest provisions of the Political Reform Act (the “Act”)² 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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to it 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 are also required to specify whether we have received a written response from either entity: we have not. (Section 1097.1(c)(4).) Furthermore, 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).)

The Fair Political Practices Commission (“Commission”) does not provide advice regarding past conduct (Section 1097.1(c)(2); Regulation 18329(b)(6)(a)), nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter only apply to prospective actions.

¹ All statutory references are to the Government Code, unless otherwise indicated.

² The Act is contained in Sections 81000 to 91014. The regulations of the Fair Political Practices Commission are contained in Regulations 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.

QUESTION

Does Section 1090 prohibit the City of Pittsburg from entering into a potential contract with Pittsburg Police Lieutenant Brian Mathews's private company, Blackline Inc. ("Blackline"), for audio and video recording review and redaction services after Lieutenant Mathews ends his employment with the City?

CONCLUSION

No. Section 1090 would not prohibit the City from entering into a potential contract for review and redaction services so long as the Lieutenant completely refrains from participating in the making of that potential contract in his official capacity as a City employee prior to ending his employment with the City.³

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Pittsburg and the authorized representative of the City. Enacted in September 2018, Assembly Bill 748 ("AB 748") and Senate Bill 1421 ("SB 1421") expand public access to certain records pertaining to peace officer and custodial officer conduct.

AB 748 amended the California Public Records Act (Section 6250, et seq.; hereafter "CPRA") by requiring that an audio or visual recording of a "critical incident," defined as an incident resulting in either the discharge of a firearm, or in death or great bodily injury to a person from the use of force, by a peace officer or custodial officer, to be disclosed pursuant to CPRA as specified. AB 748 authorizes a public agency to use redaction technology to obscure specific portions of a recording to protect the privacy of a subject depicted in the recording when the public's interest in privacy clearly outweighs its interest in disclosure.

SB 1421 amended the Penal Code by requiring certain personnel records of peace officers and custodial officers, and records relating to certain incidents, complaints, and investigations involving such an officer, to be disclosed pursuant to CPRA. SB 1421 requires records disclosed pursuant to its provisions to be redacted to remove certain specified information, including information that may cause an unwanted invasion of personal privacy if disclosed, and authorizes redaction when the public's interest in privacy clearly outweighs its interest in disclosure.

Since the enactment of AB 748 and SB 1421, the City has received multiple requests for disclosure under those bills' provisions, requiring the City to review requested records and make appropriate redactions. The review and redaction process is time-intensive, and there is a backlog of requests because the City does not have sufficient staff resources necessary to promptly respond to the requests. The City intends to contract for services for the review and redaction of approximately 100 hours of footage.

³ You have sought advice regarding Section 1090 after the Lieutenant leaves employment with the City, and we limit our advice accordingly. Prior to leaving the City, we note that the Act prohibits the Lieutenant from taking part in any decision by the City with a foreseeable and material financial effect on his business interest. (Section 87100 *et seq.*) However, upon leaving the City, the Act's conflict of interest restrictions would not apply to the Lieutenant, and we express no opinion regarding any actions of the Lieutenant prior to leaving the City.)

Pittsburg Police Lieutenant Brian Mathews has been employed by the City for the past 13 years and has been a lieutenant with the Pittsburg Police Department for the past two years. The Lieutenant has started Blackline, a private company that provides audio and video review and redaction services to public agencies and other clients.

You state that the Lieutenant has explained Blackline's redaction services and pricing structure to the Pittsburg Chief of Police and advised the Chief of Police that he intends to end his employment with the City in the near future to focus on running Blackline. You also state that the Chief of Police is aware, based on the cost of the Police Department performing review and redaction in house and estimates received for comparable services from other private companies, that Blackline is offering its review and redaction services at a competitive rate. The Lieutenant has no authority to enter into contracts on behalf of the City, and his official duties do not require him to be involved in decisions relating to the City potentially contracting for review and redaction services.

ANALYSIS

Section 1090 generally prohibits a public officer or employee, while acting in his or her official capacity, from making or participating in the making of a contract in which the he or she is financially interested. 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* (1985) 38 Cal.3d 633, 650.) 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, supra*, at p. 646.)

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.)

Lieutenant Mathews is subject to Section 1090 because he is a city employee. Decisions relating to the City contracting for review and redaction services involve a potential contract between the City and Blackline for those services. As the owner and operator of Blackline, the Lieutenant would have a financial interest in that potential contract. Therefore, Section 1090 would prohibit the City from entering into that potential contract if Lieutenant Mathews has participated in the making of that potential contract in his official capacity, or will do so in the future, unless a statutory exception or the rule of necessity also applies.

For purposes of Section 1090, participation in the making of a contract is defined broadly to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569; *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 212; *City of Imperial Beach, supra*, at p. 196.)

Section 1090, however, does not apply to a public employee who makes or participates in the making of the contract at issue solely in his or her private capacity. In *County of Marin v. Dufficy* (1956) 144 Cal.App.2d 30, 37, the court determined Section 1090 would not apply to a county physician's lease of office space to the county because the physician did not act in his official capacity with respect to the lease:

In the instant case, it is clear that Dr. Dufficy and his wife executed the lease as private citizens who owned an office building in which the county desired to lease four rooms. They were in no sense acting in an "official capacity."

Following the court's reasoning in *Dufficy*, the Office of the Attorney General has determined on numerous occasions that a public employee is not subject to Section 1090 if the employee does not make or participate in the making of the contract at issue in his or her official capacity. (80 Ops.Cal.Atty.Gen. 41 (1997) [city firefighters permitted to sell their firefighting product to the city]; 63 Ops.Cal.Atty.Gen. 19 (1980) [county employees permitted to bid on county surplus property];; 53 Ops.Cal.Atty.Gen. 163 (1970) [California Youth Authority board member permitted to obtain surplus property from the Department of Water Resources].)

The Lieutenant has no authority to enter into contracts on behalf of the City, and his official duties do not require him to be involved in decisions relating to the City potentially contracting for review and redaction services.

Thus, so long as the Lieutenant completely refrains from participating in the making of a potential City contract for review and redaction services in his official capacity as a City employee, Section 1090 would not prohibit the City from entering into that potential contract. We do not analyze statutory exceptions to Section 1090 or the rule of necessity because we have determined that Section 1090 is not applicable based on the facts presented.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Matthew F. Christy
Counsel, Legal Division

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