



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 13, 2022

Gary S. Winuk
Kaufman Legal Group
621 Capitol Mall, Suite 1900
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-22-083

Dear Mr. Winuk:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under 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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Los Angeles 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

Under the Act and Section 1090, if Councilmember Blumenfield’s spouse accepts employment with NationBuilder, may other councilmembers continue to use and pay for NationBuilder’s services under their current arrangements and enter into future renewals and modifications of those services?

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 18104 through 18998 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

If Councilmember Blumenfield's spouse accepts employment with NationBuilder, the other councilmembers may continue to use and pay for NationBuilder's services under their current arrangements. However, Section 1090 would prohibit them from entering into future renewals and modifications of those services, as explained below. In addition, the Act would prohibit Councilmember Blumenfield from taking part in decisions to continue or terminate his current month-to-month subscription to Nationbuilder because such decisions would have a reasonably foreseeable, material financial effect on Nationbuilder. Therefore, he would have to discontinue his subscription to Nationbuilder prior to his spouse's employment with the company.

FACTS AS PRESENTED BY REQUESTER

Bob Blumenfield is currently an elected member of the Los Angeles City Council. His spouse, Kafi Blumenfield, is considering employment with NationBuilder, a for-profit company based in Los Angeles that develops content management and customer relationship management software used by governmental agencies and other non-profit organizations. NationBuilder seeks to hire Ms. Blumenfield for her expertise in nonprofits and leadership development to help NationBuilder develop a new charitable division related to democracy building. If Ms. Blumenfield were to accept employment with NationBuilder, it would be as a paid employee and not in exchange for any ownership interest in the company.

The City of Los Angeles allocates funds in its annual budget to each City Council office that may be used at the discretion of the individual councilmember without requiring approval by the rest of the Council. However, the overall budget allocations to each office are approved by the entire Council. Since 2019, Councilmember Blumenfield's office has used some of its discretionary funds to pay for a month-to-month subscription to NationBuilder's website hosting services, which includes distribution of the office's e-newsletter and other constituent communications.² Should Ms. Blumenfield accept employment with NationBuilder, Councilman Blumenfield will not renew or extend any arrangement he has with NationBuilder.

NationBuilder currently provides similar services to several other Council offices. Some of these arrangements are paid for by the individual Council offices using their discretionary funds.³ The agreements provide for monthly payments for the services. In addition to the fact that each Council office has complete discretion over the use of its discretionary funds, the arrangements with NationBuilder are not treated as traditional contracts by the City of Los Angeles. Rather, these arrangements between Council offices and NationBuilder are considered an "Authority for Expenditure" ("AFE"), a mechanism for the payment of goods or services, including a subscription such as that provided by NationBuilder, that does not require formal approval by anyone other than the Council office to effectuate payment. Each City department and office has independent authority to enter into an appropriate AFE consistent with City law and policies.

² You are unaware if other councilmembers have annual or month-to-month subscriptions.

³ Other Council offices have used non-City "officeholder" campaign accounts to pay for these services. These non-City arrangements are not at issue here.

In a follow-up email on August 29, you described the process of how the annual funds are allocated and how the councilmembers can spend them. Each year, the Mayor drafts a budget for the entire City (more than 4 billion dollars) and presents the budget to the City Council for review and revision. The Council then approves the budget. One line item in the budget is the total allocation for the City Council, which is divided by 16 and shared equally between the 15 councilmembers and the Chief Legislative Analyst office.

The councilmembers do not submit their individual office budget allocations to the City Council or disclose how they will use the funds prior to City Council approval of the budget. Therefore, when the City Council approves the budget allocations, the councilmembers do not have any knowledge as to how the other councilmembers will spend the funds. Over the course of the year funds are spent independently by each office for City business purposes according to the allowed guidelines but the Council does not approve these expenditures. Councilmembers must only use these City funds for City business purposes. This year's allocation is approximately \$1.85 million per councilmember, and it pays for staff salaries and expenses to run the office. Categories for allowable expenses include printing, equipment, travel, subscriptions, and other miscellaneous expenses related to serving the community and public. Invoices must be provided to the City Clerk and Controller for payment, and the office must indicate what the City purpose is for each expenditure.

There is no ordinance that provides explicit authority for the individual councilmembers to spend these funds without City Council approval. However, each office determines how to utilize its office budget to further the councilmember's goals.

Further, with respect to NationBuilder you state that while no provider offers the exact combination of services that it provides, other vendors provide web hosting, and other vendors provide constituent management database services, but those service providers do not also provide the ability to maintain a database of constituents and their service requests or communications. Generally, the combination of being able to send out emails and maintain a database of people is unique, and the NationBuilder service allows the staff to quickly look up a constituent with their service requests and issue areas of interest, and to assign incoming emails or requests to an appropriate staff member. If separate vendors are used to provide elements of these services, it would be less efficient for the office to have these services not be integrated.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal 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.)

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.) 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.) Importantly, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

Finally, eliminating temptation for public officers and employees, obtaining their undivided loyalty, and avoiding the perception of impropriety are important public policy goals in California. (*Thomson, supra*, 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.)

Initially, your request states the subscriptions each councilmember's office has with NationBuilder are not treated as traditional contracts by the City of Los Angeles and you question whether the subscriptions are even contracts for purposes of Section 1090. As support, you state the arrangements are considered an "Authority for Expenditure" ("AFE"), a mechanism for the payment of goods or services that does not require formal approval by anyone other than the councilmember's office to effectuate payment.

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 Sections 1090 and 1097 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 v. Taft* (1962) 58 Cal.2d 565, 571.) Under general principles of law, a contract is made on the mutual assent of the parties and consideration. If an agency agrees to a purchase, there is mutual assent by the parties and consideration. A basic element of a contract is consideration. If an entity provides a good or service without receiving any compensation, or other consideration, there is no contract. (See *Webber Advice Letter*, No. A-16-007.)

In the present matter, when a councilmember's office agrees to purchase a NationBuilder subscription, there is mutual assent by the councilmember's office and NationBuilder as well as consideration – in exchange for NationBuilder's services, the councilmember's office pays for those services. Mindful that we must "avoid narrow and technical definitions of 'contract'" under Section 1090, we find the subscription for services each councilmember's office purchases from NationBuilder is a contract for purposes of Section 1090.

Next, while your request recognizes that a governing body may not avoid a Section 1090 conflict by delegating decision-making authority to another individual or body (87 Ops.Cal.Atty.Gen. 9 (2004)), you state a contract is not automatically prohibited by Section 1090 where it is not under the jurisdiction of the official. In support, you cite to 81 Ops.Cal.Atty.Gen. 274 (1998), which held the Yolo County Housing Authority Commission could employ a member of the Yolo County Board of Supervisors as its Executive Director because its contracts are independent from the Board of Supervisors:

Although here the members of the county housing authority commission are subject to removal for cause by the board of supervisors (§ 34282), their *independent contracting powers* would not be affected by such limited supervisory control for purposes of Government Code section 1090.

81 Ops.Cal.Atty.Gen., *supra*, at p. 278, emphasis added; see also in 21 Ops.Cal.Atty.Gen. 90, 91 (1953) [Section 1090 does not prohibit a city treasurer from depositing city funds into a bank partly owned by a city councilmember where the selection is not subject to the supervision or control of the city council – the significant fact is the independent status of the party contracting on behalf of the governmental agency].)

In contrast, the councilmembers in the present situation do not have any official status independent from the City Council when they enter an agreement with NationBuilder to purchase its services. More specifically, there is no ordinance or statute providing them with the independent contracting powers to enter government contracts. Simply put, the City Council has delegated authority to each of the council offices to spend the City funds at their discretion, but such delegation of its contracting authority to the individual councilmembers does not avoid application of Section 1090's prohibition against making contracts in which the councilmembers are financially interested.

If Councilmember Blumenfield's spouse were to become an employee of NationBuilder, Councilmember Blumenfield would have a financial interest, for purposes of Section 1090, in any contract that financially benefits his spouse⁴ because a member of a board or commission always has a financial interest in a spouse's source of income for purposes of Section 1090. (78 Ops.Cal.Atty.Gen. 230, 235 (1995).) Therefore, Councilmember Blumenfield and any other councilmembers who have subscriptions to NationBuilder at the time his spouse were to become an employee of NationBuilder would be prohibited under Section 1090 from modifying or renewing those existing agreements.⁵ In this regard, your facts state that Councilmember Blumenfield has a month-to-month subscription with NationBuilder – presumably, the subscription automatically renews each month and has no fixed termination date.

The next question is whether Section 1090 would prohibit the automatic renewal of the councilmembers' existing monthly subscriptions. The Attorney General addressed whether Section 1090 would prohibit the spouse of a school board member from continuing her annual employment as a substitute teacher or being appointed to a different employment position with the school district within the context of the application of the noninterest exception under Section 1091.5(a)(6).

⁴ Under Section 1090, employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

⁵ It is well settled that changes to existing contracts are themselves "contracts" under Section 1090. Therefore, a decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)

(69 Ops.Cal.Atty.Gen. 255 (1986).) There, the opinion initially concluded that Section 1090 would not prohibit the employed spouse from continuing annual employment as a substitute teacher, which requires a new contract each year, because the legislative intent of the exception is to permit a continuation of the status quo with respect to the spouse's employment. However, the opinion further concluded that changing employment positions (e.g., becoming a permanent employee) would be prohibited because the status quo would be disturbed by the new position. (*Ibid.*)

While not directly on point, we think the same rationale applies in the current situation to allow automatic renewal of the subscriptions. In this case, Section 1090 would not prohibit automatic renewal so long as there is a continuation of the status quo with respect to each Councilmember's subscription. Accordingly, if Councilmember Blumenfield's spouse accepts an employment position with NationBuilder, we find Section 1090 would not prohibit any of the councilmembers from keeping automatically renewed subscriptions with the company as long as the services provided and the term price do not change. Similarly, we find Section 1090 would not prohibit any of the councilmembers from keeping automatically renewed with the company as long as the only changes to the services provided and the term price are permitted under the terms of the existing subscription and apply broadly to all similar subscriptions. However, to the extent that any subscription does not automatically renew, the councilmembers are prohibited from renewing a subscription so long as Councilmember Blumenfield has an interest in the business including the employment of the Councilmember's spouse.

The Act

The Act's conflict of interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests. (Section 81001(b).) 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 87103.) A public 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, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Section 87103 defines financial interests to include:

- An interest in a source of income to the official, or promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c)) including 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)).

If Councilmember Blumenfield's spouse were to become an employee of NationBuilder, he would have an interest in the company as a source of income. Therefore, he would have a conflict of interest in any decisions that would have a reasonably foreseeable and material financial effect on NationBuilder.

Foreseeability & Materiality

To determine if a financial effect of a particular decision is reasonably foreseeable, we look to Regulation 18701. Regulation 18701(a) provides that a decision's effect on an official's interest

is presumed to be reasonably foreseeable if the interest is explicitly involved in the decision as a named party in, or the subject of the decision. An interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the interest.

Regulation 18702.3 provides the standards for determining the materiality of a financial effect on a source of income. Under that regulation, the reasonably foreseeable financial effect of a governmental decision on Councilmember Blumenfield's interest in NationBuilder as a source of income will be material if NationBuilder "is a named party in, or the subject of, the decision including a claimant, applicant, respondent, or contracting party." (Regulation 18702.3(a)(1).)

Here, Councilmember Blumenfield has a month-to-month subscription with NationBuilder. At the end of any month, he must decide whether to continue or terminate his agreement with NationBuilder. As a named party and subject of the governmental decisions at issue with respect to Councilmember's decision to continue or terminate the subscription to NationBuilder, such decisions would have a reasonably foreseeable, material financial effect on NationBuilder. Accordingly, if Councilmember Blumenfield's spouse were to become an employee of NationBuilder, the Act would prohibit him from taking part in those decisions, and he would therefore be required to discontinue his subscription to NationBuilder prior to his spouse's employment with the company. In contrast to Section 1090 as applied to the other councilmembers, the Act does not permit Councilmember Blumenfield from continuing an automatically renewing contract that explicitly involves a source of income to him.

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

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