



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

March 8, 2023

Karli Frye
District General Administrator
Southern Cascades Community Services District
205 Ash Valley Rd. PO Box 239
Adin CA 96006-0239

Re: Your Request for Advice
Our File No. A-23-024

Dear Ms. Frye:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.²

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. The Commission does not provide advice with respect to past conduct. (Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

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 Lassen County and the Modoc County District Attorney’s Offices, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from these entities. (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).)

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.

² We note that the situation where a person is holding more than one public position may raise issues outside of the Act and Section 1090. Please check with each of your local agency’s attorneys regarding any other laws that may apply including incompatible offices and any restriction on incompatible activities.

QUESTIONS

1. Where you are employed as the District General Administrator for the Southern Cascades Community Services District (“Community Services District”) and serve as a board member for the Big Valley Joint Unified School District (“School District”), do you have a prohibitive financial interest in the School District’s decision to sell its surplus building to the Community Services District?

2. Are you prohibited from participation in any Community Services District funding item that may come before the School District?

CONCLUSIONS

1. Under the Act, the facts indicate that it is not reasonably foreseeable that the decision may have a material financial effect on your interest in your personal finances. (Regulation 18702.5.) However, under Section 1090, your interest as an employee of the Community Services District meets the definition of a “remote interest” and you may not take part in the decision. (Section 1091(b)(13).) The School District may make this contract, so long as you follow the Section 1091 recusal requirements discussed below.

2. As a general matter, under the Act you are generally prohibited from taking part in any School District or Community Services District decision if it is reasonably foreseeable the decision may have a material financial effect on your interests including your interest in your personal finances. However, disqualification is based on the specific nature of a decision, and we cannot make a determination regarding a decision unless the decision has been identified. Additionally, we do not provide general advice under Section 1090. We recommend you seek additional advice, as needed, for future decisions.

FACTS AS PRESENTED BY REQUESTER

As of January 1, 2023, you are employed as the District General Administrator of the Southern Cascades Community Services District (“Community Services District”) located in the rural community of Adin. The Community Services District provides emergency medical services to the residents of Northern Lassen County and South/Western Modoc County, which includes the communities of Adin, Bieber, Lookout, Nubieber, Rush Creek and other outlying communities. It also facilitates an air ambulance service, non-emergency medical transport for those in need of transportation to medical facilities, and provides wheelchair, gurney, and ambulatory transport services. The Community Services District’s education center provides classes and training to the public as well as medical personnel. You also serve as a school board member for the Big Valley Joint Unified School District (“School District”) in the nearby rural community of Bieber.

The School District currently leases its surplus building to the Community Services District, and this building serves as the Community Services District’s sole base of operations. You currently work at this location. The Community Services District would like to purchase the building from the School District. The School District completed an appraisal of the building prior to your taking the General Administrator position at the Community Services District and although the School District, including board members, has this appraisal information, it has not been released to the

public. You have not shared this information with anyone. The School Board will eventually release the appraisal amount to the public and will engage discussions in the school board meeting (likely in a closed session) in regard to the appraisal.

You request advice on whether you must recuse yourself as a School District board member from the discussions and decisions related to the Community Services District's purchase of the office building. You provided additional information in response to our request that you will not experience any financial benefit or loss as a result of the decision to sell the building.

Additionally, you inquire as to whether you must recuse yourself from any Community Services District funding item that comes before the School District in the future. You note that you recently abstained from a School District action item to approve funding to the Community Services District for Emergency Medical Technician ("EMT") education expenses.

ANALYSIS

The Act

The Act's conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using their official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) 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).) Relevant to the facts provided, Section 87103 defines a financial interest to include:

- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- Any source of income, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. (Section 87103(c).)
- A public official has an economic interest in their personal finances, including those of their immediate family (Section 87103.)

While you have a position of management at the Community Services District, this is a local government agency that does not meet the definition of a "business." Section 82005 defines a "business entity" as any organization or enterprise operated for profit. You receive a salary and likely other compensation related to your employment with the Community Services District, but "income" as defined in Section 82030(b)(2) does not include salary and reimbursement for expenses received from a state, federal or local government agency. The only interest we must examine is whether you may have a personal financial interest in the surplus building sale decision.

Foreseeability

A financial effect on a public official's economic interest is reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official

or the official's agency. (Regulation 18701(a).) An economic 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 economic interest, and includes any governmental decision affecting a real property economic interest as described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).)

Where, as the facts indicate here, a public official's economic interest is not explicitly involved in the decision, a different standard for determining the reasonable foreseeability of a financial effect is applicable. Under Regulation 18701(b), "[a] financial 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. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

Regulation 18701(b) also provides factors that should be considered in determining whether a governmental decision will have a reasonably foreseeable financial effect on a financial interest not explicitly involved in a decision. Among those factors, under Regulation 18701(b)(1), is "[t]he extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency."

Materiality: Personal Financial Effect

Regulation 18702.5(a) provides that a governmental decision's reasonably foreseeable financial effect on a public official's financial interest in personal finances or those of immediate family, also referred to as a "personal financial effect," is material if the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision.

Based on the facts provided, there is no indication that the School District's surplus building sale decision may affect your personal finances, and there is no indication that you will personally receive a benefit or loss due to the sale. Accordingly, you do not have a financial interest in the School District's decision to sell the surplus building to the agency that employs you under the Act. However, as noted below, you may not take part in the decision and must recuse yourself from the decisions under Government Code Section 1090.

Additionally, you have asked, as a general matter, whether you must recuse yourself from any School District decision involving funding to the Community Services District. Generally, you will be required to recuse yourself from taking part in any School District decision in which you have a financial interest. To the extent that the only financial interest you have involved in the decision is an effect on your personal finances (including your government income), you may not participate in the decision if it is reasonably foreseeable that the decision will have a material financial impact, a benefit or loss of \$500 or more in any 12-month period due to the decision.³ In that event, you must recuse yourself, publicly identify each financial interest that gives rise to the

³ Please note that Regulation 18702.5(b) provides certain exceptions, for example where the decision would result in the payment of the official's travel expenses incurred while attending a meeting as an authorized representative of an agency.

conflict, leave the room, and refrain from any participation in the decision. (Regulation 18707.) Please seek additional advice as needed for future decisions. Also, please note that taking part in a decision includes the making of the decision; participating in the decision by means of providing information, an opinion, or a recommendation for purposes of affecting the decision; or using one's official position to attempt to influence a decision. (Regulation 18704.)

Section 1090

Section 1090 is a separate body of law which requires a separate analysis of the financial interests involved where the decision involves a public officer or employee's participation in the making of a contract. 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. 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.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body, and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

As a School District board member and as an employee of the Community Services District, you are a public officer subject to the provisions of Section 1090 and the surplus building sale decision involves a contract. Additionally, due to your status as a School District board member, you are presumed to be involved in the making of all contracts by the School District irrespective of whether you actually participate in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the determinative question is whether you have a financial interest in the decision involving the School District and the Community Services District and, if so, whether your interest is a "remote interest" or a "noninterest" as defined in Sections 1091 and 1091.5.

Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state that 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. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) The California Supreme Court in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050 stated that the situation "where public officials on behalf of a public entity participate in making a contract with a second entity for which they work, the scenario poses at least the risk that the officials will be compromised by serving 'two masters.'" (*Lexin, supra*, at p.1075, citing *Thomson, supra*, at p. 645 and fn. 14 [additional citations omitted].)

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091 or a "noninterest," as defined in Section 1091.5. If a remote interest is present, the contract may be made if: (1) the officer discloses the interest in the contract to his or her public agency; (2) that interest is noted in the agency's official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a).) If a noninterest is present, the contract may be made without the officer's abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.)

Contracts Involving Board member of One Agency and Employee of Second Agency.

The Legislature has addressed the issue of a public officer's involvement in a contract between two government agencies, where the public officer is employed by one agency and serves as a member of a body or board contemplating a contractual relationship, and defined circumstances where the interest may be deemed a "noninterest" or a "remote" interest.

A public officer has a "noninterest" in the contract where the public officer has a government salary interest in one agency and the contract does not affect the department that employs the officer, under Section 1091.5(a)(9). This section provides:

An officer or employee shall not be deemed to be interested in a contract if his or her interest is . . . the interest of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

The surplus building sale contract decision will affect the Community Services District where you are employed as the General Administrator, and thus will affect your "department." Your interest does not meet the noninterest exception in Section 1091.5(a)(9).

However, Section 1091(b)(13) states that a public officer has only a "remote interest" in a contract where the interest is that of "a person receiving a salary, per diem, or reimbursement for expenses from a government entity."

The California Supreme Court in *Lexin, supra*, examined the application of the two "government employment" sections and found as follows:

The result is a logical statutory scheme. If a contract an official considers in his or her official capacity is with the official's government employer and involves direct financial gain, the official is prohibited from participating under section 1090. If the contract involves no direct financial gain, but is with or affects the official's own department, the official's interest is a remote interest under section 1091, subdivision (b)(13) and subject to the disclosure and recusal requirements of section 1091. Finally, if the contract involves no direct financial gain, does not directly affect the official's employing department, and is only with

the general government entity for which the official works, the interest is a minimal or noninterest under section 1091.5(a)(9) and no conflict of interest prohibition applies.

(Lexin, supra, at p. 1081.)

Because the contract to sell the surplus building will affect the Community Services District, of which you are the General Administrator, you will have a remote interest in the decision. The School District may make the agreement; however, you must disclose your interest in the contract to the School District; the interest must be noted in the School District's board records; and you must abstain from any participation in the making of the contract. (Section 1091(a).)

As to future funding decisions, we recommend you seek advice, as needed, for those issues. We do not provide general advice under Section 1090.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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