



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

March 17, 2023

Keith F. Collins
Deputy City Attorney
City of Fullerton
6349 Auburn Blvd.
Citrus Heights, CA 95621

Re: Your Request for Advice
Our File No. A-23-040

Dear Mr. Collins:

This letter responds to your request for advice regarding the Political Reform 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.

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 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, may Fullerton City Councilmember Shana Charles take part in the City's contracting process with California Statute University, Fullerton, to extend the City's lease of University-owned property, given that Councilmember Charles is employed by the University as a tenured professor?

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

Yes. Under the Act, the compensation Councilmember Charles receives from the University is not considered “income” and, therefore, does not constitute a potentially disqualifying source of income interest. Additionally, under Sections 1090 and 1091.5(a)(9), as long as Councilmember Charles’s employment with the University is disclosed to the City Council and noted in its records, the councilmember does not have a financial interest in the potential contract because the contract would have no direct financial benefit on Councilmember Charles and would not affect her department.

FACTS AS PRESENTED BY REQUESTER

Shana Charles is member of the City Council for the City of Fullerton (“City”). Councilmember Charles is employed as a tenured professor at California State University, Fullerton (“CSUF”). All employment decisions relating to Councilmember Charles’s work at CSUF are made by CSUF’s Department of Public Health and the Dean of the College of Health and Human Development, specifically.

The City currently leases a portion of real property from CSUF and, in turn, the City subleases the property to Marriot for the operation of a hotel. Marriot is seeking to extend the sublease, which would require the City to negotiate an extension of the lease with CSUF. This negotiation would likely include discussions on revenue sharing between the City and CSUF, which could result in CSUF receiving additional revenues up to \$150,000.

ANALYSIS

The Act

Under Section 87100 of the Act, “[a] public official at any level of state or local government shall not make, participate in making or in any way attempt to use the official’s position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of the official’s immediate family,” or on certain specified economic interests. (Section 87103.) These economic interests include “[a]ny source of income . . . aggregating five hundred dollars (\$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).) However, the Act’s definition of “income” does include “[s]alary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency” (Section 82030(b)(2).)

As a professor at a public university, Councilmember Charles’s income and benefits are received from a state governmental agency. Therefore, although a contract between the City and CSUF involves Councilmember Charles’s employer, the contract would not implicate a potentially disqualifying source of income interest. Accordingly, the Act does not prohibit Councilmember

Charles from taking part in a contract between the City and CSUF pertaining to an extension of the City's lease.

Section 1090

Under Section 1090, public officials “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 a member.” 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.) 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, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

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. Relevant here is Section 1091.5(a)(9), which provides that an officer or employee shall not be deemed to be interested in a contract where the officer's interest is “[t]hat 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.” In *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081, the California Supreme Court determined that this exception applies when “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.” Thus, an official or employee has a noninterest in the government-entity employer under Section 1091.5(a)(9), provided that: (1) the contract at issue involves no direct financial gain to the official or employee, (2) the contract does not affect the official's or employee's department, (3) the interest is disclosed to the body or board at the time the contract is considered, and (4) the interest is noted in the body or board's official record.

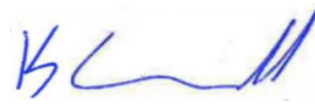
Here, the contract at issue involves no direct financial gain to Councilmember Charles, as her position is that of a tenured professor and employment decisions related to her position are made by the Dean of the College of Health and Human Development. The contract also does not involve Councilmember Charles's department at CSUF, the Department of Public Health. Accordingly, as long as Councilmember Charles's employment with CSUF is disclosed to the City Council at the time the contract is considered and that interest is noted in the City Council's official record, Section 1090 does not prohibit Councilmember Charles or the City Council as a whole from contracting with CSUF to extend the City's lease of CSUF property.

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

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

KMC:aja