



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 22, 2023

Derek P. Cole
City Attorney, City of Oakley
COLE HUBER LLP
2281 Lava Ridge Court, Suite 300
Roseville, CA 95661

Re: Your Request for Advice
Our File No. A-23-059

Dear Mr. Cole:

This letter is in response to your request for advice regarding conflict-of-interest provisions of the Political Reform Act¹ and Section 1090, et seq. 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. 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 Contra Costa 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

Do the conflict of interest provisions of the Act or Section 1090 prohibit City of Oakley (the City) officials Mayor Aaron Meadows, Vice Mayor Anissa Williams, Councilmember Hugh Henderson or Councilmember Shannon Shaw (collectively the City Officials) from taking part in decisions by the City Council regarding the City's request for proposals for a vendor to serve as concessionaire at City events for the next year, where each of these officials is an uncompensated officer of a bidding nonprofit organization?

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

No. Neither the Act nor Section 1090 prohibit the City Officials from taking part in decisions by the City Council regarding the City's request for proposals for a vendor to serve as concessionaire at City events for the next year, where each of these officials is an uncompensated officer of a bidding nonprofit organization.

FACTS AS PRESENTED BY REQUESTER

The City of Oakley is currently soliciting proposals from qualified nonprofit organizations to operate beer and wine beverage concessions at four City of Oakley events over the next year. These events are the Oakley Summer Fest, Heart of Oakley Festival, Harvest Festival, and the Jingle Ball. The City is also seeking a vendor for its "Concerts in the Park" series. City staff prepared a request for proposals and intends to present an item at a City Council meeting to select a single vendor to serve as concessionaire at these events. Four City Councilmembers are officers of nonprofit organizations that have submitted bids to serve in this capacity.

These councilmembers include Vice Mayor Anissa Williams, who serves as the president of East County All Star Fundraising, a 501(c)(3) nonprofit, that raises money to cover and offset the costs associated with various children's sports and extracurricular activities in the community for families in need. More than half of the recipients of funding are City of Oakley families participating in City of Oakley organizations. Vice Mayor Williams does not receive any form of compensation for her role as president of this non-profit organization.

In addition, Mayor Aaron Meadows and Councilmembers Hugh Henderson and Shannon Shaw serve as uncompensated club leaders of the Oakley chapter of the Rotary Club. The Rotary Club is a registered 501(c)(4) nonprofit organization providing humanitarian services and helping build goodwill in the community. More specifically, the Rotary Club's work includes supporting the residents and the City through volunteer service, such as organizing blood drives, assisting with local business development, providing grants to local teachers, and funding student exchange programs.

ANALYSIS

A. The Act.

The Act's conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using his or her 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).)

Section 87103 of the Act lists several types of financial interests that can give rise to a conflict of interest, including:

- An economic interest in a business entity² in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18702.1); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18702.2.)
- An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18702.3.)
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$590 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18702.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family. (Section 87103; Regulation 18702.5.)

According to the facts, the City Officials receive no compensation for their services in their roles with their respective nonprofit organizations and thus do not have a source of income interest. The City Officials also do not have a business interest in their respective nonprofit organizations because a nonprofit organization is not a “business entity” as defined by the Act. (Section 82005.) Finally, there are no facts suggesting that decisions related to the City Officials’ respective nonprofit organizations will have any financial effect on any of their personal finances. Thus, based on the facts provided, the City Officials do not have a disqualifying conflict of interest under the Act that would prohibit them from participating in decisions by the City Council regarding the City’s request for proposals for a vendor to serve as concessionaire at City events for the next year.

B. 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) 103Cal.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.) Finally, 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).)

² Section 82005 defines a “business entity” as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.

Here, the City has prepared a request for proposals and intends to present an item at a City Council meeting to select a single vendor to serve as concessionaire at City events for the next year. Four City Councilmembers are officers of non-profits that have submitted bids to serve in this capacity. The question, therefore, is whether Section 1090 would prohibit the City Officials from taking part in the decision based on their affiliations with their respective nonprofit organizations.

The Legislature has created various statutory exceptions to Section 1090's prohibition where the interest involved is deemed a "remote interest," as defined in Section 1091 or a "noninterest," as defined in Section 1091.5. If a noninterest is present, the public official's abstention is generally not required, and the contract may be made by the agency.

Relevant to the facts provided, Section 1091.5(a)(8) establishes that an officer is not interested in a contract if his or her interest is:

That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

Here, Vice Mayor Williams is a noncompensated president of East County All Star Fundraising, a 501(c)(3) nonprofit that raises money to cover and offset the costs associated with various children's sports and extracurricular activities in the community for families in need. More than half of the recipients of funding are City of Oakley families participating in City of Oakley organizations. Such a purpose supports the functions of the City by promoting a variety of programs for the City's youth. Based on these facts, Vice Mayor Williams would have a noninterest in a decision by the City Council regarding RFP respondents, including East County All Star Fundraising. However, in order to participate in these decisions, she must disclose her interest in the official records of the City Council.

Mayor Meadows and Councilmembers Henderson and Shaw serve as uncompensated club leaders of the Oakley chapter of the Rotary Club. The Rotary Club is a registered 501(c)(4) nonprofit organization providing humanitarian services and helping build goodwill in the community. More specifically, the Rotary's work includes supporting the residents and the City through volunteer service, such as organizing blood drives, assisting with local business development, providing grants to local teachers, and funding student exchange programs.

The Rotary Club's purposes support the functions of the City by promoting a variety of programs for the City's residents. Thus, based on these facts, Mayor Meadows and Councilmembers Henderson and Shaw would have a noninterest in decisions by the City Council regarding the City's request for proposals to select a single vendor to serve as concessionaire at City events for the next year, including the Rotary Club. However, in order to participate in these decisions, Mayor

Meadows and Councilmembers Henderson and Shaw must disclose their respective interests in the official records of the City Council.

Accordingly, under Section 1090, Vice Mayor Williams has a noninterest in any City contracts involving East County All Star Fundraising, and Councilmembers Henderson and Shaw and Mayor Meadows have a noninterest in any City contracts involving the Rotary Club.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

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