



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 7, 2024

Alisha Patterson
City Attorney
City of Laguna Woods
Rutan & Tucker, LLP
18575 Jamboree Road, 9th Floor
Irvine, CA 92612

Re: Your Request for Advice
Our File No. A-24-022

Dear Ms. Patterson:

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 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 Orange 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

Does the Act or Section 1090 prohibit Mayor Noel Hatch from participating in City decisions relating to a lease, access easement, and/or discretionary land use entitlements that are all associated with the Orange County Fire Authority (“OCFA”), where Mayor Hatch is a member of OCFA’s Board of Directors and receives a stipend from OCFA?

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. Under the Act, the compensation Mayor Hatch receives from OCFA 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 Mayor Hatch’s membership on the OCFA Board is disclosed to the City Council and noted in its records, he does not have a financial interest in the future contracts because the contracts would have no direct financial benefit to him as a member of the OCFA Board and would not affect a department that employs him.

FACTS AS PRESENTED BY REQUESTER

Your firm is the City Attorney for the City of Laguna Woods (the “City”), a California municipal corporation. You are submitting this request on behalf of Mayor Hatch.

Mayor Hatch is an elected City Councilmember for the City, and he is the City’s appointed representative on the Board of Directors for OCFA, a joint powers authority comprised of twenty-five member agencies.² Mayor Hatch receives stipends from both the City and OCFA. The City stipend is \$300 per month (i.e., \$3,600 per year). The OCFA stipend is \$100 per meeting, up to \$3,600 per calendar year.

The City and OCFA would like to enter a lease by which the City would lease City property to OCFA for a new fire station. The lease would need to be negotiated and approved by both the City Council and the OCFA’s Board of Directors. The City anticipates the new fire station will also require the City Council to approve an access easement with an adjacent property owner (although OCFA would not be a party to the assess easement, the City anticipates that obligations set forth in the access easement would be made the responsibility of OCFA in the lease agreement) and certain discretionary land use entitlements (such as use permits and approval of design review). These dual roles will place Mayor Hatch in a situation of having to represent the interests of each agency in the negotiation and/or approval of the lease, easement, and land use entitlements. With respect to the lease and easement, Mayor Hatch could also be privy to confidential closed session deliberations on real property negotiations with each agency.

ANALYSIS

The Act

The Act’s conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official’s financial interests, distinguishable from the decision’s effect on the public generally. (Sections 87100 and 87103.) These interests include an interest in a source of income, aggregating five hundred dollars (\$500) or more in value provided or promised to, or received by, the public official within 12 months prior to the time when the decision is made.

² Per OCFA’s Joint Powers Agreement, the OCFA Board of Directors must be comprised of one representative from each of the twenty-four city member agencies and two representatives from the county member agency. Each representative must be a current elected representative of the governing board of the member agency.

(Section 87103(c).)³ However, the Act’s definition of “income” does not 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 member of OCFA’s Board, Mayor Hatch’s stipend is received from a local government agency. Therefore, the future decisions concerning the aforementioned lease, easement, and land use entitlements between the City and OCFA would not implicate a potentially disqualifying source of income interest. Accordingly, the Act does not prohibit Mayor Hatch from taking part in those decisions.

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 any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective 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, 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.) Importantly, when Section 1090 is applicable to one member of a governing body of a public entity, the prohibition typically 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.)

Mayor Hatch is a public officer subject to the provisions of Section 1090. Additionally, as a member of the City Council, he is presumed to be involved in the making of all contracts by the City irrespective of whether he actually participated in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Therefore, the initial question is whether he has a financial interest in contract decisions involving the City and OCFA.

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.) Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from

³ In addition, we note that while an official always has an interest in the official’s personal finances or those of immediate family, also referred to as a “personal financial effect,” there is no suggestion from the facts that the relevant decisions will affect the personal finances of Mayor Hatch or his immediate family, and we do not address this issue further.

exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall, supra* at p. 569.)

In order to determine whether Mayor Hatch, the City's appointed member of the OCFA Board, has a financial interest in the future contracts between the City and OCFA, it is appropriate to look to the definitions of the remote and noninterest exceptions contained in Sections 1091 and 1091.5 for guidance in determining what falls within the scope of the term "financial interest" as used in Section 1090. (See 85 Ops.Cal.Atty.Gen. 34, 36 (2002).) In this regard, 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.)

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, as mentioned, there is no suggestion from the facts that the contracts at issue involve direct financial gain to Mayor Hatch. The contract also does not involve a department at OCFA that employs Mayor Hatch, as he is merely a member of the OCFA Board. (See, e.g., *Conflicts of Interest*, Office of the Attorney General (2010) at p. 75 ["(w)hen the official in question is a member of the governing board, and not a member of a 'department' of the agency, the official would have a noninterest in the contract between the two agencies. For example, a member of a county board of supervisors who also serves as a member of a children and families commission has a noninterest in contracts between the two agencies because the 'department' limitation does not apply"]; see also *Salinas* Advice Letter, No. A-23-056.)

Accordingly, as long as Mayor Hatch's position as a member of the OCFA Board is disclosed to the City Council at the time the subject contracts are considered and that interest is

noted in the City Council's official record, Section 1090 does not prohibit him from taking part in decisions concerning the subject contracts with OCFA.⁴

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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⁴ Note that Mayor Hatch would be required to follow the same procedure with OFCA in considering the City contracts.