



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 25, 2024

Natalie A. Duke
Deputy County Counsel
Office of Humboldt County Counsel
825 Fifth Street
Eureka, CA 95501

Re: Your Request for Advice
Our File No. A-24-112

Dear Ms. Duke:

This letter responds to your request for advice regarding the Political Reform Act (“Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, and not under other general conflict of interest prohibitions such as common law conflict of interest, including the 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. Finally, the Commission is not authorized and does not provide advice concerning past conduct. (Section 1097.1(c)(2) and 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 Humboldt 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 Humboldt County (“County”) from entering into the proposed Relinquishment Agreement with the California Department of Transportation (“Caltrans”) to accept the State Right-of-Way/Highway constructed under the 2007 Freeway Agreement, where the Fair Political Practices Commission (“Commission”) determined in 2013 that the County Public

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.

Works Director Mattson violated the Act in participating in the Freeway Agreement decision due to his real property interest located adjacent to the Project?

CONCLUSION

No. The Act does not prohibit the County from making the Relinquishment Agreement, so long as Director Mattson does not make, participate in making, or attempt to influence the decision in his official capacity and will properly recuse himself from the decision-making process, as described below. Section 1090 is not applicable to the Relinquishment Agreement as Director Mattson does not have a financial interest in the contract solely due to his real property interest adjacent to the Project roads subject to relinquishment.

FACTS AS PRESENTED BY REQUESTER

On May 22, 2007, Thomas Mattson, acting in his capacity as Public Works Director for the County of Humboldt (“County”) executed a Freeway Agreement between the County and the Caltrans. The 2007 Freeway Agreement superseded portions of two previous Freeway Agreements, from 1967 and 1958. In the 2007 agreement Caltrans agreed to perform a construction project on Highway 101/State Route 36, which involved making changes to, and acquiring rights of way required for, the construction, reconstruction or alteration of County, local and frontage roads. (“Project”). As a part of this Project, Caltrans constructed new frontage improvements to Sandy Prairie Road which aligned it to State Route 36. The County agreed to accept control and maintenance of each road upon notice of completion and, upon relinquishment by Caltrans, title (in part) to such roads.

County Public Works Director Mattson’s residential real property is located adjacent to a portion of Sandy Prairie Road, the frontage road noted above, that was improved by Caltrans as a part of the 2007 Freeway Agreement. Following a complaint filed in January, 2013, the Commission’s Enforcement Division sent correspondence to Director Mattson on May 24, 2013 regarding his possible Section 87100 conflict of interest in the negotiation of the Freeway Agreement with Caltrans in May of 2007. In the course of its investigation, the Enforcement Division determined that Director Mattson participated in the Freeway Agreement although he held a disqualifying interest as a real property owner near the Project and, therefore, violated the Act. The letter concluded that the statute of limitations to initiate an administrative proceeding for enforcement of the Act had lapsed,² and the Enforcement Division would bring no further enforcement action in the matter. This conclusion was caveated in that the Commission reserved its right to bring future enforcement action based on future conduct or newly discovered information.

Since this investigation, Caltrans has completed construction on the highway. As such, as of January 2024, it now seeks to enforce the terms of the Freeway Agreement and have the Board of Supervisors pass a “Resolution to enter into a Relinquishment Agreement” to accept the State Right-of-Way/Highway to the County, for portions of the Highway 101 improvements to Sandy Prairie Road and Drake Hill Road associated with the Project. County staff notes that accepting the relinquishment will increase the mileage of Sandy Prairie Road by approximately .4 of a mile and

² See Section 91000.5, which states that an administrative action alleging a violation of the Act shall not be commenced more than five years after the date on which the violation occurred.

bring the new roadway segments into the County Maintained Road System.³ Approximately 26 properties are served by the two roads.

Under the circumstances, the County is not clear whether the Enforcement Division's finding – that Director Mattson has a disqualifying interest in the decision under Section 87100 - voids the Freeway Agreement. The County has informed Caltrans of the possible issues in relying on the 2013 Freeway Agreement and has worked with Caltrans to propose a solution that seeks to conform to the Act and Commission guidelines.

The County has a separate and distinct interest in accepting the relinquishment of the state highway. It seeks to cure any defects in the contract and proceed forward with accepting the relinquishment. The Board of Supervisors proposes to sign the Relinquishment Agreement provided with this request. The County would do so, treating this as an agreement separate and independent from the Freeway Agreement. The Freeway Agreement would not be incorporated by reference and new terms would be proposed consistent with the requirements in the California Streets and Highways Code. While Director Mattson still holds the position of Director of Public Works, he has recused himself from this Project and has had no further participation in this Project. As such, Director Mattson would not execute this agreement. This responsibility would be kept by the Board of Supervisors and the Chair of the Board would sign the Relinquishment Agreement.

The County now seeks advice as to whether the proposed course of action is appropriate in light of the 2013 findings. The County seeks to assuage both concerns that there would not be individual liability for Director Thomas Mattson and that the County would be entering an enforceable contract consistent with both the Act's requirements and public policy by taking this proposed course of action.

ANALYSIS

The Act

Section 87100 prohibits 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. 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 real property in which the public official has a direct or indirect interest worth more than \$2,000 or more. (Section 87103(b)). Director Mattson has a real property interest in his residence, located adjacent to the Project.

We do not provide advice on conduct that has already occurred. Therefore, we do not provide advice on the County's Freeway Agreement. However, we note that where a decision is made involving an official with a financial interest in violation of Section 87100, a court may set

³ County staff also notes that the alternative to accepting the relinquishment under state law is for the County to protest it under California Streets and Highways Code, Section 73. Typically this occurs where the local agency objects to Caltrans' denial of requested improvements. (See Proposed Relinquishment Staff Report, p. 3)

the official action aside as void “[i]f it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved.” (Section 91003(b).) Section 91011(b) states that the statute of limitation for a civil action alleging a violation of the Act⁴ is four years after the date the violation occurred. The facts do not indicate that any action-administrative or civil-other than the 2013 complaint and resulting letter coming six years after the date of the Freeway Agreement, has been brought.

The County seeks advice on whether it can now make decisions regarding the proposed Relinquishment Agreement with Caltrans, which grew out of the 2007 Freeway Agreement and Project. We treat this as a separate decision, with a purpose limited to the County accepting responsibility for the constructed County roads, and we examine whether the Act would prohibit this decision. Director Mattson has a financial interest in real property located near the Project; however, the facts state that he has recused himself from the Project and will not execute the Relinquishment Agreement. Under the Act, a decision is not prohibited, even where it is reasonably foreseeable that the decision would have a material financial effect on an official’s financial interests, if the official does not make, participate in making, or use their official position to influence the governmental decision and the official publicly recuses themselves from the decision, as described below.

Making, Participating in, or Influencing a Governmental Decision

Regulation 18704(a)-(c) provides the definition of “making, participating in making, or using their official position to influence a governmental decision.”⁵ A public official “makes a governmental decision” if the official authorizes or directs any action, votes, appoints a person, obligates or commits the official’s agency to any course of action, or enters into any contractual agreement on behalf of the official’s agency.

A public official “participates in a governmental decision” if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.

Lastly, a public official “uses their official position to influence a governmental decision” if the official either contacts or appears before any official in the official’s agency (or in an agency subject to the authority or budgetary control of the official’s agency) for the purpose of affecting a decision; or contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within the official’s authority or on behalf of the official’s agency in making the contact.

Disqualification Requirements

In addition to the above-prohibited actions, Regulation 18707 sets forth the disqualification requirements applicable to a public official specified under Section 87200, which includes “chief administrative officers of counties,” and therefore applies to Director Mattson. Regulation 18707

⁴ This pertains to a civil action unrelated to an audit or the Franchise Tax Board report.

⁵ Note that these actions do not include actions by a public official that are solely ministerial, secretarial, or clerical; or appearances made as a member of the general public, as permitted in Regulation 18704(d).

requires that, in addition to not taking part in the decision, the official's recusal from a public meeting must include the public identification of the financial interest that gives rise to the conflict of interest immediately prior to the consideration of the agenda item, and then the official must leave the room.⁶

We advise that the Act does not prohibit the County from making the Relinquishment Agreement in order to accept the State Right-of-Way/Highway from Caltrans, and there is no concern of a conflict of interest violation, where Director Mattson does not take any of the actions described in Regulation 18704(a)-(c) regarding the decision and properly recuses himself from a public meeting, as required under Regulation 18707.

Section 1090

There is a second type of prohibition relating to contract decisions that we must examine in considering the County's Relinquishment Agreement.⁷ 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." 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.) Where a prohibited interest is found, the affected contract is "void from its inception," regardless of "whether the terms of the contract are fair and equitable to all parties." (*Thomson v. Call* (1985) 38 Cal.3d 633, pp. 646-649.) 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.) Virtually all board members, officers, and employees are public officials within the meaning of section 1090. (See, e.g., *Thomson v. Call, supra*.)

It is not disputed that Director Mattson is subject to Section 1090 in his employee capacity. When an employee, rather than a board member,⁸ is financially interested in a contract, the

⁶ If the matter is on the consent calendar, the official may remain in the room during the consent calendar. If the matter is for "closed session," the declaration must be made orally during open session, and may be limited to noting the recusal is because of a conflict of interest under Section 87200. The official must not be present when the decision is considered in closed session. For other decisions, the official's recusal must make an oral or written After disclosing the financial interest, the official may not be counted for a quorum and may not attend a closed meeting of the agency. (Regulation 18707.)

⁷ As stated above, we do not provide advice regarding the previously executed Freeway Agreement. Further, we note that a Section 1090 prohibition was not addressed in the May 2013 Freeway Agreement letter. The Commission did not have jurisdiction over Section 1090 issues until 2014. We note that similar to the statute of limitations for violations of the Act, a civil action brought by the Commission for a Section 1090 violation must not be filed more than four years after the date the violation occurred. (Section 1097.3 (c).) A contract made in violation of Section 1090 may be avoided; however, this action must be commenced within four years after the plaintiff discovered or should have discovered the violation. (Section 1092(b).) Additionally, the passage of time can render the contract immune from a Section 1090 violation challenge. (*Brandenburg v. Eureka Redevelopment Agency* (2007)152 Cal.App.4th 1350.) The facts do not indicate that any action under Section 1090 and the Freeway Agreement has been brought.

⁸ 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. (*Thomson v. Call, supra*, pp. 647-649.)

employee's agency is prohibited from making the contract only if the employee was involved in the contract-making process. Therefore, as long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from making the contract in which the employee has a financial interest. (See for example, 80 Ops.Cal.Atty.Gen. 41 (1997) [firefighters permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity]; 63 Ops.Cal.Atty.Gen. 868 (1980) [real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal]. Participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. Taft* (1962) 58 Cal.2d 565, 569.)

However, as a threshold issue, for Section 1090 to apply, the public official in question must have a financial interest in the contract in question. 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. (*Thomson v. Call, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

We have previously advised under Section 1090, that an official has a financial interest in a contract only when there is a sufficient connection between the contract in question and the interest held by the official. In *Bordsen* Advice Letter, No. A-1 7-059, we advised for the purposes of Section 1090 that several officials did not have a financial interest in a contract involving a Highway 99 corridor project agreement between a city and Caltrans, which involved frontage road improvements affecting the officials' real properties and business interests, simply because the officials' interests were adjacent to the project and would peripherally benefit along with numerous other properties and business along the route. In *Collins* Advice Letter, No. A-17-184, we advised that several officials did not have an interest in a contract to slurry-seal all residential neighborhoods, including their residential street, where the officials' properties would peripherally benefit from the contract along with all residential streets in the jurisdiction.

The Relinquishment Agreement will involve the County assuming responsibility for the improved segment of Sandy Prairie Road, a frontage road, from Caltrans, and Director Mattson owns residential property adjacent to this road. The proximity of his property ownership interest alone, to a road that will transfer to the County for responsibility, does not establish that Director Mattson has a financial interest in the Relinquishment Agreement under Section 1090.

Therefore, we advise that Section 1090 does not prohibit the County from making decisions and entering into the Relinquishment Agreement with Caltrans because there is no indication that Director Mattson's real property interest near the roads affected meets the definition of a "financial interest" in the contract 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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