



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 23, 2023

Blaine R. Cox
Damrell, Nelson, Schrimp, Pallios & Silva
1601 I Street, Fifth Floor
Modesto, CA 95354

Re: Your Request for Informal Assistance
Our File No. I-22-106

Dear Mr. Cox:

This letter responds to your request for advice on behalf of Calaveras County Supervisor Martin Huberty regarding the conflict-of-interest provisions of 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, not under other general conflict-of-interest prohibitions such as common law conflict of interest. Because your question is general in nature, we are treating your request as one for informal assistance.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.

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 Calaveras 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).)

QUESTIONS

1. May the Supervisor participate in contract negotiations and enter contracts with the County as an employee of the Calaveras Visitors Bureau (“CVB”) if he has recused himself on such matters as a County Supervisor?

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 Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

2. May the Supervisor participate and vote on matters, as a County Supervisor, pertaining to CVB, which do not involve a contractual award or compensation to CVB?
3. May the Supervisor publicly advocate for the CVB as a County Supervisor?

CONCLUSION

The Act prohibits Supervisor Huberty from participating in any decisions if it is reasonably foreseeable the decision will have a material financial effect on his nonprofit employer and source of income. Generally, the Supervisor is prohibited from taking part in any decision in which CVB is explicitly involved, including any contract with the nonprofit because it is reasonably foreseeable the contract will have a material effect on the source of income. Supervisor Huberty is also generally prohibited from contacting or appearing before any county officer or employee to influence a decision in which CVB is explicitly involved. Accordingly, the Supervisor may not take part in contract negotiations between the County and CVB, and any other matters in which CVB is explicitly involved, regardless of whether he has recused himself from the decision as a County Supervisor. Additionally, if the Supervisor needs additional assistance regarding matters in which CVB is not explicitly involved, he should seek further advice identifying the specific decision. The Act, however, does not prohibit statements made only to the general public or media.

Turning to Section 1090, you have not identified a particular contract between the County and CVB and we cannot provide specific advice regarding Section 1090 at this time. Generally, Section 1090 prohibits Supervisor Huberty, as well as the County, from entering a contract in which the Supervisor has a financial interest unless an exception applies. However, while we can express no specific opinion regarding an unidentified contract, we do note that Section 1091(b)(1) provides that an officer or employee of a nonprofit corporation or Internal Revenue Code Section 501(c)(3) entity has only a remote interest in the contracts, purchases, and sales of that nonprofit entity. Under this exception, the governing board of an agency is not prohibited from entering a contract, if the member with a financial interest discloses the interest to the board, the interest is noted in the board's official records, and the official abstains from the contracting process.³ If the County or the Supervisor needs additional assistance regarding Section 1090 and a specific contract with CVB, they should seek further advice once the contract is identified.

FACTS AS PRESENTED BY REQUESTER

Supervisor Huberty was elected to the Calaveras County Board of Supervisors, as the Supervisor for District 3, on June of 2022 and took office on January 2, 2023. Supervisor Huberty is currently, and intends to remain, the Executive Director of the Calaveras Visitors Bureau, a California nonprofit mutual benefit corporation exempt from taxation under Section 501(c)(6) of the Internal Revenue Code, which provides marketing and other services related to tourism in Calaveras County. You have stated that the County does not consider CVB to be a governmental

³ We note that under the Act, an official must recuse following the procedure outlined in Regulation 18707, which also requires the official to announce the interest and leave the room during the discussion and vote.

entity.⁴ You have also stated that CVB contracts with and receives funds from the County. A portion of funding for CVB also comes from the City of Angel's Camp.

Supervisor Huberty is the Executive Director of CVB. He receives financial compensation from the CVB for his employment with that organization. The CVB board determines the budget for CVB and the salary of Supervisor Huberty.

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 public 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 a specified economic interest, including any source of income aggregating five hundred dollars (\$500) or more in value provided or promised to or received by the official within 12 months prior to the time when the decision is made. (Section 87103(c).)

Pertinent to these facts, Supervisor Huberty has an interest in his own personal finances, as well as a source of income interest in CVB as its Executive Director. However, he does not have a business entity interest in the CVB because the definition of “business entity” under Section 82005 excludes non-profit organizations.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency.” It further provides that a financial 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 financial interest. This also includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).

Where an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides:

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

⁴ We do not address whether CVB may be a government entity under the criteria for determining whether an entity is governmental in character, as found in the Commission’s opinion *In re Siegel* (1977) 3 FPPC Ops. 62 as we do not have the information available to make that determination. Accordingly, this advice is provided based upon the facts provided including the County’s determination that CVB is not a governmental entity.

cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.

Under Regulation 18702.5, a governmental decision's reasonably foreseeable financial effect on a public official's financial interest in the official's 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. (Regulation 18702.5(a).)

Regulation 18702.3 provides the standards for determining the materiality of a financial effect on a non-profit source of income. Under that regulation, a reasonably foreseeable financial effect on a non-profit source of income is material if the decision may result in an increase or decrease of the organization's annual gross receipts, or the value of organization's assets or liabilities, in an amount equal to or more than: (1) \$1,000,000 or (2) five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than \$10,000. (Regulation 18702.3(a)(3)(A).)

Additionally, Regulation 18702.3 provides the standards for determining the materiality of an official's financial interest in a source of income where there is a "nexus" between the official's income and the governmental decision. Under the "nexus test," any reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal. (Regulation 18702.3(b).)

A public official disqualified from a governmental decision based on a conflict of interest is not merely prohibited from voting on the item. The official is also prohibited from making, participating in making or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. (Section 87100.) "A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency." (Regulation 18704(a).) "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." (Regulation 18704(b).) A public official uses his or her official position to influence a governmental decision if he or she:

- (1) Contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or
- (2) 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 his or her authority or on behalf of his or her agency in making the contact.

(Regulation 18704(c).)

Under these applicable regulations, Supervisor Huberty is generally prohibited from taking part in any decision in which CVB is explicitly involved, including any contract with the nonprofit because it is reasonably foreseeable the contract will have a material effect on the source of income. Supervisor Huberty is also generally prohibited from contacting or appearing before any county officer or employee to influence a decision in which CVB is explicitly involved. Accordingly, Supervisor Huberty may not take part in contract negotiations between the County and CVB, and any other matters in which CVB is explicitly involved, regardless of whether he has recused himself from the decision as a County Supervisor.

In regard to matters implicating CVB, in which CVB is not explicitly involved, any determination of disqualification would have to be based on the factual circumstances specific to the decision. Accordingly, we can express no opinion regarding Supervisor Huberty taking part in other matters in which CVB is not explicitly involved. If the Supervisor needs additional assistance regarding matters in which CVB is not explicitly involved, he should seek further advice identifying the specific decisions.

Making, participating in, or using position to influence a governmental decision does not include communications by a public official to the general public or media. Pursuant to Regulation 18704(d)(4), we have previously advised that a city councilmember may express the official's opinion to reporters and media outlets by writing a newspaper article or appearing on a radio program regarding the matter in which the official has a conflict-of-interest under the Act. (*Edelen* Advice Letter, No. 1-07-059 and *Acker* Advice Letter, No. A-01-117.) We have also advised that an official is free to discuss a project with the press, friends, neighbors or other members of the community, even if the official does so in an attempt to rally support or opposition to the project, unless they are members, officers, employees, or consultants of the city. (*Mizrahi* Advice Letter, No. A-12-036.) Accordingly, the Act does not generally prohibit statements made only to the general public or media so long as the statements are not made before any other supervisor, officer, employee, or consultant of the County.

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Therefore, "the test is whether the officer or employee participated in the making of the contract in (their) official capacity." (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1292 quoting *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 236-237.) The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the public entity's advantage. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) 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.) A contract that violates Section 1090 is void. (*Thomson, supra*, at p. 646.)

As a general rule, 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*, at pp. 647-649; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Participation is defined broadly and includes 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, supra*, at pp. 237; see also *Stigall, supra* at p. 569.) For example, an official (or a public employee) may be convicted of a violation of Section 1090 if it is established that he or she had the opportunity to, and did, influence execution of the contract directly or indirectly to promote his or her personal interests. (*People v. Sobel, supra* at p. 1052.)

Nonetheless, we can provide specific advice related to Section 1090 only if an actual contract is identified along with the factual circumstances pertaining to the decisions related to the contract. Generally, we can only advise that Section 1090 prohibits Supervisor Huberty, as well as the County, from entering a contract in which the Supervisor has a financial interest unless an exception applies. While we cannot determine whether an exception applies until a contract is identified, we note that Section 1091(b)(1) provides that an officer or employee of a nonprofit corporation or Internal Revenue Code Section 501(c)(3) entity has only a remote interest in the contracts, purchases, and sales of that nonprofit entity. Moreover, if a “remote interest” is present, the contract may be made if (1) the official in question discloses his or her financial interest in the contract to the public agency, (2) the interest is noted in the entity’s official records, and (3) the official abstains from any participation in the making of the contract. (Section 1091(a).)

If the Supervisor Huberty or the County needs additional assistance regarding Section 1090, and particularly whether the remote interest exception permits the County to enter any specific contract with CVB, provided the Supervisor abstains from the decisions, they should seek further advice once a contract is identified.

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

Sincerely,

Dave Bainbridge
General Counsel

Brian Lau for Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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