



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

April 30, 2021

Jeffrey Walter
City Attorney
City of Sonoma
670 W. Napa Street, Suite F
Sonoma, CA 95476

Re: Your Request for Advice
Our File No. A-21-055

Dear Mr. Walter:

This letter responds to your request for advice 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, including 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.

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 Sonoma 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 Sonoma City Councilmember Jack Ding from taking part in governmental decisions relating to a nonprofit organization given that he is a Board member and treasurer of the nonprofit?

CONCLUSION

No. Neither the Act nor Section 1090 prohibit Councilmember Ding from taking part in decisions concerning the nonprofit.

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 18110 through 18997 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.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Sonoma requesting advice on behalf of Councilmember Ding. The City Council's approval of a construction contract will likely be on the agenda for the City Council meeting scheduled for May 3, 2021. This contract is for the purpose of retaining a company to perform interior improvements and repairs to a building that houses the operations of Sonoma Overnight Support ("SOS"), a California non-profit, public benefit corporation. This building and the land on which it stands are owned by the City. SOS operates its homeless persons program from this building under a use permit granted to it by the City in 2005 and pursuant to a contract between SOS and the City entered in 2005.

Councilmember Ding has served both as a member of the SOS Board of Directors and as its treasurer for three years. He is uncompensated for his service. He receives no reimbursements from SOS for any expenses he incurs in providing the services he renders for it. Board membership is entirely voluntary. He provides free tax services to the SOS, considers them a donation, and claims the donation on his personal income tax returns.

The building out of which SOS operates its homeless program needs repairs, maintenance and improvements to its bathrooms and its other interior spaces. The City has secured a grant to fund the construction of these improvements and activities. The City staff proposes to have the City Council consider awarding the construction contract for these services at the Council's meeting on May 3, 2021. Additionally, the City is initiating the process to amend the use permit the City granted to SOS in 2005. Moreover, the contract between the City and SOS under which SOS operates its programs out of this building will likely need amending to be consistent with the amended use permit and its conditions.

Currently, SOS uses the building for the following purposes, and the amended use permit and contract are aimed at authorizing and conditioning same: 1) providing homeless persons showers and laundry facilities; 2) administrative offices and meeting spaces for SOS personnel; 3) navigation and referral services to homeless persons; 4) case management of homeless persons' needs for food, shelter, counseling, and medical services; and 5) occasional emergency overnight shelter for homeless persons.

ANALYSIS

The Act

Section 87100 prohibits 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. Pertinent to your facts, the Act's conflict of interest provisions apply to financial interests based on the following:

- An interest in a business entity² in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- The official's interest in his or her personal finances and those of immediate family members. (Section 87103.)

According to the facts, Councilmember Ding does not receive any compensation for his services as either a Board member or treasurer for SOS, and he receives no reimbursements from SOS for any expenses he incurs in providing those services. Therefore, he does not have an interest in SOS as a source of income. Additionally, Councilmember Ding does not have a business interest in SOS because, as a nonprofit organization, SOS is not a "business entity" as defined by the Act. (Section 82005.) Finally, there are no facts suggesting decisions related to SOS will have any financial effect on his personal finances. Therefore, based on the facts provided, Councilmember Ding does not have a disqualifying conflict of interest under the Act in future City Council decisions related to SOS.

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).)

The City Council will consider awarding a construction contract for the repair, maintenance and improvements to bathrooms and other interior spaces for the building out of which SOS operates its homeless program. Moreover, the contract between the City and SOS under which SOS operates its programs will likely need to be amended to be consistent with the amended use permit

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.

and its conditions. You therefore ask whether Section 1090 would prohibit Councilmember Ding from taking part in these contract decisions based on his affiliation with SOS. Importantly, 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.

Pertinent to the present situation, 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.

According to the facts, Councilmember Ding is both a member of the SOS Board and its treasurer. In these positions, he does not receive any compensation for his services, nor does he receive any reimbursement for any expenses he incurs in providing those services. In addition, based upon the description of issues it addresses, the primary purpose of dealing with homeless persons in the City supports important functions of the City. Based on these facts, Councilmember Ding would have a noninterest in City contracts concerning SOS. However, should he participate in decisions on the contracts, he must disclose his interest in the City Council's official records.

Accordingly, for purposes of the Act, Councilmember Ding does not have a disqualifying conflict of interest in City Council decisions concerning SOS and, for purposes of Section 1090, he has a noninterest in any City contracts involving SOS.

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

Sincerely,

Dave Bainbridge
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division