



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 31, 2024

William S. Smerdon
City Attorney
City of Brawley
P.O. BOX 1319
Brawley, CA 92227

Re: Your Request for Advice
Our File No. A-24-108

Dear Mr. Smerdon:

This letter responds to your request for advice on behalf of the Brawley City Council and Council Member Gil Rebollar 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, not under other general conflict of interest prohibitions such as common law conflict of interest or incompatible offices under Section 1099.

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 Imperial 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 either Section 1090 or the Act prohibit Council Member Rebollar from making or participating in making, or the City Council from entering into, a Tax Sharing Agreement with the County of Imperial, given that the Councilmember is employed by the County as Deputy Chief Executive Officer for General Services?

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. Section 1090 does not preclude Council Member Rebollar from participating in making, or the City Council from entering into, a Tax Sharing Agreement with the County, based on Council Member Rebollar interest in the County as his employer. Under the facts provided, the “noninterest” exception in Section 1091.5(a)(9) applies, and the Councilmember may participate so long as his interest is disclosed to the City Council and noted in its official records. Although the Act prohibits public officials from taking part in governmental decisions that would have reasonably foreseeable, material financial effects on the officials’ economic interests including sources of income, government salary and benefits are not considered “income” under the Act. Barring any other interests in the decision, Council Member Rebollar would not have a disqualifying financial interest under the Act.

FACTS AS PRESENTED BY REQUESTER

Revenue and Taxation Code Section 99 requires a city seeking to annex real property to its incorporated territory, and a county affected by the potential annexation, to agree upon an exchange of property taxes which are derived from the real property that would be annexed by the city. The City of Brawley will be involved in discussions with the County of Imperial regarding the establishment of a Tax Sharing Agreement between the City and the County pursuant to Revenue and Taxation Code Section 99.

Entering into a tax sharing agreement is a prerequisite to having property currently located in the County annexed to the City and annexation is required for any development project to move forward. The City and County must agree to an apportionment of revenues between the two different jurisdictions as the County would be losing land from which it had been previously deriving tax revenues. Tax sharing agreements do not change the intensity, layout, design or amenities located within the annexed territory.

Council Member Rebollar was an employee of the County of Imperial when he was elected to the Brawley City Council. When Council Member Rebollar took office, he was employed as the County’s Public Information Officer. Subsequently, Council Member Rebollar has been promoted by the County of Imperial and now holds the position of Deputy Chief Executive Officer for General Services.

The City expects to be involved in negotiations with the County with respect to a pending application for annexation into the City of a large tract of land situated in the County. The Local Agency Formation Commission will preside over the annexation.

Specifically, the City and County will negotiate a tax sharing agreement as part of the annexation. The City Council will be directly involved in these negotiations. You state that there is no master tax-sharing agreement in place and that no decisions have been made.

In a follow up email, Council Member Rebollar provided more information on how the approval process will work with the County. Council Member Rebollar stated that he has no role in the approval, development, or administration of the tax sharing agreement between these two entities. His responsibilities as the Deputy CEO of General Services focus on overseeing public communications and managing various internal operations within the County. These duties are

distinct and separate from matters related to tax sharing agreements, which fall outside of his professional scope.

It is his understanding that any involvement from the County on the tax sharing agreement will be under the direction of the County CEO, acting on behalf of the Board of Supervisors. If County departments are called to participate, it is likely that the Department of Planning, Public Works, Tax Collectors, Assessors, and others will play a supporting role in relevant aspects of the agreement. However, the primary responsibility for negotiating and finalizing the terms rests with the Board of Supervisors, the Clerk of the Board, and the designated County Negotiator, in this case, the County CEO.

ANALYSIS

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. 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.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

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.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body, regardless of whether the member actually participates in the making of the contract; and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call*, *supra* at pp. 645 & 649.)

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. Of the statutory exceptions established for a remote interest and noninterest, two exceptions for contracts between government agencies are potentially applicable. These exceptions address the issue of a public officer’s involvement in a contract between two government agencies, where the public officer serves as a member of a body or board contemplating a contractual relationship and is employed by a separate government entity. First, under Section 1091(b)(13), an agency board member who receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies.

Second, and 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 directly 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, the City would enter into a tax sharing agreement with the County, as a prerequisite to property currently located in the County being annexed to the City. There is no suggestion from the facts that the tax sharing agreement would involve direct financial gain to Council Member Rebolgar as a County employee. The tax sharing agreement also does not directly involve a department that employs Council Member Rebolgar and is only with the general government entity for which he works. Under these circumstances, we do not find that Council Member Rebolgar has a financial interest in the contract merely as the result of receipt of a government salary from the County. Accordingly, so long as Council Member Rebolgar’s interest is disclosed to the City Council at the time the tax sharing agreement is considered and that interest is noted in the City Council’s official record, Section 1090 does not prohibit Council Member Rebolgar from taking part in decisions concerning the tax sharing agreement, as a member of the City Council, based on the facts provided.

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 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 certain specified economic interests. (Section 87103.)

Among a public official’s potentially relevant economic interests is “[a]ny source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.” (Section 87103(c).) However, under the Act, the term “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).) Consequently, lacking any facts indicating that the decision concerning the Tax Sharing Agreement would impact any of Council Member Rebolgar’s other economic interests, he would not have a disqualifying financial interest under the Act.

If you have other questions on this matter, please contact me by email at znorton@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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