

May 4, 2006

SDEC Formal Advice Letter No. FA06-09

Advice Provided To:
Council President Scott Peters
City Council District 1
202 "C" St., 10th Floor
San Diego, CA 92101

Re: Request for Advice Regarding Participating in Contract Involving Retention of
Outside Counsel for Former Elected City Officials

Dear Council President Peters:

This advice letter has been prepared in response to your memorandum to the City of San Diego Ethics Commission dated April 27, 2006. You are seeking advice from the Ethics Commission interpreting the provisions of the City's Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Your letter seeks the Commission's assistance with regard to whether or not you may participate in a municipal decision pertaining to the retention of outside counsel to represent one or more former members of the San Diego City Council.

QUESTIONS

1. Under the City's Ethics Ordinance, are you precluded from voting on an item before the City Council if that item involves retaining outside counsel to represent one or more former members of the City Council with regard to their interests in litigation pertaining to the City's Elected Officers Retirement Program?
2. If the answer to the first question is in the affirmative, does the rule of necessity allow you to participate in such a matter notwithstanding any conflict of interest?

SHORT ANSWERS

1. The City's Ethics Ordinance precludes you from voting on an item before the City Council that involves making a contract with outside counsel to represent one or more former members of the City Council when you have a financial interest in that contract. You would have a prohibited financial interest in such a contract to the extent that your interests and the interests of the former Councilmembers are

substantially similar with respect to personal financial benefits under the Elected Officers Retirement Program that are at issue in the subject litigation.

2. The rule of necessity does not allow you to participate in a discretionary City Council decision to retain outside counsel to represent one or more former members of the City Council with regard to their interests in litigation pertaining to the City's Elected Officers Retirement Program.

BACKGROUND

According to documentation attached to your memorandum, the City Council docket for April 18, 2006, included item number 330, which pertains to "the Matter of Whether to Provide for an Attorney for Affected City Employees and Former City Employees in San Diego City Employees Retirement System (SDCERS) v. City of San Diego and Michael Aguirre (GIC841845)." You have indicated that this docket item has been continued to the May 8, 2006, City Council meeting. Additional documentation attached to your memorandum shows that this docket item is in response to a request by former City Councilmember Judy McCarty to have the City provide for her "defense" in the above-referenced litigation, and is also related to your efforts to consolidate legal expenses for eleven other former City Councilmembers for the same purpose. Based on the information provided to us, however, neither Mrs. McCarty nor any of the other eleven former Councilmembers are currently named as defendants in the subject civil litigation.

Mrs. McCarty's request for legal representation is set forth in a March 27, 2006, letter to you from Mrs. McCarty's attorney, Steven Strauss. In that letter, Mr. Strauss makes Mrs. McCarty's request under California Government Code section 995.4, which states that "a public entity may, but is not required to, provide for the defense of . . . an action or proceeding brought by the public entity to remove, suspend, or otherwise penalize its own employee or former employee." Mr. Strauss has characterized the subject litigation as penalizing Mrs. McCarty by seeking to decrease her pension benefits. According to Mr. Strauss, Mrs. McCarty is seeking legal fees from the City in order to intervene in the subject litigation for the purpose of defending pension benefits "on behalf of the City's current and former legislative officers." Because we have not been given any information to the contrary, we must presume that providing outside counsel to any of the other eleven former Councilmembers in connection with this docket item would be for a similar purpose.

The pension benefits at issue involve the City's Elected Officers Retirement Program [EORP] (formerly the City's Legislative Officers' Retirement Plan). It is our understanding that Mrs. McCarty and the eleven other former Councilmembers are entitled to some amount of pension benefits under EORP. It is also our understanding that you, as a current member of the City Council, will be entitled to benefits under EORP when you retire. Finally, we are also informed that the above-referenced litigation involves, in part, a dispute concerning the amount of pension benefits a retiree may lawfully receive under EORP.

DISQUALIFICATION ANALYSIS

The questions you present require us to look at the City's Ethics Ordinance, which is located at SDMC sections 27.3501 through 27.3595. The Ethics Ordinance contains the City's rules governing conflicts of interest. These rules are derived from two sources: (1) the state's Political Reform Act and the related regulations adopted by the California Fair Political Practices Commission,¹ and (2) California Government Code section 1090, which specifically pertains to financial interests in contracts. Because the Council docket item at issue involves a contract, this letter will focus on whether or not you have a prohibited financial interest in that contract.

A. Financial Interest in a Contract

The City's Ethics Ordinance states that "[i]t is unlawful for any City Official to be financially interested in any contract made by them in their official capacity." SDMC § 27.3560(a). In addition, the Ethics Ordinance does not permit the City Council to enter into a contract if any member of the City Council has a prohibited conflict, even if the conflicted official recuses himself or herself from participating in the decision. SDMC § 27.3560(b). These provisions are modeled after California Government Code section 1090, and expressly incorporate all of state law's "remote interest" and "non-interest" exceptions, which are set forth in Government Code sections 1091 and 1091.5, respectively. SDMC § 27.3560(c). Because these provisions of the Ethics Ordinance are intended to mirror the respective provisions of the Government Code, we often turn to interpretations of state law for guidance in interpreting the City's Ethics Ordinance. These interpretations occur in the form of court decisions and California Attorney General Opinions, some of which are cited in the analysis below.

The prospective decision before the City Council involves the retention of outside counsel to represent certain financial interests of Mrs. McCarty and other former Councilmembers. There can be no dispute that the City's retention of outside counsel under these circumstances would constitute the making of a contract within the meaning of section 1090. 86 Ops. Cal. Att'y Gen 138 (2003). Thus, the core issues before us involve whether or not you have a financial interest in the contract, and whether or not such an interest would preclude your participation in the making of that contract.

There are no facts before us indicating that you have any type of direct interest in any prospective contract for the retention of outside counsel for Mrs. McCarty or any of the other former Councilmembers. In other words, you have not supplied us with any information suggesting that you or your spouse have an ownership interest in any law firms that are being considered for such representation, or that you would otherwise enjoy a direct financial benefit from the City funds that would be paid for the contemplated legal services.

Even though you may not have a direct financial interest in a contract between the City and any prospective outside counsel, the fact that you and Mrs. McCarty have a similar, if not identical,

¹ Because of the conclusions reached in this letter with regard to your financial interests in a prospective contract, we need not analyze whether you would also have a prohibited financial interest under the provisions of the Ethics Ordinance that mirror the conflict of interest laws in the Political Reform Act.

financial interest in the EORP pension benefits appears to create for you an “indirect” financial interest in any contract for outside counsel made on her behalf. In other words, the City’s retention of an attorney to protect Mrs. McCarty’s interests in her EORP benefits would inure to your own financial benefit because the stated purpose for obtaining outside counsel is to prevent any reduction of EORP benefits, including the EORP benefits in which you presently have a personal vested interest. Providing Mrs. McCarty with outside counsel would also alleviate you of any need to retain your own legal counsel to pursue identical results in the litigation. The same would be true of any City Council decision to obtain outside legal counsel for any of the other eleven former Councilmembers; so long as you share their financial interests in the litigation, you are financially interested in a contract intended to benefit them in the litigation.²

Although we have not located any case law or Attorney General Opinions directly on point with the facts and questions you have raised, we are mindful of the broad reach of Government Code section 1090, and are therefore compelled to apply it to the situation before you. California courts have repeatedly recognized that section 1090’s prohibition must be broadly construed. See, e.g., *Stigall v. City of Taft*, 58 Cal. 2d 565, 569-571 (1962); *Finnegan v. Schrader*, 91 Cal. App. 4th 572, 579-580 (2001); *City Council v. McKinley*, 80 Cal. App. 3d 204, 213 (1978). Thus, even when you do not have a straightforward interest in a contract, as appears to be the case here, you may nevertheless have an interest in the contract that implicates section 1090. California courts have consistently voided such contracts where the public officer was found to have an indirect interest therein. *Thompson v. Call*, 38 Cal. 3d 633, 649 (1985). “[T]o have an ‘interest’ in a contract the officer was not required to share directly in the profits to be realized but that he has an interest the moment he places himself in a situation where his personal interest will conflict with the faithful performance of his duty as such an officer.” *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 212 (1977). As these authorities indicate, the fact that you could obtain a private financial benefit from the efforts of an attorney retained by the City to represent Mrs. McCarty or any other former Councilmember in the subject litigation appears sufficient to trigger the application of section 1090.

Section 1090 must be viewed without considering any altruistic intentions you may have with regard to Mrs. McCarty and the other former Councilmembers, and even without regard to whether or not the contract is beneficial for the City. The overriding concern is whether or not you have *any* personal financial interest in the contract. The longstanding purpose of Government Code section 1090 is to ensure that “every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity.” *Thomson v. Call*, 38 Cal. 3d at 650. It is designed to “prevent officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their public agencies.” *Stigall v. City of Taft*, 58 Cal. 2d at 569. The purpose of section 1090’s prohibition “is to remove or limit the possibility of any personal influence,

² These interests are distinguishable from situations in which the City obtains outside counsel to defend a current or former City Official in a criminal matter or where that City Official may be exposed to civil liability. In those instances, you would not be in a position to obtain a personal financial benefit from the outcome of that official’s representation and accordingly would not have the prohibited financial interest that you have with regard to the Council docket item now at issue.

either directly or indirectly, which might bear on an official's decision." *Id.* "Sound public policy dictates that these officers shall be denied the right to have any personal interest in contracts negotiated by them in their official capacity. Such policy is obviously premised on the ancient truism that one cannot faithfully serve two masters at one and the same time." *People v. Vallerga*, 67 Cal. App. 3d 847, 865 (1977), citing *People v. Darby*, 114 Cal. App. 2d 412 (1952).

California Attorney General Opinions routinely identify "financial interests" under section 1090 in circumstances where no direct interest exists. "Although section 1090 nowhere specifically defines a 'financial interest,' case law and our previous opinions indicate that forbidden 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." 86 Ops. Cal. Att'y Gen 138 (2003). "Put in ordinary, but nonetheless precise terms, an official has a financial interest in a contract if he might profit from it." 88 Ops. Cal. Att'y Gen. 32 (2005).

The far-reaching nature of section 1090 may best be summed up as follows: "However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void." 86 Ops. Cal. Atty. Gen. 187, citing *People v. Deysher*, 2 Cal. 2d 141, 146 (1934). Although we do not mean to imply that your participation in making a contract to benefit Mrs. McCarty or the other former Councilmembers would in any way be devious or ill-intentioned, the quoted language does serve to illustrate the expansive nature of section 1090 and the fact that its prohibition will apply so long as a connection can be made between a contract and your personal finances, regardless of how circuitous that connection may be. Even with the best of intentions, a section 1090 violation may exist. "The prohibition is applicable even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the city's advantage." 86 Ops. Cal. Att'y Gen 138 (2003).

As stated above, section 27.3560 of the City's Ethics Ordinance is based on the provisions of Government Code section 1090. It is appropriate, therefore, to interpret section 27.3560 with the same degree of caution as that afforded the state law. Thus, to the extent that participation in the making of a contract to provide outside counsel to represent the interests of Mrs. McCarty or any other former Councilmember would violate the provisions of section 1090, such participation would also violate the provisions of SDMC section 27.3560.

B. Remote Interests

The City Council may generally proceed with a contract even if one of its members has an interest in the contract so long as the interest is only a "remote interest" and the member discloses that interest on the record and the remaining members of the City Council authorize the contract without the participation of the conflicted member. Under Government Code section 1091(b)(13), there is a remote interest for "that of a person receiving salary, per diem, or reimbursement for expenses from a government entity." Although a definition of the term, "salary" in the context of section 1090 has not been codified in the Government Code, the term is defined elsewhere in state law. According to title 2, section 18232 of the California Code of Regulations, "salary" includes pension benefits. Because your financial interest in a contract for Mrs. McCarty's outside counsel pertains to your

EORP pension benefits, it is certainly arguable that your interest in that contract would be a remote interest.

Generally, the City Council may enter into a contract with another party even when one of its members has a remote interest in that contract. Cal. Gov't Code § 1091. It appears, however, that all or most of the other members of the City Council would have a similar financial interest in that prospective contract for outside counsel, thus raising the question of whether a quorum of disinterested Councilmembers could be assembled. In other words, to the extent that any other Councilmembers are entitled to the same EORP benefits, those Councilmembers would also have a remote interest in the contract, and would also be prohibited from participating in the making of the contract to the same extent that you are prohibited.

C. Non-Interests

When an interest in a contract is deemed a “non-interest,” the City Council may approve the contract even with the participation of the member with the financial interest. The only non-interest potentially applicable to the facts before us is the one set forth under Government Code section 1091.5(a)(9), which pertains to “that 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.” As stated in the previous section of this advice letter, pension benefits arguably fit within the definition of “salary.” What is problematic, however, is the remaining language in subsection (a)(9). Because the contract at issue would involve EORP benefits to which members of the City Council are entitled, it appears that the contract “directly involves the department of the government entity that employs” you. As indicated above, the stated purpose for retaining outside counsel for Mrs. McCarty is to aid her in the preservation of her EORP benefits as well as the EORP benefits of every other former or current Councilmember. Because the former and current Councilmembers are all in the same “department,” the provisions of section 1091.5(a)(9) do not appear applicable.

D. Rule of Necessity

Under the “rule of necessity,” a public entity may execute a contract even though it would otherwise violate the terms of section 1090. 88 Ops. Cal. Att’y Gen. 106 (2005). This rule has been summarized by California courts as follows: “The rule of necessity provides that a governmental agency may acquire essential goods or services despite a conflict of interest, and in nonprocurement situations it permits a public officer to carry out the essential duties of his/her office despite a conflict of interest where he/she is the only one who may legally act. The rule ensures that essential government functions are performed even where a conflict of interest exists.” *Eldridge v. Sierra View Local Hospital District*, 224 Cal.App.3d 311, 321 (1990). “The common law developed the rule of necessity to prevent the vital processes of government from being halted or impeded by officials who have conflicts of interest in the matters before them.” *Kunec v. Brea Redevelopment Agency*, 55 Cal.App.4th 511, 520 (1997). In situations involving the procurement of outside legal counsel, it is clear that the rule of necessity may be invoked only when the services sought are “essential” or “vital” to the City.

As discussed earlier, Mrs. McCarty's attorney has asked the City to provide his client with legal representation under California Government Code section 995.4, which provides that a public entity "may" provide a defense to "an action or proceeding brought by the public entity to remove, suspend, or otherwise penalize its own employee or former employee." Mrs. McCarty has not been named as a defendant in the subject litigation and her attorney has acknowledged that the City has no mandatory duty to provide her with a defense. Because providing Mrs. McCarty with outside counsel would be a discretionary function of the City Council rather than an essential duty to fulfill, the rule of necessity may not be invoked to overcome the prohibited financial interest you have under the Ethics Ordinance.³

CONCLUSION

Even though you may not have a direct financial interest in a contract between the City and any outside counsel retained to represent the interests of Mrs. McCarty or any other former Councilmembers in the subject litigation, it does appear that you, Mrs. McCarty, and the other former Councilmembers all have substantially the same financial interests in the EORP pension benefits. Because a City contract to retain outside counsel to help preserve those EORP pension benefits would also help to preserve your own EORP pension benefits, it appears that you would have an financial interest in that contract. Notwithstanding any "remote interests" or "non-interests" available under Government Code sections 1091 and 1091.5, it does not appear that you, or any other Councilmember similarly interested in EORP benefits, may lawfully participate in the making of a contract as described herein.

In addition, because the retention of outside counsel to assist Mrs. McCarty or any other former Councilmembers in the litigation involving the EORP pension benefits is not "essential" or "vital" to the functioning of the City, the rule of necessity may not be applied under the circumstances discussed in this letter.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

Sincerely,

Cristie McGuire
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance

³ On the other hand, it is likely that the rule of necessity would be properly invoked in a situation where the City had a duty to defend and indemnify a current or former City Official, notwithstanding the possibility that a Councilmember could enjoy some financial benefit from a contract for outside counsel as discussed in this letter. *Gonsalves v. City of Dairy Valley*, 265 Cal. App. 2d 400, 404 (1968).