

September 15, 2004

SDEC Formal Advice Letter No. FA04-06 (Supplement)

Advice Provided to:

Casey Gwinn
San Diego City Attorney
1200 Third Avenue, Suite 1600
San Diego, CA 92101

Re: Request for Supplemental Advice Regarding Post-Employment Restrictions

Dear Mr. Gwinn:

This advisory opinion is provided in response to your request for additional advice regarding your anticipated post-employment professional activities. This is a follow-up to advice provided to you in San Diego Ethics Commission Formal Advice Letter FA04-06. This supplemental letter provides additional information regarding compensation from a federal grant obtained by the San Diego Family Justice Center Foundation, in light of the additional facts you recently provided.

QUESTION

May you receive compensation from a federal grant obtained by the private, non-profit San Diego Family Justice Center Foundation to assist in providing technical assistance to federally funded sites under the President's Family Justice Center Initiative?

SHORT ANSWER

The provision in the Ethics Ordinance concerning Financial Interests in Contracts does not prohibit your anticipated compensation from the federal grant obtained by the San Diego Family Justice Center Foundation. Please refer to the discussion below for additional considerations.

BACKGROUND

This supplemental advisory opinion focuses on the potential application of the Financial Interest in Contracts provision mentioned in our previous advice letter (FA04-10). Your supplemental request, as well as the accompanying documents which include the application for the federal grant, include the following additional information concerning the underlying facts:

The San Diego Family Justice Center Foundation [the Foundation], a private, no n-profit entity, applied for a grant from the United States Department of Justice to provide technical assistance to fifteen federally funded communities that will be developing Family Justice Centers within the next eighteen to twenty-four months. The Foundation received the grant in June of 2004.

As you indicated in your prior request, you serve as a volunteer member of the Foundation's board. You have clarified that your volunteer service with the Foundation has been as a private citizen, and not as a public official. Although you participated in the application for the federal grant, you explained that you did not do so in your capacity as the City Attorney. In addition, you related that the Foundation utilized the services of a private consultant to prepare the grant application.

The grant application, submitted on February 3, 2004, indicates that the President's Family Justice Center Initiative [PFJCI] "collaborative team" will include an Executive Committee "made up of Casey Gwinn, San Diego City Attorney; Gael Strack, President of the San Diego Family Justice Center Foundation; and Charles Wilson, Executive Director of the Chadwick Center for Children and Families." In addition, the grant application indicates that "San Diego City Attorney Casey Gwinn will serve as the National Director" for the PFJCI, and that you will serve in an uncompensated capacity until the conclusion of your term as San Diego City Attorney. The budget narrative and worksheet indicate that you will be paid \$47,500 from the grant for working part-time during the first year, and \$95,000 for working full time during the second year.

The Foundation is a community partner of the San Diego Family Justice Center, which is primarily funded by the City of San Diego through general fund revenues. The Foundation is one of over twenty non-profit community partners that receive free office space at the San Diego Family Justice Center site leased by the City of San Diego.

ANALYSIS AND CONCLUSIONS

Our advice in FA04-06 references San Diego Municipal Code [SDMC] section 27.3560, which prohibits City Officials from having any financial interest in any contract made by them in their official capacity. We previously indicated that this provision is based on Government Code section 1090, and that 1090 applies to post-employment activities if a governmental official benefits from a contract he or she made while acting in a former official capacity. In your supplemental request for advice, you have asked us to "render a complete analysis on the potential conflict issue" as it relates to your contemplated compensation from the federal grant at issue.

SDMC section 27.3560 sets forth the following prohibitions concerning financial interests in contracts:

- (a) It is unlawful for any *City Official* to be financially interested in any contract made by them in their official capacity.

- (b) It is unlawful for any contract to be made by the *City Council* or any board or commission established by the *City Council* if any individual member of the body has a financial interest in the contract.
- (c) For purposes of the prohibitions set forth above in subsections (a) and (b), the term financial interest means any interest, other than a remote interest as prescribed in California Government Code section 1091 or a non-interest prescribed in California Government Code section 1091.5, which would prevent the *City Officials* involved from exercising absolute loyalty and undivided allegiance to the best interests of the *City*.
- (d) Any *City Official* with a remote interest in a prospective contract of the *City* must disclose the existence of the remote interest to the body of the board which the *City Official* is a member if that board has any role in creating, negotiating, reviewing, or approving the contract; and the *City Official* must abstain from influencing or participating in the creation, negotiation, review, or approval of the contract.

This local law is based on Government Code section 1090, which provides that:

Members of the legislature, state, county, special district, judicial district, and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

The Ethics Commission has jurisdiction to enforce the City's Ethics Ordinance. Although the Ethics Commission does not have jurisdiction to enforce those state laws and regulations which are not codified in local law, the subject provision of the Ethics Ordinance concerning financial interests in contracts is modeled on Government Code section 1090. Therefore, it is appropriate to look to previous decisions concerning 1090 for guidance in interpreting local law.

The Attorney General has issued several opinions which clarify that the prohibitions of 1090 are applicable to post-employment activities. For example, in one opinion, the Attorney General concluded that a city councilmember who participated in the planning and discussions regarding the creation of a city loan program for developing businesses could not leave the council and subsequently apply for a loan under the program. 81 Ops. Cal. Att'y Gen. 317 (1998). In another opinion, the Attorney General concluded that a former member of a city planning commission would violate section 1090 if he were to enter into a contract with the city to be a consultant with respect to the city's general plan revision since, while he was a commission member, the commission adopted a policy to use consultants instead of staff members for the plan revision. Cal. Atty. Gen., Indexed Letter, No. IL 92-1212 (Jan. 26, 1993).

It is therefore appropriate to consider the application of SDMC section 27.3560 and Government Code section 1090 to your post-employment plans and, in particular, to your contemplated compensation from the federal grant awarded to the Foundation. In order to analyze this issue, I have looked at the key elements in this provision of the Ordinance: City Official, financial

interest, and the making of a contract. As an elected City officeholder, you are a City Official as that term is defined in the Ethics Ordinance. SDMC section 27.3503.

With respect to the term “financial interest,” the courts have consistently ruled that the term cannot be narrowly construed with respect to 1090 restrictions. In *People v. Honig*, 48 Cal. App. 4th 289 (1996), the Court opined as follows:

. . . the term “financially interested” in section 1090 cannot be interpreted in a restricted and technical manner. The law does not require that a public officer acquire a transferable interest in the forbidden contract before he may be amenable to the inhibition of the statute, nor does it require that the officer share directly in the profits to be realized from a contract in order to have a prohibited interest in it. [Citations.] Rather, “[t]he instant statutes are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [state].”

Id. at 315.

You have indicated that you plan to receive compensation from the federal grant awarded to the Foundation. It is clear that this proposed arrangement will benefit you financially. As discussed above, the Court in *Honig* opined that Government Code section 1090 is concerned with any interest, other than a remote or minimal interest, even if the interest is small or indirect. *Id.* In this case, it appears that you have a direct (not an indirect) financial interest in the proposed arrangement, and that the interest is neither remote nor minimal.

Therefore, the remaining question concerns whether or not you were involved in the making of a contract in your official capacity. In *Fraser-Yamor Agency v. County of Del Norte*, 68 Cal.App.3d 201 (1977), the Court clarified that an employee or officer must participate in the making of a contract in his official capacity for the 1090 prohibition to apply. The Court further stated that, “where the contract is entered into by the body or board of which the employee or officer is a member, the element of participation is present by the mere fact of such membership,” and added that “this interpretation is evident from the language of the statute.” *Id.* at 212.

To apply the Court’s reasoning to the matter at hand, the subject prohibition is not applicable if you were not involved in the making of a contract in your official capacity, or if there was no contract made by the City of San Diego. According to the information you provided, the San Diego Family Justice Center Foundation applied for, and was awarded, the federal grant at issue. While the grant is clearly a contract, and while you admit that you were involved in the making of this contract, the City of San Diego was not a party to this contract. You have indicated that you were involved in the grant application as a volunteer member of the Foundation’s board, not as the San Diego City Attorney. It should be noted, however, that the grant application documents reference your status as the City Attorney on several occasions. Although we would need to obtain additional information in order to determine whether you used your official

position in any manner intended to influence the award of the federal grant, this issue is not relevant to our analysis because the City of San Diego was not a party to a contract in this case. As a result, the proscriptions of SDMC section 27.3560 and Government Code section 1090 are not pertinent to your contemplated compensation from the federal grant awarded to the Foundation.

You have asked that we render a “complete analysis on the conflict issue.” It is therefore relevant to look at any other applicable provisions in the Ethics Ordinance. SDMC section 27.3561 prohibits a City Official from influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on one of the City Official’s economic interests. The award of the federal grant to the Foundation was not a “municipal decision” because the City was not a party to this contract. Therefore, section 27.3561 does not apply to your situation. (It should be noted, however, that the corresponding provision in state law prohibits a public official from influencing “a governmental decision in which he knows or has reason to know he has a financial interest.” Cal. Gov’t. Code § 87100. As discussed above, the Ethics Commission does not have jurisdiction to enforce state law. Moreover, it is not appropriate for the Ethics Commission to render advice concerning past conduct. We therefore suggest that you consult with counsel on this issue.)

Similarly, SDMC section 27.3562 addresses the disqualification of City Officials from “municipal decisions” involving “benefactors” (parties who have given, promised to give, or acted as intermediaries for the City Official to receive, compensation). Because you contemplate receiving compensation from a federal grant that did not involve a “municipal decision,” this provision of the Ethics Ordinance is not pertinent to our analysis.

Finally, SDMC section 27.3551 prohibits City Officials from participating in or influencing a decision involving the interests of a person with whom he or she is seeking or negotiating future employment. Although this provision is not limited to “municipal decisions,” the application of this provision to the facts you have provided would involve an analysis of past conduct. It is therefore not appropriate for us to address this provision of the Ethics Ordinance. You may wish to consult with counsel concerning this issue.

If you have any additional questions concerning your proposed compensation from the federal grant awarded to the Foundation, or any other aspect of your post-employment plans, please contact our office.

Sincerely,

Stacey Fulhorst
Executive Director

SF/s