

**CITY OF OAKLAND**  
**OFFICE OF THE CITY ATTORNEY**  
**LEGAL OPINION**

TO: President Lynette Gibson McElhaney  
and Members of the City Council

FROM: Barbara J. Parker  
City Attorney

DATE: June 17, 2015

RE: **RECUSAL REQUIREMENTS ON MATTERS INVOLVING CONTRACTORS  
WHO MAKE CAMPAIGN CONTRIBUTIONS TO ELECTED OFFICIALS  
DURING CONTRACT NEGOTIATIONS WITH THE CITY**

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**I. INTRODUCTION**

The Oakland Campaign Reform Act ("OCRA") prohibits campaign contributions to elected officials by contractors while they are involved in certain contract negotiations with the City, including contracts to purchase land from the City.<sup>1</sup> The June 2, 2015 Council meeting agenda included an ordinance approving a Disposition and Development Agreement with a developer to acquire and develop the City's 12<sup>th</sup> Street Remainder property; OCRA's contractor prohibitions apply to this contract. A Councilmember announced that she was recusing herself due to a Public Ethics Commission investigation of a campaign contribution the contractor made to the Councilmember's campaign committee during contract negotiations with the City.

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<sup>1</sup> Oakland Municipal Code section 3.12.140(A) entitled "Contractors doing business with the city of Oakland, the Oakland Redevelopment Agency or the Oakland Unified School District prohibited from making contributions,"

No person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the city for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the city or for selling any land or building to the city or for purchasing any land or building from the city whenever the value of such transaction would require approval by the City Council shall make any contribution to the Mayor, a candidate for Mayor, a City Councilmember, a candidate for City Council, the City Attorney, a candidate for City Attorney, the City Auditor, a candidate for City Auditor, or committee controlled by such officeholder or candidate at any time between commencement of negotiations and either one hundred eighty (180) days after the completion of, or the termination of, negotiations for such contract.

## LEGAL OPINION

President Lynette Gibson McElhaney and Members of the City Council

June 17, 2015

### **Re: RECUSAL REQUIREMENTS ON MATTERS INVOLVING CONTRACTORS WHO MAKE CAMPAIGN CONTRIBUTIONS TO ELECTED OFFICIALS DURING CONTRACT NEGOTIATIONS WITH THE CITY**

Page 2

Several Councilmembers have asked whether they have a legal duty to recuse themselves in these circumstances. We provide this opinion to (1) provide clarity regarding recusal requirements in this type of circumstance; (2) explain the impact on the Council's decision of failure to recuse oneself when recusal is required; and (3) explain the steps a Councilmember is required to take if s/he is legally required to recuse him/herself.

## **II. QUESTION AND BRIEF ANSWER**

### **Question:**

Are elected public officials who receive campaign contributions that violate the Oakland Campaign Reform Act's prohibition on contributions from a prospective City contractor during contract negotiations required to recuse themselves from participation in the City's decision to enter into the contract?

### **Brief Answer:**

No, applicable conflict of interest and campaign finance laws do not require recusal by an elected public official, who receives campaign contributions from a prospective City contractor. (Note, however, that courts have found possible California Government Code Section 1090 conflicts of interest if there is evidence that the contribution was made in anticipation of the government decision on a government contract, and the decision to approve the contract was made because of the campaign contribution. But, under the strict rule of Government Code Section 1090, recusal would not be enough in these cases to remedy the conflict.)

## **III. ANALYSIS**

There are two state laws that generally govern conflicts of interest by public officials: (1) the California Political Reform Act ("PRA"), and (2) California Government Code Section 1090 ("Section 1090"). The PRA governs both conflicts in general governmental decision-making and conflicts in the context of campaign contributions. Section 1090 governs conflicts in public contracting. The City of Oakland's Government Ethics Act ("Ethics Act") incorporates the PRA and Section 1090 conflict rules by reference (OMC Section 2.25.040.A and C.), but also governs the receipt of gifts by officials from contractors doing business with the City, while the Oakland Campaign Reform Act ("OCRA") governs campaign contributions to officials from prospective contractors. Each of those laws will be considered in turn.

## LEGAL OPINION

President Lynette Gibson McElhaney and Members of the City Council

June 17, 2015

**Re: RECUSAL REQUIREMENTS ON MATTERS INVOLVING CONTRACTORS WHO MAKE CAMPAIGN CONTRIBUTIONS TO ELECTED OFFICIALS DURING CONTRACT NEGOTIATIONS WITH THE CITY**

Page 3

### **A. The General California Political Reform Act Conflict Rules Prohibiting An Official From Making Decisions Affecting Their Financial Interests Do Not Apply To Campaign Contributions**

The PRA prohibits a public official from making or participating in any government decision that will have a reasonably foreseeable material financial effect on the official or any of the official's "economic interests." Officials with a PRA conflict of interest are required to recuse themselves from the decision.

Among other things, a public official has an "economic interest" in any source of income to the official greater than \$500 the previous year. (Gov't. Code Section 87103(c); PRA Regulations Section 18703.3.) However, the PRA specifically excludes campaign contributions from the definition of "income." (Gov't. Code Section 82030(b)(1).) Therefore, the PRA conflict rules do not require recusal of a public official from a governmental decision simply because the official received a campaign contribution from an entity that will be financially affected by the decision.

The California Supreme Court in *Woodland Hills Residents Assn. v. City Council* (1980) 26 Cal. 3rd 938, 946, found that, since the PRA conflict rules expressly excluded campaign contributions, the PRA did not prevent a city councilmember from acting on a development project involving a campaign contribution from the developer. The Court further noted that "[t]o disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms" and would deprive the right of contributors such as developers "of the constitutional right to participate in the electoral process." (*Id.* at p. 946-947.)

### **B. The Specific California Political Reform Act Rule Prohibiting An Official From Making A Decision Affecting A Campaign Contributor Does Not Apply To Elected Officials Of Local Governments**

Aside from the general rules in the PRA governing conflicts in decision-making, the PRA includes a specific rule, codified in California Government Code Section 84308 ("Section 84308"), that applies to decisions affecting campaign contributors. Section 84308 requires that certain public officials recuse themselves from decisions regarding license, permits, or "other entitlements," including contracts (but excluding contracts that are competitively bid or labor or personal employment contracts), if during the previous 12 months the official received campaign contributions of more than \$250 from a party that is financially interested in the decision. However, this section does not apply to

## LEGAL OPINION

President Lynette Gibson McElhaney and Members of the City Council

June 17, 2015

### **Re: RECUSAL REQUIREMENTS ON MATTERS INVOLVING CONTRACTORS WHO MAKE CAMPAIGN CONTRIBUTIONS TO ELECTED OFFICIALS DURING CONTRACT NEGOTIATIONS WITH THE CITY**

Page 4

local governmental agencies whose members are directly elected by the voters, such as members of city councils. (Gov't. Code Section 84308(a)(3); *Conflicts of Interest*, Cal. Atty. Gen. (2010), p. 39-40.)

#### **C. The California Government Code Section 1090 Prohibition On An Official Being Financially Interested In A Government Contract Does Not Apply To Campaign Contributions, Unless The Contract Was Made Because Of The Campaign Contribution**

Section 1090 prohibits board members from having a financial interest in any government contract "made" by their board. Under the strict rule of Section 1090, recusal by the interested member will not cure a Section 1090 conflict unless the member's interest is a "remote interest" defined by statute, or unless the rule of necessity applies. (*Conflicts of Interest*, Cal. Atty. Gen. (2010), p. 67, 79.)

Courts have held that campaign contributions generally are not "financial interests" under Section 1090. (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1231; *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 957.) However, courts also have found possible Section 1090 conflicts of interest if there is evidence that a campaign contribution was made in anticipation of the government decision and the decision was made because of the campaign contribution. (*Hub City Solid Waste Services v. City of Compton* (2010) 186 Cal.4th 1114.) "But illegality is proven if there is an understanding that a payment is made in anticipation of political favor or on account of favors given, and then only if the political act was made on account of the payment or agreement to pay. This may be, but rarely is, shown by direct evidence of a scheme to repay an official's award of a public contract through campaign contributions made by the contracting entity. It also may be shown by circumstantial evidence." In this case, the court considered the fact that the contributions were made close in time to the council's approval of the contract and constituted substantial portions of the councilmembers' campaign funds. (*Id.* at 1130.)

Therefore, in most cases Section 1090 will not apply to cases in which a public official has merely received a campaign contribution from a prospective contractor. However, if it is shown that the contribution was made in anticipation of the decision to contract with the contributor and the decision to contract with the contributor was made because of the campaign contribution, Section 1090 may prohibit the contract; under the strict rule, recusal may not cure the conflict, since campaign contributions are not one of the enumerated "remote interests" that would allow for recusal.



## LEGAL OPINION

President Lynette Gibson McElhaney and Members of the City Council

June 17, 2015

**Re: RECUSAL REQUIREMENTS ON MATTERS INVOLVING CONTRACTORS WHO MAKE CAMPAIGN CONTRIBUTIONS TO ELECTED OFFICIALS DURING CONTRACT NEGOTIATIONS WITH THE CITY**

Page 5

### **D. The Government Ethics Act Rule Prohibiting An Official From Accepting Gifts From Persons Doing Business With The City Does Not Apply To Campaign Contributions**

The Ethics Act prohibits an official from soliciting or accepting any gift or loan greater than \$50 from persons doing business with, or seeking to do business with, the City,<sup>2</sup> or a person who during the past 12 months attempted to influence the official in any legislative action. (OMC Section 2.25.060.C.) However, the Ethics Act defines a "gift" as the term is defined in the PRA gift rules; the PRA defines "gift" to specifically exclude campaign contributions. (Gov't. Code Section 82028(b)(4).)<sup>3</sup>

### **E. The Oakland Campaign Reform Act Prohibition On Campaign Contributions From Prospective Contractors Does Not Require Recusal Of Officials Who Have Received Such Contributions**

The OCRA, among other things, prohibits campaign contributions from certain prospective City contractors after the prospective contractor has submitted a bid or proposal and until 180 days after negotiations have been completed or terminated. (OMC Section 3.12.140.) OCRA does not require recusal by the official who receives a contribution in violation of the contractor contribution section, nor is recusal a remedy for such a violation. By contrast, OCRA does require recusal of an official who has received a contribution in violation of other restrictions, such as prohibitions on contributions that exceed specified caps. (OMC Section 3.12.310.)

### **F. Actions Officials Is Required To Take If Recusal Is Legally Required**

When recusal is legally required of an official who is a member of a board, the official (1) must publicly identify the interest to the board at the public board meeting when the item is called, (2) must leave the room for the item, (3) may not vote on the item, and (4) may not discuss the item formally (at the meeting) or informally (outside of the meeting, including in closed session) with other board members. (PRA Regulations Section 18702.5.) If the decision is being considered in closed session, the official must

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<sup>2</sup> The Ethics Act refers to a donor who is doing business with, or seeking to do business with, the "department" of the official. For Councilmembers and others who generally govern the City, it is assumed that this would apply to doing business with the City as a whole.

<sup>3</sup> Note that that the Ethics Act gift rule is actually not a recusal rule, but a flat prohibition on receiving gifts in violation of its terms; i.e., recusal from the decision to do business with the donor will not necessarily cure an Ethics Act violation.

LEGAL OPINION

President Lynette Gibson McElhaney and Members of the City Council

June 17, 2015

**Re: RECUSAL REQUIREMENTS ON MATTERS INVOLVING CONTRACTORS  
WHO MAKE CAMPAIGN CONTRIBUTIONS TO ELECTED OFFICIALS  
DURING CONTRACT NEGOTIATIONS WITH THE CITY**

Page 6

publicly declare his/her recusal, but need not identify the specific economic interest, and may not attend the closed session or receive confidential information on the item from the closed session. (PRA Regulations Section 18702.5(c).) Note that the above rules only apply to members of certain boards, such as city councils and planning commissions. (PRA Regulations Section 18702.5(a); Gov't. Code Section 87200.)

**IV. CONCLUSION**

Generally there is no legal duty for Councilmembers who receives campaign contributions from a prospective City contractor in violation of the OCRA to recuse themselves from decisions involving that contract. Of course, any public official is free to recuse him/herself from participation in any governmental decision even if they have no legal duty to do so, for example, when the official feels that there is an appearance of impropriety if s/he participates.

Very truly yours,



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