

Fwd: Transition Plan Comments

Inbox x



Harry Tregenza

12:24 PM (1 hour ago)

to Harry, bcc: team

From: Sheri Damon <SDamon@ci.seaside.ca.us>

Sent: Friday, June 26, 2020 12:09:41 PM

To: Kendall Flint <kflint@rgs.ca.gov>; josh@fora.org <josh@fora.org>

Cc: dwilloughby@kaglaw.net <dwilloughby@kaglaw.net>; jgiffen@kaglaw.net <jgiffen@kaglaw.net>

Subject: Transition Plan Comments

Josh and Kendall, Can you ensure that the FORA board receives the below comments on the draft Transition language. Thanks.

FORA should take caution in pledging revenues for FORA debt from the Health and Safety revenues general pursuant to 33492.71 as FORA has contractually executed agreements pledging certain funds. In all instances throughout the document, it should reference that only "unpledged" and "unliened" funds could be available to satisfy any left over FORA debt in accordance with that section at such time when such tax revenues are available after the payment of the liened amounts. In Paragraph 2.2.1, in particular, FORA should clarify that it has entered an Agreement regarding the use of the Health and Safety funds and already pledged certain funds and place a lien on the revenues described in Health and Safety Code section 33492.71(c)(1)(A). (See also 2.1.1, 2.2.8 and 4)

Additionally, for purposes of FORA's independent actions the member agencies are not successors, except where an entity has agreed by contract. Here, LAFCO received FORA funds well in advance of any potential litigation which now that FORA has or will shortly resolve all known non-property use claims should reduce LAFCO's liability risk to almost zero. Had FORA held those funds, it would have used some of those funds for final resolution of FORA's monetary obligations. It is therefore appropriate to either eliminate the blanket member agencies as successor language and either not designate a successor for unknown or assign that to LAFCO who now holds the funds that FORA would have used to reduce or eliminate those issues.

June 26, 2020

Via email

Jane Parker, Chair
Board of Directors
Fort Ord Reuse Authority

Subject: 1. Objection to turning over public records to Kennedy, Archer & Giffen, PC.
 2. California Public Records Act request to FORA.
 3. Demand to preserve records.

Dear Chair Parker and members of the FORA Board of Directors:

I represent The Open Monterey Project (TOMP) and Keep Fort Ord Wild (KFOR) that act for the public benefit and in the public interest regarding public accountability and public records. TOMP and KFOR object to the proposed transition plan under the California Public Records Act, conflict of interest laws, ethical rules, and other laws. The text is unprecedented and extraordinary. It should be rewritten. At a minimum, a second vote is needed because the plan was introduced less than 72 hours ago and because Government Code section 67700(b)(2) on its face applies only to a transition plan adopted on or before December 30, 2018.

Challenged Text: section 1.5(c) of the draft plan.

All four versions of the proposed transition plan contain this text:

1.5 Transfer of FORA's Records:

Except for (a) records pertaining to the ESCA, which records will be transferred to the City of Seaside as custodian pursuant to the ESCA contract documents; (b) records transferred to the local redevelopment authority designated as FORA's successor in connection with the EDC MOA; and (c) records of attorney-client privileged communications and materials protected by the attorney work product doctrine, which will be transferred to Authority Counsel, Kennedy, Archer & Giffen, PC, all of FORA's public records will be transferred to the County of Monterey which shall be the custodian and is designated as the responsible successor agency for records management and compliance with applicable law concerning FORA's public records, including but not limited to the California Public Records Act, for the period after FORA's dissolution,¹

The proposed transfer of public records to a private law firm is unprecedented. It would violate the California Public Records Act and the responsibilities of each one of you as public officials. The law firm of Kennedy, Archer & Giffen, PC is not a public

agency subject to the California Public Records Act. It is not a proper steward of the public's records. In contrast, the proposed plan turns over all other records to public agencies – the city of Seaside, the local redevelopment authority, and the County of Monterey. Those agencies are all subject to the California Public Records Act.

You have not been advised of the myriad problems with the proposal to turn over public records unconditionally to a private law firm that has made millions of dollars from FORA.

California has a complex set of “public integrity” statutes designed to promote and require transparency, loyalty, integrity and accountability in government decisions and contracts, reinforced by common law, other statutes, and ethical rules.

- The Public Records Act gives public right of access to all public records.
- The Political Reform Act and Government Code Section 1090 prohibit any “personal financial interests” of officeholders, employees, *and consultants* in making government decisions.

Turning over a government's public records to the sole control of a private business is a bad idea for all involved.

You should not vote to transfer public records to a private entity unconditionally, where they likely would be lost forever as public records. A vote for the proposed language about Kennedy Archer & Giffen is a vote to hide public records forever from the public eye and to give public records unconditionally to a private for-profit entity that is not subject to the California Public Records Act.

Once FORA turns over its public records to the private law firm, There would no accountability because the public records are kept solely by a private entity. The broad potential for the destruction of records and other mischief is foreseeable. The specific mischief is impossible to predict at this time, and when the records are hidden from view the public may not ever learn what happened to the records, and what mischief took place. the full scope of mischief is unknown at this time.

The issues include:

- How does the public know how the public records are being kept by the private Kennedy, Archer & Giffen law firm?
- What if the private Kennedy, Archer & Giffen law firm destroys FORA's public records? How would anyone know what was destroyed and when?
- What happens to the records when the law firm splits up or dissolves?
- How does a public official know whether records are kept that could help exonerate the official? How would a state agency or DA access the records?

- What records retention and management program would be followed, and with what accountability?
- Has the Kennedy, Archer & Giffen law firm committed in writing in perpetuity to being accountable under the CPRA and to acting in all ways as a public agency would with regard to the public records of FORA?
- Would the private Kennedy, Archer & Giffen law firm respond to CPRA request in future in accordance with the California Public Records Act? If not, the records forever could be lost to the public. If the law firm fails to produce the records, would they be accountable in a lawsuit for failure to comply with the CPRA?
- Would and can the private law firm assert client confidentiality on behalf of FORA, and under what circumstances? Is Mr. Giffen his own client?
- What if one of the law firm's other clients asks the law firm for the public records? That would create a conflict of interest within the firm.
- What if a current or future client does NOT want the records released? That also would create a conflict of interest within the firm.

The Political Reform Act and Government Code Section 1090 prohibit any “personal financial interests” of officials and *consultants* in making government decisions.

Mr. Giffen and Mr. Willoughby as agency counsel have participated in drafting the proposed language that would give their law firm sole control over public records, and they have advised FORA on the legality of the proposed scheme. The courts have held that a “financial interest” in government decisions under section 1090 includes negotiations, discussions, reasoning, planning, and the give and take which goes beforehand in the making of the decision to commit oneself. If section 1090 is violated, the violation cannot be cured, mitigated or undone. The violation need not be intentional. Section 1090 conflict of interest because Mr. Giffen and/or members of his law firm have crafted the proposal and has advised FORA staff and Board as to the legality of something that could benefits him and his firm or his future clients now and/or in the future. The proposed action to transfer records appears to implicate section 1090 as to all individuals involved. This includes the interests of the attorneys involved and the public officials who may obtain a financial benefit from having the FORA records hidden from view at the Kennedy Archer & Giffen office. Their involvement in drafting and negotiating the agreement supports conflict of interest claims under Government Code sections 1090 and 1092, and the common law. You should not participate in this extraordinary and unprecedented scheme.

In determining what constitutes a contract under section 1090, courts and the Attorney General have defined the term broadly to include many different types of government actions. (E.g., *Honig*, 48 Cal.App.4th 289 (1996) (applying section 1090 to grants); 89 Op. Cal. Atty. Gen. 258 (2006) (applying section 1090 to a city council's contribution to a nonprofit); 85 Op. Cal. Atty. Gen. 176 (2002) (applying section 1090 to city council's grant of public funds to a nonprofit); 78 Op. Cal. Atty. Gen. 230 (1995) (applying section 1090 to a city's development agreement).) The courts and the

Attorney General have likewise broadly construed the term to apply to participation at any stage of process. Participation in making a contract or arriving at a decision or an agreement includes “any act involving preliminary discussions, negotiations, compromises, reasoning, planning” and drafting of documents. (Healy Adv. Ltr., FPPC No. A-17-159 (Aug. 16, 2017).) The concept of financial interest is defined broadly. “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.” (Hensely Advice Letter, FPPC No. A-16-254 (2017).) “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.” (*People v. Deysher*, 2 Cal.2d 141, 146 (1934) (citation omitted).) “[F]orbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances.” (*Honig*, 48 Cal.App.4th at 315.) That the interest might be small or indirect is immaterial so long as it is such as deprives the people of the official’s overriding fidelity to the public interest and places him/her in the compromising situation where, in the exercise of his/her judgment or discretion, he may be influenced by personal considerations.”

Ethical rules appear to prohibit such an action.

It may be unethical for a private law firm to accept public records and be the sole steward of the records under the circumstances presented here. By taking the role as sole steward of an agency’s public records, a law firm would be engaging in a business transaction with a client. That action triggers specific acts under state bar ethical rules, and those specific acts have not taken place here as far as TOMP knows. It appears that the proposed scheme would place a private law firm in the position of being their own client, of not being accountable to a client because FORA will have dissolved, and of not being subject to records management and preservation rules of the State of California and as adopted by FORA and the member jurisdictions. The FORA board at the very least should obtain independent legal advice and seek advice from State Attorney General’s office. Your jurisdictions should be very concerned about this draft proposal.

California Public Records Act Request

This is a request to Fort Ord Reuse Authority under the California Public Records Act, as follows: TOMP and KFOW seek to inspect, and possibly to copy, all of the following records of the Fort Ord Reuse Authority:

1. All records of invoices, bills, contracts, and other requests for funds from an attorney to FORA.
2. All records of invoices, bills, contracts, and other requests for funds from any person at Kennedy Archer & Giffen, including pass-through billing(s), and including past concluded litigation.

3. All records of attorney billings.
4. All payments of any attorney billing including pass-throughs.
5. All records that FORA intends to hand over to Kennedy Archer & Giffen may be public records in the future.
6. All records that will be public records under CPRA in the future. This includes, for example, all concluded litigation and litigation in which FORA is no longer a party.
7. All summaries and compilations of the above information, including partial summaries and partial compilations, and the entire record(s) in which each summary/compilation is contained.

There is no time limit to this request. To the extent that the records are currently allowed to be withheld and could be disclosed in the future, TOMP and KFOW ask FORA to ensure those records are placed with an accountable public entity, and not with a private corporation. Please produce all records in electronic format to the extent they are now in that format.

Demand to Fort Ord Reuse Authority to Preserve Records.

We demand that you and all persons who control the records not destroy any record. This includes successor agencies. We demand that no public records be given to any private entity that is not a public agency under the CPRA and other laws and rules.

Very truly yours,

STAMP | ERICKSON

/s/ Molly Erickson

Molly Erickson

cc: Kate McKenna, LAFCO, and Kelly Donlon, LAFCO counsel

1. June 26 Board packet at pages 37, 52, 66, 81.