

# **REPORT OF THE DISTRICT ATTORNEY**



## **INVESTIGATION INTO CONFLICT OF INTEREST ALLEGATIONS AGAINST THE ORANGE COUNTY FAIR BOARD**

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## I. Introduction

This report examines the investigation conducted by the Orange County District Attorney (OCDA) into allegations made against the Governing Board of the Orange County Fair and Event Center (OCFEC Board). The allegations were made public when a copy of a letter containing allegations against the OCFEC Board was leaked to the press. The letter dated Oct. 30, 2009, was sent by the Orange County Counsel (County Counsel) to the California Attorney General's Office (AG) in San Diego. This letter alleged that the OCFEC Board violated the *Bagley-Keene Open Meeting Act* and State laws governing conflicts of interest. The disclosure of the letter's contents was accompanied by additional public allegations of illegal lobbying by a consultant who was allegedly retained by the OCFEC Board.

Upon reviewing the case, the AG declared a conflict and suggested that County Counsel refer the matter to the OCDA. Although the letter had not yet been received, the press reports, public accusations, and the importance of public integrity, prompted the OCDA to initiate an investigation. After several requests by the OCDA, County Counsel forwarded the letter to the OCDA in late December 2009.

Once acquired, the OCDA reviewed the contents of the letter. Specifically, the letter alleged that members of the OCFEC Board violated the State conflict of interest law contained in Govt. Code § 1090, by using their office and public funds to 1) influence the State's pending sale of the O.C. Fairgrounds; and 2) create a private foundation to privately purchase the property to secure personal benefits for themselves. The letter further alleged that in a July 29, 2009, public meeting the OCFEC Board authorized contracts to expend public funds to retain consultants for assistance in this endeavor. The letter also asserted that the failure to list this action on the agenda, hold open discussion on it, or disclose it to the public violated the *Bagley-Keen Open Meeting Act* (Govt. § 1120 *et seq.*)

The OCDA assigned investigators and prosecutors to review the allegations and obtain and evaluate all evidence pertinent to the case. OCDA Investigators began conducting recorded interviews of relevant witnesses and acquiring, organizing, and examining all

relevant documents, including the Agendas, Minutes, and Transcripts of the meetings in question. OCDA prosecutors researched and reviewed all applicable statutory and case law, analyzed the evidence produced and collaborated with investigators during the investigation. When necessary, witnesses were re-interviewed, some multiple times, to ensure that all relevant documents and evidence had been obtained or clarified as needed. The AG was contacted during the course of the investigation. The Report's final conclusions were drawn following the OCDA's review of all evidence and applicable law. Based on the investigation conducted, the OCDA has concluded that the evidence fails to establish that any member of the Governing Board of the O.C. Fairgrounds or any other employee, agent, representative, or affiliated consultant of the O.C. Fairgrounds violated the law. The facts disclosed by the investigation may, however, serve as a reminder of the importance of avoiding the appearance of impropriety.

## **II. Factual Summary**

### **A. History and Economic and Cultural Impact of the Orange County Fair**

Orange County was created in 1889. The following year, the Orange County Community Fair Corporation was formed and put on a small fair that included a horse race and a few exhibits. In 1894, another group called the Orange County Fair Association Inc. took over the organization of the O.C. Fair (Fair). The first Fairs were primarily livestock exhibitions and horse races. At the turn of the century, vendors began displaying products and the Fair became an annual event. In 1916, the Fair was taken over by the newly organized Orange County Farm Bureau. The first O.C. Fair Board was elected in 1925 and a rodeo and carnival added to the Fair.

After World War II, the state formed the 32<sup>nd</sup> District Agricultural Association, a special-purpose state district, which was given responsibility for the Fair, with oversight by the California Department of Food and Agriculture (CDFA). The state then purchased federal land formerly occupied by an Army Air Base and earmarked portions of it for a new fairground. In 1949 the first Fair was held at the new site which became the permanent Fairgrounds. The City of Costa Mesa was incorporated in 1953. The Fairgrounds property was included within the jurisdiction of the new city.

The Fair has grown from a small, 5-day celebration to its current 23-day annual event with an attendance of over 1 million people. In addition, the Fairgrounds host events throughout the year. These events include agricultural and product markets or displays, arts and crafts displays, culinary demonstrations and competitions, exhibits, swap meets, sports races, multiple concerts by both well known and new entertainers, rodeos, festivals, carnivals, amusement rides and attractions, charitable events, auctions, demolition derbies, contests, and gun and auto shows.

There are also permanent structures on the property including a mall, a large exhibit hall, an aviation hanger, administration building, amphitheatre, restaurants, storage facilities, campgrounds, an equestrian center with stables and tracks, and a 3-acre working farm “created to educate youth about agriculture and its importance to daily life.” Numerous commercial vendors and food service providers do business on the fairgrounds and larger companies sponsor displays and exhibits of their products or services. Employment opportunities are also available both during the Fair and throughout the year. There are “Free Expression Areas” designated for those wishing to engage in or listen to public debate or speeches.

There are 23 county fairs operating in the state. A recent report of the CDFA Division of Fairs and Expositions noted the significant economic, job, charitable, cultural and educational impacts of California fairs.

Fairs have a significant impact on California’s economy. Spending by all participants at fair time and interim events results in a positive economic impact on California in excess of \$2.55 billion annually. Jobs created by fairs through direct employment and multiplier impacts reach nearly 28,000 annually. State and local governments collect in excess of \$136 million in tax revenues from fair-related activities annually.

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For each worker the fair organization and related business employ, an estimated 2.62 jobs are created. For each dollar that economic participants pay their employees, an estimated \$2.10 in income is produced. Each dollar spent by fairs and interim event participants generates an estimated 39 cents of additional spending in the state, for a total impact of \$1.39 per dollar spent.

Nonprofit groups raise in excess of \$8 million at California fairs for their community programs. Add in the approximate \$21 million raised at junior

livestock auctions, and a total of \$29 million is raised annually for community benefits.

The cultural and educational impacts of fairs are also deemed significant by the State.

A central feature of fairs is to educate the public about the importance of agriculture in California.

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Fairs entertain, but they also educate people about each other and the contributions that all segments of our society make to California. Through this vital education comes the understanding, appreciation and social harmony so necessary for a healthy and productive society.

Fairs provide a location for cultural and social interaction as well as a focal point for community members to: celebrate their heritage, compete in a variety of events, hold family reunions, display and view artwork, learn about other cultures, demonstrate new technology, [and] showcase the best of California

In addition to providing facilities and activities for educational purposes and broad community services, fairs also provide valuable community activities such as the following: Field trips, Agriculture in the Classroom, Cultural events, Concerts Head Start programs, Pre-school programs, Before/after school programs, Charitable activities, Weddings, Auto Shows, Livestock events, Farmers markets. State and local government agencies use fairs to disseminate vital information regarding the protection of California's natural, industrial, and agricultural resources. These public outreach efforts offer communities a first-hand look at California agriculture and the essential role of this \$30 billion-a-year industry. As an added benefit, California fairs promote awareness of the Golden State's cultural diversity. Approximately 33 million people attend fairground events held in rural, suburban, and urban settings annually. These events attract people from various ethnic and age groups, creating a diverse cultural representation.

The Report concluded that, "California fairs have immense economic, educational, social and cultural impacts. In sum, fairs embody the entrepreneurial excellence, the knowledge seeking, the innovative drive, and the community spirit that is the Golden State."

## **B. Management of the Fairgrounds—Organization and Governance of the Orange County Fair and Event Center**

CDFA is responsible for the oversight of California's agricultural industry, including the network of California fairs which includes the O.C. Fair. The Division of Fairs and

Expositions (DFE), a Division of CDFA, provides fiscal and policy oversight of California fairs and ensures the best use of available resources.

The 32<sup>nd</sup> District Agricultural Association which until recently had responsibility over the Fairgrounds is managed by the OCFEC. The OCFEC is governed by a 9-member Board of Directors appointed by the Governor to serve staggered 4-year terms *without compensation*. The OCFEC Board appoints a Chief Executive Officer (OCFEC CEO) to handle daily operations of the organization. The current OCFEC CEO is the only employee of the OCFEC Board and serves in a multiple at-will capacity as the CEO, Secretary, and Treasurer. The AG operates as the legal counsel for the OCFEC and a deputy AG is present at all public meetings. Since completion of the OCFEC's master land use plan in 2003, a consulting firm (Consulting Firm) has been annually retained by the OCFEC Board. The services provided by this Consulting Firm include land use planning, property analysis, and environmental impact reports. The fees for the Consulting Firm's services are billed to the OCFEC directly.

### **C. The OCFEC Board Studies Options for Local Control of Fairgrounds**

At various times in past years, the OCFEC Board had discussed detaching the Fairgrounds from State control and reorganizing its management. On **Feb. 26, 2009**, the OCFEC Board revisited this issue during its monthly public meeting after one of the Directors raised the idea of separating District 32 from the State and creating a new governing model. The OCFEC Governance Subcommittee (OCFEC Subcommittee) was created for the purpose of investigating other governing options for the OCFEC. It consisted of the OCFEC CEO and two OCFEC Board members.

The Subcommittee began studying other forms of governance, focusing on the Los Angeles County Fair model. The Los Angeles County Fair is the only privately owned fair in the State, owned by a non-profit tax-exempt entity.

### **D. The State Budget Crises Prompts Governor to Propose Sale of state assets including OC Fairgrounds**

On **May 19, 2009**, the California voters rejected several ballot proposals to increase tax revenues for the State budget, prompting the State government to search for other revenue options. Governor Arnold Schwarzenegger (Governor) publicly called for the selling-off of all under-utilized State assets to help close the State budget deficit. The O.C. Fairgrounds was listed among those assets.

**E. The OCFEC Subcommittee decides to inquire into sale of Fairgrounds and local interest in their Acquisition — Former State Senator Dick Ackerman is Retained by Consulting Firm to “Assess” the Matter**

As a result of this announcement, the OCFEC Subcommittee decided to ascertain: 1) whether the Governor and other State leaders were serious about selling the Fairgrounds; 2) whether the community supported retaining the property as a fair and event grounds; and 3) whether local government was interested in entering into a partnership to purchase the grounds in order to preserve the property’s use as a fair and event grounds. The OCFEC Subcommittee conferred with the Consulting Firm on how to assess the situation both in Sacramento and locally in order to answer these questions.

The OCFEC Subcommittee and the Consulting Firm considered former California State Senator Dick Ackerman, to be an effective person who could obtain the desired information. Mr. Ackerman had formerly represented the 33<sup>rd</sup> District and is currently a practicing attorney with a local law firm. In May 2009, the Consulting Firm retained Mr. Ackerman pursuant to their existing retainer agreement with OCFEC. The OCFEC Board approved the retention. Mr. Ackerman was to be paid by the Consulting Firm which would then bill the OCFEC for the costs.

Mr. Ackerman’s main contacts with OCFEC were with members of the OCFEC Subcommittee. He had *no* meetings with the entire OCFEC Board. Mr. Ackerman learned from the Governor’s Office and the Department of General Services (DGS) that the intent to sell the Fairgrounds was serious and that the property would be sold to the *highest* bidder.

Mr. Ackerman was also tasked with determining the possibility of gaining local control over the Fairgrounds. This necessitated researching the Fairgrounds' title to the property and ascertaining whether there were liens, entitlements, or other claims or encumbrances on it. Local zoning laws also were researched to determine whether the property could be retained as fairgrounds. In addition, Mr. Ackerman was assigned to do "community outreach to find out if there was general support" for the purchase, control, and continuing operation of the property as fairgrounds by local government or private entities. This task involved meeting with former OCFEC Board members, Orange County Business Council members, city council members, and members of the Orange County Board of Supervisors (BOS).

Mr. Ackerman first met with one member of the BOS, whom he had known as a colleague in the State Legislature (Legislature). The Supervisor inquired, "Who is going to run this thing?" Initially, this supervisor thought that the County of Orange should run it. Mr. Ackerman thought that Los Angeles County had a "good model for a fair."

#### **F. Costa Mesa City Council Passes Resolution Opposing Sale of Fairgrounds**

On **June 3, 2009**, the Costa Mesa City Council passed a resolution opposing the Governor's proposal to sell the Fairgrounds, noting that OCFEC is a "major entertainment, recreational, cultural and educational asset to Orange County," which provides "employment to thousands," "nurture[s] small business development' and "greatly assists the local and state economy." The resolution also authorized the Mayor, Mayor Pro Tem or any member of the City Council or staff to represent the City's position on the matter.

#### **G. Governor Declares Fiscal Emergency**

On **July 1, 2009**, pursuant to Article IV, § 10(f) of the California Constitution, the Governor declared a fiscal emergency, and called a special session of the Legislature to enact statutory changes to the Budget Act of 2009. On July 2, 2009, Bill AB 22 was introduced in the Legislature. The Bill contained no specifics, which were to be added by later amendments.

## **H. The OCFEC Subcommittee Requests Foundation Filing documents**

In late June or early July 2009 (the date could not be determined) one of the members of the OCFEC Subcommittee contacted Mr. Ackerman's law firm. The firm was requested to begin the drafting of formation documents for a non-profit tax-exempt entity as a new governing model for the OCFEC. Before doing so the Subcommittee member had talked with individual OCFEC Board members who might be "prospective" members of the new governing entity. The Deputy Attorney General assigned to OCFEC was neither consulted nor informed of this request, nor of the fact that current OCFEC Board members were "prospective" members of the new entity.

## **I. The OCFEC Board Holds Special Meeting to hear Subcommittee Report on Study of Governing Alternatives.—Subcommittee Proposes, and Board passes, Resolution, Supporting Sale of Fairgrounds to Non-Profit Corporation (i.e. L.A. Model) to Preserve Use as Fairgrounds**

On **July 15, 2009** the OCFEC Board held a special meeting at Costa Mesa City Hall. The special public meeting was held "for the purpose of notifying [the] public, legislature and Administration of the OCFEC Board position relative to the sale of the Fairgrounds prior to the adoption of the state budget." The CEO delivered the initial address introducing the subcommittee's pending report to the Board.

Towards the first of year, the board appointed a task force or a subcommittee to monitor the goings-on of and to look at some other fairs and their governance in general, and then expanded that role as the governor in May put forward a proposal to sell five properties, including the OC Fair and Event Center.

That task force to monitor those proceedings and that issue was made up of [two directors]. And so they have been monitoring the situation in Sacramento and locally and talking to some of the other fairs who are in the same situation as we are.

So today what we need to do is they need the subcommittee or the task force needs to present their findings. That's the first thing that needs to happen. To speak to the full board, they had to speak in public, as more than two people, as you know, have to gather in a public setting, more than two members.

So they need to produce their findings, and then the boards (sic) need to decide if their findings merit to go on to look at this proposal today. So here are the findings of the subcommittee, and then we'll talk about the merits of moving on to considering this proposal that's before us.

A member of the subcommittee then presented its findings to the full OCFEC Board.

[T]he board designated...the governance subcommittee to take a look at how other fairs throughout California are operated....

So we have looked at the governing documents and held interviews and phone conversations with fairs up and down the state.... We have met with Del Mar. We have pulled documents from Sacramento and the Cal Expo folks, just to get an idea of how to reposition this organization and this hundred fifty acres for the future. Are we doing it right now? Can we do it better? What should we be doing?

Then the state went into the tank financially, and the governor made a proposal that seven surplus properties throughout the state, of which one was the Orange County Fair, be surplus and sold to the public; and we have just sort of kept quiet as we were doing our research.

As the budget now is about to come to conclusion in the next few days, we felt it important at this point in time to bring to the board our findings. And our findings basically replicate how the County of Los Angeles operates their fair. It is a nonprofit fair that is run very effectively. It has local control, which we believe is one of the underpinnings of how we should operate these things, going forward.

So with that model in mind, we have prepared this resolution for the board's consideration, and in our hope that it gets adopted today and transmitted to the governor and the relevant state and local agencies that have oversight.

The OCFEC subcommittee's proposed resolution was to be distributed to the Governor, Orange County's legislative delegation, and other public and private agencies. It noted that the Fairgrounds were "wholly contained within the City of Costa Mesa's land use jurisdiction," that Costa Mesa had "zoned the property 'recreational/institutional,'" had passed its own resolution "opposing the sale of the Fairgrounds except to a local non-profit entity for the purpose of conducting a Fair..." and that its "General Plan" had designated the property as "Fairgrounds." On these and other grounds, the resolution resolved that: "[T]he 32nd Agricultural District's Board of Directors supports Governor Schwarzenegger's proposal to sell the Orange County Fairgrounds and the City of Costa Mesa's proposal for

a local non-profit corporation to acquire the property and perpetuate its use as a fairgrounds and event center....” (This resolution, on its face, was contrary to the Governor’s intent, and the Legislature’s enactment to sell the Fairgrounds to the highest bidder without limitation or conditions of use.)

During the public comment session it was noted that the subcommittee’s recommended resolution was “almost identical to that which the City of Costa Mesa [had] already adopted.” Costa Mesa’s Mayor Pro Tem was present and expressed the City’s support for the resolution.

And we're just delighted that you're here in our conference room, but we're very excited about what you're doing. And as you reference the resolution that we had earlier, a few months ago, opposing the sale. We just want to support what you're doing, and whatever we can do to help.

In referring to the proposed resolution another Costa Mesa official expressed support: “[C]ertainly the City of Costa Mesa, our interests are very much consistent with those of the board, recognizing there are a lot of details yet to be worked out, a lot of details.” A member of the public audience expressed concern over the possibility that the property might be bought and turned into something other than fairgrounds. She asked what the risk of this happening was. Referring to Costa Mesa city officials in the room, an OCFEC Subcommittee member responded,

We have two of the folks who will minimize risk in the room right now, that I think will help answer the question. The city of Costa Mesa retains zoning control on the property. The general plan calls out [for] a Fairgrounds. The zoning code calls out a recreational/institutional use, so the future buyer or the future operator would have to comply with those zoning restrictions.

When the questioner again expressed concern that someone would purchase the fairgrounds “and make it one big skate park,” the OCFEC Board Chair responded, “That’s where Costa Mesa has to approve anything that happens, and they won’t let it.” The Chair summarized the issue facing the community and the goal.

And I think that what we're trying do here is create a win-win-win for the State. They do need money. They're telling us they're going to put our property up for sale.

And when I say "our" I mean everyone in this room, our property up for sale. So no matter what, we've got a risk. Right now we are at a risk.

So the question is can we be pro-active to minimize that risk and retain this fair for the community, not only of the Costa Mesa but of Orange County and beyond. So that's the concept here.

So we're basically signaling to the legislature that: Look, we would like to purchase this, we collectively, and bring it back to local control, so that we don't have, every five years, when there is a budget problem, this big cloud over our heads again, and we can make sure the fair is kept in perpetuity. That's the goal here. So that's what the concept is.

In response another audience member asked:

I think it says in the resolution or what I read was that the resolution is part of it to go to a nonprofit group, that you're recommending that the sale go to a nonprofit.

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But then who is the board supporting? Is the board trying to create their own group to buy the facility now?

A Subcommittee member responded:

At this point all we're trying to do is send a signal to the governor and to the legislature, as they negotiate the budget deal, that there is interest on our part to have the property sold.

We make no other comments, no other determinations in this resolution. This is all we're talking about today.

In the future I think we're going to have discussions about who -- what vehicle might be used, be it nonprofit, for profit.

My personal preference is the Los Angeles County model of the nonprofit.

The audience member persisted:

And then what was the thought process that came up to this resolution on the board's part? What was your thinking to come to this resolution, other than...we have that option. But I'm sure that the board must have some kind of plan, if they decide they're proposing this, or do you have a plan if he proposes to put it for sale?

The Subcommittee member responded that there were no plans as yet: "This resolution comes forward from a two-person subcommittee..., so this the first time the board has

seen this as a body. So we, in the future, will be developing plans; but we don't have any plans as of today.”

A member of the OCFEC Board responded that the L.A. non-profit model was an example to be looked at.

But we do have an example out there, which is the L.A. County Fairgrounds...which has gone to a nonprofit entity. And so they broke away from the state many years ago, probably in similar circumstances, and have been able to really maintain the fairgrounds and the exposition center there, and have a very wonderful governance. So we will be looking at that model.

So when you're thinking about it, that's the kind of thing to think about.

The audience member then asked: “And is there an interested group that's come forward, saying that they would be willing to form that kind of nonprofit group?” The Subcommittee member stated, “Not to my knowledge.” The Chair then stated that those issues would be looked at in the future, but that the intent of the present meeting was to signal state government that there was local interest in purchasing the fairgrounds.

Right now our board is looking at, you know, what all that means. And those are the details that will come.

But at this point, because of the budget issue, we need to be able to signal the governor and the legislature that there is local interest from the City of Costa Mesa, from the city fair board, from the community. You know, we need to provide that signal, so they don't just sell it out from under us. They know that there are local people who are interested in cutting some kind of deal and making a win-win situation.

The CEO affirmed that there was no plan in place, only the concept of a nonprofit model. “Right now the nonprofit model is more conceptual than anything. It's just putting a concept on the table, but there is not a plan behind that.” The OCFEC Board unanimously passed the resolution at the conclusion of the public comment session. The next scheduled meeting was on July 29, 2009. The CEO questioned if waiting then was advisable to do. “But does that feel a little bit far out, the way the pacing of things is going in Sacramento?” A subcommittee member agreed but suggested another special meeting if necessary. “It does. But if we need to do a special meeting again, we'll have to.”

**J. BOS begins Process to Support Sale to Local Government Agency or Non-profit Organization — Articles of Incorporation of Non-Profit Foundation Filed by Mr. Ackerman**

On **July 16, 2009**, at the request of a Supervisor, the Clerk of the BOS calendared a proposed resolution regarding the Governor’s proposal to sell the O.C. Fairgrounds. The resolution offered support to the proposal, “Only if it provides that the Fairgrounds shall only be sold to a local government agency or local not-for-profit corporation to perpetuate its use as a fairgrounds, event center, and equestrian facility. ...”

On **July 21, 2009**, the Articles of Incorporation for the new “Orange County Fair and Event Center Foundation” (OCFEC Foundation) were filed by Mr. Ackerman’s firm with the Secretary of State. The OCFEC Foundation was organized exclusively as a non-profit corporation for public, charitable, and educational purposes within the meaning of § 501(c)(3) of the Internal Revenue Code. Specific purposes of the OCFEC Foundation were to advance and promote the scientific, educational, agricultural, horticultural, viticultural, industrial, and other interests of Orange County. The corporation was not allowed to carry out any activities not permitted by a non-profit corporation exempted from federal income tax under § 501(c)(3). No specific directors, trustees, officers, members, or other persons were specified as the governing body.

Although Mr. Ackerman’s firm had drafted several standard form bylaws, none were finalized or filed. Mr. Ackerman referred their handling to another law firm to avoid the appearance of a conflict of interest. The bylaws would control how the OCFEC Foundation “would operate” and provided that the governing members would serve *without compensation*.

**K. State Transfers Fairgrounds from OCFEC to New District**

Between **July 22, and 23, 2009**, AB 22 was amended to create a new agricultural district, District 32A, which “consist[ed] of all of that real property that is a portion of District 32 that is commonly known as the Orange County Fair located in the City of Costa Mesa.” The bill authorized the Department of General Services (DGS) “to sell all or any portion of the real

property that composes District 32A pursuant to a public bidding process designed to obtain the highest, most certain return for the State from a responsible bidder.” There was no limitation that the property must be retained as a fairground. The funds from the sale were to be “transferred to the General Fund” of the State. As a result, neither District 32, nor OCFEC possessed any authority over the Fairgrounds property. Mr. Ackerman stated that he and OCFEC “had absolutely no input into the language [of the bill] whatsoever.”

#### **L. BOS Passes Resolutions Urging that the Sale of Fairgrounds be Cancelled or Sold Only to Government Agency or Non-profit Organization**

On **July 24, 2009**, the BOS passed a resolution requesting that the Governor “immediately cancel” the sale of the Orange County Fairgrounds. A BOS resolution passed on **July 28, 2009**, supported the sale of the Fairgrounds “*only* [if] sold to a local government agency or local not for profit corporation to perpetuate its use as a fairgrounds, event center, and equestrian center.” In addition, two members of the BOS authored a letter to State Assemblyman Jose Solorio addressing the two BOS resolutions and noting that the State’s Requests for Proposals (RFP) to purchase the property did not contain provisions requiring that the property be retained as fairgrounds.

#### **M. County Officials Meet with Mr. Ackerman to Explore Options for Local Control of Fairgrounds—Governor Approves Fairgrounds Sale**

In late July 2009, after the Foundation’s articles had been filed, two Supervisors met with Mr. Ackerman to discuss the composition of the proposed OCFEC Foundation. Mario Mainero, Chief of Staff to one of the Supervisors, was also present. All participants appeared supportive of the concept of transferring ownership and operation of the Fair from the State to some form of local control.

Mr. Ackerman provided each with a copy of the filed Articles of Incorporation as well as drafts of the yet to be finalized bylaws. The main concern or differences appeared to be how the proposed non-profit organization was going to operate and who was going to run it. The two Supervisors wanted a role for the County in the governance of the OCFEC Foundation. Mr. Mainero was asked to review the bylaws, to ensure that they contained

reasonable terms for County involvement. The two Supervisors did not want another entity to gain control of the property and sell it to a “hotel interest.” Mr. Mainero provided Mr. Ackerman with proposed changes to the bylaws. After the meeting Mr. Ackerman told Mr. Mainero that he would pass them on to the new law firm handling this matter. At Mr. Mainero’s request, Mr. Ackerman also provided him with information on the Los Angeles County model.

Mr. Mainero asked about potential conflicts of OCFEC’s Board members. Mr. Ackerman told Mr. Mainero that he had consulted with the Fair Political Practices Commission (FPPC) and ethics lawyers both inside and outside his firm and was assured he was on “solid ground.” He also asked Mr. Mainero as well as the two Supervisors to let him know if they felt “there’s a problem or an issue, [or if they thought] we did something wrong.” Mr. Ackerman heard nothing back until County Counsel’s letter to the AG was made public.

(FPPC officials confirmed having received a telephone inquiry from Mr. Ackerman after the State began discussing the sale of the OC Fairgrounds, sometime between June and October 2009. Mr. Ackerman had requested a legal opinion on issues involving the private governance of the Orange County Fair, a non-profit foundation, and the sale and purchase of the Orange County Fair property. FPPC has a practice of responding to such telephone inquiries, with “non-binding” legal opinions. As no written records of such inquiries are kept, FPPC could provide no further details on the phone call from Mr. Ackerman.)

No final agreement was reached between the BOS regarding the composition of the OCFEC Foundation Board, however, OCFEC Board members felt that it should include a “broader community.” The last suggestion Mr. Ackerman had heard was for an OCFEC Foundation Board of 12-15 members. Six of them would be members of the current OCFEC Board and the remaining seats would be filled by residents of the City of Costa Mesa, County of Orange, or from the community at large.

On **July 28, 2009**, the Governor signed AB 22, *officially* approving the sale of District 32A, the O.C. Fairgrounds property. The bill contained *no limitations* on the sale of the property.

## **N. OCFEC Board of Directors Holds Public Meeting with Fairgrounds Stakeholders — Unanimous Support for Local Control and Preservation of Fair is Exhibited**

On **July 29, 2009**, the OCFEC Board held an open public meeting to discuss the now pending sale of the Fairgrounds. Contrary to usual practice, the meeting was held during the annual O.C. Fair to include many of the Fair's vendors and other stakeholders who were in the area only during the Fair's annual run from mid July to mid August. As the State's intent to proceed with the Fairgrounds sale had become manifest, the OCFEC Board thought it important to provide these "stakeholders," with the opportunity to publicly air their views. "Item 7" of the meeting's agenda read "Governance Process: A. Governor's Initiative to Sell Orange County Fair and Event Center Action Item."

The meeting's notice and agenda were published 10 days in advance. There were numerous attendees, including the Mayor and a City Council member from the City of Costa Mesa. A new deputy attorney general, replacing a previously assigned one, was introduced and present at the meeting.

A member of the OCFEC Subcommittee opened the meeting stating that, as of the day before, the Fairgrounds now had a "For Sale" sign on it. He also announced that the OCFEC Subcommittee believed the local community "was very supportive of this property remaining a fairgrounds and exhibit center. ..." "That is our desire as well as our partners, the City of Costa Mesa."

The Chair of the OCFEC Board Chair echoed this sentiment noting that the sale had come "up very suddenly, and we have had to act very quickly." The goals of the efforts that were now to be undertaken were: 1) get the O.C. Fairgrounds under local control; 2) preserve its current use as a fairgrounds and event center; and 3) avoid the threat of future sales. The Chair emphasized that the key to securing the future of the Fairgrounds was to get them under local control. This was contrary to the direction of the Governor and the Legislative enactments authorizing the sale which proposed sale to the highest bidder with no use restrictions.

But the idea is to get local control of the fairgrounds. Because we get these issues with the State every time there is a budget crisis. They come looking to the coffers of the fairgrounds throughout the state. They look at selling the property as surplus to make money for the State. And if we can bring the fairgrounds into local control here in Orange County, we won't have that dark cloud over us every few years, when the state has their budget issues.

Prior to public comment, another member of the OCFEC Board made the motion:

So I would like to make a motion to move that the board authorize the staff to retain the necessary consultants to assist in carrying out the governor's ending (sic) legislature's intent. And also that the board direct [the other subcommittee director-member] and myself, as members of the governance subcommittee, to coordinate these efforts with the CEO.

The OCFEC Chair tabled this motion pending further comments from the OCFEC Board members and the public. The OCFEC Chair at several points during the meeting articulated a desire and intent to preserve the Fairgrounds and the need to partner with local government to gain local control over the Fairgrounds in order to do so.

[W]e really want to keep status quo. We want to do what we can for the status quo. We'd like to see it remain as it is.

\*\*\*

Because we really want to make sure it stays local, that we're partnering with the City of Costa Mesa and that we keep this place for all of us, for the community, for everyone.

\*\*\*

The Governor said, "We're going to sell these properties. And we said, "If you're going to sell it it's got to be a fairgrounds, and we want local control.

Comments by other OCFEC Board members agreed with this sentiment and the desire to partner with the community and local government. (Again, these comments were contrary to the Legislative enactment authorizing the sale of the OC fairgrounds to the highest bidder, without use restriction.

"And truthfully, if all possible, we would like to keep everything the way it is."

\*\*\*

Everybody wants to keep this as a fair. And certainly I think all of us, as directors, recognize that very, very strongly at this point.

\*\*\*

Assemblyman Van Tran represents this area, and he has made it very clear that if the sale results in it not being a fair, he will introduce legislation to terminate the sale.

\*\*\*

So we have good legislative partners in Sacramento. I think they're highly respected on this one.

\*\*\*

And I can't emphasize enough how important our relationship is with our partners in the City of Costa Mesa

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I think it's going to remain a fair or it's not going to happen at all.

The Mayor of Costa Mesa supported this position:

I would say I feel confident in saying that the City Council wants to keep it zoned institutional and recreational. And there is no way I'm going to support someone coming in and wanting to put housing **or any other type of use other than fairgrounds**. I think they're pretty solid on that. I don't know how else to put it (emphasis added).

The public's comments clearly mirrored this view: one participant commented, "It sounds like we're preaching to the choir. It sounds like we're all kind of on the same page. We want to see the fair continue."

There was support expressed for the OCFEC Board or a private entity to purchase the Fairgrounds in order to preserve them. Some expressed fear that the Fairgrounds would be sold to a party not interested in maintaining it as a fair or event center. One participant commented, "Next thing you know, they're slicing it up, dicing it up, building condos and houses. It's no longer what we desire or the people that gave this fair to the State in the first place."

The OCFEC Board, local officials, and the participating audience appeared unanimous in their intent and urgency that the O.C. Fairgrounds be maintained as a fair and event center or that the proposed sale be terminated. There was also a sense of urgency. The OCFEC CEO noted: "I'm not sure we can afford to slow down. The pace, first of all, isn't ours, because it's Sacramento's. It was connected with the budget, and we'll go as quick as the governor wants to." Another OCFEC Board Member affirmed that the decision on what was to happen was not in the hands of the Board but in those of the State. "The State of

California makes the decision on who the buyer is. The board does not. I just want to clear that up. It [has] no say into who buys.”

At the end of the meeting the earlier motion was re-introduced and passed unanimously. The OCFEC Board authorized its staff to retain necessary consultants to assist in carrying out the Governor’s and Legislature’s intent. The OCFEC Subcommittee was also directed to “coordinate these efforts with the CEO.” Circumstantially, this could be interpreted (and in fact was by the complainants) as the approval for the retention of Mr. Ackerman to further the efforts of the Foundation.

**O. Some OCFEC Board Members Join Non Profit Foundation—Personally Paying for the Drafting of the Articles of Incorporation—DSG Solicits Offers to Purchase Fairgrounds and Advises Costa Mesa Not to Restrict Use of Fairgrounds Land.**

On **July 29, 2009**, two OCFEC Board members decided to be on the OCFEC Foundation Board (OCFEC Foundation). Each sent personal checks to Mr. Ackerman’s firm in payment for drafting the OCFEC Foundation’s Articles of Incorporation. Others followed in August and September. Mr. Ackerman’s firm had been billing the consulting firm for his services. Intermingled with these billings were charges for drafting these documents. Those billings were later withdrawn. Accordingly no OCFEC funds or any other public funds were used to pay for the OCFEC Foundation’s incorporating documents. The Board members’ new “interests” in the Foundation were never recorded in any records of OCFEC. According to OCFEC officials, this was not done ostensibly to avoid any mixing of the Foundation with OCFEC. For the same reason, the deputy AG who had been present at the July 29, 2009, meeting was not consulted regarding the Foundation.

On **Oct. 7, 2009**, the DGS solicited RFPs to purchase the O.C. Fairgrounds property. The RFPs were available to download on the DGS website.

On **Oct. 23, 2009**, DGS sent a letter to the Costa Mesa City Council concerning its July 28, 2009, resolution regarding the zoning of District 32A property to retain its use as fairgrounds. The letter advised the Costa Mesa City Council that DGS was soliciting

proposals to purchase the land, seeking the highest and best use. The letter asked the City Council to not interfere with the sale of the Fairgrounds property, and further requested that the City reconsider its attempts to restrict the use of the land, as doing so could adversely affect the State's attempts to sell it for the highest possible price.

**P. Oct. 30, 2009, Complaint Letter to AG**

**1. At Behest of a County Supervisor Staff Member, County Counsel Sends a Letter to the AG Alleging Violations of Conflict of Interest and Open Meeting Laws by the OCFEC Board—The AG is Requested it Investigate**

On **Oct. 30, 2009**, the Orange County Counsel sent a letter to the AG's Office in San Diego. (Reference: Attachment.) The letter alleged that at the July 29, 2009, meeting the OCFEC Board had used public funds for "lobbying" and forming the OCFEC Foundation, in which Board members also had individual personal interests, thereby violating Govt. Code § 1090. The letter also alleged that the July 29, 2009, meeting's notice and agenda did not provide proper notice of this action in violation of the *Bagley-Keene Open Meeting Act* (Govt. Code § 11120*et seq.*).

**2. The Complaint Letter is Leaked to the Press Terminating the Foundation's Efforts: AG Informs OCDA it will Declare a Conflict and Suggest Referral to OCDA—OCDA Announces Intent to Investigate**

The content of the letter was leaked to the press. The source of the leak was never determined. The allegations against OCFEC Board members were now accompanied by public allegations that Mr. Ackerman had engaged in "illegal lobbying." The now public accusations resulted in the frustration of any further attempts by the OCFEC Foundation to raise the funds necessary to purchase the Fairgrounds. At its next public meeting the OCFEC Board faced a hostile, accusatory audience.

The OCDA received press inquiries asking whether it was going to investigate the case, and contacted the AG in San Diego who confirmed receiving the letter. The OCDA was told by the AG that since they were counsel for OCFEC, the AG had a conflict of interest

that precluded it from investigating the complaint. The AG would be unable to forward the complaint to the OCDA due to the conflict, but would suggest to County Counsel that he bring the matter to the OCDA. The AG stated that it was not the source of the press leak. The OCDA then publicly announced that it would initiate an investigation into the matter.

On **Nov. 10, 2009**, the *Los Angeles Times (LAT)* published an article claiming the OCFEC CEO had acknowledged hiring Mr. Ackerman to “lobby” State officials *after* the Governor proposed the sale of the Fairgrounds property. The OCFEC CEO disputed the accuracy of the article stating that he never used the term “lobby” and requested a retraction. The *LAT* reporter acknowledged in an e-mail to the OCFEC CEO that the specific term, “lobby,” may not have been used but argued that, in his opinion, the OCFEC CEO’s description of Mr. Ackerman’s activities “fits the definition of lobbying.” The *LAT* accordingly refused to retract or correct the story.

**Q. AG Declares Conflict—OCDA Seeks Copy of Complaint Letter and Supporting Documents and Evidence—Mr. Ackerman’s Law Firm sends letter to Consulting Firm Withdrawing Charges for Foundation’s Documents.**

On **Nov. 13, 2009**, the AG wrote to County Counsel declaring a conflict of interest and declining to investigate the actions of the OCFEC on the grounds that: 1) The AG had acted as their counsel, and 2) “the District Attorney, and not the Attorney General, has primary responsibility for the investigation and prosecution of crimes occurring in the county.” The letter suggested that the County Counsel “may bring this matter to the attention of the District Attorney.” The AG forwarded a copy of this reply to the OCDA.

A message was sent to County Counsel by the OCDA, providing a contact person to accept and review the complaint, followed by a **Nov. 20, 2009**, hand delivered letter inviting County Counsel to submit its complaint to the OCDA. On **Nov. 24, 2009** the OCDA confirmed to County Counsel its intent to investigate the matter and invited again submission of the complaint and all supporting documentation or reports.

On **Nov. 23, 2009**, after the complaint letter was leaked to the press, Mr. Ackerman’s law firm sent a letter to the Consulting firm indicating that “a number of charges included in

your billings are not chargeable to your account.” The charges totaled a little over \$7,000 and were for the drafting of the Foundation’s documents. The Consulting Firm was directed to deduct those charges from the amounts owed to the firm. The individual OCFEC Board members who had elected to join the Foundation had previously already paid their portions of those charges from their personal accounts.

On **Dec. 8, 2009**, the OCDA sent a letter directly to County Counsel, reiterating the necessity of receiving “all supporting documents, reports, and witness statements underlying the allegations made in (County Counsel’s) letter.” On **Dec. 18, 2009**, County Counsel informed OCDA by telephone that his office had no additional information other than what was contained in his letter to the AG. This was followed by a letter dated **Dec. 22, 2009**, confirming that the County Counsel had “no additional information other than what was contained in the letter to the AG.” A copy of the letter was enclosed. In the interim, Mr. Ackerman voluntarily offered to come to the OCDA’s Office for an interview.

**R. State Receives Offers for Purchase—OCFEC Foundation does not Bid—State Rejects all Bids—Negotiates with Costa Mesa and Reaches Tentative Agreement to Sell Fair to Private Corporation which had been Selected by Costa Mesa under agreement to Continue and improve Fair—Approval by State Legislature Still Required.**

In **January 2010**, the City of Costa Mesa requested that the Governor stop the pending sale of the Fairgrounds. The request was denied. On **Jan. 14, 2010**, an auction was held on the Fairgrounds property. DGS publicly announced it had received seven offers for the purchase of the O.C. Fairgrounds including a joint bid from the County of Orange and the City of Costa Mesa. The joint bid from Orange County and Costa Mesa was not the highest bid. The OCFEC Foundation did not submit a bid. On **March 17, 2010**, DGS announced its rejection of all of the bids. The City of Costa Mesa then inquired if the State was interested in pursuing the “possibility of local purchase.” Exclusive negotiations with the City were authorized by the Governor’s Office.

On **June 23, 2010**, after months of negotiations the State and the Orange County Fairgrounds Authority (Joint Powers Authority that includes the City of Costa Mesa and the

Costa Mesa Public Finance Authority) reached a tentative agreement for the sale of the Orange County Fairgrounds to a Private Corporation for \$96 million. The Corporation had agreed to continue the Fairgrounds as a fair and event center and to maintain and improve the facilities to that end. The City and the Private Corporation were to partner to run the fair and events. The City retained zoning authority over the fairgrounds and was also granted an option to purchase them in the future. The agreement requires legislative approval. As of the completion of this report, that approval has not yet been granted. On **Aug. 24, 2010**, DGS issued a second RFP in the event that the Legislature does not approve the agreement with Costa Mesa. The deadline for submission was set as Sept. 30, 2010.

On Sept. 17, 2010, at its public meeting, the OCFEC Board made public a legal memo from its attorney dated the same date. The memo questioned whether the state had the authority to transfer the fairgrounds property to a new district 32A, sell it and deposit the proceeds into the general fund due to ambiguities in the title and potential conflicts with existing law. The memo concluded that,

Due to ambiguities in the Bill and conflicts between the Bill [i.e. AB 22] and the existing legislation, the Department's [i.e. DGS] authority to effectively convey title to the Property through the RFP process is unclear. In addition, even if a title company agrees to insure title, it is unclear as to whether the funds from the sale may be deposited into the state's General Fund....

On **Sept. 20, 2010**, the OCFEC Board sent a letter to the Governor containing a copy of the September 17, 2010, legal memo from its attorney. The letter did not posit the opinions contained in it as fact but rather as issues needing clarification. The letter stated:

The Board of Directors pose these issues as inquiries rather than statements of fact and are seeking clarification on the rights and responsibilities of the 32nd DAA Board of Directors should there be a successful bidder as a result of the Department of General Services' Request for Proposals II currently in the solicitation of bids phase.

As the report was released there was no "clarification" of these issues and no word on the results of the 2<sup>nd</sup> RFP.

### III. Genesis and Details of the Complaint

#### A. Contents of the Oct. 30, 2009, Letter to AG

In his Oct. 30, 2009, letter to the AG, County Counsel stated he had “been informed” that “contracts” had been entered with Ackerman and a law firm and that the “contracts were designed to lobby the Governor’s Office in formulating the terms and conditions of the RFP to be issued by the State for the sale of the O.C. Fairgrounds.” The letter also alleged that this same law firm “assisted a number of members of the Fair Board in forming the foundation eight days before the consulting contract was approved by the Fair Board.” The letter appeared to assume that public funds had been used to advance the personal interests of OCFEC Board members. The letter stated:

I question whether the Fair Board’s decision to use Fair Board funds for a lobbying or similar contract in connection with the formation of the contract or influencing the RFP process represents personal influence by Board members who are prospective foundation members, and who thus would have a direct personal interest in the outcome of the RFP process.

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Here, it appears that the Fair Board utilized public funds to engage a firm to influence the design of the RFP so it would best suit the anticipated Foundation bid. Since several members of the Fair Board were also going to be on the Foundation Board and the Foundation was incorporated as a private, non-profit entity and not a government entity), this expenditure of public funds for contract with [Ackerman’s] firm was a contract that would aid the personal interests of those members.

These “personal interests” to be served were equated to “financial interests” and described as follows: “If past practice holds, members of the Foundation Board would enjoy some (even if minimal) perquisites, such as free tickets to the Fair, parking practices, etc. Those are financial interests.” The letter concluded that this “might violate Government Code Section 1090.”

The letter further alleged that “it appears that the OCFEC Board may have violated the *Bagley-Keene Open Meeting Act*,” at its July 29, 2009, meeting by failing to properly notice and post the action that was taken on the agenda. The agenda described the topic as “Governors Initiative to Sell Orange County Fair & Event Center Action Item.” This letter

asserted that the OCFEC Board failed “to properly describe the actions taken at the meeting by the OCFEC Board, in that there was no notice given that the OCFEC Board was considering authorizing the consulting agreements discussed above.”

## **B. Interview with County Counsel**

On Feb. 9, 2010, and June 11, 2010, OCDA investigators interviewed County Counsel and asked him to provide documentation to support the allegations made in his letter. County Counsel replied that he had “no first hand information,” and “no independent knowledge” to support the allegations. He had no independent information or knowledge concerning the association between the OCFEC Board and Mr. Ackerman’s law firm, or how that firm assisted the OCFEC Board in forming the OCFEC Foundation. He did not know why the second law firm became involved in the formation process.

County counsel had based his letter on information provided to him by Mr. Mainero, including the allegation that OCFEC Board members had used public funds to influence the State’s RFP process for the Fairgrounds. He was never made aware that Mr. Ackerman had met with Mr. Mainero and two Supervisors to discuss County interest in doing something about the pending sale of the Fairgrounds. He was only aware that two Supervisors had been designated by the BOS to look into the Fairgrounds sale. County Counsel did not recall if Mr. Mainero had shown him any documents upon which he had based his opinion. Most of the information Mr. Mainero had provided was verbal. County Counsel did go to the OCFEC website to look at the OCFEC meeting’s “minutes,” but did not review the full transcript of the meeting

Mr. Mainero had also raised the *Bagley-Keene* allegations to County Counsel. After reviewing the information Mr. Mainero had provided, the County Counsel felt that the OCFEC Board did not accurately describe the action taken. County Counsel opined that *if* contracts for legal services had been approved at the meeting, the agenda should have said something similar to, “enter into contracts,” and the OCFEC should have provided copies of the contracts at the meeting. County Counsel acknowledged that the County had become interested in bidding to buy the O.C. Fairgrounds, though he could not recall if that was before or after he sent the letter.

After County Counsel drafted the letter he showed it to Mr. Mainero and circulated it among the Offices of the BOS. He then sent the letter to the AG since he thought that Office was responsible for enforcing the *Bagley-Keene Open Meeting Act*. To County Counsel's knowledge, after the letter was sent there was no discussion between his Office and the press prior to its contents being made public. He did not believe his Office to be the source of the leak.

### **C. Interview with Supervisor's Staff Member**

On March 4, 2010, and June 16, 2010, OCDA investigators interviewed Mr. Mainero, who acknowledged meeting at least once with Mr. Ackerman and two County Supervisors. He stated that he believed that Mr. Ackerman's firm was drafting formation documents for a non-profit foundation that might bid on the Fairgrounds. Mr. Mainero had drafted some language for the Legislature which limited the proposed sale to non-profit or government entities, but as the bill was on a "fast track" in the Legislature, the attempt "went nowhere." The bill considered did not provide any limits on who could buy the property or its use. This prompted the BOS to pass a resolution drafted by Mr. Mainero which stated that the Fairgrounds should be sold only to a non-profit or government entity that would continue fair operations. The bill passed the Legislature without such limitations.

Consequently, Mr. Mainero stated that by late July and early August of 2009, the "view" was that if anyone was going to buy the O.C. Fairgrounds and continue its operation as a fair and event center, it would be the non-profit OCFEC Foundation. Mr. Mainero stated that the thought then was to "at least make sure that there's County and City governance on the OCFEC Foundation Board to make sure it doesn't do something really weird." In Mr. Mainero's view, that was the "whole genesis...of why the County was cooperating with the OCFEC Foundation."

Mr. Mainero stated that the Supervisors wanted to assure a role for "County governance authority" in the OCFEC Foundation, which meant that the "County would be able to put representatives [and] the city would be able to put representatives on this foundation," as "part of the controlling body." The two Supervisors in the meeting with Mr. Ackerman had asked him to submit OCFEC Foundation's formation documents to Mr. Mainero. He was

to review them and draft revisions ensuring representation for the County and “probably” Costa Mesa. The only documents Mr. Mainero received were “vanilla draft articles of incorporation and the bylaws.” He described them as “a boiler plate type of thing.” Mr. Mainero said he was told that these documents were “not yet incorporating what you guys want.” He was promised by Mr. Ackerman that the formation documents incorporating those desired changes would be forwarded to him, but he never received anything else.

Mr. Mainero later saw a newspaper article in which the CEO of OCFEC was quoted as saying that Mr. Ackerman had been employed by contract to “lobby” on behalf of the OCFEC Board. Mr. Mainero was “positive” the article “used the word lobby” and talked about contracts. Mr. Mainero assumed this referred to the one employing Mr. Ackerman “to lobby on behalf of the OCFEC Board,” and that this contract was the same one “that we now know was approved on July 29, 2009.”

The article “raised alarm bells” so Mr. Mainero looked up the agenda of the July 29, 2009, OCFEC Board meeting and noted that it “doesn’t say anything about a contract...” The described action to be taken at that meeting was to “authorize Staff to retain the necessary consultants to assist in carrying out the Governor’s and Legislature’s intent.” Based upon the press article he had read, Mr. Mainero concluded, that this involved the creation of “a lobbying contract, that Mr. Ackerman was being employed to lobby the Governor’s office...in connection with the sale of the fairgrounds. ...”

At first Mr. Mainero assumed that the OCFEC Board members “were just paying Mr. Ackerman’s firm personally.” If the OCFEC Board members paid for the contracts personally, Mr. Mainero conceded that, “I don’t think there’s a violation. “That would be my conclusion under the law.” Mr. Mainero changed his mind when he read the agenda. If the OCFEC Board members had personally paid for the contracts “it didn’t make any sense why the public entity would be approving the contract.” He opined, “Why would the public entity have to approve a contract with Mr. Ackerman or his firm if in fact the contract is between members of the foundation as individual members? There should be no Fair Board Action.”

In sum, Mr. Mainero concluded that: 1) the agenda item on the July 29, 2009, meeting involved a contract to retain Ackerman to lobby on behalf of the OCFEC Foundation and the OCFEC Board members “in their private capacity” as OCFEC Foundation members; and 2) since it was done at a public meeting, OCFEC Board funds were used to advance these private interests. Mr. Mainero concluded: “that in my view violates [Govt. Code §1090].” He felt that *if* public funds had been used for “private advantage,” a violation of Govt. Code § 1090 could be established even though the advantages received were “pretty minimal.” Finally, Mr. Mainero also concluded that since the agenda did not say anything about an employment contract, “that in my view is an absolute violation of *Bagley-Keene*.”

Mr. Mainero confirmed that he had “suggested” the legal analysis contained in the Oct. 30, 2009, letter to County Counsel, after reading the newspaper article where the term “lobbying” had been used. When shown the Nov. 10, 2009, *LAT* article, Mainero acknowledged the discrepancy in dates but insisted that there must have been an earlier article that prompted him to bring the matter to the attention of County Counsel. Mr. Mainero felt he would have e-mailed County Counsel his legal analysis.

Mr. Mainero said that County Counsel “agreed” with his analysis and drafted the complaint letter. The letter was then shown to Mr. Mainero who made only grammatical changes to it. Although initially there had been coordination with OCFEC’s Board, that coordination ended as soon as Mr. Mainero formed and communicated his opinion that there was inappropriate conduct on the part of OCFEC’s Board.

Mr. Mainero stated he had “no specific recollection” of having informed County Counsel that he and two Supervisors had met with Mr. Ackerman to discuss County participation in the OCFEC Foundation’s governing board. Mr. Mainero assumed that one of the Supervisors who had met with Mr. Ackerman would inform the County Counsel and he was, at any rate, “laser focused” on the conflict of interest issue.

Mr. Mainero believed that he received the drafted letter from County Counsel via e-mail for review. He believed it was also sent to all of the BOS Chiefs of Staff. Mr. Mainero did not know how the media got a copy of the letter. He stated he did not leak it and felt certain it

did not come from his Supervisor's Office, as his Supervisor had a friend on the OCFEC Board whom he would not wish to publicly embarrass. Mr. Mainero noted that there were three or four other possible BOS offices from which the letter could have been leaked and that "these offices are sieves."

#### **IV. Applicable Law**

##### **A. Conflict of Interest**

There are two potentially applicable state conflict of interest laws, Govt. Code § 1090 and Govt. Code § 87100. The pertinent sections and applicable case law will be reviewed separately.

##### **1. Govt. Code § 1090**

Govt. Code § 1090 prohibits government officials from having a financial interest in any contract made by themselves or a board of which they are a member. As a state agency, Govt. Code § 1090 is applicable to OCFEC and its governing board. Section 1090 specifically provides that:

Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

"An official has a financial interest in a contract if he might profit from it." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333) "The interest proscribed by Government Code section 1090 is an interest in the contract." (*Klistoff v. Superior Court* (2007) 157 Cal. App. 4<sup>th</sup> 469, 478) If the interest involved meets this test, the application of the statute is fairly strict. A public official cannot escape liability under the law even if he abstains from participation in the making of the contract.

A "public officer cannot escape liability for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations ... Mere membership on the board or council establishes the presumption that the

officer participated in the forbidden transaction or influenced other members of the council.” (*Thomson v. Call* (1985) 38 Cal. 3<sup>rd</sup> 633, 649)

The term “contract” has been broadly interpreted. “[P]rohibited financial interests are not limited to express agreements for benefit and need not be proven by direct evidence. Rather, forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances.” (*People v Honig, supra*, 48 Cal. App. 4<sup>th</sup> 289, 315) Similarly, the phrase “contract made” has also been interpreted broadly by the courts.

Although section 1090 refers to a contract “made” by the officer or employee, the word “made” is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. (*People v. Vallergera* (1977) 67 Cal. App. 3<sup>rd</sup> 847, 868)

Consequently, “an official (or a public employee) may be convicted of violation [of Govt. Code § 1090] no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly **to promote his personal interests.**” (*Ibid; People v Sobel* (1974) 40 Cal App. 3<sup>rd</sup> 1046, 1052) (Emphasis Added) “Thus, ‘the test is whether the officer or employee participated in the making of the contract in his official capacity.’” (*People v. Gnass* (2002) 101 Cal. App. 4<sup>th</sup> 1271, 1292-1293)

## 1. Exceptions

This harshness is tempered by judicially created and specific statutory exceptions. One judicially created exception is where the conflicting interest develops *after* the contract has been created as long as this was not prearranged.

[P]ublic officers "are denied the right to make contracts in their official capacity with themselves or to become interested in contracts thus made." (Citation) We have recognized an exception to this rule where the conflict arose after the award of the contract, but this exception turns upon the fact that no earlier agreement -- express or implied -- existed between the official

and the entity contracting directly with the city. (*Thomson v. Call, supra*, 38 Cal. 3<sup>rd</sup> 633, 635)

Another judicially created exemption is for “remote or minimal interests.” Only interests “which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests” of their agency are forbidden. (*Stigall v. Taft* (1962) 58 Ca. 2<sup>nd</sup> 565, 569; *People v. Honig, supra*, 48 Cal.App.4th 289, 333) The statute “is aimed at any interest, other than an interest that is too remote or speculative, that could compromise a public official's judgment or cast doubt on whether he executed his duties with the utmost allegiance, diligence, and loyalty to his office.” (*Klistoff v. Superior Court, supra*, 157 Cal App.4<sup>th</sup> 469, 480) “The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting.” (*Lexin v. Superior Court* (2010) 47 Cal. 4<sup>th</sup> 1050, 1075)

Specific statutory exceptions for “remote interests” may be applicable to this case. Govt. Code § 1091 provides in pertinent part that:

An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has **only a remote interest in the contract** and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, "remote interest" means any of the following:

(1) That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)) or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

Two additional possibly applicable exemptions are provided in two subsections of Govt. Code § 1091.5(a). They read as follows:

(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

(12) That of (A) a bona fide nonprofit, tax-exempt corporation having among its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit....

The definitions of the types of lands pertinent to the latter exception are provided in Public Resources Code § 5902. That statute provides in pertinent part that:

"Historical resource" includes, but is not limited to, any building, structure, site areas, or place which is historically or archeologically significant, or is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California. (§ 5902(d))

"Park" means a tract of land with outstanding scenic, natural, open-space, or recreational values, set apart to conserve natural, scenic, cultural, or ecological resources for present and future generations, and to be used by the public as a place for rest, recreation, education, exercise, inspiration, or enjoyment. (§ 5902(i))

## **2. Govt. Code § 87100**

Govt. Code § 87100 provides that, "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Govt. Code § 87103 defines the nature of the proscribed financial interest. It provides that, "A public official has a financial interest in a decision...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 his or her immediate family..." Other pertinent precluded interests include direct or indirect investments in a business entity or real property which are at least worth \$2000, any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management or sources of income valued at \$500 or more.

A financial effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable." (*Smith v. Superior Court* (1994) 31 Cal. App. 4<sup>th</sup> 205, 212) Financial effects are "material", if they might interfere with an official's performance of his or her duties in an impartial manner free from bias. (*Sankey, Iris, State Board of Equalization*, 2 FPPC 157 (No. 76-071, 1976)

A knowing or willful violation of Govt. Code § 87100 may be criminally or civilly prosecuted. (Govt. Code §§ 91000 and 91005.5) Govt. Code § 91001 grants county district attorneys the authority to prosecute violations occurring within their respective jurisdictions. That authority carries with it the mandate that the good or bad faith of the officials involved must be considered before any sanctions are applied. "Whether or not a violation is inadvertent, negligent or deliberate, and the presence or absence of good faith shall be considered in applying the remedies and sanctions of this title." (Govt. Code § 91001(c))

### **B. The *Bagley-Keene Open Meeting Act***

The OCFEC Board is subject to the *Bagley-Keene Open Meeting Act* Govt. Code § 11120 *et seq* which applies to multi-member bodies in the executive branch of the State government unless otherwise accepted. (Govt. Code §§ 11121 and 11127) The Act's purpose is stated in its preamble:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

To achieve this purpose, Govt. Code §11125(a) requires that meetings must be noticed at least 10 days prior to their occurrence. The notice shall include "a specific agenda for the meeting, containing a brief description of the items of business to be transacted or discussed in either open or closed session," per Govt. Code § 11125(b). The description "generally need not exceed 20 words."(*Ibid*)

Where the subject matter of an agenda item is sufficiently described, an additional description of any potential action that may be taken is unnecessary.

[W]here the subject matter is sufficiently defined to apprise the public of the matter to be considered and notice has been given in the manner required by law, the governing body is not required to give further special notice of what action it might take. (*Phillips v. Seely* (1974) 43 Cal. App. 3<sup>rd</sup> 104, 120)

Criminal enforcement actions for violations of the *Bagley-Keene Act* may be brought only in the limited circumstance where there is a specific intent to conceal information which the public has a right to know.

Each member of a state body who attends a meeting of that body in violation of any provision of this article, and **where the member intends to deprive the public of information** to which the member knows or has reason to know the public is entitled under this article, is guilty of a misdemeanor. (Govt. Code § 11130.7, emphasis added.)

While civil actions for injunctive relief or to declare null and void an action unlawfully taken are authorized, these too are subject to limitations. A suit for an injunction can only be brought to stop present or prevent threatened future violations, not to address past ones.

[The *Bagley-Keene Open Meeting Act*] grants...a right of action...only to present and future actions and violations and not past ones. Specifically, [the *Bagley-Keene Act*] grants a right of action: (1) to stop or prevent a present or future violation of the act--but not to reach back to a past one; and (2) to determine whether the act is applicable to a present or future action--but not a past one. (Govt. Code §§ 11130; *Regents of the University of California v. Superior Court* (1999) 20 Cal. 4<sup>th</sup> 509, 536)

For alleged agenda violations there are additional limitations. If there has been “substantial compliance” with agenda and notice requirements, a suit to declare an action null and void is precluded. (Govt. Code §11030.3(b) (3))

### **C. Laws Governing “Lobbying” by Former State Officials**

The “Postgovernment Employment Restrictions Act of 1990” imposed “lobbying” restrictions on former government officials, including former members of the Legislature. The term “lobbying” however, is given a specifically limited definition.

“Lobbyist” means any individual who receives two thousand dollars (\$2,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official **for the purpose of influencing legislative or administrative action.** (Govt. Code § 82039(a), emphasis added.)

Former legislators are only precluded from “lobbying” or giving the *appearance* of lobbying *members of the state legislature*, and only for a period of one year after leaving office. Again, “lobbying” is given a limited definition.

No Member of the Legislature, for a period of one year after leaving office, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance, or by making any oral or written communication, before the Legislature, any committee or subcommittee thereof, any present Member of the Legislature, or any officer or employee thereof, **if the appearance or communication is made for the purpose of influencing legislative action.** (Govt. Code § 87406(b), emphasis added.)

## V. Analysis and Conclusions

### A. Allegations of Violations of Conflict of interest Laws

#### 1. Govt. Code § 1090

##### a) “Financially Interested” in a Contract.

Govt. Code § 1090 requires that public officials “shall not be financially interested in any contract made by them in their official capacity.” **The evidence developed by this investigation does not, beyond a reasonable doubt, establish a violation of Govt. Code § 1090 on this basis.** There are several factors that support this conclusion.

The complaint had assumed that a contract between Mr. Ackerman and OCFEC was created at the July 29, 2009, OCFEC meeting, and that *public funds* were then committed to create the Foundation. Although the resolution passed that day authorized the retention of consultants, the Consulting Firm had long been retained and Mr. Ackerman had been retained several weeks earlier. The OCFEC Board had created the OCFEC Subcommittee in February 2010 to explore other governing models for local control of the

Fair. The Governor's suggestion to sell the OC Fairgrounds intervened in May 2010, prompting the retention of Mr. Ackerman by the Consulting Firm to ascertain the seriousness of the intent to sell the Fairgrounds as well as research local government and community interest in securing local control over them. The "contract" between Mr. Ackerman and LSA, whether express or implied, was approved by the OCFEC Board, *before* the Foundation was formed.

While the OCFEC Board thus "participated" in making the contract between the Consulting firm and Mr. Ackerman, there is no evidence that they did so "to promote [their] personal interests." Assuming, moreover, that this resulted in the acquisition of a conflicting personal "financial interest" in the contract, when OCFEC board members later joined the Foundation, that interest did not develop until *after* the contract had been made. As noted earlier, conflicts arising "after the award of the contract," are legally exempted as long there was no preexisting agreement. There is no evidence of such a preexisting agreement.

OCFEC funds were not directly used in forming or operating the Foundation. After providing "boiler plate" documents, and filing the Articles of Incorporation, Mr. Ackerman referred any further Foundation, matters, to another law firm. Charges for drafting these documents mistakenly billed to the Consulting Firm were withdrawn. Prior to this, those OCFEC Board members who desired to become members of the Foundation, had already paid most of those charges from their personal funds.

## **b) Exemptions**

Only interests that would "prevent the officials involved from exercising absolute loyalty and allegiance to the best interests of the agency" constitute illegal conflicts of interests proscribed by Govt. Code § 1090. "Remote or minimal" interests" are not proscribed. Assuming, conflicting personal interests were created, the evidence shows the interest were remote and minimal. As with OCFEC Board members, governing members of the Foundation were to have served *without compensation*. The only benefits contemplated in the original complaint were certain "perquisites."

The Oct. 30, 2009, County Counsel complaint letter opined that “if past practice holds, members of the OCFEC Foundation would enjoy some (even if minimal) perquisites, such as free tickets to the Fair, parking etc.” By the letter’s own terms, these “perquisites” are not only speculative, but also remote, and “minimal.” Mr. Mainero, the person who provided the information behind the complaint also conceded that OCFEC Board members’ interests were “pretty minimal.” Remote, minimal or speculative interests are not legally sufficient to divert the loyalty of OCFEC Board members from pursuing the interests of OCFEC, which was to preserve the Fairgrounds. The investigation did not produce evidence of any other personal or financial interests.

The statutory exemptions in Govt. Code §§ 1091, 1091.5(a) (8), and 1091.5(a)(12) may be applicable. Govt. Code § 1091 provides that certain interests are deemed “remote,” among which are “[t]hat of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code....” This exemption would have applied had the OCFEC Board followed proper procedures. These procedures required that the “interest [be] disclosed to the body or board of which the officer is a member and noted in its official records.” In addition the board was required to ratify the contract involved without those interested in the contract voting. This procedure was not followed, ostensibly because the Board members felt the two entities needed to remain separate. The deputy attorney general who was present at all meetings, could have provided guidance, but was never consulted. The exemption provided by Govt. Code § 1091 is therefore not applicable as its procedural requirements were not followed.

Govt. Code § 1091.5(a)(8) exempts interests of “noncompensated officer[s] of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body ...provided ... that this interest is noted in its official records.” The Foundation’s officers were to be “noncompensated” officers of a tax exempt corporation whose stated purpose was preserving the Fair and the fairgrounds. This exemption could seemingly have applied. However, as noted, on July 22, 2009, the Legislature enacted AB 22 creating a new agricultural district (District 32A) and purporting to transfer to it all of the Fairgrounds property. DSG was given *exclusive* authority over the sale. If this action had that intended legal effect, OCFEC no longer had a function that could be supported by

the Foundation, so that the exemption would not be applicable. If “ambiguities” in AB 22 mean that OCFEC retained an interest that could be supported, the required procedures for this exemption to apply were nevertheless not followed. For this exemption to have applied, the “interest” of those OCFEC Board members who joined the Foundation would need to have been recorded in OCFEC records. For the reasons noted above, they were not. The exemption contained in Govt. Code § 1091.5(a)(8) is therefore not applicable.

The third possibly applicable exception is contained in Govt. Code § 1091.5(a)(12). This exempts interests in non-profit tax-exempt corporations formed for “the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit.” The Foundation was created as a non-profit tax-exempt corporation and the types of lands covered in this exception are broadly defined. There are no published cases limiting those broad definitions. “Historical resource” includes, but is “not limited” to “any building, structure, site areas, or place which is historically or archeologically significant, or is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California.” “Park” is also broadly defined to include land with “outstanding... recreational value...set apart to conserve cultural resources and to be used by the public for recreation, education or enjoyment.

This Report earlier surveyed the activities and events that take place on the O.C. Fairgrounds both historically and currently. A State report on the economic, charitable, entertainment, educational and cultural impacts of California fairs was also noted. The above listed authorities show that the O.C. Fairgrounds cannot be excluded beyond a reasonable doubt from these broad definitions of “historical resource” or “park.”

The transcripts of the July 15, and July 29, 2009, OCFEC Board meetings, portions of which have been quoted above, show that the intent of OCFEC Board members and purpose of the OCFEC Foundation were to preserve the O.C. Fairgrounds as a park, fair, and event center. There was no evidence that an intent other than this, such as a desire for personal profit or financial gain, motivated the Foundation’s formation or any OCFEC Board members to join it. Accordingly, **even had conflicting financial interests been established by the evidence, they are exempted under Govt. Code § 1091.5(a)(12).**

### **c) Being both Purchasers and Vendors**

In addition to proscribing conflicting “financial interests,” Govt. Code § 1090 precludes government officials from being “purchasers at any sale or vendors at any purchase made by them in their official capacity.” **Had OCFEC Board members, participated in the sale of the Fairgrounds, and as Foundation members, their purchase as well, a violation of law would have occurred.** The State Legislature’s actions in purportedly transferring the fairgrounds to a new district, if effective, means that from that moment on, OCFEC Board members, did not have any interest in or “official capacity” over the O.C. Fairgrounds or their sale. Accordingly, while they could now be purchasers they could *no longer* be sellers. In any case whether the transfer had legal effect or not, **no such purchase or sale occurred. The facts therefore do not establish a violation of Govt. Code § 1090 under these grounds either.**

### **2. Govt. Code § 87100**

Although not alleged in the complaint the OCDA also reviewed the applicability of Govt. Code § 87100. That law makes it unlawful for a public official to “participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” The interest must have a “material financial effect” specific to that official or his immediate family, and not available to the general public. (Govt. Code § 87103) To be “material” the financial effect must be sufficient to potentially “interfere with an official's performance of his or her duties in an impartial manner free from bias.” Finally, the acquisition of the financial benefit must be “reasonably foreseeable,” not merely possible. There must be a “substantial likelihood” that it will occur.

The evidence developed in the investigation did not establish a violation of Govt. Code § 87100. The pertinent governmental decisions were 1) the approval of the Consulting Firm’s retention of Mr. Ackerman, and 2) the passage of the July 29, 2009 resolution supporting the Governor’s intention to sell the Fairgrounds. Neither of these decisions appeared to produce reasonably foreseeable material financial effects.

The approval of the retention of Mr. Ackerman did not generate a “material financial affect” for the OCFEC Board members. In addition while Board members may have *tangentially* benefited from Mr. Ackerman’s research *after the fact*, when they *subsequently* joined the OCFEC Foundation, there is no evidence that this was pre-planned, and therefore *foreseeable*, when Mr. Ackerman’s retention was approved.

There were *no* contracts approved at the July 29, 2010 meeting that appeared to provide a “material” financial benefit to any OCFEC Board member. The passage of the resolution recommended by the Subcommittee was confined to an expression of support for the proposed sale and an authorization to retain expert consultants to assist doing so. There is no evidence of a specific “material” financial benefit that any OCFEC Board member would receive as a result of the passage of this resolution.

Finally civil prosecution is not authorized against members of a state fair board. Civil or criminal prosecution, in addition to requiring proof beyond a reasonable doubt in the latter case, mandates that the good or bad faith of the officials involved must be considered. Here it appears that the OCFEC Board members were not acting in bad faith or with a deliberate intention to violate the law. The evidence indicates that their intentions were directed toward preserving the O.C. fairgrounds and the Fair itself, not for self profit. Under all of these facts a prosecution for violation Govt. Code § 87100 would neither be justified nor warranted. (Govt. Code § 91001(c))

#### **B. Allegations of Violations of the *Bagley-Keene Open Meeting Act***

**The evidence does not establish a violation of the *Bagley-Keene Open Meeting Act* (Govt. Code § 11120 *et seq.*)** The Oct. 30, 2009, letter was based on information, opinion, and conjecture provided by Mr. Mainero to the County Counsel. Mr. Mainero admitted that he based his information in part, on a newspaper article, which used the word “lobbying.” The reporter used that term, not because the term had been uttered, but because he “concluded” that was what had been occurring.

Mr. Mainero and County Counsel assumed that the agenda item on the July 29, 2009, meeting involved the formation of a “lobbying” contract with Mr. Ackerman. They also

assumed that since the agenda did not mention contracts, the OCFEC Board violated the *Bagley-Keene Open Meeting Act*. Mr. Ackerman had been retained earlier by the Consulting Firm, *not* the OCFEC Board. The complainants did not know this, though the information could have been clarified with Mr. Ackerman.

The agenda of the July 29, 2009, meeting provided sufficient notice of what was to be discussed at the meeting and was published 10 days before, in compliance with the *Bagley-Keene Open Meeting Act*. The meeting was well attended by those interested in the proposed sale of the Fairgrounds. The OCFEC Board specifically calendared the meeting during the O.C. Fair, when meetings were not normally conducted, for the express purpose of allowing stakeholders to have a public discussion. There is no evidence to support the existence of any intent to avoid public comment or attention, or to conceal information from the public.

The only motion adopted at the meeting was a direction to Staff to cooperate with the State's recently formalized intent to sell the Fairgrounds, As State officials, this cooperation was required of them. The *Bagley-Keene Open Meeting Act* requires that "subject matter is sufficiently defined to apprise the public of the matter to be considered." The agenda adequately described the subject matter discussed; there was no requirement to further specify the particular action that might be taken. **Accordingly, the evidence does not establish a violation of the *Bagley-Keene Open Meeting Act*.**

### **C. Allegations of Illegal Lobbying**

Although not a part of the specific complaints made to the AG's office, the OCDA considered press reports that implied Mr. Ackerman had violated State laws restricting "lobbying" by a former State Senator.

The State's statutes provide specific definitions of what constitutes "lobbying." Not every contact constitutes "lobbying," and the law proscribes "lobbying" in very limited circumstances. To constitute "lobbying," the contact must be "for the purpose of influencing legislative or administrative action."

There is no evidence that the OCFEC retained Mr. Ackerman “to influence legislative or administrative action.” Instead the evidence showed that Mr. Ackerman was retained to: 1) Ascertain the seriousness of the State’s intent to sell the Fairgrounds; 2) explore local community interest and desire to keep the Fair; 3) ascertain local governmental *interest* in obtaining control over the O.C. Fairgrounds to ensure continuation of the Fair; and 4) research and examine the property records of the O.C. Fairgrounds to determine if there were any encumbrances that would hamper any efforts to gain local control. Without an attempt to influence the State’s legislative decision to sell the O.C. Fairgrounds there was no “lobbying” as prescribed by State statutes.

As a former legislator, Mr. Ackerman was only precluded from “lobbying” “other members of the State Legislature.” A former State legislator may “lobby” the Governor, members of the Governor’s administration, or any other government official, other than State legislators. Mr. Ackerman contacted members of the Governor’s Office and DGS. Even if Mr. Ackerman’s contacts could somehow be characterized as “lobbying,” they would still be within the law because his contact was not with State legislators. **Accordingly the evidence does not establish “illegal lobbying” in violation of Govt. Code § 87406(b).**

#### **D. Concluding Comments**

This Report culminates an investigation into allegations which were publicly aired *before* the OCDA had an opportunity to investigate their accuracy. Publicly leaking allegations before an investigation can be conducted, may not only unfairly damage reputations, but also deter reports to law enforcement, inhibit witness cooperation, result in the concealment or destruction of evidence and delay or even derail an investigation.

The initial complaint in this case was in significant part, generated because of an inaccurate newspaper article. This resulted in certain assumptions made by officials reading it. The complaint letter was therefore based in significant part, upon conjecture, assumptions and conclusions, not upon any specific factual evidence of illegal conduct. Those conjectured assumptions and conclusions proved to be erroneous.

The investigation, however, illustrates the importance of public boards avoiding the *appearance* of impropriety. Openly and publicly discussing issues of public import promotes public confidence in government. Secrecy breeds suspicion and the appearance of wrongdoing. Although the OCFEC Board publicly discussed the sale of the Fairground and the idea of local control by a non-profit tax exempt entity, they did so only generically at the July 15, 2009, meeting. Though promising public “discussions” about what “vehicle might be used, be it nonprofit, for profit,” to purchase the Fairgrounds, none were undertaken. Failing to specifically discuss the Foundation at a public meeting, followed by the unannounced participation of individual OCFEC Board members in it, produced the appearance of intentional secrecy or concealment and generated suspicion of wrongdoing.

This appearance was also augmented by some OCFEC Board responses to questions asked at the July 15, 2009 meeting. When asked if the Board had “any plans if the sale goes forward,” the response was, “in the future, [we’ll] be developing plans; *but we don’t have any plans as of today.*” Another Board member commented that the non-profit model was being looked at. When then asked if there was “an interested group” that had come forward “to form that kind of nonprofit group,” the response was, “Not to my knowledge.” In fact sometime between late June or early July 2009, *after* several members of the Board had expressed interest in joining such an organization, Mr. Ackerman’s firm had been approached and requested to draft the formation documents. Even if this had been done after, not before, the July 15, 2009 meeting, it does not lend itself to an appearance of openness and forthrightness.

Although their July 29, 2009 resolution expressed OCFEC support for the Governor’s intention to sell the Fairgrounds, statements of the members of the Board made during that meeting clearly did not support the express intent of the State to sell to the highest bidder, without a limitation on use. Instead OCFEC members expressed agreement that the Fairgrounds should only be sold *if* retained as Fairgrounds. Their subsequently, joining the Foundation beginning that same day gave the appearance that the resolution referred to the OCFEC Foundation and the retention of Mr. Ackerman and that OCFEC Board Members were using public time and resources to form it.

The OCFEC Board should have consulted with the assigned deputy AG *before* acting. Had the OCFEC Board done this, it likely would have been advised on how to *openly and publicly* construct a non-profit entity to satisfy the requirements of the several specific exceptions provided by law, and thereby avoiding the appearance of impropriety. Given that the day before the July 29, 2009 meeting, the Governor had officially authorized the Fairgrounds' sale, some Board members may have felt compelled to act quickly. There had been great depth and strength of local concern and anxiety displayed at that meeting, and the feeling that "time was running out" was manifested. Still, instead of acting quickly to join the Foundation, OCFEC Board Members should have paused to consult the available deputy A.G. Indeed they should have done so much earlier, certainly before requesting Mr. Ackerman's Firm to draft formation documents for the Foundation. The failure to do so ultimately caused the AG to conflict off the case and may have lent greater force to the appearance that the Board was breaching its fiduciary responsibility. Had the Deputy AG been timely informed and consulted, much time and public expense, as well as damage to reputations and public confidence could perhaps have been avoided.

## **VI. Glossary of Acronyms**

AG	California Attorney General
BOS	Orange County Board of Supervisors
CDFA	California Department of Food and Agriculture
CEO	Chief Executive Officer
DFE	Division of Fairs and Expositions
DGS	Department of General Services
FPPC	Fair Political Practices Commission
<i>LAT</i>	Los Angeles Times
OC	Orange County
OCDA	Orange County District Attorney

OCFEC

Orange County Fair and Event Center

RFP

Requests for Proposals



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Dear Mr. Schons:

This letter is to request that you examine the July 29, 2009 action of the Orange County Fair Board outlined in the attached minutes. It appears that this action may violate Government Code section 1090 and the Bagley-Keene Open Meeting Act.

**Government Code section 1090**

I have been informed that the contracts referenced in Agenda Item 7 of the minutes were (1) with the law firm of Nossaman, Guthner, Knox and Eliot [hereinafter "Nossaman"] and (2) with former State Senator Dick Ackerman. I am informed that the contracts were designed to lobby the Governor's office in formulating the terms and conditions of the RFP to be issued by the State pursuant to AB 4X 22, which authorizes the sale of the Orange County Fairgrounds.

I am further informed that the Nossaman firm assisted a number of members of the Fair Board in forming a foundation (the "OC Fair and Event Center Foundation"), a non-profit entity, whose Board members were anticipated to include a number of members of the current Fair Board. The Foundation was incorporated on July 21, 2009—eight days before the consulting contract was approved by the Fair Board. I am further informed that the law firm prepared the articles of incorporation and other documents for the non-profit.

I question whether the Fair Board's decision to use Fair Board funds for a lobbying or similar contract in connection with the formation of the contract or influencing the RFP process represents personal influence by Board members who are prospective foundation members, and who thus would have a direct personal interest in the outcome of the RFP process.

An official's interest need not be direct. *People v. Darby*, 114 Cal. App. 2d 412, 250 P2d 743 (1952). This interest is indirect, in that the contract would facilitate the acquisition, as opposed to this being a contract of acquisition.

Gary Schons, Esq.  
October 30, 2009  
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Here, it appears that the Fair Board utilized public funds to engage a firm to influence the design of the RFP so it would best suit the anticipated Foundation bid. Since several members of the Fair Board were also going to be on the Foundation Board, and the Foundation was incorporated as a private, non-profit entity (and not a government entity), this expenditure of public funds for a contract with the Nossaman firm was a contract that would aid the personal interests of those members. Indeed, if the Foundation were to succeed in its bid, it would both own the fairgrounds and operate the Fair and other events at the fairgrounds. If past practice holds, members of the Foundation Board would enjoy some (even if minimal) perquisites, such as free tickets to the Fair, parking passes, etc. Those are financial interests. Thus, the contract is one in which the members have an indirect financial interest, which might violate Government Code Section 1090. If this contract is illegal, it is void—it is null and of no effect, not merely voidable. Public funds cannot be used to pay this contract.

#### **Bagley-Keene Open Meeting Act**

In addition, it appears that the Fair Board may have violated the Bagley-Keene Open Meeting Act. The July 29, 2009 agenda for Item 7 states as follows:

#### **“7. GOVERNANCE PROCESS:**

##### **A. Governors Initiative to Sell Orange County Fair & Event Center Action Item”**

I do not believe this description gave fair notice to the public pursuant to Government Code section 11125(b). The minutes also fail to properly describe the actions taken by the Fair Board, in that there was no notice given that the Fair Board was considering authorizing the consulting agreements discussed above.

I request that you examine these issues.

Additionally, please advise me whether it is acceptable for members of the Orange County Board of Supervisors and/or County employees to meet with members of the Fair non-profit for the purpose of possibly joining it in preparing a bid for the fairgrounds. There is concern that meeting with those members might itself be a violation of Government Code section 1090.

Thank you very much for your consideration of this request.

Very truly yours,



Nicholas S. Chrisos  
County Counsel

NSC:nr:eb  
Enclosures