

April 23, 2014

Phaedra Norton  
City Attorney  
156 S. Broadway, Suite 240  
Turlock, CA 95380-5456

Re: Your Request for Informal Assistance  
**Our File No. I-14-045**

Dear Ms. Norton:

This letter responds to your request for advice regarding the conflict of interest provisions under both Government Code Section 1090 et seq<sup>1</sup> and the Political Reform Act (the “Act”)<sup>2</sup>. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate. If this is not the case, then our advice could be different.

Because you have not offered any specific information in your request, we are treating your request as one for informal assistance. For purposes of the Act, informal assistance does not provide the requestor with the immunity set forth in Sections 83114(a) or (b). (See Regulation 18329(b)(8)(C) and (c)(1) and (3).) Also, for purposes of Section 1090, because your request does not provide specific information regarding a future government contract, the councilmember’s identity, or the name of the insurance agency, we are only providing informal assistance and do not deem this letter to meet the requirements to permit the requester to offer the letter into evidence in a Commission enforcement proceeding or criminal prosecution regarding Section 1090. (See Section 1097.1(c)(5).)

After forwarding your request to the Attorney General’s Office and the Stanislaus County District Attorney’s Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).)

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<sup>1</sup> All further statutory references are to the Government Code, unless otherwise indicated.

<sup>2</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## QUESTIONS

1. Does Section 1090 prohibit the Turlock City Council from entering into contracts with an insurance agency where one of its councilmembers is employed?
2. Does the Act limit the city councilmember's participation in making decisions regarding services from the insurance agency?

## CONCLUSIONS

1. Section 1090 does not prevent the City of Turlock from entering into contracts with an insurance agency that employs a councilmember because the councilmember does not have a cognizable financial interest in the contracts.
2. Because it is reasonably foreseeable that the city council's decisions relating to the insurance agency will have a material financial effect on that entity, the councilmember would not be permitted to participate in decisions involving the insurance agency.

## FACTS

You are the City Attorney for the City of Turlock and you request advice on behalf of a councilmember. The councilmember appears to be considering employment with an insurance agency with whom the City of Turlock contracts for a variety of insurance services. Your request centers on whether that employment relationship would create any conflicts of interest for the City Council and the councilmember under both the Act and Section 1090.

The City of Turlock works with an independent insurance agency that provides broker services for the City's insurance programs. The City pays a brokerage fee to the independent insurance agency for the services it performs. The independent insurance agency provides services for a variety of the City's insurance needs including property coverage, insurance above the City's self-insured retention for the City's medical program, the City's medical provider network, the City's third party administrator for medical and vision claims, long term disability, life insurance and the City's employment practices liability insurance.

The City pays the insurance agency 10% of the premiums' cost for the City's self-funded plan. That amount is paid through a third party administrator. The insurance agency also receives 10% of the life insurance and disability premiums, which are paid directly to the insurance agency from the insurance providers. The amount paid to the independent insurance agency can change from year to year.

As part of its services to the City, the insurance agency identifies potential insurance providers and the City Council votes whether to approve those agreements. The City then enters contracts with those providers either directly or through the independent insurance agency. The City Council also votes whether to approve the demand for payment for services performed by the independent insurance agency.

The city councilmember appears to be considering an employment agreement with the insurance agency through which he would earn a salary plus commission. You have stated that his income would be in no way affected by these contracts, nor would he be the agent involved in making the agreements and earning commission on them.

## ANALYSIS

### *Section 1090*

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We employ a six-step analysis to determine whether the city councilmember has a disqualifying conflict of interest under Section 1090.

### **Step One: Is the City Councilmember subject to the provisions of Section 1090?**

Section 1090 provides, in part, that “[m]embers 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.” City councils and their members are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

### **Step Two: Does the decision at issue involve a contract?**

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);<sup>3</sup> 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require

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<sup>3</sup> It is noteworthy to point out that opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17), especially where, as here, it has regularly provided advice concerning a particular area of law. (*Thorpe v. Long Beach Community College Dist.*, (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

The city council enters into contracts with individual insurance providers as well as the independent insurance agency that provides brokerage services to the city. There are therefore contracts involved in the decisions as issue.

### **Step Three: Is the councilmember making or participating in making a contract?**

As a member of the Turlock City Council, which ultimately must approve any insurance plan and related payments made, the councilmember would be participating in the making of a contract.

### **Step Four: Does the councilmember have a financial interest in the contract?**

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest” (*People v. Honig, supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) While Section 1090 does not define “financial interest,” the courts have been instructive in applying this provision. In a recent case, for example, an appellate court stated: “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.” (*Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal. App. 4th 208, 221.) The court in *Eden Township* found that although an employee has a financial interest in his salary, where a contract would have no direct or indirect effect on or nexus with the public official’s salary, there is no financial interest under Section 1090. (*Ibid.*)

Here, the city councilmember would work for the independent insurance agency and be compensated in salary and commissions. Consistent with the holding in *Eden Township*, provided that his salary is not affected by the City Council’s contracts with the insurance agency and he does not service the city’s accounts and thereby gain a commission, there is no financial interest under Section 1090. Section 1090 does not, therefore, prohibit the City Council from contracting with the insurance agency with which a councilmember is employed.

Because there is no financial interest, we do not address the remaining steps of the analysis under Section 1090.

### *The Act*

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has an interest specified in Section 87103. A public official has a “financial interest” in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard

analysis for deciding whether an individual has a disqualifying conflict of interest in a given government decision. (See Regulations 18700 - 18709.)

In addition, Section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating future employment or with whom they have any arrangement concerning future employment. (See Regulation 18747.)

**Steps One and Two: Is the councilmember a public official and will he be making a decision?**

Public officials are defined as “every member, officer, employee, or consultant of a state or local government agency.” (Section 82048.) A city councilmember is a public official for purposes of the Act. You have described various decisions that the council could make regarding its insurance services. Because the councilmember will be voting on these decisions, he will be making a decision. (Regulation 18702.1.)

**Step Three: What are the official’s interests that the decisions may affect?**

Generally, to determine whether an official has a disqualifying conflict of interest in any particular governmental decision, the official must identify those interests that may be affected by the decision. Interests from which a conflict of interest may arise are set forth in Section 87103 and Regulations 18703-18703.5 and include:

- An interest in a business entity in which the official has a direct or indirect investment of \$ 2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- An interest in real property in which the official has a direct or indirect interest of \$ 2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An interest in a source of income to the official, including commission income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An interest in a source of gifts to the official if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An interest in the official’s personal finances, including those of the official’s immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Of the interests recognized in Section 87103, those interests that your facts implicate are:

*Insurance Agency:*

As an employee of the insurance agency, the councilmember would have an interest in the firm as a source of income. (Section 87103(d); Regulation 18703.1(b).) If the income from the agency aggregates to \$500 or more in the 12 months prior to the decision, the councilmember also would have an interest in the agency as a source of income. (Section 87103(c); Regulation 18703.3.)

*Clients of the Insurance Firm:*

Generally, an official only has an interest in the customer or clients of a business entity if the official owns, directly, indirectly, or beneficially, a 10-percent interest or greater in the business entity. (Section 82030.) According to your facts, the councilmember would not own any interest in the insurance agency and, therefore, does not appear to have an interest in any of the firm's clients.

*Personal Finances:*

A public official always has an interest in his or her personal finances. A governmental decision will have an effect on this interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.) Based on your facts, the city council's decisions will not have any effect on the councilmember's finances because his salary will be fixed and he will not service these accounts, therefore he will not have commission from the accounts.

Below we consider the councilmember's interest in his source of income and the insurance company as a business entity.

**Step Four: Are the official's interests directly or indirectly involved in the decision?***Insurance Agency as Source of Income*

Regulation 18704.1(a) states that a source of income is directly involved in a decision before the official's agency when that business entity or source of income either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Sources of income that are not directly involved in governmental decisions under the rules quoted above are regarded as indirectly involved. (Regulations 18704(a) and 18704.1(b).)

Based on your facts, the insurance agency will be a named party in many of the decisions at issue. The insurance company is the intermediary between the city and individual insurance providers and will contract with the city for services. In these decisions, the insurance agency seems to be initiating the proceeding by bringing options for insurance providers to the City Council. Other decisions include voting on the demands for payment by the insurance agency. In all decisions where the insurance agency is a named party or initiates the decision, the agency is directly involved.

**Steps Five and Six: Is it reasonably foreseeable that the decision will have a material financial effect on any identified economic interest?**

*Insurance Agency, Source of Income*

Any reasonably foreseeable financial effect on a source of income that is directly involved in the governmental decision is deemed to be material. The decisions are therefore deemed to have a material financial effect on the insurance agency. Based on your facts, it is reasonably foreseeable that the materiality standard will be met.

**Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?**

Public Generally

The material financial effect of a governmental decision on a public official's economic interest in real property is indistinguishable from its effect on the public generally if that decision also affects ten percent or more of all property owners in the jurisdiction of the official's agency, or 5,000 property owners in the jurisdiction of the official's agency. (Regulation 18707.1(a); Regulation 18707.1(b)(B)(i)-(ii).)

You present no facts indicating that the public generally exception applies.

Legally Required Participation

There are a limited number of circumstances that allow a public official to take part in a governmental decision despite a disqualifying conflict of interest under the legally required participation exception. This exception applies very rarely, and only where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

You present no facts indicating that the legally required participation exception applies.

*Manner of Disqualification*

Because we have concluded that the City Council's decisions on the insurance agency's contracts will have a reasonably foreseeable material financial impact on the agency, under the Act, the councilmember must disqualify him- or herself from participating in these decisions. The councilmember must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Heather M. Rowan  
Senior Counsel, Legal Division

HMR:jgl