

December 22, 2014

Daniel G. Sodergren  
City Attorney  
333 Civic Center Plaza  
Tracy, CA 95376

Re: Your Request for Advice  
**Our File No. A-14-202**

Dear Mr. Sodergren:

This letter responds to your request for advice on behalf of City Councilmember Veronica Vargas regarding the provisions of Government Code Section 1090 (“Section 1090”) and the Political Reform Act (the “Act”).<sup>1</sup> Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the San Joaquin County District Attorney’s Office, which we have done. We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

### **QUESTION**

Do either Section 1090 or the Act prohibit City Councilmember Veronica Vargas from participating in decisions regarding a contract between the City of Tracy (the “City”) and the Tracy Firefighters Association where her husband is a firefighter?

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<sup>1</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.

## CONCLUSION

No. The City Councilmember may participate in the decision regarding the firefighters provided that the agreement does not result in new or different employment for her husband.

## FACTS

You write on behalf of City Council Member Veronica Vargas who was recently elected to the Tracy City Council. Councilmember Vargas's husband is a Fire Captain, employed by the City, and an Executive Board Member of the Tracy Firefighters Association ("TFFA"). The City and the TFFA have a Memorandum of Understanding ("MOU") that expires on June 30, 2015, and will be renegotiated before that time.

The TFFA is a local affiliate of the International Association of Fire Fighters ("IAFF") (Local 3355). A five-member Executive Board, elected by the membership, governs the TFFA, which negotiates on behalf of its members. Councilmember Vargas's husband has been employed with the City since 1999 and has been one of 24 Fire Captains in the City since 2001. All members of the TFFA, including the Fire Captains, are subject to the terms of the MOU between the City and the TFFA.

The MOU, entered into pursuant to the Meyers-Milias Brown Act (Government Code Section 3500, *et seq*), governs all matters relating to employment conditions and employer-employee relations, including but not limited to: wages, hours, benefits, and employee conduct and discipline. The City and the TFFA will renegotiate the terms of the MOU before its expiration date. The City Council participates in this process by giving direction to the City's labor negotiator and giving final approval to the terms of the MOU.

## 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) 103Cal.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 the following six-step analysis to determine whether Councilmember Vargas will have a conflict of interest under Section 1090.

**Steps One, Two, and Three: Is Councilmember Vargas subject to Section 1090 and is there a contract at issue in which the City Council will participate?**

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 anybody 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.)

To determine whether a contract is involved in the decision, one may look to general principles of contract law. At issue is a memorandum of understanding governing all matters relating to employment between the City and the TFFA. The parties exchange consideration and are bound to act under the terms of the agreement. A contract is therefore at issue.

The City Council delegates the negotiations between the City and the TFFA to its labor negotiator, but will make the final decision regarding the contract itself. The City Council, including Councilmember Vargas, will participate in the decision regarding the contract.

**Step Four: Does Councilmember Vargas 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.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

To begin, it is well-settled that a member of a board or commission always has a financial interest in his or her spouse’s source of income for purposes of Section 1090. (*Glover Advice Letter, A-14-138.*) Here, Councilmember Vargas’s spouse is a firefighter employed by the City and represented by the TFFA. The TFFA represents the firefighters before the City, negotiates the MOU, and signs on behalf of the firefighters. Councilmember Vargas has an interest in her husband’s income from the City as set by the MOU with the TFFA.

**Step Five: Does either a remote interest or non-interest exception apply?**

There are several statutory exceptions to the prohibition in Section 1090. Section 1091.5(a)(6) in particular states that a spouse does not have an interest in his or her spouse’s

employment by a public agency if that employment existed at least one year prior to the officeholder's election. As applied here, Councilmember Vargas does not have a financial interest in her husband's salary as a firefighter because he has been employed for more than a year.

While this exception applies to allow Councilmember Vargas to participate in the decision regarding the MOU, there are limitations. First, she may participate to the extent that the contract concerns the conditions applicable to the spouse's current class of employment, rather than creating some new or different employment for her husband. For example, she may participate in the making of a contract that affects the salary and benefits of a class of employees that includes her husband, but not in the making of any contracts involving unique benefits that apply to him, such as decisions to promote, reclassify, or hire her husband. In such cases, the Councilmember would be required to abstain from any involvement in the contract-making process.<sup>2</sup> (See 13 Ops.Cal.Atty.Gen. 702.)

#### *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 a financial 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).)

Councilmember Vargas is a city council person and subject to the provisions of the Act and will be making a decision regarding the MOU between the City and TFFA. While a public official does have a financial interest in her husband's income, under the Act, salary from a local agency is not "income." Councilmember Vargas therefore does not have a financial interest in the decision, and may participate, subject to the limits above regarding Section 1090.

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

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<sup>2</sup> Because the non-interest in Section 1091.5(a)(6) applies, we do not apply Step Six, the Rule of Necessity.