



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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July 12, 2021

David B. Cosgrove  
Rutan & Tucker, LLP  
18575 Jamboree Road, 9<sup>th</sup> Floor  
Irvine, CA 92612

Re: Your Request for Advice  
**Our File No. A-21-076**

Dear Mr. Cosgrove:

This letter responds to your request for advice regarding Government Code Section 1090.<sup>1</sup> Please note that we are only providing advice under Section 1090, and our analysis is based solely on the facts provided. Our advice, and any immunity it may provide, is as complete and accurate as the facts provided in your request for advice and in response to our requests for additional information. If the facts underlying this advice change, then you should contact us for additional advice.

Please also note that the Commission does not provide advice regarding past conduct. (Section 1097.1(c)(2).) Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter only apply to prospective actions.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the San Bernardino County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) 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

Does Section 1090 prohibit you, contract General Counsel for the San Bernardino Valley Water Conservation District on behalf of your law firm, from entering into a contract with the District pursuant to which you would serve as part-time, in-house counsel for the District?

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

## CONCLUSION

No. Section 1090 would not prohibit you from entering into the contract with the San Bernardino Valley Water Conservation District for you to serve as part-time, in-house counsel so long as you have refrained and continue to refrain from making or participating in the making of that contract in your official capacity as the District's General Counsel.

## FACTS AS PRESENTED BY REQUESTER

You are a partner with the private law firm Rutan & Tucker, LLP, and you have served as the contract General Counsel for the San Bernardino Valley Water Conservation District (the "District") on behalf of your law firm since 1992. In that capacity, you have annually filed Statements of Economic Interests. You have generally acted in an overall advisory capacity to the District during your entire tenure as General Counsel.

Late in 2020, in discussions you were having with Mr. Daniel Cozad, the General Manager of the District (the "General Manager"), the issue arose of your respective advanced points in your careers and the impact of potential retirements or job changes to the District. Those discussions included the possibility of you transitioning to a part-time, in-house position with the District, for various work priority and possible cost-efficiency benefits.

The General Manager solicited from you a conceptual in-house retention proposal, which you provided in or around December 2020. The General Manager indicated he would review the District's upcoming fiscal year budget and assess whether he could recommend such a structural change in the District's legal services. Up until this point, your communications regarding your potential transition to serving as in-house counsel for the District were limited to your discussions with the General Manager.

On April 28, 2021, the District, after adjourning its scheduled special meeting, conducted a workshop to consider the upcoming year's budget, and you recused yourself from any participation at the outset and left the Zoom meeting, as memorialized in the meeting's minutes.

On or about May 5, 2021, the General Manager advised you that the District had retained Mr. Christopher G. Jensen as Special Counsel (the "Special Counsel") to advise the District on negotiating an in-house counsel service contract. The General Manager, on that same day, forwarded you an initial draft employment agreement that the General Manager advised had been reviewed by the Special Counsel. On the same date, the General Manager requested advice from you regarding how the closed session matter should be listed for the agenda. You declined to respond and requested that he refer that question to the Special Counsel.

On May 11, 2021, you sent proposed revisions to the draft employment agreement to the Special Counsel and copied the General Manager. The revisions all related to provisions of the proposed employment agreement, which included terms relating to salary, scope of duties, benefits, vacation and sick leave accrual, administrative support, and termination.

On May 12, 2021, the District's Board took up the matter of approval of the budget for the 2021-2022 fiscal year, and you recused yourself from the matter, indicating that your recusal was for the same reasons stated at the District's meeting on April 28, 2021. You also recused yourself from the Board's closed session meeting on that date to consider the District's potential employment of an in-house counsel.

It is your understanding that the Board has yet to take any action in open session on the contract terms discussed in closed session on May 12, 2021, and it intends to put the matter on a regular meeting open session agenda as soon as possible. Throughout this process, your communications have been limited to the General Manager and the Special Counsel. You have not spoken with any member of the District Board on the subject and have not appeared, even in a personal capacity, at any meeting at which budgeting that might include the potential in-house legal position, or the consideration of potential contract terms, was discussed.

### ANALYSIS

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.) 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.)

For purposes of Section 1090, participation in the making of a contract is defined broadly to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (*Millbrae Association for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

Section 1090, however, does not apply to a public officer who makes or participates in the making of the contract at issue solely in the officer's private capacity. (*County of Marin v. Dufficy* (1956) 144 Cal.App.2d 30, 37; 88 Ops.Cal.Atty.Gen. 56 (2005); 80 Ops.Cal.Atty.Gen. 41 (1997); 63 Ops.Cal.Atty.Gen. 19 (1980); 53 Ops.Cal.Atty.Gen. 163 (1970).)

Moreover, an agency's contract attorney who negotiates a subsequent contract for additional services with the agency, beyond those provided for in the attorney's basic retainer agreement with the agency, does not violate Section 1090 by doing so. (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 540; 99 Ops.Cal.Atty.Gen. 35 (2016).) Relying on the reasoning from these authorities, we advised in the *Calabrese* Advice Letter, No. A-17-087, that a public officer may participate in contract negotiations with a government entity for compensation for services, even if there is an existing contract for services, without violating Section 1090 so long as the officer acts in the officer's individual capacity rather than the officer's "official capacity."

Applying this reasoning to the question presented, we conclude that Section 1090 would not prohibit you from entering into a contract with the District for you to serve as part-time, in-house counsel for the District so long as you have refrained and continue to refrain from making or participating in the making of that contract in your official capacity as the District's General Counsel.

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

Sincerely,

Dave Bainbridge  
General Counsel

*Matthew F. Christy*

By: Matthew F. Christy  
Counsel, Legal Division

MFC:dkv