



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

November 9, 2023

Jose M. Sanchez
City Attorney
City of Modesto
555 Capitol Mall, Suite 1200
Sacramento, California 95814

Re: Your Request for Advice
Our File No. A-23-156

Dear Mr. Sanchez:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

Also, note that we are 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

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 Stanislaus 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 either the Act or Section 1090 prohibit Councilmember Eric E. Alvarez from taking part in, or the City of Modesto from entering into, four amended or renegotiated contracts with PG&E if Councilmember Alvarez accepts employment as a Government Affairs Representative with PG&E?

¹ 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 18104 through 18998 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

Yes. Under the Act, because PG&E would be a named party in the governmental decisions, they would have a reasonably foreseeable, material financial effect on Councilmember Alvarez pursuant to Regulation 18702.1(a)(1)(C). Moreover, he would be disqualified because of the impermissible nexus between the decisions and income he receives from PG&E under Regulation 18702.3(b). Councilmember Alvarez would likewise have a prohibitory financial interest under Section 1090 because of the nexus between the City contract decisions and his responsibility as salaried Government Affairs Representative to develop and maintain a strong local government networks to ensure PG&E's long-term success. However, the rule of necessity would apply to those decisions to allow the City Council to amend or renegotiate the four contracts at issue.²

FACTS AS PRESENTED BY REQUESTER

Modesto City Councilmember Alvarez was elected to the City Council in November 2022, and his current term will expire in 2026. Councilmember Alvarez is currently considering employment with Pacific Gas and Electric Company ("PG&E") as a Local Government Affairs Representative – Stockton Division. At the time of this letter, he has not formally accepted this job opportunity and is still gathering information related to potential conflicts of interest and impacts with accepting the job.

The Government Affairs Representative position is part of PG&E's Local Government Affairs team. This Department of PG&E is responsible for "lead[ing] the Company's government relations activities and strategies in the cities and counties we serve, helping to shape complex public policy debates that support our customers and local communities, invest in climate resiliency and the stability of the grid, and assure the long-term success of the company." The online job description states that the Government Affairs Representative is responsible for the following:

This position will be responsible for developing and maintaining a strong governmental, political and community network within the Stockton Division (San Joaquin, Calaveras, Amador and Alpine Counties). This role will also provide some coverage in Stanislaus and Tuolumne Counties. The candidate will have substantial external contact responsibility and should be experienced in working with local governments, community groups and stakeholders. The candidate will be skilled in building agreements and partnerships with coalitions of diverse interests.

Councilmember Alvarez was informed by PG&E representatives that for the duration of his current Council term, he will not have any responsibility/work in the City of Modesto. This can be revisited upon completion of his Council term if needed. Aside from the City of Modesto, Councilmember Alvarez will be available to work in the other counties and cities listed in the job description.

² Note that this letter supersedes our analysis concerning Section 1090 in the *Fowler* Advice Letter, No. A-15-145.

City of Modesto

PG&E is the exclusive provider of natural gas to retail customers located in Modesto and also provides electric service to small portions of the City. From time to time, the City works with PG&E on specific discrete matters. The City currently has four ongoing contracts with PG&E involving a reconstruction project, gas line relocation, a utility easement, and the installation of SmartMeters. The City expects that these contracts may be amended or renegotiated in the future. It is likely that other agreements will arise between PG&E and the City during Councilmember Alvarez's term.

The following is a summary of existing contracts between the City and PG&E:

June 26, 2018: Contract for work performed by PG&E on State Route 99/Pelandale Avenue Interchange Reconstruction Project in the amount of \$105,116.

February 20, 2020: The City and PG&E entered into a contract for the relocation of several gas lines within the City in the amount of \$280,722.

November 1, 2022: Approval of a Permanent Utility Easement granted to PG&E by the City for electrical facilities.

March 14, 2023: First Amendment to the agreement between PG&E and the City for one additional Gas SmartMeter installation within the City. The original agreement was entered in 2008 for a 20-year term, where PG&E pays the City a \$780 licensee fee per SmartMeter.

ANALYSIS

The Act

The Act's conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) An official's financial interests, which may give rise to a disqualifying conflict of interest under the Act, are identified in Section 87103. The following interests are relevant to your situation:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)

Here, as an employee of PG&E, Councilmember Alvarez would have both a business entity and source of income interest in his employer.

Foreseeability and Materiality

Regulation 18701(a) provides that a decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision as a named party in, or the subject of, the decision. An interest is the "subject of a proceeding" if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest including any decision affecting an interest in real property as described in Regulation 18702.2(a)(1) through (6).

The applicable standards for determining whether a reasonably foreseeable financial effect on a business entity interest, found in Regulation 18702.1, are the same standards applicable where a source of income interest is a business entity. (See (Regulation 18702.2(a)(4).) Under Regulation 18702.1(a)(1)(C), the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity is material if the entity is a named party in, or the subject of the decision, including any decision in which the entity enters into a contract with the agency. Here, the governmental decisions at issue involve the City amending or renegotiating the four current contracts with PG&E, Councilmember Alvarez's business entity and source of income interest. Accordingly, the decision would have a reasonably foreseeable, material financial effect on Councilmember Alvarez under Regulation 18702.1.³

Section 1090

Section 1090 generally prohibits public officers or employees, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is "concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of" their respective 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.)

When applicable, Section 1090's command is absolute; neither the person with the prohibited financial interest nor any body of which the person is a member may enter into the contract. The prohibition cannot be avoided merely by having the financially interested officer or employee abstain from participating in the contracting process. (85 Ops. Cal. Atty. Gen. 176, 177 (2002) citing *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-

³ On a separate ground, there is also a separate materiality standard that applies in cases where there is a "nexus" between duties owed to a source of income and to the official's public agency. Regulation 18702.3(b) provides that "[a]ny reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal." Therefore, the Act would prohibit Councilmember Alvarez from taking part in the decisions if they would achieve or aid a goal of PG&E and he is promised income for achieving this goal. Here, Councilmember Alvarez would receive income as a Government Affairs Representative to assist PG&E in, among other things, developing and maintaining a strong governmental and political network to assure the long-term success of PG&E. City decisions to amend or renegotiate current PG&E contracts to approve such things as relocation of several gas lines or a permanent utility easement would appear to aid in that express purpose, likewise disqualifying Councilmember Alvarez because of the impermissible nexus between the decisions and income he receives from PG&E.

212; 78 Ops.Cal.Atty.Gen. 362, 368 (1995).) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.)

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.) 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. (See e.g., *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002).) “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.4th 1050, 1075.) “Thus, that the interest ‘might be small or indirect is immaterial so long as it is such as deprives the [people] of [the official’s] overriding fidelity to [them] and places [the official] in the compromising situation where, in the exercise of his official judgment or discretion, [the official] may be influenced by personal considerations rather than the public good.’” (*Ibid.* quoting *Terry v. Bender* (1956) 143 Cal.App.2d 198, 208.)

As a member of the Modesto City Council, Councilmember Alvarez is presumed to be involved in the making of all contracts by the City irrespective of whether he actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the primary issue is whether he has a financial interest in the negotiations and decisions to renegotiate or amend the four current agreements between the City and PG&E due to his employment with PG&E.

Under Section 1090, employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the company and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) As your request states, however, based on *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, the Commission previously advised in a similar situation that Section 1090 would not prohibit a City from entering contracts with PG&E where a councilmember was employed by PG&E as a Government Relations Representative because there was no evidence the councilmember would derive any tangible financial benefit as a result of those contracts. (*Fowler Advice Letter*, No. A-15-145.) In revisiting this issue, we believe the holding in *Eden* should be viewed more narrowly.

In *Eden, supra*, a district official participated in negotiating public contracts with a nonprofit corporation that employed the official as its salaried president and chief executive officer. (*Id.* at pp. 212-214.)⁴ At issue in that matter was whether the official had a cognizable financial interest in the

⁴ The district entered an agreement with Sutter Health to upgrade Eden Hospital and Sutter committed to spending \$300 million to construct a replacement hospital for Eden. In addition, Sutter planned to exercise an option under that agreement to purchase and convert San Leandro Hospital from an acute care emergency service facility to an acute rehabilitation center. The official’s nonprofit operates Eden for the district.

contracts for purposes of Section 1090. (*Id.* at p. 220.) The *Eden* court ultimately concluded the official did not have a prohibited financial interest in the agreements because “[w]hile it is undeniable that employees have a financial interest in their salaries, the district has not shown that the contracts at issue here have any direct or indirect nexus to [the official’s] compensation.” (*Id.* at p. 222.) The court further stated that there was nothing in the record to support the inference that the contracts had any relationship to the official’s continued employment with the nonprofit. (*Id.* at p. 223.)

The facts in the present matter are distinguishable from those in *Eden*. Councilmember Alvarez would not be a salaried employee of a nonprofit organization; he would be an employee of PG&E, a large for-profit company, working as a Government Affairs Representative as part of PG&E’s Local Government Affairs team.

Unlike the situation in *Eden*, there is a clear nexus between Councilmember Alvarez’s would be salary and responsibilities as a PG&E employee and the City contracts at issue. To begin, the PG&E Department he would be hired by is responsible for PG&E’s government relations activities and strategies in the cities and counties where they provide service, including Modesto, to ensure “the long-term success of the company.” And an important aspect of the position as a Government Affairs Representative would be to develop and maintain a “strong governmental, political and community network.” In fact, any individual in that position is expected to have experience working with local governments and “be skilled in building agreements and partnerships.”

Just as there would be a nexus between the decisions on the agreements at issue and the income Councilmember Alvarez receives from PG&E under the Act, the same nexus would be present under Section 1090.⁵ Therefore, because PG&E is a for profit company and because Councilmember Alvarez’s employment position would require that he develop and maintain a strong local government networks to ensure PG&E’s long-term success, he would have a financial interest in any contracts between the City and PG&E.

Accordingly, Section 1090 would prohibit Councilmember Alvarez from participating in, and the City from entering into, the amended or renegotiated contracts at issue unless an exception applies.

Rule of Necessity

The Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. However, based upon the facts provided, it does not appear that any of these exceptions are currently applicable. Accordingly, we analyze the potential application of the rule of necessity.

⁵ Importantly, this conclusion is consistent with and follows the California Supreme Court’s directive that the Act and Section 1090 are “in pari materia” and should be construed together so that all parts of the statutory scheme are given effect.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91 citing *People v. Lamas* (2007) 42 Cal.4th 516, 525.)

In limited circumstances, a “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity has two facets: in procurement situations, it has permitted a government agency to acquire an essential supply or service despite a conflict of interest; in nonprocurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) In nonprocurement situations, such as the situation here, the rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid.*)

In a nonprocurement situation where the rule of necessity applies to allow a multi-member body to act when it otherwise would have been precluded from doing so due to a member’s conflict of interest, the member with the conflict of interest must abstain from participation. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 112 (1986).)

Thus, to determine if the rule of necessity applies, we must examine whether amending or renegotiating the current contracts between the City and PG&E is an essential duty of the City Council and whether the City Council is the only government entity legally capable of doing so. (See, e.g., *Schons* Advice Letter, No. A-16-180 [permits water district to enter agreement with disqualified boardmember/landowner to resolve access to important district property that provides essential wastewater services to the community]; *Schroeter* Advice Letter, No. A-19-006 [allows city to enter agreements to make improvements for the sake of public safety that are essential to the airport’s operation despite councilmember’s financial interest in the agreements]; *Lew* Advice Letter, No. A-21-073 [applies to an MOU between a tribe and city to ensure project impacts are properly mitigated while providing new infrastructure and economic opportunities to the city].)

According to the facts, the City currently has four ongoing contracts with PG&E, the exclusive provider of natural gas (and electric service in some instances) to retail customers residing in the City. The specific contracts involve a reconstruction project on State Route 99/Pelandale Avenue Interchange, relocation of several gas lines, a utility easement for electrical facilities, and the installation of SmartMeters. In our view, all of these contracts pertain to essential duties the City provides to its residents and there is no indication from the facts that any governmental entity, other than the City Council, has the legal capability of amending or renegotiating those contracts.

Accordingly, based on these facts and consistent with the law, we find that the rule of necessity would apply to allow the City to amend or renegotiate the four current contracts with PG&E. Of course, Councilmember Alvarez would be required to abstain from any participation in the amending or renegotiating of the contracts in his official capacity as a member of the City Council. Similarly, because he is also disqualified from taking part in those decisions under the Act, he must follow the recusal requirements outlined in Regulation 18707(a), which includes the further requirement that Councilmember Alvarez recuse himself and leave the room after identifying his economic interests. (Regulation 18707(a)(1)(C).)

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:aja