



Board Ethics and Governance Issues – A View from the Trenches

Community College League of California (CCLC)
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Agenda

- Conflicts of Interest Laws
 - Gov Code § 1090
 - Political Reform Act
 - Common Law conflicts
- Laws Relating to the Perquisites of Office
- Transparency Laws
 - Brown Act
 - Public Records Act

Basic Values

Duty of Public Officials and Employees

- Engender public confidence in government decisions

How?

- Promote transparency in government actions
- Make government accessible to members of the public
- Apply rules equally and without bias
- Make decisions based on merit, not personal interests
- Provide same level of service to all
- Treat public with respect, dignity and courtesy

Conflict of Interest Laws

General Duties

- Duty to avoid conflicts, or even the appearance or possibility of a conflict
- Public officials and employees must perform their duties:
 - Impartially;
 - Free from bias caused by own financial interests; or
 - Free from bias caused by financial interests of supporters

Duty of Public Officials and Employees

- To be personally disinterested in contracts, financial matters or hearing processes in which you are officially responsible
- Avoid even the *appearance* or *possibility* of a conflict

Government Code § 1090 Conflicts

General Rule

- A public officer or employee may not make contracts in which he or she is financially interested

Penalties

- Civil & Criminal
 - *P. v. Honig*
 - *Thomson v. Call*

Gov't Code § 1090 Test

1. Is person an officer or employee?
2. Is there a contract?
3. Did the person “make” the contract?
4. Do they have a financial interest?
5. Is it a statutory “non-interest”?
6. Is it a statutory “remote interest”?
7. Does the “rule of necessity” apply?

What is a “Financial Interest”?

- Financial interest is not defined by statute
- General inquiry:
 - Would employee or official realize a private gain?
 - Would the interest cause the employee’s or official’s loyalties to be divided?
- Can be direct or indirect financial interest

Effect of § 1090 Conflict

- The entire legislative body is barred from making the contract
- Abstaining is insufficient to cure a conflict
- Does not matter if contract is fair or more advantageous
- No “good faith” defense
- If the contract is already made, it is void and unenforceable

Summary of Operative Legal Principles

Government Code § 1090:

- No public officer may make a contract in which he/she is financially interested
- Even if contract is fair, just, equitable or more advantageous
- No “good faith” defense
- Contract is void and unenforceable
- Insufficient for interested party to abstain
- *Appearance* of financial conflict prohibited

Common Law Prohibition:

- Public officials may not use their position for private benefit — both economic and non-economic
- Public officials must act with undivided loyalty
- Public officials must act with the appearance of fairness

Political Reform Act Conflicts

General Rule

- No public official may:
 - Make/participate/use position to influence decision
 - If knows/should know of disqualifying conflict of interest

Political Reform Act Test

1. Are you a public official making, participating in making, or attempting to use your position to influence a decision?
 - Do you exercise discretion or judgment with regard to the decision?
2. If yes, do you have an economic interest in the decision?
3. If yes, is your interest directly or indirectly involved in the decision?
4. If direct, is your interest material?

Political Reform Act Test (Cont'd)

5. If material, is it reasonably foreseeable that the decision will have a material effect on your economic interest?
6. If foreseeable, is the effect distinguishable from effect on public generally?
7. If not, is your official participation nonetheless required?

Effect of Conflict

- Trustee must:
 - Publicly declare the specific interest
 - Leave the room/refrain from participating
- Employees/Officials – No clear requirements
- No good faith defense!
- Penalties: Primarily FPPC fines

Summary of Operative Legal Principles

Political Reform Act

- No public official may:
 - Make/participate/use position to influence a decision
 - If knows/should know of disqualifying financial conflict of interest
- Board member must:
 - Publicly identify the financial interest after announcement of agenda item
 - Leave the room/refrain from participating

Common Law Prohibition:

- Public officials may not use their position for private benefit – both economic and non-economic
- Public officials must act with undivided loyalty
- Public officials must act with the appearance of fairness

Perquisites of Office

Limitations on the Receipt of Gifts - Government Code §§ 89503, 89506

- Gift defined:
 - Any payment/benefit
 - To official
 - Confers personal benefit
 - Without consideration
 - Includes rebates/discounts not offered to public

Limitations on the Receipt of Gifts – Gov't Code §§ 89503, 89506

- Officials and candidates:
 1. Cannot accept any gift(s) from one source worth more than \$500* in calendar year if required to report receiving gifts from that source;
 2. Are disqualified from participating in decisions involving the source of gift(s) of \$500 or more in previous 12-month period
- Gifts aggregating \$50 or more in a calendar year must be reported on Form 700
- Always check district's conflict of interest code for more info

Limitations on the Receipt of Gifts

2 C.C.R. § 18944

- Gifts made to official and family member = Gift to official for full value
- Gift given directly to family member = Gift to official if:
 - Gift reduces official's normal obligation to financially provide for family member;
 - Official uses gift;
 - Official controls who will use gift; **OR**
 - Giver involved in government decision within last 12 months.

Exception: Official can show an established working/social relationship between donor and family members

Gifts of Public Funds Prohibited - California Const. Art. XVI, Sec. VI

- All expenditures of public funds must have public purpose.
- Test:
 - Does expenditure serve public interest?
 - Ask: Is the purpose of the expenditure to benefit the public interest or the interest of private individuals or for private purposes?
 - Note: Good intentions not synonymous with public benefit
 - Is the expenditure authorized?
 - Public official possesses only those powers conferred by law

Mass Mailings – Gov't Code § 89001

- No mass mailing shall be sent at public expense
- “Mass mailing” means more than 200 substantially similar items sent in a single calendar month, but does not include:
 - A form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry
 - A letter where the name of elected official is only in letterhead or logo and all official’s names are same size, font, color and location

Mass Mailings – Government Code § 89001

- Items prepared or mailed at public expense generally may not:
 - Feature an elected officer affiliated with the agency which produces or sends the mailing
 - Include the name, office, photograph, or other reference to an elected officer if the item is prepared in coordination with the elected officer

Transparency Laws

Public Meeting Law: The Brown Act

- Guarantees the public's right to attend and participate in meetings of legislative bodies
- Requires that public agency actions “*Be taken openly and that their deliberations be conducted openly*”
 - Narrow exceptions apply

What is a Meeting?

- Any congregation of a majority of the members of the legislative body in the same time and place to hear, discuss or deliberate upon any item within the subject matter jurisdiction
- Includes:
 - Informal sessions or conferences
 - Telephone conversations for the purpose of making a decision
 - E-mails

Beware of Serial Meetings

- A serial meeting violates the Brown Act
- “Serial meeting” occurs when there is:
 - A series of communications of any kind among a majority of the members, directly or through intermediaries;
 - To discuss, deliberate, or take action on any item of business;
 - That is within the jurisdiction of the legislative body.

Limited Exception: Closed Sessions

- Permissible where allowed by statute, including:
 - Certain personnel matters
 - Labor relations
 - Real property transactions
 - Pending litigation
- Disclosure of confidential information obtained during closed session is generally illegal

Case Study – Brown Act

The Superintendent/President drafted a new policy that she wants the Trustees to adopt. The S/P meets separately with each Trustee to provide information regarding the policy, but she does not communicate or share comments or the position of any member.

The Superintendent/President knows she has the support of a majority of the Trustees. Has she violated the Brown Act?

Agenda Posting Requirements

- Post agenda at least 72 hours before a “regular” meeting
 - 24 hours before a “special” meeting
- Must specify time/location of meeting
- Specify where public can access non-privileged documents distributed to legislative body
- Brief general description of each item
- Include items to be discussed in closed session
- No action may be taken on any item not appearing on the posted agenda

What are Public Records?

- The Act applies to “*any writings... prepared, owned, used, or retained by any... agency regardless of physical form or characteristics.*”
- May include:
 - Employment contracts, MOUs
 - Names, job titles, salaries
 - Names and pension amounts
- **The Act favors disclosure**

When are Public Records Subject to Inspection?

- Public records are subject to inspection at all times during the business hours of the state or local agency
- Public records must be made available for copying upon:
 - Receipt of a request which reasonably describes an identifiable record; and
 - Upon payment of appropriate fees, if any

Responding to a Request for Records

- Agency has **10 days** upon receipt of the request to notify the person whether or not it will comply
- Notice of denial must state the names and titles or positions of each person responsible for the denial

Examples of Exempt Records:

- Drafts, notes, memos **NOT** regularly kept
- Pending litigation materials
- Communications received from legal counsel
- Law enforcement complaints and investigations
- Personnel records, where disclosure would result in privacy invasion
- Test questions, scoring keys, examination data
- Others as defined by Gov't Code § 6254
- Catch-all exception under Gov't Code § 6255

Case Study – Public Records Act

A PRA was submitted for all emails or texts sent or received by members of the Trustees about the cost of the annual Fourth of July celebration. Since the District does not provide phones or email addresses to Trustees members, the District did not search for any documents and did not disclose any records.

Is the District's response sufficient?

Case Study – Public Records Act

The Faculty Association asks for all emails to or from former Trustee Lim and also for all emails to or from Bill Perez, a donor to the Foundation. The hardworking CISO conducts the necessary searches. The requests generate 86,000 emails. It falls to the CISO and the CHRO to review the 86,000 emails and determine if any are exempt from disclosure. This will take many months.

How do you proceed?

Questions?

Thank You!

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