

Understanding Public Service Ethics Laws & Principles: AB 1234 Training

*League of California Cities
Annual Conference*

Wednesday, September 7, 2022, 10:00 am



HOUSEKEEPING

You **MUST** be signed in

You must be present for the full two-hour training

You will receive your certificate at the end of the training

We also have certificates for attorneys for MCLE credit

Contact Taylor Buck (tbuck@ca-ilg.org) with questions or concerns

ILG IS NONPROFIT, NONPARTISAN & HERE TO HELP

- ILG is the nonprofit training and education affiliate of three statewide local government associations
- Together with our affiliates, we serve over 2,500 local agencies – cities, counties and special districts
- We provide practical and easy-to-use resources so local agencies can effectively implement policies on the ground



OUR PROGRAMS AND SERVICES

Program Areas

Leadership & Governance

Civics Education & Workforce

Public Engagement

Sustainable & Resilient Communities



Services

Education & Training

Technical Assistance

Capacity Building

Convening

Our mission is to help local government leaders **navigate complexity, increase capacity & build trust** in their communities

Understanding
Public Service
Ethics Laws
and Principles
(AB 1234)

League of California Cities
Annual Conference & Expo
Wednesday, September 7, 2022

Presenters:

Andrew L. Jared, Senior Counsel
Aleks R. Giragosian, Senior Counsel
Colantuono, Highsmith & Whatley, PC

Historical Background



Elements of Ethics Training

- Conflict of Interest Training
- Ralph M. Brown Act Training
- California Public Records Act Training

Conflict of Interest Outline

1. Government Code Section 1090
2. Political Reform Act
3. Incompatible Offices/Activities
4. Statement of Economic Interest
5. Gift Limits

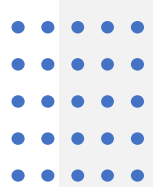
- [A Notorious Example of Conflict of Interest](#)



Government Code § 1090

Basic Rule

- Adopted as early as 1851, later recodified in 1943
- Public officials “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.”
- Prohibition applicable even when:
 - Contract is objectively fair and reasonable
 - Contract reflects lowest price or best value
 - Official abstains from participation in contract

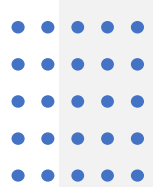


What Constitutes “Making a Contract”?

- Voting to approve
- Designing specifications
- Preliminary discussions
- Negotiating
- Actual signing of contract
- For consultants: Entering into contracts on matters where previously provided design or other services

Indirect Interest

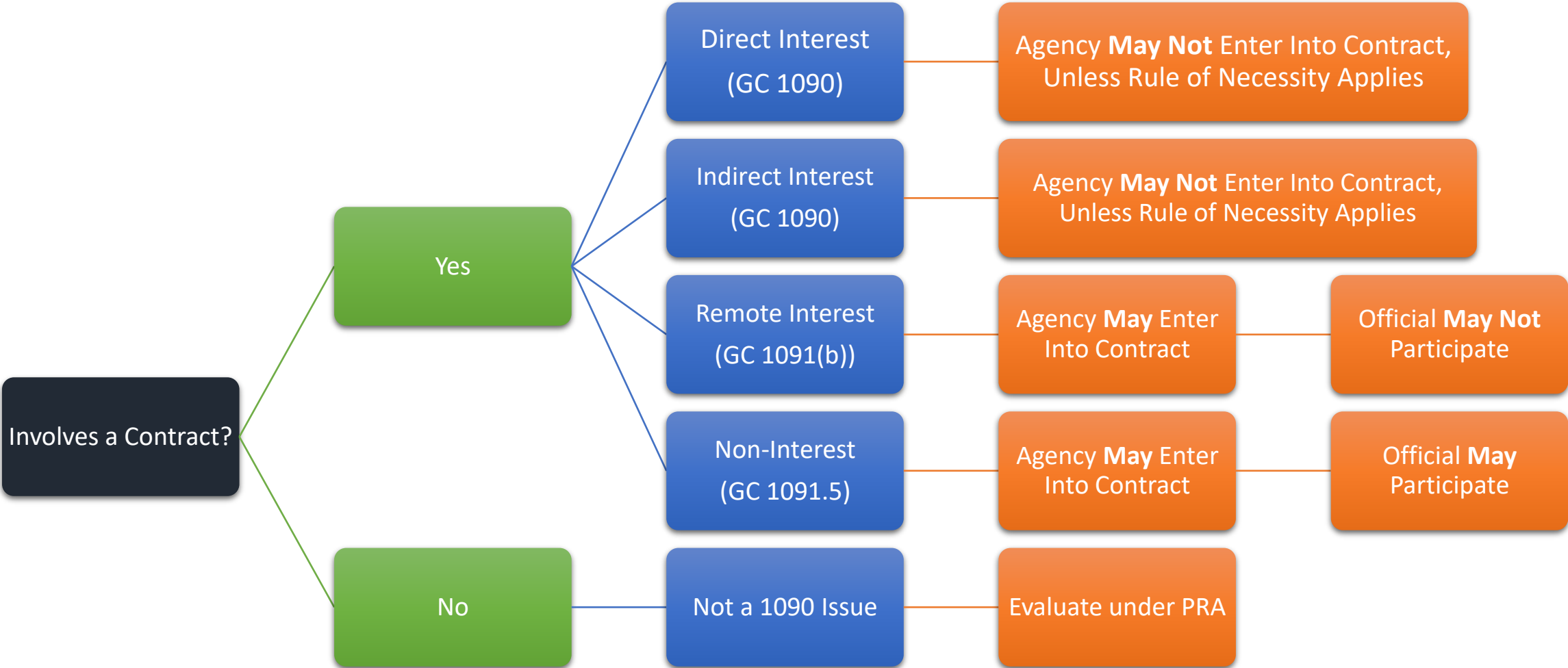
- An indirect interest includes any investment or interest owned by:
 - The spouse or dependent child of a public servant;
 - An agent on behalf of a public servant;
 - A business entity or trust in which the public servant, the public servant's agent, spouse, and dependent children own directly, indirectly, or beneficially a 10% interest or greater



What are the exceptions?

- **The Remote Interest Exception**
 - Disqualifies official, but board may act
- **The Non-interest Exception**
 - The financial interest “doesn’t count” and is ignored
- **The Rule of Necessity**
 - Non-statutory rule applicable only in very limited circumstances

Section 1090 Decision Tree

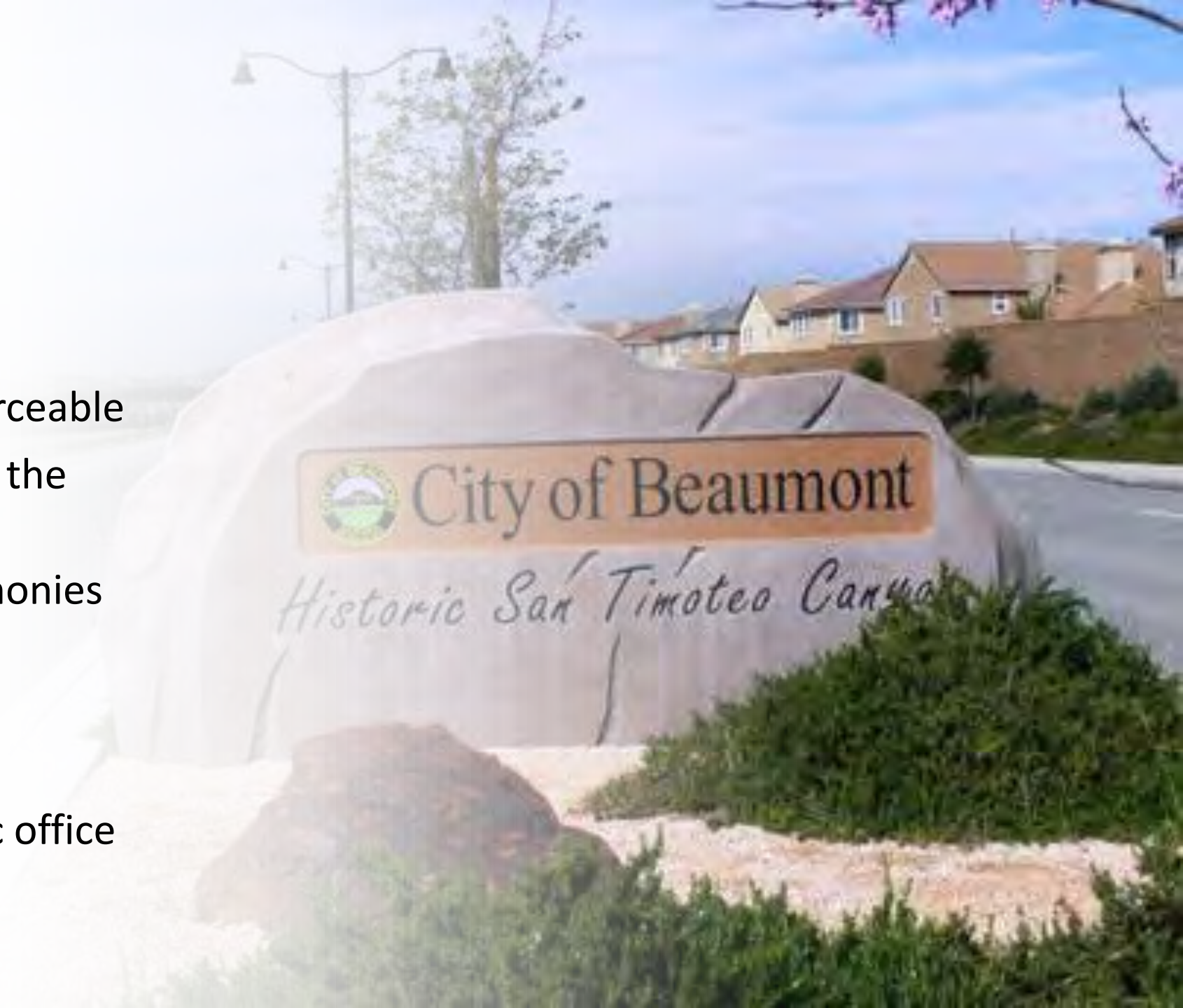


Obtaining FPPC Advice

Type	Method	Immunity	Precedential Value	Response Time
Informal Advice	Email or Telephone	No	No	2-3 Business Days
Formal Advice	Mail or Fax	Yes	No	21 Business Days
FPPC Opinion	Mail or Fax	Yes	Yes	Several Months

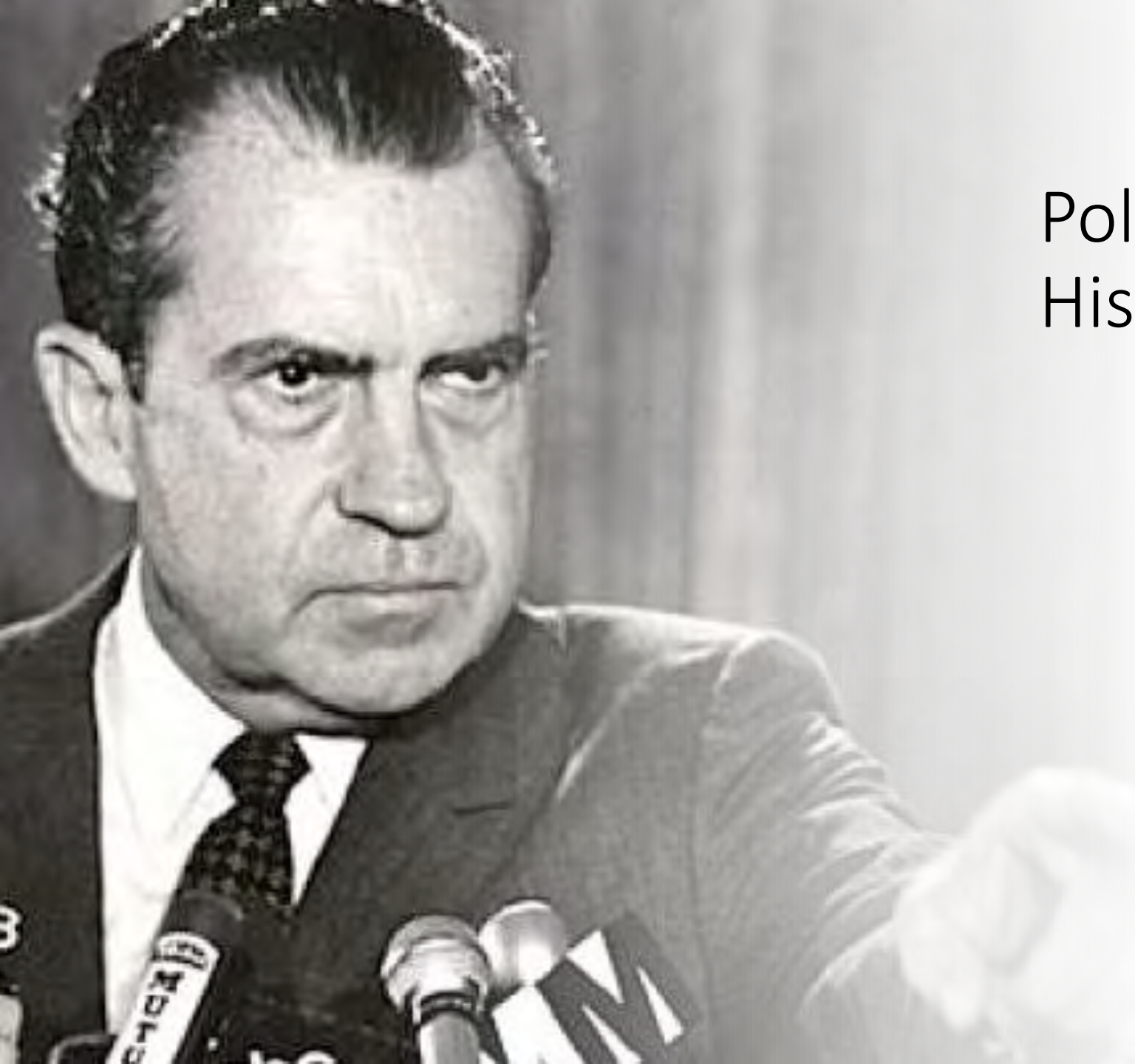
Consequences

- Contract is void and unenforceable
- Agency may keep benefit of the contract
- Official must disgorge any monies
- Violation is a **felony**
 - Fine,
 - Imprisonment,
 - Lifetime ban from public office
- [Example of a 1090 Violation](#)



Consequences

- Violation is a **Felony** (GC §1097)
 - Fine,
 - Imprisonment,
 - Lifetime ban from public office
- Aider & Abettor Liability (GC §1090(b))
- Civil Statute of Limitations
 - 4 years after a party discovers or should have discovered the violation (GC § 1092(b))
- Criminal Statute of Limitations
 - 3 years after discovery of the violation (PC §§ 801 & 803)



Political Reform Act: History

- In response to Watergate
- Californians adopt Proposition 9 in 1974
- Championed by Secretary of State Jerry Brown, the People's Lobby, and Common Cause

Does the Political Reform Act Apply?

Public Official

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graph TD; A[Public Official] --> B[Governmental Decision]; B --> C[Financial Interest];
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Governmental Decision

Financial Interest

Who is a “Public Official”?



87200 Filers



Designated Public Servants



Consultants who serve in a staff capacity by contract, or make decisions on behalf of the public agency

What is a “Governmental Decision”?

- Any action taken by a government agency that has a financial effect on any person other than the governmental agency making the decision
- Prohibition on influencing a Governmental Decision through:
 - Voting
 - Discussing
 - Lobbying

What is a
“Financial
Interest”?



4-Step Test: Is the Interest Disqualifying?

Is there a reasonably foreseeable effect on the financial interest?



Is the effect material?



Is the effect indistinguishable from the effect on the public generally?



Is there an exception that applies?

The “Public Generally” Exception (GC § 87103)

- Effect of decision on public official’s financial interest is **not unique** compared to effect on a significant segment of the public
- “Significant segment” includes:
 - 25% of businesses or entities in the jurisdiction
 - 15% OR 25% of all real property in the jurisdiction
 - 25% of all individual’s in the jurisdiction
- And no disproportionate effect on public official’s financial interest
- Examples: Assessments, taxes, fees, rates, charges that apply equally to public official’s financial interest or entire jurisdiction

What To Do If There Is a Conflict: In-Person Meeting

When the agenda item is announced, but before discussion of the item begins:

1. State that you have a conflict of interest;
2. Publicly identify each financial interest;
3. Recuse yourself from participation in discussion; and
4. Leave the room for the duration of the discussion
5. Only return once the next agenda item is called.

NOTE: FPPC recently closed a loophole

What To Do If There Is a Conflict: Tele- conferenced Meeting

When the agenda item is announced, but before discussion of the item begins:

1. State that you have a conflict of interest;
2. Publicly identify each financial interest;
3. Recuse yourself from participation in discussion;
and
4. Turn off your video and mute your mic
5. Only return once the next agenda item is called.

POLL!

Political Reform Act Violations & Fines

- Criminal
- Civil
- The Court of Public Opinion
- [Recent Example](#)



Incompatible Offices

Government Code Section 1099-



- Offices are incompatible when one:
 - Audits, overrules, or removes members of the other
 - Possibility of a significant clash of duties or loyalties
 - Public policy considerations make it improper
- Does not apply to an employment position
- Forfeit the first office upon acceding to the second
- Poll!

Incompatible Activities Government Code § 1126

- Rule: “[A] local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed.”
- Agency must provide policy regarding which activities are incompatible
- Does not apply to elected officials, only employees and appointed officials

Statement of Economic Interest

- All local agencies must adopt conflict of interest code which designates certain employees as Form 700 filers
- Must file within 30 days of taking office and leaving office, and annually thereafter
- Check with your City Clerk to determine whether you are a Form 700 filer

CALIFORNIA FORM 700
FOR POLITICAL PRACTICE COMMISSION

SCHEDULE A-2
Investments, Income, and Assets
of Business Entities/Trusts
(Disclose Interest in 10% or Greater)

A. BUSINESS ENTITY OR TRUST

Name: _____
Address (Street, P.O. Box, Apartment): _____
City, State, ZIP: _____
 Trust, per 2-2 Business Entity, complete the box, then go to 7

GENERAL DESCRIPTION OF BUSINESS ACTIVITY:
Fair Market Value: \$0 - \$10,000 \$10,001 - \$100,000 \$100,001 - \$1,000,000 Over \$1,000,000
If Applicable, List Date: _____
Acquired: _____ Disposed: _____
Nature of Investment: Tax-Exempt For-Profit Other: _____
Your Business Position: _____

B. BUSINESS ENTITY OR TRUST

Name: _____
Address (Street, P.O. Box, Apartment): _____
City, State, ZIP: _____
 Trust, per 2-2 Business Entity, complete the box, then go to 7

GENERAL DESCRIPTION OF BUSINESS ACTIVITY:
Fair Market Value: \$0 - \$10,000 \$10,001 - \$100,000 \$100,001 - \$1,000,000 Over \$1,000,000
If Applicable, List Date: _____
Acquired: _____ Disposed: _____
Nature of Investment: Tax-Exempt For-Profit Other: _____
Your Business Position: _____

6. IDENTIFY THE GROSS INCOME RECEIVED (INCLUDE YOUR PRO RATA SHARE OF THE GROSS INCOME TO THE ENTITY/TRUST)
 \$0 - \$999 \$1,000 - \$19,999 \$20,000 - \$49,999 Over \$50,000

7. IDENTIFY THE GROSS INCOME RECEIVED (INCLUDE YOUR PRO RATA SHARE OF THE GROSS INCOME TO THE ENTITY/TRUST)
 \$0 - \$999 \$1,000 - \$19,999 \$20,000 - \$49,999 Over \$50,000

8. LIST THE NAME OF EACH REPORTABLE SINGLE SOURCE OF INCOME OF \$1,000 OR MORE (CHECK & REPORT IF APPLICABLE)

A. INVESTMENTS AND INTERESTS IN REAL PROPERTY HELD BY THE BUSINESS ENTITY OR TRUST
Check for all:
 INVESTMENT REAL PROPERTY
Name of Business Entity & Street Address (if Applicable) & Parcel Number of Real Property: _____
Division of Business Address (City or County) & Parcel Number of Real Property: _____
Fair Market Value: \$0 - \$10,000 \$10,001 - \$100,000 \$100,001 - \$1,000,000 Over \$1,000,000
If Applicable, List Date: _____
Acquired: _____ Disposed: _____
Nature of Investment: Tax-Exempt For-Profit Other: _____

B. INVESTMENTS AND INTERESTS IN REAL PROPERTY HELD BY THE BUSINESS ENTITY OR TRUST
Check for all:
 INVESTMENT REAL PROPERTY
Name of Business Entity & Street Address (if Applicable) & Parcel Number of Real Property: _____
Division of Business Address (City or County) & Parcel Number of Real Property: _____
Fair Market Value: \$0 - \$10,000 \$10,001 - \$100,000 \$100,001 - \$1,000,000 Over \$1,000,000
If Applicable, List Date: _____
Acquired: _____ Disposed: _____
Nature of Investment: Tax-Exempt For-Profit Other: _____

Gift Restrictions: Is it a Gift?

- A “payment made by any person of any thing of value when the official does not provide full consideration for the value of the benefit received.”
- Includes gifts to spouse and dependent children
- Given as of the date the gift is received or promised

Exceptions to Gift Restrictions

- Informational material (electronic media ok)
- Gifts from family (includes distant relations and former family)
- Gifts from Close Friends (“long term, close, personal friendship, unrelated to the official’s position with the agency”)
- Reciprocal gifts (between friends during special occasions; not lobbyists)
- Ceremonial Role (2 tickets to entertainment event)
- Home hospitality (food, home entertainment, overnight lodging, etc.)

Exceptions to Gift Restrictions

- Gambling, Prizes, Awards (must report as income; not because of official status)
- Bereavement Gifts (those typically provided)
- Gifts of Human Compassion (charity from within social circle to offset medical or living expenses when in need)
- Acts of Neighborliness (free, ordinary services polite people provide without charge)
- Dating (unless lobbyist or matter pending before agency)
- Gifts for Attending Wedding (reportable and valued at ½ total value)

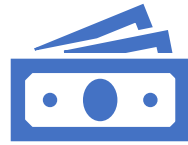
Gifts of Travel: Exceptions

- Government Pays for Government-Related Travel
 - Not Reportable, unlimited
- Private Entity Pays for Government-Related Travel
 - Reportable, unlimited
 - Form 801 or Form 700 Disclosure
- Private Entity Pays for Private Travel
 - Reportable and limited
 - Form 700 Disclosure

Gift Restriction Summary



Gifts aggregating \$50 or more in the reporting period must be disclosed on a Form 700



Gifts aggregating \$520 or more in the reporting period from a single source are a conflict of interest

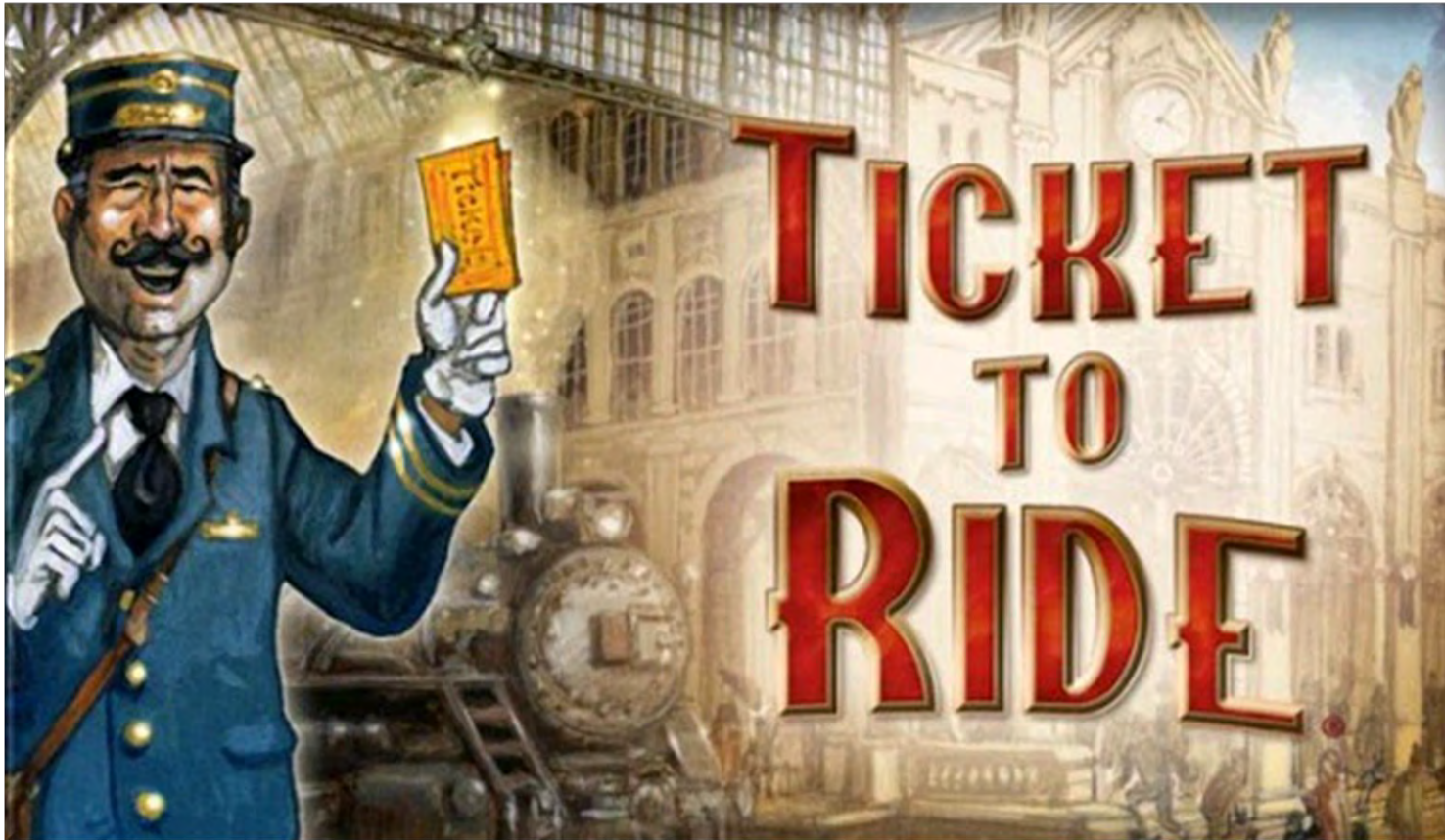


Return to donor within 30 days



Donate to a charity, but can't claim as a tax deduction

Travel Payments: Article XII, § 7



- A transportation company may not grant free passes or discounts to anyone holding an office in this State; acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office.
- Punishable by forfeiture from office



Honorariums

- No local elected office holder, candidate for local elected office, or designated employee may accept any honorarium.
- “Honorarium” means a payment for a speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.



Questions
and Answers

CA Public Records Act: Historical Background



- Modeled on Federal Freedom of Information Act
- Signed by Governor Reagan in 1968
- Requires inspection and disclosure of public records

CA Public Records Act: Purpose

39

- California Constitution: “the People have the right of access to information concerning the conduct of the people’s business”
- Government Code: “In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”

“Public Record”

- Any writing*
- Containing information relating to the conduct of the public’s business
- prepared, owned, used, or retained*
- by any state or local agency
- regardless of physical form or characteristics.*

CA Public Records Act: Process

City receives PRA request
(request can be in any form, including oral)

01

City Clerk has 10 days to provide records, make them available for inspection during business hours, notify requestor of exemption, or request extension

02

Upon request, City Clerk has additional 14 days to provide records, make them available for inspection during business hours, or notify requestor of exemption

Exemptions from Duty to Disclose

- “Preliminary drafts, notes or memoranda ... not retained ... in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.”
- Pending litigation
- “personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy”
- Certain public contract documents and architectural drawings/building plans
- Councilmembers’ home addresses or phone numbers
- Records protected by legal privilege (attorney-client or work product)
- General public interest exemption*

Remedies



Requesters can sue to challenge denial of request



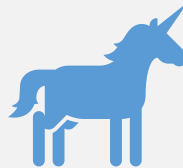
Burden is on the agency to justify withholding records



Agency cannot seek declaratory relief



Agency pays legal fees upon loss



Agency wins fees only if suit is “clearly frivolous”

Do's and Don'ts

Do

- Assist requester by helping narrow search by date range, sender, and subject matter
- Make documents available in electronic format
- Provide documents in native file format, upon request
- Adopt a retention schedule and delete documents pursuant to it

Don't

- Respond to a request for answers, instead of a request for documents
- Charge for anything other than a nominal copying fee
- Send or save public documents to personal devices
- Create unhelpful records



Questions
and Answers



Ralph M. Brown Act: Historical Background

“The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”



Heart of the Brown Act

“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as provided in this chapter.”



What is a “Legislative Body”?

- Governing body of a local agency
- A local agency created by state or federal statute
- Any sub-committee, board, or commission created by the local agency

Legislative Body: Exception

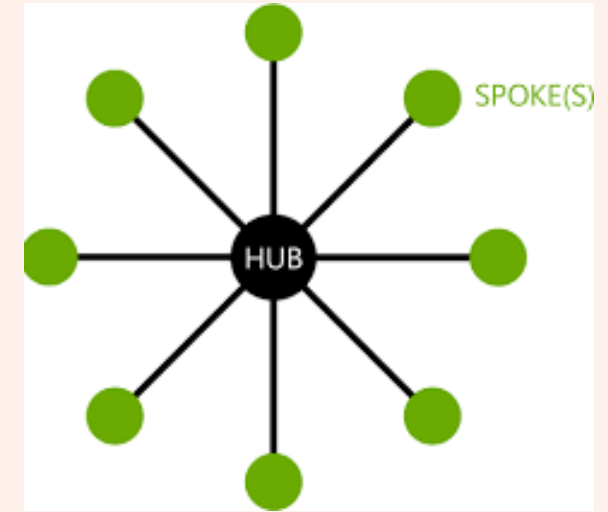
- Ad Hoc Committee:
 - Advisory to legislative body
 - Temporary
 - Limited Purpose
 - Composed of less than quorum legislative body's members
- Special advisory groups
 - Created by staff or a single member of the legislative body
 - Advisory to staff or the single member
- Public employees

What is a “Meeting”?

“Any congregation of a majority of the members of a legislative body at the same time and place, to **hear, discuss, or deliberate** upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.”

Any use of a **series of communications** of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

Serial Meetings



- Hub and Spoke
- Daisy Chain



Examples of Serial Meetings + Polls



Serial Briefings



Email



Social Media

Can I post about City business on social media?

Yes,

- but members of a board cannot use social media to discuss among themselves “business of a specific nature that is within the subject matter jurisdiction of the legislative body.”
- CAN use social media to communicate with constituents
- CANNOT have one member post on discussions by other members
- CANNOT weigh in with “likes” or emoji’s; This counts as discussion.

(GC §54952.2(b)(3))



Garnier v. O'Connor-Ratcliff

- Do you have an official (as opposed to personal) social media account?
- May members of the public interact with your page?
- Are interactions limited to reactions and comments, or can people post content?
- Have you adopted an etiquette policy or incorporated your City's policy by reference?
- Consult legal counsel before deleting comments/posts or blocking users.



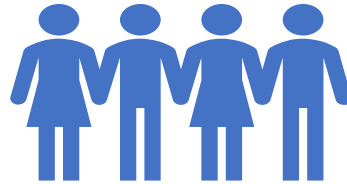
Exceptions to the Definition of Meeting



Individual
Contacts



Conferences



Community
Meetings



Meetings of
another
Legislative Body



Social or
Ceremonial
Occasions

Meeting Location

Must occur within boundaries of the agency, except to:

- comply with a court order or attend a judicial proceeding
- inspect real or personal property
- attend a meeting with another legislative body or
- meet with a state or federal representative to discuss legislative or regulatory issues
- meet in a facility outside of, but owned by, the local agency if the topic relates to the facility
- visit independent legal counsel's office for a closed session

Teleconferencing

Required	Default Teleconferencing	Special Teleconferencing
State of emergency	No	Yes
Teleconference method included on agenda	No	Yes
Teleconference location included on agenda	Yes	Yes
All votes by roll call	Yes	Yes
Agenda posted at teleconference location	Yes	No
Quorum must participate from locations within boundary of agency	Yes	No
Allow for live public comment	Yes	Yes
Requires affirmative findings by the legislative body	No	Yes

Different Meetings and Requirements

Meeting Type	Publishing Agenda	Setting Meeting Date, Time, and Place	Public Comment for Items Not on Agenda
Regular	72 Hours Before Meeting	Set by resolution or ordinance of the majority during a meeting	Yes
Special	24 Hours Before Meeting	Set by presiding officer or majority vote during or outside of a meeting	No
Emergency	As soon as possible	Set by majority vote during or outside of a meeting	No
Adjourned	No agenda posted if meeting is adjourned for less than 5 days	Set by an order of adjournment adopted by any members present at a prior regular or special meeting	Depends on whether it is a regular or special meeting

Content of Agenda

- Call to Order
- Roll Call
- Approval of Agenda
- Approval of Minutes
- Public Comment on Items Not on the Agenda
- Consent Items
- Discussion Items with brief description of each item
- Future Agenda Items

Content of Agenda

- Must contain
 - Public Comment for all items on agenda
 - Brief general description of each item (need not exceed 20 words)
 - Time and location of meeting
 - How to request disability-related modification or accommodation
- (GC §54954.2)
- Must be posted on City website

Staff Reports and Presentations

- Staff reports and presentations do not need to be posted 72 hours in advance (like the agenda)
- Public must have ability to review staff reports and presentations
- AB 2647 Requirements:
 - An initial staff report or similar document is available for public inspection at least 72 hours beforehand;
 - Agency immediately posts any subsequent staff report or presentation to its website;
 - The website is listed on the agency's agenda; and
 - Agency makes physical copied available for public inspection "beginning the next regular business hours of the local agency"

Public Comment

- Two types:
 - For items on the agenda
 - For items not on the agenda
- Never discuss public comments not on the agenda
- Exceptions
 - Emergencies (floods, fires, strikes)
 - Subsequent need (2/3 vote)

Right to Public Comment

- City may establish “reasonable regulations” to ensure intent if carried out
 - Can adopt reasonable regulation limiting time for speakers (GC §54953.3(b)(1))
 - Number of minutes per speaker per topic may be adjusted
 - Must provide at least twice the allotted time for persons using a translator (GC §54953.3(b)(2))
 - May require speaker cards; CANNOT require public to provide names or other information



Right to Public Comment

- Speaker should **not** be interrupted, unless speech is not protected by First Amendment (e.g., threats, incitement of violence, extreme obscenity)
- [Public Comment at its Best](#)
- When should we cut this individual off?
 - When they get loud?
 - When the Vice Mayor feels insulted?
 - When they give silent nazi salute?
 - When they say a “swear word”?
 - When their 3 minutes are up?
 - When they cause a disruption of the meeting?





Public Rights

- Public right to photograph and record meetings
- Cannot limit public access
- Reasonable time, place, and manner restrictions permitted



Closed Sessions

- Exception to open meeting requirement
- Limited to topics identified in State law
- Limited to board and necessary staff
- Specified agenda format and “reporting out” requirements
- Don’t go into closed session without legal assistance
- Don’t disclose closed session confidences
- Poll!

Violation of the Brown Act

- What happens when the Commission violates the Brown Act?
 - Person alleging violation must send a letter within 30 or 90 days
 - Commission will have up to 30 days to cure alleged violation
 - Lawsuit must be filed within 15 days after the Commission's 30 days expires
- What happens when a court determines a Brown Act violation occurred?
 - Violative action is nullified
 - City pays plaintiff's attorneys' fees
 - Civil penalties
 - Criminal penalties



Questions
and Answers