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LEAGUE OF CALIFORNIA CITIES 2023 ANNUAL CONFERENCE, PRE-CONFERENCE

Understanding Public Service Ethics Laws and Principles (AB 1234)

SEPTEMBER 20, 2023

PRESENTED BY:

Kimberly Horiuchi

Understanding Public Service Ethics Laws and Principles (AB 1234)

September 20, 2023

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Required "Ethics Laws" Under Gov't Code § 53234

- Laws relating to personal financial gain
- Laws relating to claiming the perquisite of office
- Government transparency laws
- Laws relating to fair processes

ethics

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Part 1 Laws Relating to Personal Financial Gain

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Laws Relating to Personal Financial Gain

- Conflicts of interest
- Bribery
- Extra compensation
- Campaign contributions
- Conduct upon leaving office



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General Duties


- Duty to avoid conflicts, 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.

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Gov't Code § 1090 - Contracts

General Rule

- A public officer or employee may not make contracts in which he or she is financially interested
- Prohibition applicable even when:
 - Contract is objectively fair and reasonable
 - Contract reflects lowest price/best value
 - Official abstains from participation in contract



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Gov't Code § 1090 Test

Is there a Gov't Code § 1090 issue?

1. Is the person an officer or employee?
2. Is there a contract?
3. Did the person "make" the contract?
4. Do they have a financial interest?

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What is a "Financial Interest?"

- Financial interest *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, large or small

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Gov't Code § 1090 Exceptions

If Gov't Code § 1090 is triggered, it is not a violation if one of the following applies:

1. The financial interest is a statutory "non-interest"
2. The financial interest is a statutory "remote interest"
3. The narrow "rule of necessity" exception applies

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Case Study on Financial Interests

City Council Member Susan is the owner of a large parcel of property within the City. The City is looking to obtain land for a fire station. Susan thinks her property would be perfect, so she sells the parcel below the fair market value to a property developer who then sells it to the City. To be safe, Susan discloses her involvement and abstains from the final decision to purchase the property.

Were Susan's disclosure and abstention adequate to shield her from liability under Gov't Code § 1090?

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Case Study on Financial Interests



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Case Study on Financial Interests

Jacob is the president of City's Firefighters Association and a Trustee on the City Board. He voted to approve a proposal which allowed the City to limit funding its retirement system in exchange for City providing increased pension benefits to City employees, including himself.

Did Jacob's vote to increase pension benefits for himself and other City employees violate Gov't Code § 1090?

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Case Study on Financial Interests



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Case Study on Gov't Code § 1090

Maria was a member of a city council, but wanted to be City Manager. She participated in repealing an ordinance preventing councilmembers from becoming city managers for one year, and discussed her contract terms with council members prior to their vote, but abstained from the actual vote itself.

Has Maria violated Gov't Code § 1090?

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Case Study on Gov't Code § 1090



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Case Study - Rule of Necessity?

City contracts with an outside firm that performs mandated drug testing of employees. The only certified drug testers in the City are hospital staff including one doctor who serves on the City Council. A City employee has a traffic accident and must be drug tested immediately. None of the other hospital staff is available.

May the City pay the doctor to perform the drug test?

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Case Study - Rule of Necessity?



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Effect of Gov't Code § 1090 Conflict

- The 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

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Political Reform Act Gov't Code § 87100

General Rule

- No public official may make, participate in making or in any way use or attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a financial interest



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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?

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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?

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Case Study – Political Reform Act

The City Council is asked to review and approve a plan by Box Superstore to build a new store. Box Superstore pays Councilmember Jacobs a monthly salary for work unrelated to City government. The Council's decision will not affect Jacobs' monthly salary.

Can Jacobs participate in the decision?

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Case Study – Political Reform Act

NO

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What Do You Do When a Conflict Exists?

Decisions subject to Brown Act or the Bagley-Keene Open Meeting Act, the public official must:

1. State you have a conflict and publicly identify each type of financial interest that gives rise to disqualifying conflict of interest,
2. Make the identification orally and part of the official public record, and
3. Leave the room/refrain from participating

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What Do You Do When a Conflict Exists?

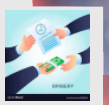
For decisions **NOT** subject to Brown Act or the Bagley-Keene Open Meeting Act, the public official must:

1. State you have a conflict and publicly identify each type of financial interest that gives rise to disqualifying conflict of interest;
2. Make a written or oral identification;
3. Is not required from leaving the room, except for during closed sessions.

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Bribery Penal Code §§ 7(6) and 68

- Definition of bribery:
 - Giving or promising to give anything of present/prospective value/advantage;
 - With a corrupt intent;
 - To unlawfully influence the recipient's action, vote, or opinion.
- Penalties:
 - Imprisonment, fine, and/or restitution;
 - Official forfeits office; AND
 - Permanently precluded from holding public office, employment or appointment in the state.



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Conflicts of Interest and Campaign Contributions – Govt. Code § 84308

- Applies when a decision pertaining to any license, permit, or entitlement for use is pending before a council, board, or agency.
- An officer of a "public agency" may not receive/solicit direct campaign contributions:
 - More than \$250 while a proceeding is pending;
 - From parties/other financially interested persons;
 - During proceeding involving a license, permit, or other entitlement for use; AND
 - For twelve (12) months after a final decision is rendered.
- Before making any decision in a proceeding involving a license, permit, or other entitlement for use pending before an agency, any officer who receives a contribution within the prior 12 months of more than \$250 from a party or any participant shall disclose that fact on the record of the proceeding.
- If an officer receives a contribution which would otherwise require disqualification, and returns the contribution within 30 days from the time the officer knows, or should have known, about the contribution, the officer is permitted to participate in the proceeding.

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Conflicts of Interest When Leaving Office – Govt. Code § 87407

- Before leaving office:
 - Public official may not make, participate in making, or influence government decisions;
 - Directly relating to any persons with whom public official is negotiating or has any arrangement concerning prospective employment.

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Conflicts of Interest When Leaving Office – Govt. Code § 87406.3

- For one year after leaving office:
 - An elected official/city manager/chief administrative officer, or general manager;
 - May not be compensated as an agent/attorney/representative of another person;
 - To appear before or communicate with their former agency for the purpose of influencing;
 - Regarding an administrative action or a legislative action (permits, licenses, grants, or contracts proceeding sale or purchase of goods or property, adoption of rules, etc.).

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Conflict of Interest Codes – Govt. Code § 87300

- Every state and local government agency has a conflict of interest code
- Requirements may be more stringent than those from state law
- Read your agency's conflict of interest code!




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Part 2
Laws Relating to Claiming the Perquisites of Office

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

- A "gift" is:
 - Any payment or benefit
 - That confers a personal benefit
 - For which the official/employee/recipient does not provide goods or services of equal or greater value (including rebates/discounts unless made in the regular course of business to members of the public)



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Does the Gift Limit Apply to You?

- Elected state or local officers or candidates;
- City managers, city attorneys, public officials who manage public investments (Gov't Code § 87200);
- "Designated employees" who are identified by an agency's conflict of interest code.

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

- Evaluate each gift to see if the following provisions are triggered:
 - Officials and candidates:
 - 1) Cannot accept any gift(s) from one source worth more than \$590 in a *single 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 more than \$590 in previous *12-month period*
 - Gifts aggregating \$50 or more in a calendar year must be reported on form 700
 - Agency's conflict of interest code may provide further information regarding disclosure of gifts

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Limitations on the Receipt of Gifts 2 C.C.R. § 18943

- Gifts made to official and family member = Gift to official for full value
- Gift given directly to family member = gift to official if:
 - No established working/social relationship between the donor and family member suitable to the type of gift provided;
 - Gift by a donor who is registered to lobby the official's agency;
 - Giver is a person who has a contract with the official's agency or engages in business that regularly seeks contracts with the agency and the official may reasonably foreseeably participate in the decision; **OR**
 - Giver involved in government decision within last 12 months or in a current action the official will foreseeably participate.

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Receipt of Gifts-Tickets and Passes – 2 C.C.R. § 18944.1

- Entertainment or sporting ticket or pass does not have to be reported on form 700 if:
 - Agency has written policy stating public purpose for distribution of ticket permanently posted on website
 - The ticket's distribution is reported within 45 days
 - Ticket or pass cannot be earmarked for use by particular official
 - The agency determines, in its sole discretion, who uses the ticket or pass

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Exceptions to the Gift Limitations

- Exempt from value limitation but must be disclosed on form 700:
 - Wedding gifts (Half of value attributed to each spouse)
 - Payments for transportation, lodging, and subsistence that are exempt from limits on gifts by Government Code Section 89506



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Travel Payments

Travel payments =
Payments, advances, or reimbursements for travel, including actual transportation, parking, and related lodging and subsistence.

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Travel Payments

- Not prohibited or subject to gift limit, but may be reportable
 - Free admission to an event (within the U.S.) at which official makes speech, is on a panel or makes presentation if for agency business (covers necessary travel, lodging, food)
 - Travel reasonably related to government or legislative purpose provided by agency, or §501(c)(3) organization

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Exceptions to the Gift Limitations

- **Exempt from both value limitation and disclosure requirement (Form 700):**
 - Informational materials;
 - Gifts returned within 30 days of receipt to the donor or delivered to § 501(c)(3) organization or government agency without claiming a deduction for tax purposes;
 - Gifts from close relatives (spouse, children, siblings, grandparents, aunts, uncles);
 - Campaign contributions that are required to be reported;

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Exceptions to the Gift Limitations (Cont'd)

- **Exempt from both value limitation and disclosure requirement (Form 700):**
 - Any devise or inheritance;
 - Personalized plaques with a value of less than \$250;
 - Hospitality in a friend's home;
 - Tickets to campaign events or fundraiser for a §501(c)(3) organization;
 - Bona fide campaign contributions;
 - Gifts exchanged with another in connection with birthdays, holidays, or similar events if gifts not disproportionate in value.

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True, False or Maybe?

Clyde, a City Council member, attends the wedding of his friend and local businessman Monty. Monty passes out wedding favors valued at \$75 per person to all of his guests, including Clyde.

Clyde does not have to disclose the gift because it was substantially similar to the gifts everyone else received?

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True, False or Maybe?

TRUE

The gift was substantially similar in value to everyone else's gifts.

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Honoraria Ban
Gov't Code §§ 89501-89502

- "Honoraria": payments made to an official for making speeches, publishing articles, or attendance at conference, meal, conventions, or social event
- Elected officials, candidates, or local official per Gov't Code § 87200 may not accept Honoraria
- Prohibition does not apply if within 30 days of receipt:
 - Return to donor; **OR**
 - Deliver to official's governmental agency for donation to agency's general fund without claiming as deduction from income.

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Exceptions to the Honoraria Ban

- Exceptions for earned income
 - "Earned income" is:
 - Payment received in return for rendering personal services customarily provided in connection with the practice of a bona fide business, trade or profession
- Limitations for earned income exception
 - Earned income of \$500 or more may be reportable as income; and
 - May result in disqualification from decisions affecting the source of the income

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Exceptions to the Honoraria Ban

- Exceptions **NOT** reportable as income or gifts:
 - Payment made directly to a bona fide charitable or tax exempt non-profit organization if donation made directly to charity, speaker does not claim tax-exemption, speaker not identified and donation not a condition for the speech, article or attendance
 - Payment received from family member

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Penalties for Violation of the Gift Limits and Honoraria Ban

- Giver and receiver are liable up to three times the amount of the unlawful gift/Honoraria
- Administrative sanctions, including fines of up to \$5,000 per violation



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True, False or Maybe?

The District Attorney has been invited to make a presentation at the Association of Prosecutors' state-wide conference in Los Angeles. He arrives one day before the conference, delivers his talk the next day, and leaves the following day. The DA's lodging, food, and transportation costs total \$4,000 and are paid in full by the Association.

The DA has violated the gift limits because his expenses are covered for days he is not presenting?

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True, False or Maybe?

FALSE

No violation if costs are reasonably related to governmental purpose, and the lodging and subsistence limited to the day before, day of, and the day after the presentation.

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Misuse of Public Funds

- Public expenditures are proper only if implicitly or explicitly authorized by legislative enactment
- Gov't Code § 8314 prohibits local official/employee from using (or permitting others to use) public resources for campaign/personal/ unauthorized purposes
- Violation is a felony punishable by imprisonment and disqualification from holding any office in the state (Penal code § 424)

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

- All expenditures of public funds must have a public purpose
- Test:
 - *Does the expenditure serve the public interest?*
 - Ask: Is the purpose of the expenditure to benefit the public interest or the interest of private individuals or for private purposes?
 - *Is the expenditure authorized?*
 - Public official possesses only those powers conferred by law

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True, False or Maybe?

Sarah, a physician with the County Hospital, went to the Republic of Congo to treat those affected by an Ebola outbreak. The County reimbursed Sarah's travel expenses to the Republic of Congo.

This is a misuse of public funds by the County?

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True, False or Maybe?



It is permissible if the governing body decides there is a public purpose.

Attorney General opinion 05-309

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Mass Mailings
Gov't Code § § 89001 and 89002

- 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 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

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Prohibition on Free or Discounted Travel
California Constitution, Art. XII, SEC. 7

- Public officers may not receive free or discounted travel from transportation companies, whether for personal or business travel
- Applies to elected and non-elected officers, but does not apply to employees

Violation of the prohibition results in immediate forfeiture of office.

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Part 3
Government Transparency Laws

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Economic Interest Disclosure Gov't Code § 87200

- Covered officials:
 - Planning commissioners
 - County supervisors
 - District attorneys/county counsels
 - County chief administrative officers/treasurers
 - City council members/mayors
 - City managers/attorneys/treasurers
 - Public officials who manage public investments
 - Candidates for any of these offices at any election
 - Other officials designated by local agency conflict of interest codes



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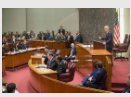
Economic Interest Disclosure Gov't Code § 87200

- Filed upon taking office/leaving office/annual basis
- Form 700 requires disclosure of personal financial interests
- Alerts public officials to actual and potential conflicts to help avoid conflicts
- Informs public about potential conflicts

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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



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Who Is Subject to the Brown Act?

- Any Local Legislative Body of:
 - Counties and Cities
 - School & Community College Districts
 - Municipal Corporations
 - Political Subdivisions of the State
 - Local Public Agencies
 - Joint Powers Agencies
 - Housing Authorities
 - Boards of Education
 - Planning Commissions
 - Air Pollution Control Districts
 - Other Special Districts

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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 any item within the subject matter jurisdiction
- Includes:
 - Informal sessions or conferences
 - Telephone conversations for the purpose of making a decision
 - E-mails

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A Meeting is NOT

- Individual contacts or conversations that are not serial meetings
- Attendance of a majority of the members at conferences to discuss issues of general interest, so long as business not discussed
- Attendance of a majority of the members of the legislative body at purely social or ceremonial occasions

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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.

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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

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Case Study – Brown Act

Don filed a suit against City. During a closed meeting, City Council members excused themselves in small groups to speak with a non-government affiliated mediator to gather facts about the pending litigation. After each group had met with the mediator, they could not reach a consensus on settling the suit.

Has the City Council violated the Brown Act?

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Case Study – Brown Act



Serial meetings between members of the Legislative Body, either personally or through intermediaries, violates the Brown Act.

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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

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Virtual Meetings

- Under AB 361, legislative bodies are allowed to meet virtually during a proclaimed state of emergency if any of the following apply:
 - State or local officials have imposed or recommended measures to promote social distancing
 - The purpose of the meeting is to determine whether, as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees
 - The legislative body has already determined that as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees

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Virtual Meetings (Cont'd)


The legislative body may meet virtually, so long as it:

- Gives public notice of the meeting and posts agendas
- Protects the statutory and constitutional rights of the parties and the public
- Provides public access to the meeting and an opportunity to address the body directly
- Provides public the opportunity to comment in real time, without a requirement to submit comments in advance
- Suspends further action on items in the meeting agenda in the event that there is a disruption in the ability of the meeting to be broadcast to members of the public or in the ability for members of the public to comment
- Avoids closing any timed public comment period until such time has lapsed


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California Public Records Act (CPRA)

"...[A]ccess to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."




Gov't Code § 7921.000

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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
 - Salary information

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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

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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

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Examples of Exempt Records:

- Preliminary drafts **NOT** regularly kept
- Pending litigation
- Communications received from legal counsel
- Complaints and investigations
- Personnel records
- Library circulation records
- Financial data
- Others as defined by Gov't Code § 7923.600-7927.705
- Catch-all exception under Gov't Code § 7922.000

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Enforcement


- A court may order production of records improperly withheld
- The court shall award cost and reasonable attorney's fees to prevailing plaintiff

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Case Study – Public Records Act

A newspaper submits a records request for communications following anonymous allegations that Port District Board Members had a financial interest in a proposed contract. The newspaper requests voicemails, emails, or texts sent or received on personal electronic devices for the Members, and members of their executive staff. The District did not produce communications that were stored solely on personal devices or servers.


Was the District justified in its failure to produce?

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Case Study – The CPRA



City of San Jose v. Superior Court (Smith) (2017) 2 Cal.5th 608

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Understanding Public Service Ethics Laws and Principles (AB 1234)

September 20, 2023

Presented by: Kimberly Horiuchi

Part 4 Laws Relating to Fair Processes



Common Law Bias Prohibitions

- **Common law bias based on personal interest:** *Public officials cannot use their position for personal gain*
- **Common law bias or prejudice based on unofficial source:** *Decision at a hearing should be based on the record*
- **Common law prohibition on prejudging:** *Public official should not be committed to an outcome before the hearing. Opinions are okay, but should not approach a hearing with a closed mind*



Due Process Requirements

- Notice of intended action
- Opportunity to prepare
- Opportunity to be heard
- Fair and impartial hearing
- Requirements of due process are flexible depending upon the interests at stake



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Doctrine of Incompatible Offices
Gov't Code § 1099

- Offices are incompatible when any of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:
 1. Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body
 2. Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices
 3. Public policy considerations make it improper for one person to hold both offices

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Doctrine of Incompatible Offices
Gov't Code § 1099

- The public officer shall be deemed to have forfeited the first office upon ascending to the second office. This provision is enforceable pursuant to code Civ. Proc. § 803
- Section 1099 does not apply to a position of employment, including a civil service position
- Section 1099 does not apply to a governmental body that has only advisory powers

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Competitive Bidding Requirements for Public Contracts—Public Contract Code § 20162

- Statutes intended to:
 - Invite competition; and
 - Guard against favoritism, extravagance, fraud and corruption
- Provisions of the Public Contracts Code, including the Local Agency Public Construction Act, require competitive bidding on county, municipal and local public works projects exceeding specified amounts
- Generally, when the total cost of a construction project exceeds a specified threshold (e.g., \$5,000 or \$10,000), the appropriate district or agency must solicit bids in writing and award the work to the lowest responsible bidder, or reject all bids
- **Complex Statutes – Seek Advice Of Counsel**

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Competitive Bidding Requirements for Public Contracts—Public Contract Code § 20162

- Result of violations of competitive bidding laws:
 - Contract is void and illegal;
 - Contract cannot subsequently be ratified; **AND**
 - Contractor has no right to reimbursement for service or materials furnished, even if they were rendered in compliance with contract requirements.

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Nepotism

- Policies intended to avoid the appearance of impropriety or favoritism
- Discrimination based on marital status is prohibited, but anti-nepotism policies are permissible when the marital status creates an unreasonable workplace conflict or hazard, and when the policies are narrowly tailored to respond to the conflict/hazard
- Public official should not participate in decisions directly affecting family members

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Resources

- The Fair Political Practices Commission
www.fppc.ca.gov
1-866-ASK-FPPC (1-866-275-3772)
- The Attorney General
www.ag.ca.gov

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Thank You!

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