

Managing the Public's Business Under California's Ethics Laws

League of California Cities
Planning Commissioners
Academy
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AB 1234 Training

- Who gets AB 1234 training?
- Applicability to legislative bodies vs. staff
- Topics
 1. Ethics and Scandals
 2. Personal Financial Gain (aka Conflicts of Interest)
 3. Perks of Office
 4. Fair Processes & Procedures
 5. Government Transparency



Part I: Ethics and Scandals

3



Ethics: What, and So What?

- What are ethics?
- Ethics vs. Laws: Minimum standards vs. Moral standards
- Public officials held to higher standards
- What sets off *your* ethics alarm?



4



Institute for Global Ethics' Universal Ethical Values

- Fairness
- Loyalty
- Compassion
- Trustworthiness
- Responsibility
- Respect



5



Scandalous!

- Sexting, Surfing and *Scandal*
- Drugs, guns and gambling
- The sun never sets on Nepotism
- "It's not theft if I deserve it"
- What are you hiding?
 - Alleged transparency violations
 - Creative ownership
- The 24-hour news cycle, web-based longevity: old stories never die



6

Ethics Laws

- Minimum standard
- Not always common sense
 - Consider political process
- Appearances matter
- Sources of laws and regulations
 - Role of FPPC



7

Part II: Personal Financial Gain (aka Conflicts of Interest)

8

Personal Financial Gain

- Laws to mitigate inevitable conflicts of interest
- Public officials should not benefit financially from their positions
- Laws govern conflicts of interest
 - Government decision-making
 - Public contracts
 - Campaign contributions
 - Bribery



9

Avoiding Conflicts in Government Decisions

FPPC: “You have a conflict of interest with regard to a particular government decision if it is sufficiently likely that the outcome of the decision will have an important impact on your economic interests, **and** a significant portion of your jurisdiction does not also feel the important impact on their economic interests.”



Political Reform Act
(Government Code § 87100 *et seq.*)

10



Applying the Law

- 4-step analysis (rather than old-fashioned 8) with two pre-cursors
 - Public Official
 - Financial Interests
 - Business investment, position
 - Sources of income: \$500 in past 12 months
 - Real estate: \$2,000 value
 - Sources of gifts: \$470 in past 12 months (*up from \$460 as of 1/1/2017*)
 - Personal financial effect: \$250 up or down in next 12 months

11



4-Step Analysis:

1. Is the financial interest “reasonably foreseeable”?
 - *“Realistic possibility and more than hypothetical or theoretical”*
2. Is it material?
 - *Apply the new regulations (*Note: FPPC update in progress)*
 - Named party or property?: Probably yes
 - Not named?: Will the value or use change?
3. Is the effect on the official the same as on the “public generally”?
4. Is the official “making, participating in the making, or using his or her position to influence” the governmental decision from which the financial effects result?

12



Hypothetical

- Staff Member: “As you know, the City needs a new building due to our aging facilities. Staff proposes that the City lease a new facility located at 123 First Street.”
- Council Member: “Wait a minute, I think Manager of Planning and Development owns that facility. Can the Council authorize the City Manager to execute the lease?”

13



What if there is a PRA conflict?

- Staff:
 - Report it
 - Don’t participate
- Board Members:
 - Report in open session
 - Leave the room
 - Don’t participate
 - Don’t discuss
 - Don’t vote
- Penalties, consequences
 - FPPC enforcement
 - *Heightened focus*
 - Fines (*trending up*: \$30,000-\$50,000)
 - Attorneys’ Fees
 - Misdemeanor, may lose office
 - May invalidate decision

1-866-ASK-FPPC

advice@fppc.ca.gov

14



No Self-Dealing in Contracts (Section 1090)

You “shall not be **financially interested** in any **contract made**” in your official capacity, or by any body or board of which you are a member.

Government Code §1090 *et seq.*



No Self-Dealing in Contracts

- Is there a financial interest?
 - Eden Township: *Is there a benefit? Is it a reliable rule?*
- Is the financial interest a remote interest (Board only) or statutory non-interest?
 - Examples: landlord/tenant, non-profit entity
 - “Public services generally provided” “on same terms” non-interest exception



What if there is a Section 1090 conflict?

- If Board member, two choices: No contract or resign
- Staff can recuse instead of resign
- Penalties & consequences of violation
 - Contract = void **and** refund money
 - Felony: imprisonment and fines (\$5,000-\$10,000)
 - Attorneys' fees
 - Can never hold another public office

17



Long-Awaited 1090 Reform

AB 1090 (2013) allows FPPC to:

- *Provide opinions and advice*
- *Bring civil and administrative enforcement actions, after consultation with D.A.*



18



Hypothetical

Staff Member: “As you all know, the City and County are planning a big New Year’s Eve fireworks show at Central Park. We will be looking to the Commission to approve several event-related contracts and plans in the coming months.”

Commissioner: “This is going to be great – I live across the street from the park! Can I participate in discussions related to this event?”



Campaign contributions as conflicts, aka “Pay-to-Play” rules, Levine Act

- No officer shall:
 - Accept/solicit/direct \$250 from party or for 3 months after final decision
 - Participate in/influence a decision if financially interested party has contributed \$250 within past 12 months; officers must report such conflicts
- Covers contributions to all campaigns officer supports
- Covers:
 - Business, professional, trade, land use licenses/permits
 - Entitlements for use
 - Nonexempt contracts
 - Franchises
- Exceptions:
 - *Decisions of boards/councils with directly elected members, e.g., cities, some special districts*
 - Competitively bid contracts
 - Contracts for labor/personnel employment



Future Employment

- No participation in decisions involving future employers
 - How far into the process are you?
 - Who else knows you are thinking of leaving?
 - Who else can cover this part of your job?
- Revolving door prohibition
 - Covers elected officials and executive directors
 - Cannot represent clients/employers before agency for one year

21



Bribery

- **Anything of value** in exchange for a vote, opinion or action
- *Quid pro quo*
- Even if bribe not actually received
- Penalties & consequences
 - Imprisonment of 1-4 years
 - Fines up to \$10,000 or double amount of bribe
 - Attorneys' fees
 - Forfeit office, disqualified from future office, employment or appointment in California



22

Honest Services Laws

- Federal Laws
- Mail and wire fraud
- Now limited to bribery and kickbacks in interstate communication
- Penalties: up to 20 years in jail and \$250,000 fine

23

Take-Aways

- Always be on the lookout for a conflict
- Ask for help!
- The problem – and the solution – may or may not be obvious
- Be prepared for questions



24

Part III: Perks of Office

25

Perks of Office

- Public officials should not benefit personally from their positions
- Laws govern
 - Gifts
 - Honoraria
 - Free/discounted transportation
 - Use of public resources



Stricter of state law and agency policy governs

26



Gift Limits

- “Public Official”: Conflict of Interest Code
- “Gift”: Anything that confers a “personal benefit” for which you do not provide something of equal value
- Limit: \$470 per source per calendar year for 2017-2018
- COI Disqualifying Interest: Over \$470 in 12 months from single source
- Report: Any gift worth \$50 or more
 - *Designated positions: only report if connected to job duties*
- Separate rules for gifts to and from the agency, tickets
- May differ from agency policies, especially for vendors

27



Is it a gift, does an exception apply, and what is it worth?

1. Is there a personal benefit?
2. What is it? Look it up, but...

It's a gift if it's:

- Food/drink
- Services
- Travel/lodging
- Money/loan
- Items/things

But it may be exempt if:

- Reciprocal exchange
- “Host” is present
- Prize/earnings
- Personalized plaque/award (if under \$250)
- Received at big event
- Informational materials
- Inheritance
- Act of neighborliness or compassion
- Campaign contribution

28



Is it a gift, does an exception apply, and what is it worth?

3. Who is it from?
 - Does an exception apply?
 - *Family members*
 - *“Long-term, close personal friend” (“BFF exception”)*
 - *Non-agency business relationship (day job, old job)*
 - *“Dating” relationship*
 - Are they in your disclosure category?
 - Are they a vendor? Does a special rule apply?
4. Is the source a lobbyist or do they have a matter pending before your agency (12 months forward, 12 months back)?

29



Is it a gift, does an exception apply, and what is it worth?

5. Who is the gift to?
 - You, your spouse, your child
6. If the gift was received at an event, exemptions and valuation depend on nature of event
 - Public event where make a speech
 - Wedding, other private event
 - In someone’s home

30

Conferences

- Free or reduced registration is OK
- Meals, lodging and transportation costs
 - Subject to gift limits unless paid by 501(c)(3) or public agency
 - Can be disqualifying
- What if you are performing a service? (Is the “gift” actually “income”?)

Board members: Give a brief report at next meeting for reimbursed travel!

31

Gift Tips

- *Look to agency’s policies first*
- *Keep a gift log*
- *Consider the FPPC’s gift tracking app*
- *Use the FPPC Fact Sheet*



32



Honoraria

- Officers, candidates for office, and designated officials
- No compensation allowed for writing, attending or speaking
- Expense reimbursement OK if in CA
- Exceptions
 - Bona fide business or profession
 - Artistic performance
 - Money paid to agency
 - Direct charitable donations



33



Hypothetical

Board Member: “I would like to report that I attended the APA conference last week and received reimbursement from APA for my attendance. What a great experience! I learned a ton and made connections with all sorts of firms that could help us. Normally, I’d end my report there, but I have a question.

One particular consultant took me and my spouse golfing at an amazing country club. Then he took us out to dinner the next night. I think the total value of these gifts was about \$800. I can pay him back if I have to, but I think its fine because I bought him two drinks at the conference reception plus a couple cups of coffee during the week. I’m good, right?”

34

What to do with these Perks?

- 30 days to decline/donate/pay down/return
- Report it
- Disclosure/disqualification
 - Disqualification from participating in gov't decisions if over \$470 in past 12 months
 - Announce the interest, leave the room
- Penalties & consequences
 - Fine: \$5,000 per violation
 - Own attorneys' fees \$3,000-\$30,000
 - Others' attorneys' fees



35

Ban on Free or Discounted Transportation

- *OK if employment benefit or in furtherance of official duties*
- Applies to officers but not employees
- Applies to public or private transportation companies only
- Progressive era law
- Penalty is forfeiture of office



36



Use of Public Resources

- Personal (or political) use or gifts of public resources
 - Funds
 - Surplus property
 - Staff time
 - Copiers, phones



37



Mass Mailing Prohibition

- No newsletters or mass mailing at public expense
 - Costs of design, production & printing \$50+
 - Features name, picture, office, other such reference to elected official
 - 200+ substantially similar items in 1 month
- Exceptions
 - Legally required notices, announcements
 - Intra-agency communications



38

Campaign and Political Activities

- No public funds for partisan campaigning
- No use of phones, supplies, fax machines, computers
- Informational materials: factual, balanced, do not advocate
- No solicitation of officers or employees
- Penalties: civil, criminal
- **Can't** use resources to advocate or campaign for local ballot measure
- **Can** use resources to provide informational/educational materials that are neutral and balanced in timing, tenor and tone



OK on own time and dime!

39

Compensation and Reimbursement Policies

- Compensation of Council/Board members
- Executive and staff compensation
- Reimbursement: actual and necessary expenses
 - Follow adopted policies
 - Use agency expense form and submit receipts
 - Public records
- Penalties: criminal, civil, permanent disqualification



40



Part IV: Fair Processes & Procedures

41



Fair Processes

- Government processes should be fair and consistently applied to avoid bias and favoritism
- Laws cover:
 - Constitutional due process
 - Statutes, rules and policies for fair processes
 - Competitive bidding
 - Fares/rates/charges
 - Incompatible offices and activities



42



Constitutional Due Process & Fair Processes

- Cannot deprive public of
 - Life
 - Liberty
 - Property
- Without due process
 - Notice
 - Opportunity to be heard
 - Fair and impartial hearing
- Establish standards and follow procedures



43



Competitive Bidding

- Public money for the public good
 - No discrimination or favoritism
- Federal, State and local laws and agency policies
- Essential elements
 - No conflicts of interest
 - Confidentiality
 - No ex parte communications
- Special concerns
 - Surplus property
 - Technology contracts



44





Incompatible Offices & Activities

- Having more than one “master” – even if all are “the public” – creates conflicting duties
- Incompatible public offices
 - Penalty: forfeiture of first public office
- Incompatible activities (private and public): typically defined by agency policy



Part V: Government Transparency

Government Transparency

- Government works for the public and should be open to the public
- Laws cover:
 - Open meetings
 - Public records
 - Agency, Individual Reports (FPPC Compliance)



47

Open Meetings: Brown Act

- Meetings of local legislative bodies
 - Notice specifying time and place of meeting
 - Published agenda
 - Opportunity for public comment
- Penalties: Invalidate action and/or misdemeanor
- New laws
 - *AB 2257: post agenda or link to agenda on primary website homepage accessible through a prominent, direct link for all meetings after 1/1/2019 (Gov't Code 54954.2)*
 - *AB 1787: members of the public with translators receive twice the allotted time for public comment*

48

Closed Session Exceptions

- Real property – “price and terms of payment” only
- Pending litigation
- Personnel
 - *Post-Bell reform: can only approve compensation at regular meeting and in open session*
 - *New law (SB 1436): before taking final action on executive compensation, legislative body must orally report a summary of a recommendation for a final action during the open meeting (Gov’t Code section 54953)*
- Threat to public security
- Labor negotiations
- ***Duty of confidentiality!***



49

Brown Act Pitfalls

- Quorums outside of noticed meetings
 - Conference exception
 - Improper use of “ad hoc” committees
- “Serial” conversations
 - Daisy chain
 - Hub and spoke
 - Talking outside of meetings
 - *E-mail / Internet*



50



Public Records

- Right to inspect and copy public records
- Includes all non-exempt writings or other recording concerning the public's business owned or retained by a state or local agency
 - E-mail is covered; metadata may be
 - *Personal devices & accounts: New Law*
 - Some exemptions
 - Drafts, personnel files, pending litigation, trade secrets, deliberative process, otherwise privileged, “catch-all” exemption



51



Key Lessons

- Pay attention to your ethical compass
- Consider political climate – appearances matter!
- Laws change, but values don't
- Board and managerial leadership matters
- Remember the strictest rule governs (check grants, agreements, & other restrictions)
- Seek help if you need it

52

