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BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

AB 1234 Ethics Guidance

February 5, 2024

Presenters



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Why is This Training Important



- Comply with the law
- Learn best practices
- Promote positive public perceptions
- Avoid legal problems

Spirit of the Law



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
 1102 Q Street • Suite 3000 • Sacramento, CA 95811
 (916) 322-5660 • Fax (916) 322-0886

FOR IMMEDIATE RELEASE
 June 22, 2022

FOR FURTHER INFORMATION
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 (916) 322-7761

New report ranks FPPC among the best States in campaign finance laws

The Fair Political Practices Commission (FPPC), California's governmental ethics and campaign disclosure agency, is ranked among the nation's best in a newly released report ranking all state campaign finance and political ethics agencies.

The Coalition for Integrity (C4I) just released its first-ever, 2022 State Campaign Finance Index, which rates states on factors including strength of campaign finance laws, transparency, and requirements for disclosure in political advertising and campaign finance.

The 2022 Index ranks California (the FPPC) second, slightly behind Washington. The C4I Index gives California a score of 80.95, with Washington at 83.99. The methodology can be found in the full report, linked below.



The State Campaign Finance Index 2022

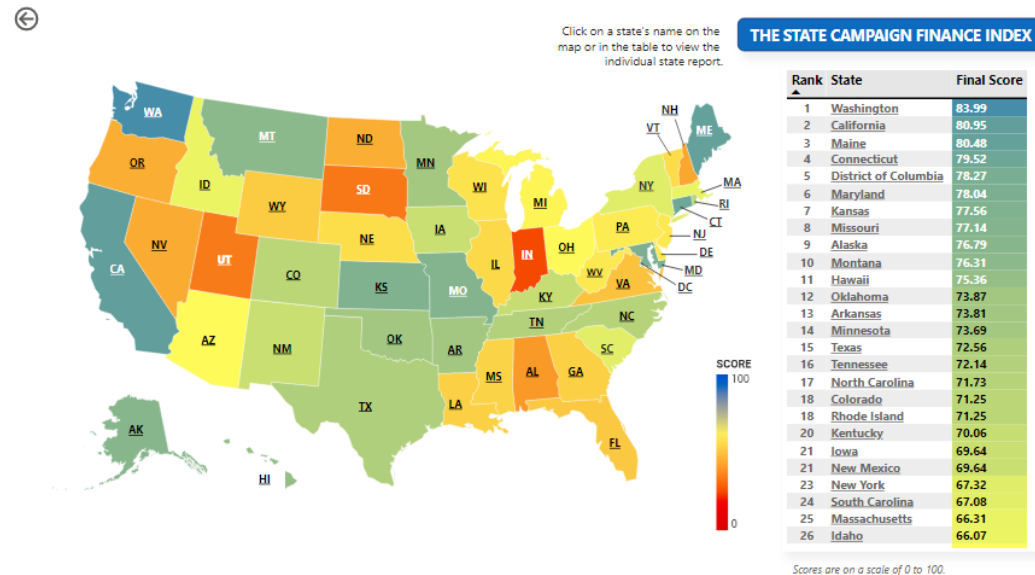
The State Campaign Finance Index 2022 analyzes the laws of 50 states and the District of Columbia relating to the scope, independence, and powers of state agencies which regulate campaign finance, as well as each state's laws on campaign coordination, campaign contributions, disclosure of those contributions, requirements for transparency of funding of independent expenditures and political advertisements, and the availability of campaign finance information. The Index focuses on laws pertaining to state executive and legislative races.

The State Campaign Finance Index 2022

June 21, 2022

[Jump to: Recommendations & Major Findings | Rubric & Rankings | Full Report | Resources & Downloads](#)

The State Campaign Finance Index Scoring Map



Personal Financial Interests

Conflict Laws Focus on Personal Financial Interests



Political Reform Act

Decisions of Government Entities,
Officers and Employees

Gov. Code § 1090

Contracts “Made” by Government
Entities

What's the Difference Between the PRA and GC 1090?



- All Contracts made by a Government Entity Involve a Governmental Decision BUT not all Governmental Decisions Involve a Contract
- Thus, when a decision affects a contract, both the PRA and GC 1090 apply

Political Reform Act of 1974 (Gov. Code § 87100, et seq.)

Personal Financial Interests Political Reform Act of 1974

- Officials should perform duties solely in the public's interest, not for their own financial interests.



How is this done?

**Disclosure
(Form 700)**

Disqualification

Personal Financial Interests Disclosure

Who?

87200 Filer:

Elected Officials, Finance Directors, Commissioners, City Attorney

Code Filer:

Assistant City / County Clerk, Planner, Department Heads, Consultant

How?

Use Form 700

When?

✓ Assuming Office

✓ Leaving Office

✓ Annually, by April 1st

Signed Under Penalty of Perjury

CALIFORNIA FORM 700
FAIR POLITICAL PRACTICES COMMISSION
A PUBLIC DOCUMENT

STATEMENT OF ECONOMIC INTERESTS
COVER PAGE

Date Received
Official Use Only

Please type or print in ink.

NAME OF FILER (LAST) (FIRST) (MIDDLE)

1. Office, Agency, or Court
Agency Name _____
Division, Board, Department, District, if applicable _____ Your Position _____
► If filing for multiple positions, list below or on an attachment.
Agency: _____ Position: _____

2. Jurisdiction of Office (Check at least one box)
 State Judge or Court Commissioner (Statewide Jurisdiction)
 Multi-County _____ County of _____
 City of _____ Other _____

3. Type of Statement (Check at least one box)
 Annual: The period covered is January 1, 2012, through December 31, 2012.
-or- The period covered is ____/____/____, through December 31, 2012.
 Assuming Office: Date assumed ____/____/____
 Leaving Office: Date Left ____/____/____ (Check one)
 The period covered is January 1, 2012, through the date of leaving office.
 The period covered is ____/____/____, through the date of leaving office.
 Candidate: Election year _____ and office sought, if different than Part 1: _____

4. Schedule Summary
Check applicable schedules or "None." ► Total number of pages including this cover page: _____
 Schedule A-1 - Investments - schedule attached Schedule C - Income, Loans, & Business Positions - schedule attached
 Schedule A-2 - Investments - schedule attached Schedule D - Income - Gifts - schedule attached
 Schedule B - Real Property - schedule attached Schedule E - Income - Gifts - Travel Payments - schedule attached
-or-
 None - No reportable interests on any schedule

5. Verification
MAILING ADDRESS STREET CITY STATE ZIP CODE
(Business or Agency Address Recommended - Public Document)
DAYTIME TELEPHONE NUMBER E-MAIL ADDRESS (OPTIONAL)
() _____
I have used all reasonable diligence in preparing this statement. I have reviewed this statement and to the best of my knowledge the information contained herein is true and complete. I acknowledge this is a public document.
I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date Signed _____ Signature _____
(month, day, year) (File the originally signed statement with your filing official)

Clear Page Print Form

FPPC Form 700 (2012/2013)
FPPC Advice Email: advice@fppc.ca.gov
FPPC Toll-Free Helpline: 866/275-3772 www.fppc.ca.gov



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Personal Financial Interests Political Reform Act of 1974

General Rule

Public officials shall not:

- make,
- participate in making, or
- attempt to influence
- a governmental decision in which they have a financial interest.



Personal Financial Interests Political Reform Act of 1974



WHO IS A PUBLIC OFFICIAL?

- A Public Official is every:
 - Member
 - Officer
 - Employee
- and certain Consultants of a State or Local Agency.

(Gov. Code. sec. 82048)

Personal Financial Interests Political Reform Act of 1974



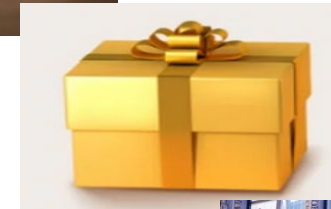
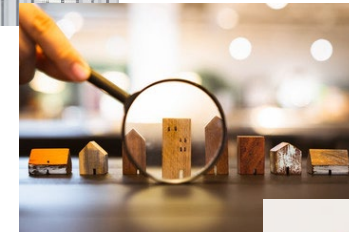
What is your role in the governmental decision?

- **Making**: authorizing, directing, voting on, or committing the agency to the decision.
- **Participating in Making**: providing info, opinions, or a recommendation for the purpose of affecting the decision.
- **Attempting to Influence**: (1) contacting any official in the agency for the purpose of affecting a decision, or (2) contacting another agency on behalf of your agency to affect a decision.

Personal Financial Interests Political Reform Act of 1974

Types of Economic Interests:

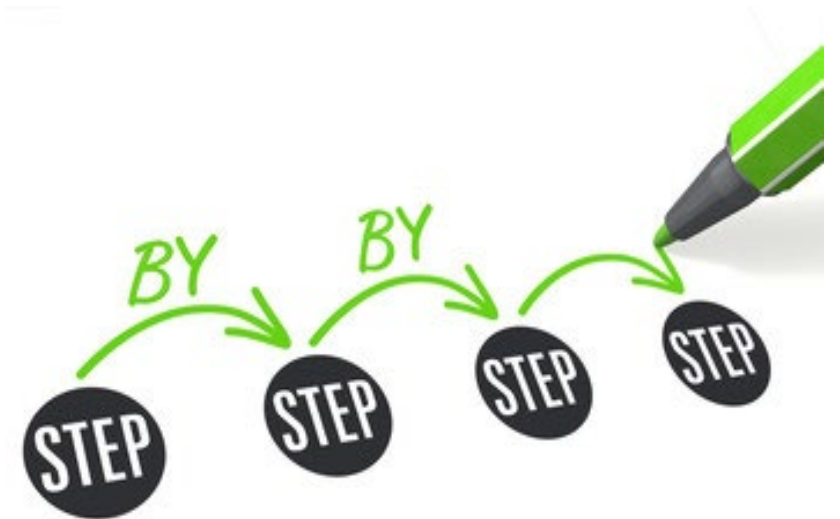
- ✓ Business Investment
- ✓ Source of Income
- ✓ Business Position or Employment
- ✓ Real Property
- ✓ Gifts
- ✓ Personal Finances



Personal Financial Interests Political Reform Act of 1974

The FPPC Does a Four-Step Analysis:

1. Is it reasonably foreseeable that decision will have a financial effect on your economic interest?
2. Will financial effect be material?
3. Is the financial effect indistinguishable from its effect on the public generally?
4. Is there another exception?



Personal Financial Interests Political Reform Act of 1974



- **Reasonably foreseeable** – “Realistic possibility”
- **Material** – Above FPPC standards (e.g., within 500 feet of real property owned)
- **Public generally exception** – Affects: (1) 25% of properties, businesses, or individuals, and (2) no unique effect on public official
- **Other exceptions** – e.g., rule of necessity, speaking as a member of the public on an item of personal interest

Personal Financial Interests Political Reform Act of 1974



- **HYPO:**

A board member is going to vote to award a construction contract for a facility to a company who employs his sister's husband (brother-in-law) in a top executive position.

Can the board member vote on the decision to award the contract?



Personal Financial Interests Political Reform Act of 1974

Answer: Yes.

An official has an economic interest in his or her own finances and those of his or her immediate family (spouse and dependent children). A mere sibling relationship is not enough to create a conflict.



Personal Financial Interests Political Reform Act of 1974



- **HYPO:**

An agency is considering constructing a hiking trail on agency property on the opposite side of a creek that borders a board member's backyard.

Can the board member who owns the property vote on the decision to develop the trail?



Personal Financial Interests Political Reform Act of 1974



Answer: Most Likely, No.

An official who has an financial interest of \$2,000 or more in real property is presumed to have a conflict in any matter affecting real property located within 500 feet of the property line of the official's property, and may not vote on the matter unless there would be no measurable impact to the property.



Personal Financial Interests Political Reform Act of 1974

What do we do when a conflict exists?

- **DO NOT** PARTICIPATE IN THE DECISION
- **DO NOT** DISCUSS, GIVE OPINION OR INFLUENCE
- DISCLOSE
- DISQUALIFY



Interest in Public Contracts (Gov. Code § 1090)

Financial Interest in Public Contracts Government Code § 1090

If:

- A Public Official
- Who Has a Financial Interest
- Makes A Contract

Then:

- Contract is VOID
- Penalties Apply



Self-Dealing

Consultants & Independent Contractors



- GC 1090 applies to officials, officers and employees.
- An outside consultant can be considered an “employee” under the law when that consultant acts in an advisory role and has duties to engage in or advise on public contracting that he/she is expected to carry out on the government’s behalf.

Financial Interest in Public Contracts Elected Official Scenario



- **Facts:** A water district board member owns the construction company that has been awarded the contract to remodel District's office. She recuses herself from participating or voting to approve the contract.

Financial Interest in Public Contracts Elected Official Scenario



- **Holding:** The contract is void.
- **Analysis:**
 - The director is financially interested in the contract.
 - A director's interest in the contract prohibits the district from entering into the proposed contract, even though the member does not participate in and abstains from the actual decision.

Financial Interest in Public Contracts Employee Scenario

- **Facts:** An agency staff member wants to contract to sell a unique device that he invented for the agency's engineering department. The decision would be made by the general manager without any input from the employee.
- **Question:** May the contract be made?



Financial Interest in Public Contracts Employee Scenario



- **Answer:** Yes, if he **discloses** his interest and **disqualifies** himself from participating in, or influencing the decision making process.



Financial Interest in Public Contracts

Contract Defined



- Use general contract principles
- Examples:
 - Construction contracts
 - Purchases
 - Development agreements
 - Civil service appointments
 - Grants and donations

Financial Interest in Public Contracts

“Making” the Contract

“Making” includes:



- Negotiations,
- Discussions,
- Reasoning,
- Planning, and
- The “give and take which goes beforehand in the making of the decision to commit oneself”

Financial Interest in Public Contracts

Types of Financial Interests

- **Financial Interest**
 - Direct (contracting party)
 - Indirect (related to contracting party)
- **Effect**
 - Positive or negative
- **Certainty not required**



Financial Interest in Public Contracts

Remote Interest Exceptions - § 1091(b)

- **Requirements:**
 - Public disclosure noted on records
 - No attempt to influence
 - Board acts in good faith
- **17 Exceptions**, including:
 - Employees, in certain cases
 - Suppliers, in certain cases



THESE ARE FACT-SPECIFIC - CHECK WITH YOUR ATTORNEY

Financial Interest in Public Contracts Non-Interest Exceptions - § 1091.5(a)

- **Requirements:**
 - Some do not require disclosure or disqualification
- **14 Exceptions**, including:
 - Corporate ownership
 - Less than 3% of shares, and
 - Income of less than 5% of total
 - Expense reimbursements
 - Recipient of public services



THESE ARE FACT-SPECIFIC - CHECK WITH YOUR ATTORNEY

Financial Interest in Public Contracts

Limited Rule of Necessity



- Permits a public body, that has a duty to act upon a matter before it, to do so despite a conflict of interest when the public agency is the only entity capable to act on the matter (where one or more of the Board members has a personal financial interest).
- Example: Public official owns the only mortuary within 500 miles and the public agency needs to contract with a mortuary.
- Rule of Necessity allows the official to disclose and disqualify

Personal Financial Interests Interest in Public Contracts



Ramifications

- **Criminal**
 - Willful Violation = Felony
 - Lifetime bar to public office

Civil

- Contract = Void and unenforceable
- Disgorgement of all money
- Civil Penalties

Administrative Fines

Revolving Door

Personal Financial Interests “Revolving Door”

AFTER LEAVING OFFICE:

Elected Official & Manager

- One Year Ban
- Prohibited from appearing before, or communicating with, Board on behalf any other person for compensation



“Feathering Your Nest”

Personal Financial Interests “Feathering Your Nest”

Influencing Prospective Employment:

No Public Official Shall:

- Participate in decision making process when it relates to any prospective employer.
- UNLESS: An exception applies.



Bribery

Personal Financial Interests Bribery

Bribery: The offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties.



Difference between a Gift or Political Contribution and a Bribe

The commonly accepted borderline is that a gift or contribution (money or anything of value) is a bribe if there is proof of a quid pro quo.

A promise to perform an official act or not.



Personal Advantages and Perks

Personal Advantages and Perks

- Gifts
- Honoraria
- Travel/Lodging Expenses
- Loans
- Reimbursements
- Mass Mailings
- Misuse of Public Funds
- Nepotism
- Charity Fundraising Disclosures

“ When public officials are influenced in the performance of their public duties by base and improper considerations of personal advantage, they violate their oath of office ... ”

- Terry v. Bender (1956)

Personal Advantages and Perks

Disclose
\$50+

Disqualify
\$590/12mos.

Refuse
\$590+

- Bottom Line: Watch your calendar
- Estimate
- Track
- If Gift Exceeds Limit: Return, Pay or Donate

Personal Advantages and Perks Common Exceptions

- Gifts to public agency
- Gifts returned unused or donor reimbursed within 30 days
- Gifts from family members
- Gifts of hospitality
- Reciprocal exchanges
- Tickets/passes to certain fundraisers



Agency Disclosures

Gift to Agencies: Forms 801 & 802



Gift to Agencies: Form 801

- **Know the rules:** NEW - Exceptions on gifts of travel now apply to elected officials and officials specified in Gov. Code § 87200.

Tickets: Form 802

- Applies to tickets for entertainment, recreational or similar purpose.
- List of Public Purposes.
- New Definition of Ceremonial Use
- Written Ticket Policy Required

Gift to Agency Report A Public Document

1. Agency Name Date Stamp **California Form 801** For Official Use Only

Division, Department, or Region (if applicable)

Street Address

Area Code/Phone Number E-mail

Agency Contact (name and title) Amendment (explain in comment section)

Date of Original Filing: (month, day, year)

2. Donor Name and Address

Individual Last Name First Name Other Name

Address City State Zip Code

If "Other" is marked, describe the entity's business activity (if business) or its nature and interests.

If applicable, identify the name of each source and the amount(s) solicited or received by the donor for this gift.

Name \$ Amount Name \$ Amount

3. Payment Information

Date and Amount of Payment (other than travel) (month, day, year) \$ (Round to whole dollars)

Travel Payment Information (Round to whole dollars) Location of Travel

Date(s) of Travel \$ Transportation Expenses \$ Lodging Expenses \$ Meal Expenses \$ Other Expenses \$ Total Expense

Provide a specific description of the nature and use of the payment for official agency business:

Identify the officials for whom the payment was used:

Last Name First Name Title Department/Division

Last Name First Name Title Department/Division

4. Verification

I have determined that it is in the interests of the agency to accept this gift and use it for the official agency business described above.

Signature of Agency Head or Designee First Name Title (month, day, year)

Comment: (Use this space or an attachment for any additional information.)

[Clear Form](#) [Print Form](#) FPCC Form 801 (JULY 2012) FPCC Toll-Free Helpline: 866/ASK-FPCC (866/273-7772)

Agency Report of: Ceremonial Role Events and Ticket/Pass Distributions A Public Document

1. Agency Name Date Stamp **California Form 802** For Official Use Only

Division, Department, or Region (if Applicable)

Designated Agency Contact (Name/Title)

Area Code/Phone Number E-mail Amendment (Must provide explanation in Part 3.)

Date of Original Filing: (Month, Day, Year)

2. Function or Event Information

Does the agency have a ticket policy? Yes No Face Value of Each Ticket/Pass \$

Event Description Provide Title/Explanation Date(s) / /

Ticket(s)/Pass(es) provided by agency? Yes No If no: Name of Source

Was ticket distribution made at the behest of agency official? No Yes If yes: Official's Name (Last, First)

3. Recipients

Use Section A to identify the agency's department or unit. Use Section B to identify an individual. Use Section C to identify an outside organization.

A. Name of Agency, Department or Unit	Number of Ticket(s)/Pass(es)	Describe the public purpose made pursuant to the agency's policy

B. Name of Individual (Last, First)	Number of Ticket(s)/Pass(es)	Identify one of the following:
		Ceremonial Role <input type="checkbox"/> Other <input type="checkbox"/> Income <input type="checkbox"/> <small>(If checking "Ceremonial Role" or "Other" describe below)</small>
		Ceremonial Role <input type="checkbox"/> Other <input type="checkbox"/> Income <input type="checkbox"/> <small>(If checking "Ceremonial Role" or "Other" describe below)</small>

C. Name of Outside Organization (include address and description)	Number of Ticket(s)/Pass(es)	Describe the public purpose made pursuant to the agency's policy

4. Verification

I have read and understand FPCC Regulations 19944.1 and 19942. I have verified that the distribution set forth above, is in accordance with the requirements.

Signature of Agency Head or Designee First Name Title (Month, Day, Year)

Comment: (Use this space or an attachment for any additional information.)

FPCC Form 802 (4/12) FPCC Toll-Free Helpline: 866/ASK-FPCC (866/273-7772)

Personal Advantages and Perks



- Third party payments to agency used for travel and conference costs, in lieu of agency funds, are only allowed if:
 - The costs are for “official agency business”
 - The agency head decides who will attend
 - The agency reports the payment (Form 801)
 - Plans are coordinated with the agency
 - Reimbursements go directly to the agency
 - No personal benefit (only for business)
 - Travel time is not extended

Personal Advantages and Perks Tickets and Passes



- FPPC adopted Regulation 18944.1 regulating tickets or passes distributed by a public agency to officials or employees
- Applies to tickets/passes to recreational/ entertainment/amusement events.

Personal Advantages and Perks Tickets and Passes



- Regulation 18944.1 provides that tickets/passes distributed to, or at the behest of, an official of the agency are not considered a gift if:
 - The public official claims them as income for federal income tax purposes
 - Tickets are distributed to employees/officials (other than elected) to promote morale/employee retention
 - Tickets are distributed pursuant to the agency's adopted ticket policy

Personal Advantages and Perks Tickets and Passes



- Agency ticket policy must be adopted by legislative body and include:
 - List of public purposes for which tickets may be distributed
 - Requirement that all tickets distributed shall be to accomplish one of the public purposes
 - Prohibition against transferring tickets received except to members of the official's immediate family or no more than one guest
 - Prohibition against disproportionate use of tickets or passes by certain officials
- Ticket distribution must be recorded on form provided by the FPPC and forwarded to the FPPC for posting on its website

Personal Advantages and Perks Rules of the Road



- Acceptance of passes or discounts from transportation companies is prohibited.
- Informational exception to gift rules does not include travel – exceptions apply.
- Travel may be subject to gift limits. Evaluate on a case-by-case basis – source, purpose.
- Travel paid by using agency funds is totally exempt from limits and disclosure if for agency business.



Behested Payments: Form 803



Behested Payment Report **A Public Document** **Behested Payment Report**

1. Elected Officer or CPUC Member <i>(Last name, First name)</i>		Date Stamp	California Form 803 <small>For Official Use Only</small>
Agency Name			
Agency Street Address			
Designated Contact Person <i>(Name and title, if different)</i>		<input type="checkbox"/> Amendment <i>(See Part 5)</i>	
Area Code/Phone Number	E-mail <i>(Optional)</i>	Date of Original Filing: _____ <small><i>(month, day, year)</i></small>	

2. Payor Information *(For additional payors, include an attachment with the names and addresses.)*

Name _____

Address _____ City _____ State _____ Zip Code _____

3. Payee Information *(For additional payees, include an attachment with the names and addresses.)*

Name _____

Address _____ City _____ State _____ Zip Code _____

4. Payment Information *(Complete all information.)*

Date of Payment: _____ *(month, day, year)* Amount of Payment: *(In-Kind FMV)* \$ _____ *(Round to whole dollars.)*

Payment Type: Monetary Donation or In-Kind Goods or Services *(Provide description below.)*

Brief Description of In-Kind Payment: _____

Purpose: *(Check one and provide description below.)* Legislative Governmental Charitable

Describe the legislative, governmental, charitable purpose, or event: _____

5. Amendment Description or Comments

6. Verification

I certify, under penalty of perjury under the laws of the State of California, that to the best of my knowledge, the information contained herein is true and complete.

Executed on _____ DATE By _____ SIGNATURE OF ELECTED OFFICER OR CPUC MEMBER

FPPC Form 803 (December/09)
FPPC Toll-Free Helpline: 866/ASK-FPPC (866/275-3772)

[Clear Form](#) [Print Form](#)

FOR ELECTED OFFICIALS ONLY

- Contributions of **\$5,000 or more**
- made by a single source in cooperation with elected official
- **Must be reported to official's agency within 30 days.**

Personal Advantages and Perks Honoraria Is Illegal



- What is Honoraria?
- To whom does it apply?
- Application
- Exceptions

Personal Advantages and Perks Loans / Reimbursements / Nepotism



- Personal Loans
- Reimbursement Policy
- Mass Mailings (special rules)
- Nepotism (Agency Policy)

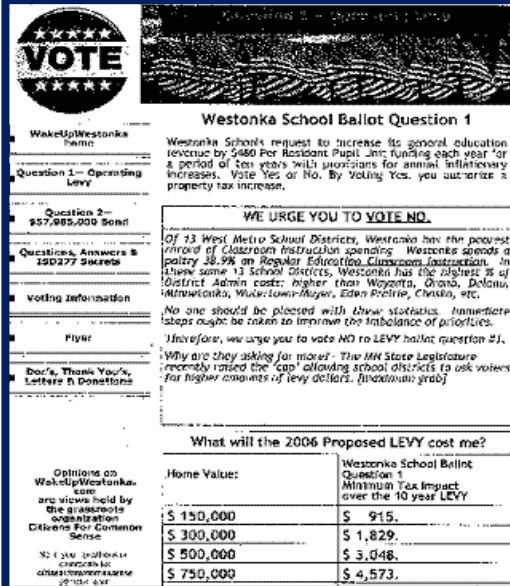
Personal Advantages and Perks Misuse of Public Funds



Ballot Measures



Endorsements & Legislative Activities



Westonka School Ballot Question 1

Westonka Schools request to increase its general education revenue by \$460 Per Resident Pupil Unit, funding each year for a period of ten years with provisions for annual inflationary increases. Vote Yes or No. By Voting Yes, you authorize a property tax increase.

WE URGE YOU TO VOTE NO.

Of 13 West Metro School Districts, Westonka has the poorest record of Classroom Instruction spending. Westonka spends a paltry 28.9% on Regular Education Classroom Instruction. In these same 13 School Districts, Westonka has the highest % of District Admin costs: higher than Wapato, Grand, Delano, Minnetonka, Waukegan-Hagen, Eden Prairie, Chisago, etc.

No one should be pleased with these statistics. Immediate steps ought to be taken to improve the imbalance of priorities.

Therefore, we urge you to vote NO to LEVY ballot question #1.

Why are they asking for more? The MN State Legislature recently raised the "cap" allowing school districts to ask voters for higher amounts of levy dollars. Bureaucrats grab!

Home Values:	Westonka School Ballot Question 1 Minimum Tax Impact over the 10 year LEVY
\$ 150,000	\$ 915.
\$ 300,000	\$ 1,829.
\$ 500,000	\$ 3,048.
\$ 750,000	\$ 4,573.

Informational Materials

Transparency Laws

(Gov. Code § 54950, et seq.; Gov. Code § 6250, et seq.; and California Constitution)

Spirit of the Law



“Tuesday’s Redding City Council meeting provided a rare opportunity to look behind the curtain as the council debated, sometimes hotly, aspects of the state’s open-meeting law and who broke it.

It also showed that Redding’s city government needs a new culture of transparency — its priorities at the moment are backward.”

– *Record Searchlight Editorial 11-18-2015*

Transparency Laws

The Ralph M. Brown Act & The California Public Records Act

Applies to:

- Local agencies
- Legislative bodies
- Meetings
- Persons elected to legislative bodies, even prior to assuming office,
- Certain private organizations



Transparency Laws

The Brown Act - Meetings



1. What is a meeting?
2. When is a meeting not a meeting?

Transparency Laws

The Brown Act – Serial Meetings



SERIAL MEETINGS

Use of:

- direct communication;
- intermediaries; or
- technology

to develop a collective

concurrence outside of a meeting is expressly prohibited.

E-MAILS

When e-mailing:

- Don't "reply to all"
- Do not take a position or make a commitment
- Take caution to ensure compliance with law

Transparency Laws

The Brown Act – Social Media



AB 992 (2020) – It is not a serial meeting to provide information to, or solicit information from, the public about agency business using social media

- Must be “open and accessible” to general public (no blocking)
- Cannot “discuss among themselves”
- No responding directly to other members’ posts about agency business
 - No use of emojis, etc., on other members’ posts

Transparency Laws

The Brown Act – Rules Governing Meetings

- Regular meeting
- Special meetings
- Emergency meetings
- Adjourned meetings
- Public's right to comment
- Report individual votes or abstentions



Transparency Laws

The Brown Act – Closed Sessions

Must be:

- Expressly authorized
- Briefly described in agenda
- Verbally announced

If action is taken, may need to report it to the public and report individual votes or Abstentions

- Disclosure of closed session matter is illegal



Transparency Laws

The Brown Act – Recent Legislation



- Teleconferencing
 - AB 361 (2021)
 - AB 2449 (2022)
- Disruption of Meetings
 - SB 1100 (2022)
- Distribution of Writings
 - AB 2647 (2022)
- Distribution of Writings
 - AB 2647 (2022)

Transparency Laws

The Brown Act - Ramifications

- For violations, Court may:
 - Enjoin action,
 - Invalidate action, or
 - Mandate correction.
- Court costs & attorney fees are recoverable
- Individuals who intentionally violate may be guilty of a misdemeanor



“Secrecy is for losers”

-U.S. Senator Patrick Moynihan

Transparency Laws

California Public Records Act (CPRA)

Every person has a right to inspect public records of any state or local agency.

What is a public record?

Any writing containing information related to the conduct of the public's business retained by any public agency



Emails, Social Media and Other Communications on Private Devices and Accounts



“Here, we hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act.” *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608

Why the Court Ruled As It Did

“Access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state,” according to the Public Records Act and the state constitution.



The court made it clear it would not permit public officials to conduct the public’s business on private devices and place those communications beyond the reach of the Public Records Act and thereby encourage public officials to conduct the public’s business in private.

What Factors Help Determine Whether a Communication on a Private Device is a “Public Record”

The opinion suggested looking to the following factors:

- content
- context
- purpose
- audience
- whether the employee was acting within the scope of employment in preparing or receiving the communication



Transparency Laws

California Public Records Act



Handling Requests

- Public records must be available during office hours.
- Agencies must make copies of disclosable records “promptly available”... “upon request.”
- Agency shall:
 - Within 10 days: determine disclosable records
 - Within 14 days: request time extension for “unusual circumstances”

Hours
Monday 8AM—5PM
Tuesday 8AM—5PM
Wednesday 8AM—5PM
Thursday 8AM—5PM
Friday 8AM—3PM



Transparency Laws

California Public Records Act

When is a public record exempt from disclosure?

- Preliminary drafts, notes or memos not kept in ordinary course of business
- Real estate appraisals
- Personnel, medical, similar files
- Records about pending litigation
- Records pertaining to an investigation
- Deliberative process
- Catch-all exemption



Transparency Laws

California Public Records Act



SB 272 - The California Public Records Act: Local Agencies: Inventory. Each local agency, except an educational agency, is now required to create a catalog of enterprise systems, make the catalog publicly available upon request, and post the catalog on the agency's Website.

The catalog is to list the following information:

1. Current system vendor.
2. Current system product.
3. A brief statement of the system's purpose.
4. A general description of categories or types of data.
5. The department that serves as the system's primary custodian.
6. How frequently system data is collected.
7. How frequently system data is updated.

EXEMPT: IT security systems, video monitoring systems, systems used for 911 dispatch and emergency services, etc.

Transparency Laws

California Public Records Act



Best Practices

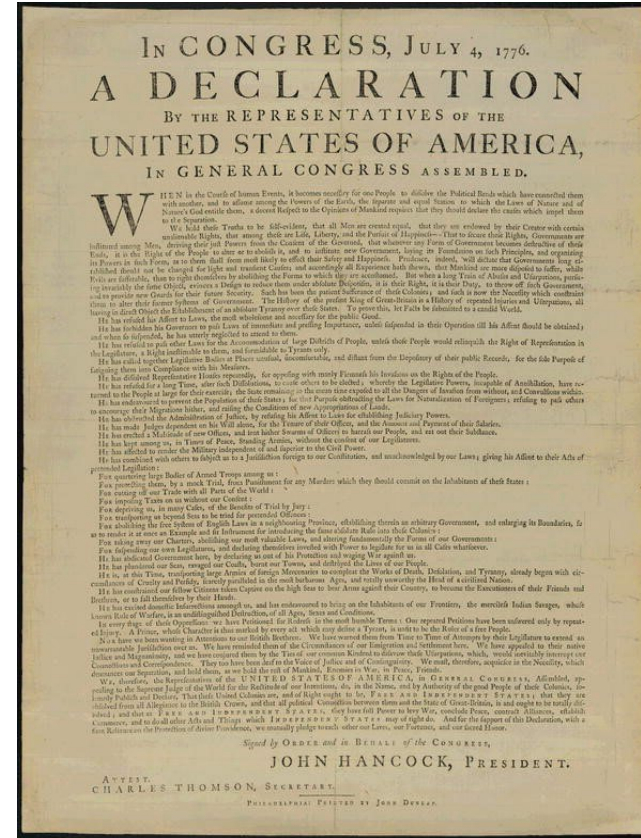
- Always respond to requests
- Adopt a policy / procedures
- Develop standardized fees



Fair Process

Fair Process

1. Due Process
2. Bias
3. Competitive Bidding
4. Incompatible Offices
5. Incompatible Activities



Fair Process Due Process



The Oath of Allegiance

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this allegiance freely without any mental reservation or purpose of evasion or help or aid.

What does Due Process mean?

- Notice
- Opportunity to be heard
- Fair and impartial decision-maker

“No state shall deprive any person of life, liberty or property without due process at law”

- U.S. Constitution Amend XIV, sec 1

Common Law Conflicts of Interest

Common Law Conflict of Interest Often Relates to Fair Process

Common Law Conflict of Interest



Pre-dates the financial conflicts of interest in the Political Reform Act and Government Code section 1090

AND

Those laws now supplant common law conflicts of interest based on financial interests

SO

What's left is a mere vestige of the common law doctrine

Common Law Conflict of Interest



What is it?

“A public officer is impliedly bound to exercise the powers conferred on him primarily for the benefit of the public. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal.”

Common Law Conflict of Interest

“The common law doctrine against conflicts of interest . . . prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties.”



Common Law Conflict of Interest



Avoiding the Conflict

The conflict “may usually be avoided by complete abstention from any official action with respect to or attempt to influence the transaction” (64 Ops.Cal.Atty.Gen. 795, 797 (1981)).

Common Law Conflict of Interest



HYPO:

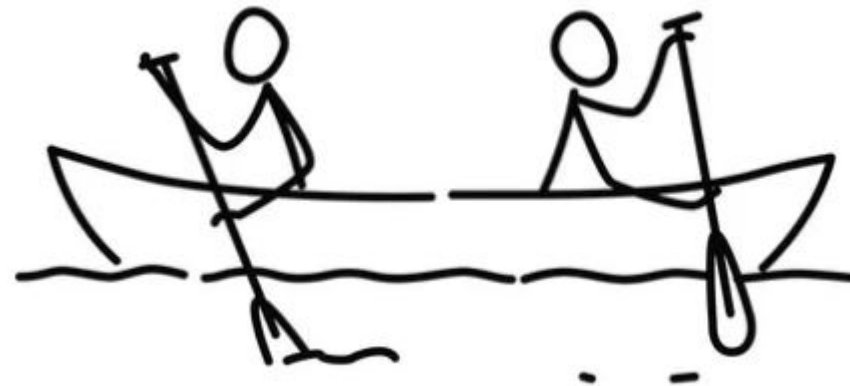
The adult child of a special district director has sued the district in connection with a vehicle collision between the child and an on-duty district employee. The board is to vote on approving a substantial settlement with the adult child.

May the director vote under the PRA, GC 1090, common law conflict rule?

Common Law Conflict of Interest

- PRA – yes, because the member does not have a financial interest in his adult child’s personal finances.
- GC 1090 – yes, same reason, no financial interest.
- Common law conflict – no, should not because of private, personal interest and bias.

Remedy: Recuse or abstain



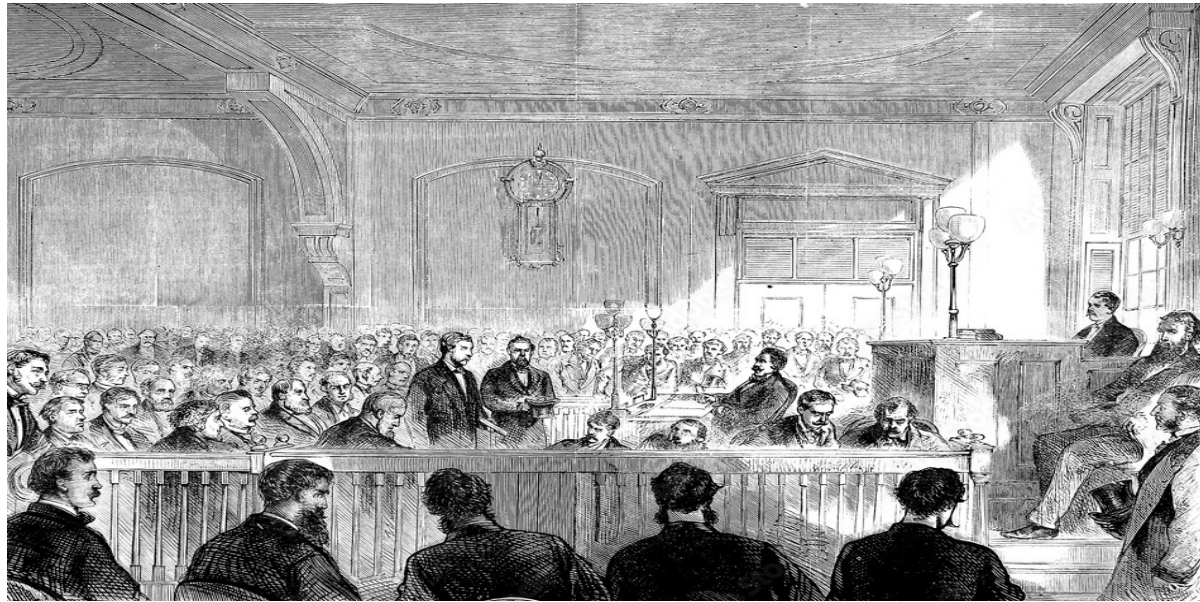
HYPO:

Boardmember Smith rents an apartment month to month next to a property whose owner is seeking agency permission for utilities connections to build a homeless shelter that will interfere with the Boardmember's view of a park. The Boardmember vocally opposed the shelter's application before the media and a committee of the agency. The matter is before the Board.

Fair Process Due Process

Any Due Process concerns?

Can Boardmember Smith participate in the decision by the Board?



Fair Process Due Process

Yes, there are Due Process concerns.

- Bias
- Lack of impartiality
- Personal, private stake in the outcome

Should he participate?

Likely Not. The member would not be a neutral and fair decision maker, denying the applicant procedural due process.



Fair Process Competitive Bidding

- Purposes
- General Rule
 - Only when required by statute or ordinance
 - Lowest, responsive, responsible bidder
 - Thresholds for Public Works
- Exceptions



Fair Process Incompatible Offices Doctrine



Elements:

- Official holding two public offices simultaneously
- Conflicting or overlapping functions (audit, overrule, remove, or exercise supervisory powers)

Ramifications:

- Immediate forfeiture of first office

Fair Process Incompatible Activities Gov. Code §1126



- Applies to officers and employees, but NOT ELECTED OFFICIALS
- Agency must adopt a statement of incompatible activities, statutory prohibition is not self-executing
- Agency may prohibit activities involving:
 - Private gain or advantage
 - Receiving consideration for performing duties
 - Acts outside scope of employment
 - Impairment of efficiency

Attorney exception – Gov. Code 1128: government entity lawyer may serve on another board or commission

CAN AN ELECTED OFFICIAL BE DISQUALIFIED FROM VOTING/DECISION- MAKING FOR RECEIVING CAMPAIGN CONTRIBUTIONS?

- Due to recent legislation (SB 1439) the answer is now YES
- Levine Act (Gov. Code § 84308)
- Proceedings involving entitlements, licenses, permits (land use permits, franchise, zoning variances, consulting contracts)



Fair Process Best Practices for Decision-Makers

1. If you can't be fair, don't participate
2. Avoid statements before the close of a hearing
3. Make decisions based on administrative record
4. Avoid the appearance of bias
5. Pay attention
6. Above all, you will be judged by your fairness and integrity



**“Of course we’ll make a decision ...
once we have considered the 5243 factors.”**

Conclusion

Finding Your Way – Ethics Laws



Summary of 4 Major Areas

Personal Financial Interest

1. Political Reform Act
2. Contracts
3. Revolving Door
4. Feathering Your Nest
5. Bribery/Mail Fraud

Personal Advantages & Perks

1. Gifts
2. Honoraria
3. Travel/Lodging Expenses
4. Loans
5. Reimbursements
6. Mass Mailings
7. Misuse of Public Funds
8. Nepotism
9. Charity Fundraising Disclosure

Transparency Laws

1. Brown Act
2. Public Records Act

Fair Process

1. Due Process
2. Bias
3. Competitive Bidding
4. Incompatible Offices
5. Incompatible Activities
6. Campaign Finances
7. Best Practices

Ethics Laws

California's ethics laws set the minimum standards for public service



In civilized life, law floats in a sea of ethics
(US Supreme Court Justice Earl Warren 1964)



*“We are what we repeatedly do.
Excellence, then is not an act, but a habit.”*

–Aristotle



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