

Small School Districts' Association 31st Annual Conference

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Keeping School Boards Out of Trouble

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Governance

- Thank you for what you do because being a school board member is difficult.
 - Everybody is an expert
 - Complexity of K-12 education-initiatives, jargon
 - Regulated, unionized, policy-laden and financially challenged

Roles

- Representative role
- Enforcement role
- Fiduciary role

State Laws that Govern School Board Conduct

- ❑ Education Code section 35145
- ❑ Government Code section 54954.2
- ❑ Education Code section 35163-4...but,
- ❑ Education Code section 35160

Other Statutory Schemes

- Open meeting laws
- Public record laws
- Conflict-of-interest laws

Themes

- Balancing
- Clarity
- Community engagement
- Civility

The Brown Act What You Don't Know Can Hurt You!

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Why Does This Training Matter??

- ❑ It's the law!
- ❑ The California Open Meeting Law
 - ❑ "It is the intent of the law that actions be taken openly and deliberations be conducted openly."
 - ❑ The meetings of public bodies and the *writings* and public officials and agencies shall be open to public scrutiny.

More Importantly...

- What kind of district do you want to be?
- The Brown Act gives us a chance to do better! Think of it as a starting point not the end game.
- As Board members you can adopt policies that improve upon the Brown Act.

Why Would You Want to Do That?

- To protect yourself and your district!
 - Avoid inefficiency-invalidation
 - Avoid lawsuits initiated by your constituents
 - Avoid criminal charges, oras
 - Preserving your reputation in good standing in the community-good governance

Goals of the Brown Act

□ Balancing

- A Board's need to get business done smoothly
- The public's right to meaningfully participate in meetings (agenda and document review)
- A Board's right to address confidential matters for the good of the public in general (personnel, litigation)

Goals of the Brown Act, continued...

- ❑ By respecting all the goals of the Brown Act, *to the exclusion of none*, you can preserve the integrity of the decision-making process.
- ❑ This balancing will ultimately answer all your questions.
- ❑ Draft Board policies that anticipate problems.

Who is Covered?

- ❑ All public bodies! Only pertains to individual conduct of Board members in extreme circumstances (criminal conduct).
- ❑ Does not apply to staff. However, they may facilitate a violation by acting as a conduit to deliberation.

Is the Public Covered?

- ❑ The Brown Act gives the public the right to participate in meetings, within reasonable limits.

- ❑ The Board can set reasonable, content neutral regulations on public testimony.

- ❑ Can the public be disruptive or defamatory?
 - When can you clear the room?
 - Who can be asked to leave?

What Is a Legislative Body?

- This is broadly construed by decision and statute to include every type of local agency decision-making body.
 - Newly elected members who are not sworn in must abide by the Brown Act as though they are already in office.
 - Meetings between incumbents and newly elected members could violate the Brown Act.

Legislative Bodies, continued...

- Committees created by formal action or created to serve a local agency are subject to the Brown Act.
 - Standing Committees
 - Appointed Bodies
 - Private organizations created by a legislative body (Chambers of Commerce)

What Are Not Legislative Bodies Subject to the Brown Act?

- Temporary committees composed less than a quorum of members
- Groups that advise a single elected official
- Groups appointed by staff. (Staff meeting or Superintendent's counsel)

Meetings

- A meeting is "... any congregation of a majority of the members of the legislative body at the same time or 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."
 - Deliberation as well as action

Types of meetings

- ❑ Regular meetings -occurring at time, date and location set by formal action (72-hour posting requirement)
- ❑ Special meetings -called by President or Board majority to discuss discrete items
- ❑ Emergency meetings -prompt action needed, little notice
- ❑ Adjourned meetings -adjourned to a specified time and place. No new notice or agenda needed if less than five days from regular meeting

Meetings That Are Not Meetings

- ❑ Individual contacts - contacts between an elected official and another person
- ❑ Conferences - allows a board majority to attend concerning issues of general interest
- ❑ Community meetings - allows a majority to attend open them publicized meetings of another organization
- ❑ Other legislative bodies - can attend meetings of other legislative bodies
- ❑ **STILL CANNOT DISCUSS OR DELIBERATE AGENCY BUSINESS AT OTHER ORGANIZATION'S "MEETINGS"!**

Meetings That Are Not Meetings, continued...

- Other legislative bodies - can attend open and public meetings of another legislative or public agency

- Standing committees - the majority can attend a notice meeting of a standing committee of the legislative body (**Issues** - Who can attend? Who can participate?)

- Social events- A majority can attend recognitions, parties and ceremonial events together
 - Reminder: workshops, retreats and study sessions are meetings

Serial Meetings

- ❑ Best defined as a meeting that involves only a portion of the legislative body, but eventually involves a majority.
- ❑ The problem is the development of a "collective concurrence" in private which denies the public's right to participate in decision-making.

Serial Meetings, continued...

- "Daisy-chain" serial meeting:
 - Member A contacts member B, member B contacts member C, until a quorum has discussed, deliberated or taken action on an item (emails, blogs, chat rooms).

- "Pub-and-spoke" serial meeting:
 - A staff member or intermediary individually discusses an issue with a majority and shares viewpoints (writings, constituents).

Further Meeting Issues

- Informal gatherings - members can meet socially if they do not discuss agency business (perception problem).
- Teleconferencing - Brown Act allows teleconferencing at open and closed sessions if:

A quorum of the body participates from locations within the local agency's jurisdiction; and

Teleconference locations made available to public

Roll call votes

- Can you teleconference from a cell phone in your car?

Meeting Locations

- Must be within boundaries or local agency territory, unless:
 - Must leave boundaries to comply with law (settlement conference)
 - Inspect real or personal property which cannot be brought into territory
 - School board members can leave area for bargaining conferences, interview superintendent candidates, or interview public regarding prospective superintendent.

Agendas

- Every regular meeting must be preceded by a posted agenda that advises the public of the meeting and the matters to be transacted or discussed.
- Simply put, a body cannot act on or consider any matter that is not placed on an agenda and described with enough specificity to adequately inform the public what will be considered.

Notice

- The agenda must be posted at least 72 hours before the meeting in a location "freely accessible to members of the public."
 - Does 72 hours include weekends?
 - "Freely accessible" Internet?, Kiosk?
 - Mailed agenda upon written request. Does a request last forever?

Agenda Issues

- These issues take on great importance for a divided Board.
 - Who decides what goes on the agenda? (Board policy)
 - Who decides the order of the agenda?
 - Who decides what is a consent discussion or an action item?
 - Who decides the agenda language?

School Boards

- ❑ A school Board must adopt regulations to make sure the public can place matters affecting district business on meeting agendas and to address the Board on those items. (Education code section 35145.5.)
- ❑ Board retains discretion over agenda composition
 - But just because you can, should you?

Agenda Items

- ❑ Open and closed session items need to be sufficiently descriptive to inform the public what is happening.
- ❑ The Brown Act contains "safe harbor" language to help with the drafting of agenda items. Substantial compliance with safe harbor language is strongly recommended to insulate officials from legal challenges. (Government code section 54954.5.)

Agenda Attachments

- ❑ Board agenda materials must be made available to the public. Any writing distributed to a Board majority are public records and must be made available for public inspection.
- ❑ Writings distributed less than 72 hours before the meeting must be "made available" to the public. To comply provide an inspection location. (Consider privileges.)

Public Comment

- The public has a right to comment on any matter within the subject matter jurisdiction of the Board no matter how uncomfortable or professionally critical.

- However, they cannot be disruptive, defamatory, or personal.

Response

- The Brown Act only allows a brief response limited to:
 - Providing reference or factual information for staff follow-up
 - Directing staff to place a matter on a future agenda
 - Asking clarifying question(s)

- Engaging in dialogue places Board at risk of developing a collective concurrence on an item that is not on the agenda but may come before the Board later. (Community meeting.)

Disruptive Behavior

- ❑ A Board can remove persons from a meeting who willfully interrupt proceedings. (Recording?) (Enforcement?)
- ❑ If order cannot be restored the meeting room may be cleared
- ❑ Members of the media who have not participated in the disturbance must be allowed to continue to attend the meeting
- ❑ The Board may establish a procedure to readmit an individual or individuals not responsible for the disturbance (Board policy)

Reporting Votes

- ❑ A new state law requires bodies to report any action taken and any vote or abstention in relation to that action. (Gov. Code §54953 (c)(2).)
- ❑ Previously, local agencies were not required to report individual officials' votes unless the meetings were conducted by teleconference.
- ❑ The new law pertains to any action requiring a vote, including motions, proposals, resolutions and ordinances.
- ❑ Consider Board policy for implementation. (Electronic school board software.)

Closed Sessions

- ❑ Only specifically delineated matters can be discussed in closed session. There is no exception if the subject matter is sensitive or embarrassing. Similarly, it does not matter that the board wants to speak among themselves, or staff wishes to speak with the Board. It must fall within an enumerated exception.
- ❑ The Legislature determined it was in the public's interest to avoid revealing certain confidential information.

Closed Session Issues

- These issues take on great importance for a divided Board:
 - Closed session confidentiality
 - Evaluation
 - Off topic discussions leading to conflicting Brown Act allegations
 - Language of closed sessions agenda items

Litigation

- The theoretical basis for the litigation exception is a closed session can be held to confer with legal counsel when open discussion would prejudice the local agency's position.
 - Attorney-client/work product privileges
 - Existing litigation
 - Pending litigation

Public Employment

- The Brown Act authorizes closed sessions to consider the appointment, employment, evaluation, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee.
 - The purpose of this is to avoid undue embarrassment for individuals. Not to avoid discussing personnel policies.

Public Employment, continued

- 24 hour notice only required when hearing specific complaints against an employee. This includes hearing live testimony, considering documentary evidence and making credibility determinations.
 - What about discussing evaluation methodology?
 - What about discussing dismissal without hearing evidence? (24 hour notice? "Consider")
 - Compensation?

More Closed Session Exceptions

- ❑ Labor negotiations - can meet with labor negotiators to receive information and discuss negotiation strategy and goals. (Rodda act)
- ❑ Purchase and sale of real property - can meet with your negotiator (staff member) to discuss purchase, sale, lease or disposition of real property.
- ❑ Student discipline - student confidentiality is the paramount concern. Have clear understanding of expulsion appeal hearing and reporting protocols.

Penalties

- The most effective way to ensure compliance with the Brown Act is regular training and clear policies. However, there are remedies available if the Act is violated:
 - Civil invalidation
 - Criminal prosecution

Penalties, continued...

□ Invalidation

- Before filing a court action seeking invalidation a person who believes a violation occurred must first send a written "cure or correct" demand.
- Demand must be sent within 90 days of the alleged violation or 30 days if the action was taken in open session in violation of section 54954.2 (Agenda).
- If the person does not like the outcome a lawsuit must be filed within the next 15 days.

Penalties, continued...

□ Civil action:

- Challenger must demonstrate prejudice as a result of the alleged violation.
- Challenger must demonstrate more prejudice if the body deliberated but did not act.
- Attorneys fees granted if challenger prevails, unless fees determined to be "unjust."

Penalties, continued...

- Misdemeanor-Prosecutor must prove beyond a reasonable doubt:
 - A member had the intent to deprive the public of information to which they knew they were entitled;
 - A member of a legislative body must attend a meeting at which a Brown act violation occurred; and
 - A majority voted to take action. (Deliberation cannot give rise to criminal penalties.)

Final Thoughts

- ❑ The public and watchdog agencies cannot realistically monitor all elected official conduct. Therefore,
- ❑ We should all try to get along. These intricacies become important when we are fighting amongst ourselves.
- ❑ Resolve problems through balancing the conflicting goals of the Brown Act. Always consider effective government and the public's right to open government.
- ❑ If balancing and civility do not work, anticipate problems and draft Board policies to avoid controversy.

The Public Records Act

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ABOUT YOU

- Who are you and why are you here?
- Why does this matter?
- Whose interest to you represent?
 - Board policy?
 - Moving target?
- What are your goals?
- What are requestor's goals?
 - Does it matter? Yes!

The Public Records Act

- Public Records Act ("PRA"),
Government Code sections 6250-
6276.48
 - Provides public access to state and local
government records
 - Balance with right to privacy and
governmental efficiency

Freedom of Information Act

- If records are mistakenly sought under FOIA, a California agency should:
 - Explain that FOIA covers federal government records
 - Explain that PRA covers California government records
 - Provide or exclude record in accordance with PRA

Purpose

- Access to information about the conduct of the public's business is a fundamental and necessary right of every person in California.

Purpose, continued...

- ❑ Access permits public to monitor governmental activities.
- ❑ Agency cannot deny access to disclosable records based on requestor's intended usage.

Definitions

□ Public record defined:

- Any writing that is owned, used or retained by a government agency in the conduct of its official business.
- Act creates no duty to answer questions. Information is different than records.

E-mail

- E-mail is expressly covered. Remember, using e-mail is creating a public record. Text messages are a less clear issue. It's much simpler and better to use the telephone.
- Issues:
 - When is e-mail no longer a record?
 - When you place it in the trash?
 - When it leaves your hard drive?
 - When it is erased from the agency's back-up?

Inter-relationship with Discovery the Act

Different Purposes: Balancing v. Litigation

- During discovery in litigation, agency may be required to recover e-mail from back-up tapes.
- At present, there are no cases or opinions regarding retrieval of e-mail trash under the PRA. PRA and litigation serve very different purposes. Based on the purposes of the PRA as discussed in *Rogers v. Superior Court (1993) Cal.App.4th 469*, it seems unlikely that agencies would be asked to retrieve records from back-up tapes under the PRA.

A Proper Request

- Request may be made orally or in writing.
- Strongly recommend that the agency confirm oral requests in writing.
- Written requests facilitate agency compliance by reducing confusion about the records requested and permits the agency to track the request.

A Proper Request, continued...

- Request need not identify an exact record.
- Request may identify records by their general content.
- Obtain v. Inspect – technological practicalities such as Email requests.

A Proper Request, continued...

- ❑ Request must be sufficiently precise to permit the agency to locate the records. (*Rogers v. Superior Court (1993) 19 Cal. App 4th 469.*)
- ❑ Specific and focused requests facilitate prompt disclosure by the government.
- ❑ Request should not be unduly burdensome.

A Proper Request, continued...

- ❑ Open-ended requests are improper:
 - They are burdensome
 - They frustrate the government agency
 - They are expensive for the requester
 - May lead to non-compliance

Assisting the Requester

- When a request is not specific and focused, the agency has a duty to assist the public in focusing the request.
 - Assist in identifying requested information. Be careful about asking requester's intent.
 - Describe physical location(s) of the record only if requesting an extension or offering an extension.

Duty to Search

- Agency must make reasonable efforts to locate requested records. At a minimum, such efforts should include:
 - Consulting record indices
 - Consulting knowledgeable people
 - Looking in logical places
 - “needle in a haystack” search likely not required

Inspection of Records

□ General Rule

- Agency records may be inspected at any time during regular office hours.
- Implied rule of reason: inspection should not disrupt smooth operation of agency.
- Okay to inspect then obtain – remember technology (Camera phones).

Inspection of Records, continued...

- In reality, agency may need to:
 - Locate the requested records
 - Gather multiple records for inspection
 - Redact exempt information prior to inspection
 - Burden generally not sufficient to justify non-production.

- Appointment to inspect records may be necessary under these circumstances.

Requesting Copies of Records

- Agency should provide records promptly.
- Agency has up to 10 days to:
 - Determine if it will comply with the request, and
 - Notify the requester of its determination
 - Remember, 10 days to “respond” not produce records.

Extending Response Timeline

- Agency may extend period to make this determination for up to 14 days if there is a need to:
 - Communicate with field offices
 - Examine/redact voluminous records

Compliance

- ❑ No bright line test for when records must be provided
- ❑ Once the determination to comply with the request has been made, the agency has a reasonable period of time to provide the records
- ❑ Remember that the records must be provided "promptly"

Compliance, continued...

- If the agency cannot provide the records during the time for making a determination, it must provide a good faith estimate of when the copies will be available.

Fees for Record Duplication

- Agency may charge the direct cost of duplication
- Be consistent, although discretion is allowed
 - Direct cost includes:
 - pro-rata cost of duplication equipment
 - pro-rata cost of equipment operator (salary and benefits)
 - Board policy?
- DOJ charges \$.10 per page

Fees for Record Duplication, continued...

- May charge before records provided
 - Direct costs do not include:
 - research
 - retrieval
 - redaction
 - search
 - assistance
 - legal costs
 - mandated costs

Fees for Record Duplication, continued...

- Special rules for electronic records
 - Agency may recover full costs where agency is required to:
 - extract or compile data
 - undertake programming to produce data

Withholding Records

- ❑ Agencies need not provide privilege or exemption log of exempt records
- ❑ Agencies should provide a sufficient explanation of the reasons for withholding records so that the public can decide whether to challenge the agency's withholding – accomplished by letter

Withholding Records, continued...

Waiver:

- If exempt information is disclosed, then the exemption is waived – only Board should waive – it is their privilege
- The following disclosures are not waivers:
 - Disclosures made pursuant to discovery requests
 - Disclosures to interested public agencies
 - Experts and agents

Withholding Records, continued...

□ Source of Exemptions

- Expressly provided in Gov. Code § 6254
- Imported into § 6254(k) from other provisions of state or federal law
- Public interest balancing test under § 6255 – “catch-all”

Withholding Records, continued...

- Litigation and legal advice exemptions
 - Pending litigation- (Gov. Code § 6254 (b))
 - “Pertaining to” pending litigation (Complaints and Tort claims)
 - Exempts records prepared for use in litigation
 - Exemption lasts only for duration of litigation
 - Billing entries and retainer agreements may remain exempt
 - Incident reports prepared in anticipation of litigation.
 - Settlement agreements ultimately subject to disclosure under the Brown Act

Withholding Records, continued...

Privileges

- Attorney-client privilege (Evid. Code § 954 imported into PRA via Gov. Code § 6254 (k)) –Never expires
 - Code of Professional Conduct § 3-600-Organization is a client
- Be careful of e-mail (waiver)

Withholding Records, continued...

- Attorney work product (Code Civ. Proc. § 2018.30 imported into PRA via Gov. Code § 6254 (k)) – Never expires
 - Protects impressions and conclusions of attorney
 - Applies to legal advice in litigation and non-litigation contexts – General Counsel v. Maintenance & Operations.
 - Again, be careful of email (waiver)

Withholding Records, continued...

Exemption for personnel records-Gov. Code § 6254 (c).

Exemption applies to personnel, medical or similar records whose disclosure would constitute an unwarranted invasion of personal privacy.

Usually involves personal information required by employer.

Withholding Records, continued...

Exemption generally does not cover information that would be exchanged at a cocktail party, such as educational background, employment background and training.

- Personnel records are defined by content, not by location.

Withholding Records, continued...

- Salary information not exempt from disclosure
- Performance evaluations are exempt from disclosure
- Case law is unsettled regarding when disclosure of personnel actions are required to be disclosed

□ TRUE v. FALSE

- Court required disclosure if there were substantial evidence of wrongdoing irrespective of outcome; nondisclosable only if charges found to be groundless (*AFSCME v. Regents of the University of California* (1978) 80 Cal.App.3d 913; *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041.)

Public Interest Balancing Test – Gov. Code § 6255

- *San Jose v. Superior Court (1999) 74 Cal.App.4th 1008*, outlines the three-step test for the public interest balancing test:
 - The public interest in disclosure
 - The public interest in nondisclosure, not the agency's
 - Less intrusive alternatives to satisfy the public interest in disclosure

Deliberations

- Deliberative process privilege
 - Protects records involved in the decision-making process
 - Implemented through public interest balancing test in Gov. Code § 6255
 - Permits candid debate and airing of potential solutions

Deliberations, continued...

- Deliberative process privilege
 - Focuses on recommendatory speech not facts (mental process of decision-makers)
 - Sometimes facts are inextricably intertwined with recommendatory speech and they are exempt as well.

Deliberations, continued...

- Deliberative process privilege
 - Advisors may be from inside or outside the government
 - Deliberative process privilege may be overcome by a narrow request with high public interest

Drafts

- Drafts, notes and memoranda (Gov. Code § 6254 (a))
 - Protects preliminary drafts, notes and memoranda that are not retained in the ordinary course of business where the public interest in nondisclosure outweighs the public interest in disclosure
 - Distinguished from deliberative process exemption by “normally retained” elements

Drafts

- Drafts, notes and memoranda (Gov. Code § 6254(a))
 - *Difficulty test to understand and apply (Citizens for a Better Environment v. California Department of Food and Agriculture (1985) 171 Cal.App.3d 704.)*
- Deliberative process privilege exemption is easier to understand and apply.

Enforcement and Judicial Review

- ❑ Create your own trial court and appellate record during process – Communicate!
- ❑ If judge finds public interest in disclosure, requester is “prevailing party.”
- ❑ Prevailing party if win case or disclosure “permitted” by lawsuit.

Enforcement and Judicial Review, continued...

- ❑ Requester entitled to records and reasonable attorneys' fees.
- ❑ Only requester can seek injunctive/declaratory relief. Agency cannot go to court to see if disclosure warranted.
- ❑ Agency only gets fees if action adjudged to be "totally frivolous."

Enforcement and Judicial Review, continued...

- Discretionary appellate review available – must seek “stay” to avoid disclosure.

CONCLUSION

- ❑ Board members and staff alike to understand that all public records act requests are made to the **Board**.
- ❑ Therefore, it is important that the Board communicates with staff, and vice versa, regarding not only policy, but also specific requests.
- ❑ Misunderstanding issues as such as timelines, waiver, exemptions, can bring public embarrassment to the district.

Conflict of Interest Law in California

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Conflict of Interest Laws

- The most important thing to keep in mind is that conflict laws are intended to address both real and perceived wrongdoing. There are three (3) sources of conflict law in California:
 - Government Code section 1090 et seq.- contractual conflicts;
 - The Political Reform Act of 1974-Government Code section 81000 et seq.; and
 - Common law.

Government Code section 1090

- Section 1090 provides in relevant part:
 - "Members of the Legislature, state, district, judicial district, and city officers or employees 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."

Section 1090, continued...

- ❑ When section 1090 applies, the entire board is precluded from entering into a contract. It is not enough that the financially interested member abstains.

- ❑ Government Code section 1092 and case law hold that any contract made in violation of section 1090 is void.

Financially Interested

- Section 1090 does not define when an official is "financially interested" in a contract.
- Although section 1090 is concerned with financial interests, its primary purpose is to make sure the public officials exercise "absolute loyalty and undivided allegiance to the best interests of the entity they serve."

Financially Interested, continued...

- ❑ City employee, involved in purchasing books, awards contract to his wife's company (*People v. Sobel*)
- ❑ Public official was a shareholder in a brokerage firm doing business with the county despite a financial arrangement which would assure the official would receive no compensation from the contract (*Fraser-Yamor Agency, Inc. v. County of Del Norte*)
- ❑ *Board Members of a county retirement system voted to increase retirement benefits for all employees. The court held that there was no conflict because they received the same benefits they would have, had they not been Board members. (Lexin v. Superior Court)*

Financially Interested, continued...

- Can a Board member who is married to a tenured teacher vote on a promotion involving Board action?
- Can the Board member abstain?
- Can the teacher ever be promoted?
 - "Rule of necessity" - the rule is that essential government functions will be performed even if a conflict exists.
- 69 Ops.Cal.Atty.Gen. 102 (1986)

Financially Interested, continued...

- Prohibition Even Where Contract Is Advantageous
 - Government code section 1090 prohibits public officers to enter into contracts in which they are financially interested even if they are advantageous to the entity. (*Thompson v. Call*)

- Delegation of Board Authority
 - A board cannot avoid conflict of interest laws by delegating authority to the superintendent. The superintendent acts on the authority of the Board.

Exceptions to Section 1090

- “Remote interests” - Government Code section 1091:
 - That of an officer or employee of a nonprofit, tax-exempt entity or nonprofit corporation. (Section 1091 (b) (1).)
 - That of an employee or agent of the contracting party, if the contracting party has 10 or less employees and if the officer was an agent of the contracting party for at least 3 years prior to the officer initially accepting his or her office. (Section 1091 (b) (2).)
 - That of every landlord or tenant of the contracting party. (Section 1091 (b) (5).)
 - That of a person receiving salary, per diem, or reimbursement for expenses from a public entity. (Section 1091 (b) (13).)

Exceptions to Section 1090, continued...

- If a Board member or public official has a remote interest the Board may approve the contract if:
 - The official discloses his or her financial interest in the contract to the public agency;
 - Such interest is noted in the body's official record; and
 - The officer abstains from participation in the making of the contract.
-

Exceptions to Section 1090, continued...

- "Non-interests" section 1091.5
 - Situations that might technically create a conflict of interest under Section 1090, but which the Legislature decided were exempt for policy reasons. Examples:
 - That of an officer being reimbursed for his or her actual and necessary expenses incurred through the performance of official duties (Section 1091.5 (a) (2).)
 - That of a spouse of an officer in his or her spouse's employment or office holding if his or her spouse's employment or office holding had existed for at least one year prior to his or her election or appointment. (Section 1091.5 (a) (6).)
- Unlike remote interests no abstention or disclosure required.

Don't Go This Alone

- ❑ As you can see these distinctions are hyper-technical. Any issue regarding contracts, reclassification, vendors, and where there is any relationship whatsoever... Call your lawyer!

- ❑ You have privileges and a resources... Use them!

The Political Reform Act

- Government Code section 87100 et seq. states the basic prohibition:

"No public official at any level of state or local government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

What is a Financial Interest ?

- Government code section 87103(c) states:
 - "An official has a financial interest in a decision... If it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on an official or a member of his or her immediate family." Or,
 - "Any source of income other than gifts... aggregating \$250 or more in value, received by or promised to the public official within 12 months prior to the time when the decision was made."

What is a Financial Interest?, continued...

- Section 87103 (d) states "... if it is reasonably foreseeable that a decision will have a material financial effect on ...any business entity which a public official is a director, officer, trustee, employee or holds a position of management."
- Section 82005 defines a "business entity" as any organization or enterprise operated for profit. Nonprofit organizations are not included.

In Conclusion...

- ❑ A public official should participate in a decision having to do with him or herself, their immediate family, or their business.
- ❑ Again, these are fine distinctions. If you have any questions... I bet you think I'm going to say call your lawyer. Wrong!
- ❑ Call the Fair Political Practices Commission ("FPPC"). They will render written advice before any action is taken as to whether there may be a violation.

FPPC 8 Step Analysis

- Step 1 - Are you a "public official," under the law. If you are not an elected official or a State or local government employee you are a "public official"

- Step 2 - Are you making, participating in making, or influencing a governmental decision?
 - Makes a government decision (voting or making an appointment);
 - Participates in making a government decision (giving advice or recommendations);
 - Influences a governmental decision (lobbying or communicating with decision maker).

- If you answer "yes" to either of those questions, now may be the time to call your lawyer.

FPPC 8 Step Analysis, continued...

- Step 3 - What is the financial interest? What are the possible sources of a financial conflict of interest? Financial interests include:
 - Business investment - \$2000 interest in the investment
 - Business implement or management - officer or management
 - Real property - \$2000 interest in the property
 - Sources of income - community property, \$250 one year before decision
 - Gifts - \$400 within 12 months of the decision
 - Personal financial effect - personal expenses go up or down \$250 in a twelve-month period because of a government decision.

FPPC 8 Step Analysis, continued...

- Step 4 - Are your financial interests directly or indirectly involved in the Government decision?
 - FPPC clearly more concerned if financial interests are directly involved.
- Step 5 - Are your financial interests material? The FPPC has adopted regulations for deciding what kind of financial effects are important not to trigger a conflict of interest.

FPPC 8 step analysis, continued...

- Step 6 - Is it substantially likely that the government decision will result in one or more of the materiality standards being met for one or more of your financial interests?
 - Is it reasonably foreseeable that the government decision will affect the official's financial interests?

FPPC 8 Step Analysis, continued...

- ❑ If your answer to questions 1-6 are "yes," a conflict exists. However steps 7 and 8 are exceptions that allow participation regardless.
- ❑ Step 7 - Does the "public generally" exception apply? If the general public going to feel essentially the same impact from the government decision as the public official there may not be a conflict.
- ❑ Step 8 - Is your participation legally required? This is much like the "rule of necessity." Does the public official need to act, will the organization be paralyzed?
- ❑ The Fair Political Practices Commission can be reached on its toll-free telephone line (1-866-275-3772) or at www.fppc.ca.gov.

Common Law

- ❑ Some situations are not precluded by either Government Code section 1090 et seq. or Government Code section 87100 et seq. However, according to the Attorney General, they did not pass the smell test.

- ❑ Consequently, they opined that there was a "common law" doctrine of conflict of interest.

Common Law, continued...

- A redevelopment agency board member considered participating in a property improvement loan to a Board member's nondependent son.
 - Section 1090 was not violated because it was no contract
 - Section 87100 was not violated because there was no financial interest
 - However, the Attorney General concluded that the Board should avoid any conflict because the circumstances may have provided the temptation to act for private reasons.

- The moral of the story, be careful out there.
(Ops.Cal.Atty.Gen 19 (2009))

Thank you for your time!

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