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An Overview of Ethics Laws Governing Municipal Officials in California

In California, there are four main areas in which conflicts of interest may come up for public officials: (1) conflicts of interest; (2) fair process; (3) transparency; and (4) gifts or perks that a public official may receive. However, it is worth noting that there is a difference between *ethics* and *what is required by the law*. In general, the law serves as the minimum. Ethics is everything that is above the minimum. This article will provide a broad overview of laws governing the ethical behavior of public officials.

Financial Gain and Conflicts of Interest

In general, there are three areas of law in which conflicts of interests may arise: (1) Political Reform Act; (2) conflicts of interest in contracts under Government Code Section 1090; (3) the common law prohibition against conflicts of interest; and (4) conflicts due to campaign contributions under the Levine Act.

Political Reform Act (“Act”)

The Act prohibits public officials from making, participating in making, or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. The Act also identifies several financial interests that could require recusal if the impact of a decision is material: (1) business entities; (2) real property; (3) source of income; (4) source of gift; and (5) official’s personal finances. The Fair Political Practices Commission (“FPPC”) has adopted extensive regulations to assist with determining whether a public official has a conflict of interest under the Act.

If a public official has a disqualifying interest, then he or she must, immediately prior to the consideration of the matter: (1) publicly identify the financial interest that gives rise to the conflict, (2) recuse himself or herself from discussing and/or voting on the matter, and (3) leave the room until after the discussion, vote, or other disposition of the matter. This recusal requirement also includes recusal from activities outside of meetings as well, such as communicating with staff, other officials, etc. If a public official violates the Act, then this can result in criminal and civil penalties for that councilmember.

Government Code Section 1090 (“Section 1090”)

Section 1090 prohibits most government agencies from making or entering into, a contract if a member of its governing body has a financial interest, direct or indirect, in the subject contract. “Financial interest” is not defined by Section 1090, but courts have interpreted the term liberally. For example, in *People v. Deysher* (1934) 2 Cal.2d 141, 146, the court stated that “[h]owever devious and winding the chain may be which connects the officer with the forbidding contract, if it can be followed and the connection made, the contract is void.” Further, the certainty of financial gain is not necessary to create a conflict under Section 1090. Making or entering into a contract includes decisions to modify, extend, or renegotiate a contract. The FPPC has previously advised that this would also include terminating or amending a contract since such actions would require a “negotiation” prohibited by Section 1090.

Additionally, certain statutory exceptions may apply to the otherwise applicable Section 1090 prohibition. Government Code Section 1091 itemizes “remote interests” of public officers that allow a contract subject to Section 1090 to be entered into by the government agency, upon disclosure by the member of the governing body and recordation in official records of the conflict, and then recusal of such member from the matter. Government Code Section 1091.5 provides for “non-interests” of public officers that simply allow a contract to be entered into by the government agency despite a Government Code Section 1090 issue if certain requirements are met depending upon the specific non-interest (e.g., some non-interests exceptions require disclosure of the underlying interest).

If a public official violates Section 1090, this could result in criminal and civil penalties for that councilmember. Willful violation of Section 1090 may be punished as a felony. Furthermore, a contract entered into in violation of Section 1090 is voidable.

Common Law Conflicts

Common Law Conflicts are found by the courts to exist in particular instances and often in the absence of a statutory violation such as under the Political Reform Act or Government Code Section 1090. “The prohibition against a public officer having a conflict of interest in the performance of public duties has long been recognized in common law. The common law doctrine ‘strictly requires public officers to avoid placing themselves in a position in which personal interest may come into conflict with their duty to the public.’ [.]” Thus, the basic principle behind Common Law Conflicts is that a “public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence and primarily for the benefit of the public.” (*Noble v. City of Palo Alto* (1928) 89 Cal.App.47, 51.) For a common law

conflict of interest to exist, “actual injury is not required.” (See California Attorney General’s Office, Conflicts of Interest (2010) at 102.) However, courts and the Attorney General’s Office have stated that, where statutes expressly cover a situation that common law covers, the statutes would take precedence and where a statute has covered an area, the common law cannot be interpreted in an inconsistent manner. (See, e.g., Cal.Fam. Bioethics Council v. Cal. Inst. for Regenerative Medicine (2007) 147 Cal.App.4th 1319, 1367; Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152, 1171, fn. 18; 88 Ops.Cal.Atty.Gen. 32 (2005).)

Levine Act

The Levine Act, codified under Government Code Section 84308, prohibits local elected and appointment officials from participating in a proceeding involving a “license, permit, or other entitlement for use” if the official received a campaign contribution of \$500 or more from a party or participant to that proceeding in the 12 months prior to the proceeding. It also prohibits acceptance of a contribution of \$500 or more in the 12 months after a final decision is rendered. “License, permit or other entitlement for use” means “all business, professional, trade, and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts, and all franchises.” However, it does not include certain things such as competitively bid contracts where competitive bidding is required by law, policy, or regulation; labor contracts; personal employment contracts; and contracts between two or more agencies (a complete list can be found under Government Code Section 84308(a)(5)). In certain circumstances, contributions may be returned. However, analysis under the Levine Act is oftentimes complex and we recommend that each situation be individually analyzed.

Legislation Regarding Fair Processes

When acting in a quasi-judicial capacity, governing bodies must hold fair hearings without the participation of biased decisionmakers and decisionmakers must be fair and impartial. Absent a financial interest (and when rules mandating internal separation of functions, such as the above, and prohibitions against ex parte communications are observed), there is a presumption of impartiality. Further, a person claiming bias bears the burden to show “that the probability of actual bias on the part of the ... decision maker is too high to be constitutionally tolerable” and must do so with clear evidence and concrete facts (Petrovich Dev. Co., LLC v. City of Sacramento (2020) 48 Cal. App. 5th 963, 974.) However, note that campaign statements made while running for election to city council do not necessarily establish bias because a “councilman has not only a right but an obligation to discuss issues of vital concerns with his constituents and to state his views on matters of public importance.” (City of Fairfield v.

Superior Court (1975) 14 Cal.3d 768, 773, 780-82.)

Legislation Regarding Transparency

There are two main areas of law that regulate transparency in government: the Ralph M. Brown Act (“Brown Act”) and the Public Records Act (“PRA”).

The Brown Act generally requires that governing bodies of government entities conduct their business at an agendaized meeting that is open to the public. The agenda for these meetings must be posted at least 72 hours in advance, for regular meetings, and 24 hours in advance, for special meetings. The Brown Act also contains several limited exceptions for “closed session” meetings that allow the governing body to meet in a nonpublic setting to discuss certain confidential matters, such as matters relating to litigation, real property negotiations, and labor negotiations. The Brown Act also guarantees the public’s right to provide public comment to the governing body on matters that are on the meeting agenda and within the subject matter jurisdiction of the government agency.

The PRA is California’s public records law. This law allows any member of the public to request a public record from the government entity. The government entity must provide a response within 10 days, but is also able to extend that deadline by 14 days. In general, all records of a government entity must be disclosed unless one of the PRA’s enumerated exceptions applies, such as those relating to attorney-client privileged material and draft documents.

Legislation Regarding “Perks”

Public officials may not receive gifts from a single source that exceeds \$630, in the aggregate, in a calendar year (the \$630 limit is adjusted by the FPPC every two years). Gifts from a single source aggregating in \$50 or more must be disclosed. Further, gifts aggregating to \$630 or more during any 12-month period may subject the official to disqualification with respect to the source.

What is a gift? A “gift” is “any payment that confers a personal benefit on the recipient” to the extent that the official does not make a payment or provide services of equal or greater value. This includes gifts to a family member if there is (1) no established relationship between the family member and the donor where it is appropriate for the family member to receive the gift or (2) the donor is a lobbyist with the official’s agency and is involved in an action before the agency in which the official will participate, or is engaged in business with the agency in which the official will participate thereon. There are also certain exceptions to the definition of “gift” including gifts from family, inheritance, and campaign contributions.

Trust Is Vital for California's Municipal Officials

As it can be seen, public official ethics are broadly categorized as conflicts of interest; fair process; transparency; and gifts or perks. Each of these areas are intended to build the public trust in government. Because of this, even a mere *appearance* of an issue in any of these categories could erode this trust even if an official has complied with the law. These laws are incredibly fact specific and complex so if an issue ever comes up, please be sure to speak with your agency attorney.

Burke, Williams & Sorensen, LLP regularly advises clients on legal matters relating to Public Agency Ethics.

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