

What Every Board Member Needs to Know:

November 18, 2015

- I. The Ralph M. Brown Act
- II. Conflicts of Interest
- III. Gifts and Select Other Ethics Considerations
- IV. Campaign Activity

I. The Ralph M. Brown Act

Open and Public



Ralph M. Brown 1959

“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”
(California Government Code §54950.)

The Brown Act

- All meetings of legislative bodies must be open to the public, unless **closed session** is **specifically authorized**.
- The Brown Act is designed to ensure public access to local government.

Who is Subject to the Brown Act?

- “Legislative Body” includes the governing board, and subsidiary bodies:
- Standing committees.
- Advisory committees that include a majority of the members of the Board.
- But NOT, a subcommittee made up of less than a majority of members, that is an advisory committee AND is not a standing committee.

Who is Subject to the Brown Act?

- Elected and Appointed Board Members
 - Persons who have been elected or appointed, but have not yet assumed office, are considered member of the Board and are subject to the Brown Act.

What is a “Meeting”

- The definition is very broad and includes any gathering of a majority of members to hear or discuss any item of district business or potential business. A meeting under the Brown Act does not have to include action. It can simply be the exchange of information.

What is a “Meeting” – Serial Meetings

- Serial meetings occur when a majority of the members have communicated (e.g. by telephone, email, text message, or through an intermediary) about an issue within their jurisdiction to share information, learn the opinion of other members, or develop consensus on action to be taken.
- “Daisy Chain” serial meeting.
- “Hub & Spokes” serial meeting. The “hub” can be anybody.

What is a “Meeting” – E-mail

§54952.2(b): [A]ny use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited.

This includes e-mail!

What is a “Meeting” – E-mail

- In 2001 the CA Attorney General issued an opinion regarding the use of email. (Opinion #00-906, 2001) concluding, a majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act.
- Publicizing the email does not cure the violation because the public is still deprived of the deliberative process.
- “The term ‘deliberation’ has been broadly construed to connote ‘not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.’ [Citation.]” (*Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234; see *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376.)

Exceptions

- A majority of the members may gather for certain functions that are not “meetings”:
 - Conferences open to the public
 - Community meetings
 - Properly noticed meetings of other legislative bodies or standing committees
 - Purely social or ceremonial occasions

Exceptions – Caveat

- Generally, even with “non-meetings”, members shall not discuss among themselves any issue within the Board’s jurisdiction.
- The only time members can discuss district business outside a properly noticed meeting is when the business is part of the other organizations noticed agenda. For example, if the Board of Supervisors requests that the School Board members attend their meeting to discuss district business, and the BOS had properly posted notice.

Notice & Agenda

- All regular meetings must be publicly noticed at least **72 hours** before a regular meeting in a location freely accessible to the members of the public, and on the District's website.
- The notice must include the meeting **agenda** containing a brief general description of each item of business to be transacted or discussed, including items to be discussed in closed session.
- Agenda items must have enough information to enable members of the general public to determine the general nature of the subject to be discussed, and generally need not exceed **20 words**.

Notice & Agenda for Special Meetings

- Written notice must be delivered to each member of the legislative body and to each local newspaper of general circulation, and radio or television station which has requested such notice in writing.
- The written notice must be posted at least **24 hours** prior to the special meeting in a site freely accessible to the public and on the district's website. The notice must include the time and place of the meeting, and a brief description of all business to be transacted or discussed. (§54956)
- The Board cannot consider business that is not mentioned in the agenda.

Notice & Agenda Exceptions

The board can not discuss or take action on any item that is not on the agenda. There are three action exceptions:

- Emergency situations -- rare
- A need for immediate action – discovered after agenda posted; 2/3 vote required to discuss
- Items posted on a previous agenda not more than five days earlier

Closed Session

- “If a specific statutory exception authorizing a closed session cannot be found, the matter must be conducted in public regardless of its sensitivity.” (§ 54962; *Rowen v. Santa Clara Unified School District* (1981) 121 Cal.App.3d 231, 234; 68 Ops.Cal.Atty.Gen. 34(1985).)
- Items to be discussed in closed sessions must be on the agenda and orally announced before going into closed session. Section 54954.5 of the Act provides a model format for closed session agendas.
- No person may disclose confidential information acquired by being present in an authorized closed session.
- Actions taken in closed sessions must be disclosed in public immediately after the closed session, including the vote of each member.

Closed Session

- Prohibited unless specifically authorized for:
 - Certain personnel matters (appointment or employment, performance evaluation , discipline or dismissal, complaints against employees).
 - Pending litigation (existing, threatened, or potential). NOTE: Attorney must be present.
 - Real property negotiations.
 - Labor negotiations.
 - Public Security.
 - Student discipline.

Rights of the Public

- Must be allowed to address an item on the agenda or any matter within the jurisdiction of the agency
- Meetings must be reasonably accessible to all and non-discriminatory
- Members of the public cannot be compelled to provide their name or sign a register
- Members of the public as well as the press can record the meeting
- Members of the public may criticize the policies, procedures, programs, etc. of the district, acts or omissions of board members and district employees
- Persons who disrupt the orderly conduct of a meeting can be removed from the meeting

II. Conflicts of Interest

Political Reform Act Conflicts of Interest

- **Basic Rule:** A public official may not make, participate in making, or in any way use or attempt to use his or her official position to influence a governmental decision when he or she knows or has reason to know he or she has a **disqualifying financial interest**.

Disqualifying Financial Interest

- A public official has a **disqualifying financial interest** if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or his or her immediate family, or on any qualifying financial interest.
- The Fair Political Practices Commission employs a **4-step** (previously 8-step) analysis to determine whether a disqualifying financial interest exists.

Step One: 2 Parts

- Is it **reasonably foreseeable** that the governmental decision that the governmental decision will have a financial effect on any of the public official's **financial interests**?

Step One: Financial Interest

- Do you, or an immediate family member, or a business in which you are a 10% or more owner, have a **financial interest** in the decision?
 - Types of financial/economic interests:
 - Investments in business entities
 - Interests in real property
 - Sources of income
 - Sources of gifts (including agents and intermediaries)
 - Positions within business organizations
 - Personal finances of the official and the official's immediate family

Step One: Reasonably Foreseeable

- Is it **reasonably foreseeable** that the governmental decision will have a financial effect on that interest?
 - A financial effect is *presumed* to be reasonably foreseeable if the financial interest is a named party/subject of a governmental decision before your agency.
 - Even if a financial interest is not explicitly involved in a decision, there *may* still be a reasonably foreseeable financial effect.
 - As a general rule, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable.
 - FPPC provides factors to help determine whether a financial effect is reasonably foreseeable.

Step Two: Materiality

- Will the reasonably foreseeable financial effect be **material**?
 - Materiality: important or substantial.
 - Whether a particular effect is material depends on the type of interest.

Step Three:

Distinguishable From Public Generally

- Is the material financial effect **indistinguishable from its effect on the public generally?**
 - A significant segment of the public will be affected by the decision, and the effect on the official's interest is not unique compared to the effect on that significant segment.
 - Significant segment=at least 25% of all businesses, real property, or individuals within the official's jurisdiction.
 - Examples of a unique effect include a disproportionate effect on development potential of real property, and income producing potential of official's business entity due to proximity of a property that is the subject of a decision.

Step Four: Making the Decision

- Is the public official making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision?
 - Making a decision includes voting, authorizing or directing an action, appointing a person, or entering into a contract.
 - Participating in a decision may include providing information, an opinion, or a recommendation.
 - Attempting to influence a decision includes contacting or appearing before an official in his or her own agency for the purpose of influencing a decision, *or appearing before another agency* on behalf of his or her agency.
- If, based on the prior three steps, you have a conflict, you are prohibited from taking any of these actions.
 - You may disclose the conflict, either orally or in writing
 - You may not attend closed session meeting when the decision is considered, or review any non-public information about the decision

Bottom Line

- PRA conflict of interest analysis is complex and highly fact specific.
- When in doubt, seek advice from the FPPC.

Other Conflicts of Interest

- Even if there is no conflict of interest under the Political Reform Act, there may be a conflict under another provision of California law.
- Examples include. . .

Government Code § 1090

- **Government Code § 1090** prohibits elected officials and public employees from having a financial interest in any *contract* made by them in their official capacity.
 - **Examples of financial interest in a contract:** You have an employment relationship with the person/entity that seeks to contract with your agency; you are the attorney, agent or broker of a contracting party; you are a supplier of services or goods to a contracting party; you are the landlord or tenant of a contracting party; you are the officer or employee of a nonprofit corporation that is a contracting party. The official's interest also includes the community property and separate property interests of the official's spouse.
 - **Effect of a § 1090 violation:** A single official's financial interest in a contract prevents the entire governing board from entering into a contract; unlike a PRA conflict of interest, recusal is not an option.
 - Possible criminal consequences for a violation.
 - FPPC now has civil/administrative enforcement authority over § 1090, and can issue advisory opinions

Statutory Exceptions: Remote Interest

- Remote Interest Exceptions (Government Code § 1091)
 - If you have a remote interest, you may recuse yourself from participation in the making of the contract, and the rest of the board may decide all issues involved making the contract
 - Must disclose the interest to the Board and have the interest noted in the Board’s official records
 - Must completely recuse—no attempts to influence other Board members
 - Remote Interest Exceptions include:
 - Officer or employee of a nonprofit corporation or 501(c)(3) entity
 - Pre-existing employment of at least three years with contracting entity, when other factors are met
 - Landlord or tenant of contracting party
 - Supplier of goods and services to the contracting party for at least five years prior to becoming a board member (i.e., pre-existing subcontractor relationship)
 - Employee of consulting, engineering, or architectural Firm, so long as you are not an officer, director, or other role with primary management capacity

Statutory Exceptions: Non-Interest

- Non-Interest Exceptions (Government Code § 1091.5)
 - Generally, no recusal or disclosure is required—may participate in all parts of a contracting decision
 - Non-Interest Exceptions include:
 - Corporate ownership and income (e.g. stock) if both ownership interest and income are minimal
 - Reimbursement of your actual and necessary expenses incurred in your official capacity
 - Spouse’s pre-existing employment so long as the terms of the employment do not change

Statutory Exceptions : Education Code

- Education Code Exception
 - School Board members of school districts with an average daily attendance of 70 or less may contract with their districts under certain circumstances. (Education Code § 35239.)

III. Gifts and Select Other Ethics Considerations

Gifts

- **What is a “Gift”?** A “gift” is any payment or other benefit provided to you that confers a personal benefit for which you do not provide goods or services of equal or greater value in return. A gift includes a **rebate or discount** in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public.
 - **Exceptions:** Certain items are not considered gifts, including gifts from close family members, informational materials that assist you in the performance of your official duties, and certain benefits provided to you when you are making a speech.
 - **Valuation:** Gifts are generally valued at the fair market value at the time the gift is received. There are some exceptions for specific items (e.g., attendance at certain types of events).

Gifts

- **\$460 Gift Limit (1/1/15 – 12/31/16):** State and local officials and designated employees are prohibited from receiving a gift or gifts totaling more than \$460 in a calendar year from a single source (company or person). This gift limit is adjusted every odd-numbered year.
- **Gifts to Family Members:** Under most circumstances, a gift to a family member (spouse, domestic partner, or dependent child) is considered a gift to the official.
- **Disqualification:** Gifts aggregating \$460 or more from certain sources per rolling 12-month period generally disqualify you from participating in matters involving the source of the gifts.
- **Disclosure:** Gifts aggregating \$50 or more generally must be disclosed on your Form 700 Statement of Economic Interests.

Form 700

Statement of Economic Interests

- State and local government officials designated employees must file a Form 700 Statement of Economic Interests disclosing their personal assets and income.
 - Form 700s are typically required of candidates, upon assuming office, annually, and upon leaving office. Form 700s are public documents and any member of the public may inspect and receive a copy of any statement.

Honoraria

- **Prohibition:** A public official or designated employee generally may not accept honoraria payments. (Government Code §89502(c).) There are some limited exceptions to this prohibition.
 - **Honorarium:** An “honorarium” is any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering. (Government Code § 89501.)

Behested Payments

- **Behested Payments:** A “behested payment” is a donation made at the request or suggestion of an elected official (or his or her agent or employee) principally for legislative, governmental, or charitable purposes.
 - For example, an elected board member may ask a third party to contribute funds to a school in his or her district, or to a job fair or health fair.
- **Reporting:** Behested payments totaling \$5,000 or more from a single source in a calendar year must be disclosed by the official on a Form 803, which is filed with the official’s agency within 30 days of the date of the payment(s). (Government Code § 82015; FPPC Regulation 18215.3.)

Loan Restrictions

- **In General:** elected officials may not receive personal loans that exceed \$250 in the aggregate at any given time from:
 - A district officer or employee
 - District contractors/consultant
 - Agencies over which your agency exercises direction and control, or officers or employees of those agencies
- **Exception:** This prohibition does not apply to loans received from banks or other financial institutions, and retail or credit card transactions, made in the normal course of business on terms available to members of the public without regard to official status. (Government Code § 87460.)
- Elected officials are also prohibited from receiving a personal loan of \$500 or more unless the loan is made in writing and clearly states the terms of the loan. (Government Code § 87461.)
 - Certain specified information must be included in the written loan document

IV. Campaign Activity

Campaign Activity

- The Political Reform Act, the Education Code, local laws, and district policies may all impact your campaign activity, including for your own campaign or for another candidate or ballot measure.

Campaigning for Office

- Contributions raised and expenditures made for the purpose of supporting your candidacy are subject to various restrictions and disclosure requirements.
 - If you are going to raise/spend money in support of your campaign, you may be required to open a campaign bank account and form a committee under the Political Reform Act.
 - Campaign contributions may not be commingled with personal funds, and may only be used for certain purposes.
 - Candidates must file certain campaign statements, including a Candidate Intention Form before raising or spending any money, and must file periodic campaign reports.

Use of Public Funds

- **Public Funds Must Only Be Expended For Authorized Public Purposes.** Public funds or resources cannot be used to support your campaign or any other candidate or ballot measure campaign. (Government Code §§ 8314 and 59464; Cal. Penal Code section 424; *Stanson v. Mott*, 17 Cal. 3d 206 (1976).) Violations of the laws prohibiting misuse of public funds may subject the violator to criminal and civil sanctions. These penalties may include imprisonment for up to four years and a bar from holding office. This prohibition includes using district compensated staff, cars, phones, etc. to work on your political campaign.
- **Prohibition on Soliciting Contributions from Public Employees:** An officer or employee of a local agency is prohibited from knowingly, directly or indirectly, soliciting a political contribution from an officer or employee of his or her agency or from a person on an employment list of that agency. There is an exception for solicitations that are made to a significant segment of the public. (Government Code § 3205.)

Restrictions on Political Activities in the Education Code

- Education Code sections 7050 et seq. impose a number of restrictions on the campaign activity of school districts, board members and employees, including:
 - **Use Of School Funds To Urge Support Or Defeat Of Ballot Measure Or Candidate:** No school district or community college district funds, services, supplies, or equipment may be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district. Limited exceptions permit the use of public resources to provide information to the public about the possible effects of any bond issue or other ballot measure under certain conditions (including that the information be fair and impartial). (Education Code § 7054.)
 - **District Policies:** Pursuant to the Education Code, districts may establish rules and regulations concerning officers and employees engaging in political activity during working hours and political activities on district premises. (Education Code § 7055.)