

# Ethics



Training Presentation for Local Governments in  
Compliance with AB 1234

By P. Scott Browne

# Contact



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# WELCOME



Conflict of Interest  
Political Reform Act  
Constitutional Issues  
Transparency Laws  
Fair Decision Making and Processes

# Conflict of Interest

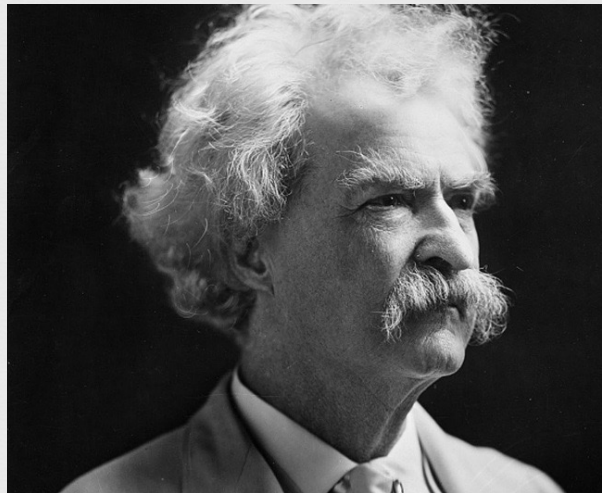


- ⌘ Government Code § 1090
- ⌘ Political Reform Act
- ⌘ Common Law Bias / Due Process Requirements
- ⌘ Nepotism
- ⌘ Incompatible Offices
- ⌘ Government Code § 1126

# Conflict of Interest



“Always do right – this will gratify some and astonish the rest.”



Mark Twain

# Gov. Code 1090



Public officials “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.”



# Government Code 1090



Absolute prohibition on financial interests in contract made by public official **or** the board of which the official is a member

Prohibition applicable, despite:



- Objectively fair and reasonable contracts
- Contracts let to lowest bidder
- Official abstains from participation

# Government Code 1090



## What Constitutes “Making a Contract”?

- ❧ Voting to approve
- ❧ Designing specifications
- ❧ Preliminary discussions
- ❧ Negotiating
- ❧ Actual signing of contract



# Government Code 1090



- ❧ The Remote Interest Exception
  - ❧ Disqualifies official, but board may act
- ❧ The Non-interest Exception
  - ❧ The financial interest “doesn’t count” and is ignored
- ❧ The Rule of Necessity
  - ❧ Non-statutory rule applicable only in very limited circumstances

# Government Code 1090



## HARSH CONSEQUENCES

- Contract is void and unenforceable
- Agency may keep benefit of the contract
- Official must disgorge any monies
- Violation is a **felony**
  - Fine, Imprisonment, Lifetime ban from public office

# Political Reform Act

v.

## Common Law



- The Political Reform Act – Public Officials are disqualified from participating in governmental decisions in which they have financial interest
- Perceptions vs. Requirements

# Conflict of Interest under PRA

## “Basic Rule”



“A **public official** ... has a prohibited conflict of interest and **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. 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 public official, or his or her immediate family, or on any financial interest.”

Cal. Code Regs, tit. 2, § 18700

# “Public Official” Defined



- Persons who are members, officers, employees, or consultants of a public agency
- Consultants who serve in a staff capacity by contract, or make decisions on behalf of the public agency

# “Financial Interests” Defined



- Personal finances and finances of immediate family member (spouse/partner/dependent child)
- Business entity with investment of \$2,000 or more
- Real property valued at \$2,000 or more
- Source of income of \$500 or more in past 12 months
- Business entity as director, officer, partner, trustee, employee, or management position
- A donor, intermediary, agent for a gift or gifts totally \$500 in last 12 months

# 4-Step Test

## Determining Disqualifying Conflict of Interest



1. Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests? If yes, step 2.
2. Will the reasonably foreseeable financial effect be material? If yes, step 3.
3. Is the reasonably foreseeable material financial effect indistinguishable from its effect on the public generally? If no, step 4.
4. Public official may not participate in governmental decision unless exception applies (legally required participation)

# “Reasonably Foreseeable”

## Determining Disqualifying Conflict of Interest



- Explicitly Involved: Named party or subject of governmental decision, e.g., license, permit, entitlement, or contract
- Not Explicitly Involved: Realistic possibility and more than hypothetical or theoretical
- “Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position”



# “Material”

## Determining Disqualifying Conflict of Interest



- Depends on the type of financial interest involved in the governmental decision
- Means “important enough to matter”
  - “A reasonably prudent person” would conclude the decision would change the value of the business or entity
  - “One penny rule” no longer applies
- Public official may not participate in governmental decision affecting real property within 500 feet of his or her real property **without clearance from FPCC**

# “Indistinguishable from Public Generally” Determining Disqualifying Conflict of Interest



- Effect of governmental decision on public official's financial interest is **not unique** compared to effect on a **significant segment** of the public
- “Significant segment” includes:
  - 25% of businesses or entities in the jurisdiction
  - 25% of all real property in the jurisdiction
  - 25% of all individual's in the jurisdiction
- And no disproportionate effect on public official's financial interest
- Exception: Assessments, taxes, fees, rates, charges that apply equally to public official's financial interest or entire jurisdiction

# Making or Attempting to Influence a Governmental Decision



- Very broad and includes:
  - Voting
  - Discussing
  - Lobbying
- Applies to any use of your government position to affect any governmental decision.

# What to do if there is a conflict



- **Publicly identify** each financial interest. If applicable, on the record after agenda item announced and before discussion and voting begins
- **Recuse yourself** from participation in discussion and refrain from attempting to influence
- **Abstain** from voting
- **Leave the room** while the item is discussed (unless on consent calendar)
- Make sure the record reflects you have done this

# Conflicts of Interest and Campaign Contributions



- Contributions are not “income” or “gifts” under Political Reform Act
- More than \$250 w/in 12 months of decision makes donor source of income
- Disqualification  
30 day cure period.



# Conflicts of Interest and Campaign Contributions



- Contributions are not “income” or “gifts” under Political Reform Act
- But, Gov. Code § 84308 :
  - No solicitation of donations from those w/ matters pending before your agency
  - Applies to appointed officials & elected officials in appointed positions



# Conflicts of Interest and Personal Loan Restrictions



- Loans of \$250 or more from contractors with the public agency.
  - Exception: Specified commercial loans made to officials in ordinary course of business on same terms as to other members of the public.
- Elected official may not accept personal loans of \$500 or more, unless the contract is in writing and the officer complies with specified requirements.

# Conflicts of Interest When Leaving Office



- **Gov. Code § 87406.3 (Revolving Door rule)**
  - Elected officials and CEO may not be compensated to lobby the agency for one year after leaving office
  - No appearance or communication except on behalf of another agency
  - Local charter or ordinance may be stricter
- **Gov. Code § 87407**
  - Prohibits local public officials from participating in decisions involving prospective employers



# Conflict of Interest



## How to Obtain

### Advice

- Agency Attorney
- Own attorney
- 1-866-ASK-FPPC
- FPPC Advice Letters



# Violations/Fines of the PRA



☞ Criminal

☞ Civil

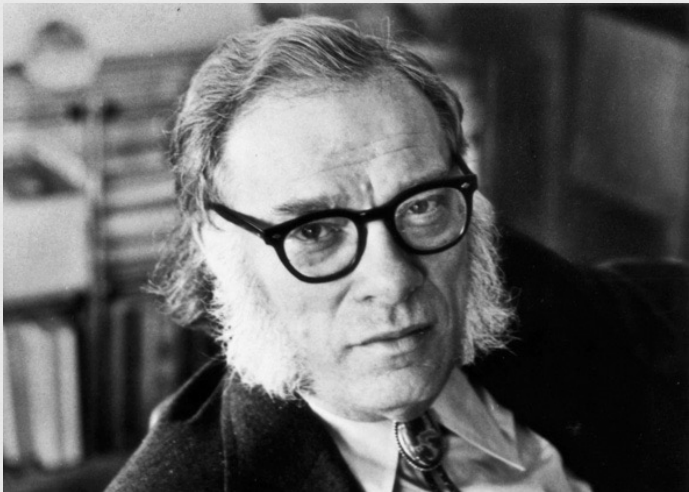


☞ The Court of Public Opinion

# Common Law Bias/Due Process



“Never let your sense of morals get in the way of doing what is right.”



-Isaac Asimov

# Common Law Bias/Due Process



- ❧ Public officials cannot use their official position for private benefit.
- ❧ Due process in an administrative hearing demands an appearance of fairness and the absence of even a **probability** of outside influence on the adjudication.
- ❧ Doesn't preclude holding opinions; just participation by someone with a closed mind as to a quasi-judicial decision.

# The Appearance of Bias



How it may look to others ...



# Nepotism



# Nepotism



- No specific laws concerning nepotism.
- May be affected by “income” interest under Political Reform Act or definition of “family” under Political Reform Act.
- Local agency may draft anti-nepotism policy.
- Federal funding requirements.

# Incompatible Offices



“One cannot serve two masters.”



# Incompatible Offices



- ❧ Exists if any significant clash of duties exists between the offices, if the dual holdings would be improper because of public policy, or if one officer exercises supervisory, auditory or removal power over the other.
- ❧ Examples: water district director and city council position; school board member and city council member

# Government Code § 1126



- ☞ “[A] local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed.”
- ☞ Agency must provide policy.

# Other Political Reform Act Issues



- ❧ Statements of Economic Interest (Form 700s)
- ❧ Gifts
- ❧ Travel Payments
- ❧ Honoraria
- ❧ Mass Mailing

# Statement of Economic Interest



- ✓ All local agencies must adopt conflict of interest codes.
- ✓ An agency's conflict of interest code may require the filing of a Form 700.

The image shows a sample of California Form 700, Schedule A-2, titled "Investments, Income, and Assets of Business Entities/Trusts". The form is designed for public officials to disclose their financial interests. It is divided into two main columns, A and B, each with sub-sections for "BUSINESS ENTITY OR TRUST". Each sub-section includes fields for the name of the entity, address, and a general description of the business activity. Below these are sections for reporting investments, including fair market value, acquisition/disposition dates, and the nature of the investment (e.g., stock ownership, partnership). There are also sections for reporting real property interests held by the entity or trust. The form includes checkboxes for "ACQUIRED" and "DISPOSED" and fields for "APPLICABLE LIST DATE". The top right corner of the form indicates it is "CALIFORNIA FORM 700" and "FOR PUBLIC OFFICIALS".

# Form 700s (Cont'd)



- Must file upon taking office, leaving office, and on an annual basis
- Require disclosure of personal financial interests
- Alert public officials to personal interests that might be affected
- Help inform the public about potential conflicts of interest

# Gift Restrictions



“What you get  
free costs too  
much.”

- Jean Anouilh



# Gift Restrictions



- No local elected office holder, candidate for local elected office, or designated employee of a local agency may accept any gift or gifts from a **single source** aggregating in excess of \$500 (1/1/19 – 12/31/20)
- Gifts aggregating \$50 or more in the reporting period must be disclosed on a Form 700

# Gift Restrictions (Cont'd)



## Is it a gift?

- ✓ A “payment made by any person of any thing of value when the official does not provide full consideration for the value of the benefit received.”
- ✓ Rebates
- ✓ Gifts to Family (unless no business before official in 12 months prior or foreseeable future + established relationship with family member)



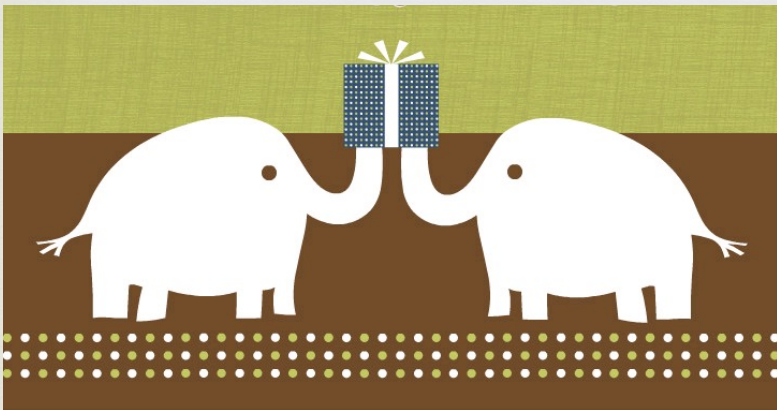


# Exceptions to Gift Restrictions



## ☞ When is a Gift not a Gift?:

- ☞ Informational Material (electronic media ok).
- ☞ Home Hospitality.
- ☞ Gifts from Family (expanded to include more distant relations and former family)
- ☞ Reciprocal Gifts (between friends during special occasions; \$500; not lobbyists)



# Exceptions to Gift Restrictions



- ❧ Ceremonial Role (2 tickets to entertainment event)
- ❧ Gambling, Prizes, Awards (must report as income; not because of official status)
- ❧ Gifts for Attending Wedding
- ❧ Bereavement Gifts (typically provided)
- ❧ Acts of Neighborliness (free ordinary services polite people provide without charge)
- ❧ Dating (unless lobbyist or matter pending before agency)
- ❧ Gifts of Human Compassion (Charity from within social circle to offset medical or living expenses when in need)

# Exceptions to Gift Restrictions



- ❧ Gifts from Close Friends (“long term, close personal friendship, unrelated to the official’s position with the agency”)
- ❧ Catch all Exemption. If it is clear that the gift is not from a lobbyist or someone who was attempting to influence the official’s official position, then the gift is exempt.

# Gift Restrictions (Cont'd)



## Who gave the gift?

- ❧ Gifts via Intermediary = gift from source
- ❧ Aggregation of Gifts: if one person directed or controlled multiple gifts, all have same source.
- ❧ Gifts from Groups: value of gift is allocated among the donors, based upon the amount that each donor contributed.



# Gift Restrictions (Cont'd)



## ☞ Promises of Gifts.

“Given” on the date the officer knew of the offer

## ☞ Redirecting Gifts to Charity.

If redirected to a 501(c)(3) organization within 30 days, not a gift; **but only** if public officer and immediate family hold no position w/ charity.

# Gifts of Travel



- ❧ Certain travel payments may be subject to gift limit restrictions and/or may be reportable.
- ❧ payments, advances, or reimbursements for travel
- ❧ lodging and subsistence
- ❧ Substantial updates effective 1/1/14



# Gifts of Travel



## ❧ Not Reportable, unlimited

- Ride-sharing, training paid for by government, government travel, bona fide business travel for official's private business (not speeches), certain campaign travel.

## ❧ Reportable, unlimited.

- USA Governmental travel, presentation at conference, paid by charity or foreign government, Travel directly related to official business paid directly to agency

## ❧ Reportable and limited

# Examples of Travel Exceptions



- ✧ Travel payments in connection with an event w/in US at which 87200 filer (elected officials) gives a speech or participates on a panel is reportable but not subject to gift limit
- ✧ Payments to local filers (staff) not reportable or subject to limit if w/in course & scope of employment, proper public expenditure and w/in U.S.



# Travel Exceptions (Cont'd)



- ❧ **Not subject to gift limit, but which may be reportable:**
  - ❧ Travel in connection w/ bona fide business, trade, or profession, and which satisfies criteria for federal income tax deductions for business expenses.
  - ❧ Travel to view recycling facility at request of agency when cost paid directly to agency.

# Travel Payments: Article XII, § 7



A transportation company may not grant free passes or discounts to anyone holding an office in this State; acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a **forfeiture of that office.**



# What are the Elements of the Ban?



- ❧ This ban is violated when a transportation company makes a gift of transportation or discounts the price of transportation to a public officer.
- ❧ The ban applies to public officers, both elected and non-elected, but not to employees.
- ❧ The ban applies to interstate and foreign carriers, as well as domestic carriers, and to transportation received outside of California.

# Violation of Ban



⌘ Punishable by forfeiture of office.



# The Ban also applies to:



- ❧ Applies to intrastate and interstate carriers.
- ❧ Applies even if the carrier does not do business in California.
- ❧ Applies to both business and personal travel.

# Honorariums



- ❧ “Honorarium” means a payment for a speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.
- ❧ No local elected office holder, candidate for local elected office, or designated employee may accept any honorarium.

# Honorarium Exceptions



Some payments are *not* prohibited *nor* required to be disclosed on a Form 700:

- ∞ returned within 30 days.
- ∞ donated to general fund within 30 days, (and no income tax deduction).
- ∞ made directly to a bona fide charitable, educational, civic, religious, or similar tax-exempt, non-profit organization (with exceptions)

# Mass Mailing Restrictions



**Items prepared or mailed at public expense may not:**

- ✧ Feature an elected officer affiliated with the agency; or
- ✧ Include the name, photograph, or other reference to an elected officer if the item is prepared in coordination with the elected officer.

Applies if 200 pieces or more by mail





# Other Restrictions



- ❧ Gifts of Public Funds
- ❧ Extra Compensation
- ❧ Bribery
- ❧ Embezzlement
- ❧ Due Process

# Gifts of Public Funds



All expenditures of public funds  
must be for a public purpose.

-Cal. Const., Art. XVI, Section 6

❧ Does the expenditure  
serve the public  
interest?



# Misuse of Public Resources



❧ **Rule:** No use of public funds or resources for personal, non-public purposes, including campaigns.

❧ **“Public Resources”**

- ❧ staff time,
- ❧ office equipment
- ❧ supplies
- ❧ excludes incidental or minimal uses.



# Misuse of Public Resources



- ❧ **Penalties:** disqualification from office, jail, civil penalties up to \$1,000 / day plus 3x the value of the unlawful use.
- ❧ **Tip:** Ensure that expense or use is consistent with adopted agency policy or practice.

# Extra Compensation



❧ Extra compensation paid to employees after services have already been rendered is generally prohibited.

❧ Cal. Const. art. XI, § 10(a)

❧ **Exception:** When retroactive compensation is paid to employees pursuant to terms of newly negotiated MOU covering the period for which retroactive compensation is being paid



# Bribery



## Penal Code § 68:

“Every officer...who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his or her vote, opinion, or action upon any matter then pending, or that may be brought before him or her in his or her official capacity” is guilty of bribery

Penalties: prison, fine, loss of office, barred from office for life



# Embezzlement



- ❧ Penal Code § 424 & Gov't Code § 8314:
  - ❧ Personal use, private loan, refusal to turn over public money
  - ❧ Campaign or electoral use of public property
- ❧ Penalties: prison, loss of office, barred from office for life
- ❧ “Incidental and minimal use” is not a violation

# Due Process



∞ Constitutional guarantee that citizens may not be deprived of:

- Life
- Liberty (good reputation, incarceration)
- Property (civil service job, real or personal property)

∞ Without “due process.”



# Due Process



Administrative hearing requirement

⌘ Quasi-judicial proceedings

⌘ E.g., development issues, permits, etc.



# Due Process



## Requires:

- ⌘ Notice of the intended action;
- ⌘ Opportunity to prepare;
- ⌘ Opportunity to be heard; and
- ⌘ Fair and impartial hearing.

# The Brown Act



“Government ought to be all outside and no inside.”



- Woodrow  
Wilson

# Purpose of the Brown Act



“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as provided in this chapter.”



# Legislative Body



- ❧ City Council, Board of Supervisors, District Board
- ❧ Any committee created by formal action of the City Council, BOS, or Board (ordinance, resolution, minute action)
- ❧ Any committee created by a committee
- ❧ Standing Committees

# What's a Meeting?



“Any congregation of a majority of the members of a legislative body at the same time and 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.”

# More on definition of “meeting”

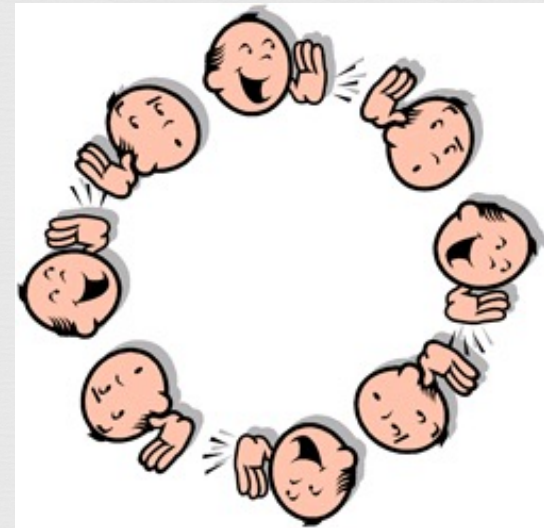
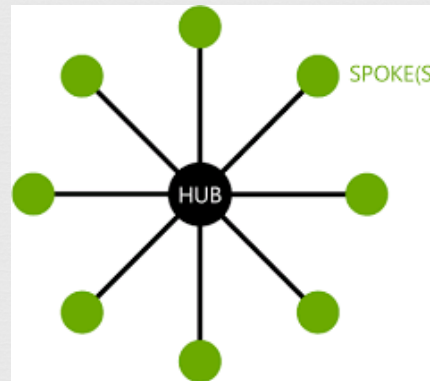


Any use of a **series of communications** of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

# Serial Meetings



- Daisy Chain
- Hub and Spoke
- Serial Briefings
- Email





# “Meeting or No Meeting” Game



Hypothetical 5-member City Council:

- Anne
- Betty
- Charlie
- Dan
- Edith

# Act 1, Scene 1: “The Daisy Chain”



- ☞ Anne calls Betty to urge her to vote “YES” on the proposed new tech center.
- ☞ Betty runs into Charlie at the grocery store and tries to sell him on the tech center idea, but Charlie isn’t buying it.

Violation?

- ☞ Charlie then calls Dan and tells him to vote “NO” on the tech center.
- ☞ No one contacts Edith.

Violation?

# Act 1, Scene 2



- ☞ Anne emails Edith with a plea for the tech center.
- ☞ Edith replies with her support.
- ☞ Anne forwards the original email and Betty's reply to Charlie, seeking his support.

Violation?

- ☞ What should Charlie do?

# Act 1, Scene 3



- ☞ Anne emails Edith urging support for the tech center.
- ☞ Unbeknownst to Edith, Anne has blind copied Betty.

Violation?

# Act 2, Scene 1, “Hub and Spoke”



- ☞ A citizen lobbies Anne to vote “YES” on the proposed tech center.
- ☞ The same citizen later lobbies Betty.
- ☞ The same citizen later lobbies Charlie.

Violation?

# Act 2, Scene 2



- ❧ Anne expresses her support for the tech center to the City Manager.
- ❧ Anne also tells the City Manager that she knows that Betty backs the project.
- ❧ Anne suggests the City Manager can contact Charlie for his support of the project.

Violation?

# Act 2, Scene 3



- ❧ Anne sends an email to Betty seeking support on the tech center.
- ❧ Betty does not reply or forward it (she's learned her lesson).
- ❧ Anne sends another email to Charlie seeking support on the tech center.
- ❧ Charlie doesn't reply to Anne, but forwards Anne's email to Dan with a comment that Anne is out of control and needs some Brown Act training.

Violation?

New Issue: Are any of these emails Public Record?

# Exceptions to the Scope of the Meeting Definition



- ❧ Individual Contacts
- ❧ Conferences
- ❧ Community Meetings
- ❧ Meetings of another Legislative Body
- ❧ Social or Ceremonial Occasions



# Meeting Location



**Meetings of a legislative body must occur within the boundaries of the agency, except to:**

- comply with a court order or attend a judicial proceeding
- inspect real or personal property
- attend a meeting with another legislative body meet with a state or federal representative
- meet in a facility outside of, but owned by, the local agency
- visit legal counsel's office for a closed session

# Lawful Meetings



- ⌘ Post an Agenda 72 or 24 Hours in Advance
  - ❑ Post on website too
  - ❑ Make available to public any materials given to Legislative Body after agenda issued
- ⌘ Discuss only agendized matters
- ⌘ Allow for public comments

# Teleconferencing



## Existing Law: Teleconferencing may be used if:

- there is audio or video or both connecting locations;
- the notice and agenda identify the remote location;
- the remote location is posted and accessible to the public;
- all votes are by roll call;
- all locations comply with the Brown Act, including allowing public participation;
- a quorum participates from within the jurisdiction

# New Remote Participation Law



- ❧ AB 2449 (2023) established an alternative method to allow commissioners to participate remotely if there is “just cause” or an emergency:
- ❧ “Just cause” is defined as any one of the following:
  - ❧ Child care or caregiving of a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner that requires a member to participate remotely.
  - ❧ A contagious illness that prevents a member from attending in person.
  - ❧ A need related to a physical or mental disability.
  - ❧ Travel while on business of the legislative body or another state or local agency.

# New Remote Participation Law



- ❧ Emergency means a physical or family medical emergency that prevents a member of a legislative body from attending in person.
- ❧ For just cause or emergency remote participation, the member should request as soon as possible, and state for the record briefly the grounds that justify the need for remote participation. The member must also state whether any adult is also in the room and their relationship to the member
- ❧ Procedure:
- ❧ Must use two way visual and audio connection like Zoom or Microsoft Teams;
- ❧ must also provide public participation by same method and provide public access information on the agenda (Zoom link)
- ❧ Member may not participate remotely more than 3 consecutive months or 20% of overall meetings
- ❧ Not required to make remote site publicly accessible

# Agendas and Public Comment



- ✓ Agenda must be posted 72 hours in advance with brief description of each item of business with Zoom link if remote participation anticipated
- ✓ Limited to agendized items unless special circumstances justify addition to agenda
- ✓ Every agenda must allow comment on items on the agenda prior to action
- ✓ Regular agendas must allow comment on items not on the agenda but within agency's jurisdiction ("Public comment")

# Discussion of Off-Agenda Items



- “Briefly respond” to comments or questions or to report on individual activities
- Agendize for subsequent discussion
- Special Circumstances
  - Emergencies (floods, fires, strikes)
  - Subsequent need (2/3 vote)



# Closed Sessions



- Limited topics, typically limited to board and necessary staff
- Specified agenda format and “reporting out” requirements
- Don’t go into closed session without legal assistance
- Don’t disclose closed session confidences



# Dealing with the Public



- œ Public Right to Photograph and Record (Audio/Video)
- œ Reasonable time, place, and manner restrictions permitted



# Enforcement



- ⌘ Court of Public Opinion
- ⌘ Written notice and opportunity to cure
- ⌘ Civil Action
- ⌘ Criminal Action

# Conclusion



## ⌘ Complicated details, but simple general rule

- Do the public's business in public
- Give the public notice and an opportunity to participate

## ⌘ When in doubt, ask for help

# California Public Records Act



“A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both.”

- Pres. James Madison



# California Public Records Act



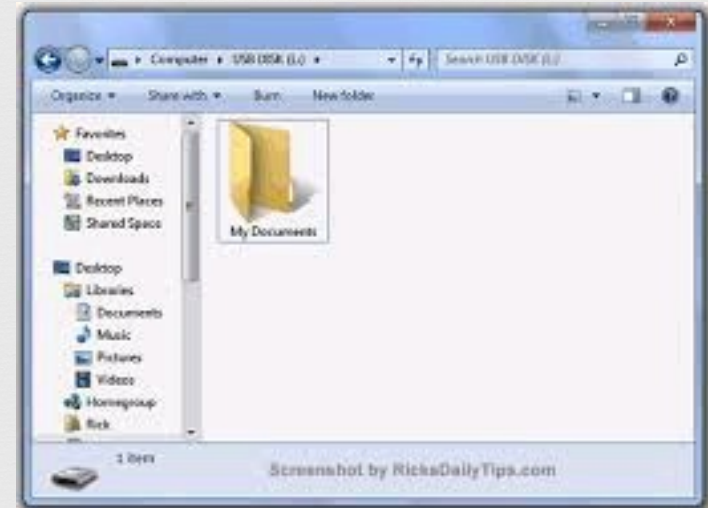
## Purpose of the CPRA

“In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”

# What is a “Record”?



- ❧ “Any writing containing information relating to the conduct of the public’s business prepared, **owned, used, or retained** by any state or local agency regardless of physical form or characteristics.”
- ❧ Employment contracts specifically included
- ❧ May include emails, perhaps even if on personal email account if concerning public business



# Retention and Destruction



**Many agencies have records retention policies.**

**Records must be:**

- Preserved for period specified by policy
- Destroyed only after approval by designated persons, usually including legal counsel

# Public Records Requests



## **An agency must:**

- Make records available for inspection during business hours
- Redact confidential portions so balance can be made available
- Provide copies “promptly” at cost if “reasonably identifiable.”
- Respond w/in 10 days of request unless “unusual circumstances” justify up to 14 more days



# Public Records Requests



## **TIP: Coordination and Handling of Requests**

- ☞ All records requests should be coordinated through a single office
- ☞ When in doubt, treat any records inquiry as a CPRA request

# Exemptions from Duty to Disclose



- ❧ “Preliminary drafts, notes or memoranda ... not retained ... in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.”
- ❧ Pending litigation
- ❧ “personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy”
- ❧ Documents of agency contractors that are not by contract owned by the agency

# More Exceptions to Disclosure



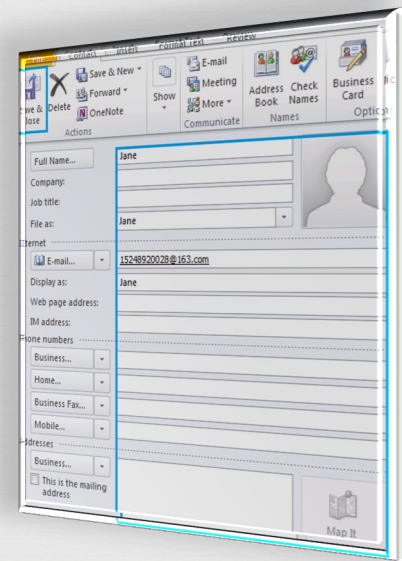
- ❧ Real estate appraisals
- ❧ Taxpayer data received in confidence
- ❧ Records protected by legal privilege (attorney client, work product, etc.)
- ❧ Security assessments
- ❧ Utility ratepayer information
- ❧ General balancing exception:
  - ❧ “Public interest served by not disclosing the record clearly outweighs the public interest served by disclosure.”



# Home Address & Phone of Public Officials



“No state or local agency shall post the home address or telephone number of any elected or appointed official on the Internet without first obtaining the written permission of that individual”



# Duty to Assist Requesters



## The agency will:

- Assist requester to identify records responsive to request
- Describe the medium and location in which records exist
- Provide suggestions to overcome “any practical basis for denying access.”
- Or provide index of records

# Electronic Records



## The agency:

- Must make electronic records available in electronic format
  - ✓ In any format used by the agency
  - ✓ In any format in which agency holds it
- May recover only direct cost of duplication
- Requester pays hardware and software costs for unusual formats
- No duty to compromise computer system security



# Remedies



- ❧ Requesters can sue to challenge denial
- ❧ Burden is on the agency to justify withholding records
- ❧ Agency has no right of appeal; review is by discretionary writ
- ❧ Agency pays legal fees on loss
- ❧ Agency wins fees only if suit is “clearly frivolous”

# Recommendations



- ❧ Don't create unhelpful records
- ❧ Copy staff on all items provided to entire legislative body
- ❧ Don't retain records without a reason
- ❧ Segregate exempt from non-exempt records
- ❧ Segregate personal from public
- ❧ Be careful with email

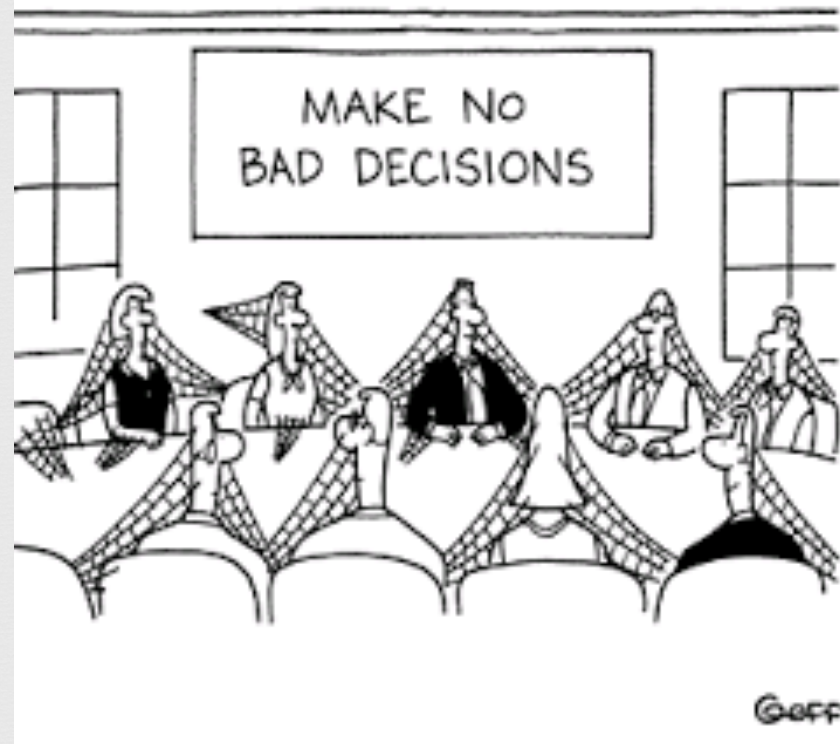


# Ethical Decision-Making



“Whenever two good people argue over principles, they are both right.”

Marie Ebner von Eschenbach



# General Thoughts on Ethical Decision-Making



- ❧ Is the action legal?
- ❧ Does it meet your own sense of right and wrong?
- ❧ Is it good public policy?
- ❧ Is it consistent with the agency's or the community's values?
- ❧ Does it comply with the Golden Rule?

# Ethical Decision-making (Cont.)



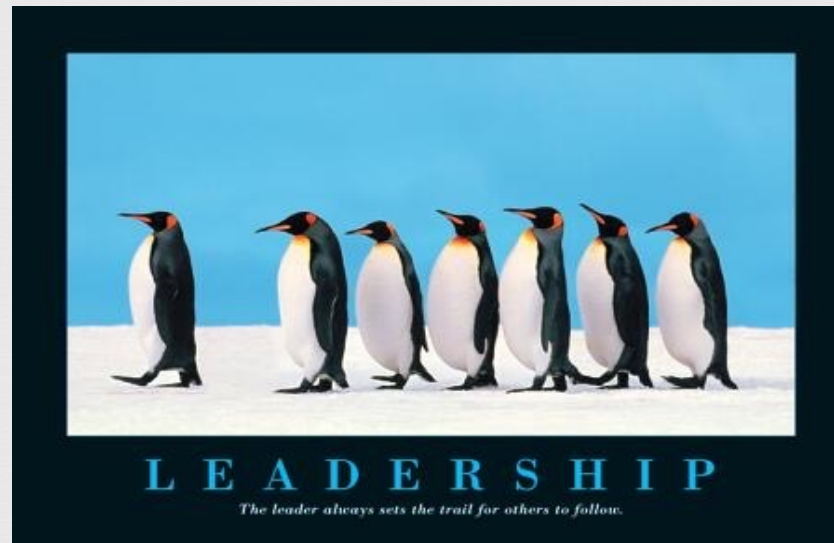
- ❧ Don't be afraid to invite ethics into the room
- ❧ There is often more than one "right" answer and it is okay to disagree about what is right or wrong
- ❧ Consider adopting a local ethics or standards of conduct policy
- ❧ The Institute for Local Government has good resource materials at [www.ilsg.org](http://www.ilsg.org)

# Conclusion



“Management is doing things right;  
leadership is doing the right things.”

Peter Drucker



# Questions & Answers



Thank You  
for listening