

**Conflicts of Interest and Ethics
For Local Government
Officials: Political Reform Act &
Common Law Conflicts of
Interest**

**City of El Cerrito
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TABLE OF CONTENTS

Page

I.	POLITICAL REFORM ACT	1
A.	General Rule Regarding Conflicts of Interest	1
B.	Conflicts of Interest under the POLITICAL REFORM ACT	1
C.	Components of a POLITICAL REFORM ACT Conflict of Interest	2
D.	DISQUALIFICATION IF CONFLICT EXISTS.....	5
E.	Penalties for Violation of the Political Reform Act	6
1.	Administrative Fine.....	6
2.	Civil Remedy	6
3.	Criminal Sanctions	6
F.	HOW TO OBTAIN ADVICE	6
1.	Unofficial	6
2.	FPPC Advice Letter.....	6
II.	CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS.....	6
A.	DISCLOSURE – REPORTING OF CONTRIBUTIONS	7
B.	PERSONS COVERED	7
C.	PROCEEDINGS COVERED	7
D.	DISQUALIFICATION REQUIRED.....	7
III.	CONFLICTS OF INTEREST WHEN LEAVING OFFICE.....	7
IV.	PROHIBITION AGAINST BRIBERY	8
V.	COMMON LAW BIAS PROHIBITIONS	8

INTRODUCTION

There are various laws in place to prevent councilmembers from participating in decision in which they have a disqualifying conflict of interest. The purpose of such laws and regulations is to ensure that all actions are taken in the public interest. This handout discuss some of the major rules governing conflicts of interest. If at any time a Councilmember believes a potential for conflict of interest exists, he/she is encouraged to consult with the City Attorney as soon as possible. Violations of these rules may result in significant penalties including fines or criminal prosecution.

I. POLITICAL REFORM ACT

The Political Reform Act of 1974 was adopted by initiative as a response to the "Watergate" scandals and is contained in Government Code Sections 81000 *et seq.* It is the primary source of statutory law in California regarding conflicts. The Political Reform Act regulates disqualification of government officials due to conflicts of interest. In addition, it also regulates reporting and disclosure of economic interests; gift and honoraria limits; and, to a limited extent, campaign contributions. The Political Reform Act establishes the Fair Political Practices Commission ("the FPPC") as the State agency charged with its enforcement. FPPC regulations implementing the Political Reform Act are found at 2 Cal. Code of Regulations ("CCR") §18110 *et seq.*

A. GENERAL RULE REGARDING CONFLICTS OF INTEREST

No public official at any level of government shall make, participate in making or in any way attempt to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, he or she has a financial interest. (Gov. Code § 87100.) The purpose of the Political Reform Act is to ensure officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the interests of persons who have supported them.

B. CONFLICTS OF INTEREST UNDER THE POLITICAL REFORM ACT

An official has a conflict of interest under the Political Reform Act when it is reasonably foreseeable that the decision will have a material financial effect on an economic interest of the official or a member of his or her immediate family. 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 financial interest of the official or his or her immediately family. (2. Cal. Code Regs. § 18700(a).) A public official's immediate family includes his or her spouse and dependent children.

A public official has a financial interest in anything or anyone listed below, including if such interest is held by a member of the official's immediate family:

Business Investments: A public official has an economic interest in a *business entity*, operated for profit, in which he or she has a direct or indirect investment of \$2,000 or more.

Business Management Positions: A public official has an economic interest in any business entity, operated for profit, in which he or she holds a position as a director, official, partner, trustee or any position of management.

Real Property: A public official has an interest in real property when the official, spouse or dependent children have a direct or indirect equity, option or leasehold interest of \$2,000 or more in a parcel of property located in, or within two miles of, the geographical jurisdiction of the official's agency.

Sources of Income: A public official has an economic interest in any person or entity from whom he/she has received income aggregating \$500 within 12 months prior to the time when the relevant governmental decision is made. Income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income. (Gov. Code § 87103).

PRACTICE TIP: The Political Reform Act does not include income received from government entities as "income". As a consequence, a public official usually has no conflict of interest under the Political Reform Act even when the decision affects his or her government employer, unless another economic interest is also involved. WARNING: Government Code Section 1090 does not exclude government salaries from its definition of "financial interest".

Sources of Gifts: A public official has an economic interest in any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$500 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

PRACTICE TIP: The gift limitation amount is adjusted by the FPPC every two years.

Personal Financial Effects: A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, and those of his or her immediate family.

C. COMPONENTS OF A POLITICAL REFORM ACT CONFLICT OF INTEREST

FPPC regulations establish a 4-step process for determining whether or not a conflict of interest exists in any given case. (2 Cal. Code Regs. § 18700 *et seq.*) A public official seeking to determine whether or not he or she has a conflict of interest should make the following determinations:

Step One: Is the financial effect on the public official's financial interest "reasonably foreseeable" with the meaning of the PRA?

FPPC regulations require that it be "reasonably foreseeable" that a decision will have a financial effect on a financial interest of the public official in order for a conflict of

interest to exist. A financial effect is presumed to be reasonably foreseeable if the financial interest is a named party in, the subject of, or otherwise explicitly involved in a governmental decision before the official or the official's agency. (2. Cal. Code Regs. § 18701(a).)

If a financial interest is not explicitly involved in a governmental decision, a financial effect is reasonably foreseeable if the financial effect is a realistic possibility and more than hypothetical or theoretical. Various factors may be considered in determining whether a governmental decision will have a reasonably foreseeable financial effect on a financial interest not explicitly involved in a governmental decision. Factors include, but are not limited to, the extent to which the occurrence of the financial effect is contingent upon intervening events, outside the control of the public official or the public official's agency and whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome of the governmental decision under normal circumstances. (2. Cal. Code Regs. § 18701(b).)

Step Two: Is the financial effect material?

A public official may not participate in a governmental decision if the reasonably foreseeable financial effect on the official's financial interest is material. The rules for determining whether the financial effect is material differ depending on the type of financial interest involved.

- If the decision involves a financial interest in a business entity:

The financial effect is material if, among other reasons, the business entity bids on or enters into a contract with the official's agency or applies for a permit, license, grant or other entitlement from the official's agency. (2. Cal. Code Regs. § 18702.1.)

- If the decision involves a financial interest in real property:

The financial effect is material if, among other reasons, the governmental decision would determine the property's zoning, or would affect the property value of any parcel located within 500 feet of the official's property. (2 Cal. Code Regs. § 18702.2.)

- If the decision involves a financial interest in a source of income:

The financial effect is material if, among other reasons, the source of income is the applicant, respondent, contracting party or otherwise named or identified as the subject of the proceeding before the official's agency. (2 Cal. Code Regs. § 18702.3.)

- If the decision involves a financial interest in a source of gifts:

The financial effect is material if, among other reasons, the source of the gift is the applicant, respondent, contracting party or otherwise named or identified as the subject of the proceeding before the official's agency. (2 Cal. Code Regs. § 18702.4.)

- If the decision involves a financial interest in the public official's personal finances or those of his or her immediate family:

The financial effect is material if, among other reasons, the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision. (2 Cal. Code Regs. § 18702.5.)

The factors listed under each type of financial interest above are not exhaustive, and are only examples. Please review the applicable regulation or contact legal counsel for complete information.

Step Three: Is the effect on the official the same as on the “public generally”?

A public official does not have a conflict of interest if the material financial effect on the official's interest is indistinguishable from the decision's effect on the public generally. A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if a significant segment of the public is affected. (2 Cal. Code Regs. § 18703.)

A significant segment of the public is at least 25 percent of:

- (1) All businesses or non-profit entities within the official's jurisdiction;
- (2) All real property, commercial real property, or residential real property within the official's jurisdiction; or
- (3) All individuals within the official's jurisdiction.

Even if a significant segment of the public is affected, the decision is not indistinguishable if the decision's effect on the official's financial interest is not unique compared to the effect on the significant segment. A unique effect includes, among other things, a disproportionate effect on the development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.

Step Four: Is the official “making, participating in the making, or using his or her position to influence” the governmental decision from which the financial effects result?

A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (2 Cal. Code Regs. § 18704(a).) A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without

significant intervening substantive review. (2 Cal. Code Regs. § 18704(b).) A public official uses his or her official position to influence a governmental decision if he or she contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision or any other government agency and acts or on behalf of his or her agency in making the contact. (2 Cal. Code Regs. § 18704(c).) There are limited exceptions to these rules. (2 Cal. Code Regs. § 18704(d).)

PRACTICE TIP: Because “participation” is broader than merely the final vote on a matter, it is important for public officials to not become involved in the preliminary stages of a decision on which their board or commission may ultimately have the final vote.

If the public official is not “making a decision” as defined in the Political Reform Act, then he or she does not have a conflict of interest.

D. DISQUALIFICATION IF CONFLICT EXISTS

If, after following the process outlined above, a conflict is found to exist, the public official is disqualified from participating in making the decision. An official who is disqualified from an item on the agenda for a closed session may not attend the closed session or obtain the materials distributed for the closed session.

If a conflict exists and the disqualified member is not required to participate by the rule of necessity, then the member must:

1. Publicly identify the financial interest that gives rise to the conflict in detail sufficient for a layperson to understand the conflict.
2. Recuse himself/herself from attempting to influence, participating in, discussing or voting on the matter.
3. Leave the room where the discussion or consideration of the matter is occurring, unless the matter is listed on the consent calendar of the public agency.

Notwithstanding the conflict, however, an official may appear in the same manner as a member of the general public before his or her agency solely to represent himself in a matter related to his or her own personal interests. This includes where decisions would affect real property or a business entity that is solely owned by the official or the official’s immediate family. In such cases, the official must still identify the conflict and leave the dais, but he or she may address the agency from the same position as the public and may listen to the public discussion of the item. (2 CCR § 18704(d).)

The public agency may also be able to “segment” the decision under consideration, so that the official may participate in portions, but not all, of the decision. This may occur provided that: (2) the decision can be broken down into separate decisions that are not “inextricably interrelated” to the decision in which the official has a conflict; (2) the decision in which the official has a financial interest is segmented from the other decisions; (3) the decision in which the official has a financial interest is considered first and a final decision on that segment is reached by the agency without any participation by the official; and (4)

participation by the official in the remaining segments does not result in a reopening of, or otherwise financially affect, the segment from which the official was disqualified. (2 CCR § 18706.)

E. PENALTIES FOR VIOLATION OF THE POLITICAL REFORM ACT

1. Administrative Fine

The administrative fine is \$5,000 fine per violation imposed by FPPC.

2. Civil Remedy

If official derived economic benefit from decision, fine could amount to 3 times the benefit received.

3. Criminal Sanctions

If the official knowingly or willingly violated the law: misdemeanor conviction, fine of \$10,000 or 3 times value of benefit conferred (whichever is greater and the official may not be a candidate for public office for 4 years).

F. HOW TO OBTAIN ADVICE

If you think you may have a conflict, contact your agency's attorney who may be able to provide general guidance. The FPPC will also provide free advice.

1. Unofficial

You may request *unofficial* advice from the FPPC by calling 1-866-ASK-FPPC (1-866-275-3772), or you can get general guidance and information from the FPPC website at "www.fppc.ca.org."

2. FPPC Advice Letter

Only a public official or his or her authorized representative can seek advice concerning his/her duties. The FPPC does not provide third party advice. However, written FPPC advice conveys immunity even if the advice is incorrect as long as the advice is followed. The FPPC does not provide advice for past conduct. Importantly, receiving written advice from the FPPC can take up to a month, so requests should be made far in advance of the relevant decision.

PRACTICE TIP: If uncertain regarding the existence of a conflict, always ask for advice first in order to obtain the immunity. Advice may take several months, therefore ask early. If the FPPC is unclear on the facts as described in your request, it may respond with a letter that generally describes the applicable standards, but does not answer the specific question and does not provide immunity.

II. CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS

The Political Reform Act regulates campaign contributions to certain classes of public officials as a potential conflict of interest requiring disqualification of the official.

A. DISCLOSURE – REPORTING OF CONTRIBUTIONS

In general, ethics rules concerning campaign contributions focus on disclosure rather than disqualification. Rules pertaining to disclosure are set forth in both State statute (see Gov. Code §§ 84100 *et seq.*) and the regulations of the FPPC (see 2 California Code of Regulations §§18401 *et seq.*). Candidates are required to file semi-annual campaign statements. (Gov. Code §84200.) Campaign statements must, among other things, list the name, address and occupation of individuals donating or loaning \$100 or more. (Gov. Code §84211.)

B. PERSONS COVERED

The Political Reform Act's prohibition on conflicts of interest with regard to campaign contributions applies to state and local agency heads and members of boards and commissions. However, the prohibition does not extend to members of local governmental agencies whose members are directly elected by the voters. (Gov. Code § 84308.) Therefore, members of city councils, county boards of supervisors and boards of directors for special districts are exempt from conflicts of interest regarding campaign contributions. However, these officials are not exempt from coverage when they sit as appointed members of other boards or bodies such as joint powers agencies or regional governments.

C. PROCEEDINGS COVERED

The prohibition extends to all proceedings that involve a license, permit, or other entitlement for use. (Gov. Code § 84308.) These terms include all business, professional, trade, and land use licenses and permits, and all other entitlements for use, including entitlements for land use, contracts and franchises. However, the Political Reform Act expressly exempts contracts that are competitively bid, relate to labor matters, or relate to personal employment from the campaign contribution requirements.

D. DISQUALIFICATION REQUIRED

Covered officials may not receive more than \$250 in contributions from a party to a covered proceeding within the 12 months preceding the decision. (Gov. Code § 84308, 2 CCR § 18438.8.) Parties to covered proceedings are required to list all contributions more than \$250 to covered officials involved in the proceedings. If a covered official has received more than \$250 within the prior year, he or she must disqualify himself or herself from participating in the proceeding. However, if an official returns the part of the contribution that exceeds \$250 within 30 days of discovering the contribution and the proceeding, then disqualification is not required.

Covered officials are also prohibited from soliciting or receiving contributions of more than \$250 from parties who they know are financially interested in the outcome of a proceeding. Interested parties may not make contributions of more than \$250 to covered officials while proceedings are pending and for a period of time of three months thereafter.

III. CONFLICTS OF INTEREST WHEN LEAVING OFFICE

Prior to leaving government office or employment, the Political Reform Act prohibits all public officials from making, participating in the making or using their official position to influence the making of government decisions directly relating to any person with whom they are negotiating, or have any

arrangement, concerning prospective employment. (Gov. Code § 87407.) This requirement was amended in 2003 to include local government officials as well as State officials.

A local elected official, chief administrative officer of a county, city manager, or general manager or chief administrator of a special district who held a position with a local government agency shall not, for a period of one year after leaving that office or employment, act as agent or attorney for any other person by making any formal or informal appearance before or by making any oral or written communication to that local government agency, or any committee, subcommittee, or present member, officer, or employee of that local government agency, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (Gov. Code § 87406.3(a).) This prohibition will not apply if the former official is an officer or employee of, and appearing on behalf of, another public agency. (Gov. Code § 87406.3(b).)

IV. PROHIBITION AGAINST BRIBERY

Penal Code Section 165 provides that a member of any city or town council, board of supervisors, or board of trustees of any local public agency who receives, or offers or agrees to receive any bribe upon any understanding that his or her official vote, opinion, judgment, or action shall be influenced thereby, may be imprisoned for up to four years and forever disqualified from holding any public office or trust.

Penal Code Section 7 defines a "bribe" for the purposes of the Penal Code as "anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity."

As far as the bribe-taker is concerned, the crime of bribery consists of three elements: (1) the person charged must be a member of one of the bodies specified in section 165, which basically consists of all cities, counties, and other local public agencies; (2) that person must ask for, receive, or agree to receive something of "value or advantage," present or prospective; and (3) the request, receipt or agreement to receive must be upon an understanding that his or her opinion, judgment or action upon any official matter on which he or she may be required to act will be influenced.

PRACTICE TIP: While the common perception of a bribe is a large sum of money passed under the table, the fact is that a bribe can take virtually any form. A public official should be careful not to accept anything of value that might influence his or her official decision.

V. COMMON LAW BIAS PROHIBITIONS

A. COMMON LAW CONFLICT OF INTEREST CASES

While there are now statutory provisions prohibiting a financial conflict of interest, there are still cases that invoke the old common law doctrine against conflicts of interest. The common law doctrine against conflicts of interest is the judicial expression of the public policy against public officials using their official positions for private benefit. This doctrine has been primarily applied to require a public official to abstain from participation in cases where the public official's private financial interest may conflict with his or her official duties. But it can also apply to non-financial conflicts as well.

By virtue of holding public office, an elected official is impliedly bound to exercise the powers conferred on him or her with disinterested skill, zeal, and diligence and primarily for the benefit of the public. An elected official bears a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of private interest. (*See Noble v. City of Palo Alto*, 89 Cal.App. 47, 51 (1928).) Violation of the common law duty to avoid conflicts of interest can constitute official misconduct and result in a loss of office. Generally, such conflicts are found only when there is an identifiable financial interest that is affected; however, any potential common law conflict of interest issue should be discussed with your agency's attorney.