

# Water 101 – The Basics and Beyond|Governance Primer for Water District Directors

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# Agenda

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- Roles and Responsibilities of a Water District Director
- Overview of the Brown Act
- Overview of Conflicts of Interest
- Overview of the Public Records Act
- Avoiding Common Pitfalls

# Roles and Responsibilities of a Water District Director

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- District board members usually do not have individual powers or authorities.
- Individual board members have power when acting as part of the district board.
- Effective board members work cooperatively as a unit to plan and implement their respective districts' programs.
- General manager oversees the implementation of the Board's approvals and day to day management.



# Governing Laws

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- State Constitution:
  - Proposition 218.
- State Law:
  - Water Code.
  - Government Code (Brown Act, Political Reform Act, Public Records Act).
  - Public Resources Code (CEQA).
  - Public Contract Code.
  - Organic Statutes of the District.

# Governing Laws (Cont.)

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- Local Laws:
  - County Municipal Code.
  - City Municipal Code.
  - District Bylaws, Ordinances, Resolutions.
- Other:
  - Agreements binding the District.

# The Brown Act

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- The Brown Act is California's sunshine law. (*Gov. Code § 54950, et seq.*)
- “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 (*Gov. Code § 54953(a)*)” except when closed sessions are permitted.

# Purposes Of The Brown Act

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- Three purposes of the Brown Act:
  - To ensure that the decision-making process of legislative bodies is *conducted in public*.
  - To guarantee the *right of the public to address legislative bodies* on matters within the jurisdiction of those bodies.
  - To provide *notice* of the items to be discussed or the action to be taken by the legislative body by posting agendas in advance of the scheduled meeting.

# What Is A “Legislative Body?”

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- The governing body of a local agency (e.g., Board) and permanent or temporary Boards, commissions and advisory committees created by formal action of the local agency. (*Gov. Code § 54952(a),(b).*)
- Newly elected Board members not yet sworn in are considered members of the legislative body. (*Gov. Code § 54952.1.*)



# Not A “Legislative Body”

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- **Individual** decision-makers who are not members of Boards or commissions, such as agency or department heads, when they meet with advisors, staff or colleagues.

# What Is A “Meeting?”

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- 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* within its subject matter jurisdiction. (*Gov. Code § 54952.2.*)

# Serial Meeting Is A “Meeting”

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- A majority of the members of a legislative body shall not, outside an authorized meeting, use 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. (*Gov. Code § 54952.2.*) (*Gov. Code § 6252.7.*)

# Types Of Serial Meetings

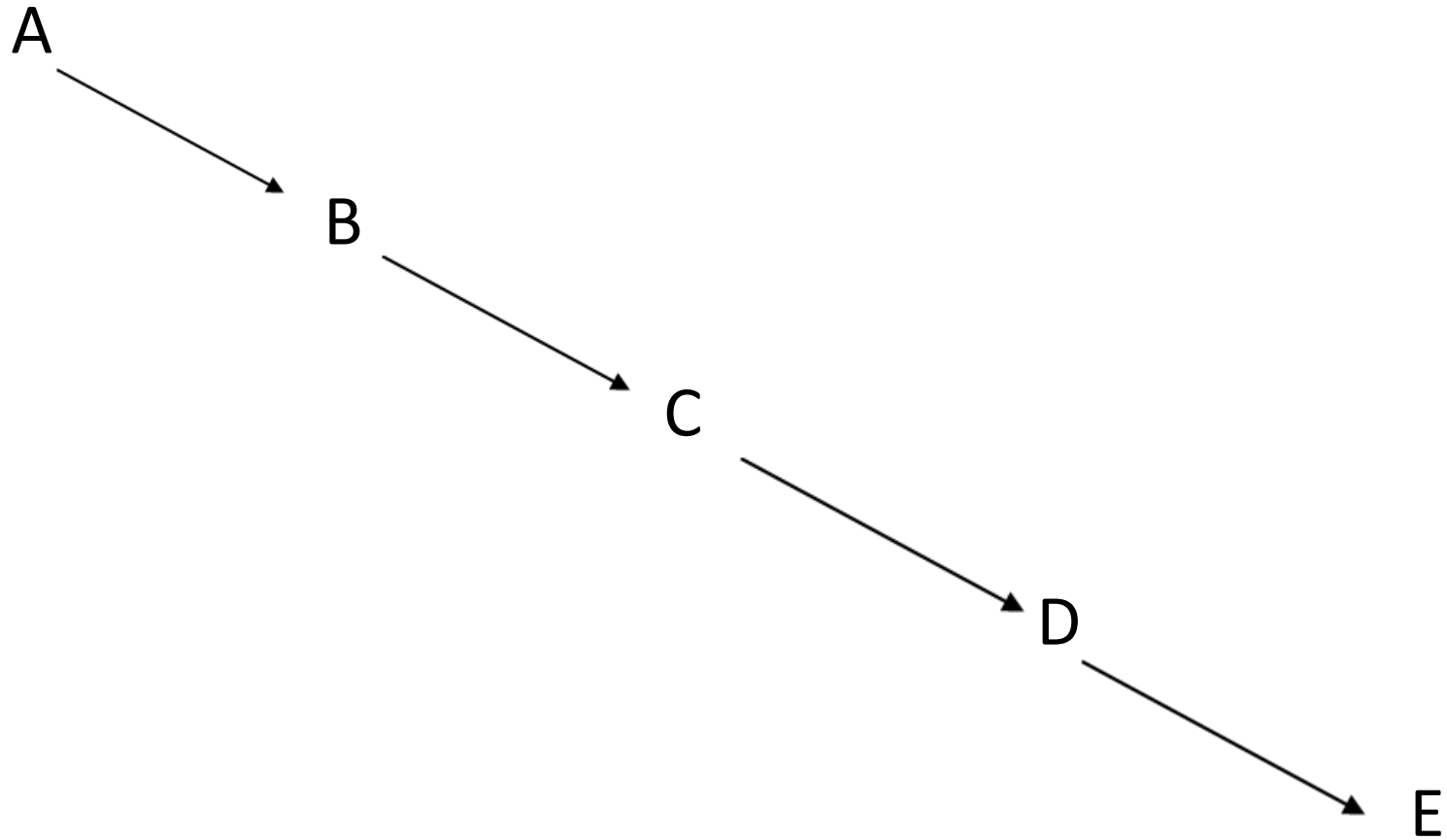
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- Daisy chain.
- Hub and spoke.
- Intermediaries.
- Emails, text messages, Blackberries, etc. (See, Gov. Code § 54952.2(b).)



# Daisy Chain

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# Intermediaries

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- The Brown Act prohibits the use of personal intermediaries to discuss, deliberate, or take action on any item of business within the subject matter jurisdiction of the body.
  - (e.g. use of manager, third parties, electronic devices. Serial meetings can happen inadvertently.)

# Meetings Are Open Or Closed

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- Meetings are considered either open or closed. (*Gov. Code § 54953(a).*)
- No members of the public may be invited to a closed session.



# Closed Sessions

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- There are a number of basis for closed session (i.e. personnel, labor and negotiation, pending litigation/significant exposure to litigation, real estate negotiations).
- Who May Participate?
  - Depends on the nature of the matter. Some examples:
    - Litigation—requires attorney.
    - Real estate—can designate a negotiator.
    - Labor—can designate bargaining representatives.
- Members of the public may not participate.





# Closed Sessions (Reporting Out)

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- Action taken in closed session must be publicly “reported out” after the action is final. The vote of each member of the legislative body who attended the closed session also must be reported. (*Gov. Code § 54957.1(a).*)
- *Some limited exceptions exist.*
- *Purpose of closed session is to avoid revealing confidential information that may prejudice the legal or negotiating position of the agency or compromise the privacy interests of employees.*



# Closed Sessions (Disclosures)

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- Confidential information acquired in closed session by any person present is strictly prohibited by the Brown Act. (Gov. Code section 54956.96).

# Penalties

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- **Criminal**: a misdemeanor occurs if a member of the legislative body attends a meeting in which action was taken in violation of the Brown Act, if the member *intended* for the Brown Act to be violated. (*Gov. Code § 54959.*)
- **Civil**: remedies include a court order to prohibit future violations or to nullify action taken in violation of the Brown Act (injunctive relief). (*Gov. Code § 54960.1(a).*)
  - Before civil suit can be filed, the complainant has 30 days (or 90 days if the violation occurred in closed session) to make a written demand on the agency to cure or correct the violation. (*Gov. Code § 54960.1(b)(c).*)
- **Other**: refer a member of the legislative body to the grand jury; disciplinary action against an employee who has willfully disclosed information.



# Conflicts of Interest

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- Underlying principle: No person may serve two masters.
  - The public has a right to know that its servants will act in the public's best interest without regard to an official's private interests.
- Issues may arise from many sources and at the last minute.
- Conflicts of interests arise from many laws.

# Overview of Laws

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- **Political Reform Act**
  - Disqualification, Reporting and Disclosure.
  - Gifts and Honoraria Limits.
  - Campaign Contributions.
- **Contractual Conflicts – Section 1090**
  - Transportation (Cal. Constitution).
  - Incompatible Offices.
  - Use of Public Resources for Campaign Activity.
  - Campaign Contributions.
- **Common Law of Conflicts**

# Warning

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- There are different sources of conflicts.
  - We are not covering all the conflict laws.
- You may have a conflict under one law but not for others.
  - You must analyze each situation under each possible conflict law.
- The potential liability for violation can be VERY harsh.

# Political Reform Act

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- Government Code sec. 81000 et seq.
- Regulated and enforced by Fair Political Practices Commission (the “FPPC”).



# Disqualification Requirement

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- “No public official at any level of state or local government shall make, participate in making or in any way attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a financial interest.” Govt. Code sec. 87100.





# Key Terms for Disqualification

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- Public Official.
- Make or participate in making or attempting to influence.
- Governmental Decision.
- Financial Interest.

# Points to Remember

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- CPRA applies to *financial conflicts* arising from *economic interests*.
  - other laws apply to other types of conflicts.
- Existence of a conflict is heavily *fact dependent*.
  - A change in the facts may alter the answer.
- *Be proactive* -Learn which of your economic interests may result in a conflict.

# Analysis of a Potential Conflict

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- 1. Is the individual involved a “public official?”
- 2. Is the individual involved making, participating in making, or using his/her official position to influence a governmental decision?
- 3. Does the individual involved have an economic interest in the decision?
  - Business investment, business management positions, real property, sources of income, gifts, personal financial effects.



# Conflicts Analysis (cont.)

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- 4. Is the economic interest directly involved or indirectly involved?
- 5. What is the “materiality” standard for each interest?
  - Materiality is a measure of whether or not the potential conflict is of sufficient concern to warrant disqualification and it depends upon both the type of the economic interest affected, and whether that interest is directly or indirectly involved.
- 6. Is it reasonably foreseeable that the effect on the economic interest will be material?

# Conflicts Analysis (cont.)

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- 7. Is the effect on your economic interest distinguishable from the effect on the public generally?
- 8. Is participation legally required? (The Rule of Necessity).

# Does a Conflict Exist?

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- If a conflict is found to exist, the public official must abstain from participating in the decision or even attempting to influence it.
  - Publicly identify the interest.
  - Recuse self.
  - Leave the room.

# Gifts

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- “Gift” is any payment or item of value that confers a personal benefit on the recipient, including rebates or discounts on items, meals, and travel expenses from non-transportation companies.



# Gifts

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- Public officials must disclose gifts of \$50 or more on their Statements of Economic Interests (Form 700).
- Any person or organization that has given you *gifts* valued at \$470 (effective January 2017) or more in 12 months.
  - Maximum adjusted every odd numbered year.
- Exceptions to gift limits.
  - Immediate family.
  - Equal exchanges.



# Form 700 (Statement of Economic Interests)

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- FPPC form 700 includes many economic interests.
- FPPC form 700 *does not include all economic interests* that can cause a conflict under the Political Reform Act.
  - Just because you did not have to disclose it, does not mean it may not cause a conflict.
- Timing for filing:
  - Within 30 days of assuming office/employment.
  - Annually thereafter by April 1<sup>st</sup>.
  - Within 30 days of leaving office/employment.



# Government Code section 1090

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- Separate and apart from CPRA—FPPC has no jurisdiction with respect to Section 1090 conflicts.
- Public officials are not allowed to be financially interested in any contract made by them in their official capacity, or any body or board of which they are a member.



# Government Code section 1090

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- Intent is to curtail self dealing and the avoidance of public officers or employees placing themselves in a position where personal interest might overcome their duty to the public.
- Making of the Contract:
  - Includes not only the execution of the contract itself, but all preliminary planning for, discussions, negotiations, and other events leading up to the execution of the contract.



# 1090 Continued

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- If any public official has a conflict, neither the entity nor the contractor may enter into the contract. The conflict taints the entire body and the legislative body may not waive the conflict.
- Violation of 1090 voids the contract.
- Gov. Code section 1090 applies even if:
  - The contract is objectively fair and reasonable.
  - All parties agree to waive the conflict.
  - Let to the lowest bidder.
  - Official with the conflict abstains.



# 1090 Exceptions

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- Remote Interest (disclose the interest and disqualify):
  - Non-profit and non-salaried.
  - Contract 5 years before taking of office, etc.
  - GC 1091.4 – Certain actions of small landowner voting Special Districts
- Non-interest (may fully participate):
  - Ownership of less than 3% stock.
  - Spouse's employment if spouse in the same position for one year, etc.

# 1090 Violations

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- Consequences are severe:
  - Void contract.
  - Felony (willful violations).
  - Disqualification from office.

# Public Records Act

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- The CPRA is a series of statutes that govern the public's access to government records.
- It makes all non-exempt, state and local government agency records, in any form or medium, subject to public inspection.

# Public Record Defined

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- Any “writing” containing information relating to the conduct of the public’s business, prepared, owned, used or retained by the agency, regardless of the form in which it is kept.
- Writing includes any form of communication or representation including electronic data, photos, sounds, discs, punch cards, etc.





# Does the Record Exist?

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- CPRA applies only to existing, reasonably identifiable records. (Including those that are segregable).
- No duty under the CPRA to create new records in response to a request or create a document in a new format or any other specific preferences of the requester.
- However, may be a duty to provide electronic data in a format requested under certain circumstances (GC 6253.9).

# Is it a “Public” Record?

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- Not every document found in your agency is a public record.
- The public’s right to disclosure of public records is not absolute.
  - Catch-all exemption.
  - Specific Exemptions.
    - Set forth in Section 6254 and 6275.
  - Evidence Code section 1040 (“official information”).
  - Privileges.



# Interplay Between Brown Act and Public Records Act

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- *City of San Jose v. Superior Court* (March 27, 2014, Case No. H039498).
  - Court of Appeals held that private communications sent on personal devices that are not stored on a public agency's servers are not subject to the CPRA.
  - Court acknowledged concerns about potential abuses but stated this was a policy issue to be resolved by the Legislature.
  - Review granted by the Supreme Court. Waiting for a decision. Case argued and submitted 12-07-16.

# Avoiding Pitfalls

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- *Know the purpose of the law*-to prevent bias, both actual and apparent.
- Learn to spot potential trouble early-*be aware of your economic interests.*
- Don't try to memorize a lot of rules-*understand the "big picture"* of the rules.
- Recognize the *importance of differing facts*
- Don't be afraid to *ask for help.*



# Thank You!

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