

**LEGAL HANDBOOK FOR CITY OF FRESNO
BOARDS, COMMISSIONS, COMMITTEES, AND
SIMILAR BODIES**

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TABLE OF CONTENTS

- I. INTRODUCTION5
 - A. HOW CITY BOARDS, COMMISSIONS, COMMITTEES AND SIMILAR BODIES ARE CREATED.5
 - B. THE POWERS AND DUTIES OF CITY BOARDS, COMMISSIONS, COMMITTEES, AND SIMILAR BODIES.5
 - 1. Enabling Legislation or Documents.....5
 - 2. Internal Rules or Bylaws.....5
 - C. THE RECORDS OF THE CITY CLERK.6
- II. THE BROWN ACT7
 - A. WHAT IS THE BROWN ACT?7
 - B. TYPES OF BOARDS, COMMISSIONS, COMMITTEES, AND SIMILAR BODIES THAT ARE SUBJECT TO THE BROWN ACT.....7
 - 1. Bodies Created by Charter or Ordinance.7
 - 2. Bodies Created by Resolution or Formal Action of the Council. ...7
 - 3. Subcommittees of Boards, Commissions, Committees, or Similar Bodies.8
 - C. BOARDS, COMMISSIONS, COMMITTEES, AND SIMILAR BODIES THAT ARE NOT SUBJECT TO THE BROWN ACT.....8
 - 1. Ad Hoc Committees Comprised Solely of Less than a Quorum of the Council.8
 - 2. Committees Created by an Individual Decision Maker.....8
 - D. THE GENERAL REQUIREMENTS UNDER THE BROWN ACT.....8
 - 1. Post the Agenda.....8
 - 2. Contents of the Agenda.....9
 - 3. The Public’s Rights.....9
 - 4. Non-Agenda Items Rule.10
 - E. WHAT IS A “MEETING?”10
 - 1. Face to Face Meetings.....10

2.	Informal Gathering.....	10
3.	Serial Meetings.....	11
F.	GATHERINGS THAT ARE NOT MEETINGS.....	11
1.	The Individual Contact Exception.....	11
2.	The Conference Exception.....	11
3.	Other Public Meetings.....	11
4.	Meetings of Other Legislative Bodies.....	11
5.	Social or Ceremonial Occasions.....	12
6.	Standing Committee Exception.....	12
G.	TYPES OF MEETINGS.....	12
1.	Regular Meetings.....	12
2.	Special Meetings.....	12
3.	Emergency Meetings.....	12
H.	LOCATION OF MEETINGS.....	12
I.	CLOSED SESSIONS.....	13
J.	BROWN ACT VIOLATIONS.....	13
III.	CONFLICTS OF INTEREST.....	14
A.	INTRODUCTION.....	14
B.	POLITICAL REFORM ACT.....	15
1.	Members of Bodies Who Must Comply with the Political Reform Act.....	15
2.	Disclosure of Financial Interests.....	15
3.	Disqualification Under the Eight Step Process.....	16
4.	Civil and Criminal Enforcement.....	19
5.	Resources Available from the Fair Political Practices Commission.....	20

C.	CONFLICTS OF INTEREST IN CONTRACTS UNDER SECTION 1090 <i>ET SEQ.</i>	21
1.	Persons Who Are Subject to Section 1090 <i>et seq.</i>	21
2.	Participation in Making a Contract.	21
3.	A Multi-member Body May Not Execute a Contract If One of Its Members Has a Requisite Financial Interest in a Contract.	22
4.	Requisite Financial Interest.....	22
5.	The Multi-member Body May Execute a Contract If Its Member Has Only a “Remote Interest” and Abstains from Participating in the Making of the Contract.	22
6.	Interests that Are Considered “Noninterests.”	24
7.	Eminent Domain.	26
8.	Subdivided Lands.....	26
9.	Local Workforce Investment Board.	26
10.	Limited Rule of Necessity.....	27
11.	Remedies for Contracts Made in Violation of Section 1090.	27
D.	COMMON LAW DOCTRINE OF INCOMPATIBLE PUBLIC OFFICES. .	29
E.	COMMON LAW CONFLICT OF INTEREST DOCTRINE.	30
F.	OTHER MISCELLANEOUS CONFLICTS LAWS.....	31
1.	Redevelopment Agency Conflicts.....	31
2.	Exception to Redevelopment Agency Conflicts.....	31
3.	Discount Passes on Common Carriers.....	31
4.	Government Code Section 87407: Revolving Door for Local Agencies.....	32
IV.	RETENTION AND DISCLOSURE OF PUBLIC RECORDS	35
A.	INTRODUCTION.....	35
B.	PUBLIC RECORDS ARE SUBJECT TO DISCLOSURE UNLESS EXPRESSLY EXEMPT UNDER THE PUBLIC RECORDS ACT.....	35

C. PROCEDURE FOR REQUESTING AND RESPONDING TO REQUESTS FOR PUBLIC RECORDS.35

D. VIOLATIONS OF THE PUBLIC RECORDS ACT.....36

V. RECOMMENDATIONS37

ENDNOTES.....38

I. INTRODUCTION

Individuals who serve on City boards, commissions, committees, and similar bodies (hereinafter “body”) are public officers and carry out the duties of government. This Handbook contains basic laws and legal procedures that apply to public officers while serving on City bodies. This Handbook is intended to be used as a reference for such public officers to ensure that the actions taken in their official capacity are above reproach and in compliance with the laws. The City Attorney’s Office will endeavor to assist the public officers while serving in their official capacity. In the event this Office is unable to provide assistance because the matter is private in nature or creates a conflict of interest, we will refer the public officer to the appropriate agency or to his/her private attorney.

A. HOW CITY BOARDS, COMMISSIONS, COMMITTEES AND SIMILAR BODIES ARE CREATED.

A body may be created a number of ways, such as pursuant to federal law, state law, City Charter, or the Fresno Municipal Code. The Mayor, Council, or an individual Councilmember may also create multi-member bodies as permitted by law, to assist them in carrying out their official duties.¹ Since there are many ways a body may come into existence, the enabling legislation or resolution that created the body should be consulted for determining its powers and duties.

B. THE POWERS AND DUTIES OF CITY BOARDS, COMMISSIONS, COMMITTEES, AND SIMILAR BODIES.

1. Enabling Legislation or Documents.

The City Attorney’s Office receives a number of inquiries regarding the qualification, appointment, term of office, and removal process for members serving on various City bodies. The enabling legislation that created the body will govern. For example, if a body was created by federal or state law, those laws must be consulted regarding its powers and duties. For boards and commissions created by Charter, the Charter provisions located in Article IX of the Charter commencing with Section 900 *et seq.*, governs. Boards and commissions created by Charter include the Planning Commission, Civil Service Board, and City Retirement Boards. For all other bodies created by Council, the ordinance or resolution creating the body governs. Finally, whenever a body is created by the Mayor or individual Councilmember, the elected officer should file a form with the City Clerk setting forth the powers and duties of the body.

2. Internal Rules or Bylaws.

A body may also adopt bylaws for its internal governance that are consistent with its powers and duties. There are also well established laws on the governance of bodies. For example, an individual appointed to serve at the pleasure of the appointing authority may be removed from office by the appointing authority without cause and without notice

and a hearing.² However, if a public officer is appointed to serve a definite term of office, the officer may only be removed for cause before the expiration of the term. This means that there must be specific and definite charges, justifying action, with legal notice, reasonable opportunity to be heard, and a finding or judgment.³ In another example, if a person is appointed to a board who does not meet the qualifications for the appointment, the appointment is considered null and void by operation of law.⁴

C. THE RECORDS OF THE CITY CLERK.

Much of the enabling legislation and documents for City bodies are located in the City Clerk's Office. The enabling legislation may take the form of, but is not limited to, an ordinance, resolution, minutes of Council meetings, and staff reports. In early 2004, the Council also adopted the "Boards and Commissions Appointment Process" in Resolution No. 2004-6 to streamline the application process for individuals interested in serving on various City bodies. Resolution No. 2004-6 will be administered by the City Clerk, which is available on the City of Fresno website at www.fresno.gov/cityclerk/.

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II. THE BROWN ACT

A. WHAT IS THE BROWN ACT?

The Brown Act is state law that governs meetings conducted by local legislative bodies to facilitate public participation and to curb misuse of the democratic process by secret legislation by public bodies.⁵ The Brown Act generally requires local legislative bodies to conduct meetings in open public sessions, and to post meeting agendas in advance.⁶

B. TYPES OF BOARDS, COMMISSIONS, COMMITTEES, AND SIMILAR BODIES THAT ARE SUBJECT TO THE BROWN ACT.

The Council, as the governing body of the City, is the most basic type of body subject to the Brown Act. Subsidiary bodies of the Council may also be subject to the Brown Act. Any board, commission, committee, or similar bodies of the City, such as a task force, created by Charter, ordinance, resolution, or formal action of the Council are “legislative bodies” subject to the open meeting requirements of the Brown Act. The only exception to this rule are advisory ad hoc committees comprised solely of less than a quorum of the Council.⁷ Examples of bodies of the City that fall within the definition of “legislative bodies” include the following:

1. Bodies Created by Charter or Ordinance.

The Charter created three legislative bodies consisting of the Planning Commission, Civil Service Board, and Retirement Boards.⁸ Examples of bodies created by the Fresno Municipal Code include the following: Housing & Development Commission;⁹ Building Standards Appeals Board;¹⁰ Mobile Home Park/Rent Review Stabilization Commission;¹¹ Fresno Clean Air Advisory Committee;¹² Housing Advisory Finance & Appeals Board;¹³ Historic Preservation Commission;¹⁴ Joint Advisory Appeals Board;¹⁵ Building Commission;¹⁶ and the Industrial Development Authority.¹⁷ Legislative bodies created by ordinance that are not codified in the Fresno Municipal Code are also subject to the Brown Act.

2. Bodies Created by Resolution or Formal Action of the Council.

Bodies created by Council by resolution or formal action are “legislative bodies” for purposes of the Brown Act. The phrase “formal action” appears to be a term intended to distinguish between the official actions of the Council and the informal actions of particular Councilmembers. For example, if the Council designates two of its members to sit on an advisory committee and establish a committee’s agenda, the Council has taken “formal action” even though Council did not act by formal resolution.¹⁸ Similarly, if the Council authorizes a public officer to appoint a committee under specified circumstances, this will more likely than not, constitute a creation of an advisory committee by formal action of the Council.¹⁹ “formal action” of the Council is not limited to a formal resolution or a formal vote by the Council.²⁰

3. Subcommittees of Boards, Commissions, Committees, or Similar Bodies.

If the body creates a subcommittee to carry out its mission, the subcommittee may also be subject to the Brown Act. To make that determination, the same legal analysis that applies to City bodies also applies to the subcommittee. In other words, if the body that created the subcommittee is a “legislative body” for purposes of the Brown Act, the subcommittee will also be subject to the Brown Act unless the subcommittee is an ad hoc committee. To be an ad hoc committee, the subcommittee must be composed solely of less than quorum of the legislative body that created it, may not have a continuing subject matter jurisdiction, or a meeting schedule fixed by Charter, ordinance, resolution, or formal action of the body that created it.

C. BOARDS, COMMISSIONS, COMMITTEES, AND SIMILAR BODIES THAT ARE NOT SUBJECT TO THE BROWN ACT.

Examples of bodies that are not “legislative bodies” for purposes of the Brown Act include the following.

1. Ad Hoc Committees Comprised Solely of Less than a Quorum of the Council.

An “ad hoc committee” is a committee composed solely of the members of the Council that are less than a quorum of the Council, does not have a continuing subject matter jurisdiction or a meeting schedule fixed by Charter, ordinance, resolution or other formal action of the legislative body.²¹ Ad hoc committees generally serve only a limited or single purpose, are not perpetual, and are dissolved when their specific task is completed. Committees that do not qualify as an ad hoc committee are standing committees that must comply with the Brown Act.

2. Committees Created by an Individual Decision Maker.

A multi-member body created by an individual decision maker is not subject to the Brown Act.²² For example, a committee created by the Mayor or individual Councilmember is not a “legislative body” for purposes of the Brown Act. However, if the Council directs or authorizes a single individual to appoint a body, the body will probably be subject to the Brown Act.²³

D. THE GENERAL REQUIREMENTS UNDER THE BROWN ACT.

The basic mission of the Brown Act is to ensure that decisions are made public. A body that is subject to the Brown Act must comply with the rules that provide for public access to its meetings. The general requirements of the Brown Act are as follows:

1. Post the Agenda.

- The agenda must be posted in an area freely accessible to the public.

- The agenda for regular meetings must be posted at least 72 hours in advance.²⁴
- The agenda for special meetings must be posted at least 24 hours in advance.²⁵
- For emergency meetings, the media must be given one hour advance notice. Notice of meetings for dire emergencies must be given at or near the time the presiding officer notifies the members of the body of the meeting.²⁶

2. Contents of the Agenda.

- The agenda must specify the time and location of the meeting.²⁷
- The agenda must contain a brief general description of each item of business to be transacted or conducted at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words.²⁸
- The agenda must provide a public comment period for the public to address the legislative body before or during consideration of an item on the agenda. For regular meetings, the agenda must also allow members of the public to address the body on any matter within the subject matter jurisdiction of the body. For special meetings, a member of the public does not have a right to address the legislative body on matters that do not appear on the agenda.²⁹
- The agenda must include information regarding how, to whom, and when a request for disability related modification or accommodation, including auxiliary aids or services may be made by a person with a disability who requires modification or accommodation in order to participate in the public meeting.³⁰

3. The Public's Rights.

- Members of the public shall not be required to register their names, provide other information, complete a questionnaire, or fulfill any other conditions to attend the meeting.³¹
- The public has a right to videotape, record, or broadcast the meeting so long as it does not create a persistent disruption of the proceedings.³²
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- Information given to a majority of the members of the legislative body in connection with an open meeting must be equally available to the public unless exempt under the Public Records Act.³³

- If requested, the agenda shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C Section 12132).³⁴

4. Non-Agenda Items Rule.

- A body cannot discuss or take action on any item not appearing on the agenda.³⁵
- Narrow exceptions to the non-agenda items rule include the following: briefly responding to comments made by a private person during the public comment period; asking staff for clarification; directing staff to place an item on a future agenda; or making a brief announcement or report regarding the member’s own activities.³⁶
- Additional exceptions to the non-agenda items rule include the following: emergency situations that qualify for “emergency meetings”; when two-thirds of the members of the legislative body decide there is a need to take immediate action that was brought to their attention after the agenda was posted; or when an item was continued from a prior meeting that was posted no more than five days prior to the date action is taken on the item.³⁷

E. WHAT IS A “MEETING?”

Meetings of the legislative body must comply with the open meeting requirements of the Brown Act. The term "meeting" is very broadly defined as any congregation of a majority of the members of the legislative body at the same time and place to hear, discuss or deliberate upon any matter which comes under the subject matter jurisdiction of the legislative body.³⁸ Meetings may occur in a variety of situations.

1. Face to Face Meetings.

A meeting occurs whenever a majority of the members of the legislative body meets face to face to discuss, decide, or vote on an issue within its subject matter jurisdiction. The legislative body need not take any action for a gathering to be considered a “meeting.” A gathering is a “meeting” if a majority of the members of the body receives information, hears a proposal, discusses their views on an issue, or takes action on any issue under the subject matter jurisdiction of the body.

2. Informal Gathering.

A gathering need not be formally convened to be considered a “meeting,” and may occur in a variety of social situations. For example, if a majority of the members of the body have lunch together and discuss or decide matters within its subject matter jurisdiction, the gathering is a “meeting.” A meeting may arise in other contexts, such as at social

gatherings where a majority of the members of the legislative body discuss any matter within the body's subject matter jurisdiction.

3. Serial Meetings.

A meeting may also take place in situations where a majority of the members of the body do not meet face to face. The Brown Act expressly prohibits the use of devices, such as direct communication, personal intermediaries, or technological devices to develop a collective concurrence as to actions to be taken. For example, a member of the legislative body may not contact a majority of its members by telephone, e-mail, fax, or by a third party to discuss any matter within its subject matter jurisdiction outside of the public domain. Most often, this type of a meeting occurs through a series of communications by individual members or groups smaller than a quorum that ultimately involve a majority of the members. These meetings are called serial meetings.³⁹

F. GATHERINGS THAT ARE NOT MEETINGS.

There are six types of gatherings that are not subject to the Brown Act.⁴⁰ If a gathering does not fall within any of the six exceptions, a majority of the members in the same room who are merely listening to a discussion of the body's business will be participating in a meeting that requires notice, an agenda, and a period for public comment. The six exceptions are as follows:

1. The Individual Contact Exception.

Conversations between a member of the body and any other person, that does not serve to "poll" members of the body does not constitute a meeting for purposes of the Brown Act.⁴¹

2. The Conference Exception.

Attendance of a majority of the members of the body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the body, provided a majority of the members do not discuss among themselves specific business within the body's subject matter jurisdiction.

3. Other Public Meetings.

Attendance of a majority of the members of the body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided a majority of the members do not discuss among themselves specific business within the body's subject matter jurisdiction.

4. Meetings of Other Legislative Bodies.

Attendance of a majority of the members of the body at an open and noticed meeting of another body of the local agency, provided a majority of the members do not discuss

among themselves specific business within the body's subject matter jurisdiction.

5. Social or Ceremonial Occasions.

Attendance of a majority of the members of the body at a purely social or ceremonial occasion, provided a majority of the members do not discuss among themselves specific business within the body's subject matter jurisdiction.

6. Standing Committee Exception.

Attendance by a majority of the members of the body at an open and noticed meeting of a standing committee of that body, provided that the members of the body who are not members of the standing committee attend only as observers.

G. TYPES OF MEETINGS.

There are three types of meetings that can be called under the Brown Act: regular meetings, special meetings and emergency meetings.

1. Regular Meetings.

Regular meetings are held at a regular time and place established by local rules. With certain exceptions, the body may only take action on items that are listed on the agenda.

2. Special Meetings.

Special meetings are called on an "as needed" basis for special purposes. The body may only take action on items listed on the agenda.⁴²

3. Emergency Meetings.

An emergency meeting may be called on less than 24 hours' notice, regarding a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the body. An emergency meeting may also be held for a "dire emergency" for a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity.⁴³

H. LOCATION OF MEETINGS.

As a general rule, regular and special meetings must be held within the boundaries of the territory over which the legislative body has jurisdiction.⁴⁴ Exceptions to the boundary requirement are as follows: to comply with federal law, state law, or court order; to inspect real property or personal property which cannot be conveniently brought within the jurisdiction; to participate in meetings with multi-agency significance located within the jurisdiction of one of the agencies; to meet in the nearest available facility if the body has no meeting facility within its jurisdiction, or at the principle office of the body located outside of the jurisdiction; to meet with federal or state officials on legislative or regulatory issues affecting the local agency; to meet in or nearby a facility owned by the local agency, if the facility is directly related to the topic of the meeting; and to visit the office of

the body's legal counsel for closed session on pending litigation to reduce legal fees or cost.⁴⁵

I. CLOSED SESSIONS.

Closed sessions are not open to the public and information acquired during properly held closed sessions are confidential and may not be disclosed without the body's authorization. A body may not meet in closed session unless expressly authorized by the Brown Act. The statutory exceptions to the open meeting requirements are narrowly construed, and unless a specific statutory exception applies, a legislative body must consider the matter in open session regardless of its sensitivity.⁴⁶ Examples of authorized closed sessions include: real property negotiations, existing or anticipated litigation, threat to public services or facilities, personnel matters, health claims, and applications of early withdrawal of funds in a Deferred Compensation Plan.⁴⁷

The body should consult with their legal advisor before holding a closed session to ensure that the item meets all of the statutory requirements for holding a closed session, is properly noticed on the agenda, and that the reporting requirements following a closed session are satisfied.⁴⁸

J. BROWN ACT VIOLATIONS.

The district attorney or any interested person may demand in writing, that the body declare any actions taken in violation of the Brown Act as null and void or cure the defect within 90 days of the alleged violation. However, if the action was taken in open session, but in violation of the agenda requirements, the written demand must be made within 30 days. The body must act on the matter within 30 days of receiving the written notice. If no action is taken by the legislative body, the district attorney or any interested person may file a suit to have the action of the body declared null and void.⁴⁹

The City may be required to pay attorneys' fees and costs for successful actions.⁵⁰ Individual members of the body may also be criminally liable for violating the Brown Act, if a member attends a meeting with intent to deprive the public of information to which the member knows or has reason to know the public is entitled pursuant to the Brown Act.⁵¹ Criminal violations of the Brown Act are misdemeanors punishable by up to one year in jail and/or fines. For these reasons, the City's business must be carried out in a manner that prevents any actual or perceived Brown Act violations.

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III. CONFLICTS OF INTEREST

A. INTRODUCTION.

Members serving on City boards, commissions, committees, and similar bodies are public officers and subject to the conflict of interest laws. The purpose of such laws is to promote public confidence in the conduct of public officers. The conflict of interest laws discussed in this Handbook include the following: the Political Reform Act; Government Code Section 1090 *et seq.* relating to conflicts in contracts; common law doctrine of incompatible offices; common law conflicts of interest; and other miscellaneous state law provisions. The laws in this area can be complex. This section of the Handbook is intended to assist public officers in recognizing situations that may give rise to a conflict of interest.

It is the duty of the individual member to contact the local agency's advisor if the member believes he or she has a conflict of interest. Deciding whether a member has a conflict of interest is fact intense and generally requires significant research and analysis. For this reason, members should contact their legal advisor regarding a possible conflict as far in advance of his or her participation on the matter as possible. In matters involving potential conflicts, advance preparation is very important to ensure that participation occurs in an appropriate manner.

If the City Attorney's Office is the local agency's legal advisor, please keep in mind that the City Attorney's Office represents the City's interest, and the public officer in his or her official capacity. Conflict of interest questions addressed to the City Attorney should be submitted in writing as far in advance of participation in the governmental decision as possible. Any last minute conflict of interest inquiries will usually result in the City Attorney's Office giving conservative advice, that the member should announce his or her conflict and disqualify himself or herself from the matter. Since conflict of interest issues may affect the decisions of the body, it is the practice of the City Attorney's Office to distribute copies of all written opinions relating to conflicts to the entire body.

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B. POLITICAL REFORM ACT.

The voters of the State of California adopted the Political Reform Act⁵² in 1974 to ensure that public officers perform their duties in a lawful and unbiased manner. The Fair Political Practices Commission administers and enforces the Political Reform Act, and issues regulations to carry out its purpose.⁵³ The purpose of the Political Reform Act is to prohibit a public officer from participating in a decision that will impact his or her economic interests. Conflicts of interest are prevented in two ways, by disclosure and disqualification.⁵⁴ The conflict of interest provisions of the Political Reform Act are applied on a decision by decision basis,⁵⁵ and do not prevent a public officer from seeking or holding office, whether public or private.⁵⁶

This section of the Handbook is intended to provide a “big picture” of the conflict of interest provisions of the Political Reform Act to make it easier for public officers to know the rules that must be applied in every given case. Understanding which of the public officer’s economic interests could give rise to a conflict of interest will assist the public officer in spotting potential conflicts of interests early. A public officer should not rely solely on this Handbook to decide whether he or she has a conflict of interest under the Political Reform Act. Deciding whether a public officer has a conflict of interest will depend heavily on the facts and a detailed application of the laws.

1. Members of Bodies Who Must Comply with the Political Reform Act.

Salaried and unsalaried members of bodies with decisionmaking authority are public officers subject to the Political Reform Act.⁵⁷ A body has decisionmaking authority if any of the following applies.

- It may make a final governmental decision.
- It may compel a governmental decision.
- It may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden.
- It makes substantive recommendations that are, and over an extended period of time has been, regularly approved without significant amendment or modification by another public officer or governmental agency.⁵⁸

2. Disclosure of Financial Interests.

The purpose of disclosing financial interests is to alert public officers of personal interests that might be affected while performing their official duties, i.e., making governmental decisions. Disclosure also helps the public know about the public officer’s potential conflicts of interest. Each state and local agency must adopt a conflict of interest code designating the positions subject to disclosure, and its disclosure requirements.

The City's local conflict of interest code is located in Fresno Municipal Code Section 2-2001 *et seq.* The Council, by resolution, designates the positions and the types of financial interests that must be disclosed by persons holding those positions. The extent of disclosure will depend on the types of decisions made by the person in that position. The local conflict of interest code contains the following disclosure categories.

- Category I- Investments in business entities (e.g., stock holdings, owning a business, a partnership), and positions of management or employment with business entities.
- Category II- Sources of personal income, including gifts, loans and travel payments.
- Category III- Interests in real estate (real property).

Public officers disclose their financial interests on a form entitled "Statement of Economic Interests" (SEI) or "Form 700" issued by the Fair Political Practices Commission. SEIs are filed annually, and also within 30 days of taking office or leaving office. SEIs submitted by public officers are public records and are made available for public inspection upon request. State law also requires certain public officers to file SEIs, independent of the local conflict of interest code. Those individuals include members serving on the planning commission, and public officers who manage public investments.⁵⁹

The City makes every effort to designate all bodies that make governmental decisions in the local conflict of interest code. Members of bodies whose positions are not designated in the local conflict of interest code who believe their positions do involve making or participating in a governmental decision should contact the City Clerk's Office. The City Clerk maintains the SEIs filed by the public officers pursuant to the local conflict of interest code.⁶⁰ We must emphasize that regardless of whether the individual is required to file a statement of economic interest, every governmental officer or employee must refrain from making or participating in a governmental decision that has a reasonably foreseeable material financial effect on his or her personal financial interests.⁶¹

3. Disqualification Under the Eight Step Process.

A conflict of interest may only arise from particular kinds of economic interests. Learning to recognize the economic interests from which conflicts of interests can arise will avoid potential conflict of interest problems. Once a public officer has the ability to spot potential problems, he or she can contact the Fair Political Practices Commission or the agency's legal advisor for assistance. Deciding whether a public officer has a financial conflict of interest involves an eight step process described below.

Step One. Whether the individual is a public officer.

If the public officer is designated in the local conflict of interest code to file an SEI each year, or otherwise participates in making governmental decisions, the individual is a

Step Two. Whether the public officer is making, participating in making, or influencing a governmental decision.

Such acts generally involve exercising discretion or judgment with regard to a decision, as follows.

- Making a governmental decision (for example, by voting or making an appointment to a position).
- Participating in making a governmental decision (for example, giving advice or making recommendations to the decision maker).
- Influencing a governmental decision by communicating with the decision maker.

Step Three. Identify the economic interests.

This step involves identifying the sources of a possible financial conflict of interest. There are only six kinds of economic interests from which a conflict of interest may arise.⁶³ Those economic interests are the following.

- **Business investment.** An economic interest in a business entity in which the public officer, his or her spouse, dependent children, or anyone acting on the public officer's behalf has invested \$2,000 or more.
- **Business employment or management.** A business entity in which the public officer is a director, officer, partner, trustee, employee, or holds any position of management.
- **Real property.** An economic interest in real property in which the public officer, his or her spouse, dependent children, or anyone acting on his or her behalf has invested \$2,000 or more, and also certain leasehold interests.
- **Sources of income.** An economic interest in a source from whom the public officer has received (or has been promised) \$500 or more in income within 12 months prior to the decision. The public officer will have a community property interest in the spouse's income. Also, if the public officer, his or her spouse or dependent children, own 10% or more of a business, the public officer will be considered to receive "pass-through" income from the business' clients. In other words, the business's clients may be considered sources of income to the public officer.
- **Gifts.** An economic interest in anyone, whether an individual or an organization, who has given the public officer gifts which total \$340 or more

within 12 months prior to the decision.

- **Personal financial effect.** An economic interest in the public officer's personal expenses, income, assets, or liabilities, as well as those of the public officer's immediate family. This is known as the "personal financial effects" rule. If these are likely to go up or down as a result of the governmental decision, then it has a "personal financial effect" on the public officer.

There may be situations where a public officer is not required to report an economic interest in the SEI. The economic interests that are not reported in the SEI may nevertheless be a source of a disqualifying conflict of interest. For example, a personal residence is not reported on the SEI. However, it is common for a personal residence to give rise to a disqualifying conflict of interest despite not being disclosed.

Step Four. Whether the economic interest is directly or indirectly involved in the governmental decision.⁶⁴

Directly involved economic interests are directly affected by the governmental decision, and will create a bigger risk of a conflict of interest than an economic interest that is only indirectly involved in the decision. For this reason, the conflict of interest regulations distinguish between directly involved and indirectly involved economic interests. There are specific rules for determining whether an economic interest is directly or indirectly involved in a governmental decision. The details of these rules are beyond the scope of this Handbook and will require a case by case analysis based on the particular facts.

Step Five. Whether the financial impact on the public officer's economic interests triggers a conflict of interest.

The test is whether it is sufficiently likely that the governmental decision will have a material financial effect on the public officer's economic interests.⁶⁵ The word "material" is akin to the term "important." The officer will have a conflict of interest only if it is reasonably foreseeable that the governmental decision will have an important impact on his or her economic interests. The regulation contains "materiality standards," or criteria for determining what kinds of financial impacts resulting from governmental decisions are considered material or important.

Step Six. Whether it is substantially likely that the governmental decision will result in one or more of the materiality standards being met for one or more of the public officer's economic interests.

The test is whether it is sufficiently likely that the outcome of the decision will have an important impact on the public officer's economic interests. The likelihood need not be a certainty, but it must be more than merely possible. The threshold question is whether it is substantially likely that one of the materiality standards identified in Step Five will be met as a result of the government decision.⁶⁶ Step Six requires a factual analysis as to how the economic interest fits into the entire factual picture surrounding the decision.

Step Seven. Whether the public generally exception applies.

Even if the public officer has a conflict of interest, the public officer will not be disqualified from the decision if the public generally exception applies.⁶⁷ A public officer is less likely to be biased by a financial impact when a significant part of the community is substantially likely to feel the same impact from a governmental decision. The “public generally” exception must be considered with care. There are specific rules for identifying the “specific segments” of the general population with which the public officer may compare his or her economic interest and specific rules for deciding whether the financial impact is “substantially similar.”

Step Eight. Whether the public officer is legally required to participate in the governmental decision.

Even if the public officer has a disqualifying conflict of interest, his or her participation may be legally required.⁶⁸ These are rare circumstances in which the public officer may be called upon to take part in a decision despite the fact that the public officer has a disqualifying conflict of interest. This “legally required participation” rule applies only in certain very specific circumstances where the government agency would be paralyzed from acting. The public officer is most strongly encouraged to seek advice from the legal advisor or the Fair Political Practices Commission before the public officer acts under this rule.

If a public officer has a disqualifying conflict of interest, the public officer must disqualify himself or herself from participating in the decision. Public officers who hold an office specified in Section 87200 are required to announce the conflict of interest in sufficient detail to be understood by the public and recuse herself or himself from the matter. The public officer must also leave the room while the matter is being discussed, unless the item was placed on the uncontested calendar.⁶⁹ Those officers specified in Section 87200 include, but are not limited to, members of the planning commission, mayor, city manager, city attorney, city treasurer, members on the city council, and public officers who manage public investments.

In the case of a conflict of interest, the public officer in question has the duty to disqualify himself or herself. This duty cannot be delegated to staff members or to an attorney. The duty rests with the officers in question because only they know the extent of their own personal financial dealings.

4. Civil and Criminal Enforcement.

If a conflict of interest exists, there are several different agencies or persons who may bring an action to enforce the Political Reform Act. A district attorney, the California Attorney General or the Fair Political Practices Commission may bring an action, either civil or criminal.⁷⁰ In addition, any person residing within the jurisdiction may obtain authorization to bring a civil action to enjoin violations or compel compliance with the Political Reform Act. Finally, a local agency may discipline persons who violate certain

provisions of the Political Reform Act.⁷¹

A knowing and willful violation of the Political Reform Act is a misdemeanor punishable by a fine and/or imprisonment. A violator may be fined up to \$10,000 or three times the amount not properly disclosed, unlawfully contributed, expended, given, or received, for each violation.⁷² Finally, any person convicted of a misdemeanor is barred from being a candidate for any elective office or acting as a lobbyist for four years following the conviction.⁷³ A court may set aside an official action of a public officer if the action might not have otherwise been taken had the violator disqualified himself or herself.⁷⁴

5. Resources Available from the Fair Political Practices Commission.

The Fair Political Practices Commission has a full-time staff and several resources available to assist public officers on the conflict laws. The resources provided by the Fair Political Practices Commission include the following:

- Seek informal assistance from a consultant at the Fair Political Practices Commission. The consultant can be reached at (916) 322-5660 or 1 (866) ASK-FPPC [(866) 275-3772] during normal business hours.
- Review materials on conflicts of interest which are available on the Fair Political Practices Commission website, located at www.fppc.ca.gov.
- Request a formal written advice letter from the Fair Political Practices Commission.

The City Attorney's Office has no statutory duty or authority under the Political Reform Act to give advice to any advisory body on the Political Reform Act or its application. By statute, the Fair Political Practices Commission has the primary responsibility for impartially administering and implementing the Political Reform Act.

Opinions from the City Attorney's Office are not binding on the Fair Political Practices Commission. Therefore, a public officer's reliance on a City Attorney's opinion will not immunize an officer from any Fair Political Practices Commission administrative action, or from any civil or criminal proceeding if any officer violated the Political Reform Act or other conflict of interest laws. Only good faith reliance on formal written advice from the Fair Political Practices Commission offers protection. We refer each officer who wants this assurance to request a formal opinion from the Fair Political Practices Commission. An officer may rely in good faith on a formal opinion, and acquire some protection from administrative action, and from civil and criminal actions or penalties.

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C. CONFLICTS OF INTEREST IN CONTRACTS UNDER SECTION 1090 *ET SEQ.*

Section 1090 prohibits public officers from being financially interested in a contract. Section 1090 states:

Members of the Legislature, state, county, district, judicial district, and city officers or employees 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. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity....

The purpose of Section 1090 is to make certain that every public officer is guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Any contract made in violation of Section 1090 is void, and cannot be enforced.⁷⁵ In addition, the officer who commits a violation may be subject to criminal and civil penalties, and potential disgorgement of any consideration received or any property acquired in the transaction.⁷⁶ In instances where Section 1090 conflicts with the Political Reform Act, the Political Reform Act will control over Section 1090.⁷⁷

1. Persons Who Are Subject to Section 1090 *et seq.*

Virtually all board members are public officers within the meaning of Section 1090.⁷⁸ Section 1090 also applies to members of advisory bodies if they participate in the making of a contract through their advisory function.⁷⁹ Public officers serving on a multi-member body cannot escape liability for a Section 1090 violation merely by abstaining from voting or participating in discussions or negotiations. Thus, members serving on a body are conclusively presumed to be involved in the making of all contracts under the body's jurisdiction.⁸⁰

2. Participation in Making a Contract.

The critical test for determining whether Section 1090 has been violated is whether the public officer participated in the making of a contract in his or her official capacity.⁸¹ Section 1090 has been extended to cover those who "participate" in the making of the contract by giving advice or being involved in preliminary discussion, negotiations, compromises, reasoning, planning, drawing of specifications, or the solicitation for bids.⁸² A contract must be finalized before a violation of Section 1090 can occur. Once a contract is made, Section 1090 is violated if the officer had participated in any way in the making of the contract. In other words, a public officer may be convicted of a violation regardless of whether the officer actually participated personally in executing the contract, so long as the officer had the opportunity to, and did influence execution directly or indirectly to promote his or her personal interests.⁸³

3. A Multi-member Body May Not Execute a Contract If One of Its Members Has a Requisite Financial Interest in a Contract.

If a public officer is a member of a multi-member body that executes the contract, the officer is conclusively presumed to be involved in the making of the contract. This absolute prohibition applies regardless of whether the contract is found to be fair and equitable, or whether the officer abstains from all participation in the decision. In other words, no multi-member body may make a contract which is financially beneficial to one of its members even if the “interested” member abstains.⁸⁴

4. Requisite Financial Interest.

Section 1090 applies to contracts in which a public officer has a financial interest. The term “financial interest,” is not defined in the statute. Based on case law and statutory exceptions to the basic prohibition, the term is liberally interpreted.⁸⁵ Whether a proscribed financial interest exists in a public contract is primarily a question of fact.⁸⁶ Financial interests include both direct and indirect interests in a contract.⁸⁷ The following is an example of an indirect interest: A member of a county board of supervisors sold his printing business to his son, in return for a promissory note. The printing business provided printing services to the county. The court concluded that the supervisor had a financial interest in the county printing contract, because the contract enhanced the security of his promissory note.⁸⁸

5. The Multi-member Body May Execute a Contract If Its Member Has Only a “Remote Interest” and Abstains from Participating in the Making of the Contract.

A public officer serving on a board, commission, or committee with only a “remote interest” in a contract will not be deemed to have an “interest” within the meaning of Section 1090. If the public officer’s financial interest is a “remote interest,” a contract may be executed if the officer does all of the following:

- Discloses the financial interest to the agency, board, or body.
- The interest is noted in the body’s official records.
- The officer completely abstains from any participation in the making of the contract.⁸⁹

An officer who intentionally fails to disclose the existence of a remote interest before action is taken on a contract in question violates Section 1090, and will be subject to criminal prosecution. However, the violation does not void the contract unless the private contracting party had knowledge of the officer’s remote interest at the time the contract was executed.⁹⁰

There are 14 categories of financial interests considered “remote interests” pursuant to

Section 1091(b)(1)-(14). The “remote interests” consist of the following:

- **Officer or employee of a nonprofit corporation.** An officer or employee of a nonprofit corporation, except as provided in Section 1091.5(a)(8).
- **Employee or agent of a private contracting party.** An employee or agent of a private contracting party, if the following four conditions are met: the contracting party has 10 or more other employees; the public officer was an employee or agent of that party for at least three years prior to taking office; the public officer owns less than 3 percent of the shares of stock of the contracting party; and the former or current employee or agent is not an officer or director, and did not directly participate in formulating the bid of the contracting party.
- **Employees or agents of the contracting party.** An employee or agent of the contracting party, if all of the following conditions are met: the agency in which the person is an officer is a local public agency located in a county with a population of less than 4,000,000; the contract is competitively bid and is not for personal services; the employee or agent is not in a primary management capacity with the contracting party, is not an officer or director of the contracting party, and holds no ownership interest in the contracting party; the contracting party has 10 or more other employees; the employee or agent did not directly participate in formulating the bid of the contracting party; and the contractor is the lowest responsible bidder.
- **Parent.** A parent’s interest in the earnings of his or her minor child for personal services.
- **Landlord or tenant.** That of a landlord or tenant of the contracting party.
- **Attorney, stockbroker, insurance or real estate broker/agent.** This narrow exception may apply to: an attorney of a contracting party or an owner, officer, employee or agent of a firm, which renders or has rendered services to the contracting party in the capacity of stockbroker, insurance agent/broker or real estate agent/broker. For this exception to apply, two conditions must be present. The individual must not receive any remuneration, consideration or commission as a result of the contract; and the individual has an ownership interest of 10 percent or more of the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.
- **Member of a nonprofit corporation formed under the Agricultural Code or Corporations Code.** Any member of a nonprofit corporation formed under either the Food and Agricultural Code or Corporations Code for the sole purpose of selling agricultural products or supplying water.
- **Supplier of goods and services.** A supplier of goods or services when

those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.

- **Party to a Land Conservation Contract.** An officer who enters into any contract or agreement under the California Land Conservation Act of 1965.
- **Director or 10 percent owner of bank or savings and loan.** Except as provided in Section 1091.5(b),⁹¹ a director of, or a person having an ownership interest of 10 percent or more in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor or creditor.
- **Employee of a consulting, engineering, or architectural firm.** An engineer, geologist, or architect employed by a consulting engineering or architectural firm who does not serve as an officer, director, or in a primary management capacity.
- **Housing assistance contracts.** An elected officer in a housing assistance payment contract, entered into pursuant to Section 8 of the United States Housing Act of 1937,⁹² as amended, provided that the officer was elected after November 1, 1986, and the contract was in existence prior to the officer assuming office. The exemption for housing assistance contracts extends only to renew or extend an existing tenant's contract or in a jurisdiction in which the rental vacancy rate is less than 5 percent as to new tenants in a unit previously under a Section 8 contract.
- **Salary, per diem, or reimbursement of expenses from a government entity.** A salary, per diem, or reimbursement for expenses from a government entity.
- **Ownership of less than 3 percent of shares in a for-profit corporation derived from employment.** A for-profit corporation that is the contracting party, provided the officer owns less than 3 percent of the shares of the corporation derived from his or her employment with that corporation.

6. Interests that Are Considered "Noninterests."

The Legislature has defined certain interests as "noninterests." Unlike the "remote interest" exception, an interest that falls into one of these categories is treated as no interest at all, and holding such an interest does not require abstention and generally does not require disclosure. The noninterests in Section 1091.5 are as follows:

- **Corporate ownership and income.** The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of the officer's total annual income,

and any other payments made to the officer by the corporation do not exceed 5 percent of the officer's total annual income.

- **Reimbursement of expenses.** Reimbursement for actual and necessary expenses incurred in the performance of official duty.
- **Public services.** A recipient of public services generally provided by the public body or board of which the officer is a member, on the same terms and conditions as if the officer were not a member of the board.
- **Landlords and tenants of governments.** A landlord or tenant of the contracting party if the contracting party is the federal government or any federal department or agency of this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any public corporation or special, judicial, or other public district of this state or an adjoining state, unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Section 1091.
- **Public housing tenants.** A tenant in public housing, created pursuant to the Health and Safety Code, in which the officer serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to Part 1.7 of Division 24 of the Health and Safety Code.
- **Spouses.** A spouse of an officer or employee of a public agency in his or her spouse's employment or office holding if his or her spouse's employment or office holding has existed for at least one year prior to his or her election or appointment.
- **Unsalariated members of nonprofit corporations.** A nonsalariated member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and the interest is noted in its official records.
- **Noncompensated officers of tax-exempt corporations.** A noncompensated officer of a nonprofit, tax-exempt corporation which, as one of its primary purposes, supports the functions of a public body or board, or to which the public body has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.
- **Contracts between government agencies.** A person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that

employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in the official records.

- **Attorney, stockbroker, insurance or real estate broker/agent.** An attorney of the contracting party or an owner, officer, employee, or agent of a firm which renders, or has rendered service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.
- **Officers, employees and owners of less than 10 percent of a bank or savings and loan.** Except as provided in subdivision (b),⁹³ that of an officer or employee of or a person having less than a 10-percent ownership interest in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor, or creditor.
- **Certain bona fide nonprofit, tax-exempt corporations.** That of: (a) a bona fide nonprofit, tax-exempt corporation, having among its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit that enters into an agreement with a public agency to provide services related to park and natural lands or historical resources and which services are found by the public agency, prior to entering into the agreement or as part of the agreement, to be necessary to the public interest to plan for, acquire, protect, conserve, improve, or restore park and natural lands or historical resources for public purposes; and (b) any officer, director, or employee acting pursuant to the agreement on behalf of the nonprofit corporation.

7. Eminent Domain.

Absent unusual facts, an eminent domain is not subject to Section 1090 because the process is statutorily mandated.⁹⁴

8. Subdivided Lands.

An officer is not prohibited from subdividing land owned by the officer or in which the officer has an interest. The officer must fully disclose the nature of the interest in the land to the body, and may not vote or participate in any manner in the approval.⁹⁵

9. Local Workforce Investment Board.⁹⁶

Section 1090 does not apply to contracts or grants made by local workforce investment

boards created pursuant to the federal Workforce Investment Act of 1998 except when both of the following conditions are met: (a) the contract or grant directly relates to services to be provided by any member of a local workforce investment board or the entity the member represents or financially benefits the member or the entity he or she represents; and (b) the member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.

10. Limited Rule of Necessity.

According to the California Attorney General, the rule of necessity has two facets.⁹⁷ The first facet concerns situations in which a board must contract for essential services and no source other than that which triggers the conflict is available. The contracting officer, or a public board upon which he or she serves, would be the sole source of supply of such essential supply or service, and also would be the only officer or board permitted by law to execute the contract. Public policy would authorize the contract despite this conflict of interest.

The second facet of the doctrine focuses on the performance of official duties rather than upon the procurement of goods or services. A public officer is permitted to carry out the essential duties of his or her office despite a conflict of interest when he or she is the only one who may legally act. It ensures that essential governmental functions are performed even where a conflict of interest exists.⁹⁸

According to the California Attorney General, when the rule of necessity is applied to a member of a multi-member board, as opposed to a single officer or employee, the board member must abstain from any participation in the decision. In other words, the effect of the rule of necessity is to permit a board with a substantially interested member to nevertheless make a contract, but the board member is still prohibited from participating in its making. In the case of a single officer or employee, application of the rule of necessity permits the officer or employee to participate in the making of the contract.⁹⁹

11. Remedies for Contracts Made in Violation of Section 1090.

Generally, every contract made in violation of Section 1090 may be avoided at the instance of any party except the officer interested in the contract.¹⁰⁰ A narrow exception exists for a good faith lessee, purchaser, or encumbrancer of real property, where value was paid, and interest acquired without actual knowledge of a Section 1090 violation.¹⁰¹ In all other instances, payments made to the contracting party must be returned and no claim for future payments under such contract may be made. In addition, the Supreme Court has determined that the public entity is entitled to retain any benefits which it receives under the contract.¹⁰²

Every officer subject to Section 1090 who willfully violates any of the provision of Section 1090 *et seq.*, is punishable by a fine of not more than one thousand dollars or by imprisonment in state prison, and is forever disqualified from holding any office in the State of California.¹⁰³ Any current public officer or employee who willfully and knowingly

discloses confidential information for pecuniary gain, to any other person, confidential information acquired by him or her in the course of his or her official duties, or uses any such information for the purpose of pecuniary gain, is guilty of a misdemeanor.¹⁰⁴

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D. COMMON LAW DOCTRINE OF INCOMPATIBLE PUBLIC OFFICES.

The common law doctrine of “incompatible offices” restricts the ability of public officers to hold two different public offices simultaneously if the offices have overlapping and conflicting public duties. A court has summarized the doctrine as follows:

One individual may not simultaneously hold two public offices where the functions of the offices concerned are inherently inconsistent, as where there are conflicting interests, or where the nature of the duties of the two offices is such as to render it improper due to considerations of public policy for one person to retain both.¹⁰⁵

Two elements must be present to fall within the common law doctrine of incompatibility of offices. First, the officer in question must simultaneously hold two public offices. Second, there must be a potential conflict or overlap in the functions or responsibilities of the two offices.¹⁰⁶ In the absence of statutes suggesting a contrary result, offices are incompatible if there is any significant clash of duties or loyalties between the two offices, if the dual office holding would be improper for reasons of public policy, or if either office exercises a supervisory, auditory, appointive, or removal power over the other.¹⁰⁷ The common law doctrine may be superseded by legislative enactment. In other words, the legislature may expressly authorize the dual holding of offices notwithstanding the fact that the dual holding would otherwise be prohibited by the common law doctrine.¹⁰⁸

Under the first element, the prohibition applies when both positions are offices. The elements of an office include the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is vested with power to perform a public function for a public benefit.¹⁰⁹ The Attorney General summarized the requirements as follows: the public office is a position in government, (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and exercises some sovereign powers of the state.¹¹⁰ The second element requires a review of the duties of the two public offices, to determine whether the performance of duties of either office could have an adverse effect on the other.¹¹¹

In deciding whether the offices are incompatible, an actual clash of duties or loyalties need not be found to exist. The potential for significant clashes is sufficient to render the offices incompatible.¹¹² Under this common law doctrine, the public officer automatically vacates the first office upon assumption of the second office if the two are incompatible.¹¹³ If it appears likely that the duties of the two offices overlap, this Office will generally render conservative advice and recommend that the officer not simultaneously hold both offices to avoid an automatic vacancy in the first office.

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E. COMMON LAW CONFLICT OF INTEREST DOCTRINE.

In 1928, the California Supreme Court enunciated the common law doctrine¹¹⁴ against conflicts of interest as follows:

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.¹¹⁵

The common law conflict of interest is not defined by statute or by regulation. The basic rule is that a public officer 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. The California Attorney General has taken the position that where no conflict is found according to statutory prohibitions, special situations could still constitute a conflict under the longstanding common law doctrine.¹¹⁶ If a situation arises where a common law conflict of interests exists as to a particular transaction, the officer is disqualified from taking any part in the discussion and vote regarding the particular matter.¹¹⁷

As a general rule, the decision maker should not be tempted by his or her own personal or pecuniary interest and the doctrine will apply to situations involving nonfinancial personal interest.¹¹⁸ A good example where a common law conflict of interest might lie is when a parent of an elected official owns property as his or her sole and separate property and applies for rezoning in order to develop an apartment complex. The elected officer may know of his or her parent's economic needs, or know that eventually he or she will inherit the apartment complex. This most likely presents a common law conflict of interest.¹¹⁹

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F. OTHER MISCELLANEOUS CONFLICTS LAWS.¹²⁰

1. Redevelopment Agency Conflicts.

An officer whose official duties require participation in the formulation or approval of plans or policies for the redevelopment of the project area may not acquire any interest in any property included within the project area.¹²¹ If any officer owns or has any direct or indirect financial interest in the property included within the project area, that officer shall immediately make a written disclosure of that financial interest to the agency and the legislative body, entering the disclosure in the official minutes of the agency and the legislative body. Failure to make this disclosure constitutes misconduct in office. A memo prepared by the City Attorney's Office on the subject is available on the City of Fresno Website at <http://www.fresno.gov/Staff/ConflictofInterestMaterials.htm>. The memo also includes a form entitled "Disclosure Statement Redevelopment Agency Project Areas," to be completed by the affected public officers.

2. Exception to Redevelopment Agency Conflicts.

Health and Safety Code Section 33130 does not, however, prohibit any officer from acquiring an interest in property within the project area for the purpose of participating as an owner or reentering into business pursuant to the State Redevelopment Law if the officer has owned a substantially equal interest as that being acquired for three years immediately preceding the selection of the project area.¹²² A rental agreement or lease of property which meets four conditions set forth in the statute is not an "interest in real property" for purposes of Subdivision (a).¹²³

A further exception is found in Health and Safety Code Section 33130.5, which permits any officer of the agency to acquire property for personal residential use by lease or purchase within a project area after the agency has certified that the improvements to be constructed or work to be done on the property to be purchased or leased has been completed or has certified that no improvements need to be constructed or that no work needs to be done on the property. This section also requires immediate written disclosure to the agency, recording the disclosure in the minutes, and disqualification from voting on any matters directly affecting such purchase, lease, or residency. Finally, failure to disclose constitutes misconduct in office.

3. Discount Passes on Common Carriers.

California Constitution Article XII, Section 7 prohibits public officers from accepting free or discount passes from a transportation company. The basic prohibition states:

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

relation to nor have a financial interest in a person or corporation subject to regulation by the commission.¹²⁴

The Attorney General has opined that the prohibition applies in the following manner¹²⁵:

- The prohibition applies to public officers, both elected and nonelected, but not to employees.
- The prohibition applies irrespective of whether the pass or discount was provided in connection with personal or public business.
- Violation of the prohibition is punishable by forfeiture of office. Quo warranto proceeding is the appropriate way to enforce the remedy.

The Attorney General has indicated that where free flights or travel is part of a compensation package (i.e., where the public officer was a spouse of a flight attendant), the free transportation was offered to the public officer as a member of a larger group under a generally authorized or approved plan, a violation does not result.¹²⁶ The Attorney General has also sanctioned frequent flyer discounts and a coach to first-class upgrade as part of the airline=s policy of providing free first-class upgrades to honeymooning couples.¹²⁷

Thus, if the pass or discount is provided to the officer because of his or her position as a government official, the prohibition applies. If it is provided to the officer as a member of a larger group that is not related to the functions of his or her office, the prohibition may not be applicable.

4. Government Code Section 87407: Revolving Door for Local Agencies.

Effective January 1, 2004, Section 87407 of the Political Reform Act was amended to prohibit both state and local public officers from using his or her official position to influence a governmental decision on any person in which the public officer has, is negotiating with, or has any arrangement for future employment. Before its amendment, Section 87407 only applied to state public officers.¹²⁸ Section 87407 now reads as follows:

No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.

The Fair Political Practices Commission has not had an opportunity to issue a written opinion on the amended Section 87407. Relying on past advice letters on the subject, the Fair Political Practices Commission has advised that merely sending a resume or application to a specific person or entity is not considered as negotiating prospective

employment. Similarly, entertaining informal inquiries about a public officer's future plans and receiving expressions of general interest in discussing potential employment opportunities at some indefinite point in the future is not considered negotiating prospective employment.¹²⁹

Regulation 18747 describes the prohibition as follows:

- a. No public official subject to Government Code Section 87407 shall “make”, “participate in making” or “use his or her official position to influence” any governmental decision as defined in 2 Cal.Code Regs., Sections 18702.1, 18702.2, 18702.3, 18702.4, if the decision directly relates to a prospective employer.
- b. A governmental decision “directly relates” to a prospective employer if the public officer knows or has reason to know:
 - (1) The prospective employer is “directly involved” in the decision, as defined in Cal.Code Regs., Section 18704.1(a); or
 - (2) It is reasonably foreseeable that the financial effect of a decision on a prospective employer is material as follows:
 - (i) For a business entity, the same as 2 Cal.Code Regs., Section 18705.1(b);
 - (ii) For a nonprofit entity, the same as set forth in 2 Cal.Code Regs., Section 18705.3(b)(2); or
 - (iii) For an individual, the same as set forth in 2 Cal.Code Regs. Section 18705.3(b)(3).
- c. A person is a “prospective employer” of a public officer if the officer, either personally or through an agent, is “negotiating” or has an “arrangement” concerning prospective employment with that person.
 - (1) A public officer is “negotiating” employment when he or she interviews or discusses an offer of employment with an employer or his or her agent.
 - (2) A public officer has an “arrangement” concerning prospective employment when he or she accepts an employer’s offer of employment.
 - (3) A public officer is not “negotiating” or does not have an “arrangement” concerning prospective employment if he or she rejects or is rejected for employment.
- d. Notwithstanding subdivision (a), the prohibition of Government Code Section 87407 do not apply if:
 - (1) The governmental decision will affect the prospective employer in substantially the same manner as it will affect a “significant segment” as set

forth in 2 Cal.Code Regs. Section 18707(b)(1) of the public generally;

(2) The public officer is legally required to make or participate in the making of the governmental decision within the meaning of Government Code Section 87101 and 2 Cal.Code Regs. Section 18708; or

(3) The prospective employer is a state, local or federal governmental agency.

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IV. RETENTION AND DISCLOSURE OF PUBLIC RECORDS

A. INTRODUCTION.

The City, including its boards, commissions, committees, and similar bodies, are subject to state laws governing the retention of public records.¹³⁰ The City's records retention schedule is located in Resolution No. 93-139, which lists the time periods certain public records must be retained by the City. In addition to the City's duty to retain records, the Public Records Act¹³¹ details what government information is and is not available to the public. The Public Records Act, which is modeled after the federal Freedom of Information Act, applies to records containing information relating to the conduct of the public's business prepared, owned, used, or retained by a local agency regardless of physical form or characteristics.¹³² City bodies are "local agencies" and subject to the Public Records Act.¹³³ Unless otherwise provided, public records are to be open to inspection at all times during the office hours of public agencies.¹³⁴ Any person may receive a copy of any identifiable public record upon request and payment of a prescribed fee.¹³⁵

B. PUBLIC RECORDS ARE SUBJECT TO DISCLOSURE UNLESS EXPRESSLY EXEMPT UNDER THE PUBLIC RECORDS ACT.

Public records are subject to disclosure unless they are expressly exempt under the Public Records Act or exempt under the "balancing test." The balancing test is also referred to as the "catchall provision," where the City must determine whether the public interest in disclosure is clearly outweighed by the public interest in nondisclosure.¹³⁶

C. PROCEDURE FOR REQUESTING AND RESPONDING TO REQUESTS FOR PUBLIC RECORDS.

- Any person may request to inspect or receive a copy of a record. The request may be verbal and need not be in writing. City staff may ask the person to submit the request in writing to ensure timely and full compliance with the request.
- The local agency must determine whether the request reasonably describes an identifiable record. If not, the local agency must make reasonable efforts to assist the person to make a focused and effective request that reasonably describes an identifiable record. This additional duty is not required if the records requested are made available, the records are expressly exempt from disclosure, or an index of the records are made available.¹³⁷
- If the records requested exist, the local agency must determine within ten (10) days of receipt of the request (verbal or written) whether the request in whole or in part, seeks disclosable records. The local agency must

immediately notify the person of the determination and the reasons therefor. Under unusual circumstances, the duty to respond may be extended by no later than fourteen (14) days. Under no circumstances may the Public Records Act be used to delay or obstruct inspection or copying of public records.¹³⁸

- The City must determine whether the records requested are exempt from disclosure under its express provisions or under the balancing test. If certain portions of the record are exempt from disclosure, the local agency must delete those portions that are reasonably segregable from the record, and make the balance of the record available for inspection.¹³⁹
- If the request is denied, the local agency must justify the denial by demonstrating that the record is expressly exempt under the Public Records Act or under the balancing test.¹⁴⁰ If the request for records was in writing, any denial in whole or in part, must be in writing. The notification of denial must include the names and titles or positions of each person responsible for the denial.¹⁴¹
- If the records are not exempt from disclosure, the local agency must have the records made available for inspection, or have copies of the records available upon payment of a fee as set forth in the Master Fee Schedule.¹⁴²
- If the documents are voluminous or in a form that is not easily reproducible, ask the person whether a summary of the information contained in existing documents may be provided as a response to the request.

The local agency should contact its legal advisor whenever there is a question of whether a document is exempt from disclosure, whenever the document is labeled attorney-client privilege, and whenever the document pertains to litigation or threatened litigation.

D. VIOLATIONS OF THE PUBLIC RECORDS ACT.

A local agency may not file a declaratory relief action solely to determine the local agency's obligation to disclose documents requested by a member of the public.¹⁴³ If the local agency refuses to supply records, the requesting person may bring an action in Superior Court to compel disclosure. If the court determines the records must be turned over, the local agency is required to pay attorneys' fees and court costs. If the local agency prevails, it is entitled to attorneys' fees only if the court finds that the request was "clearly frivolous."¹⁴⁴ Usually, refusal to disclose is based upon the privacy rights of an employee or applicant.

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V. RECOMMENDATIONS

In summary, individuals serving on a City board, commission, committee, or a similar body, or one of its subcommittees are subject to a number of state laws. For this reason, we recommend that all such bodies of the City, no matter how small, maintain at a minimum, an official address, a files location, a copy of agendas, notices, and minutes of meetings in their files.

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ENDNOTES

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- ¹ See for example, Charter Section 900, which permits the council to create boards and commissions as in its judgment are required, and grant them such powers and duties authorized by law.
- ² *Zumwalt v. Trustees of Cal. State Colleges* (1973) 33 Cal. App. 3d 665, 674.
- ³ *McQuillin Mun. Corp.* § 12.230.10(3rd ed.) pp 399 - 400.
- ⁴ *Daniels V. Tergeson* (1989) 211 Cal. App. 3d 1204; 73 Ops. Cal. Atty. Gen. 197, 206 (1990) and cases cited therein.
- ⁵ *Cohan v. City of Thousand Oaks* (1994) 30 Cal. App. 4th 547, 555.
- ⁶ *Boyle v. City of Redondo Beach* (1999) 70 Cal. App. 4th 1109, the Brown Act is located in Government Code Section 54950 *et seq.* All statutory references are to the Government Code, unless otherwise noted.
- ⁷ Section 54952(b).
- ⁸ Charter Sections 907-910.
- ⁹ FMC Sections 2-903 and 17-103.
- ¹⁰ FMC Section 9-70103.1.4.
- ¹¹ FMC Section 8-1206.
- ¹² FMC Section 9-1904.
- ¹³ FMC Section 13-215.1.
- ¹⁴ FMC Section 13-404.
- ¹⁵ FMC Section 13-905.
- ¹⁶ FMC Section 13-1500.200.
- ¹⁷ FMC Section 18-601.
- ¹⁸ *Joiner v. City of Sebastopol* (1981) 125 Cal. App. 3d 799, 805.
- ¹⁹ *Frazer v. Dixon Unified School District* (1993) 18 Cal. App. 4th 781, 792-793.
- ²⁰ *The Brown Act, Open Meetings For Legislative Bodies*, California Attorney General's Office 2003.
- ²¹ Section 54952(b).
- ²² 75 Ops. Cal. Atty. Gen. 263, 269 (1992).
- ²³ *Frazer v. Dixon Unified School District* , *supra*, 18 Cal. App. 4th at p. 793.
- ²⁴ Section 54954.2.
- ²⁵ Section 54956.
- ²⁶ Section 54956.5.

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- ²⁷ Section 54954.2.
- ²⁸ *Id.*
- ²⁹ Section 54954.3.
- ³⁰ Section 54954.2.
- ³¹ Section 54953.3.
- ³² Section 54953.5.
- ³³ Section 54957.5.
- ³⁴ Section 54954.2.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ Section 54952.2(a).
- ³⁹ Section 54952.2(b).
- ⁴⁰ Section 54952.2.
- ⁴¹ Section 54952.2(c)(1).
- ⁴² Section 54956.
- ⁴³ Section 54956.5.
- ⁴⁴ Section 54954.
- ⁴⁵ *Id.*
- ⁴⁶ *Rowen v. Santa Clara Unified School District* (1981) 121 Cal. App. 3d 231, 234.
- ⁴⁷ Sections 54954-54957.10.
- ⁴⁸ Sections 54954.5, 54957.1 *et seq.*
- ⁴⁹ Section 54960.1.
- ⁵⁰ Section 54960.5.
- ⁵¹ Section 54959.
- ⁵² Sections 81000 *et seq.*
- ⁵³ All references to regulations are to Title 2, Division 6 of the California Code of Regulations.
- ⁵⁴ Sections 87100 *et seq.*
- ⁵⁵ “*Holding Two Positions*” (updated 12/19/03), prepared by the Fair Political Practices Commission.
- ⁵⁶ *Eldridge v. Sierra View Hospital District* (1990) 224 Cal. App. 3d 311.
- ⁵⁷ Regulation 18701.

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- ⁵⁸ *Id.*
- ⁵⁹ Section 87200.
- ⁶⁰ FMC Section 2-2001 *et seq.*
- ⁶¹ Section 82048: Regulation 18701.
- ⁶² Regulation 18702.
- ⁶³ Regulation 18703.
- ⁶⁴ Regulation 18704.
- ⁶⁵ Regulation 18705.
- ⁶⁶ Regulation 18706.
- ⁶⁷ Regulation 18707
- ⁶⁸ Regulation 18708.
- ⁶⁹ Section 87105.
- ⁷⁰ Section 91001.
- ⁷¹ Section 91003.
- ⁷² Sections 91000, 91005.
- ⁷³ Section 91002.
- ⁷⁴ Section 91003.
- ⁷⁵ *Thomson v. Call* (1985) 38 Cal. 3d 633, 649.
- ⁷⁶ Section 1097.
- ⁷⁷ Section 81013 – Political Reform Act prevails over all other statutory provisions that would otherwise prohibit an individual from complying with the Political Reform Act.
- ⁷⁸ *Thomson v. Call, supra*, 38 Cal. 3d at p. 633.
- ⁷⁹ *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal. App. 2d 222, 237.
- ⁸⁰ *Thomson v. Call, supra*, 38 Cal. 3d at p. 649.
- ⁸¹ *Millbrae Assn. for Residential Survival v. City of Millbrae, supra*, 262 Cal. App. 2d at p. 237; 66 Ops. Cal. Atty. Gen. at 160-161.
- ⁸² *Campagna v. City of Sanger* (1996) 42 Cal. App. 4th 533, 538.
- ⁸³ *People v. Sobel* (1974) 40 Cal. App. 3d 1046, 1052.
- ⁸⁴ *Thomson v. Call, supra*, 38 Cal. 3d at pp. 645, 649.
- ⁸⁵ *Conflict of Interest*, California Attorney General’s Office (1998), pp. 46, 51.
- ⁸⁶ 84 Ops. Cal. Atty Gen.158 (2001).
- ⁸⁷ *Thomson v. Call, supra*, 38 Cal. 3d at p. 645.

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- ⁸⁸ *Moody v. Shuffleton* (1928) 203 Cal. 100.
- ⁸⁹ Section 1091.
- ⁹⁰ Section 1091(d).
- ⁹¹ Section 1091.5(b) identifies interests deemed “noninterests.”
- ⁹² 42 U.S.C. Section 1437f.
- ⁹³ Section 1091.5(b) states that an officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor, or creditor.
- ⁹⁴ *Santa Clara Valley Water District v. Grosse* (1988) 200 Cal. App. 3d 1363, 1369.
- ⁹⁵ Section 1091.1.
- ⁹⁶ Section 1091.2.
- ⁹⁷ 69 Ops. Cal. Atty. Gen. 102, 109.
- ⁹⁸ *Id.*
- ⁹⁹ *Id.*, school board trustee abstention; 67 Ops. Cal. Atty. Gen. 369, *supra*, at p. 378, board member abstention; 65 Ops. Cal. Atty. Gen. 305, *supra*, at p. 310, superintendent of schools permitted to participate.
- ¹⁰⁰ Section 1092.
- ¹⁰¹ Section 1092.5.
- ¹⁰² *Thomson v. Call*, *supra*, 38 Cal. App. 3d at p. 633.
- ¹⁰³ Section 1097.
- ¹⁰⁴ Section 1098.
- ¹⁰⁵ *Elridge v. Sierra View Local Hospital District*, *supra*, 224 Cal. App. 3d at p. 319.
- ¹⁰⁶ 68 Ops. Cal. Atty. Gen. 337 (1985).
- ¹⁰⁷ *People ex rel Chapman v. Rapsey* (1940) 16 Cal. 2d 636, 642.
- ¹⁰⁸ 74 Ops. Cal. Atty. Gen. 116, 117 fn. 1 (1991).
- ¹⁰⁹ *People ex rel Chapman v. Rapsey*, *supra*, 16 Cal. 2d at p.642.
- ¹¹⁰ 68 Ops. Cal. Atty. Gen. *supra*, at p. 337.
- ¹¹¹ *Elridge v. Sierra View Local Hospital District*, *supra*, 224 Cal. App. 3d 311 at p. 319.
- ¹¹² 78 Cal. Ops. Atty. Gen. 316 (1995).
- ¹¹³ As set forth in *People ex. rel. Chapman v. Rapsey*, *supra*, 16 Cal. 2d at p. 644 the mere acceptance of the second incompatible office per se terminates the first office as effectively as a resignation; but see however, 74 Ops. Cal. Atty. Gen. 116 (1991) in which the Attorney General concluded that the person will remain in the prior position

as a de facto member until he or she resigns or is removed from office by a quo warranto action or other lawsuit.

¹¹⁴ The common law has developed through precedential court decisions. It differs from statutory law which has been created through the legislative process.

¹¹⁵ *Noble v. City of Palo Alto*, (1928) 89 Cal. App. 47, 51.

¹¹⁶ 53 Ops. Cal. Atty. Gen. 163 (1970).

¹¹⁷ 26 Ops. Cal. Atty. Gen. 5, 7 (1955).

¹¹⁸ *Clark v. Hermosa Beach* (1996) 48 Cal. App. 4th 1152.

¹¹⁹ League of California Cities, *Providing Conflict of Interest Advice*, February 2004.

¹²⁰ *Id.*

¹²¹ Health Safety Code Section 33130.

¹²² Health & Safety Code Section 33130(b).

¹²³ Health & Safety Code Section 33130(c).

¹²⁴ Cal. Const. Art. XII, Section 7.

¹²⁵ *Conflicts of Interest*, California Attorney General's Office (1998) at p. 72.

¹²⁶ 67 Ops. Atty Gen. 81 (1984).

¹²⁷ 74 Ops. Atty Gen. 26 (1991).

¹²⁸ AB 1678.

¹²⁹ FPPC Advice Letter A-03-269 (2004).

¹³⁰ Sections 34090 *et seq.*

¹³¹ Sections 6250 *et seq.*

¹³² Section 6252.

¹³³ Section 6252(b).

¹³⁴ Section 6253(a).

¹³⁵ Section 6253(b).

¹³⁶ Section 6255.

¹³⁷ Section 6253.1.

¹³⁸ Section 6253.

¹³⁹ *Id.*

¹⁴⁰ Section 6255.

¹⁴¹ Section 6253.

¹⁴² *Id.*

¹⁴³ *Filarsky v. Superior Court* (2002) 28 Cal. 4th 419.

¹⁴⁴ Section 6259.