

San Elijo Joint Powers Authority: public agency ethics laws, and organizational structure

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What we will cover

- **San Elijo Joint Powers Authority status:**
 - Structure of joint powers agreement
 - County sanitation district rules
- **AB 1234 mandates two hours of ethics training every two years for**
 - Every elected or appointed official who gets compensation or reimbursements
 - Every employee designated by policy
 - Topics covered are set by FPPC and AG (2 CCR sec. 18371)

Brief history of San Elijo JPA

- Cardiff Sanitation District and Solana Beach Sanitation District agreed in 1963 to construct joint sewerage system
- 12 (or more) revisions to joint powers agreement between 1963 and 2008
- Solana Beach Sanitation District dissolved in 1990 into City of Solana Beach
- Cardiff Sanitation District dissolved in 1991 into City of Encinitas
- Restatement of joint powers agreement proposed in 2006, and was adopted thereafter by both Cities

Legal structure of San Elijo JPA

- Joint powers authority is legally separate agency from member agencies
- Subject to restrictions of a county sanitation district (Health & Safety Code § 4700 *et seq.*)
- Basic purpose is to operate Joint System
- Governed by city council members representing Solana Beach and Encinitas, equally
- General manager has charge of day to day operations

Recent changes to San Elijo Joint powers agreement

- Once operated on a contract basis, now a separate employer
- Revisions to joint powers agreement give general manager more responsibility
- Deleted outdated references and consolidated amendments into a single document
- Revised agreement reflects actual practices of agency

AB 1234 Compliance

- SEJPA has an adopted policy for Board members, General Manager and Board Secretary
 - **What activities are compensable**
 - **Reimbursement process and rates**
 - **Expense reporting and post-event reports**
 - **Recordkeeping regarding compliance**
 - **Ethics training required every 2 years (which is why you're here today)**

What we will cover

- **AB 1234 mandates training in:**
 - Ensuring fair processes in government
 - Government transparency rules
 - Laws regarding personal financial gain
 - Laws concerning “perks” of office
- **We will provide certificate of compliance**

Fair Processes

- Due process in decision-making
- Competitive bidding
- Common law bias restrictions (including anti-nepotism rules)
- Incompatible offices

Fair Processes: Due Process

- Basic due process guaranteed by state and federal constitutions
 - Impartial decision maker (no bias, conflict)
 - Notice of decision to be made
 - Opportunity to be heard
 - Some right of appeal
- How much due process is enough?
 - Skelly hearings vs. at-will employment
 - Revoking discharge permit
 - Declaring bidder non-responsible vs. non-responsive

Fair Processes: Bidding

- When competitive bidding is mandated is primarily statutory
 - Construction contracts generally require C/B
 - Services contracts generally don't require C/B
- Common exceptions:
 - Specialized equipment and technology
 - Energy management
- Even if *not* required, process must be fair
 - Rules agency sets must be followed or award can be set aside by writ
 - Don't change rules in the middle of game

Fair Processes: Bidding

- Competitive bidding is required:
 - For work exceeding \$35,000 (Public Contract Code section 20783)
 - Unless board rejects bids by 4/5 vote and perform by force account
 - Unless it is sewerage maintenance or repair
 - But, emergency work can be done to safeguard life, health and safety if board declares need

Fair Processes: Freedom From Bias

- Common law bias restrictions (including anti-nepotism rules)
 - Common law cases survive the Political Reform Act, Government Code 1090, etc.
 - Non-economic interests in decision may require disclosure and disqualification: *perception* of fairness
 - Non-dependent family members
 - Current and former business associates
 - Appearance of personal bias based on prior association, advocacy of cause, membership in organizations

Fair Processes: Incompatibility

- “Public offices” that overlap in any way are “incompatible” (Gov. Code sec. 1099)
 - Penalty is forfeiture of second office assumed
 - Cannot hold civil and active military office
 - “Overlap” means one supervises, oversees or regulates the other—even just potentially
 - Water district director and city council member
 - Joint powers authority membership *expressly* allowed

Fair Processes: Incompatibility

- Public *employment* is not automatically “incompatible” though may be
 - But most public employees forfeit employment if assume office of agency which employs them
- Agencies need formal policies on “moonlighting” and notice to employee (Gov. Code section 1126)

Government Transparency

- Disclosure
- Open meetings
- Public records

Government Transparency -- Disclosure of Economic Interests (Gov. Code 87200 et. seq)

- “Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the official should be disqualified from acting in order that conflicts of interest may be avoided” (Gov. Code 81002(c).)
- Be familiar with reporting requirements—they have a broad reach

Government Transparency -- Disclosure of Economic Interests

HOW DOES IT WORK?

- Adopt a conflict of interest code.
- File a Statement of Economic Interests, called “SEIs” or “Form 700s.”
- Form 700s are filed with the agency
- Form 700s must be signed under penalty of perjury.
- FORM 700s are PUBLIC DOCUMENTS (no home addresses and telephone numbers).
- **NEW: Form 801 for reporting gifts to the agency**

Government Transparency -- Disclosure of Economic Interests

- Form 700 includes extensive instructions
- FPPC levies penalties if not filed timely. The fines are up to \$5,000 per day.
- Must be filed by: Elected and Designated Officials
- File when: Assuming Office, Annually, Leaving Office, Candidate for Office, Amendment of Form
- File with state, city or county agency

[www. fppc.ca.gov](http://www.fppc.ca.gov) FPPC Publication: “Your Duty to File”

Government Transparency -- Brown Act (Gov. 54950 et seq.)

- “The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

Government Transparency -- Brown Act – Open Meetings

Applies to Legislative Bodies:

- Governing bodies, committees and commissions, whether advisory or decision making, created by formal action of a legislative body.
- Private corporations when created to exercise public authority or if it receives funds and a member of the agency is appointed as a voting member.

Government Transparency -- Brown Act – Open Meetings

- Advisory committees subject to open meetings laws if created by official action
- **Exception:** Ad hoc committees comprised solely of less than a quorum of the legislative body with temporary task

Government Transparency – Brown Act – Open Meetings

- MEETINGS

- All meetings of a legislative body of a local agency shall be OPEN and PUBLIC and all persons shall be permitted to attend any meeting subject to certain narrow exceptions.
- Meetings must be held in a public place, properly noticed, with agenda items containing a sufficient description to put the public on notice of what will be discussed.
- Action cannot be taken on items not on the agenda.

Government Transparency -- Brown Act – Open Meetings

- A majority of the members of the legislative body at the same time and place
- To hear, discuss, or deliberate (including retreats!)
- Use of direct communications, personal intermediaries, or technological devices employed by a majority of members to build collective concurrence on action anticipated is prohibited....
Including via E-MAIL
- It does not include individual contacts, conferences, community meetings, social events or meetings of other legislative bodies.
- Agenda materials provided to board members must be made available to the public at the same time

Government Transparency -- Brown Act – Closed Sessions

- Personnel
- Litigation – Threatened, existing, anticipated
- Real Estate Negotiations – Price and Terms
- Labor Negotiations
- Public Security

Government Transparency -- Brown Act – Closed Sessions

Except as expressly authorized by law, no closed sessions are permitted (Gov. Code section 54962)

No “semi-closed” sessions: “The general rule is that closed-session access is permitted only to people who have ‘an official or essential role to play’.” (A.G. Opinion No. 04-408, 2005)

Government Transparency -- Public Records – Prop 59

- Voter Approved Prop 59
- Cal Const., Art 1, Sec. 3 “the people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public official and agencies shall be open to public scrutiny.”

Government Transparency -- Public Records Act (6250 et seq.)

- The Legislature . . . finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

Government Transparency -- Public Records Act

- Generally, the laws favor disclosure.
- The burden is on the agency to justify a failure to disclose.
- Public records include all writings, photographs, electronic files, etc., including e-mail, if kept in the ordinary course of business.
- Public records must be open for inspection.

Government Transparency -- Public Records Act

Extensive list of exempt confidential documents including:

- Preliminary Drafts
- Personnel and Medical Records
- Litigation Records (while pending)
- Trade Secrets
- Name, Address & Phone Numbers

Financial Gain

- Bribery
- Conflicts of interest
- Campaign regulation

Financial Gain – Bribery

- **BRIBERY - (Penal Code sec. 68)**
 - Every officer, employee or appointee of any political subdivision who asks, receives or agrees to receive any bribe for an agreement to vote, opine or act in a certain manner on any is guilty of bribery punishable by imprisonment in the state prison for 2-4 years, or if no bribe has actually been received, by a restitution fine.

Financial Gain – Conflicts

- **CONFLICTS OF INTEREST- Political Reform Act (Gov. Code 87100, 87103)**
 - 87100 – No governmental official at any level of state or local government shall make, participate in making or in any way attempt to use his or her official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.
 - 87103 – A public official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her family, or one of the following financial interests:

Financial Gain – Conflicts

- Business Interest-Direct or Indirect Investment of \$2000 or more
- Real Property Interest – Direct or Indirect Interest worth \$2,000 or more.
- Any source of income, except gifts or loans by a commercial lender, worth \$500 or more within the prior twelve months.
- Any business entity in which the official is a director, officer, partner, trustee employee or holds any position of management
- Any donor of gifts, aggregating \$250 or more in the prior 12 months – provided, received, or promised

www.fppc.ca.gov

FPPC publication: “Can I Vote?”

Financial Gain – Conflicts

- What do I do if I have a conflict?
- Publicly identify the nature of the conflict so as to be understood by the public
- Recuse yourself from discussing or voting
- Leave the room until the matter is concluded (unless the item is on consent)
- But, you may speak when the general public speaks

Financial Gain – Prohibited Contracts (1090)

- Simple Rule: A government agency cannot contract with itself.
- Officers AND employees may not have a financial interest in contracts made by them or by any board or body of which they are members.
- Must satisfy BOTH the Political Reform Act and Gov. Code 1090

Financial Gain -- Prohibited Contracts (1090)

- Gov. Code 1090 applies when:
 - A financially interested director is a member of the board that actually approves the contract. Note: abstention is not enough!
 - A staff member has a financial interest in a contract if the staff member participates in making the contract.

Financial Gain – Prohibited Contracts (1090)

- Making a contract includes:
 - Preliminary discussions, negotiations, compromises, reasoning, drawings of plans, solicitations for bids, modifications to contracts.
 - There is an exception to 1090 for remote interests and non-interests as defined by statute and for existing contracts.

Financial Gain – Prohibited Contracts (1090)

- PENALTIES FOR 1090 VIOLATION:
 - Maximum penalty for willful violation is a felony conviction, \$1,000 fine or imprisonment in the state prison and the official is forever disqualified from holding any office in this state. A contract made in violation of 1090 is void and payment is prohibited. It is probably subject to a 3 year statute of limitations after discovery, although sometimes longer.

Financial Gain- Prohibited Contracts (1090)

- Nonprofit defenses not available:
 - Good faith doesn't matter.
 - Reliance on advice of counsel doesn't matter
 - Fairness of transaction doesn't matter
 - Approval by remaining Board doesn't matter
 - Lack of direct benefit doesn't matter
- Enforcement can be private, DA, AG and FPCC
 - FPCC advice now available before transaction

Financial Gain – Conflicts Campaign Contributions

- **CAMPAIGN CONTRIBUTIONS – (Gov. Code 84308)**
 - Disqualifies any officer who is running or has run for elective office from participating in decisions affecting campaign contributors.
 - Generally, the officer is disqualified and must disclose if he or she received contributions **of more than \$250** in the prior 12 months.
 - And, the officer is prohibited from soliciting or receiving contributions **in excess of \$250** during proceedings affecting campaign contributors, or for three months afterwards.

Financial Gain – Conflicts Leaving Office (Gov. 87406.3, 87407)

- Employment Restrictions (revolving door rule)
 - Local elected official, chief administrative officer of a county, city manager or general manager or chief administrator of a special district shall not, for a period of one year after leaving employment, act as agent or attorney for, or otherwise represent, for compensation, any other person by making appearance or oral or written communications to that local government agency or any subcommittee for the purpose of influencing administrative or legislative action or any action on a proceeding involving amendment, award, revocation of a permit, license, grant or contract.

Financial Gain – Conflicts Leaving Office (Gov. 87406.3, 87407)

- Employment Restrictions (cont'd)
 - No public official shall make, participate in making, or use his or her official position to influence any decision relating to any person with whom he or she is negotiating prospective employment.

Perquisites of public office or employment (perks)

- Compensation and reimbursement
- Limits on receipt of gifts
- Ban on honoraria
- Ban on free transportation
- Gifts of public funds
- Misuse of public funds
- Mass mailing limits

Perks: Compensation and Reimbursements

- AB 1234 says
 - Written policy required
 - Must specify events Board gets compensation for beyond “meetings”
 - IRS reimbursement rates, or lowest rates available by default
 - Documentation of reimbursement required
 - Post-activity “report” required
 - Agency must track compliance

Perks: Questions under AB 1234

- Policy must be in place before compensation or reimbursement can be provided?
- What is a “reasonable” time for submission of reimbursement requests?
- What if agency pays directly for meals, hotel, etc. so there is no “reimbursement”?

Perks: Gift and Honoraria Limits

- Receipt of gifts above **\$460** (indexed) is illegal—even from friends
- Receipt of honoraria for appearance or speeches are prohibited
 - Travel expenses, lodging may count
 - FPPC regulations exempt some gifts
 - Can be paid for practicing profession

Perks: Free Transportation

- California constitution (art XII, sec. 7) expressly prohibits public officers from accepting free or discounted transportation from transit companies
- Penalty is forfeiture of office
- Doesn't apply to **employees**

Perks: Misuse, Gifts of Public Funds

- Misuse of public funds can be crime (Penal Code section 424)
 - Violation of AB 1234 policy
 - Allowing political use of public funds or resources for candidate, ballot measure
 - Spending or allowing below-cost use of public resources for purpose beyond agency authority
 - Donation of services or use of equipment?
 - Paying for dinner for board member's spouse?
 - Buying advertisement in Chamber of Commerce publication?

Perks: Misuse, Gifts of Public Funds

- Gift of public funds is unconstitutional in California (art. 16 section 6)
 - Officials may have personal liability
 - Courts allow public officials to determine value of expenditure to agency
 - “Gifts” include “lending credit”
 - Can’t guarantee private debt (so no partnerships)
 - Can’t “mortgage” public property
 - Amount of severance for breach of public employment contract limited (Government Code section 53260)

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Constitutional limits on public officers

- ARTICLE VII, sec. 7.
 - *A person holding a lucrative office under the United States or other power may not hold a civil office of profit. A local officer or postmaster whose compensation does not exceed 500 dollars per year or an officer in the militia or a member of a reserve component of the armed forces of the United States except where on active federal duty for more than 30 days in any year is not a holder of a lucrative office, nor is the holding of a civil office of profit affected by this military service*

Constitutional limits on public employee compensation (bonuses)

- ARTICLE XI, sec. 10.
 - (a) A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor *after service has been rendered or a contract has been entered into and performed in whole or in part*, or pay a claim under an agreement made without authority of law.

Perks: Mass Mailings

- Political Reform Act treats 200+ mailings of information about elected officials as a campaign expense
- If at public expense, is a misuse of funds
- Watch out for newsletters, annual reports and press releases
- Photos of elected officials get special scrutiny

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