

## AB 1234 Self-Study Materials

### Part II: Governmental Transparency and Fair Processes

AB 1234 requires elected and appointed officials to take two hours of ethics training if they receive compensation for their service or are reimbursed for their expenses.<sup>1</sup> The ethics training requirement may also apply to agency employees designated by the agency's legislative body.<sup>2</sup>

There are many ways to satisfy this requirement, including in-person training and self-study activities. Moreover, like all ethics laws, AB 1234 is a floor, not a ceiling. Local officials can demonstrate their commitment to ethics in public service by going beyond AB 1234's minimum requirements.

As a special service, the Institute for Local Government is offering this article for one hour of AB 1234 self-study credit (or half of the minimum requirement). To claim self-study credit, log on to [www.ca-ilg.org/AB1234selfstudy](http://www.ca-ilg.org/AB1234selfstudy), print out and take the test, mail it to the address indicated with the \$37.50 processing fee. This fee covers grading the test, providing the correct answers (and explanations) and your proof of participation certificate; it also supports the Institute's work in the public service ethics area.

### Scope of This Self-Study Exercise

This article covers half of the required areas of ethics, including:<sup>3</sup>

- Governmental transparency laws, including financial disclosure laws and laws protecting the public's right to participate in meetings and access public records (the Brown Act and Public Records Act); and
- Laws relating to fair processes, including common law bias, due process, incompatible offices, competitive bidding requirements for public contracts and disqualification from participation in decisions involving family members.

The self-study materials covering the other half of the areas of ethics training required by AB 1234 may be found here: [www.ca-ilg.org/post/ab-1234-self-study](http://www.ca-ilg.org/post/ab-1234-self-study).

Note that public service ethics laws are extraordinarily complex. The learning objective of both self-study and in-person AB 1234 training courses is to familiarize local officials with when they need to consult agency counsel, the attorney general or the Fair Political Practices Commission about a given situation or course of action.

### Transparency Laws

The principle underlying governmental transparency laws is that the public trusts what it can observe. Transparency law is intended to promote participatory democracy, moreover, the prospect that actions will be publicly known can be a deterrent against actions that might undermine public trust. Thus, the laws in this area are designed to promote the general ethical values of trustworthiness and responsibility.

There are two basic categories of transparency laws. One relates to activities of the individual official. For example, these laws require specified officials to periodically disclose their personal financial interests (so the public can assess whether those interests played a role in the official's decisions). They also require officials to disclose campaign and charitable fundraising activities.

The other kind of transparency laws requires governmental processes to be transparent to the public. These laws require that governmental decisions be made in public and that the public have the opportunity to weigh in on those decisions. They also require that most public records be open to public inspection.

This self-study exercise discusses both kinds of transparency laws.

## Financial Disclosure Laws

There is an adage about one's life being an open book. Nowhere is this truer than for public officials and their finances. The bottom line is that when you become a public official, the public gets to learn a great deal about your financial life. The voters created these disclosure requirements when they approved the Political Reform Act in 1974.<sup>4</sup>

The disclosure requirements apply to nearly every local elected official and department head. Members of commissions, boards, committees and other local agency bodies with significant decision-making authority are also subject to disclosure requirements. An agency may require additional staff positions to disclose their economic interests under the agency's local conflict of interest code. Such employees are known as "designated employees."

The following kinds of economic interests must be disclosed if they meet certain minimum thresholds:<sup>5</sup>

- Sources of income;
- Interests in real property;
- Investments;
- Business positions; and
- Gifts

This disclosure is made on forms called both "Statements of Economic Interests" and "Form 700s." Copies of these forms are generally provided by one's agency. Interactive versions of the forms are available from the Fair Political Practices Commission website: [www.fppc.ca.gov](http://www.fppc.ca.gov).

These forms must be completed 1) upon assuming office 2) on an annual basis while in office and 3) upon leaving office.

## Charitable Fundraising

The disclosure laws are not limited to an official's personal financial interests. There are extensive disclosure requirements relating to an official's campaign fundraising activities.<sup>6</sup> However, a sometimes-overlooked disclosure obligation relates to an official's charitable fundraising activities. The theory is that the public has a right to know who is contributing to an elected official's favorite charities and other causes.

The trigger occurs when an elected official gets someone to contribute \$5,000 or more to a legislative, governmental or charitable cause during a calendar year, known as a behested payment.<sup>7</sup> Within 30 days of reaching the \$5,000 threshold, the elected official must file a report with the official's agency (typically with the filing officer).

## Conducting the Public's Business in Public

California's open meeting laws<sup>8</sup> provide legal minimums for local governmental transparency in decision-making. Decision-making bodies--which include the governing board as well as many committees and advisory bodies--must conduct their business in an open and public meeting to assure the public is fully informed about local decisions.<sup>9</sup>

The following are some key things to keep in mind:

- **Meetings.** A "meeting" is any situation involving a majority of the governing body in which business is transacted or discussed.<sup>10</sup> In other words, a majority of the governing body cannot talk privately about an issue before the body no matter how the conversation occurs, whether by telephone or e-mail or at a local coffee shop.<sup>11</sup>
- **Serial Meetings.** One thing to watch for is unintentionally creating a "serial" meeting—a series of communications that result in a majority of governing body members having conferred on an issue. For example, if two members of a five-member governing body consult outside of a public meeting (which is not in and of itself a violation) and then one of those individuals consults with a third member on the same issue, a majority of the body has consulted on the same issue. Note the communication does not need to be in person and can occur through a third party. For example, sending or forwarding e-mail can be sufficient to create a serial meeting, as can a staff member polling governing body members in a way that reveals the members' positions to one another.<sup>12</sup>
- **Permissible Gatherings.** Not every gathering of governing body members is a problem. For example, a majority of the governing body may attend the same educational conference or a community meeting not organized by the local agency.<sup>13</sup> Nor is attendance at a social or ceremonial event in and of itself a violation.<sup>14</sup> The key rule to keep in mind is a majority of the governing body members cannot meet and discuss agency business except at an open and fully noticed public meeting.
- **Closed Sessions.** The open meeting laws include provisions for closed discussions under very limited circumstances.<sup>15</sup> Because of the complexity of the open meeting laws, close consultation with an agency's legal advisor is necessary to ensure that the requirements relating to and the limitations on closed sessions are observed.

## The Public's Right to Participate in Meetings

Another element of open meeting laws is the public's right to address the governing body. A public official's role is to both hear and evaluate these concerns. There are a number of basic rules that govern this right.

- **Posting and Following the Agenda.** The open meeting laws require that the public be informed of the time of and location and the issues to be addressed at each meeting.<sup>16</sup>
- **Agenda Descriptions.** Each agenda item shall provide a description of the item sufficient enough to inform the community as to whether they should want to participate and/or be heard on the item.
- **The Public's Right to be Heard.** Generally, every agenda must provide an opportunity for the public to address the governing body on any item of interest to the public within the body's jurisdiction.<sup>17</sup> If the

issue of concern is one pending before the legislative body, the opportunity must be provided before or during the body's consideration of that issue.<sup>18</sup>

- **Reasonable Time Limits May Be Imposed.** Local agencies may adopt reasonable regulations to ensure everyone has an opportunity to be heard in an orderly manner.<sup>19</sup>

## The Public's Right to Access Records

Copies of the agenda materials and other documents distributed to the governing body must also be available to the public.<sup>20</sup> The public has the right to see any materials that are created as part of the conduct of the people's business.<sup>21</sup> These materials include any writing that was prepared, owned, used or retained by a public agency.<sup>22</sup> They include documents, computer data, e-mails, facsimiles and photographs.<sup>23</sup> The public may even have a right to access records such as texts and email messages on private devices and accounts used by a public official.<sup>24</sup>

Although there are exceptions to a public agency's duty to disclose records, the safe assumption is virtually all materials involved in one's service on the governing body--including e-mails--are public records subject to disclosure.

## Fair Process Laws

Not surprisingly, fair process laws promote the ethical value of fairness. This is the notion that everyone has a right to be treated fairly by governmental processes, irrespective of who they are or whom they know. The public's perception that decisions are made fairly is a key element of the public's confidence and trust in government and individual public officials.

## The Obligation to be a Fair and Unbiased Decision-Maker

Although California statutes largely determine when public officials must disqualify themselves from participating in decisions, common law (judge-made) and some constitutional principles still require a public official to exercise his or her powers free from personal bias-including biases that have nothing to do with financial gain or losses.

In addition, constitutional due process principles require a decision-maker to be fair and impartial when the decision-making body is sitting in what is known as a "quasi-judicial" capacity. Quasi-judicial matters include variances, use permits, annexation protests, personnel disciplinary actions and licenses. Quasi-judicial proceedings tend to involve the application of generally adopted standards to specific situations, much as a judge applies the law to a particular set of facts.

For example, a court overturned a planning commission's decision on due process grounds, concluding that a planning commissioner's authorship of an article hostile to a project before the commission gave rise to an unacceptable probability of bias against the project, and that the commissioner should have disqualified himself from participating in the decision.<sup>25</sup>

Typically, having the official who may have exhibited bias disqualify himself or herself solves the problem.<sup>26</sup> If the problem is not addressed though, the agency's decision will be at risk of being overturned by the courts.<sup>27</sup> The agency will have to conduct new proceedings free of the influence of the biased decision-maker.<sup>28</sup> If the

violation rises to the level of a denial of due process under constitutional law, the affected individual(s) may seek damages, costs and attorney fees.<sup>29</sup>

Finally, community relations—and the public's views of an official's responsiveness—are seriously undermined when it appears an official is not listening to the input being provided by the public. Even if you disagree with the views being offered, treat the speaker with the same respect you would like to be treated with if the roles were reversed. Moreover, at least one court has ruled that officials' perceived inattentiveness during a hearing violated due process principles.<sup>30</sup>

## Campaign Contributions and Bias

Generally, the ethics laws with respect to campaign contributions emphasize disclosure rather than disqualification. The emphasis on disclosure enables the public to assess for itself the degree an official could be influenced by campaign contributors who appear before the agency. Both financial and in-kind support must be disclosed.

However, under limited (and sometimes counterintuitive) circumstances, certain local agency officials must disqualify themselves from participating in proceedings regarding licenses, permits and other entitlements for use if the official has received campaign contributions of more than \$250 during the previous twelve months from any party or participant.<sup>31</sup> The restrictions apply if the official is sitting on an appointed (as opposed to elected) body.<sup>32</sup>

In addition, these officials are prohibited from receiving, soliciting or directing a campaign contribution of more than \$250 from any party or participant in a license, permit or entitlement proceeding while the proceeding is pending and for three months after the contribution.<sup>33</sup>

## Holding Multiple Public Offices

There is such a thing as too much public service; the law limits the degree to which public officials can hold multiple public offices. The reason is that, when one assumes a public office, one takes on responsibility to the constituents of that agency to put their interests first. When one occupies multiple offices in multiple agencies (for example, membership on the city council and serving on the board of another local agency), that job becomes more complicated, both legally and ethically, because of the possibility of conflicting loyalties.<sup>34</sup>

Offices are incompatible if there is a potential for any significant clash of duties or loyalties between the offices, or either officer exercises a supervisory, auditory or removal power over the other. The prohibition against the simultaneous holding of incompatible offices does not require the existence of an actual conflict between the offices. A potential for a significant clash between the two offices is sufficient to trigger the prohibition.<sup>35</sup> Note there can be specific legislative exceptions to incompatible office rules.

## Competitive Bidding Processes for Public Contracts

Public contracting laws—including those adopted at the local level—are designed to give all interested parties the opportunity to do business with the government on an equal basis. This keeps contracts from being steered to businesses or individuals because of political connections, friendship, favoritism, corruption or other factors.

It also assures that the public receives the best value for its money by promoting competition among businesses so the public can receive the best deal.<sup>36</sup>

Many competitive bidding requirements are locally imposed, for example, by charter cities as part of their municipal affairs authority.<sup>37</sup> State law also authorizes local agencies to adopt procedures for acquisition of supplies and equipment.<sup>38</sup> Most of these purchasing ordinances require competitive bids for contracts in excess of designated dollar amounts.

For public works projects, state law defines when general law cities and counties must use competitive bidding. For general law cities, public works projects over \$5,000 are subject to the state's competitive bidding requirements.<sup>39</sup> For county projects, the threshold is based on population: \$6,500 (counties with populations of 500,000 or over), \$50,000 (counties with populations of 2 million or over) and \$4,000 (all other counties).<sup>40</sup> Note that it is a misdemeanor to split projects to avoid competitive bidding requirements.<sup>41</sup>

In order to give all interested parties an opportunity to do business with the agency and get the best price for the public, the agency has to publicize the opportunity. This is typically accomplished by publishing a notice inviting bids in a newspaper of general circulation that is printed or published in the jurisdiction, or if there is none, posting the notice in at least three public places in the jurisdiction.<sup>42</sup> Trade publications can also be a helpful way to reach a wide segment of the contracting industry.

## Decisions Involving Family Members

The Political Reform Act requires public officials to disqualify themselves from participating in decisions that will increase or decrease their immediate family's expenses, income, assets or liabilities.<sup>43</sup> "Immediate family" includes one's spouse or domestic partner and dependent children.<sup>44</sup> The notion is that it is very difficult for any person to be fair and unbiased when one's family's interests are concerned; it is, of course, also difficult for the public to perceive the official to be fair and unbiased about close family members.

Because of this, some jurisdictions have adopted additional restrictions on the hiring or appointing of relatives of public officials. These are known as anti-nepotism policies. It can be wise to avoid questions about family relationship by voluntarily not participating in decisions that affect family members, even if the law or local agency regulations allow you to participate.

## Beyond the Law

At some point in your service as a public official, you will likely face two common types of ethical dilemmas:

- **Personal Cost Ethical Dilemmas.** This involves situations in which doing the right thing may or will come at a significant personal cost to you or your public agency. These also can be known as "moral courage" ethical dilemmas.<sup>45</sup>
- **Right-versus-Right Ethical Dilemmas.** This type of ethical dilemma involves those situations in which there are two conflicting sets of "right" values.<sup>46</sup>

Of course, some dilemmas are a combination of both: a conflict between competing sets of "right" values (right-versus-right) and a situation in which doing the right thing involves personal or political costs.

## Personal Cost Ethical Dilemmas

With these kinds of dilemmas, the costs can be political - such as the loss of political support or perhaps even one's prospects for reelection. Or, the cost can be financial, for example a missed opportunity for financial gain or material benefits. Issues relating to the proper use of public resources fall into the "personal cost" type of ethical dilemma, in as much as these dilemmas typically involve whether one is going to forgo a tempting political or personal benefit. Finally, the cost can be more directly personal, as when one fears a particular course of action may jeopardize a friendship. In these situations, the answer is relatively simple. *The bottom line is that being ethical means doing the right thing regardless of personal costs.*

## Right-versus-Right Ethical Dilemmas

Right-versus-right ethical dilemmas can be more difficult to resolve. An easy example, however, is when a political supporter urges you to do something that conflicts with your own best sense of what will serve your community's interests. In this dilemma, there is a conflict between your *responsibility* to do what is in the public's best interest and your *loyalty* to your political supporter. Responsibility and loyalty are both bona fide ethical values.

The key is, as a public servant, the ethical value of responsibility (and the responsibility to do what is in the public's best interest) trumps the ethical value of loyalty. This is when thinking about the public's perception of the right thing to do can be a useful dilemma-resolution strategy.

## Conclusion

In politics, there is a great temptation to engage in ends/means thinking in which one is tempted to conclude that good or desirable ends justify the means. As both Dr. Martin Luther King, Jr. and Gandhi have observed, the means *are* the end in a democracy and good ends cannot come from questionable means.

Public officials are stewards of the public's trust in both their institutions and their leaders. Central to that trust is a fair and open process. Conscientious attention to laws and principles of fair and open government will help you as a leader pursue both good means and good ends.

## Resources for Further Information

For more information about ethics laws and principles, check out the following resources:

- California Attorney General Publications: [www.caag.state.ca.us/publications/index.htm](http://www.caag.state.ca.us/publications/index.htm) (click on "ethics")
- Fair Political Practices Commission Publications: <http://www.fppc.ca.gov/index.php?id=226>
- Institute for Local Government Ethics Resource Center: [www.ca-ilg.org/trust](http://www.ca-ilg.org/trust)

*Disclaimer: Open meeting practices continue to evolve as the COVID-19 crisis continues and agencies use a wide range of technology to meet their needs. The information provided in this document is for general informational purposes only and is not intended to provide legal advice to any individual or entity. ILG urges you to consult with your own legal advisor before taking any action based on this information.*

## References

- <sup>1</sup> Cal. Gov't Code § 53235(a), (b).
- <sup>2</sup> Cal. Gov't Code § 53234(c).
- <sup>3</sup> Cal. Gov't Code § 53234(d)(3), (4).
- <sup>4</sup> This is a requirement of the Political Reform Act. *See generally* Cal. Gov't Code §§ 87200 and following.
- <sup>5</sup> *See* Cal. Gov't Code §§ 87200-87210; 2 Cal. Code Regs. §§ 18723-18740.
- <sup>6</sup> *See generally* Cal. Gov't Code §§ 84100 and following; 2 Cal. Code Regs. §§ 18401 and following.
- <sup>7</sup> *See* Cal. Gov't Code § 82015(b)(2)(B)(iii).
- <sup>8</sup> *See generally* Cal. Gov't Code §§ 54950 and following (for cities, counties, special districts and school districts); Cal. Educ. Code §§ 72121 and following (for community college district governing boards).
- <sup>9</sup> *See* Cal. Gov't Code 54952.2(a); Cal. Gov't Code § 54954.2(a).
- <sup>10</sup> Cal. Gov't Code § 54952.2(a).
- <sup>11</sup> Cal. Gov't Code § 54952.2(b); Cal. Educ. Code § 72121.
- <sup>12</sup> Cal. Gov't Code § 54952.2.
- <sup>13</sup> Cal. Gov't Code § 54952.2(c)(2).
- <sup>14</sup> Cal. Gov't Code § 54952.2(c)(5).
- <sup>15</sup> *See* Cal. Gov't Code § 54954.5; Cal. Educ. Code § 71122.
- <sup>16</sup> Cal. Gov't Code § 54954.2(a); Cal. Educ. Code § 72121.
- <sup>17</sup> Cal. Gov't Code § 54954.3(a); Cal. Educ. Code § 72121.5.
- <sup>18</sup> Cal. Gov't Code § 54954.3(a).
- <sup>19</sup> Cal. Gov't Code § 54954.3(b); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).
- <sup>20</sup> Cal. Gov't Code § 54957.5.
- <sup>21</sup> *See generally* Cal. Gov't Code §§ 6250 and following.
- <sup>22</sup> Cal. Gov't Code § 6252(d).
- <sup>23</sup> Cal. Gov't Code § 6252(e).
- <sup>24</sup> *City of San Jose vs. Superior Court of the County of Santa Clara*, 2 Cal. 5<sup>th</sup> 608 (2017)
- <sup>25</sup> *Nasha v. City of Los Angeles*, 125 Cal. App. 4th 471 (2004).
- <sup>26</sup> *See Fairfield v. Superior Court*, 14 Cal. 3d 768 (1975); *Mennig v. City Council*, 86 Cal. App. 3d 341 (1978).
- <sup>27</sup> *See generally* Cal. Civ. Proc. Code § 1094.5.
- <sup>28</sup> *See Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996) (requiring council to rehear an appeal from the planning commission's decision and provide a fair hearing).
- <sup>29</sup> *See* 42 U.S.C. §§ 1983, 1988.
- <sup>30</sup> *See Lacy Street Hospitality Service v. City of Los Angeles*, 22 Cal. Rptr. 3d 805 (2004) (depublished 2005 Daily Journal D.A.R. 84). This case may not be cited as precedent and is provided here only as an illustration.
- <sup>31</sup> Cal. Gov't Code § 84308.
- <sup>32</sup> *See* Cal. Gov't Code § 84308(a)(3); 2 Cal. Code Regs. § 18438.1.
- <sup>33</sup> *See* Cal. Gov't Code § 84308(b).
- <sup>34</sup> *See* Cal. Gov't Code § 1126.
- <sup>35</sup> *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 641-642 (1940)
- <sup>36</sup> *See* Cal. Pub. Cont. Code § 100.
- <sup>37</sup> *Smith v. City of Riverside*, 34 Cal. App. 3d 529 (1973).
- <sup>38</sup> Cal. Gov't Code §§ 54201 and following.
- <sup>39</sup> Cal. Pub. Cont. Code §§ 20160-20162.
- <sup>40</sup> Cal. Pub. Cont. Code §§ 20120-20123.
- <sup>41</sup> Cal. Pub. Cont. Code § 20163.



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<sup>42</sup> See, e.g., Cal. Pub. Cont. Code § 20164.

<sup>43</sup> See 2 Cal. Code Regs. § 18703.5.

<sup>44</sup> Cal. Gov't Code § 82029; 2 Cal. Code Regs. § 18229.

<sup>45</sup> See Rushworth M. Kidder, *Moral Courage: Taking Action When Your Values Are Put to the Test* (William Morrow, 2005).

<sup>46</sup> See Rushworth M. Kidder, *How Good People Make Tough Choices: Resolving the Dilemmas of Ethical Living* (Simon and Schuster, 1995) 13-49.