

Using Public Resources for Gifts and Charitable Purposes

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A Commitment to Public Law

Question: *Our agency recently adopted a very austere budget; this resulted in elimination of popular services and programs. Our agency chief executive has been quoted as saying that, in the current economic environment, our agency can fund only essential agency functions.*

A local blogger has argued that the agency “wastes” resources on nonessential and possibly unlawful activities and this “waste” should be addressed before programs are eliminated. To document this assertion, she has requested records relating to:

- *Gifts to individuals;*
- *Gifts and/or contributions to nonprofit organizations;*
- *Travel expenses; and*
- *Credit card usage.*

She also apparently has her eye on other forms of charitable fundraising. Her theory is that, if the staff has time for such activity, they must not have enough “real work” to do. (She already has run a post criticizing firefighters participating in a “Fill the Boot” campaign for a local charity.) She has asked for copies of all emails that refer to charitable fundraising on agency time and/or using agency facilities.

As part of her crusade to restore the cut programs, she has promised to involve our district attorney, who recently announced a greater focus on public integrity issues (including the misuse of public resources). Our agency is pretty careful, but there are a few items in the records that could embarrass the agency.

What’s done is done, of course. But what spending guidelines

might local agencies consider to reduce the likelihood of heartburn when these kinds of records requests come in?

Answer: In these difficult economic times, many agencies are finding their spending decisions under increasing scrutiny. In fact, one study showed that budgetary challenges are driving greater transparency in local agency information and decision-making.¹

Careful stewardship of public dollars is not, however, a new concept. In his first inaugural address, Thomas Jefferson equated “good government” with a “wise and frugal government” that among other things, does not “take from the mouth of labor the bread it has earned.”²

Jefferson’s observation is one of the key reasons decisions on how to use public resources are especially sensitive. Most taxpayers understandably believe that a dollar that goes to the agency is a dollar they don’t get to spend (or, in Jefferson’s metaphor, bread out of taxpayers and their families’ mouths). Public dollars are a quintessential example of “other people’s money.”

This piece will address the gifts and charitable contribution and/or fundraising issue raised by the question above. The next will address travel, expense reimbursement and credit card use.

Gift-Giving Issues for Public Agencies

Public-sector norms can differ significantly from the private sector. It is common for business people to extend hospitality and make gifts and charitable contributions to generate goodwill for the company.

In the public sector, California’s constitution specifically prohibits “gifts” of public resources, often referred to as the ban on “gifts of public funds.”³ It also applies to gifts from either an agency or its officials to private citizens or organizations.

Because this ban is in California’s constitution, it applies to all public agencies except charter cities. However, the charters of many charter cities prohibit gifts.

How does one know if a goodwill activity or gesture that might be perceived as a gift is okay? The test is whether a valid public purpose justifies the use of public resources in the manner proposed.⁴

Note that special districts have an additional burden when it comes to expenditures. Not only must they demonstrate the contribution serves a valid public purpose, but they must also demonstrate that the expenditure falls within the specifically enumerated powers of that particular type of district.⁵

Other Resources from the Institute

For more information, see the following Everyday Ethics for Local Officials columns at www.ca-ilg.org/everydayethics:

- “Raising Funds for Favorite Causes”
- “Commitment to Nonprofit Causes and Public Service: Some Issues to Ponder”
- “For Whom the Whistle Blows”

Another legal requirement to be aware of is the prohibition against using public resources for personal or political purposes.⁶ Public resources include public money, of course. Public resources also include anything paid for with public money, including equipment, supplies, staff time and public agency facilities.⁷

Use of Public Resources in General

A wise public servant makes sure any use of public agency money, supplies, facilities, equipment or staff time occur in accordance with adopted agency policies, including requirements relating to disposition of surplus agency property. Such policies can include findings on the benefits of the allowed uses of public resources (for example, the benefits being a member of certain civic organizations or picking up the tab at meals if that is the best way to get face time with certain individuals to discuss agency business).⁸

Charitable Donations

The prohibition against gifts of public funds has implications for charitable giving by public agencies.⁹ As Scrooge-like as it may seem, a public official should not assume it is appropriate for public agencies to contribute to charitable organizations.

When might public agency support for charitable organizations be appropriate? The following examples illustrate some circumstances:

- When the charity provides a service that complements or enhances one the public agency provides itself;
- When there is an identifiable secondary benefit to the public agency; or
- When the charity provides a service the public agency could provide but chooses not to.

Making findings in the minutes about the benefits to the agency associated with providing resources to the charity is a good practice. See chart below for example analyses.

As always, concluding that expenditure may be legal is just the first step of the analysis — just because something is “legal” does not mean that it is the best use of resources in light of all competing demands on the agency’s treasury.

Examples of Ways to Document Benefits Associated with Charitable Support		
Relationship To Public Agency Programs	Example	Nature of Benefit(s)
1. Complementary service	Donation to Tree Foundation in return for agreement to replace street trees agency removes because of disease or old age	Foundation has specialized knowledge about trees suitable for area Organization shares goal of populating area with more trees, thereby saving energy and enhancing property values for residents Other grants received by the Tree Foundation mean the agency and those it serves save money on replacement of trees
2. Demonstrable benefit	Boys and Girls Club's after school programs	Such programs reduce the need for law enforcement activities in area. Programs promote public safety and law abiding youth in a positive, cost effective manner
3. Service agency could provide but does not	Homeless shelter and associated placement programs	Such programs help end cycle of homelessness. Reducing homelessness is one of the agency's housing element goals

Making donations to charitable causes that are far away from the jurisdiction (for example, the victims of a hurricane) also present special challenges. Because of the distance, it can be more difficult to justify the contribution as creating benefits to the jurisdiction's residents.¹⁰ Some agencies cite promoting a culture of mutual aid and reciprocity as the anticipated benefit.

Individual decisions (for example, by elected officials or staff) to use public money to support a particular charitable or civic organization can also be subject to question. The least risky approach is to have such be made by an agency governing body, so the requisite findings on the benefit to the agency and the community it serves can be made.

Such a process can also be more transparent in terms of notice that such support is under consideration, and it provides an opportunity for the community to weigh in on the wisdom of using public resources for such purposes. This type of approach also reduces the possible perception that decisions are made to curry political favor.¹¹

Of course, just because something is allowed under legal standards doesn't mean that it is the best use of scarce public resources. This is where the front page test is a good guide — particularly with the understanding that bloggers and members of the media usually put themselves in the role of questioning public agency actions. The key question for any use of public money is whether the use is the best use. This is particularly so when an agency is finding it necessary to discontinue programs and services that the public values that perhaps are more central to the agency's mission.

Fundraising on Agency Time

As already mentioned, staff time is a public resource. Accordingly, it can be wise for local agencies to have policies governing under what circumstances staff may fundraise for charitable purposes while at work. Such policies can minimize criticism and legal questions relating to whether employees are using public agency time and other resources for personal purposes (in other words, using their time on the job to raise funds for their personal causes).

Such policies can also avoid tensions between employees who fundraise and those who are the objects of those fundraising solicitations. The latter may feel their relations with colleagues will be damaged if they don't open their wallets.¹² Fundraising ethics suggests that no one should ever be pressured to give (for example, supervisors should avoid soliciting those they supervise because of the power differential) and that such efforts should not occur during working hours.

Fundraising solicitations to those *outside* the agency present other issues. Those who do business with the agency (or want to do business with the agency) may feel pressured to contribute to maintain positive relations.

These solicitations also can look like pay to play to the public and media.¹³

Solicitations for fundraisers connected with religious organizations can present separation of church and state issues.¹⁴ Using public resources to support such fundraisers can subject an agency to criticism that it is endorsing a particular religion.¹⁵

Finally, if such fundraising is allowed under specified circumstances, safeguards and controls must be in place to assure that any funds raised through such efforts go to the cause identified in the solicitation.

Seek Professional Advice

Although the Institute for Local Government endeavors to help local officials understand laws that apply to public service, its informational materials are not legal advice. In addition, attorneys can and do disagree on the best application of those rules to public meeting practices.

Officials are encouraged to consult an attorney for advice on specific situations.

In a similar vein, some agencies prohibit groups from engaging in charitable fundraising during governing body meetings. Groups are allowed to speak during public comments at the meetings, but are not allowed to sell goods or collect donations in the meeting chambers.

Conclusion

Missteps, criticism and embarrassment can be minimized when everyone participating in a public agency's process of allocating resources and making spending decisions is sensitive to the reality that every public dollar is the community's money. Orientations of newly elected officials and new employees provide one opportunity to sensitize and acquaint public officials and employees to relevant agency policies on what is and is not allowed. Emphasizing the special stewardship of the agency over public resources as a part of internal communications and the overall agency culture is another helpful strategy.

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About the Institute for Local Government

This resource is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities. ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties.

For more information and to access the Institute's resources on ethics visit www.ca-ilg.org/analyzing-public-service-dilemmas.

The Institute welcomes feedback on this resource:

- Email: ethicsmailbox@ca-ilg.org Subject: *Using Public Resources for Gifts and Charitable Purposes*
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References and Resources

Note: Sections in the California Code are accessible at <http://leginfo.legislature.ca.gov/>. Fair Political Practices Commission regulations are accessible at www.fppc.ca.gov/index.php?id=52. A source for case law information is www.findlaw.com/cacases/ (requires registration).

¹ Emily Jarvis, Transparency Report Card - Did your state make the grade? April 9, 2013, available at www.govloop.com/profiles/blogs/report-cards-are-in-did-you-state-s-transparency-make-the-grade?elq=41580263bf4f4745991fe0b09631d2aa&elqCampaignId=2920 (quoting Phineas Baxandall, senior analyst for tax and budget at the US Public Interest Group that annually grades each state on transparency: "Tight budgets are actually a spur towards greater transparency in that public officials want to show that they are taking these tradeoffs seriously. They want to show the money is accounted for. One of the things we asked states was how much does this really cost them and we continue to be surprised how little it costs," said Baxandall.

² Thomas Jefferson, First Inaugural Address, 1801 available at www.bartleby.com/124/pres16.html. The full quote is:

Let us, then, with courage and confidence pursue our own Federal and Republican principles, our attachment to union and representative government. Kindly separated by nature and a wide ocean from the exterminating havoc of one quarter of the globe; too high-minded to endure the degradations of the others; possessing a chosen country, with room enough for our descendants to the thousandth and thousandth generation; entertaining a due sense of our equal right to the use of our own faculties, to the acquisitions of our own industry, to honor and confidence from our fellow-citizens, resulting not from birth, but from our actions and their sense of them; enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence, which by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter—with all these blessings, *what more is necessary to make us a happy and a prosperous people? Still one thing more, fellow-citizens—a wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities.* (emphasis added)

- ³ See Cal. Const. art. XVI, § 6 (“nor shall it [the Legislature] have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individuals, municipal or other corporation whatever;...”). See also *Albright v. City of South San Francisco*, 44 Cal. App. 3d 866, 870, 118 Cal. Rptr. 901, 902 (1975) (making the connection between council member expenses and the prohibitions against a gift of public funds). Although the prohibition is directed to the Legislature, the courts’ theory is that, since general law cities, counties and special districts derive much of their authority from the Legislature, such local agencies also do not have the power to make gifts of public funds.
- ⁴ *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 103-04, 248 Cal. Rptr. 290, 295 (1988). See also McQuillin, *Municipal Corporations*, § 39.25 (3d ed.) (all expenditures must be for a public purpose).
- ⁵ See for example, California State Auditor, “Metropolitan Water District of Southern California: Its Administrative Controls Need to Be Improved to Ensure an Appropriate Level of Checks and Balances Over Public Resources,” (Report #2003-136, June 2004), at 15-18, available at www.bsa.ca.gov/pdfs/reports/2003-136.pdf.
- ⁶ Cal. Gov’t Code § 8314. See Cal. Penal Code § 424.
- ⁷ Cal. Gov’t Code § 8314(b)(3).
- ⁸ David Fonseca, West Hollywood Patch, No Charges Filed Against Duran for Meals Expenses, April 15, 2013 available at <http://westhollywood.patch.com/articles/no-charges-filed-against-duran-for-meals-expenses>.
- ⁹ See generally McQuillin, *Municipal Corporations*, § 39.32 (3d ed.) (“Appropriations to charitable or nonprofit associations, without consideration [something in return], cannot be made.”)
- ¹⁰ See 64 Cal. Op. Att’y Gen. 478 (1981) (noting that grants to other agencies must serve the interests or purposes of the residents of the granting agency).
- ¹¹ “Here’s \$50,000 – Spend it Well,” *Sacramento Bee*, November 23, 2003, page B1, B6 (The president of the local taxpayers’ association suggested that when donations are made to groups from individual discretionary accounts there is “a thin line” and observed that it is “almost like they’re buying votes”).
- ¹² See for example, What’s the etiquette for sharing kids’ fundraiser appeals at work? Linda Ann Nickerson Oct 6, 2011 12:08 PM EDT <http://shine.yahoo.com/etiquette-sharing-kids-fundraiser-appeals-160800552.html>
- ¹³ “Mayor Works Around the Rules,” *San Jose Mercury News* Editorial, March 21, 2004.
- ¹⁴ City Attorneys’ Dep’t League of California Cities, *The California Municipal Law Handbook* § 1.63 (Ann H. Davis ed., Cal CEB 2012).
- ¹⁵ Ed Fletcher, Chili Cook-off Lands City Officials in Hot Water, March 12, available at www.sacbee.com/2013/03/12/5254712/roseville-chili-cook-off-lands.html (a national organization took a city to task when an employee sent an email to neighborhood organizations promoting attendance at a fundraiser for a religiously affiliated organization in which city officials were participating, but was not sponsored by the city. A local law professor noted a problem arises when employees are picking which event to endorse or support, noting that it’s advisable to avoid speaking as the government endorsing a religion).