



For Whom the Whistle Blows

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Question: *I am a newly appointed finance director working on my first budget. My agency has a policy of giving each elected official an "allowance" to use for whatever community projects or causes he or she believes are worthy - with no collective findings of public purpose by the governing body as a whole. Looking at the records, it appears most officials use this "allowance" for charitable purposes. At the last agency I worked in, our attorney cautioned us against this kind of charitable giving because of its potential to create gift-of-public-funds issues.*

I raised my concern with agency counsel, and she agrees the practice is problematic. She says the council, naturally, likes the policy. My boss is sympathetic to these concerns but is unwilling to rock the boat over what is, after all, a fairly small amount of money. This still feels uncomfortable to me, but I can't afford to lose my job over it. What should I do?

Answer: What you have described is a classic "personal cost" kind of ethical dilemma. You have identified a practice that is legally problematic but are worried that the cost to you of rectifying the situation is more than you want to pay.

At stake, however, is the ethical value of responsibility, inasmuch as you have a legal and ethical responsibility to not misuse public resources. You also may feel a sense of conflicting loyalties; wanting to do what your employer wants (and not appear in- subordinate) - but not wanting to harm the organization's reputation in the community if your concerns about the legal issues associated with such expenditures are valid. Let's analyze these issues.

Related Resources from the Institute

Additional resources from the Institute include:

- *Using Public Resources for Gifts and Charitable Purposes*, available at www.ca-ilg.org/PublicResourcesforGifts
- *Understanding the Basics of Public Service Ethics Laws*, available at www.ca-ilg.org/FairProcess
- *Commitment to Nonprofit Causes and Public Service: Some Issues to Ponder*, available at www.ca-ilg.org/nonprofits

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.

The Professional Responsibility to Safeguard the Public's Trust

When faced with an ethical dilemma, it can be useful to consult relevant codes of ethics. The places to start include both the agency's code, if there is one, as well as the relevant codes of ethics for your and your supervisor's professional associations.

For example, both the California Society of Municipal Finance Officials Code and the International City-County Management Association Code emphasize integrity and preserving public trust and confidence at the outset of their respective codes.

A question to ask is: How the public will perceive your professionalism and integrity if it were known that you had a basis to question this kind of expenditure and did not do so? This is where the "newspaper test" can be a handy guide. How would you feel if this situation were re-reported on the front page of the local newspaper, and it was reported that you knew the expenditures were questionable but processed them anyway? What will such an experience mean in terms of your future job prospects?

These are more than rhetorical questions. According to Mountain View City Manager Kevin Duggan, those in positions of authority in an organization should expect to be asked the following when ethics issues surface:

- What did you know?
- When did you know it?
- What did you do about it?

Recent newspaper coverage in agencies rocked by scandal back up Duggan's prediction that staff's actions (and possible inaction) will be scrutinized.

To the "Higher-Ups" in the Chain of Command

If staff expresses an ethical or legal concern about something happening within your agency, your immediate reaction may be to feel defensive, criticized and annoyed if the practice being questioned is one you like. Resist this impulse! Whistle-blowers are, by and large, trying to keep the organization from doing something that may ultimately result in legal action or embarrassment - to both the organization and its leaders. Just as a complaint is a gift in customer service circles, so is "internal" whistle-blowing. It makes sense to encourage employees to express concerns to those inside the organization who are in a position to evaluate the concerns and, if appropriate, take steps to address them.

Encouraging internal whistle-blowing is an important management practice to avoid damage to an organization and its credibility when an employee brings his or her concerns to the attention of those outside the organization. In the article "Encouraging Internal Whistle-Blowing in Organizations," the Markkula Center for Applied Ethics offers the following "best practices" for encouraging employees to bring up problems before they become damaging to an organization:

Develop a whistle-blowing policy that includes a clear explanation for the process of voicing concerns and bans retaliation against those that use it.

- Secure endorsement from top management and communicate the organization's commitment to management and staff at all levels.

The Risk of Going Along

Notwithstanding one's professional ethical responsibilities, it can be tempting to adopt a "go-along, get-along" kind of approach to this situation. After all, the amounts of money are relatively minor, and the city has never been challenged on this particular practice. And the money is going to charities in the community; it's not as if anyone is receiving a personal benefit from public funds.

Nonetheless, there is a good argument that, depending on how the program is structured, the practice could be a misuse of public resources. State law prohibits misuse of public resources² and imposes severe penalties for those who even permit the misuse of public resources.³ This includes a fine of up to \$1,000 a day and three times the value of the resource used. Although there has not been a reported appellate court case finding the practice you describe as indeed a misuse of public resources, these kinds of penalties make the stakes fairly high.

But What if I Get Fired?

State whistle-blowing laws make it unlawful for employers to retaliate against employees who refuse to participate in unlawful activities.⁴ Furthermore, if an employee can demonstrate by a preponderance of evidence that his or her whistle-blowing activities were a contributing factor in an adverse employment action, the burden of proof then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the action for "legitimate, independent reasons" even if the employee had not been a whistle-blower.⁵

These protections apply specifically to local agency employees.⁶ Violation of the whistle-blowing laws is a misdemeanor.⁷ The maximum criminal penalty for an individual is a year of jail time, a fine of \$1,000 or both.⁸ In the case of corporations the criminal penalty is a fine of up to \$5,000.⁹

In addition, retaliation against an employee for whistle-blowing activities could result in a suit for violation of the employee's civil rights.¹⁰ Such actions carry the prospect of damages¹¹ and attorney's fee awards.¹²

- Publicize the organization's commitment to ethical and legal conduct regularly; publicly acknowledging and rewarding employees who raise concerns is one way to communicate the depth of the organization's commitment to ethics.
- Investigate and follow up when concerns are expressed. Inaction is the best way to create cynicism about an organization's commitment to ethics.
- Assess the organization's internal systems. Find out employees' opinions about the organization's commitment to ethics and values.
- Walk the talk. The performance review process should hold staff accountable not only for meeting the organization's goals and objectives but doing so in accordance with the organization's values, which are ideally expressed in an adopted code of ethics.¹

Without question, some whistle-blowers have less than honorable motivations for whistle-blowing. The goal, however, is to create a culture where all employees feel comfortable sharing concerns to help their leaders determine which concerns are valid and which are not.

Do these legal protections provide absolute and complete protection against the potential negative consequences of delivering an unwelcome message or refusing to cooperate? Of

course not.¹⁹ This is why there are two challenges in being ethical: deciding on the right thing to do and then having the moral courage to indeed do the right thing.²⁰

Or as City Manager Duggan observed at a recent manager's conference about the ethical obligations of staff: "While there can be significant negative consequences to taking action, you can be viewed as complicit in the unethical behavior if you do not. In a worst-case scenario, you may need to take the long-term view about the situation and ask yourself whether this is an instance in which you need to lose your job to save your career - not to mention your integrity and reputation."

If This is a Legal Issue, Isn't it the Agency Attorney's Job to Pursue?

Interestingly, the agency counsel is in a particularly sticky situation if she has given advice that has not been followed. State law imposes on all attorneys a duty to keep client communications confidential.²¹ Under the California State Bar's Rules of Professional Responsibility, the attorney can only work her way up the city's hierarchy, sharing her concerns ultimately with the highest level decision-makers (in this situation, the city council).²² If that decision-maker does not heed her concerns, her only option is to resign; attorneys' professional responsibilities preclude them from disclosing the organization's problematic conduct to outsiders.²³ Repeated efforts to change this prohibition for public agency attorneys have been vetoed.²⁴

On Public Agency Charitable Giving

Why is the practice described in this article legally questionable? California's Constitution prohibits gifts of public funds;¹³ because charitable contributions are gifts, this prohibition has implications for charitable giving by public agencies.¹⁴ The presumption underlying the constitutional prohibition is that taxpayer funds should be used for public services, programs and facilities; any purely philanthropic activities should be left to the discretion of the individual taxpayer.

Consequently, the test for any use of public resources is whether a valid public purpose is served.¹⁵ The challenge with having individual officeholders make this decision is that there is no collective finding by the decision-making body regarding the public purpose served by an individual expenditure. Although the courts give deference to a legislative body's findings concerning public purpose,¹⁶ they can't defer to findings that don't exist (which is what happens if the decision is made solely by an individual council member).

For example, the state auditor recently criticized a water district for providing support to a variety of nonprofit organizations, noting both the constitutional prohibition against gifts of public funds and the obligation that special districts have to show that an expenditure falls within the specifically enumerated powers of the district.¹⁷ The state auditor also faulted the district for not having policies that define the types of public and private agencies whose support furthers the interests of the district.¹⁸

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Figuring Out How to Proceed

Talk with the city manager and city attorney about communicating your collective concerns to the council. Ethicist Michael Josephson offers the following tips on how to bring your concerns to your boss's - and ultimately the governing body's attention.

- **Be prepared.** Make sure you have your facts correct and you are speaking with the right person.
- **Be respectful.** Watch your tone. Be earnest but not self-righteous or accusatory. Don't raise your voice or make threats. Be willing to listen as well as talk.
- **Be fair.** Don't assume bad motives; be open to new facts and explanations. Don't equate not agreeing with you as not listening, not caring or being stupid.
- **Be honest.** Don't exaggerate or omit important facts.
- **Stick to the point;** stay focused.²⁷

Let's assume that your agency attorney has expressed her view that the way your agency administers the policy presents legal issues. You may want to ask the attorney to advise you and the governing body on the potential legal liabilities for each of you.

One such consequence is that any employee or member of the public can call the state attorney general's whistle-blower hotline, handled through the Public Inquiry Unit at (800) 952-5225, to register their concerns about such potentially unlawful practices.²⁸ State law now requires employers to post this number at the workplace.²⁹ The attorney general has authority to bring actions to redress improper use of public resources, as do district attorneys.³⁰

As with all ethical dilemmas, there is no one-size-fits-all solution. Ideally, by working with the city manager and city attorney, you can devise a strategy that keeps the agency - and all of its decision-makers - well on the safe side of the law.

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Although a number of local agency attorneys expressed discomfort with this practice of leaving decisions concerning public agency support for charities to individual officeholders, there may be ways to structure such a program so it conforms better to legal requirements.

Even so, the governing body should still have a policy discussion about whether this is the best system for making decisions about the use of scarce public resources. For example, another public agency's practices in this regard came under scrutiny even though the agency reportedly put safeguards in place to make sure the funds were appropriately spent. The president of the local taxpayers' association suggested that using such monies for charitable contributions involves "a thin line," observing that the practice is "almost like they're buying votes."²⁵ The local newspaper also noted that such funds were used to boost officeholders' public profiles.

Recent research²⁶ suggests that the public's perception that government misuses public resources is one of the reasons that the public is reluctant to give government greater authority to solve pressing problems. Although these accounts may have personal and political advantages for local officials, those advantages may come at significant cost in terms of whether the public perceives that their taxpayer dollars are being used only for critical public services. In short, decision-makers need to ask themselves the usual question: Even if this program could be structured in a way to be legal, does that mean that the practice is ethical - or that the public will perceive it to be so?

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 <http://www.ca-ilg.org/ethics-transparency> .

The Institute welcomes feedback on this resource:

- *Email:* ethicsmailbox@ca-ilg.org Subject: *For Whom the Whistle Blows*
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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 Lilanthi Ravishankar "Encouraging Internal Whistleblowing in Organizations" prepared for the Markkula Center for Applied Ethics' Business and Organizational Ethics Partnership, available at www.scu.edu/ethics/publications/submitted/whistleblowing.html.

² See Cal. Penal Code section 424 ("Each officer of ... any county, city, town or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys who ... without authority of law, appropriates the same ... to the use of another ... is punishable by imprisonment in the state prison for two, three or four years, and is disqualified from holding any office in this state.") Cal. Gov't Code section 8314(a) ("It is unlawful for ... any ... local appointee, employee, or consultant, to use or permit others to use public resources for ... personal or other purposes which are not authorized by law."). See also *Stockett v. Association of California Water Agencies Joint Power Insurance Authority*, 34 Cal. 4th 441, 20 Cal. Rptr. 3d 176 (2004) (dismissed employee allowed to proceed with wrongful termination claims; administrative claim included sufficient information).

³ See, e.g., Cal. Gov't Code section 8314(c)(1) (imposing a civil penalty of up to \$1,000 per day, plus three times the value of the resource used).

⁴ See Cal. Labor Code section 1102.5(c) ("An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.")

⁵ Cal. Labor Code section 1102.6.

⁶ See Cal. Labor Code section 1106.

⁷ Cal. Lab. Code § 1103.

⁸ *Id.*

⁹ *Id.*

¹⁰ See e.g., *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983); *Pickering v. Bd. Of Educ. Of Twp. High Sch. Syst. 205, Will County, Ill.*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

¹¹ 42 U.S.C. § 1983.

¹² 42 U.S.C. § 1988.

¹³ See Cal. Const. art. XVI, section 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.

¹⁴ See generally McQuillin, *Municipal Corporations*, section 39.25 (3d ed.) ("Appropriations to charitable or nonprofit associations, without consideration [something in return], cannot be made.")

¹⁵ *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*, section 39.19 (3d ed.) (all expenditures must be for a public purpose).

¹⁶ *Board of Supervisors of City and County of San Francisco v. Dolan*, 45 Cal. App. 3d 237, 119 Cal. Rptr. 347 (1975) (The determination of what constitutes a "public" purpose is primarily a matter for the Legislature and its discretion will not be disturbed by the courts so long as the determination has a reasonable basis).

¹⁷ 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.

¹⁸ *Id.* at 18.

¹⁹ See, e.g., C. Fred Alvord *Whistleblowers: Broken Lives and Organizational Power* (New York: Cornell University Press, 2001).

²⁰ See Roger J. Sullivan, *Immanuel Kant's Moral Theory* (New York: Cambridge University Press, 1989), as cited in Curtis Ventriss and Shane M. Barney, "The Making of a Whistleblower and the Importance of Ethical Autonomy," *Public Integrity* Volume 5, Number 4 (Fall 2003) at 355, 356.

²¹ Cal. Bus. & Prof. Code section 6068.

²² State Bar Rules of Professional Conduct, rule 3-600(B).

²³ See 71 Ops. Cal. Atty. Gen. 255 (1988) (Opinion No. 87-302) (finding whistle-blowing statutes do not override the attorney-client privilege).

²⁴ See, e.g., AB 363 (introduced in 2002 and vetoed by Governor Davis) and AB 2713 (introduced in 2004 and vetoed by Gov. Schwarzenegger).

²⁵ "Here's \$50,000 - Spend it Well," *Sacramento Bee*, Nov. 23, 2003, page B1, B6.

²⁶ Viewpoint Learning, *Listening to Californians: Bridging the Disconnect* (Executive Summary), January 2005.

²⁷ Michael Josephson Commentaries, *Being an Effective Critic* 350.1 (March 26, 2004).

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²⁸ See Cal. Labor Code section 1102.7 (requiring the attorney general to set up the hotline).

²⁹ See Cal. Labor Code section 1102.8 (requiring employers to post employees' rights and responsibilities under the whistle-blower laws, including the telephone number for the attorney general's hotline).

³⁰ See Cal. Gov't Code section 8314(c)(1) (so do city attorneys in cities with populations over 750,000).