

Open Meetings and Conflict of Interest

The Science Program has proposed a policy on open meetings and conflict of interest for the California Bay-Delta Authority Independent Science Board. The full text of this Policy will soon be posted on this website. In the meantime, below is a general description of the applicable laws:

Open Meetings Laws

California's Bagley-Keene Open Meetings Act applies to advisory bodies that are created by law. The California Bay-Delta Authority Act provides for the creation of the ISB. Thus meetings of the ISB must be noticed 10 days in advance and held in public in compliance with the requirements of the Bagley-Keene Act. The Act also applies to subcommittees of three or more members formed by the ISB or by its chairman, which are considered to be advisory committees to the ISB. Larger subcommittees may be formed for particular purposes, but they must meet the agenda and open session requirements of the Bagley-Keene Act. Small advisory subcommittees of two members are not subject to the open meeting requirements.

Conflict of Interest Laws

A. Political Reform Act

The California Political Reform Act prohibits public officials from making government decisions in which they have a financial interest. The disqualification provision of the Act hinges on the effect a decision will have on a public official's financial interests. When a decision is found to have the requisite effect, the official is disqualified from making, participating in the making, or using his or her official position to influence the making of that decision. (Gov. Code, section 87100.)

The Act also requires public officials to file statements of economic interests. (Gov. Code sections 87302, 87500.) Members of decision-making boards are subject to this requirement, but an advisory board is not, unless it has made substantive recommendations that have been, over an extended period of time, regularly approved without significant amendment by another government agency. Because the ISB is advisory in nature, does not make final government decisions or have the power to compel or prevent governmental decisions, and does not have a track record of having its recommendations adopted without change by the California Bay-Delta Authority, individuals serving on the ISB are not considered government officials for purposes of compliance with the California Political Reform Act, and are not required to file disclosures of financial interests (Form 700) as a result of their participation on the ISB. This may change in the future if the ISB does acquire a track record of having its recommendations adopted.

Certain members of the ISB do, however, carry out other activities for the CALFED Science Program, and may be considered “consultants” to the Authority or to the Association of Bay Area Governments as a result of those activities, and in that case, they will be required to file Form 700s.

B. Common Law Conflict of Interest Rules.

Even though members of the ISB are not formally covered by the Political Reform Act, they are still bound by common law conflict of interest rules. A clear expression of the common law doctrine is found in *Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51:

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.

If a situation arises where a common law conflict of interest exists as to a particular transaction, the official is disqualified from taking any part in the discussion and vote regarding the particular matter. The common law doctrine applies to *non-financial* as well as financial personal interests.

C. California Government Code Section 1090

Although members of the ISB are not considered public officials for the purposes of the Political Reform Act, they are considered public officers or employees for purposes of compliance with California Government Code section 1090, which prohibits a public officer or employee from making a contract in which he or she is financially interested.

The prohibition applies to virtually all officers, employees, and multi-member bodies, whether elected or appointed, at both the state and local level. It also includes the members of advisory bodies if they participate in the making of a contract in their advisory function. *Any participation by an officer or employee in their public capacity in the process by which such a contract is developed, negotiated, and executed, including planning and priority-setting through a PSP process or otherwise, is a violation of section 1090.*

For decision-making boards, if a member of the board has a financial interest, unless it is defined as a “remote” interest or non interest in Government Code sections 1091 or 1091.5, the entire board is precluded from acting on the contract. The Attorney General’s Office has not applied this restriction to bodies that are advisory only. If a member of the ISB has a financial interest in a proposed contract or grant, or a remote interest as defined in Government Code section 1091, the ISB may still make recommendations regarding that contract or grant, so long as the interested member discloses his or her interest, and disqualifies himself or herself from *any* involvement in or discussion of the contract.

If a member of ISB has a “non interest” as defined in Government Code section 1091.5, he or she may participate in the discussions leading to a recommendation regarding a future contract. For ISB members who are employed by public universities, section 1091.5 (a) (9) provides that an officer or employee shall not be deemed to be interested in a contract if his or her interest is “that of 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” and noted in the official records.¹ Thus, an ISB member may not participate in recommendations regarding a contract or grant that may be awarded to a member of his or her own department at a public university, but the member is not precluded from acting on other contracts to his or her home university. If the member’s university is a private institution, the member’s interest is not considered a non-interest, but would be a direct or remote interest that would require disqualification.

¹ The remote interests of Government Code section 1091 and non-interests of Government Code section 1091.5 are discussed in the Attorney General’s Conflict of Interest pamphlet, but the language of 1091.5 (a) (9), cited in this paragraph has been amended to read as quoted here.