

DO LOOK A GIFT HORSE IN THE MOUTH: THINK TWICE BEFORE YOU ACCEPT

Presentation by Grant Herndon

The bearing of gifts to influence public officials is as old as history. Even in the school setting, private companies that do business with government sometimes attempt to curry favor with board members and staff with offers of materials, trips, tickets and meals. The acceptance of gifts can impact the thinking of even the most scrupulous public servant, so that even where a gift does not lead to undue influence, the public may perceive that an improper favoritism is at play.

According to the nonprofit Institute for Local Government, “The goal underlying California’s gift reporting and gift limits is to prevent either the perception or the reality of gift giving influencing public officials’ actions. This is because public agency actions should always promote the public’s interests, as opposed to narrow personal or political interests.”¹

California local public officials are governed by several legal schemes designed to limit the ability of vendors to influence public decisions in a variety of ways, and specifically by limiting the acceptance of gifts. These rules stem from the ethical principle that those in public service serve as stewards of their agencies’ resources and should not receive personal advantages and perks beyond the stipends and salaries the law permits.

The most important law governing the acceptance of gifts is the Political Reform Act², which is enforced by the California Fair Political Practices Commission. The Commission has recently stepped up its efforts to narrow certain exceptions to the gift limitations, such as rules concerning travel payments, gifts to spouses, and gifts of tickets and passes.

With new disclosure requirements and the advent of Internet technology, information regarding gifts in the public arena is becoming widely available. For example, the *Sacramento Bee* recently compiled a database of all gifts reported by state officials over a 10-year period, which is posted on its website.³

A sample query showed four pages of disclosure for a state legislator ranging from a donation of Girl Scout cookies to a trip to Miami paid for by a horse racing association. After the article, a blog allowed the public to express its feelings about the gifts. (Example: “*NO gifts should be allowed, PERIOD! They are government employees and most government employees can’t accept*”)

From the *Sacramento Bee*:

See anything out of the ordinary? A big gift right before a crucial vote? A large gift that doesn’t show up on required disclosure reports for state leaders? Or anything else fishy? Email Us.

¹ Institute for Local Government website, www.ca-ilg.org/GiftCenter

² California Government Code section 81000 and following.

³ The database is at: www.sacbee.com/2009/09/02/2156954/database-see-every-gift-given.html#ixzz1SPqcfzfs

gifts. Neither should they. This needs to be STOPPED! Who do we need to start such a bill? Uh . . . err . . . oops . . . one of THEM. Fat chance!!”)

This article explores the reporting requirements and legal limitations on the acceptance of gifts for both local elected officials and local agency employees. It does not attempt to cover the many detailed nuances in law and regulation, but rather, to highlight the issues. Elected officials and education administrators are encouraged to consult legal counsel and the Fair Political Practices Commission in attempting to determine their obligations in this area.⁴

1. WHAT IS CONSIDERED A GIFT?

A gift is something of value provided to you for your **personal benefit**, for which you have not provided goods or services of equal value in return.

From this basic definition, there are many, many exceptions and fine points in the law. However, any time you are offered a gift, you should stop and consider whether there may be a consequence in your role as a public employee or elected official. Even when it is lawful, a public servant has a personal decision to make when acceptance of the gift could reflect negatively on his or her district or undermine the integrity of its decision-making processes.

The following are examples of common situations requiring an analysis of the applicable gift limitation rules and exceptions.

Example 1:

You are a school administrator. A friend treats you to a golf weekend in Santa Barbara. Your friend has conferred a personal benefit on you. You have received a gift which needs to be analyzed under the gift rules.

Example 2:

A software company offers free software, along with registration and lodging at a seminar on how to use the software, to the district’s Information Technology director and up to five others of his choosing.

Example 3:

At the annual school boards association meeting, a school board member attends a reception and dinner paid for by a law firm serving school districts.

2. DO I NEED TO WORRY ABOUT GIFTS INVOLVING FAMILY MEMBERS?

For the most part, gifts to a public official from immediate family are not a concern. This includes gifts from your spouse, children, parents, grandparents, grandchildren, siblings, aunts, uncles, nieces, nephews, first cousins, and their spouses.

If the family member is acting as an agent or intermediary for someone other than one of these family members, the gift is subject to the rules relating to gifts. For example, a gift from a relative which is in reality subsidized by a

If Uncle Bernie gives you a shipment of roof shingles which are really provided on behalf of his employer, it will be subject to the gift rules even though from a family member.

⁴ Schools Legal Service offers an annual workshop on ethics issues for trustees and administrators.

vendor of the type that does business with your district, the gift will be subject to the legal limitations.

Gifts **TO** certain family members, specifically spouses and children, can be treated as gifts to the public official and are the subject of recent changes to FPPC regulations. Under recent amendments, “children” can include students up to age 23 living in the home who are not self-supporting. A gift to a family member can be treated as a gift to the public official where the official will enjoy a financial benefit from the gift, or will use it or decide who will use it. An exception may apply if the family member can establish a working, social or similar relationship with the donor independent of the donor’s relationship with the public official.⁵

3. ARE THERE SOME KINDS OF GIFTS I DON’T HAVE TO WORRY ABOUT AT ALL?

There are many exceptions to the gift rules. The following are some of the major exceptions – they do not have to be reported on Form 700 and are not subject to the gift limits.⁶

- **Returned and Donated Gifts.** If you return the gift unused **within 30 days** of receiving it, or reimburse the donor, you need not disclose it. The same applies where you donate the gift unused and without claiming a tax deduction to a government agency or a tax-exempt “501(c)(3) charity” in which a family member does not have a position.
- **Hospitality.** Gifts of hospitality include food, drink or occasional lodging in someone’s home. The host needs to be present. If the hospitality is funded by someone else, it may be considered a gift if you are informed that is the case, or if it is clear under the circumstances. Under recent amendments, the hospitality extends to a vacation home or boat. However, the official must have a relationship and association with the host unrelated to the official’s position.⁷
- **Holiday gifts.** When you exchange birthday or holiday gifts with someone which are approximately equal in value, you do not need to worry about the gift rules.
- **Inheritance.** Gifts received by way of inheritance are not subject to the rules.
- **Campaign Contributions.** Campaign contributions are not treated as gifts, but they may be subject to disclosure under the campaign disclosure rules of the Political Reform Act.
- **Plaques and Trophies.** Personalized plaques and trophies are not subject to the gift rules if their individual value is less than \$250.
- **Single Ticket to Candidate or Nonprofit Fundraisers.** If you receive one ticket for yourself and one other for a guest to a fundraiser for a candidate or campaign committee or for a tax-

Campaign contributions are not treated as gifts, but may be subject to reporting under the campaign disclosure rules of the Political Reform Act.

⁵ Title 2, California Code of Regulations, section 18943.

⁶ Most of these exceptions can be found at Government Code section 82028 and in the FPPC regulations at 2 CCR section 18492 and 18493.

⁷ 2 CCR 18942.2.

exempt nonprofit and the ticket comes directly from the organization for your own use, you will not have to report the gift (it is deemed to have no value) if specified criteria are met.

- **Passes or Tickets From Your District.** If your district or COE gives you passes or tickets to entertainment, amusement or recreational events, they will normally be considered income to you. If they were given to your district/COE from an outside source, they will count as gifts to you. However, if they are given to you with the expectation that you will attend to perform a public purpose for your agency, and you fill out the appropriate FPPC paperwork, you may not need to disclose them.
- **Employee Raffles.** Where the source of the raffled items is limited to agency employees, the gift rules will not apply. That means that the donating employee is not acting as an intermediary for a vendor or some other donor. Passes or tickets (of the type described in Regulation 18944.1) are treated separately.
- **Free Admission to Perform a Ceremonial Role.** This will not be subject to the gift rules so long as the district identifies the event on FPPC Form 802.
- **Gifts of Informational Material.** An important exception from the gift rules involves “informational material provided to assist you in the performance of your official duties.” This can include some fairly high ticket items, including books, reports, pamphlets, periodicals, videotapes, and free/discounted access to informational conferences. It can also include scale models, pictorial representations, maps and similar items, although if their value exceeds the gift limit, you would have the burden of proving they are informational items. This can also include on-site demonstrations, tours or inspections designed specifically for public officials to assist them in performing their official duties.
- **BFFs: Bona Fide Dates.** Certain gifts received from close personal friends or a person with whom you have a “bona fide dating relationship” may not be subject to the gift restriction reporting requirements. (However, such gifts may still disqualify you from voting on matters relating to the gift giver.)

4. ARE LOANS TO A PUBLIC OFFICIAL CONSIDERED GIFTS?

Personal loans to an elected official or education agency employee can be considered gifts and subject to the gift rules when they are not repaid. The time frame depends upon factors such as whether the loan identifies repayment dates, when the loan was made, and when the last payments were made.⁸

Caution: Elected officials must **NOT** accept a personal loan of \$500 or more unless made in writing under clearly identified terms. Elected officials and employees designated as managing public investments are prohibited from receiving a personal loan from officers, employees, consultants or contractors.

⁸ Government Code section 87462.

5. HOW ARE TRAVEL PAYMENTS TREATED UNDER THE GIFT RULES?

In some cases, travel payments (payments for transportation, parking, related lodging, meals and subsistence) are exempt from some or all of the gift rules, but the rules have been tightened in this area. For example, there is a limited exemption for transportation payments made to a public employee (not elected officials) in connection with a speech on official agency business. In these instances, the gift limitation may not apply, but the reporting obligations do. Consult counsel and/or the FPPC in dealing with these issues.⁹

6. WHAT ARE THE GIFT DISCLOSURE REQUIREMENTS?

The answer is different for elected officials and “designated employees.”

A. *Elected Officials.* Elected officials disclose all gifts that are not exempt, regardless of their source, if the value exceeds \$50. If multiple gifts are received from the same source during the year, they must be disclosed when the total value exceeds \$50.

B. *Employees.* Employees are required to disclose gifts and other economic interests if their positions are designated in the district’s local conflict of interest code.¹⁰ The conflict of interest code identifies the positions that have to make disclosures on the Fair Political Practices Commission’s Form 700 (Statement of Economic Interests) and it describes the scope of the disclosure requirement, which is tailored to the type of decisions in which the position is involved in. Most gifts are reported on Schedule D to Form 700 – some travel payments may be required to be reported on Schedule E.

(1) *Designated Employees.* Designated employees are required to report on Form 700 gifts from a single source totaling \$50 or more from sources they would be required to report on Form 700. That means that if the employee’s disclosure categories require, for example, disclosure of business interests or income from vendors of the type that do business with the district, gifts from that same source would also be disclosable. Note, however, that in the case of gifts, it does not matter whether the source does business within the district: Gifts are reported ***regardless of the location of the vendor*** if the vendor is otherwise one that would trigger a reporting obligation for the employee.

 **Example:** Your district’s conflict of interest code calls for program coordinators to report “investments or business positions in or income from sources which manufacture or sell supplies, books, machinery, or equipment of the type used by the department which the designated person manages or directs.” You are the special education coordinator and you receive a sport jersey from an athletic apparel company in Nevada, valued at \$65. The special education department does not use the items sold by this company. The coordinator would not be required to disclose this gift.

⁹ See FPPC, “Limitations and Restrictions on Gifts, Honoraria, Travel and Loans,” March 2011.

¹⁰ For K-12 districts, this is normally part of, or an appendix to, Board Bylaw 9270 for districts using California School Boards Association policies (copy attached).

(2) *Employees Who Manage Public Investments.* Employees in the special category of those who “manage public investments” have especially broad disclosure obligations similar to those of Board members: they disclose gifts regardless of whether they are required to be disclosed under the local conflict of interest code. Employees in this category are designated as such in the conflict of interest code. Their duties typically involve the investment of special types of public funds outside the County Treasury.

(3) *What About Other Employees Not Required to File Form 700?* Employees who are not “designated employees” under a district’s local conflict of interest code are not required to disclose gifts unless a separate policy requires them to do so.

7. WHAT IS THE GIFT LIMIT?

The Political Reform Act prohibits acceptance of gifts in excess of the gift limit. The gift limit is currently \$440 (it will increase to \$460 on January 1, 2015). It is biennially indexed for inflation. This means that elected officials (and employees who “manage public investments”) may not accept gifts from a single source the value of which exceeds \$440 (\$460 on January 1, 2015) in a calendar year.

As noted above, for “designated employees,” the prohibition applies to gifts from a single source during a calendar year ***when the source is one the employee would be required to disclose on Form 700.***

8. WHAT ARE SOME OF THE CONSEQUENCES OF VIOLATING THE GIFT RULES?

In addition to late filing penalties and other administrative fines of up to \$5,000 per violation, civil sanctions of up to three times the value of the gift may be imposed. In some cases, criminal penalties may apply, along with disqualification from holding public office.

In addition, the acceptance of gifts exceeding the gift limitation disqualifies the recipient from participating in decisions involving the gift-giver. This means that a board member would be prohibited from participating in the discussion and voting on a decision involving the gift source. Designated employees would be prohibited from participating in the making of the decision, which impacts activities ranging from developing the contracts and specifications for a transaction involving the gift source, doing the research, advising the board or other decision makers, etc.

9. WHAT ABOUT GIFTS TO THE DISTRICT OR AGENCY ITSELF?

Under certain circumstances, a payment or gift made to a district which confers a personal benefit on an employee may nevertheless not be considered a gift to that employee if it meets the criteria to be considered a true “gift to the agency.” This means that the use of the gift will not be controlled by the employee who benefits from it. In addition, the gift must be used for agency business. For example, the gift of travel to a conference could qualify as a gift to the agency if the employee who uses it did not have the power to decide who could go and attends on district business. The gift gets reported on FPPC Form 801, which is maintained by the district and posted on its website. The employee who had the benefit of the gift would not need to disclose it on Form 700.

10. SPECIAL RULES FOR TICKETS

Gifts of tickets from a district to district officials are now subject to new rules. Normally, where tickets were a gift to the district and are passed along to an employee, they would have to be reported on Form 700. However, if the district has the power to decide who uses the tickets and the employee uses them for a public purpose, the individual who is chosen to use them may not have to report them on Form 700 if they are instead disclosed on FPPC Form 802.

11. BEHESTED PAYMENTS

Sometimes influence can be obtained not by making a gift to a public official outright, but by making payments to a charity or cause favored by the official.

Behested gifts must now be reported on FPPC Form 803 if they total \$5,000 or more from a single source in a calendar year. They are filed with the district or COE within 30 days of the date of the payment.¹¹ For example, in 2010, Governor Brown reported \$2.29 million in “behested” payments, mainly for the benefit of Oakland charter schools which he supports.¹² In one opinion, the FPPC found that a school board trustee must report the district’s receipt of 600 free Dodgers’ tickets, since they were donated at the trustee’s request for the benefit of the district.¹³

12. CAN DISTRICTS GO BEYOND FPPC REQUIREMENTS?

Under existing law, absent some other district policy, numerous exceptions allow public officials to receive gifts up to \$440 per year (\$460 as of January 1, 2015) from a single source. A vendor could lavish gifts on employees who are not designated to file Form 700. For example, an employee who works in the MOT department of a school district but does not make the kinds of decisions requiring the filing of Form 700 could receive expensive gifts from a contractor or vendor, virtually without limitation and despite the potential for negative public perception. For some districts, even the receipt by school officials of gifts valued below the \$440 limit are very problematic.

Some districts have a strict “no gifts” policy or other restrictions which may apply to all employees, not just those who file Form 700. Some districts may limit the value of gifts to an amount below the statutory threshold, such as \$100 in a calendar year.

The nonprofit Institute for Local Government has created a number of forms for use by local agencies, such as a “no gifts” policy sample letter to use in returning gifts from vendors, etc.

These concepts may be of interest, particularly for districts which do a high volume of building and construction.

Updated: December 8, 2014

¹¹ Government Code section 82015.

¹² See, FPPC, Payments for Legislative, Governmental or Charitable Activities, Statewide Officials, 2010.

¹³ FPPC Opinion No. A-10-063.