



# Annual Ethics Policy Review and Brown Act Update

January 9, 2024  
Board of Directors

# Agenda

- Review of Board Ethics Policy 6.04
- Update on Legal Developments in 2023
  - The Ralph M. Brown Act
  - Conflicts of Interest under the Political Reform Act
  - Conflicts of Interest under Government Code § 1090

# Board Ethics Policy Review



## Policy 6.04, “Ethics of the EBMUD Board of Directors”

- **Purpose:** “This policy promotes awareness of ethics, integrity and fidelity as critical elements in Board members’ conduct and in achievement of the EBMUD mission.”
- **Source:**
  - Based on numerous relevant laws, including the California Constitution, the Political Reform Act, Government Code § 1090, the Penal Code, the Elections Code and the MUD Act.
  - Also based on policy decisions of the Board in furthering ethics and transparency.

# Responsibilities of Public Office

Board will:

- Uphold the State and Federal Constitutions;
- Comply with applicable open government, conflict and disclosure laws;
- Fulfill all legally-required training requirements, including ethics and sexual harassment prevention; and
- Work in full cooperation with other public officials, unless legally prevented from doing so.

# Fair and Open Processes Involving the Public

Board will:

- Fully comply with Ralph M. Brown Act open meeting requirements; and
- Disclose any oral or written communications with persons regarding adjudicatory or quasi-adjudicatory agenda matters.

# Fair and Equal Treatment

Board will:

- Promote diversity, equity, inclusion and equality in personnel and contracting matters;
- Not engage in discrimination or harassment in performance of official duties;
- Not grant special consideration to any person or group beyond that of every other similarly-situated person or group; and
- Cooperate in achieving District's equal opportunity objectives.

# Proper Use and Safeguarding of District Property and Resources

Board members will:

- Safeguard District property against unauthorized use, removal, or loss, including through criminal acts or breach of trust;
- Not ask or require District employee to perform services for personal benefit or profit;
- Protect and properly use any District asset within their control, including information recorded on paper or electronically;
- Maintain accurate written records, including expense accounts;
- Adhere to District policies.



# Use of Confidential Information

Board members will:

- Safeguard confidential information;
- Not disclose information that legally qualifies as confidential, including:
  - Information received for or during a closed session meeting;
  - Attorney-client privileged information; and
  - Information exempt from disclosure under the Public Records Act.

Board members may make complaints to a grand jury or district attorney and disclose facts necessary to establish the alleged violation of law, after bringing the matter to the President or full Board and providing an opportunity to cure the violation.

# Conflicts of Interest

A Board member will not:

- Have a financial interest in a contract before the District;
- Participate or use their position to influence a Board decision in which they have a legally prohibited interest;
- Accept any honoraria;
- Accept gifts exceeding legal limits or fail to report gifts, contributions and income as required by law; or
- Recommend the employment of a relative to the District or a District contractor.

# Soliciting Political Contributions

A Board member will not:

- Solicit or direct political contributions or in-kind services from District officers, employees, consultants or contractors;
- Solicit or direct political contributions or in-kind services from vendors or consultants with a material financial interest in a matter pending before the District; or
- Use the District's seal, trademark, stationary or other District indicia in soliciting political contributions.

## Incompatible Offices

Board members must resign from the District if they are elected or appointed to a public office for which the duties of the office may legally require action contradictory or inconsistent with the interests of the District.

## Candidate's Statement

A Board member will not include false or misleading information in a candidate statement for a general District election.

## Board Member – General Manager Relationship

- The Board provides policy direction and instructions to the General Manager on matters within the legal authority of the Board by majority vote during regular or committee meetings.
- Board members deal with matters within the authority of the General Manager through the General Manager, except when a matter pertains to functions of the General Counsel.

## Exercise Responsible Fiscal Management

- The Board ensures District maintains a system of auditing and accounting that shows a financial condition compliant with accounting principles and the law.
- Auditor retention provisions:
  - Finance/Administration Committee will interview and recommend independent auditor to conduct annual audit and period single audits of federal funds received;
  - Independent auditor will provide reports and recommendations to Finance/Administration Committee;
  - Auditor reports will be provided to Board upon completion; and
  - Staff will respond to audit recommendations and provide periodic updates to Board.

## **Improper Activities and the Reporting of Such Activities; Protection of Whistleblowers**

- The General Manager has primary responsibility for compliance with District personnel policies and procedures, and for investigating violations and taking appropriate corrective and disciplinary action.
- The Board ensures the General Manager is operating the District according to Board policies and the law.
- Board members will disclose to the General Manager improper activities within their knowledge.
- Board members will not interfere with the General Manager's investigation and remediation.
- A Board member will not directly or indirectly use their position to discourage whistleblowing.

## Directors' Compensation and Expense Reimbursement

- Each Board member receives a monthly stipend, contingent on attending a minimum of 50 percent of assigned meetings, unless excused by President for “good cause.”
  - Good cause includes, but is not limited to, a Board member’s illness, family emergency, or schedule conflict directly related to the business and interests of the District.
  - Arrival at a meeting more than 15 minutes late will count as an absence unless excused by presiding officer due to “unforeseen circumstances.”
- Board members are encouraged to engage in outside activities that further the District’s interest.
  - Board members do not receive compensation for such activities.
  - Board members are entitled to reimbursement for their expenses.



## Violation of Ethics Policy

- A perceived violation should be referred to President for investigation and consideration of appropriate action.
- Violations may be addressed by legal remedies, including:
  - Board resolution of disapproval;
  - Injunctive relief; or
  - Referral of the violation to the Fair Political Practices Commission, District Attorney or Grand Jury.

# The Ralph M. Brown Act

## 2022 and 2023 Updates



## Remote Appearances: Assembly Bill 557

- In response to COVID pandemic, Government Code § 54953 was amended to allow for remote appearances during a declared state of emergency.
- Section 54953 required the governing body to meet not less than every 30 days to make findings in support of remote appearances.
- AB 557:
  - Extended the period in which to hold a meeting to not less than every 45 days; and
  - Eliminated required finding that state or local health officials impose or recommend social distancing measures.

## Remote Appearances: Assembly Bill 2449 (2022)

- Allows a member of governing body to participate in a meeting remotely in “emergency circumstances” or for “just cause.”
- Limits on number of remote appearances at meetings:
  - For “just cause”: Two meetings per year.
  - For “emergency circumstances”: No limit, but cumulatively, remote attendance for just cause or emergency circumstances is limited to:
    - No more than more than three consecutive months; or
    - 20 percent of the “regular meetings for the local agency” within a calendar year; or
    - No more than two meetings if the legislative body regularly meets fewer than 10 times per calendar year.

## Remote Appearances: Assembly Bill 2449 (2022)

- What does this mean for District meetings?
- AB 2449 refers to meetings of “legislative body,” and Brown Act defines “legislative body” to include committees.
- Based on this, a Board member may:
  - Use the “just cause” exception for two regular meetings and two committee meetings per year for each committee on which the Board member sits.
  - Cumulatively use either the “just cause” or “emergency circumstances” exception for no more than three consecutive months for regular meetings or each committee on which the Board member sits.
  - Cumulatively use either the “just cause” or “emergency circumstances” exception for no more than four regular Board meetings per calendar year.

# Political Reform Act

## 2023 Levine Act Clarifications



## Background of Levine Act

- Levine Act prohibits an officer from accepting, soliciting or directing contribution of more than \$250 from any party or “participant” with a financial interest that the officer “knows or has reason to know” has a matter “pending” before the agency involving a “license, permit, or other entitlement for use.”
- Under Senate Bill 1439, prohibition applied to both appointed and elected officials, effective January 1, 2023.

## Levine Act Provisions

- Levine Act is more expansive than EBMUD's Campaign Finance Reform Ordinance:
  - Includes contracts, but also applies to “a license, permit, or other entitlement for use.”
  - Applies to “parties” or “participants” to entitlement – “participants” include persons with a financial interest who may oppose an entitlement or contract.
  - Restriction on donation ends one year after action on entitlement, regardless of whether or not entitlement granted.
  - If an officer knows they have accepted a donation from party or participant in the 12 months prior to consideration of entitlement, they must announce the donation and recuse themselves from participation.



## FPPC 2023 Clarifications on Levine Act

- A proceeding is “pending” for an “officer” when:
  - The decision is before the officer/governing body, including when the item is placed on the agenda for discussion; or
  - It is reasonably foreseeable the decision will come before the officer and the officer knows or has reason to know the decision is within the jurisdiction of the agency.
- A proceeding is “pending” for a “party” or “participant” once the decision is within the jurisdiction of the agency (e.g., once an application has been filed).
- An officer is not at risk of violating the Levine Act by accepting a contribution from a party or participant when the officer does not know or have any reason to know about the proceeding.

## FPPC 2023 Clarifications on Levine Act

- An officer “knows or has reason to know” that a “participant” has a financial interest in a decision if:
  - The officer has actual knowledge of the financial interest; or
  - The participant reveals facts in written or oral statements during a proceeding before the officer that make the person’s financial interest apparent.
- An officer aware of any of the following facts has reason to know of a participant’s financial interest:
  - The participant has an interest in property located within 500 feet of the real property at issue in the proceeding;
  - The participant has an economic interest in a business entity that may see a significant increase or decrease in customers as a result of the proceeding; or
  - The participant has a business relationship with the applicant that may result in additional services provided to the applicant.

# FPPC 2023 Clarifications on Levine Act

- An officer does not know or have reason to know of a participant's financial interest solely as a result of the participant identifying an economic interest located in the general vicinity of a business entity or real property at issue in the proceeding.
- Levine Act is complicated – consult with OGC if you have questions!

# Government Code § 1090

## Review of 2023 Updates



## Assembly Bill 334: Contractor Conflicts of Interest

- Courts have found that independent contractors may be “officers” for the purposes of Government Code section 1090’s prohibition on making a contract in which the officer has a financial interest.
- As a result, independent contractors may be precluded from bidding for work on projects in which they had been involved during the design phase because they helped “make” the contract.
- AB 334 added section 1097.6 to the Government Code, codifying Attorney General and court clarifications on the applicability of section 1090 to independent contractors.

# Assembly Bill 334: Contractor Conflicts of Interest

- An independent contractor is not an “officer” if the contractor’s duties and services related to an initial contract did not include “engaging in or advising on public contracting” on behalf of the public entity.
- “Engaging in or advising on public contracting” means preparing or assisting the public entity with any portion of the public entity’s preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity.

# Assembly Bill 334: Contractor Conflicts of Interest

- If the independent contractor did “engage in or advise on public contracting” on behalf of the public entity, then the contractor is an “officer.”
- But the contractor is not disqualified from bidding on a subsequent contract under section 1090 if:
  - The contractor did not “engage in or advise on the making of the subsequent contract” during its performance of the initial contract.
  - The contractor did not “engage in or advise on the making of the subsequent contract” by participating in the planning, discussions, or drawing of plans or specifications during an initial stage of a project if:
    - That participation is limited to conceptual, preliminary, or initial plans or specifications; or
    - All bidders or proposers for the subsequent contract have access to the same information, including all conceptual, preliminary, or initial plans or specifications.

**Ethics laws are many,  
multi-layered, and  
complex.**

**Consult early with the  
Office of General  
Counsel and/or FPPC.**

**(1-866-ASK-FPPC)**

**Questions?**

