

# BOARD OF DIRECTORS MEETING

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August 31, 2023



## PLEDGE OF ALLEGIANCE

I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all.



## PLEDGE OF ALLEGIANCE TO THE TEXAS FLAG

Honor the Texas flag; I pledge allegiance to thee, Texas, one state under God, one and indivisible.



# 2

## Public Comment

# 3

Texas Open Government and Ethics Training (Training Regarding Open Meetings Act, including Public Comment and Maintaining Order in Meetings; the Public Information Act; and Key Ethics Rules)

Stephen Tatum, *General Counsel*

# TARRANT REGIONAL WATER DISTRICT

## **Board Training For Texas Open Government & Ethics**

Texas Open Meetings Act  
Texas Public Information Act  
Ethics For Public Officials

**Stephen Tatum, General Counsel  
August 31, 2023**

# TEXAS OPEN MEETINGS ACT

# TEXAS OPEN MEETINGS ACT

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## Codified in Texas Government Code Chapter 551

### Purpose:

To ensure that the decision-making process of government entities remains open, visible, and accountable to the public by allowing citizens to observe and participate in discussions about issues and actions that affect them.

### General Rule:

A governmental body may only exercise its authority at a meeting of a quorum of its members where the public has been given adequate notice of the time, place, and subject matter of the meeting.

# TEXAS OPEN MEETINGS ACT

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## What is a “meeting”?

**“A verbal or written deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action.”**

Chapter 49 of the Texas Water Code expressly provides that a meeting of a committee of a Board (like the TRWD Board) where less than a quorum is present is not subject to the requirements of the Open Meetings Act.



# TEXAS OPEN MEETINGS ACT

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**A “gathering” of a quorum may still be subject to the Act, even if no formal action is taken. A “gathering” is:**

One conducted by the governmental body, with a quorum present, called by the body, and at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

# TEXAS OPEN MEETINGS ACT

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## What is NOT a “meeting” under the Act:

- A gathering of a quorum at a social function unrelated to public business
- Attendance by a quorum at a regional, state, or national convention or workshop, ceremonial event, or press conference.
- Attendance by a quorum at a candidate forum, appearance, or debate to inform the electorate.
- If no formal action is taken and any discussion of public business is incidental to the event or gathering at which a quorum is present.

# TEXAS OPEN MEETINGS ACT

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## **A “Walking Quorum” is prohibited under the Open Meetings Act**

A walking quorum exists when there are a series of written or verbal communications between Board members, and

- (1) The individual communications involve fewer Board members than a quorum;
- (2) When taken together, the series of communications involves a quorum of the Board;
- (3) The communications occur outside of a meeting conducted under the Act; and
- (4) The communications concern an issue within the jurisdiction of the Board.

# TEXAS OPEN MEETINGS ACT

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## NOTICE REQUIREMENTS

- 72 hours in advance
- Date, hour, place, and subject(s) of the meeting
- “in a place readily accessible to the general public”
- Must inform the general public that some action will be considered on a topic

# TEXAS OPEN MEETINGS ACT

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## RECORDING REQUIREMENTS

- Keep minutes or make a recording—both of which are public records—stating the subject of each deliberation, the vote, order, decision, or other action take on the item.
- Maintain a “certified agenda” or tape recording or each closed/executive session for at least two years
- Anyone in attendance may record an open meeting by audio or video

# TEXAS OPEN MEETINGS ACT

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## EMERGENCY MEETINGS

TRWD may call an emergency meeting to deliberate or take action on an emergency or urgent public necessity, but any action taken must directly relate to responding to the emergency

- Can be held on one hour posted notice that clearly identifies the emergency or urgent public necessity
- Must involve an imminent public health and safety situation or reasonably unforeseeable situations requiring immediate action
- Examples:
  - fire, flood, earthquake, tornado, or other weather events
  - infrastructure emergencies such as power, transportation, or communications systems failures
  - epidemic
  - riot, civil disturbance, threatened acts of lawlessness or violence

# TEXAS OPEN MEETINGS ACT

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## SPECIAL CALLED MEETINGS

Section 551.131 of the Act specifically allows water districts to hold a meeting by telephone conference call or video conference call IF

- (1) the meeting is a special called meeting and immediate action is required; and
- (2) it is difficult or impossible for a quorum of the governmental body to convene at one location

\*\*\*Subject to regular notice requirements under the Act

# TEXAS OPEN MEETINGS ACT

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## PARTICIPATING IN MEETINGS BY VIDEOCONFERENCE CALL

- A Board member may participate in an open meeting remotely and will be considered present at the meeting for all purposes.
- Generally, TRWD must have a quorum (or at least the presiding member) physically present at one location of the meeting that is open to the public AND the notice must specify this location.
- The public must be able to see and hear you at the location specified. Video and audio must be broadcast live at the meeting.
- If there is a problem with the audio or video feed, the meeting must be recessed until the problem is addressed.



# TEXAS OPEN MEETINGS ACT

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## CLOSED MEETINGS/ EXECUTIVE SESSION

The Open Meetings Act recognizes that governmental bodies sometimes need to deliberate privately, so it authorizes closed meetings through specific and narrowly tailored exceptions to the general rule that meetings must be open to the public.

- The Board must first convene a proper open meeting and announce which exception allows it to meet in closed session.
- The Board may not vote or otherwise take action in a closed session
- Discussion must be limited to the exception claimed, nothing outside the exception can be discussed.
- The Board has discretion to decide who attends, can include employees of the District

# TEXAS OPEN MEETINGS ACT

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## PUBLIC PARTICIPATION AND PUBLIC COMMENT

- Citizens have the right to address and petition their government for redress of grievances.
- TRWD's Board "shall allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body's consideration of the item."
- Section 551.007 of the Act allows TRWD's Board to determine whether the opportunity for public comment will occur before or during its discussion of an agenda item.
- A single public comment period at the beginning of an open meeting satisfies statutory public comment requirements.

# TEXAS OPEN MEETINGS ACT

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The Act also recognizes the governmental body's duty and need to conduct public business in an orderly manner in a way that does not unreasonably interfere with the public's right to address its government.

- The Board “may adopt **reasonable rules** regarding the public's right to address the body...including rules that **limit the total amount of time** that a member of the public may address the body on a given item.”
- The Board “may not prohibit public criticism of the governmental body, including criticism of any act, omission, policy, procedure, program, or service.” This subsection does not apply to public criticism that is otherwise prohibited by law.
- **\*\*\*Importantly, in setting rules the Board must not discriminate for or against a specific viewpoint. E.g., the Board cannot allow only those in support of a proposed action to speak, while prohibiting those opposed from speaking.**

# TEXAS OPEN MEETINGS ACT

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- The TRWD Board has the right to insist that persons attending board meetings maintain order and obey the Board's rules.
- The Texas Penal Code allows the Board to remove a person who disrupts a public meeting, which generally means to prevent or disrupt a lawful meeting by obstructing or interfering with the meeting by physical action or verbal utterance.
- There is a legal distinction between speech that causes inconvenience or annoyance and speech that would be considered "fighting words."

# TEXAS OPEN MEETINGS ACT

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## VIOLATIONS OF THE OPEN MEETINGS ACT

### Civil Remedies

- Actions are voidable (not void)
  - Injunctions to stop actions

### Criminal Penalties

- Misdemeanor when a Board member knowingly engages in communications constituting a “walking quorum”

# TEXAS PUBLIC INFORMATION ACT

# TEXAS PUBLIC INFORMATION ACT

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Codified in TEXAS GOVERNMENT CODE CHAPTER 552

## Purpose:

To promote transparency, public oversight, and government accountability by ensuring that government entities give citizens access to information about what public servants are doing on their behalf.

## General Rule:

Government records are presumed to be open to the public unless they fall under certain exemptions specified by law.

The PIA sets guidelines and procedures that public entities must follow when responding to public information requests.

# TEXAS PUBLIC INFORMATION ACT

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**“Public Information” = “Recorded information in practically any medium”**

This means any information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) BY a governmental entity;
- (2) FOR a governmental entity and the entity:
  - owns the information;
  - has a right of access to the information; or
  - spends public money to create or maintain it; OR
- (3) By an individual officer or employee of a governmental entity in the officer’s or employee’s official capacity and the information pertains to official business of the governmental entity.



# TEXAS PUBLIC INFORMATION ACT

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## Important to remember:

“Public Information” specifically includes “any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.”

This includes information relating to TRWD business on a public official’s personal email account, personal phone, or personal computer.

# TEXAS PUBLIC INFORMATION ACT

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**The PIA only applies to information in existing records.**

The PIA does not require governmental bodies to create new information, prepare answers to questions, conduct research, or compile statistics.

The requestor is only entitled to records or information already in existence.

# TEXAS PUBLIC INFORMATION ACT

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## PERSONAL DEVICES AND TEMPORARY CUSTODIANS

Public Officials are “temporary custodians” of public information when

- (1) The official creates or receives public information in the transaction of official business, and
- (2) Has not provided the information to the government entity’s public information officer or designee.

What this means: You have to maintain public information on your personal devices unless and until you provide the information to TRWD.

# TEXAS PUBLIC INFORMATION ACT

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## RESPONDING TO PIA REQUESTS

When a written (required) request is received, TRWD must:

- (1) Promptly produce the information;
- (2) Request clarification if request is unclear or request a narrowing if the request is overly broad and will produce a large amount of information;
- (3) Decline to release the information and assert that the information is protected from disclosure under a clear exception that does not require an Attorney General Opinion; OR
- (4) Within ten (10) business days of the request, write a letter to the Attorney General requesting an opinion on whether the information is disclosable or required to be withheld under the Act

# TEXAS PUBLIC INFORMATION ACT

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## COMMON EXCEPTIONS TO DISCLOSURE

- Medical records
- Personal family information, addresses, telephone numbers, social security numbers
- Information related to Driver's Licenses, vehicle registrations, credit cards, and bank account information (automatically excepted from disclosure)
- Agency memoranda that would be privileged from discovery in civil litigation, including drafts and discussion related to policy matters
- Information that if released would provide an advantage to competitors or bidders interested in selling, buying, or renting TRWD property.
- Attorney/client privileged information or information relating to current, anticipated, or pending litigation

# TEXAS PUBLIC INFORMATION ACT

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## DOCUMENTS ROUTINELY SUBJECT TO DISCLOSURE

- Personnel documents
- Reports, audits, evaluations, completed investigation reports
- Permits, maps, diagrams
- TRWD emails
- Invoices, contracts, etc.

# TEXAS PUBLIC INFORMATION ACT

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## **COST RECOVERY AND ESTIMATES**

**The PIA allows governmental entities to recover certain costs associated with responding to PIA requests.**

This includes up to \$0.125 per page of copies, \$15 per hour of labor charges if the responsive records exceed 50 pages or are located in multiple locations, overhead charges (20% of labor), and the cost of produced materials like CDs and flash drives.

To recover these charges, the governmental entity must first notify the requestor if the estimated costs exceed \$40 and the requestor is informed of less costly methods of viewing the records (if available).

# TEXAS PUBLIC INFORMATION ACT

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## PENALTIES

Criminal Penalties may be imposed for:

- Releasing confidential information or refusing to release public information.
- Willful destruction, mutilation, removal without permission, or alteration of public information.
- Misuse of confidential information.



# ETHICS FOR PUBLIC SERVANTS

WATER SUPPLY · FLOOD PROTECTION · RECREATION



# ETHICS FOR PUBLIC SERVANTS

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Board members are fiduciaries of the District and must act solely and exclusively for the benefit of the District.

As fiduciaries of the entity, Board members owe the following duties:

- Duty of Care – Duty to use reasonable efforts and diligence in serving TRWD, based on the standard of a reasonably prudent person.
- Duty of Loyalty – Duty to act solely in the best interests of TRWD.

The foundation of a fiduciary duty is trust.

# ETHICS FOR PUBLIC SERVANTS

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- 1. Nepotism**
- 2. Conflicts of Interest**
- 3. Gifts**

# NEPOTISM

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A public official may not appoint or vote for the appointment or confirmation of a relative to a position that is to be directly or indirectly compensated from public funds.

The prohibition applies to an individual related to the public official within the third degree of consanguinity or the second degree of affinity.

# NEPOTISM

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## Degrees of Consanguinity

First Degree – parent, child

Second Degree – brother, sister, grand-parent, grand-child

Third Degree – great grand-parent, great grand-child, aunt/uncle, niece/nephew

## Degrees of Affinity

First Degree – Spouse and parent or child of spouse

Second Degree – grand-parent, grand-child, sister or brother of spouse

# NEPOTISM

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## Family Member vs. Family Relationship

“Family member” applies to income and gift disclosure requirements – person related to officer within 1st degree by consanguinity or affinity who contracts with TRWD at requisite financial levels requires officer to file disclosure.

“Family relationship” is additional reporting requirement for officer independent of income/gift financial levels based solely on vendor being related to officer within 3<sup>rd</sup> degree by consanguinity or 2nd degree by affinity.

# CONFLICTS OF INTEREST

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## SELF DEALING

### Texas Local Government Code Chapter 171

Applies to certain Board votes or decisions on “any matter involving” a business or real property in which a Director has a certain level of financial interest.

If a Director has a **substantial interest** in a business entity or in real property, the Director must file an **affidavit** stating the nature and extent of the interest and must abstain from further participation if action on the matter will have, or it is reasonably foreseeable that it will have, a **special economic effect** on the business entity.

**EXCEPTION:** When a majority of Directors have the same conflict.

# CONFLICTS OF INTEREST

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## Is there a conflict? The “Substantial Interest” Test

### Business entity

- Director owns  $\geq 10\%$  of voting stock/shares
- Director owns  $\geq 10\%$  or  $\geq \$15,000$  of fair market value, or
- Funds received  $> 10\%$  of Director’s gross income for previous year

Property – interest of  $\geq \$2,500$

Family Member – if family member in the “first degree by consanguinity or affinity” of Director has a substantial interest



# CONFLICTS OF INTEREST

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## Additional triggers for the “substantial interest test” in Board Governance Policy 9.3

- Has a controlling interest in the business entity
- Has any participating interest, either direct or indirect, by shares, stock, or otherwise, whether or not voting rights are included, in the profits, proceeds, or capital gains of the business entity in excess of 10%
- Holds the position of a member of the Board of Directors or other governing board of the business entity
- Serves as an elected officer of the business entity
- Is an employee of the business entity

# CONFLICTS OF INTEREST

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## **If a TRWD Board Member has a unique Substantial Interest**

- (1) Disclose (file affidavit) before a vote or decision on the matter and state the “nature and extent of the interest”
- (2) Abstain from “further participation in the matter,” i.e., discussion and vote

# CONFLICTS OF INTEREST

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## **Consequences for violating Chapter 171:**

- Violation is Class A misdemeanor (max. 1 year jail and/or 4K fine)
- Action not voidable unless vote impacted by non-abstaining official

# CONFLICTS OF INTEREST

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## Important Considerations:

- A Chapter 171 violation occurs when a Director votes or decides on any matter involving the business entity or real property for which the Director has a substantial interest.
- The vote or decision does not need to be a direct contract award to the business or direct sale or purchase of the property in question, it is enough that the vote or decision “involves” the business or property.
- A Director’s interest in a subcontractor known at time of vote/decision implicates statute, but not for a subcontractor added after the vote/decision.

# CONFLICTS OF INTEREST

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## **PUBLIC DISCLOSURE OF CONFLICTS** **Texas Local Government Code Chapter 176**

- Requires local government officers and vendors to disclose employment and business relationships between them.
- What triggers disclosure?
  - When income > \$2,500 or when gifts > an aggregate of \$100
- Must file a **conflicts disclosure statement** BUT recusal from vote not required
- Relationships with vendors by certain family members (1<sup>st</sup> degree consanguinity or affinity) triggers Director filing

# CONFLICTS OF INTEREST

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## Exceptions to Public Disclosure

- Transactions subject to rate or fee regulation
- Transactions subject to price and terms available to public
- Purchase of lease/goods/services chartered by a state or federal agency & subject to reporting and examination by that agency
- Political contributions
- Food accepted as a guest
- Gift offered because of kinship or personal, professional, or business relationship independent of status as a Director

# CONFLICTS OF INTEREST

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## Filing Requirements

- Texas Ethics Commission has filing forms but file locally
- Director files Conflict of Interest Statement (CIS)
- Vendor files Conflict of Interest Questionnaire (CIQ)
- Must be under oath
- TRWD must place on website
- Deadline is 5:00 PM of 7<sup>th</sup> business day following awareness

# CONFLICTS OF INTEREST

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## Conflict of Interest Statement

- Identification of Director and vendor
- Description of the nature and extent of each employment or other business relationship and each family relationship with vendor
- List gifts accepted by the Director and any family member by date gift accepted and description of gift



# CONFLICTS OF INTEREST

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## CONSEQUENCES OF NONCOMPLIANCE

**Criminal Penalties** - If a Director knowingly fails to file CIS:

- Class A for  $\geq$  \$5 million contract (max. penalty is 1 year, 4K fine)
- Class B for  $\geq$  \$1 million < \$5 million contract (max. penalty is 180 days jail, 2K fine), and
- Class C for < \$1 million or no K amount for contract (max. penalty is \$500 fine)

**Safe Harbor Exception** - If deadline is missed to file a Cis, no offense if filed not later than the seventh day after receipt of notice from TRWD of the alleged violation.

# CONFLICTS OF INTEREST

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## TRWD Board Governance Policy 9.4 Stricter than Chapter 176

A Director may not accept a gift from a vendor that might “reasonably tend to influence the Director in the discharge of official duties or that the officer knows or should know is being offered with the intent to influence the Director’s official conduct.”

# CONFLICTS OF INTEREST

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## TRWD Board Governance Policy 9.4 Stricter than Chapter 176

- Directors are prohibited from accepting from current or potential contractors, vendors, and consultants:

vacations, pleasure trips, or hunting trips; discounts not available to the general public; products or services not available to the general public under similar circumstances; loans or advances; entertainment at a discount unavailable to the general public; or other unusual favors not available to the general public at the same cost.

# CONFLICTS OF INTEREST

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## Important Considerations

- Director not required to disclose an interest for contracts predating a Director's service as a Director or beyond 12-month period
- The statute does not require Director/vendor relationship involving TRWD, so relationship unrelated to TRWD business requires disclosure if requisite income, gift, or family relationship is met
- Violation does not occur until Director is aware and 5:00 PM of 7<sup>th</sup> business day passes
- Even then, no violation if timely filed after Director receives notification from TRWD of an alleged violation

# GIFTS TO PUBLIC SERVANTS

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## **Texas Penal Code § 36.08**

### **Gift to Public Servant by Person Subject to His Jurisdiction**

**A public servant who exercises discretion with contracts, purchases, payments, claims or other pecuniary transactions of government commits an offense if he solicits, accepts or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim or transaction involving the exercise of his discretion.**

# GIFTS TO PUBLIC SERVANTS

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## **Texas Penal Code § 36.02** **Bribery**

A public servant commits the offense of bribery when he/she accepts, agrees to accept, or solicits any benefit as consideration for a decision, opinion, recommendation, vote, or other exercise of discretion.

To prove bribery, a prosecutor must show that the benefit offered or given to an official was offered or given as consideration for an official's decision. This is a fact question that would have to be addressed on a case-by-case basis.

# GIFTS TO PUBLIC SERVANTS

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- A prohibited “benefit” is anything reasonably regarded as pecuniary (monetary) gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest
- In advisory opinions, the Ethics Commission has stated that the following gifts are benefits: a \$50 clock, a hotel room, a hunting trip, football tickets, a \$160 rifle, and a \$60 restaurant meal.

# GIFTS TO PUBLIC SERVANTS

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The Penal Code statutes **do not** apply to:

- Any benefit to which the public servant is lawfully entitled or for which he gives legitimate consideration in a capacity other than as a public servant;
- A gift or other benefit conferred on account of kinship or a personal, professional or business relationship independent of the official status of the recipient;
- An item with a value of less than \$50, excluding cash or a negotiable instrument;
- Food, lodging, transportation, or entertainment accepted as a guest and disclosed in accordance with applicable law; or
- A political contribution as defined by Title 15, Election Code.



# GIFTS TO PUBLIC SERVANTS

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## Question:

**May a Director accept a gift that is provided in appreciation for superior public service and that is not in exchange for any official exercise of discretion?**

- Public officials and employees are prohibited from accepting gifts of any kind from a person subject to his/her jurisdiction, regardless of whether it is in recognition of superior service or a token of gratitude. A floral arrangement, gift basket, gift certificate, tickets to an event, or complimentary/discounted services or products would constitute a gift.

# GIFTS TO PUBLIC SERVANTS

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## Question:

May a Director receive food and entertainment?

- A public official or employee may lawfully accept food, lodging, transportation, or entertainment as a guest—meaning that the recipient must be **in the presence of the donor**.
- If the public official or employee is required by state law to report such a gift, it must be done in accordance with the law for the exception to apply.

# GIFTS TO PUBLIC SERVANTS

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## Question:

### What if the gift is unsolicited?

- Even if a gift is unsolicited, it may still be considered bribery of a public official or an employee or a gift from a person subject to his/her jurisdiction if the public official or employee accepts or agrees to accept the unsolicited gift, and the gift is considered a benefit a reasonable person would consider to have some monetary value





# 4

## Executive Session



# 5

## Future Agenda Items



# 6

Special Called Meeting: September 13, 2023 at 3:30 PM

Monthly Meeting: September 19, 2023 at 9:00 AM



# 7

## Adjourn