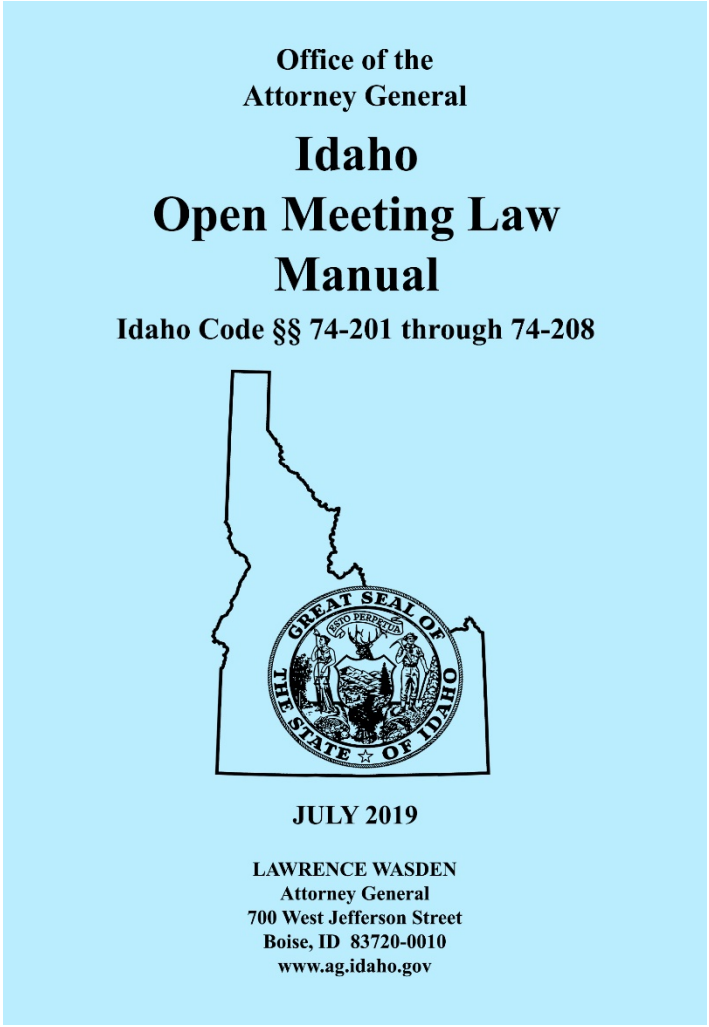
Idaho Open Meeting Law

State of Idaho

Office of Attorney General

Lawrence Wasden



Office of the
Attorney General

Idaho
Open Meeting Law
Manual

Idaho Code §§ 74-201 through 74-208

JULY 2019

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It is policy of this state that formation of public policy is public business and shall not be conducted in secret.

(Idaho Code § 74-201)

Outline

I. Definitions

II. Notice and Agenda

III. Conduct of the Meeting

IV. Executive Sessions

V. Enforcement

Rule of statutory construction

Words are given the meaning set forth in the definition portion of the code section or chapter.

- The definition contained in code controls over the common definition of the word.
- Different chapters or code sections may define the same word slightly differently.
- If no statutory definition exists, the common meaning controls.

Definitions

Decision

Any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present. (Idaho Code § 74-202; Open Meeting Law Manual (OML) p. 23)

Deliberation

The receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature. (OML p. 23)

Definitions

Public Agency

Any state board, commission, department, authority, educational institution or other state agency created by or pursuant to statute or executive order of the governor. Any regional board, commission, department or authority created by or pursuant to statute. Any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho any subagency of a public agency which is created by or pursuant to statute or executive order of the governor, ordinance, or other legislative act. (OML p. 23-24)

Definitions

<u>Governing Body</u>

Members of any public agency which consists of two (2) or more members with the authority to make decisions for or recommendations to a public agency regarding any matter. (OML p. 24)

<u>Meeting</u>

Convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter. (OML p. 24)

- regular meeting
- special meeting

Notice and Agenda

- Regular Meetings

  No less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice shall be given, unless otherwise provided by statute. (Idaho Code § 74-204(1); OML p. 25)

- Special Meetings

  Shall not be held without at least a twenty-four (24) hour meeting and agenda notice, unless an emergency exists. (Idaho Code § 74-204(2); OML p. 25)

New Provision

- Notice for meetings and agendas shall also be posted electronically if the entity maintains an online presence through a website or social media platform. (Idaho Code § 74-204(1))

Notice and Agenda

- Executive Sessions

  A twenty-four (24) hour meeting and agenda notice shall be given if only an executive session will be held. Notice must state reason and specific provision of law authorizing the executive session. (Idaho Code § 74-204(3); OML p. 26)

Notice and Agenda

- An agenda is required for each meeting.
  - posted same as meeting notice
  - only “good faith” amendments
  - motion and vote required for amendments made within 48 hours of, or during, the meeting

    (Idaho Code § 74-204(4); OML p. 26)

New Provisions

- An agenda item that requires a vote shall be identified on the agenda as an “action item” to provide notice that action may be taken on that item. Identifying an item as an action item does not require a vote to be taken on that item. (Idaho Code § 74-204(4))

- Final action may not be taken on an agenda item added after the start of a meeting unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes. (Idaho Code § 74-204(4)(c))

Conduct of Meeting

- All meetings of a governing body of a public agency shall be open to the public. (Idaho Code § 74-203 & OML p. 24)

- A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced. (Idaho Code § 74-203(4) & OML p. 25)

Conduct of Meeting

- All meetings may be conducted using telecommunications devices. (Idaho Code § 74-203(5) & OML p. 25)

- Members of a public board may **<u>not</u>** use computers <u>or texting</u> to conduct private conversations among themselves about board business.

Conduct of Meeting

- The governing body of a public agency shall provide for the taking of written minutes of all its meetings, and all minutes shall be available to the public. (Idaho Code § 74-205(1); OML p. 27)

- Minutes shall include:
  - All members of the governing body present
  - All motions, resolutions, orders, or ordinances proposed and their disposition
  - The results of all votes

(Idaho Code § 74-205(1); OML p. 27)

Executive Sessions

An executive session at which members of the public are excluded may be held, but only for the purposes and only in the manner set forth in this section. The motion to go into executive session shall identify the specific subsections of this section that authorize the executive session. There shall be a roll call vote on the motion and the vote shall be recorded in the minutes. An executive session shall be authorized by a two-thirds (2/3) vote of the governing body. (Idaho Code § 74-206(1); OML p. 27)

Executive Sessions

a) When, in hiring a public officer, employee, staff member, or individual agent, the respective qualities of individuals are to be evaluated in order to fill a particular vacancy or need.

b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student.

(Idaho Code § 74-206(1); OML p. 27)

Executive Sessions

c) To acquire an interest in real property which is not owned by a public agency.

d) To consider records that are exempt from disclosure.

e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations

(Idaho Code § 74-206(1); OML pp. 27-28)

Executive Sessions

f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement.

(Idaho Code § 74-206 (1); OML p. 28)

Executive Sessions

g) To engage in communications with a representative of the public agency's risk manager or insurance provider to discuss the adjustment of a pending claim or prevention of a claim imminently likely to be filed. The mere presence of a representative of the public agency's risk manager or insurance provider at an executive session does not satisfy this requirement.

h) To consider labor contract matters authorized under Section 74-206 (1)(a) and (b).

(Idaho Code § 74-206(1); OML p. 28)

Executive Sessions

- The exceptions to the general policy in favor of open meetings stated in this section shall be narrowly construed. It shall be a violation of this act to change the subject within the executive session to one not identified within the motion to enter the executive session or to any topic for which an executive session is not provided. (Idaho Code § 74-206(2); OML p. 28)

Executive Sessions

- No executive session may be held for the purpose of taking any final action or making any final decision. (Idaho Code § 74-206(3); OML p. 28)

- Minutes pertaining to an executive session shall include a reference to the specific statutory subsection authorizing the executive session and shall also provide sufficient detail to identify the purpose and topic of the executive session but shall not contain information sufficient to compromise the purpose of going into executive session. (Idaho Code § 74-205(2); OML p. 27)

Negotiations in Open Session

- All negotiations between a governing board and a labor organization shall be in open session.
- A governing board may hold an executive session for the specific purpose of:
  - Considering a labor contract offer or to formulate a counteroffer; or
  - Receiving private information about a specific employee
- All documentation exchanged between the parties during negotiations shall be subject to public writings disclosure laws.
- Public testimony, if any, shall be posted as an agenda item.
- Any other provision notwithstanding, the governing body shall post notice of all negotiation sessions at the earliest possible time practicable.

(Idaho Code § 74-206A; OML p. 29)

Enforcement

- Failure to comply with the provisions of Idaho Code §§ 74-201 – 74-207 renders the action null.
- Any member who participates in a meeting that violates these provisions will be subject to a civil penalty.
  - up to $250
  - up to $1,500 for “knowingly” participating
  - up to $2,500 if subsequent to previous violation within last 12 months

(Idaho Code § 74-208; OML p. 30)

Enforcement

- Attorney General shall have the duty to enforce this act in relation to public agencies of state government.
- Prosecuting Attorneys' duty to enforce this act in relation to local public agencies within their respective jurisdictions.
- Any person affected by a violation of the provisions of this act may commence a civil action.

(Idaho Code § 74-208; OML p. 30)

Enforcement

- A violation may be cured by a public agency upon:
  - The agency's self-recognition of a violation; or
  - Receipt by the secretary or clerk of the public agency of written notice of an alleged violation. A complaint filed and served upon the public agency may be substituted for other forms of written notice.
    - Upon notice, the governing body has fourteen (14) days to respond publicly and either acknowledge the violation and state an intent to cure or state that it has determined that no violation has occurred and that no cure is necessary. Failure to respond shall be treated as a denial of any violation for purposes of proceeding with any enforcement action.

(Idaho Code § 74-208(7)(a); OML p. 31)

Enforcement

- Following the public agency's acknowledgment of a violation pursuant to paragraph (a)(i) or (a)(ii) of this subsection, the public agency shall have fourteen (14) days to cure the violation by declaring that all actions taken at or resulting from the meeting in violation of this act void.

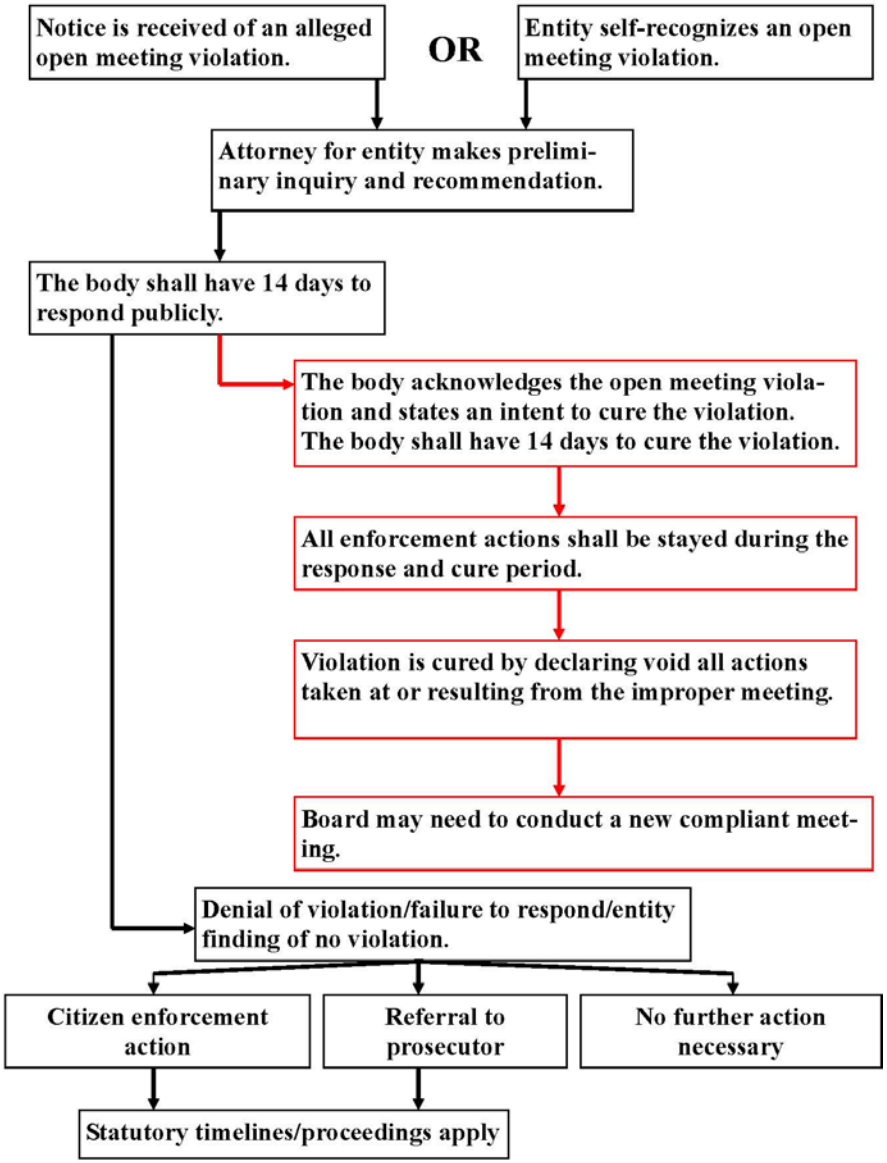
(Idaho Code § 74-208(7)(b); OML p. 31)

Enforcement

- All enforcement actions shall be stayed during the response and cure period but may recommence at the discretion of the complainant after the cure period has expired.
- A cure as provided in this section shall act as a bar to the imposition of the civil penalty provided in subsection (2) of this section. A cure of a violation as provided in subsection (7)(a)(i) of this section shall act as a bar to the imposition of any civil penalty provided in subsection (4) of this section.

(Idaho Code § 74-208(7)(c) and (d); OML p. 31)

Curing Process – Idaho Code § 74-208(7)



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OPEN MEETING LAW CHECKLIST

Regular Meetings

Meeting Date and Time: _____

Meeting Location: _____

_____

_____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- ❑ Meeting Notice posted 5 or more calendar days prior to the meeting date. [Idaho Code § 74-204(1)]
- ❑ Agenda Notice posted at least 48 hours prior to the meeting. [Idaho Code § 74-204(1)]
- ❑ Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- ❑ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ❑ Secretary or other person appointed to take minutes. [Idaho Code § 74-205(1)]

After Meeting

- ❑ Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 74-205(1)]

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OPEN MEETING LAW CHECKLIST

Special Meetings

Meeting Date and Time: _____

Meeting Location: _____

_____

_____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- ❑ Meeting and Agenda Notice posted **at least 24 hours** prior to the meeting. [Idaho Code § 74-204(2)]
- ❑ Notification provided to the news media. [Idaho Code § 74-204(2)]
- ❑ Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- ❑ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ❑ Secretary or other person appointed to take minutes. [Idaho Code § 74-205(1)]

After Meeting

- ❑ Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 74-205(1)]

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OPEN MEETING LAW CHECKLIST

Executive Sessions

Session Date and Time: _____

Session Location: _____

_____

_____

[Idaho Code § 74-203(4) and (5)]

Executive Session Only

- ❑ Meeting and Agenda Notice posted **at least 24 hours** prior to the session. [Idaho Code § 74-204(3)]
- ❑ Posting of Amended Agenda [Idaho Code § 74-204(4)]

Executive Session During Regular or Special Meeting

- ❑ Motion to enter Executive Session to discuss one of the exemptions listed in Idaho Code § 74-206.
- ❑ ⅔ vote to enter Executive Session reflected in regular/special meeting minutes. [Idaho Code § 74-206(1)]

During Session

- ❑ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ❑ Secretary or other person appointed to take minutes. [Idaho Code § 74-205(1)]

After Session

- ❑ Minutes must reference statutory subsection authorizing executive session and identify purpose and topic of session. [Idaho Code § 74-205(2)]
- ❑ Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 74-205(1)]

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>> SAMPLE FORM <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

EXECUTIVE SESSION MOTION AND ORDER

_____ (print name), _____ (print title), MOVES THAT THE BOARD, PURSUANT TO IDAHO CODE § 74-206, CONVENE IN EXECUTIVE SESSION TO: (identify one or more of the following)

- ❑ Consider personnel matters [Idaho Code § 74-206(1)(a) & (b)]
- ❑ Deliberate regarding an acquisition of an interest in real property [Idaho Code § 74-206(1)(c)]
- ❑ Consider records that are exempt from public disclosure [Idaho Code § 74-206(1)(d)]
- ❑ Consider preliminary negotiations involving matters of trade or commerce in which this governing body is in competition with another governing body [Idaho Code § 74-206(1)(e)]
- ❑ Communicate with legal counsel regarding pending/imminently-likely litigation [Idaho Code § 74-206(1)(f)]
- ❑ Communicate with risk manager/insurer regarding pending/imminently-likely claims [Idaho Code § 74-206(1)(i)]

Purpose/Topic summary (required): _____
AND THE VOTE TO DO SO BY ROLL CALL.

CONVENE AT: _____ ADJOURN AT: _____

	YES	NO	ABSTAIN
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

>> SAMPLE FORM <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

MOTION AND ORDER TO AMEND AGENDA

(less than 48 hours before regular meeting or 24 hours before special meeting)

_____ (print name), _____ (print title), MOVES THAT THIS GOVERNING BODY, PURSUANT TO IDAHO CODE § 74-204, AMEND THE AGENDA FOR THIS MEETING AS FOLLOWS:

_____

_____

_____

_____

_____

Good faith reason item not included in posted agenda (required):

_____

_____

_____

_____

	YES	NO	ABSTAIN
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

Questions?

State of Idaho

Office of Attorney General

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Idaho Ethics in Government

State of Idaho

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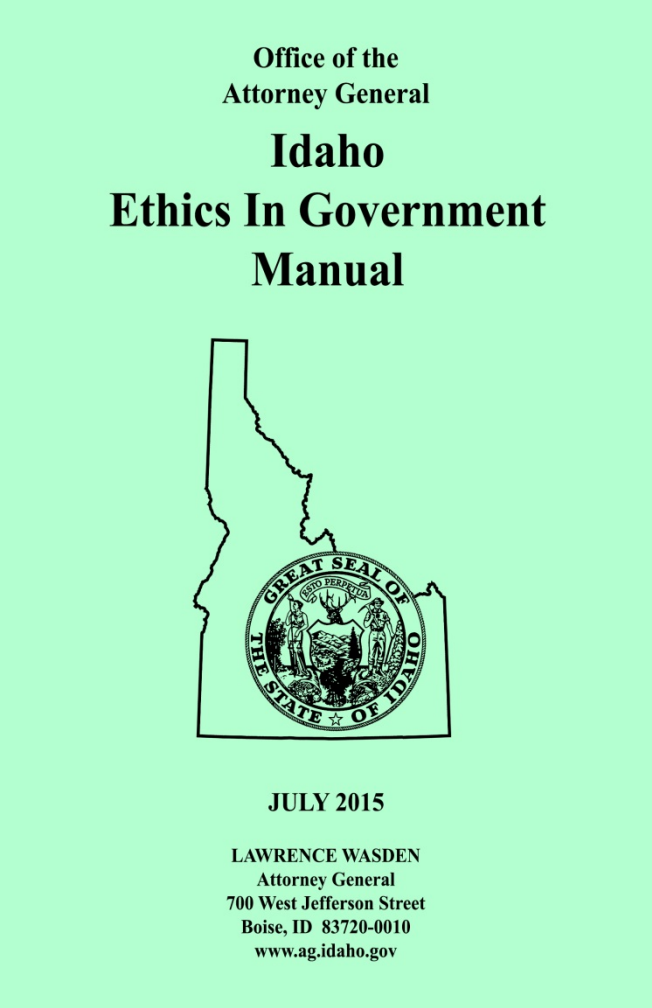

Office of the
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Idaho
Ethics In Government
Manual

JULY 2015

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I.C. § 74-402 Why Ethics?

- **(1) Protect the integrity of government** throughout the state of Idaho while at the same time facilitating recruitment and retention of personnel needed within government;
- **(2) Assure independence, impartiality and honesty** of public officials in governmental functions;
- **(3) Inform citizens of the existence of personal interests** which may present a conflict of interest between an official's public trust and private concerns;
- **(4) Prevent public office from being used for personal gain** contrary to the public interest;
- **(5) Prevent special interests from unduly influencing** governmental action; and
- **(6) Assure that governmental functions and policies reflect**, to the maximum extent possible, **the public interest.**

Public Office = Public Trust

- Government is a trust, officers trustees
  - Trust and trustees are created for benefit of people (Henry Clay). (Idaho Code sec.74-402)
- Trade off of a republic:
  - We can’t do it all ourselves—elect representatives, acknowledge that they will have personal interests—but will put them aside to act in the public interest

Approaching Ethical Scenarios

- Floor or Ceiling?
  - Why do we need ethical rules/statutes?
  - Loopholes?
- Two Courts
  - The Traditional Judicial System
    - You may be able to make a legally correct defense of your actions….

    BUT
  - The Court of Public Opinion
    - May not accept your explanation
    - The PRESS
    - A win in a judicial proceeding may not carry over to election time.

Constitutional Prohibition

- Article VII, § 10—**Making profit from public money prohibited—**The making of profit, directly or indirectly, out of state, county, city, town, township or school district money, or using the same for any purpose not authorized by law, by any public officer shall be deemed a felony, and shall be punished as provided by law.
- *Nampa Hwy. Dist. No. 1 v. Graves*, 77 Idaho 381 (1956)

Statutes

- Title 42, Section 1757
- Title 74, Chapters 4 (Ethics in Government) & 5 (Prohibitions Against Contracts with Officers)
- Title 18, Chapter 13, Bribery and Corrupt Influences Act

I.C. § 42-1757

No member of the board shall participate in the action of the board, nor be present during the board's deliberations, concerning an application for a loan by an entity in which such board member is an officer, agent or employee, or in which such board member has any interest.

Definition of Conflict of Interest

- Idaho Code sec. 74-403(4):
- "Conflict of interest" means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated, unless the pecuniary benefit arises out of the following:
  - (a) An interest or membership in a particular business, industry, occupation or class required by law as a prerequisite to the holding by the person of the office or position;
  - (b) Any action in the person's official capacity which would affect to the same degree a class consisting of an industry or occupation group in which the person, or a member of the person's household or business with which the person is associated, is a member or is engaged;
  - (c) Any interest which the person has by virtue of his profession, trade or occupation where his interest would be affected to the same degree as that of a substantial group or class of others similarly engaged in the profession, trade or occupation;
  - (d) Any action by a public official upon any revenue measure, any appropriation measure or any measure imposing a tax, when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner and degree.

Conflict is NOT

- Difference of Opinion
- Advice you don’t like
- Previously stated policy position
- Personal dislike of someone

Required Action in Conflicts

- Specifics in Idaho Code § 74-404
  - Disclosure
  - Acquiring of an opinion from counsel
  - Act on Advice of Counsel
    - If counsel is wrong—individual is protected
    - If individual is wrong without counsel—no protection

Enforcement

- Title 18—Criminal:
  - 18-1360. PENALTIES. Any public servant who violates the provisions of this chapter, unless otherwise provided, shall be guilty of a misdemeanor and may be punished by a fine not exceeding one thousand dollars ($1,000), or by incarceration in the county jail for a period not exceeding one (1) year, or by both such fine and incarceration. In addition to any penalty imposed in this chapter, any person who violates the provisions of this chapter may be required to **forfeit his office** and may be ordered to make restitution of any benefit received by him to the governmental entity from which it was obtained.

Conflict Exception

- Noncompensated
  - No salary or fee
  - Must observe procedure in Idaho Code § 18-1361A
- Civil Penalty for Violation
  - $1,000
  - Plus may be prosecuted for any criminal violations

How to identify a conflict?

- Ask—Am I doing this for me, or am I doing this for everyone?
- Is there an immediate or direct personal benefit—or one shared by a significant portion of the public?
- How large is the class of people it affects—100,000; 100; 1,000,000? As the class shrinks, the need to disclose increases.

Bribery & Corrupt Influences Act

- Chapter 13, Title 18:
- Defines:
  - Public Servant (18-1351)
  - Pecuniary Benefit (18-1351)
- Prohibits Bribery/Compensation for past action (18-1352)/(18-1354)
- Prohibits threats to public officials (18-1353 & 18-1353A)
- Retaliation 18-1355

Bribery & Corrupt Influences Act

- Gifts—18-1356(4)
- Legislative and executive officials. No legislator or public servant shall solicit, accept or agree to accept any pecuniary benefit in return for action on a bill, legislation, proceeding or official transaction from any person known to be interested in a bill, legislation, official transaction or proceeding.

Idaho Code 18-1356(5)Exceptions

- This section shall not apply to:
- (a) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled; or
- (b) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or
- (c) trivial benefits not to exceed a value of fifty dollars ($50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality; or
- (d) benefits received as a result of lobbying activities that are disclosed in reports required by Chapter 66, Title 67, Idaho Code. This exception shall not apply to any activities prohibited by subsections (1) through (4) of this section.

Using Public Position for Gain

- Idaho Code 18-1359
  - Can’t use position for private gain
  - Can’t solicit payment/gifts
  - Use confidential information
  - Be interested in contract
  - Appoint or vote for appointment within 2nd degree
  - Exception—benefits, payments in ordinary course of business

Caution

- Culture of entitlement
- Know who friends are…
  - Who you are; or
  - What you are?
- Little steps…
- Rationalization

Questions?

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