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2021

## Special District Duties and Liabilities

### Comprehensive Overview for Board Members and Staff

**Eileen G. Eakins**  
Managing Shareholder  
NW Local Government Legal Advisors, LLC  
[eileen@lg-advisors.com](mailto:eileen@lg-advisors.com)  
(503) 607-0517

**George M. Dunkel**  
Senior Consultant  
Special Districts Association of Oregon  
[gdunkel@sdao.com](mailto:gdunkel@sdao.com)  
(503) 369-2050

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## Special District Duties And Liabilities

## Topics to Cover

- Powers and Protections
- Roles and Responsibilities
- Finances
- Public Contracting
- Ethics
- Public Meetings
- Public Records
- Risk Management and Loss Prevention

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## **Special District Duties And Liabilities**

## **Powers and Protections**

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### Topics to cover

- Authority of the District
- Duties of the Board
- Authority of the Board
- Sovereign immunity

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## Authority of the district

### “Dillon’s Rule”:

A local government may exercise powers that are expressly provided for by law or are necessarily implied.

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### Expressly provided authority:

- ORS Chapter 198
- “Principal Act” of District (i.e., ORS chapter 266)
- Other statutes, e.g.:
  - Elections (ORS Ch. 255)
  - Bonds (ORS Ch. 280)
  - Contracts (ORS Ch. 279A, B, C)
- Administrative Rules
- Ordinances

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## Necessarily implied authority, e.g.:

- Purchasing supplies
- Employing staff
- Entering into contracts
- Incidental tasks relating to exercise of authority

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## Duties of the Board

- Ensure the District operates in a legal and fiscally responsible manner
- Enter into legal obligations on behalf of the District
- Oversee financial operations
- Establish legislation by ordinance when appropriate
- Establish district-wide policies
- Delegate authority when appropriate
- Supervise the chief executive officer, if there is one

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## Authority of the Board

Q. Individual Board members have the power to engage in the following tasks without the consent of the rest of the Board (choose all that apply):

- A. Attend board meetings by telephone.
- B. Establish policies.
- C. Review personnel records.
- D. Direct staff.
- E. Sign contracts.

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## Board action:

- Must be at a properly called public meeting
- Requires a quorum to be present
- Generally requires approval by a majority of the board
- All votes must be taken publicly (no secret ballots)

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## Sovereign Immunity

- Prohibits a government body from being sued unless the “sovereign” (e.g., the state of Oregon) grants permission to do so through legislation
- The legislation may dictate the method and terms of the suit

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## Legal actions against public bodies [ORS 30.320]:

- Contracts: Treated like any private party.
- Quiet title: Treated like any private party.
- Tort: Only as provided in ORS 30.260 to 30.300 [Oregon Tort Claims Act]

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## Oregon Tort Claims Act:

“Subject to the limitations of ORS 30.260 to 30.300, every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties... The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties ... shall be an action against the public body only... No other form of civil action or suit shall be permitted.”

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## Oregon Tort Claims Act Damage Caps

*(July 1, 2021 – June 30, 2022)*

### Personal injury or death:

- State, single claimant: \$2,347,700 *(up from \$2,307,500)*
- State, aggregate claims: \$4,695,300 *(up from \$4,615,000)*
- Local government, single claimant: \$782,600 *(up from \$769,200)*
- Local government, aggregate claims: \$1,565,100 *(up from \$1,538,300)*

### Property Damage:

- State and local, single claimant: \$128,400 *(up from \$126,200)*
- State and local, aggregate claims: \$641,800 *(up from \$630,800)*

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## **Special District Duties And Liabilities**

## **Board Roles and Responsibilities**

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## **Topics to cover**

- Board rights and qualifications
- Board decision-making
- Board vision, mission, and values
- Expectations

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## Board rights and qualifications

### Board Qualifications:

- Must be qualified to serve in the District (usually “elector” or resident)
- Volunteer public officials may hold an unlimited number of unpaid offices

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- Special district Board members can be “compensated” up to \$50/day or portion thereof, and be reimbursed for expenses
- Elected board members can be recalled, but usually can’t otherwise be removed

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- Entitled to indemnity under OTCA for claims of negligence against Board
- Not entitled to indemnity if acting outside “course and scope”

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- Can be found personally liable for repayment of unlawful expenditure of public funds. (ORS 294.100)
- Can become ineligible for public office if “a member of, or affiliated with, any organization which teaches the doctrine of, or advocates, the overthrow of the Government of the United States by force or violence.” (ORS 236.030)

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Office becomes vacant if board member:

- Dies or resigns;
- Ceases to be an inhabitant of the entity for which he or she was elected or appointed, if this is required;

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- Is convicted of an infamous crime, or any offense involving the violation of the oath of the incumbent while in office.
- Refuses or neglects to take the oath of office, or to give or renew the official bond of the incumbent, or to deposit such oath or bond within the time prescribed by law

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- Has election or appointment declared void by a competent tribunal;
- Is found to be a mentally diseased person by a competent tribunal;

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- Ceases to possess any other qualification required for election or appointment to such office (ORS 236.010); or
- Agrees to engage in, or does engage in, a duel, or “curry a challenge” to a duel to another person. (Or. Const. Art. II, Section 9).

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## Board decision- making

### Regular voting procedures

- Affect day-to-day operations
- Recorded in the minutes
- No other documentation necessary

### Resolution

- Establishes formal policy of board.
- Governs internal operations
- Simple adoption procedures

### Ordinance

- Local law.
- Requires statutory authority
- Formal adoption procedures

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## Resolutions.

- Written record of important board decisions and district policy
- May be required by statute
- Simple adoption requirements
- Included in published meeting agenda
- Must be approved by majority of board

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### **Non-emergency ordinance.**

- Notice published in a newspaper of general circulation 4-10 days before the meeting, stating the time, date and place of the meeting, giving a brief description of the ordinance to be considered, and stating that copies are available at the district office.
  
- May also be posted in three public places within the district at least 10 days before the meeting; or published by radio and television stations broadcasting in the district [see ORS 193.310 and 193.320].
  
- Must be read during regular meetings of the district board on two different days at least six days apart.

(Wait. There's more.)

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- Reading must be full and distinct unless, at the meeting:
  - ✓ A copy of the ordinance is available for each person who desires a copy; and
  - ✓ The board directs that the reading be by title only.
  
- Requires affirmative vote of a majority of the members of the district board.

(Keep going.)

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- Within seven days after adoption:
  - ✓ Signed by the presiding officer;
  - ✓ Attested by the recording secretary of the district board at the session at which the board adopted the ordinance; and
  - ✓ Filed in the records of the district.
  
- A certified copy filed with the county clerk, available for public inspection.
  
- Unless referred to electors, takes effect on the 30th day after it is adopted, unless a later date given in the ordinance.

(Not done yet.)

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- May be adopted after a single reading
- Takes effect immediately upon adoption
- Must state nature of emergency
- Requires unanimous approval, a quorum being present
- Notice must be published within fifteen (15) days of adoption

(That's enough about ordinances.)

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## Board vision, mission, and values

- **Vision:**
  - What does the District strive to be?
  - How do we want to be seen?
- **Mission:**
  - Why does the District exist?
  - What services do we provide?
- **Values:**
  - What are our guiding principles?
  - What are our standards for conduct and ethics?

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## Expectations of Board Members

### Board members should:

- Be prepared and informed.
- Be honest and courteous.
- Be respectful of each other and the District.
- Be on time.
- Be friendly.
- Be courageous.
- Represent the board's position/action.
- Understand your and others' roles and responsibilities.

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## Expectations of the CEO/Manager

### The CEO/Manager should be expected to:

- Be prepared and informed.
- Provide options.
- Make recommendations.
- Provide organized board packets.
- Communicate; no surprises.
- Be honest.
- Be friendly.
- Represent the board's actions.

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## Special District Duties And Liabilities

## Finances

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## Topics to cover

- Methods of district financing
- Local Budget Law
- Audits

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## Methods of special district financing

### **Permanent Tax Rate**

- Permanent tax rate is permanent
- Property values frozen at 1995 rates, less 10 percent
- Values and PTR may increase no more than 3 percent/year

### **Local Option Tax**

- May exceed permanent tax rate limitations
- Five-year limit for operating revenues
- Capital improvements no more than 10 years
- Subject to compression
- Requires double-majority approval

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## **Fees for Service**

- Must be authorized by law
- Must be “reasonable”
- Check principal act for specific procedures

## **Grants**

**Investments (ORS 294.035)**

**Loans and Financing (ORS Ch. 297)**

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## **System Development Charges (water, wastewater, parks, transportation, drainage)**

- Requires capital improvement plan (CIP)
- If revision of CIP will result in increase in SDC, 30 days’ notice to those on list required; hearing if requested in writing
- Requires an adopted methodology
- Requires SDC ordinance
- Can be financed through Bancroft Bonds
- Must be accounted for separately
- May only be spent on “capacity-increasing” capital improvements named in plan
- Creation or modification of SDC or SDC methodology requires 90 days’ notice to list of those who have requested notification

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## General Obligation Bonds

- Authority must be granted in statute
- Used for capital construction
- Paid back with property taxes
- Double-majority approval required
- Not subject to compression

## Revenue Bonds

- Paid back with any revenue of District
- Election only required if sufficient requests
- Election requires double-majority approval

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## Local Budget Law

### Procedures

- Budget committee is formed.
- Budget officer prepares a proposed budget.
- Notice of the budget committee meeting is published.
- Budget document is made available at or before the budget committee meeting at which the budget is presented.

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- Budget committee conducts at least one public meeting for receiving the budget message and budget document and providing opportunity for public questions or comments.
- Budget committee approves the budget.
- Notice of the public hearing and a summary of the approved budget is published.
- Notice of budget meetings to be published either twice in a newspaper, or once in the newspaper and once on the District website.

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- Governing body (board) conducts a public hearing on the approved budget.
- After public comment and deliberations, governing body adopts the budget and enacts resolutions or ordinances accordingly by June 30.
- Governing body certifies the district's tax, if any, to the county assessor by July 15.

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## Municipal Audit Law

- All local governments must file certain reports/certificates with the Secretary of State. [See ORS 297.435.]
- Full audit required if total expenditures for all purposes, including moneys expended for debt retirement, exceed \$500,000 for the year.
- Less stringent “review” available if expenditures are between \$150,000 and \$500,000 and proper filings are made.

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## Special District Duties And Liabilities

## Public Contracting

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## Topics to cover

### Key Terms

- |                               |                        |
|-------------------------------|------------------------|
| 1: Is it a public contract?   | 7: Procurement?        |
| 2: Is it exempt from bidding? | 8: Construction?       |
| 3: Is it an emergency?        | 9: Surplus property?   |
| 4: What kind of contract?     | 10: The solicitation   |
| 5: Dollar amount?             | 11: Authority to award |
| 6: Professional services?     | 12: Contract award     |

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## QUICK REFERENCE GUIDE TO PUBLIC CONTRACTING IN OREGON

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### Key Terms

**Local Contract Rules, or Local Rules**: Contracting Rules adopted by resolution of the District's Board of Directors. May specifically adopt the Oregon Attorney General's Model Public Contracting Rules ("Model Rules") or specifically decline to adopt them and adopt different rules.

**Local Contract Review Board ("LCRB")**: The District's board of directors, exercising specific contracting authority granted under the Public Contract Code. The Board of Directors must specifically delegate this authority elsewhere, but very rarely ever does.

chapters 279A, 279B, and 279C.

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## QUICK REFERENCE GUIDE TO PUBLIC CONTRACTING IN OREGON

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Oregon Revised Statutes (“ORS”): Oregon’s code of laws.

Public Contracting Code: Oregon’s laws governing public contracting, specifically [ORS 279A, 279B, and 279C]O

Oregon Administrative Rules (“OAR”): Rules adopted by state agencies.

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## QUICK REFERENCE GUIDE TO PUBLIC CONTRACTING IN OREGON

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Oregon Attorney General’s Model Public Contracting Rules (“Model Rules”): Administrative rules for public contracting adopted by the Oregon Attorney General. They apply to state agencies specifically but will apply to other types of public entities (like special districts) by default unless the entity’s governing board specifically declines to adopt them. They can be found in OAR Chapter 137, Divisions 46 through 49.

Qualification-Based Selection (“QBS”). Candidates must be evaluated based on qualifications first, with cost or pricing evaluated secondarily. Applies to contracts for architects, engineers, surveyors, and photogrammetrists, and “related services” exceeding \$100,000.

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# 1. Is it a public contract?

“Public contract” means a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.

Does not include:

- Grants
- Contracts for the purchase or sale of real estate
- Intergovernmental agreements (IGAs)
- Contracts for which no district funds are used

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- “Yes.” Assume competitive bidding will be required unless there is an exemption. Move on to next step.
- “No.” Public Contracting Code does not apply. Contract may be awarded by any reasonable method, but other laws may apply.

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## 2. Is it exempt from competitive bidding?

### A. By statute:

- Sole-Source, Fixed Price. Sole-source expenditures where the rate or price is established by law or ordinance for source selection [ORS 279A.025(2)(f)].
- Investments. The investment of funds as authorized by law, and other financial transactions that by their character cannot practically be established under the competitive contractor selection procedures of ORS 2798.050 to 2798.085 [ORS 279A.025(2)(q)(C)].
- Certain Contracts with Non-Profits. Contracts made with qualified non-profit agencies providing employment opportunities for disabled individuals under ORS 279.835 to ORS 279.855. [ORS 279A.025(4)].
- “Piggyback” Contracts. Contracts for purchase or lease of personal property entered into by another public agency that allows for “piggybacking” onto the contract terms, according to ORS 279A.205 through 279A.215 (“Cooperative Procurements”).

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- ### B. By Rule: As specifically provided in the applicable section of the **Local Public Contracting Rules**.

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C. By Resolution: By resolution of the LCRB (“Special Procurement”).

The Board of Directors, acting as the Local Contract Review Board, may exempt certain contracts or classes of contracts from competitive bidding requirements after adopting written “findings” to support the exemption, holding a public hearing (for construction contracts), and adopting a resolution declaring the exemption.

For procurements, a similar process applies if the Board wants to obtain an item from a single source (i.e., sole-source).

- For sole-source procurements, see ORS 279B.075.
- For other procurements (“Special Procurements”), see ORS 279B.085.
- For public improvements, see ORS 279C.335.

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- “Yes.” Follow applicable purchasing processes in statute, rules, resolution, or agreement.
- “No.” Move on.

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### 3. Is it an emergency?

**Local Rules** define “emergency.”

For example:

“Emergency” shall be defined as follows: “Circumstances that (a) could not have reasonably been foreseen; (b) create a substantial risk of loss, damage, or interruption of services or a substantial threat to property, public health, welfare or safety; and (c) require prompt execution of a contract to remedy the condition.”

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To skip competitive bidding in an emergency, **Local Rules** must describe the process used to award an emergency contract.

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- “Yes.” Award the contract as described in the **Local Rules**.
  - Pro tip: Incorporate ORS 279B.080 (procurements) and OAR 137-049-0150 (public improvements) into **Local Rules**.
- “No.” Move on.

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## 4. What kind of contract is it?

Public contracts in Oregon fall into one of the following categories:

- A. Personal services (professional services)
- B. Procurements (purchase of goods, or services that are not personal services)
- C. Public improvements (construction)
- D. Surplus property (disposing of things you don't need)

The contracting process varies, depending on the type of contract.

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Once the type of contract is determined, move on.

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## **5.** What is the amount of the contract?

- Within each category of contract, the contracting process may vary, depending on the amount of the contract.
- Once the estimated dollar amount is determined, move on.

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Once the type of contract and the value of the contract are determined, move on.

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## 6. Is it a personal services contract?

**Local Rules** define this. For example:

“Personal Services” include those services that require specialized technical, creative, professional or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment, and for which the quality of the service depends on attributes that are unique to the service provider. Such services include, but are not limited to: Architect, engineer; surveyor; photogrammetrist; attorney; accountant; auditor; computer programmer; artist; designer; performer; consultant; outreach educator; and workshop facilitator.

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If “yes,” is it a contract for an architect, engineer, surveyor, or photogrammetrist?

- Yes:
  - If \$100,000 or more, must be formally bid and qualification-based selection (QBS) will apply.
  - If under \$100,000, award like other personal services contracts.
- No: Move on.

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If “yes,” **Local Rules** prescribe how the contract may be awarded.

For example:

- a) A personal services contract totaling less than \$50,000 in either a calendar year or a fiscal year may be awarded by direct appointment, without competitive bidding.
- b) A personal services contract totaling between \$50,000 and \$150,000 in the aggregate may be awarded after obtaining at least three informal quotes, according to the procedures for Intermediate Procurement described in ORS 279B.070.
- c) A personal services contract totaling more than \$150,000 in the aggregate shall be awarded using competitive sealed proposals as provided in ORS 279B.060, unless exempted from competitive bidding by resolution of the Local Contract Review Board according to the requirements of ORS 279B.085.

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## 7. Is it a purchase of goods or services (not personal services)?

This is called a “procurement” under the Public Contracting Code.

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- “Yes.”
  - A. Under \$10,000, no competitive process is required. Get the best deal you can for the District.
  - B. Between \$10,000 and \$150,000, get at least three competitive quotes from qualified vendors. Written quotes are always recommended; required if bids will exceed \$75,000.
  - C. More than \$150,000, contract must be advertised and competitively bid unless the LCRB grants an exemption by resolution. May use an invitation to bid or a request for proposals. Consult applicable statutes in ORS chapter 279B.
- “No.” Move on.

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## 8. Is it a contract for construction?

- This is a “public improvement” under the Public Contracting Code.
- A public improvement for \$50,000 or more is called a “public work.”

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- “Yes.”
  - A. Under \$5,000, no competitive process is required. Get the best deal you can for the District.
  - B. Between \$5,000 and \$100,000, obtain at least three competitive quotes from qualified vendors. Written quotes are always recommended; required if bids will exceed \$75,000.
  - C. More than \$100,000, contract must be advertised and competitively bid unless the LCRB grants an exemption by resolution. Consult applicable statutes in ORS chapter 279C.

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- D. If more than \$50,000, prevailing wages must be paid, regardless of the method of making the award. The advertisement or request for bids, and the contract itself, must state this requirement. Consult applicable statutes in ORS chapter 279C.
- E. If more than \$100,000, a bid bond, performance bond, and payment bond are required.

- **“No.” Move on.**

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## 9. Are you disposing of surplus property?

Selling publicly owned property is a “public contract” under the Contracting Code. It must be competitively bid and sold to the highest bidder unless the Local Rules provide for a different process.

The **Local Rules** should define “surplus property.” For example:

*“Surplus Property” is defined as any personal property of the District that has been determined by the Board as being of no use or value to the District.*

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- If “yes,” follow **Local Rules**, which should describe how surplus property may be disposed of, e.g., donated, thrown away, sold at auction, etc.
- If “no,” start over. It either isn’t a public contract, or you missed a step.

If the contract is ready to award, move on.

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If the contract is not exempted and is ready to be competitively bid, move on.

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## 10. The solicitation.

- Competitive Quotes (informal bidding)
  - Procurements. See ORS 279B.070
  - Public improvements. See ORS 279C.412-279C.414
  
- Request for Proposals (RFP)
  - Personal services. See **Local Rules**.
  - Procurements. See ORS 279B.060
  - Public improvements. Exemption required; see ORS 279C.400-279C.410
  
- Invitation to Bid (ITB)
  - Procurements. See ORS 279B.055
  - Public improvements. See ORS 279C.360-279C.395

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## 11. Who has the authority to award the contract?

- The Board of Directors must approve all contracts, unless they have delegated this authority elsewhere, such as to the Executive Director, Fire Chief, or General Manager.
  
- The **Local Rules** may describe the scope of delegation for approval of contracts, including assigning dollar limits to this authority.

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- If there is no **Local Rule** delegating authority to approve contracts, or if the **Local Rule** specifically requires it, the Board of Directors must approve all contract awards.
- If authority is delegated in the **Local Rule**, follow the **Local Rule**.
  - Pro tip: Include authority to act in an emergency within the Delegation Rule.

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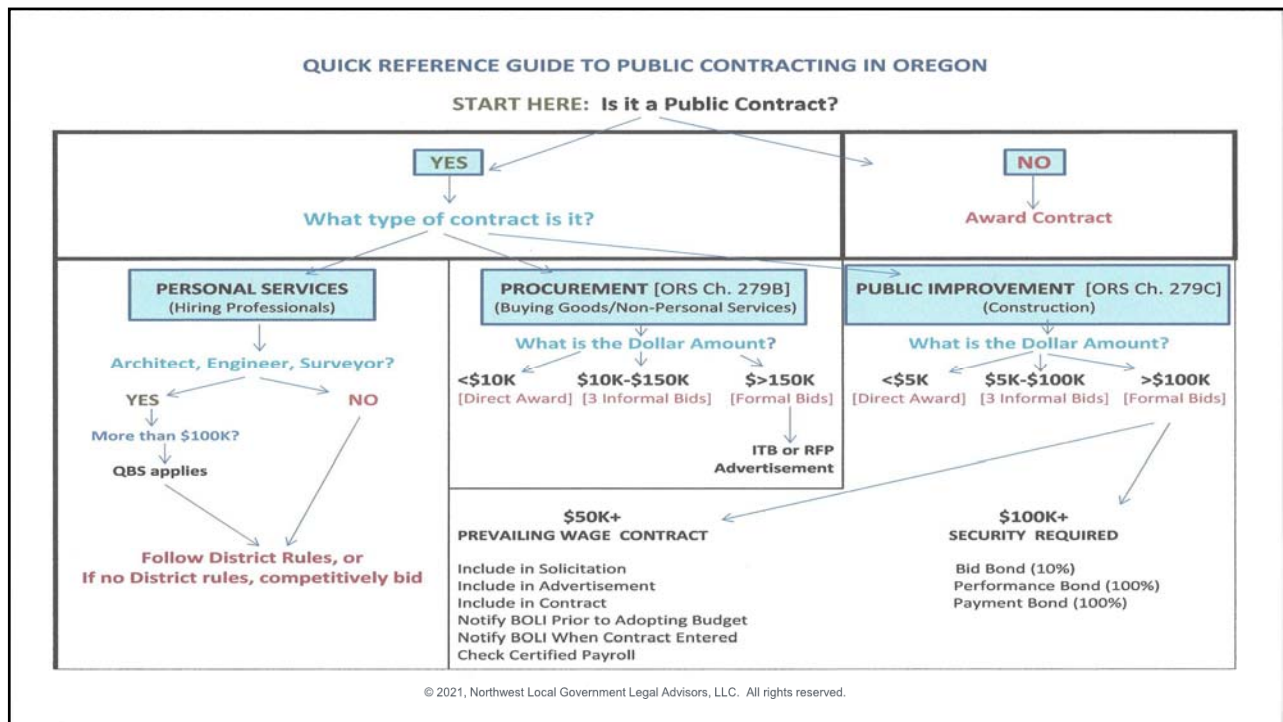
## 12. Contract award.

- Direct Award (no bidding): “Any manner deemed practical and convenient.”
- Informal Bidding (three quotes): “Best serves the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor.”
- Formal Bidding: Lowest responsive, responsible bidder.
  - Responsive: Substantially complies with requirements for submission.
  - Responsible: Has all necessary qualifications and resources to do the job.

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## Recent changes in the law

**HB 3082 (2021):** After January 1, 2022, threshold for bidding a public improvement contract increases from \$5,000 to \$10,000. Minimum for formal bids remains \$100,000.

**SB 420 (2021):** Contracting agency may authorize a public improvement contract to be named a “community benefit contract.” May require contractor to qualify as a training agent or provide apprenticeship training. [See ORS 660.020].

**HB 3089 (2021):** Public Drinking Water and Sewer Ratepayer Assistance Fund created. Grants provided to public water/sewer providers. \$15 million in funds available beginning July 1, 2021.

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## **Special District Duties And Liabilities**

## **Public Meetings**

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## **Topics to cover**

- Review of the law
- Notice requirements
- Executive sessions

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## Oregon statutory policy.

“The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of [the public meetings law] that decisions of governing bodies be arrived at openly.” ORS 192.620 [1973]

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## Purposes of the law

- To open meetings of governing bodies to the public;
- To give notice of the time and place of meetings; and
- To make meetings accessible to those wishing to attend.
- No requirement to let the public talk.
- “Public meeting” vs “public hearing.”

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“What is a ‘public meeting’?”.

Any meeting where a quorum of the decision-making body is present and is discussing or “deliberating toward” a matter of business is a public meeting.

Any meeting of a body formed to advise a public body is a public meeting.

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Which of the following is allowed at a public meeting? (Choose all that apply.)

- A. Shouting at each other.
- B. Meeting outside the district.
- C. Meeting on the second floor of a building with no elevator.
- D. Holding the meeting when no notice was given.
- E. Smoking

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For a seven-member board, which is NOT a public meeting?

- A. Three members call a fourth one on the phone, to discuss firing the manager.
- B. Four members go fishing together.
- C. The chair sends a group email to the rest of the board to ask how they plan to vote at next week's board meeting.
- D. Five members attend a work session at the home of the chair, to hammer out some personnel policies.

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**What is the difference between a legal public meeting and an illegal public meeting?**

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### “How much notice is required?”

Provide *general* notice to the public at large, and *actual* notice to specifically interested persons:

## Notice

- Executive session only: Same as for any other meeting.
- Special meeting: At least 24 hours’ notice to public and media.
- Emergency meeting: As much notice as possible under the circumstances.

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### True or false:

If no members of the public attend a district’s board meetings for one year, the public body is not required to send out notice for meetings.

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## Notice is required for all public meetings.

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### “What if we don’t give proper notice?”

Any member of the media or anyone affected by a decision of the public body may sue.

- A successful suit makes the meeting illegal.
- Decisions may be voidable or void.
- Successful plaintiff can receive attorney fees.
- Board members can be held *personally* liable for abusing the executive session privilege; civil penalties up to \$1,000 per violation and attorney’s fees under Oregon’s Government Standards and Practices (ethics) laws.

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**True or false:**

Meeting minutes are only required when the board votes on something or holds an executive session.

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**“Can we tape record the meeting instead?”****Minutes**

Yes. Minutes may be taken in writing, or by sound, video, or digital recording.

Final transcript or recording must “give true reflection of matters discussed and views of the participants.” The public may be charged for the cost of a written transcript made from a recording.

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## **“Can’t we just post a running notice somewhere, giving the time and date of the meetings?”**

- Yes, if the notice includes an agenda.
  
- But if possible, you should publish notice for each general meeting, along with a proposed agenda.

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## **“What should be in the minutes?”**

### At minimum:

- Names of every board member present.
- A general summary of each topic discussed.
- How each topic was resolved.
- The outcome of any votes taken, including who voted, and how.
- Reference to any document discussed at the meeting.

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## Executive sessions

“Executive session” means any meeting or part of a meeting of a governing body which is closed to certain persons for deliberation on certain matters. ORS 192.610(2)

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## No final votes – discussion only.

“No executive session may be held for the purpose of taking any final action or making any final decision.” ORS 192.660(6).

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## **“Who may attend an executive session?”**

- Board members.
- Anyone authorized by the board.
- Member(s) of the media\*.  
*\* Unless the executive session is to discuss litigation in which the news medium is a party.*

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## **Can a board call an executive session whenever it chooses?**

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**ORS 192.630:**

(1) All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by ORS 192.610 to 192.690.

(2) A quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as otherwise provided by ORS 192.610 to 192.690.

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**Notice required.**

Notice must be given for executive sessions as with any other public meeting.

Notice should state the statutory authority for the executive session.

The board chair also should state the statutory authority when convening the executive session so it is recorded in the minutes.

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## Minutes required.

Minutes of executive session minutes are usually exempt from public records disclosure. But they can be reviewed by a court of law.

Information discussed in executive session is confidential to the Board and anyone else who attends.

Disclosure by one waives the right to confidentiality for everyone.

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## Permissible reasons for executive sessions

To consider the employment of a public officer, employee, staff member or individual agent, IF:

- Vacancy advertised;
- Regular hiring procedures adopted;
- If officer (i.e., management), public has had opportunity to comment;
- If CEO, hiring criteria and procedures were adopted in public meetings with opportunity for public comment

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Previous slide does NOT apply to:

- The filling of a vacancy in an elective office.
- The filling of a vacancy on any public committee, commission or other advisory group.
- Consideration of general employment policies.
- The employment of the chief executive officer, other public officers, employees and staff members if requirements are not met.

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## Permissible reasons for executive sessions

- To consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent who does not request an open hearing.
- To review and evaluate the employment-related performance of the chief executive officer of any public body, a public officer, employee or staff member who does not request an open hearing.

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## Permissible reasons for executive sessions

- To conduct deliberations with persons designated by the governing body to carry on labor negotiations.
- To conduct deliberations with persons designated by the governing body to negotiate real property transactions.
- To carry on negotiations under ORS ch. 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

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## Permissible reasons for executive sessions

- To consider information or records that are exempt by law from public inspection.
- To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.

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## Permissible reasons for executive sessions

- To discuss information about review or approval of programs relating to the security of ... generation, storage or conveyance of:
  - Electricity;
  - Gas in liquefied or gaseous form;
  - Hazardous substances;
  - Petroleum products;
  - Sewage;
  - Water;
  - Telecommunication systems (cellular, wireless, radio);
  - Data transmissions by whatever means.

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## Executive session penalties.

Failure to comply with executive session laws is punishable under Oregon's Ethics Laws for Public Officials.

It is personal to the elected official.

The maximum fine is \$1,000 per violation but excused if decision made in reliance on advice of public body's legal counsel.

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## Recent changes in the law

**SB 317A (2018)** – Clarifies that state and local governments may hold meetings on Tribal lands, even if they're not meeting with a Tribe.

**SB 288 (2019)** – Clarifies that “local governments” include special districts.

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## Recent changes in the law

**HB 4212 (2020)** – Clarifies that public bodies may hold virtual meetings or implement social distancing measures.

**HB 2560 (2021)** – Governing body must provide remote or telephone access to public meetings (not exec. sessions) “to the extent reasonably possible,” and allow testimony to be given orally or in writing.

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## **Special District Duties And Liabilities**

## **Public Records**

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## **Topics to cover**

- Review of the law
- Disclosure requirements
- Exemptions from disclosure
- Storage
- Retention

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## Review of the law

“What is a ‘public record’”?

“Any information in any form capable of retention by a custodian that: (a) Relates to an activity, transaction or function of a public body; and (b) is necessary to satisfy the fiscal, legal, administrative or historical policies, requirements or needs of the public body.”

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### **Public’s rights.**

Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505.

If a person who is a party to a lawsuit in which a public body is a party, or who has filed a tort claim notice, asks to inspect or to receive a copy of a public record that the person knows relates to the proceeding or notice, the person must submit the request in writing to the custodian and, at the same time, to the attorney for the public body.

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### True or false:

A request for public records may be denied if the person making the request is just trying to create hassles and cause trouble.

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### Public records custodian.

- Keep records safe
- Furnish proper and reasonable opportunities for inspection and examination of the records in the office of the custodian, and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours

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- If the public record is maintained in machine readable or electronic form, furnish proper and reasonable opportunity to assure access.
- The Custodian may adopt reasonable rules necessary for the protection of the records and to prevent interference with the regular discharge of duties of the Custodian.

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*Effective Jan. 1, 2018:*

Disclosure  
requirements

Must acknowledge request within five (5) business days, and complete request “as soon as possible and without unreasonable delay, but no later than ten (10) business days after acknowledgement.”

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- Response time can be extended while public body seeks clarification or additional information.
- Request is complied with if the public body explains where the records are publicly available.
- Public body is not liable for any damages if a record is disclosed that is not expressly required to be kept confidential.
- Failure to respond within time frame is considered no response and will allow the requester to seek enforcement.

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### **Responding to records requests.**

- Acknowledge receipt of the request.
- Ask for more clarification if necessary.
- Provide information as follows....

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- You do not possess, or are not the custodian of, the record;
- You have at some of the requested records, and give an estimate of time and fees, or when such an estimate will be given;
- You're uncertain whether you possess the public record and that you will search for it and respond as soon as practicable;
- State or federal law prohibits you from acknowledging whether the record exists or that acknowledging whether the record exists would result in the loss of federal benefits or other sanction. Cite the applicable law.

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Provide a copy in the form requested, if available. If it is not available in the form requested, make it available in the form in which it is maintained.

If subject to attorney-client privilege, in lieu of providing a copy, the public body may prepare a condensation from the record of the significant facts that are not otherwise exempt from disclosure. [ORS 192.360]

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A citizen asks for written minutes of a meeting to be transcribed onto an audiotape. Is the district required to do this?

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**Fees:**

- Must be authorized in Public Records Policy.
- If the fee will be greater than \$25, the District first must provide the requestor with a written notification of the estimated amount of the fee and wait for the requestor to confirm that he/she wants to proceed.
- The Custodian may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

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**Written policy required:**

The Board must adopt written procedures for making public record requests that includes:

- (a) The name of one or more persons to whom public record requests may be sent, with addresses; and
- (b) The amounts of and the manner of calculating fees that the public body charges for responding to requests for public records.

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**Additional recommendations:**

- Require requests to be in writing.
- Include times/days when inspection is permitted.
- List considerations for waiving or reducing fees.
- Post the policy.
- Apply it uniformly to everyone.
- If in doubt, don't respond without a lawyer's advice.

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## Exemptions from disclosure\*

\* These are examples, only. Please don't rely on these slides and then tell everybody a lawyer told you what to do.

- If requested in writing, address, home telephone number and email address if the individual demonstrates to the satisfaction of the public body that doing so could endanger the personal safety of the individual or a family member residing with them.
- Employee photo ID badges.
- Email addresses in possession of local government (e.g., for employees, clients, stakeholders, newsletter subscribers, vendors), except those assigned for official use by public employee.

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- Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy.
- Personally identifiable information (e.g., home address, SSN, driver's license number, etc.) of an employee or volunteer, absent a showing of clear and convincing evidence from the requester that the public interest requires disclosure. [Subject must be given at least seven (7) days' notice before their information is released.]

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- Information submitted in confidence and not otherwise required by law to be submitted (limited).
- Nonfinancial membership records and employee financial records maintained by PERS.
- Library circulation records.

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- Personally identifiable information about customers of a people's utility district or the names, dates of birth, driver license numbers, telephone numbers, email addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body, unless the customer consents, or if doing so is necessary to provide services or to establish and manage customer accounts.

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**Unless the public interest requires disclosure:**

- Records pertaining to ongoing or likely litigation or mediation to which the public body is a party.
- Trade secrets.
- Criminal investigatory information.
- Investigatory information for worker's comp claims and OSHA violations, until the final order is issued.

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- Personnel discipline records.
- Test questions, scoring keys, etc.
- Real estate appraisal information prior to acquisition.
- Names and signatures of employees relating to some union activities.

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- Certain information relating to archaeological sites or threatened or endangered species.
- Information about review or approval of programs relating to the security of systems that provide electricity, sewer, water, or other public services.
- Operational plans relating to anticipated threats to public safety, security measures, or records that would allow unauthorized access to, or interference with, property or disrupt services.

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## Records storage

- Secure, fire-resistant structures
- Temperature and humidity to ensure optimum longevity
- Adequate light and access to permit retrieval
- Adequate ventilation and protection against insect or mold invasion.
- Protected from water damage
- Not placed on the floor

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Agencies shall, with the advice and assistance of the State Archivist, identify their essential records, regardless of medium or physical format.

Agencies shall store security copies of essential electronic records systems off the premises where the system is used, along with any system documentation necessary to enable recovery of the system in the event of an emergency.

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## Records retention

Oregon State Archivist establishes rules and schedules.

General schedules for special districts located in Oregon Administrative Rules (OAR) ch. 166, Division 150.

Local agencies are required to report to the Archivist which documents have been destroyed, per the schedules.

Upon request, the State Archivist may perform, and charge for, microfilm services for the public body.

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## Recent changes in the law

**HB 2101A (2017).** Established four-member public records subcommittee of Legislative Counsel Committee.

Established 15-member Oregon Sunshine Committee supported by DOJ. Tasked with reviewing public records laws and exemptions and making recommendations for changes.

**SB 106 A (2017).** Established Public Records Advocate appointed by Governor to facilitate public records conflicts.

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## Recent changes in the law

**SB 500 (2021):** Public Records Advocate is independent office in executive department (not supervised by Governor).

**SB 90 (2021):** Creates new exemption from disclosure for addresses of individuals with intellectual or developmental disabilities residing in adult foster homes or residential training facilities.

**SB 792 (2021):** Exempts from disclosure personally identifiable information of anyone under 16 years of age obtaining hunting or fishing license from ODFW.

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# Special District Duties And Liabilities

# Ethics Laws for Public Officials

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## Topics to cover

- Application of the law
- Ethics in employment
- Financial gain
- Gifts
- Undue influence
- Conflicts of interest

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## Application of the law

- Oregon Government Ethics Commission (OGEC) is the administrative agency that enforces Oregon's ethics laws.
- Created in 1974 by a state-wide ballot measure following the Watergate scandal.
- Ethics laws for public officials were enacted at the same time.

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## Sources of authority.

- Oregon Revised Statutes (“ORS”) Chapter 244.
- Oregon Ethics Commission’s Guide for Public Officials.

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## Scope of ethics laws.

- Economic conflicts of interest.
- Undue influence.
- Use of political office for financial gain.
- Public disclosure.

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## Laws apply to...

### Public officials and candidates.

- Public Official: Any person serving the state of Oregon or any of its political subdivisions or any other public body of the state as an elected official, appointed official, employee, agent, irrespective of whether the person is compensated for the services. ORS 244.020(14).
  
- Includes, but is not limited to: Current and former board members, employees, volunteers, and candidates for public office.

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## ... relatives of public officials:

- Spouse, parent, stepparent, child, sibling, stepsibling, son-in-law, daughter-in-law of the public official, or of the public official's spouse. (Now also includes "First Person," to include the spouse or partner of the Governor).
  
- Any individual for whom the public official has a legal support obligation; or who benefits financially from the public official's employment with the public entity.

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## Ethics in employment

### “Can I hire my relative?”

- No. A public official may not participate in employment decisions regarding relatives or household members.
- Includes interviews, debates, or discussions regarding the hiring or firing of relatives or household members.
- Two exceptions...

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1. The class exception: If the public official’s action affects a class of people (including his/her relative) to the same degree, then the nepotism provisions are not violated.
2. The unpaid volunteers exception: Generally, nepotism provisions do not apply to decisions regarding unpaid volunteers.

Also, a public official may serve as a **reference** or provide a **recommendation** for a relative.

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## “Can I supervise my relative?”

- No, a public official may not directly supervise relatives or household members.

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## Application of the law

- Oregon Government Ethics Commission (OGEC) is the administrative agency that enforces Oregon’s ethics laws.
- Created in 1974 by a state-wide ballot measure following the Watergate scandal.
- Ethics laws for public officials were enacted at the same time.

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## Financial gain

### The “but for” test.

- A public official shall not use the official position to obtain financial gain or avoid financial detriment that would not otherwise be available *but for* the public official’s position. ORS 244.040.
- Applies to the public official, a relative of the public official, or a business owned by the public official or the public official’s relative.

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## Financial gain

### Examples of unlawful gain:

- Using district equipment (e.g. phones, computers, wood shop tools, vehicles, or storage space) when the public does not have the same access to this equipment.
- Free use of District facilities when the public is required to pay to use them.
- Accepting meals or other free stuff by public officials.
- Employer-provided cell phones for personal use, frequent flier miles earned on official business, discounts -- unless part of compensation.

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### **What is NOT unlawful financial gain?**

- Official salary and benefits.
- Unsolicited honoraria under \$50 or related to private employment.
- Reimbursement of expenses.
- Unsolicited awards for professional achievement.
- Gifts under \$50 from a source without an administrative or financial interest in the public official or the entity he/she represents.

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### **General rule:**

#### **Gifts**

A public official (or a relative, or a business of the public official) may not receive a gift valued at greater than \$50 from someone with a legislative or administrative interest in the public body.

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## What is a “gift”?

“Something given to a public official, or a relative of the public official, when there is no payment, or payment is for a discounted price, and the opportunity (gift) is not available to others who are not public officials on the same terms or conditions.”

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## **What is a “legislative or administrative interest”?**

With respect to the public body, can the giver:

- ...sell things?
- ...submit bids?
- ...get a license or permit?
- ...advocate for legislative outcomes (i.e., lobby)?
- ...be affected by employment decisions?

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## **Permissible gifts.**

- Gifts of any value if the giver does not have a legislative/administrative interest in the public entity.
- Gifts of \$50 or less from a single source with a legislative/administrative interest in the public entity.
- Gifts that bear no relationship to the person's public position.

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- Informational or program material, publications or subscriptions related to the recipient's performance of official duties.
- Reasonable expenses paid by a public or non-profit entity for attendance at a convention, fact-finding mission or trip, conference or other meeting if the public official is scheduled to deliver a speech, make a presentation, participate on a panel or represent a government entity.

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- Unsolicited awards of appreciation with a resale value of less than \$25 dollars (e.g., engraved plaques).
- Unsolicited honoraria of less than \$50.
- Reasonable expenses provided to the public official, relatives, or staff when the public official is representing the public entity or speaking in an official capacity.
- Contributions to the public official's legal expense trust fund established under ORS 244.209.

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### **“Is entertainment a gift?”**

- Yes, entertainment gifts include invitations to events or activities put on for recreation or amusement. (E.g. concerts, plays, sporting events).
- If provided by someone with a legislative or administrative interest in the public body, the \$50 annual limit applies.

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## “What about meals and beverages?”

- Food and beverages consumed in the presence of the buyer is subject to the \$50 limit.
- However, you may accept food and beverage at a reception when it is an incidental part of the reception.
- Also, food or beverage consumed at the event when the public official represents the public entity is not a gift.

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## A public official may not:

### Undue influence

- Solicit or accept the offer, pledge or promise of **future employment** based on any understanding that a vote, official action or judgment would be influenced by the offer.
- Use or attempt to use **confidential information** gained through their positions as public officials for financial gain. *[Also applies to former public officials.]*
- Directly receive a beneficial interest in a contract which they authorized for the two years following the contract’s authorization.

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... continued...

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...

- Solicit or accept the offer, pledge or promise of **future employment** based on any understanding that a vote, official action or judgment would be influenced by the offer.
- Use or attempt to use **confidential information** gained through their positions as public officials for financial gain. *[Also applies to former public officials.]*

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*Potential conflict of interest.*

Conflicts of  
interest

“Could” result in financial gain or avoidance of financial detriment.

- Disclose for the record.
- You may still discuss.
- You may still vote.

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### Actual conflict of interest.

“Will” result in financial gain or avoidance of financial detriment.

- Disclose for the record.
- Abstain from discussion.
- Do not vote (unless action cannot be taken without member’s vote).

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### Penalties.

- Maximum penalty for most ethics violations is \$5,000.
- Fine for violation of executive session law \$1,000, but excused if decision made in reliance on advice of public body’s legal counsel.
- In addition, if a public official financially benefited, the OGEC can impose a civil penalty in an amount equal to twice the amount the public official realized as a result of the violation.

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- No penalty if official or candidate relied in good faith on Ethics Manual or Ethics Commission opinion.
- ORS 244.400 formerly required the Ethics Commission to pay the attorney fees of a party who prevails in a contested case.

Legislative Update: (2019) Prevailing party may file a petition in Marion County Circuit Court seeking attorney fees, which the court may award (or not) if the award was not “substantially justified” or other circumstances make the award “unjust,” and provided the funds are “available to the Commission.”

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## Recent changes in the law

**(2019) Amendment to ORS 244.049:** Prevents a public official from using public funds or funds from third parties to make payments under a non-disclosure agreement relating to workplace harassment (including sexual harassment or sexual assault) by the public official while in office or when a candidate for office.

**SB 61 (2021):** Authorizes Ethics Commission to issue written opinions on violations of executive session laws. [Former statute limited written opinions to violations described in ORS chapter 244 only.]

**SB 62 (2021):** Prohibits public official from requesting or receiving public money to pay penalty for ethics violation(s).

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## Special District Duties And Liabilities

## Risk Management and Loss Prevention

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## Miscellaneous and other recent changes in the law

**HB 2174 (2021):** County may require that the state Department of Administrative Services credit forest reserve monies allotted to county roads to other county-wide providers of road services.

**HB 3071 (2021):** All elected officials are now mandatory reporters of child abuse, elder abuse, or abuse of disabled persons.

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## SDAO Pre-Loss Legal Services

Known claim served.

You think you may have a claim.

You are considering personnel action.

“Oh, shucks.”

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## RESOURCE LIST

Public Records and Meetings Manual • Oregon Attorney General	\$25 <a href="http://www.doj.state.or.us/pdf/publications_orderform.pdf">http://www.doj.state.or.us/pdf/publications_orderform.pdf</a>
Public Contracting Manual • Oregon Attorney General	\$65 <a href="http://www.doj.state.or.us/pdf/publications_orderform.pdf">http://www.doj.state.or.us/pdf/publications_orderform.pdf</a>
Public records retention schedules • Oregon State Archivist	Free, on-line Oregon Administrative Rules (OAR) Chapter 166
Basic Budgeting Book Local Budgeting in Oregon Local Budget Law Local Budgeting Manual • Oregon Department of Revenue	Free, on-line <a href="http://www.oregon.gov/DOR/PTD/ptd_localbudpubs.shtml">http://www.oregon.gov/DOR/PTD/ptd_localbudpubs.shtml</a>

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## RESOURCE LIST

<p><b>A Guide for Public Officials</b>  <ul style="list-style-type: none"> <li>• Oregon Ethics Commission</li> </ul> </p>	<p><b>Free, on-line</b>  <a href="http://www.oregon.gov/OGEC/docs/PO_Guide_2008.doc">http://www.oregon.gov/OGEC/docs/PO_Guide_2008.doc</a> </p>
<p><b>District Elections Manual</b>  <ul style="list-style-type: none"> <li>• Oregon Secretary of State, Elections Division</li> </ul> </p>	<p><b>Free, on-line</b>  <a href="http://www.sos.state.or.us/elections/publications/district.html">http://www.sos.state.or.us/elections/publications/district.html</a> </p>
<p><b>Restrictions on Political Campaigning for Public Employees</b>  <ul style="list-style-type: none"> <li>• Oregon Secretary of State, Elections Division</li> </ul> </p>	<p><b>Free, on-line</b>  <a href="http://www.sos.state.or.us/elections/publications/260.432_quickref.pdf">http://www.sos.state.or.us/elections/publications/260.432_quickref.pdf</a> </p>

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ROAD SHOW 2021**

**Thank you .**

**Eileen G. Eakins**

Law Offices of Eileen Eakins, LLC

[eileen@lgl-advisors.com](mailto:eileen@lgl-advisors.com)

(503) 607-0517

**George M. Dunkel**

Special Districts Association of Oregon

Consulting Services, Senior Consultant

[gdunkel@sdao.com](mailto:gdunkel@sdao.com)

(503) 369-2050

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