

COLORADO STATUTORY PROVISIONS CONCERNING ETHICS AND CONFLICTS OF INTEREST FOR MUNICIPAL OFFICIALS AND EMPLOYEES

by

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Applicable Statutes

Ethics and conflicts of interest for local government officers and employees are addressed in three areas of the Colorado Revised Statutes:

- I. Article 18 of Title 24. Part 1 is Colorado's "Code of Ethics" for public officers and employees. Part 2 addresses proscribed interests in contracts;
- II. Sections 31-4-404(2) and (3), concerning restrictions on members of municipal governing bodies voting on matters in which they have a personal or private interest; and
- III. Section 18-8-308 of the Colorado Criminal Code, imposing certain disclosure requirements on public officials.

Caveat: Be sure to check for local charter or ordinance provisions that may also bear on these issues.

Colorado "Code of Ethics" for Public Officials and Employees-

[C.R.S. 24-18-101, et seq.; C.R.S. 24-18-201, et seq.]

Violation of Public Trust and Fiduciary Duty- Standard of Proof

The Code of Ethics identifies several rules of conduct for local government officials and employees. Violation of these rules is declared to be a breach of fiduciary duty and the public trust. [C.R.S. 24-18-103(2)] A local government official or employee whose conduct departs from his fiduciary duty is "liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust." The district attorney in the district where the trust is violated is authorized to bring "appropriate judicial proceedings" on behalf of the people, and money collected in such proceedings is paid to the general fund of the local government. Successful prosecution under the Code of Ethics for breach of fiduciary duty requires proof beyond a reasonable doubt of the commission of any act proscribed in the Code.

Code of Ethics: Rules of Conduct

[C.R.S. 24-18-101, et seq]

The Code of Ethics specifies "Rules of Conduct", violation of which constitutes breach of fiduciary duty and the public trust. (The Code also specifies non-binding "Ethical Principles", which are intended as guides to conduct.)

1. Use of Confidential Information for Personal Benefit. [C.R.S. 24-18-104-(1)(a)]

A local government official or employee shall not:

"Disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal financial interest."

- Note that this section restricts only use of "confidential" information.
- "Financial interest" is defined as a substantial interest held by an individual which is:
 - (a) An ownership interest in a business
 - (b) A creditor interest in an insolvent business
 - (c) An employment or prospective employment for which negotiations have begun
 - (d) An ownership interest in real or personal property
 - (e) A loan or any other debtor interest
 - (f) A directorship or officership in a business.(24-18-102-(4), C.R.S)

2. Accepting Gifts or Economic Benefits as Rewards or Inducements. [C.R.S. 24-18-104-(1)(b)]

A local government official or employee shall not:

"Accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

- 1) *Which would tend to improperly influence a reasonable person in his position to depart from the faithful discharge of his public duties; or*
- 2) *Which he knows or which a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken."*

- This prohibition utilizes an objective "reasonable person" standard. Thus it is no defense to argue that the gift or benefit did not actually induce improper conduct or was not actually understood to be a reward for official action.
- *Inclusions: "Economic benefit tantamount to a gift if substantial value"*
 - I. A loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans, and
 - II. Compensation received for private services rendered at a rate substantially exceeding the fair market value of such services. [C.R.S. 24-18-104(2)]

- *Exclusions: Economic benefits*. The Code does not define “gift of substantial value”; however, it does identify several items that are not considered “gifts of substantial value” or “economic benefits tantamount to gifts of substantial value.” [See C.R.S. 24-18-104(3)] Among these exclusions are:
 - Campaign contributions reported under the Fair Campaign Act,
 - Honoraria
 - “Items of perishable or nonpermanent value, including, but not limited to, meals, lodging, travel expenses or tickets to sporting, recreational, educational, or cultural events.”

3. Transactions With Those One Supervises or Inspects. [C.R.S. 24-18-109(2)(b)]

A local government official or employee shall not:

“Engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties.”

4. Acts Benefitting Ones Business or Client. [C.R.S. 24-18-109-(2)(b)]

A local government official or employee shall not:

“Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative or agent.”

- “Official act” is defined as including any “vote, decision, recommendation, approval, disapproval, or other action, including in action, which involves the use of discretionary authority.” [C.R.S. 24-18-102(7)]

Exclusions: Section 24-18-109(4) provides that it is not a breach of fiduciary duty or the public trust for a local government official or employee to:

- (i) Use local government facilities or equipment to communicate with constituents, family members or business associates, or
- (ii) Accept or receive benefits as an indirect consequence of transaction local government business

Defense: Disclosure

- A. Section 24-18-110 provides for voluntary disclosure by a local government official or employee of the “nature of his private interest” prior to acting in a manner that may impinge upon fiduciary duty and the public trust. Proper disclosure is an affirmative defense to “any civil or criminal action or any other sanction.” (Emphasis added)
- B. Proper disclosure:
 - 1. For local government officials and employees, disclosure must be in writing to the Secretary of State. Disclosure may be accomplished online: go to the Secretary of State website, www.sos.state.co.us; click on “Elections” and then “Conflict of Interest”.

2. Elements of the disclosure
 - (i) Amount of financial interest if any,
 - (ii) Purpose and duration of services rendered, if any,
 - (iii) Compensation received for services, or
 - (iv) "Such other information as necessary to describe" the interest.
3. If the act is then performed, the official or employee shall state for the record the fact and nature of the interest involved.

Code of Ethics: Prohibited Interests in Contracts

[C.R.S. 24-18-201, et seq.]

Rule: Local government officials and employees "shall not be interested in any contract made by them in their official capacity or by any body, agency or board of which they are members or employees."

- **Note:** See particularly part (e) below, concerning compliance with the "Disclosure and Abstention" statutes.
- **"Safe Harbors":** The statute states that certain types of transactions are not "contracts" for purposes of these restrictions. [C.R.S. 24-18-201(1)(b)] Excluded transactions include:
 - a. Contracts awarded to the lowest responsible bidder based on competitive bidding procedures;
 - b. Merchandise sold to the highest bidder at public auction;
 - c. Investments or deposits in financial institutions which are in the business of loaning or receiving monies;
 - d. A Contract with an interested party if, because of geographical restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It shall be presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.
 - e. A contract with respect to which any... local government official or employee has disclosed a personal interest and has not voted thereon or with any respect to which any member of the governing body of a local government has voted thereon in accordance with Section 24-18-109(3)(b) or 31-4-404(3), C.R.S. Any such disclosure shall be made: To the governing body, for local government officials and employees.
- **Noncompliance- contract voidable:** Violation of the prohibitions described above shall render the contract voidable at the instance of any party to the contract except the officer interested therein. [C.R.S. 24-18-203]

Rule: "Revolving Door" Provision: Former employees may not within six months of the end of their employment contract or be employed by any employer that contracts with a local government during his employment.

Title 31-Municipal Governing Body Members –Disclosure/Abstention

[C.R.S. 31-4-404(2) and (3)]

Rule: "Disclosure and Abstention", a member of the governing body of a city or town who has a personal or private interest in any matter proposed or pending before the governing body shall:

- A. Disclose such interest to governing body,
- B. Not vote and
- C. Not attempt to influence the votes of other members of the governing body. [C.R.S. 31-4-404-(2)]

Exception

A member of the governing body may vote notwithstanding his or her personal or private interest if:

- A. Such member's participation is necessary to achieve a quorum or otherwise enable the body to act, and
- B. Disclosure is made pursuant to Section 24-18-110 C.R.S. of the Colorado Code of Ethics for Public Officials and Employees (which, as noted above, requires disclosure in writing to the Secretary of State prior to official action). [31-4-404-(3)] C.R.S.

Criminal Code Disclosure Requirements

[C.R.S. 18-8-308]

Section 18-8-308 of the Colorado Criminal Code contains additional disclosure requirements affecting local government officials and employees.

Rule: When the disclosure requirement of section 18-8-308 C.R.S. is triggered, "actual advance written notice" to the Secretary of State and to the governing body is required 72 hours before any action is taken.

What triggers the Law (When you pay attention to this rule): An impending exercise of "substantially discretionary function with respect to a government contract purchase, payment or other pecuniary transaction" where a "potential conflicting interest" is known by the official or employee to exist.

- A "potential conflicting interest" exists when the public servant is a director, president, general manager or similar executive officer or owns or controls directly or indirectly a substantial interest in any non-governmental entity participating in the transaction in question.