

HANDBOOK FOR MEMBERS OF THE STATE OF UTAH BOARDS AND COMMISSIONS



Gary R. Herbert
Governor



STATE OF UTAH

OFFICE OF THE GOVERNOR
SALT LAKE CITY, UTAH
84114-2220

GARY R. HERBERT
GOVERNOR

GREG BELL
LIEUTENANT GOVERNOR

September 2009

Dear Board Member,

As Governor, I would like to personally thank you for your willingness to serve the State of Utah as a member of a board or commission. Upon your appointment, you joined a select group of Utah citizens who represent their community and peers as they help influence policies and programs that play an instrumental and invaluable role in guiding our state toward a successful future.

As I welcome you into your new position, I would like to share with you three key priorities for my administration: Economic Development; Public and Higher Education; and Energy. By working together, in unprecedented ways, I know we will make great strides in these areas that are crucial for Utah's success.

Also, please allow me to share the core principles and beliefs that guide my personal commitment to service, as well as that of my team:

- State taxpayers are our valued customers, and it is our responsibility to provide them with a well-run and efficient government;
- Although we may not always agree, we can work together with respect toward a common goal — the good of our State and its citizens, and
- At all times, government should be open, honest, accessible and accountable.

Please keep these points in mind as you embark on this new journey. Yours is a significant responsibility to promote the best interests of our State. I encourage you to attend meetings related to your position, and actively participate and stay informed about current issues.

I applaud your commitment to the well-being of our great State, and thank you again for your dedication and service.

Sincerely,

A handwritten signature in black ink that reads "Gary R. Herbert".

Gary R. Herbert
Governor

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INTRODUCTION

Welcome to public service! This handbook is a compilation of information and suggestions to help you effectively serve in a position in state government. Some of the information summarizes laws that may affect your service. This handbook is not intended to have the force of law or rule, nor is it necessarily a complete or accurate interpretation of the law. If you have specific questions, please address them to your board staff.

EXECUTIVE BOARDS

Utah Code Annotated § 67-1-2.5 defines an executive board as “any executive branch board, commission, council, committee, working group, task force, study group, advisory group, or other body with a defined limited membership that is created to operate for more than six months by the constitution, by statute, by executive order, by the governor, lieutenant governor, attorney general, state auditor, or state treasurer or by the head of a department, division or other administrative subunit of the executive branch of state government.” Throughout this handbook, the term “board” will be used uniformly to refer to any executive board.

TYPES OF BOARDS AND COMMISSIONS

As a board member, you are responsible to learn about your specific assignment. There are three major categories of boards: policy, advisory and nominating. Please be sure you know what type of board you are assigned to and become familiar with its scope of authority and duties, which are outlined in the statute or provision that creates the board.

POLICY BOARD: A policy board possesses a portion of the sovereign power of the state to enable it to make policy for the benefit of the general public. It is created by the constitution or by statute and performs its duties in accordance with statute and department policies. It is permanent and continuous and not temporary or occasional.

ADVISORY BOARD: An advisory board provides advice and makes recommendations to another person or entity that makes policy for the benefit of the general public. It is created by statute or executive order. It performs its duties only under the supervision of another person, as provided in statute.

NOMINATING COMMITTEE: A nominating committee recruits, evaluates and recommends qualified individuals to the appointing authority for vacancies in various positions in state government. It is created by the constitution or by statute.

ROLE AND RESPONSIBILITIES OF A BOARD MEMBER

All members of state boards and commissions are expected to:

- Understand that executive boards are a part of the executive branch of government and are accountable to the governor through the executive director of the department or government entity.
- Remember that boards are responsible for policy direction or advice regarding policies. They should not be concerned with the day-to-day administration of the department.
- Agree to make your board a priority and devote an appropriate amount of time and energy to the assignment.
- Prepare for, attend and actively participate in all board meetings.
- Learn about your board and the specific role you play as a member. Be sure you know if you are appointed to represent a particular constituent group.
- Represent your constituency by communicating with them and listening to them.
- Know about the authority your board has in shaping public policy. Respect that authority and work within the framework established in statute.
- Maintain a good working relationship with fellow board members, board staff, department administration and the Governor's Office.
- Research issues and form reasonable opinions based on facts.
- Maintaining a state-wide perspective. Your decisions affect all citizens in Utah and you are responsible to keep the best interest of the public in mind.

CHARACTERISTICS OF AN EFFECTIVE BOARD MEMBER

An effective state of Utah board member is committed to the public and to the mission of the board. The board member has experience dealing with the values, vision, and long-term interests of Utah's citizens. The board member possesses well-developed civic, interpersonal, and professional sensitivities and skills. The board member has the ability to assemble and evaluate information and to communicate his or her own views with honesty, directness, and integrity. The board member is willing to share power and negotiate fairly, to affirmatively participate in board discussions and decision-making, to delegate or allow others to make decisions as needed, and to acknowledge staff's expertise in implementation of policy. The board member has the ability to think in terms of systems and contexts and is willing to do all required "homework" to develop a sound understanding of board subject matter. As a board member, he or she performs with independent judgment and courage, and in good faith.

MEDIA GUIDELINES

The public has a right to know how we conduct ourselves while in public service. To ensure that our work is correctly represented, we must set and meet high standards of professionalism when working with the media. Board members can meet these standards by working closely with the department's Public Information Officer (PIO) to respond to media requests. Media requests should be addressed with the following guidelines in mind:

- **Orderly:** Boards and commissions work with diverse, complex agencies that require orderly interaction with the media to meet needs appropriately. An orderly interaction means requests are funneled through department protocols.
- **Spokespersons:** The department public information officer generally serves as the department spokesperson. There may be occasions when it is appropriate for a board or commission member to give comment to the media. A good working relationship between board members and the department communications team will help facilitate the needs of both the media and the department.
- **Timely:** We respond to media inquiries promptly - usually within two hours. If a board or commission member receives a request, the member should contact the department public information officer, and ensure that pertinent information is shared prior to the interview.
- **Role:** The media may contact board members because of their position on the board. If board members respond to a media request, they must recognize that they are doing so as an appointed representative.

Agency public information officers are available for more detailed training on working with the media.

OATH OF OFFICE

The Utah State Constitution, Article IV, Section 10 requires that “all officers made elective or appointive by this Constitution or by the laws made in pursuance thereof, before entering upon the duties of their respective offices, shall take and subscribe” to an oath of office. An oath of office form is enclosed with your appointment letter. Please appear before a notary or member of the judiciary and have the oath administered. Return the oath to: Office of the Governor, attn: Oath of Office, State Capitol Complex , East Building, Suite 220, SLC, UT 84114. Most departments have a notary on staff. The staff assigned to your board can assist you with the oath of office, if needed.

ATTENDANCE REQUIREMENTS

In order to conduct business, a quorum must be present. A quorum is a simple majority of voting members. Therefore, meeting attendance is crucial. Within their specific bylaws, most boards have strict attendance policies. Governor Herbert expects his appointees to adhere to those policies and make board meetings a priority.

TERM EXPIRATION AND REAPPOINTMENT POLICY

Generally, board members serve four-year terms. When a mid-term vacancy occurs, the replacement fills the remainder of the unexpired term. Board members are often allowed to serve two terms. However, a review is conducted before a reappointment is extended. The Governor makes the final decision on all appointments and reappointments. Please note the term expiration date in your appointment letter. As that date nears, be prepared to notify the board staff and the Governor’s Office if you would like to continue your board service. A reappointed member must fill out a new oath of office form and may be asked to complete a new per diem form, conflict of interest form, or other disclosure statements.

COMPENSATION AND REIMBURSEMENT

Members of boards and commissions created by statute, who are not employed by state or local government, higher education, or the Legislature, receive no regular compensation. However, board members are allowed meeting per diem and mileage reimbursement. Reimbursement is based on current state rates and dependent upon the agency budget. This allowance does not apply to boards and commissions not created by statute. As a public service to the state, the board or commission member may opt to decline the allowed per diem or reimbursement. Boards and commissions may set reimbursement rates lower than the state-allowed rates by submitting their proposal in writing to their agency accounting office.

MEETING PER DIEM

Each member may receive \$60 per diem for each official meeting attended that lasts up to four hours and \$90 per diem for each official meeting that is longer than four hours. Travel expenses may also be paid to members in accordance with travel rules and agency approval. Members may decline to receive per diem and expenses for their services. If necessary, a per diem form is enclosed with your appointment letter. Please complete the form and return to the department at your first board meeting.

TRAVEL AND MEAL REIMBURSEMENT

All travel arrangements, both in-state and out-of-state, and all expenditures must be arranged and approved by the agency in advance. The traveler must submit the appropriate travel reimbursement forms and receipts.

TRAVEL RATES — IN-STATE

Non-Overnight Trips. A board or commission member may be authorized to receive meal per diem if the destination is at least 100 miles from “home-base.” The allowance is not considered an absolute right of the traveler and must be arranged and approved in advance by the agency.

Meals. The basic meal allowance for a 24 hour period of travel is a total of \$30, to be computed as follows: \$6 per breakfast, \$9 per lunch, \$15 per dinner. Meals may also be provided to the board by the agency.

Mileage. Mileage reimbursement will be for the lesser of mileage or airfare unless approved by the executive director of the department. Mileage is calculated at 36½ cents per mile. This rate includes toll fees, parking, etc.

TRAVEL RATES — OUT-OF-STATE

Out of state travel must be approved in advance by the executive director of the department. Travel arrangements must be made by the state-contracted travel agency in accordance with state rules.

Meals. The basic meal allowance for a 24 hour period of travel is a total of \$38, to be computed as follows: \$9 per breakfast, \$11 per lunch and \$18 per dinner.

For premium cities (New York, Chicago, Washington D.C., Atlanta, Los Angeles, San Francisco, and Boston) the traveler may choose to accept the per diem rate or be reimbursed at the actual meal cost, with original meal receipts, up to \$50 per day. Alcohol is not reimbursable. To qualify for premium rates for a given day, the traveler must be entitled to *all* meals for that day. A combination of per diem and actual may be used; however, one method or the other must be used for each full day. Receipts must be submitted for the premium cities.

For full policy and detailed travel information, see State of Utah Accounting Policies and Procedures section FIACCT 10-02.00 at www.finance.utah.gov

PURCHASING

Purchases must be approved and processed in advance by the agency. If the board or commission purchase is under \$500, no bid process is necessary. However, all purchases must be authorized in advance by the executive director of the department. If the purchase is between \$500 and \$1,999, the agency must get three telephone bids and choose the least expensive or justify, in writing, selecting a bid other than the least expensive. If the purchase is \$2,000 or higher, the agency must contact the Utah Division of Purchasing to conduct a formal bid process. All bids, including telephone bids, must be documented in writing and submitted to the department. Board members may not be reimbursed for any purchase without prior authorization from the executive director of the department.

PUBLIC ACCESS TO GOVERNMENT RECORDS

Utah law espouses the view that the people's business is done in public and government records should generally be available to the public. Exceptions to this rule exist to protect against invasion of privacy and against unreasonable hindrance of the deliberative process.

The Utah law dealing with records is the Utah Government Records Access and Management Act (Title 63, Chapter 2, Utah Code Annotated), known as "GRAMA" for short. GRAMA is a complicated law, but it requires in essence two things. First, it requires a government agency to retain government records in accordance with the agency's approved retention schedule. Second, it requires the government agency to provide copies of, or permit access to public government records in its possession upon written request.

The requirements of GRAMA apply to government agencies, not to individuals. In nearly every case a request for records under GRAMA is directed to an agency, and it is the agency that is responsible for responding to the request. However, you have obligations under GRAMA as you serve in an official capacity on a board. This section of the handbook outlines general rules for you to follow to keep you safely within the law. It also elaborates on further aspects of GRAMA to enhance your background knowledge of the subject.

GENERAL RULE

As a board member, you can most easily satisfy the requirement to retain records by making a practice of promptly providing the board staff with a copy of (1) any record you create as part of your official service and (2) any record you receive from outside the agency in the course of your official service. This latter category could be letters, graphs, handouts or anything given to you by constituents, advocates or others that deal with board business or official duties. You do not have to provide the staff with copies of items passed out in board meetings, since the staff will already have these. If you follow this suggestion, the staff will be responsible for following the record retention requirements.

You can satisfy your obligation to disclose public records by simply forwarding any request you receive under GRAMA to agency staff. Please do so immediately, because GRAMA imposes a short deadline on responding. The staff will analyze the request and write a response. Depending on the nature of the request, the staff may contact you to ask for documents in your possession that may need to be included in the response. Please continue to retain (or turn over to the staff) any documents you think may be subject to the request until all appeals on the request have expired.

EXCEPTIONS

Records that board members create or receive in the course of their work as board member are government records and are subject to GRAMA, but there are some legal and practical exceptions to this rule.

- *Records a board member receives from staff supporting the board.* Staff will be responsible for complying with GRAMA requirements for these records.
- *Records a board member receives from sources outside of the agency, copies of which are also given to staff supporting the board.* Again, staff will be responsible for complying with GRAMA requirements for these records.
- *Board member's notes or memoranda made in connection with an adjudicative hearing.* These are not records under GRAMA § 63-2-103(18) (b) (ix).
- *Board member's notes and daily calendars, prepared by them for own personal use.* These are not records under GRAMA § 63-2-103(18) (b)(vii).
- *Junk mail or commercial publications received by a board member in the course of their work.* These are not records under GRAMA § 63-2-103(18)(b)(v).

The last three categories of records are not subject to GRAMA, so they need not be reviewed or described in response to a GRAMA request.

If you routinely provide staff with copies of records you create or receive, it is unlikely that you will have records that do not fit into one of the exceptions described above. If all records in your possession fit within one of the exceptions described above, you have no additional obligations under GRAMA. If you leave the board, please provide any records that remain in your possession to department staff.

OTHER ASPECTS

There are two other GRAMA provisions with which a board member should be familiar:

GRAMA § 63-2-201(8)(a) states: *“A governmental entity is not required to create a record in response to a request.”*

Often requests labeled as requests for records are really requests for information that would require an agency to create a record in response. If there are no existing records responsive to a GRAMA request, that is a sufficient response.

GRAMA § 63-2-205(3) states: *“Unless otherwise required by a court or agency of competent jurisdiction, a governmental entity may not destroy or give up custody of any record to which access was denied until the period for an appeal has expired or the end of the appeals process, including judicial appeal.”*

This means that, once a GRAMA request is received, board members and other agency personnel may not destroy a record, or even return it to the person who provided it, until the matter has been resolved.

PRIVACY

A board member with records that are private, controlled, or protected should manage and dispose of those records in a manner that protects their confidentiality. GRAMA § 63-2-801 specifies criminal penalties for intentional disclosure of these records. In addition, although the law is undeveloped in this area, it is possible that governmental entities and employees may be found liable for damages for wrongful release of records that contain private information.

OPEN MEETING LAW

Under the Utah Open and Public Meetings Act (Utah Code Annotated 52-4-1 to -10), boards are required to hold open meetings, but in appropriate circumstances, boards may close part of an open meeting to discuss certain statutorily-designated topics.

Initial Open Meeting with Quorum Present. Boards may not close a meeting or go into an “executive session” without first convening an open meeting at which a quorum is present. (A “meeting” of a board includes any meeting, other than a chance meeting, in which a quorum of the board convenes to discuss or act upon a subject over which the board has jurisdiction.)

Two-Thirds Vote Required. If the board wishes to conduct a closed session, it must first vote on whether a closed session is permissible under the Utah Open Meetings Act. A two-thirds affirmative vote is required.

Minutes Must Reflect the Votes and Reasons for Closed Meeting. The board minutes must indicate the statutory reason(s) for the closed session and must show how each member voted on the proposed closing.

Topics Which May Be Discussed in Closed Meetings. Section 52-4-5 of the Open Meetings Act (attached) identifies the topics that may be discussed in a closed meeting. Section 52-4-4 of the Open Meetings Act states that only these topics may be discussed at a closed meeting. The topics which are appropriate matter for a closed meeting are:

- **Discussions About Individuals.** Section 52-4-5(1)(a)(i) allows the board to go into executive session to discuss “the character, professional competence, or physical or mental health of an individual.”
- **Discussions Related to Collective Bargaining.** Section 52-4-4(1)(a)(ii) allows for “strategy sessions to discuss collective bargaining” to be closed.
- **Strategy Sessions About Pending Litigation.** Section 52-4-5(1)(a)(iii) allows the board to close a meeting for “strategy sessions to discuss pending or reasonably imminent litigation”. If the board were sued, for example, this exception would allow the Board to meet with its attorneys to plan its strategy or settlement response in a particular piece of litigation. This exception would not, however, allow a closed meeting for non-strategy sessions, such as simple reports about the status of a pending lawsuit. Nor would this exception allow the Board to exclude the public from the Board’s discussions about a controversial topic that could conceivably result in some future litigation. Unless the threatened litigation is “reasonably imminent” and the Board needs to discuss its litigation strategy,

this statutory exception does not apply.

- **Discussions Regarding Acquiring Real Property.** Section 52-4-5(1)(a)(iv) provides for closure of meetings for “strategy sessions to discuss the purchase, exchange, or lease of real property when public discussion of the transaction would disclose the appraisal or estimated value of the property under consideration or prevent the public body from completing the transaction on the best possible terms”.
- **Discussions Regarding Sale of Real Property.** Section 53-4-5(1)(a)(v) provides for closure of meeting for “strategy sessions to discuss the sale of real property” under certain circumstances.

Board Must Verify That the Closed Meeting Discussed Only Permissible Topics.

The Board may close a meeting only to discuss a topic listed in Utah Code Annotated 52-4-5 (attached). If the Board closes a meeting to discuss “the character, professional competence, or physical or mental health of an individual” or “the deployment of security personnel, devices or systems,” the Board chair must sign a sworn affidavit to that effect.

If the purpose of the closed meeting is to discuss any other statutorily-permissible topic, the Board must either tape-record the closed session or keep detailed written minutes of the closed session. If a judge later decides that the closed meeting was unlawful, the judge must release the tape or the minutes.

Closed Meetings Are Never Required. The Open Meetings Act allows the Board to close a meeting to discuss certain statutorily-designated topics, but the Act does not require any meeting to be closed. Generally speaking, even if the Open Meetings Act allows the Board to close a meeting, the Board should consider whether it is in the public interest to conduct the discussion in secret. For example, the statute allows a closed meeting to discuss the character or professional competence of an individual. This provision protects that individual’s privacy interests. If the individual actually prefers to have the discussion conducted openly, however, the Board may not be justified in relying on this statutory basis for a closed meeting.

No Final Decisions or Actions in a Closed Meeting. Although Board members may discuss certain topics in a closed meeting, any actual votes or decisions must be made in an open meeting. Section 52-4-4 states that “no . . . resolution, rule, regulation, contract or appointment shall be approved at a closed meeting”

Procedures for Electronic Meetings. The Open Meetings Act allows the Board to conduct meetings by “telephone, telecommunications or computer conference,” as long as the Board complies with certain statutory requirements for giving public notice and providing each Board member an opportunity to participate in the electronic meeting.

Penalties for Violating the Open Meetings Act. If a court finds that a public body has violated the Open Meetings Act, the court may declare that any final action taken at the meeting is void, and may order the public body to comply with the statute. The court may also order the public body to pay the opposing party’s attorney’s fees, and may order the public body to release the tape or minutes about the closed meeting.

UTAH ADMINISTRATIVE RULE MAKING PROCESS: A SUMMARY OF THE PATH A RULE TAKES

This section only applies to policy boards which are given rule making authority by statute. The basic rule making process is formally outlined in Utah Code Annotated, 63-46a-4. The requirements for special types of rule making actions such as 120-Day Emergency Rules and Five Year Review and Extensions will vary somewhat from this basic process. Additional information on rule making is available at <http://www.rules.utah.gov>.

General Background

The rule making process includes five major phases: (1) pre-proposal phase; (2) proposal phase; (3) comment period; (4) adoption of the rule; and (5) enforcement of the rule. A rule is published twice – once when it is proposed, and again, when it is made effective – and both publications are significant milestones in the rule making process. The basic sequence of the rule making process is outlined below.

Pre-Proposal Phase

An agency may not propose a rule unless:

- The agency is authorized by the Utah Constitution, state statute, federal law, or a court order to make rules.
- The agency identifies a need for a new rule or a change to an existing rule. (The need for a rule may come from public comments, new legislation, court decisions, etc.)

An agency must engage in rule making when any of its action:

- Authorizes, requires, or prohibits an action;
- Provides or prohibits a material benefit;
- Applies to a class of persons or another agency; and
- Is explicitly or implicitly authorized by statute.

The term “*agency*” refers to state boards, commissions, departments, divisions and other state entities that are “authorized or required by law to make rules, adjudicate, grant or withhold licenses, grant or withhold relief from legal obligations, or perform other similar actions or duties delegated by law.” The term “agency” does not include the legislative or judicial branches of state political subdivisions. See UCA 63-46a-2(2).

Ideally, the agency works in partnership with interested parties when it prepares a proposed rule. The agency must also complete a **rule analysis** as required by UCA 63-46a-4(5). This statute requires the agency to identify the rationale for the rule, the fiscal impact on the agency and others, and the procedures for allowing public comment on the proposed rule.

The executive director of each department must review rules prepared and submitted by entities under its jurisdiction and must comment on the fiscal impact the rule may have on businesses. The agency may also pre-file the rule with the Governor's Office of Planning and Budget.

Interested persons may request that their name be placed on a mailing list for advanced notice of rule making. (The term "person" refers to individuals, corporations, organizations, and governmental entities other than the agency. See UCA 63-46a-2(12).)

Proposal Phase

The agency files the proposed rule with the Division of Administrative Rules, which reviews the rule for completeness and compliance with the Utah Administrative Rulemaking Act and related rules. The Division of Administrative Rules also sends a copy of the rule to the Governor's Office of Planning and Budget for executive branch review.

The agency notifies interested persons who: (1) have requested notice; (2) are legally entitled to receive such notice; and (3) in the judgment of the agency, should be notified. At a minimum, the notice must include a copy of the rule analysis.

The Division of Administrative Rules publishes the proposed rule in the Utah State Bulletin. The Division of Administrative Rules also publishes a summary of the rule in the Utah State Digest.

Comment Period

During the comment period, any person may submit public comments about a proposed rule directly to the agency. The rule analysis will have specified how to submit such comments to the agency's contact person.

The agency must accept public comment during the period it designates on the rule analysis. The comment period must be no fewer than 30 days and no more than 119 days after publication of the proposed rule.

The agency then considers the public comment it received.

The Legislative Administrative Rules Review Committee may also ask the agency to appear before the committee to discuss the proposed rule.

Any person may request that the agency hold a public hearing about a specific proposed rule. The agency *must* hold a hearing when other law requires a hearing, or

when requested by: (1) another state agency; (2) ten interested persons; or (3) an interested association having not fewer than ten members. Even if these factors are not involved, the agency may hold a hearing if it so wishes. The request for a hearing must be made within 15 days of publication of the rule in the Bulletin, must be held before the rule is made effective, and must be no fewer than seven nor more than 30 days after the agency received the request.

Adoption Phase

The agency notifies the Division of Administrative Rules of the rule's effective date. The effective date must be no fewer than 31 days and no more than 120 days after publication of the rule in the Bulletin. The Division of Administrative Rules then codifies and publishes the effective rule in the Utah Administrative Code. If the Division of Administrative Rules does not receive a Notice of Effective Date on or before the 120th day, the rule lapses and to enact the rule, the agency must start the rule making process over again.

Enforcement Phase

During this phase, the agency enforces the final rule. The final rule is still subject to review, however. For example, the Legislative Administrative Rules Review Committee may ask the agency to appear before the committee to discuss the rule. In addition, Section 63-46a-12 of the Utah Code allows any person to petition the agency to change or repeal an existing rule, or enact a new rule. The agency must respond within 30 days by either making the requested change or by stating its reasons for denying the person's petition.

ETHICS ACT AND CONFLICTS OF INTEREST

This section provides information on ethics requirements and potential or actual conflicts of interest of members of boards. In addition to this information, many agencies and boards have specific policies and forms regarding these matters

As you are aware, pursuant to Utah Code Annotated (UCA), Title 19, the boards are comprised of members who by statute are representatives of various interests and groups. These statutorily-established criteria for membership on the boards make conflicts of interest inevitable.

Applicable Law

By amendments in 1989 to the Utah Public Officers' and Employees' Ethics Act (Ethics Act), board members are now covered by its various provisions. The definition of "public officer" means "all elected or appointed officers of the state . . . who occupy policy-making posts." Board members are appointed and determine state policy under their respective statutory powers. Prior to 1989, board members were considered specifically by statute as "special employees" who were excluded from the requirements of the Ethics Act. The 1989 amendments deleted the exclusion.

In 1998, the Legislature amended the Ethics Act by clarifying that the offenses covered by this act do not encompass actions taken under circumstances amounting to a violation of UCA § 63-56-72 or § 76-8-105. UCA § 63-56-72 makes it a felony for any person who in any official capacity participates in the procurement of any supplies, services, construction, real property, or insurance for the state of Utah or any subdivision thereof if that person asks, receives, or offers to receive, from any person interested in the sale of these items or services, any emolument, gratuity, contribution, loan, reward, or any promise thereof, either for himself or for another person or organization.

In the 2000 General Session, the Utah State Legislature added provisions making it an offense to donate or to demand donations of property, money or services on a condition of granting a permit, approval, or other authorization. UCA § 67-16-5.3 and 5.6.

Under UCA § 76-8-105, a public servant is guilty of receiving or soliciting a bribe if that person asks for, solicits, accepts, or receives, directly or indirectly, any benefit with the understanding that the purpose is to influence an action, decision, opinion, recommendation, judgment, vote, nomination, or exercise of discretion. It is not a defense that the public servant was not qualified to act in the desired way, did not act in the desired way, or the benefit is not asked for, conferred, solicited, or accepted until after the public servant has performed the desired action or ceases to be a public servant.

Requirements of the Ethics Act

A. Disclosure

Under § 67-16-7 of the Ethics Act, every public officer who is an officer, director, agent, employee, or the owner of a substantial interest in any business entity which is subject to the regulation of the agency is required to disclose:

31. the position held; and
32. the precise nature and value of interest. (Does not apply where total value does not exceed \$2,000. Life insurance policies and annuities are not considered in determining value.)

If the position changes or value is significantly increased, it must be reported.

Under § 67-16-6, a public officer may not receive or agree to receive compensation for assisting any person or business in any transaction involving any agency unless the public officer discloses the name and address of the public officer and the agencies involved, and provides a brief description of the transaction.

Under § 67-16-8, a public officer may not participate or receive compensation in respect to any transaction between the state and any business entity to which the public officer is also an officer, director or employee or owns a substantial interest, unless disclosure is made as indicated below.

B. Method of Disclosure

A sworn, written statement by the public officer giving the information listed above is to be filed with the head of the agencies involved and the Utah Attorney General's Office. Many boards have a specific form or format for the written statement.

C. Prohibitions

Restrictions outlined in the Ethics Act include:

No public officer shall:

1. accept employment or engage in any business or professional activity that he may reasonably expect would require or induce him to improperly disclose controlled information;
2. improperly disclose or use controlled, private or protected information acquired by reason of his position or in the course of official duties to further substantially his personal economic interest or obtain special privileges or exemptions for himself or others;
3. use or attempt to use his position to further substantially his personal economic interest or to secure special privileges or exemptions for himself or others;
4. accept employment that would impair his independence of judgment or interfere with the ethical performance of his public duties;
5. receive, take, seek, or solicit, directly or indirectly, for himself or another a gift

- of substantial value or a substantial economic benefit tantamount to a gift,¹
- a. that would tend to improperly influence him in the discharge of his duties,
 - b. that the person knows or a reasonable person in that position should know under the circumstances is primarily to reward the person for official action taken,
 - c. if he recently has been or is or will be involved in a government action affecting the donor or lender unless a disclosure of the gift, compensation, or loan has been made in the manner described above;
6. have personal investments in any business entity which will create a substantial conflict between his private interests and his public duties; or
 7. donate or to demand donations of property, money or services on a condition of granting a permit, approval or other authorization.

Conflicts of Interest

A. Discussion - Procedure

In the past, different approaches have been taken by various members of boards when they have had conflicts of interest. These approaches have included:

1. oral disclosure of the conflict before discussion and then participating in the discussion but not the vote;
2. oral disclosure of the conflict at the beginning of the discussion with no participation in discussion or the vote; or
3. oral disclosure of the conflict and physically withdrawing from the meeting when an action is being discussed and voted upon.

The approach taken by the Board member with a conflict of interest is an individual decision. While no specific law exists mandating how conflicts of interest should be resolved, the Board could establish a policy recommending how conflicts of interest should be handled. While that policy may not be binding on a Board member, it would reflect the Board's attitude as to the best way to handle action items where there is a potential conflict of interest. Some Boards have established policies on handling conflicts of interest.

¹ Economic benefit tantamount to a gift includes:

- (1) a loan at an interest rate that is substantially lower than the commercial rate for similar loans; and
- (2) substantially higher compensation received for private services than the fair market value of those services.

Excluded from this definition is an occasional non-pecuniary gift of a value less than \$50.00, an award publicly presented in recognition of public service, any bona fide loan made in the ordinary course of business, or a political campaign contribution.

B. What is a Conflict of Interest?

One question which often arises is what constitutes a potential conflict of interest. It is generally considered that a potential conflict of interest is any direct and immediate interest or relationship, including financial interest, with persons or businesses regulated by or directly affected by decisions of the Board, or persons or organizations which may present requests or issues before the Board. The interest of a spouse or other members of the immediate family/household or the interest of any other person which is constructively controlled by the member is included.

It is recognized that some relationships and interests have more “potential” for being a conflict of interest than others. There are some interests and relationships which because of their nature are insignificant. The financial interest may be so small or the relationship so remote that it does not present an actual conflict.

Types of interests to be considered as potential conflicts of interest include relationships or interests with persons, business enterprises, or nonprofit, professional, charitable, religious, social, educational, recreational, environmental, public service, or civic organizations,

1. with which you are connected as a member, employee, officer, owner, director, trustee, partner, advisor, or consultant;
2. in which you have any continuing financial interest as a creditor or through ownership of stocks, bonds, or other securities, ownership of real property or rights in lands, or through a pension or retirement plan, shared income or otherwise; or
3. to which you are indebted financially.

PARLIAMENTARY PROCEDURE

Based on Robert's Rules of Order (1977 Edition)

RULES OF ORDER

Boards are encouraged to develop a consistent protocol for their meetings. Robert's Rules of Order is perhaps the most widely known set of rules for the conduct of meetings, though it is not the only one.

The rules of parliamentary procedure are meant to help, not hinder. Applied with common sense, they should not frustrate the meeting or entangle it in red tape. The chair should retain control, give clear explanations, and keep things as simple as possible. Adhering to protocol and agendas keeps meetings organized. A chair who maintains parliamentary rules at normal times may welcome the general recognition of rules during a stressful meeting.

When in doubt, the underlying rule is:

- Respect the wishes of the majority;
- Protect the minority;
- Do what seems fair and equitable.

RESPONSIBILITIES OF THE CHAIR

1. Recognize board members entitled to speak or propose motions. Note: some motions may be made while another member has the floor. Speaker must state the purpose of the interruption so the chair can rule on its validity.
2. Restate motions after they have been seconded, then open discussion.
3. Close discussion and put motions to vote. Votes on motions that are not debatable should be called immediately. Restate the motion exactly as it was made or amended before calling for a vote.
4. Announce the result of a vote immediately. A tie vote defeats a motion requiring a majority of those voting. The chair may vote to make or break a tie.
5. Avoid entering any controversy or interfering with legitimate motions.
6. Maintain order and proper procedure, making necessary rulings promptly and clearly.
7. Expedite board business in every way compatible with the rights of board members. You can allow brief remarks on motions that are not debatable, advise board members how to take action (proper motion or form of motion), or order proposed routine action without a formal vote (for example, "If there is no objection, the minutes will stand approved as read. Hearing no objection so ordered").

PRINCIPLES OF PARLIAMENTARY LAW

1. Parliamentary procedure requires that all board members have equal right; there must be mutual respect among board members; and the rights of the minority to initiate motions, debate, and have their votes counted be protected, while at the same time the will of the majority governs.
2. Only one item may be under consideration at a time.
3. The majority vote decides the questions.
4. Any matter once decided cannot be brought up again at the same meeting, except by a motion to reconsider.
5. The simplest, clearest and most expeditious way is considered proper, as long as it does not violate the rights of board members.

PROPOSING AND DISPOSING OF A MOTION

1. Gain floor by being recognized by chair.
2. State motion. (“I move that...”)
3. Motion can be seconded by any member without gaining floor.
4. Chair state motion (if proper) and opens it for discussion (if debatable).
5. During discussion, the motion may be amended or disposed of by postponement (to a time certain or indefinitely), referral to a committee, or tabling.
6. The chair puts the motion to a vote when there is no further discussion.
7. The chair announces the outcome of the vote.

MOTIONS

1. **Motion to take from table** - requires second, not debatable, and not amendable.
Purpose: To bring up for consideration an issue that has been laid on the table.
Effect of adoption: Puts motion before board again in exactly the same condition as when laid on table.
2. **Motion to reconsider** - requires second, debatable, and not amendable.
Purpose: To set aside a previous vote and reconsider the question for adoption or rejection.
Restrictions: Used only if vote cannot be reversed with more simple procedures. Motion must be made by member who voted on the prevailing side. May not be made later than the next meeting after the vote to which it applies. If action has already been implemented, vote cannot be reversed. Motion may be made when another member has the floor, but its consideration is the same for a main motion.
Effect of motion: Stops any action authorized by the original vote.
Effect of adoption: Sets aside original vote, puts matter back to where it was just before the vote was taken.
3. **Main Motion** - requires second, debatable, and amendable.
Purpose: To bring an issue up for consideration or action.
Effect of adoption: Action authorized.

4. **Motion to postpone indefinitely** - req. second, debatable, not amendable
Purpose: To kill main motion without a formal vote; trial vote to test strength.
5. **Motion to amend a motion** - requires second, debatable*, amendable.
*not debatable if motion to which it applies is not debatable.
Purpose: To put motion in most acceptable form before voting on it, by striking out or inserting words or substituting one paragraph or motion for another.
Restrictions: An amendment to a pending amendment may be proposed, but not an amendment to the third degree. Any germane amendment is in order as long as it is not identical in effect to a no vote on the main motion.
Effect of adoption: Changes the wording of the pending motion.
6. **Motion to refer to a committee** - requires second, debatable, and amendable.
Purpose: To have a matter studied by a committee.
Form: Motion may include membership of committee and instructions to it, and may be amended with respect to these matters.
Effect of adoption: Disposes of motion until committee reports back or is discharged by the board.
7. **Motion to limit debate or extend limits** - requires second, not debatable, and amendable.
Purpose: To regulate length of time a question may be discussed or length of time allotted to each speaker.
Form: Motion state limits and may be amended in this regard.
8. **Motion on previous question** - requires second, not debatable, and not amendable.
Purpose: To have discussion ended immediately and a vote taken.
Form: May specify only the immediately pending question, of all pending questions.
Effect of adoption: Chair must immediately put question to a vote and allow no further discussion.
NOTE: This motion should not be confused with the call for the “question” which is only a suggestion that the board members are ready to vote, and may not be used to deprive any board member of the right to continue the discussion if desired.
9. **Motion to table** - requires second, not debatable, and not amendable.
Purpose: To set a matter aside temporarily. May be moved even after the previous question has been ordered.
Effect of adoption: Matter on table may be brought up again, but not later than the next meeting, by adoption of a main motion to take it off the table.
10. **Question of order** - no second required, decision of chair, not debatable, not

amendable.

Purpose: To ask that a rule that is being violated be observed.

Form: Floor is gained, even while another is talking, by stating, "Chairperson, I rise to a point of order." Chair asks member to state point, then rules whether point is well taken. If point is accepted, Chair makes ruling. If point is not accepted, Chair overrules point of order.

11. **Division of board** - no second required, no vote necessary, not debatable, not amendable.

Purpose: To secure a recount of a vote by a more accurate method than originally used.

Form: board member, without recognition, says, "I call for a division."

12. **Appeal Chair's decision** - requires second, debatable*, not amendable.

Purpose: To overrule a decision made by the chair.

Form: Board member says, "Chairperson, I appeal from the decision of the chair."

Restrictions: Motion must be made as soon as the decision is announced.

*Debatable if pending question is debatable. Can be laid on the table, which takes the pending with it.

Effect of adoption: If less than majority sustain chair decision is reversed.

PARLIAMENTARY PROCEDURE AT A GLANCE

Based on Roberts Rules of Order

To do this...	You say this...	May you interrupt?	Is a second required?	Is the motion debatable?	Required vote
*Adjourn meeting	"I move the meeting be adjourned"	No	Yes	No	Majority
Recess meeting	"I move the meeting be adjourned until..."	No	Yes	No	Majority
*Make a personal request	"Point of privilege"	Yes	No	No	No vote
*Suspend further consideration	"I move to table the motion"	No	Yes	No	Majority
End debate	"I move the previous question"	No	Yes	No	2/3 vote
Postpone consideration	"I move this matter be postponed until..."	No	Yes	Yes	Majority
Have something studied further	"I move this matter be referred to a committee"	No	Yes	Yes	Majority
Amend a motion	"I move that this motion be amended by"	No	Yes	Yes	Majority
Introduce new business	"I move that..."	No	Yes	Yes	Majority
*Object to something	"Point of order"	Yes	No	No	No vote Chair only
Request information	"Point of information"	Yes	No	No	No vote
*Ask for a vote by actual count to verify a voice vote	"I call for a division of the house (or board)"	No	No	No	No vote
*Object to discuss a matter	"I object to consideration of this matter"	Yes	No	No	2/3 vote
*Take up a matter previously tabled	"I move to take from the table"	No	Yes	No	Majority
*Reconsider a previous action	"I move to reconsider the action relative to..."	Yes	Yes	Yes	Majority
*Consider out of order	"I move to suspend the rules and consider..."	No	Yes	No	2/3 vote
*Vote on a ruling by the chair	"I appeal the chair's decision"	Yes	Yes	Yes	Majority

*Motion cannot be amended

DUE PROCESS IN ADMINISTRATIVE HEARINGS

A. Rights of Parties

- 1) A fair trial before a fair tribunal.
- 2) An unbiased, impartial judge.
- 3) Both actual bias and any appearance of unfairness must be avoided
- 4) These principles apply to both administrative proceedings as well as judicial trials.
- 5) See *Anderson v. Industrial Commission*, 696 P.2d 1219 (Utah 1985)
Bunnell v. Industrial Commission, 740 P.2d 1331 (Utah 1987).

B. Fact Finder's Duty to Elicit Evidence

- 1) The opportunity to question witnesses aids the fact finder's role in any case.
- 2) The opportunity for respondent to examine and cross-examine each witness.
- 3) Do not intimidate the witnesses by attitude or demeanor.

C. Suggestions for Examining Witnesses

- 1) The methods of examination involve two aspects:
 - a) The substance and nature of questions.
 - b) The attitude and demeanor of the questioner.
- 2) The purposes of examination depend on the role of the questioner:
 - a) Parties and their attorneys question witnesses to present a case.
 - b) Fact finders question witnesses to ascertain the truth.
- 3) The "Single Fact" Rule
 - a) Each question should involve only a single fact.
 - b) When a question raises multiple facts, the witness can avoid acknowledging a critical fact.
- 4) The demeanor of the questioner
 - a) Generally, the questioner should be controlled and polite to the witnesses.
 - b) An arrogant or hostile attitude can signal possible bias or partiality.
 - c) Questioners should avoid:
 - i) Tactics that are devious or deceitful.
 - ii) Badgering, brow-beating or humiliating a witness.
 - iii) Sanctimonious attitude.
 - iv) Loss of temper (usually accompanied by a loss of concentration and control of the witness).
 - v) Body language or countenance that conveys derision, confusion, disbelief, etc.

D. Conduct of Hearings

1) The Nature of Disciplinary Proceedings

"It is well settled that administrative hearings need not possess the formality of judicial proceedings. The degree of formality depends on the nature of the administrative proceedings The strict rules of evidence and procedure that apply in a courtroom . . . need not apply in an administrative hearing Hearsay and other forms of evidence that might be inadmissible in a court of law may be considered during an administrative hearing.

Despite the flexibility of administrative hearings, there remains the necessity of preserving fundamental requirements of procedural fairness in administrative hearings. It is a clear abuse of discretion for an administrative body to exercise its discretion over the manner in which it conducts its proceedings such that it denies due process to a party appearing before it."

--*Tolman v. Salt Lake County Attorney*, Utah, 818 P.2d 23 (1991).

2) Due Process Safeguards

". . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding"

--*D. B. v. Division of Occupational and Professional Licensing*, Utah, 779 P.2d 1145 (1989).

3) Right to Fair Hearing

"One of the fundamental principles of due process is that all parties to a case are entitled to an unbiased, impartial judge. A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires not only an absence of actual bias, but endeavors to present even the possibility of unfairness."

--*Anderson v. Industrial Commission*, Utah, 696 P.2d 1219 (1985)

4) Conduct and Demeanor of the Fact Finder

" . . . due process demands a new trial when the appearance of unfairness is so plain that we are left with the abiding impression that a reasonable person would find the hearing unfair."

--*Bunnell v. Industrial Commission*, Utah, 740 P.2d 1331 (1987).

E. Ex Parte Communications in Agency Adjudicative Proceedings

- a) Ex parte communications are communications with the finder of fact made out of the presence of the other parties to the matter.

"Ex parte communications essentially consist of evidence, arguments, or other information relevant to a disputed issue that are transmitted to a judging-type of decision maker in a way that renders the information insufficiently open to challenge and testing by an adversely affected party. Typically, an investigative or advocacy functionary in a decisional system or an interested party transmits such information to a decision maker. A somewhat similar situation occurs when a judicial-type decision maker takes the initiative to seek out extra-record information." 1993 Utah L. Rev. 1135, 1139.

- b) Examples of ex parte communications include being contacted by a friend or relative vouching for the good character of the respondent, being contacted directly by the respondent to explain the circumstances, or being contacted by a friend or relative of the respondent calling in a favor for the respondent.

c) Disclosure of Ex Parte Communication

If you as a board or commission member receive an ex parte communication, it must be disclosed to all interested parties, including your government agency.

- d) **Purposes for the Prohibition of Ex Parte Communications**
When an administrative adjudicator uses "evidence" outside the record there is a denial of a fair hearing because, as to that "evidence," there has been no hearing at all, for the disadvantaged party has not been heard. If a trial-type hearing is required by due process of law, its deprivation a fortiori violates the due process precept.

The prohibitions against improper ex parte communications are measures imposed to avert this kind of due process violation. They also aid in preserving the due process requirement of an unbiased tribunal and the related public interest in avoiding the appearance of bias on the part of public decision makers." *Mathew Zaheri Corporation v. New Motor Vehicle Board*, 55 Cal. at 4th 1305 (1997).

GOVERNMENTAL IMMUNITY

As a member of a statutorily created board or commission, you are entitled to the protections of the Governmental Immunity Act found in Title 63, Chapter 30 of the Utah Code.

Board and commission members are included within the definition of "employee" for purposes of the Governmental Immunity Act (§ 63-30-2, Utah Code).

In pertinent part, the Governmental Immunity Act provides ". . . no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice." (§ 63-30-4(4), Utah Code).

In other words, performing the duties and functions of a board or commission member within the scope of your appointment will not expose you to personal liability for those actions unless you act or fail to act due to fraud or malice.

Note: Advisory groups or panels created by boards and commissions may or may not be covered by the Governmental Immunity Act. Please consult with the agency for further information.