

# Ethics for Public Procurement

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May 15-16, 2013



**Andrew M. Cuomo**  
Governor  
State of New York

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Commissioner  
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# Ethics for Public Procurement

## *Introduction*

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### **Applicable Principles and Guidelines**

- The Procurement Stewardship Act (Article XI of the New York State Finance Law) sets forth the principles for conducting procurements in a fair and transparent manner.
- The Public Officers' Law sets forth guidelines for state employees on how to act in an ethical manner.
- The Procurement Council Guidelines, which were established by the State Procurement Council, pursuant to State Finance Law Section 161(2)(d) also contain guidance on ethical procurements. They can be found at [www.ogs.ny.gov/procurecounc/pdfdoc/guidelines.pdf](http://www.ogs.ny.gov/procurecounc/pdfdoc/guidelines.pdf)



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# Ethics for Public Procurement

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### **Applicable Principles and Guidelines**

- State Finance Law Article 11
- Public Officers Law Section 73, *Business or Professional Activities by State Officers and Employees and Party Officers*
- Public Officers Law Section 74, *Code of Ethics (also referred to as the Code of Conduct)*
- Chapter 14 of the Laws of 2007-The Public Employee Ethics Reform Act of 2007
- Chapter 399 of the Laws of 2011-The Public Integrity Reform Act
- Governor Cuomo's Executive Order No. 3
- Governor Paterson's Executive Order No. 7, as continued by Governor Cuomo's Executive Order No. 2.



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# Ethics for Public Procurement

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### **Statutory Considerations in Procurements**

- Laws governing public procurement in New York date back to 1940 (Chapter 593, Section 160 of the Laws of 1940).
- Those laws focused primarily on the process for obtaining commodities and did not address the conduct of procurement in great detail.



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### **Statutory Considerations in Procurements**

- In 1995, the Procurement Stewardship Act was enacted. (Chapter 83, Section 33, 1995 N.Y. Laws 537) It repealed the earlier laws, addressed the vast changes made to the way government procured goods and services since 1940 and included, among other things, ethical considerations.
- More recent updates to the Public Officers Law, including the Public Employee Ethics Reform Act of 2007 and the Public Integrity Reform Act of 2011, continued to address ethical considerations in procurement.



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### Why is Ethics Important?

- The State spends a lot of money;
- The State has an obligation to procure in ways that are responsible to the needs and expectations of the taxpayers, the vendors and the agencies and employees that use the goods and services procured; and
- A violation of the ethics laws and rules can lead to a bid protest or investigation, undermine the public's confidence in government and/or result in administrative, civil or even criminal penalties.



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### Topics to be Discussed

- Gifts
- Conflicts of Interest
- Post Employment Restrictions
- Political Activities and Outside Employment
- Procurement Lobbying



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### Introduction

- While some would argue that public employees “can’t be bought for a lunch,” there are issues of perception and fairness and the appearance of impropriety that must be considered.
- These issues should be looked at from the perspective of the vendors and the general public as well as the message that they send to state employees.



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### **General Rule**

- State employees are prohibited from soliciting or accepting gifts having more than nominal value where it could reasonably be inferred that the gift was intended to influence them or could reasonably be expected to influence them in the performance of their official duties or was intended as a reward for any official action on their part. (Public Officers Law Section 73 (5)(a)).



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### What is a Gift?

- A gift is anything of value in any form. This includes, but is not limited to, money, services, loans, travel, lodging, meals, refreshments, entertainment, discounts, debt forgiveness or promises.
- The value of a gift is the retail cost to purchase it or its face value.
- Anything that you pay market value for is not a gift.



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### Applicable Laws and Principles

- State employees are also prohibited from accepting multiple gifts from a single donor on a regular basis, even if those gifts are of nominal value.
- In addition, there are circumstances where the gift giver may be a “disqualified source” and all gifts are prohibited. For example, potential vendors being considered for award of a contract are disqualified sources. Disqualified sources also include persons or entities that are regulated by, do business with, appear before or negotiate with your agency, lobbies or has litigation pending against your agency, applies for or receives funds from your agency or contracts with your agency or another agency when your agency receives the benefit of the contract.



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## *Gifts*

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### Applicable Laws and Principles

- State employees are prohibited from soliciting, offering, making or accepting a gift of any value if it would constitute a substantial conflict with the proper discharge of their duties.
- Reciprocity does not reduce the value of a gift.
- You may not designate a friend, family member or entity (a charity for example) to receive a gift that you cannot receive.



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### Permissible Gifts

- The Public Integrity Reform Act excluded from the definition of a gift food or beverage valued at \$15.00 or less. So, you may accept a gift of food or beverage valued at \$15.00 or less provided the acceptance of the gift complies with Public Officers Law Section 74. (Section 74 prohibits using your position to secure unwarranted privileges or exemptions for yourself or others, prohibits engaging in a course of conduct that gives a reasonable impression that any person can improperly influence you or unduly enjoy your favor in the performance of your duties or that you are affected by the influence of a party or person and suggests that you endeavor to pursue a course of conduct that will not raise suspicion among the public that you are likely to be engaged in acts that are in violation of the trust placed in you.)
  - Items given because of a personal relationship.
  - Rewards or prizes given to competitors in contests or events, including random drawings open to the public.
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### Real Life Ethical Lapses

The majority of government employees adhere to applicable principles and guidelines but...



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### Real Life Ethical Lapses



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### Real Life Ethical Lapses

Fallout from the 2010 General Services Administration Western Region's Conference includes:

- An Inspector General's report;
- At least four congressional hearings;
- At least thirteen agency leaders or managers being fired, placed on leave or resigning;
- Calls for a DOJ investigation for possible criminal charges; and
- Legislative efforts to promote transparency (The Digital Accountability and Transparency Act).



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### Real Life Ethical Lapses

GSA published a notice of its planned procurement for hotel space on its website on February 2, 2009.

- In March 2009 two “scouting trips” were taken to Vegas by GSA employees. The employees stayed at hotels in Vegas and in one instance, the GSA consultant e-mailed the M Resort stating that a GSA employee would be staying at the hotel the night before the scouting trip and was not entitled to the government rate or a complimentary free night, and therefore, “needed a friend of a friend of the owner rate.”



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### Real Life Ethical Lapses

During a second trip in March 2009, another employee stayed in a flat suite at the M Resort and her sister and niece stayed in a connecting room at discounted rates.



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### Real Life Ethical Lapses

During scouting trips, GSA “VIPs” were provided with upgraded suites that “they received as a reward for GSA contracting with the M Resort.” The value of the discount that the M Resort provided GSA for this was \$21,540.00.



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### Real Life Ethical Lapses

During the WRC, the spouse of a GSA administrator requested, and the M Resort provided, a hotel room at the government rate to her relatives. (Neither the spouse or the relatives were GSA employees or participants in the conference.)



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### Real Life Ethical Lapses

During the WRC, a GSA employee involved in planning the conference contacted the M Resort's catering and conference services manager indicating that she "could not live without" a \$98.00 purse from the gift shop and asking if the manager received a discount and, "if so, will you help me?" The manager provided a \$30.00 comp. which the GSA employee accepted.



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### Real Life Ethical Lapses



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### Real Life Ethical Lapses

An Inspector General report released in August 2010, about the New York State Fair, discussed a number of instances of situations that created an appearance of impropriety in violation of the Public Officers Law:

- Discounted Christmas cards for the Fair's director's family made by a vendor under contract with the Fair;
- Renovations to State buildings by the Fair right before the director's daughter's wedding reception which was held at the fairgrounds;
- Highly discounted catering invoices and an apparent quid pro quo in which the State renovated a banquet room for use by the caterer.



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### Real Life Ethical Lapses

In December 2010, the Former New York State Fair Director Peter Cappuccilli Jr. was arrested on charges of grand larceny, defrauding the government, official misconduct and accused of using his fair position to benefit himself and his family.

- He faced two felony charges and two misdemeanors. The most serious charge, grand larceny, carries a maximum sentence of up to seven years in prison.
- In July 2011, he plead guilty to official misconduct and agreed to pay the State \$50,000 restitution and was sentenced to a one-year conditional discharge.



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## *Conflicts of Interest*

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### Applicable Laws and Principles

- Public Officers Law §74 contains the Code of Ethics which prohibits conflicts of interest. The statute sets out a series of standards to determine if there is a conflict of interest, including the concept of “the appearance of impropriety”.
  - Potential conflicts of interest can arise in a number of different situations.
  - You have responsibilities as a public sector employee that differ from those of private sector employees.
- The general rule is that officers and employees of state government may not engage in activities that would create or appear to create a conflict with their public duties, nor raise suspicion among the public that they are likely to be engaged in acts that are in violation of their public trust.



# Ethics for Public Procurement

## *Conflicts of Interest*

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### Introduction

There are several areas which create the potential for a real or apparent conflict of interest:

- Personal outside employment or investments;
- Nepotism and improper political considerations in government hiring and contracting;
- Release of confidential information; and
- Gifts.



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## *Conflicts of Interest*

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### The Code of Ethics:

- Prohibits engaging in transactions with any business entity where the employee has a financial interest that can conflict with their duties;
- Prohibits making investments that may be directly related to the employee's decisions or which otherwise create a substantial conflict with their duties;
- Prohibits use of official position to secure unwarranted privileges for yourself or others;
- Prohibits giving the reasonable basis for the appearance that you are affected by kinship, rank, position or influence of any party or person;
- Prohibits raising suspicion among the public that you are likely to be engaged in actions in violation of the trust placed in you; and
- Prohibits giving the reasonable basis for the impression that any person can improperly influence you or unduly enjoy your favor in the performance of your official duties.



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## *Conflict of Interest*

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### Applicable Laws and Principles

- Public Officers Law §73(4)(a)(i) prohibits the sale of goods or services greater than \$25 to a state agency by a state employee or a firm where the employee holds more than 10% of the stock **unless there is a competitive bid.**
- Public Officers Law §73(14) prohibits elected officials, state officers or employees, members of the Legislature and their employees from participating in decisions to hire, promote, discipline or discharge a relative for any compensated position at a state agency, public authority or the Legislature.

Except:

- Hiring of a relative by a legislator with a physical impairment for the purpose of assistance;
- Temporary hiring of legislative pages, interns and messengers; and
- Responding to inquiries regarding prospective hires.



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## *Conflicts of Interest*

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### Applicable Laws and Principles

- Public Officers Law Section 73(15) prohibits elected officials, state officers or employees, members of the Legislature and their employees from participating in:
  - State contracting decisions involving the payment of more than \$1,000.00 to them, their relatives or any entity that they or their relatives have a financial interest in; and
  - Decisions to invest public funds in a security of an entity that they or their relatives have a financial interest in, or that is an underwriter for or receives a brokerage, origination or servicing fee from.



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### Applicable Laws and Principles

- Public Officers Law Section 73(16) prohibits elected officials, state officers or employees involved in the awarding of state grants or contracts from asking current or prospective grantees or contractors about:
  - Their political affiliation or that of any of their officers, directors or employees;
  - Campaign contributions made by them or any of their officers, directors or employees; or
  - Votes cast by them or any of their officers, directors or employees.

Refusal to answer the above or the giving or withholding of any contributions cannot influence awards of grants or contracts.



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## *Conflicts of Interest*

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### Applicable Laws and Principles

- Public Officers Law Section 73(17) provides that unless necessary for the proper application of law or regulation or in order to ensure adequate political party representation as consistent with the public practices of the agency or authority, elected officials, state officers or employees are prohibited from asking applicants for public employment to disclose:
  - Their political affiliation;
  - Their campaign contributions; or
  - Their voting history.
- Refusal to answer the above or the giving or withholding of any contributions cannot influence decisions regarding hiring, promoting, discharge or discipline.



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## *Conflicts of Interest*

### Real Life Ethical Lapses



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### Real Life Ethical Lapses

In December 2011, the NYS Inspector General released a report on Charles Thropp.

<http://www.ig.ny.gov/pdfs/ThroppPublicReport.pdf>



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### Real Life Ethical Lapses

In 2010, the Inspector General and the Department of Environmental Conservation (DEC) received a complaint from a landowner alleging that oil wells operated on his property by a company called Cal Ban were not in compliance with DEC regulations and that DEC was not taking appropriate action regarding the wells because the DEC inspector, Charles Thropp, was an officer of Cal Ban.



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### Real Life Ethical Lapses

Mr. Thropp was hired by DEC in 2005 as a Mineral Resources Specialist assigned to oil and gas well inspection and enforcement activities in DEC Region 9.

- Before coming to work at DEC, Mr. Thropp was the president of Cal Ban Corp., a firm that operates oil wells in DEC Region 9, and owned at least one-seventh of the Cal Ban stock. All of this information was divulged on Mr. Thropp's resume and during his interview with DEC.



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### Real Life Ethical Lapses

The Inspector General's Report indicates that Mr. Thropp was told by DEC that if he was hired he would need to "divorce himself" from Cal Ban.

- Upon being hired by DEC, Mr. Thropp resigned as Cal Ban president, a position that his sister assumed, but retained his ownership interest in the company.
- Questions remain as to whether "divorce himself" was explained as meaning that Mr. Thropp needed to divest himself of any ownership in the company but it is clear that DEC officials did not ask Mr. Thropp if he divested his interest.



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### Real Life Ethical Lapses

During the IG investigation, Mr. Thropp stated that divestiture would have been a “big problem” because there was no way for him to divest himself of the stock.

- Despite this statement, Mr. Thropp soon after transferred all of his Cal Ban stock to his sister.



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### Real Life Ethical Lapses

After being hired at DEC, Mr. Thropp told superiors that Cal Ban owed him a large sum of money (reported to be \$250,000.00). DEC officials did not ask any questions about this statement or take any action regarding the same.



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### Real Life Ethical Lapses

In response to a complaint against Cal Ban, DEC assigned investigators from Region 8 to investigate and Mr. Thropp had no involvement in the investigation and subsequent enforcement action, however, the IG found that there was a failure to disclose by Mr. Thropp and a failure to investigate by DEC.

- The IG referred Mr. Thropp's case to the Commission on Public Integrity, a predecessor to JCOPE, and recommended that DEC take appropriate action against Mr. Thropp.
  - Mr. Thropp has been counseled not to discuss any issues related to Cal Ban in his employment at DEC and DEC conducted agency wide and Region 9 specific ethics trainings.



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### Real Life Ethical Lapses

A recent report by the Inspector General investigated allegations of misconduct by Jerry Cosgrove, Former Deputy Commissioner of the Department of Agriculture and Markets.



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### Real Life Ethical Lapses

Mr. Cosgrove worked for the American Farmland Trust (AFT), a national organization that promotes farmland protection from 1992 until 2007.

- He served as AFT's Northeast Regional Director, overseeing AFT's NYS legislative efforts.



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### Real Life Ethical Lapses

Mr. Cosgrove is married to Judy Anderson, a consultant to land trusts and land conservation organizations in New York.

- In January 2007, Ms. Anderson was retained by the New York Agricultural Land Trust (NYALT). This was done at the suggestion of David Haight, a subordinate of Mr. Cosgrove at the time NYALT was created.



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### Real Life Ethical Lapses

In March 2007, Mr. Cosgrove was appointed as Deputy Commissioner for Agriculture and Markets.

- In this position, Mr. Cosgrove was in charge of the Agricultural and Farmland Protection Program. This program directed the purchase of development rights by local governments in order to protect agricultural and farm lands.



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### Real Life Ethical Lapses

- While working at AFT, Mr. Cosgrove unsuccessfully attempted to persuade the legislature to create a Land Trust Grant program.
- As Deputy Commissioner, Mr. Cosgrove participated in drafting new legislation to create a Land Trust Grant program. This legislation originally mentioned NYALT as a potential recipient of the grant funds.



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### Real Life Ethical Lapses

- The legislation was passed in 2008 and provided that applicants could receive up to \$50,000.00 in a fiscal year but that the total of all grants awarded could not exceed \$500,000.00 in any fiscal year.
- The award of grants was required to be made on a competitive basis through a RFP process.



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### Real Life Ethical Lapses

- Mr. Cosgrove worked on the drafting of the RFP, showed his wife an initial framework for the RFP to which she provided comments (including allowing state funding of organizational policy development, the work that she was performing for NYALT.)
- Ms. Anderson then advised NYALT on its response to the RFP.



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### Real Life Ethical Lapses

- After the initial scoring of the RFP responses, NYALT fell below the minimum required for funding.
- Mr. Cosgrove then asked for and was shown the rankings and scores for the responses. According to testimony, he then asked why NYALT was not funded and indicated that “if [NYALT does not] receive funding, heads are going to roll.”



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### Real Life Ethical Lapses

- Employees testified that they were frightened by Mr. Cosgrove's actions.
- Subsequently, the scoring process was revised and NYALT achieved a score that made it eligible for funding. However, the revised scoring made so many entities eligible for funding that the awards would exceed the \$500,000.00 limit.



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### Real Life Ethical Lapses

- Testimony indicates that as a result of Mr. Cosgrove's pressure and threats, an increase in the funding level was requested and approved. NYALT was awarded a \$100,000.00 grant.
- In summary, Mr. Cosgrove drafted a RFP that would allow an entity that his wife worked for to receive state funds. Those funds paid his wife's salary and at times were deposited in their joint account.



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### Real Life Ethical Lapses

- Mr. Cosgrove also worked on renewal discussions and processes for a contract with his former employer, AFT. He authorized an increase in AFT's funding, potentially added terms to the contract's scope of work and approved the renewal of the contract.



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## *Conflicts of Interest*

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### Real Life Ethical Lapses

- When Mr. Cosgrove went to work at the Department of Agriculture and Markets, staff raised concerns about possible conflicts of interest between his former employment and his wife's current employment.
  - In response, Mr. Cosgrove requested an informal opinion from CPI, the predecessor to JCOPE, but appears to not have disclosed all pertinent facts. The opinion indicated that there was no conflict and Mr. Cosgrove often cited the opinion as evidence of the propriety of his conduct without ever showing the opinion to anyone who would note any inconsistencies in the facts presented.



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## *Conflicts of Interest*

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### Real Life Ethical Lapses

- Once the Inspector General commenced its investigation, the Land Grant Trust program was suspended and Mr. Cosgrove was terminated.
- The report was provided to JCOPE and the District Attorney's Office for action.



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## *Post Employment Restrictions*

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### Applicable Laws and Principles

- Public Officers Law Section 73(8)(a)(i) establishes a two year bar on activities before an employee's former agency (appear or practice or receive compensation for any services in relation to any case, proceeding or application or other matter before the agency).
- Public Officers Law Section 73(8)(a)(ii) establishes a lifetime bar on transactions that the employee worked on while in state service (appear, practice, communicate, otherwise render services or receive compensation for any services in relation to any case, proceeding, application or transaction with respect to which the employee was directly concerned and in which he or she personally participated or was under their active consideration).
- Additional bars apply to members of the legislature and executive chamber staff.



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## *Post Employment Restrictions*

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### Applicable Laws and Principles

- Public Officers Law Section 73(8)(e) does provide a government-to-government exception.
- Other exceptions have been instituted in specific situations (reductions in the workforce, year 2000, etc.)



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## *Post Employment Restrictions*

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### **Applicable Laws and Principles**

The NYS Ethics Commission, a predecessor to the NYS Joint Commission on Public Ethics, issued Advisory Opinion 06-01 which provides:

- Pursuant to the authority vested in it by Executive Law §94(15), the New York State Ethics Commission ("Commission") concludes that
  - (1) State employees may not solicit a post-government employment opportunity with any entity or individual that has a specific pending matter before the State employee; and only may, 30 days from the time a matter is closed or the employee has no further involvement because of recusal or reassignment, solicit an employment opportunity;



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## *Post Employment Restrictions*

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### Applicable Laws and Principles

(2) State employees who receive an unsolicited employment-related communication from such an entity or individual (a) cannot pursue employment with the entity or individual or (b) must recuse themselves from the matter and any further official contact with the entity or individual and wait 30 days from such recusal before entering into post-government employment communications with the entity or individual; and

(3) State employees must promptly notify their supervisors and ethics officers of such employment-related communications whether or not they intend to pursue the employment opportunity.



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## *Post Employment Restrictions*

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### Real Life Ethical Lapses

- Pursuant to an OSC audit released in February 2012, Rico Singleton, the former deputy chief information officer at the NYS Office for Technology, the predecessor to the NYS Office of Information Technology Services, did not follow this Advisory Opinion. According to the audit, on August 6, 2009, after signing a contract with McAfee, but prior to McAfee being paid \$1.9 million under the contract, Mr. Singleton solicited employment for himself at McAfee. He interviewed at McAfee's Atlanta office less than a month after McAfee was paid by the State.



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### Real Life Ethical Lapses

- The audit states that Mr. Singleton's actions not only appear to violate the Public Officers Law, but also the agreement with McAfee itself, which restricted OFT and McAfee from soliciting employees of the other for hire for the term of the agreement plus one year. McAfee staff stated that Mr. Singleton specifically requested that any information relating to the job interview not be sent to his work computer but, instead, wished that all information regarding his possible employment with the company be sent to his personal e-mail account.



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## *Post Employment Restrictions*

### Real Life Ethical Lapses

From: Rico Singleton (LinkedIn Messages)  
Sent: Thu Aug 06 10:15:02 2009  
To: [REDACTED]  
Subject: RE: Join my network on LinkedIn  
Importance: Normal

## LinkedIn

Rico Singleton has sent you a message.

Date: 8/06/2009

Subject: RE: Join my network on LinkedIn

Hey.. let's schedule some time to talk. I'm ready to talk about MFE.. Looking to leave before December so need to start putting things in motion.. When do you have time..



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## *Post Employment Restrictions*

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### Real Life Ethical Lapses

From: Rico J. Singleton <rico@[REDACTED]>  
To: [REDACTED]  
Sent: Thu Sep 17 20:09:54 2009  
Subject: Follow up

I'm planning on being at Focus to speak on NYS ELA again. Look forward to catching up with you there. In the meantime let me know what your thinking... My preference is to be able to reside in GA, to work in GHE as strategic business development, and nothing less than Director level at minimum, and to have flexibility to grow business where ever possible and feasible around the country.



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## *Post Employment Restrictions*

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### Real Life Ethical Lapses

- By the time the audit was released, Mr. Singleton no longer worked for the State. OSC referred his actions to JCOPE for investigation. Mr. Singleton could face civil penalties, including fines, but not criminal charges for violating that state's public office laws, according to the comptroller's office.
- In addition, the audit led to Mr. Singleton's resignation from his position as CIO for the City of Baltimore.



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## *Political Activities and Outside Employment*

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### Applicable Laws and Principles

Public Officers' Law Section 3-c prohibits commissioners, executive directors or other heads of state agencies from seeking nomination or election or becoming a candidate for any compensated federal, state or local public office unless they first resign from their public employment or take a leave of absence without pay.

- The resignation or leave must start before the individual engages in any political activity, including but not limited to, announcing a candidacy, circulating petitions, soliciting contributions, distributing literature or taking any other action to actively promote oneself as a candidate for elective office.



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# Ethics for Public Procurement

## *Political Activities and Outside Employment*

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### Applicable Laws and Principles

- Public Officers' Law Section 73(9) prohibits party officers from serving as a judge, attorney general, deputy or assistant attorney general, solicitor general, district attorney or assistant district attorney.



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# Ethics for Public Procurement

## *Political Activities and Outside Employment*

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### **Applicable Laws and Principles**

The Code of Conduct prohibitions regarding conflicts of interest and breach of trust also apply to political activities:

- Soliciting Campaign Contributions;
- Use of State Position to Gain Advantage in a Political Campaign;
- Use of State Resources, etc.; and
- Campaign on Your Own Time.



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# Ethics for Public Procurement

## *Political Activities and Outside Employment*

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### **Applicable Laws and Principles**

Civil Service Law Section 107 addresses politics in the workplace. It provides that political affiliations (with the exception of unclassified appointments in Boards of Elections) should be irrelevant to employment in New York State. This statute also prohibits employers from asking or for using knowledge of an employee or candidate's political affiliation in a discriminatory manner.



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# Ethics for Public Procurement

## *Political Activities and Outside Employment*

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### Real Life Ethical Lapses



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## *Political Activities and Outside Employment*

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### **Real Life Ethical Lapses**

- Mr. Blagojevich was arrested at his home by federal agents and charged with corruption stemming from a complaint alleging that the governor conspired to commit several pay to play schemes, including attempting "to obtain personal gain ... through the corrupt use" of his authority to fill President Obama's vacated Senate seat. The complaint alleged that in wiretapped recordings Mr. Blagojevich discussed his desire to get something in exchange for an appointment to the seat.



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# Ethics for Public Procurement

## *Political Activities and Outside Employment*

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### Real Life Ethical Lapses

- On January 8, the Illinois House voted 114-1 (with three abstentions) to impeach Mr. Blagojevich. The charges brought by the House emphasized Mr. Blagojevich's alleged abuses of power and his alleged attempts to sell gubernatorial appointments and legislative authorizations and/or vetoes, including the alleged attempt to sell the appointment to the Senate seat vacated by the resignation of President Obama. Mr. Blagojevich was frequently reported as having been taped by the FBI saying "I've got this thing, and it's &\*%&\* golden. I'm just not giving it up for &\*%&\* nothing." He was removed from office and prohibited from ever holding public office in the State of Illinois again, by two separate and unanimous votes of 59–0 by the Illinois Senate on January 29, 2009.



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## *Political Activities and Outside Employment*

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### **Real Life Ethical Lapses**

- Mr. Blagojevich was indicted by a federal grand jury in April 2009. Most of the charges related to attempts to sell the Senate seat. On August 17, 2010, he was convicted on one of the 24 federal charges, a charge of lying to the FBI, and the jury was hung on 23 other counts. Because the jury could not agree on the remaining charges, a mistrial was ordered for those counts and the prosecution retried the case.



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# Ethics for Public Procurement

## *Political Activities and Outside Employment*

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### Real Life Ethical Lapses

- On June 27, 2011, Mr. Blagojevich was found guilty of 17 of 20 charges, not guilty on one, and no verdict was rendered by the jury on two counts. He was found guilty on all charges pertaining to the Senate seat, as well as extortion relating to state funds being directed towards a children's hospital and race track. In December 2011, Mr. Blagojevich was sentenced to 14 years in federal prison. There is no parole in the federal prison system, however under federal rules, Mr. Blagojevich may be eligible for early release based upon good behavior, in 2024, after he has served at least 85%, or 12 years of his sentence.



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# Ethics for Public Procurement

## *Political Activities and Outside Employment*

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### **Applicable Laws and Principles**

- The Code of Conduct prohibitions regarding conflicts of interest and breach of trust also apply to outside employment:
  - Specifically, it prohibits accepting other employment that will impair an employee’s independence of judgment or require disclosure of confidential information.
- The concept of “employment” is broadly defined.
- Look at conflicts of time and interest.



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### **Applicable Laws and Principles**

- The Procurement Lobbying Law, codified in State Finance Law Sections 139-j and k and the Legislative Law, was enacted in 2005 in order to regulate communications between vendors, referred to as “offerrors” in the law and governmental entities.
- The aim is to encourage the open, level and transparent playing field envisioned by Section 163 of the State Finance Law.



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### **Applicable Laws and Principles**

The Procurement Lobbying Law applies to contracts with an estimated annualized expenditure of \$15,000.00.

- There are certain exemptions for grants, intergovernmental agreements, organ transplant contracts, etc.

(State Finance Law Section 139-j(1)(g))



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### **Applicable Laws and Principles**

The requirements of the law apply during the restricted period. The restricted period commences with the earliest written notice, advertisement or solicitation of a RFP, IFB or other method of soliciting responses from offerors intending to result in a procurement contract with a governmental entity and continues until approval of the final contract award by the governmental entity, and if necessary, OSC.

(State Finance Law Section 139-j(1)(f))



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### **Applicable Laws and Principles**

An “offeror” is defined as an individual or entity, or any employee, agent or consultant or person acting on behalf of such individual or entity that contacts a governmental entity about a governmental procurement during the restricted period whether or not the caller has a financial interest in the outcome of the procurement.

- Exception for governmental agency or its employees that communicate with the procuring agency in the exercise of their oversight duties.

(State Finance Law Section 139-j(1)(h))



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### Applicable Laws and Principles

A contact is defined as any oral, written or electronic communication with a governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the governmental entity's conduct or decision regarding the governmental procurement. (State Finance Law Section 139-j(1)(c))

- Exception for communications from members of the state legislature or their staffs when acting in their official capacity. (State Finance Law Section 139-k(6)).
- \*\*\*\*Not all communications are Contacts! Only communications that are an “attempt to influence” a Governmental Entity’s conduct or decisions are contacts, and therefore, subject to the Procurement Lobbying Law’s requirements.



# Ethics for Public Procurement

## *Procurement Lobbying*

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### **Applicable Laws and Principles**

Section 139-j(3)(a) of the State Finance Law provides that offerors shall only make permissible contacts to a governmental entity regarding a governmental procurement.

- This means only contacting the designated contact for the procurement; or



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### Applicable Laws and Principles

- Engaging in a contact that is an exception to the requirements of the law, for example:
  - The submission of written questions by a method provided for in the solicitation;
  - Participation in a demonstration, conference or other means for exchange of information in a setting open to all potential bidders as provided for in the solicitation;
  - Contract negotiations after tentative award;
  - Protests, appeals or other review proceedings; and
  - Communications solely relating to vendor responsibility.



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### Applicable Laws and Principles

Governmental entities must name designated contacts when a restricted period is established.

- Designated contacts must be knowledgeable about the procurement.



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### **Applicable Laws and Principles**

- Violation of Section 139-j(3)(a) leads to an investigation and if sufficient cause exists to believe that the allegation is true the offeror will be notified of the investigation and an opportunity to be heard.
- Governmental Entities are obligated to develop policies and procedures on the review and investigation process.
  - Standard is a “knowing and willful” violation of the law!



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### Applicable Laws and Principles

- A finding of a knowing and willful violation of the law leads to a determination of non-responsibility for the offeror. The offeror, its subsidiaries and any related or successor entity with substantially similar function, management, board of directors, officers and shareholders shall not be awarded the procurement contract unless there is a finding of necessity in order to protect public property or public health and safety and a determination that this entity is the only source capable of providing the article within the necessary timeframe.
  - Finding of non-responsibility is to be reported to OGS which posts the same on its website.



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### Applicable Laws and Principles

Two non-responsibility determinations within four years results in an offeror being debarred for a period of four years from the date of the second non-responsibility determination.

- Debarments must also be reported to OGS for posting on the website.
  - The list of non-responsible offerors can be found at:  
[http://www.ogs.ny.gov/aboutogs/regulations/SFL\\_139j-k/NonResponsible.htm](http://www.ogs.ny.gov/aboutogs/regulations/SFL_139j-k/NonResponsible.htm)
  - The list of debarred offerors can be found at:  
[http://www.ogs.ny.gov/aboutogs/regulations/SFL\\_139j-k/Debarred.htm](http://www.ogs.ny.gov/aboutogs/regulations/SFL_139j-k/Debarred.htm)



# Ethics for Public Procurement

## *Procurement Lobbying*

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### Applicable Laws and Principles

Section 139-k of the State Finance Law requires that governmental entities require offerors to disclose non-responsibility findings within the previous four years.

- A failure to disclose is to be considered by the governmental entity when it is making its responsibility determination regarding the offeror.



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### Applicable Laws and Principles

State Finance Law Section 139-j(4) requires that contacts during the restricted period be recorded in the procurement record:

- Name;
- Address;
- Telephone number;
- Place of principal employment and occupation; and
- Whether the individual was the offeror or retained, employed or designated by or on behalf of the offeror to appear or contact the governmental entity about the procurement.



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## *Procurement Lobbying*

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### Applicable Laws and Principles

- Contract awards must contain a certification by the offeror that all information provided with respect to the Procurement Lobbying Law is true, complete and accurate.
- Contracts must contain a provision allowing for termination of the contract in the event that such certification is found to be intentionally false or incomplete. This is now included in Appendix A.

(State Finance Law Section 139-k(5))



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## *Procurement Lobbying*

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### **Applicable Laws and Principles**

The law requires governmental entities to develop a policy on permissible contacts and obtain a written affirmation from offerors as to their understanding of and agreement to comply with the entity's procedures relating to permissible contacts during the procurement pursuant to State Finance Law Section 139-j(3).

(State Finance Law Section 139-j(6)(b))



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# Ethics for Public Procurement

## *Procurement Lobbying*

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### **Applicable Laws and Principles**

The Procurement Lobbying Law established the Advisory Council on Procurement Lobbying. Comprised of members from state and local government and the vendor community, the Council provides advice on the requirements of the law in the form of model policies and frequently asked questions.

Please visit:

<http://www.ogs.ny.gov/aboutOgs/regulations/defaultAdvisoryCouncil.asp> for more information.



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# Ethics for Public Procurement

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Any Questions???



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## Additional Information

Please feel free to contact me with any questions:

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# **Project Sunlight**

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**May 15-16, 2013**



**Andrew M. Cuomo**  
Governor  
State of New York

**RoAnn M. Destito**  
Commissioner  
Office of General Services

# PROJECT SUNLIGHT

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## What is Project Sunlight?

- Part of the Public Integrity Reform Act of 2011, Laws of 2012, Chapter 399 §4
- Publicly accessible online database
- Covers every state agency, department, division, office and board
- Covers every public benefit corporation, public authority, and commission with at least one member appointed by the governor
- Covers SUNY and CUNY



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# PROJECT SUNLIGHT

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## What does Project Sunlight require?

- The law requires that state employees who are decision makers or advisors report “appearances” with non-government entities to the on-line searchable database
- Only appearances related to certain topics need to be reported, so not every meeting needs to be reported
- Meetings related to procurement must generally be reported



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## Who is covered?

- State employees with decision or policy making authority
- State employees who advise policy makers
- Advisor may have authority only in certain areas, so the question of coverage may be fact specific



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# PROJECT SUNLIGHT

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## How does the database work?

- Each State entity has a Project Sunlight liaison, typically in the legal department, who handles administration, entity-specific policies, and access to the database
- Agency users will log into the database to log appearances at <http://projectsunlight.ny.gov/login>
- The public database is available at <http://projectsunlight.ny.gov>



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## What must be reported?

- With respect to Procurement, State employees must report appearances for the purpose of “procuring a state contract for real property, goods or services”
- Note: Reporting is also required in other areas, such as Regulatory Matters, Rate Making, Judicial and Quasi-Judicial Activities, and Adoption or Repeal of a Rule or Regulation. Reporting requirements related to these areas are beyond the scope of this presentation. Please contact your agency liaison if you need more information regarding these areas.



# PROJECT SUNLIGHT

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## What is an Appearance?

- Non-written communication: In-person meeting, phone call, or video conference
- Between a State entity and an outside party (purely intra-State meetings do not need to be reported)
- Appearances do not need to be formal, nor do they need to occur at a State office
- An Appearance can be initiated by either a vendor or the State
- Appearances do not need to relate to a specific procurement



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## What is an Appearance (cont.)?

- Cold-call sales meetings and sales meetings from vendors
- Meetings with existing vendors for new products or services
- Meetings involving substantial renegotiations of contracts



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## What is not an Appearance?

- Written communication such as faxes, letters, or emails
- State employees conducting market research or looking to inform a policy decision
- Outreach to determine interest or availability for an upcoming procurement
- Purely informational or ministerial contact
- Meetings that are confidential pursuant to federal or state statutes, rules or regulations



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## What is not an Appearance (cont.)?

- Contacts related to procurements under \$25,000. Note that this threshold is lower than the threshold imposed by the State Finance Law regarding discretionary spending
- Appearances related to emergency procurements



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## What is not an Appearance (cont.)?

- Participation in industry meetings, conferences, or panels not related to a specific procurement
- Short and informal meet-and-greets, introductions, or purely social interactions
- Note, however, that an Appearance could occur before or after one of these two scenarios



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## What is not an Appearance (cont.)?

- Appearances as part of a formal procurement that are otherwise covered by the Procurement Lobbying Law
  - Appearances during a restricted period, such as bid meetings and presentations
  - Phone calls to designated contacts
  - Bid clarifications



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## What is not an Appearance (cont.)?

- Appearances following the award of a contract related to contract administration.
- This includes:
  - Discussion of open contract terms
  - Purchases off an already existing contract
  - Meetings regarding contract performance



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## Conclusion

- Each State entity has a Project Sunlight liaison, typically in the legal department, who handles administration, entity-specific policies, and access to the database
- If your liaison is unable to help, please contact [Help@ProjectSunlight.ny.gov](mailto:Help@ProjectSunlight.ny.gov)
- The Project Sunlight website is available at <http://ProjectSunlight.ny.gov>



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