

# Duties and Risks in Confidentiality

## **Evolving Challenges for Port Commissioners**

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# Introduction

What we will examine:

1. Your role as commissioner of a public body—  
Who do you represent?
2. Keeping confidences of your port—privileged  
and non-privileged confidences.
3. Your obligations and the state laws on  
disclosure of public records and open  
meetings.

# Role of commissioner

4 main duties all governing boards must follow:

1. Duty to govern.
2. Duty of diligence.
3. Duty of obedience.
4. Duty of loyalty.

# Duty of loyalty

Who do you represent and serve?

1. Campaign supporters/donors?
2. Business?
3. Shipping lines?
4. Labor?
5. The elected official who appointed you?
6. The public interest?
7. Everyone whose first name is Tom?

# Duty of loyalty (cont.)

The answer:

All of the above, through serving the port itself.

The first duty is to the entity—the port—on which you serve.

# Duty of loyalty

There are those officials who never get it

They're elected or appointed believing that their loyalty to their supporters takes precedence over their loyalty to the organization.

# Duty of loyalty

Serving on a governing board of a public body is analogous to serving on the board of directors of a private corporation.

There is a fiduciary obligation to the organization.

Some believe that they can do whatever they want because they “serve the public interest”.

# Duty of loyalty

This problem is similar in many ways to the problems that attorneys representing public entities have to face—who is the client.

In particular, there's a group of commentators who suggest that public attorneys' first obligation is not to the organization they serve, but "the public interest."

# Duty of loyalty

The question for attorneys, as well as public officials who believe this is:

who decides?

If people believe they serve the public interest and not the public entity and also believe in their power of determining what the public interest is serves not the public, but only themselves.

# Confidentiality

Secrets and confidential information: it's not all bad.

There's a lot of heated rhetoric that the public has a right to know everything that goes on inside any government entity.

Some of this is brought on by those who are suspicious of any kind of government action, some of it is by the press, some of it by politicians looking to score easy political points.

# Confidentiality

To be fair, some of this rhetoric is justified by the actions of some in government who have abused the public trust.

# Confidentiality

However, there is a necessity to keep some information secret.

For example—If the port wants to buy land to build a new terminal—if the public knew this was imminent, then land speculators would snap up the land and potentially drive up the price.

# Confidentiality

Settlement discussions—what're the port's vulnerabilities—if opposing counsel knew, then the port is placed at a disadvantage.

Labor union negotiations—if the port's position is known to the other side, the port loses its ability to obtain a deal that is in the best interest of the port.

# Confidentiality

There's two kinds of confidential information.

The first is non-privileged (see the examples above) dealing with business issues.

# Confidentiality

The other kind of confidential information is privileged communications. The only privileged communications that could apply in our setting is attorney-client communications.

# Confidentiality

Attorney-client privilege--What is it?

It's a duty and a rule that keeps certain communications between a lawyer and client confidential.

It is a wall that prevents anyone who is outside the attorney/client relationship from being privy to what was properly communicated within that relationship.

# Confidentiality

Why do we have it?

It's designed to promote candor in the relationship between the attorney and the client. It's an old privilege that goes back to the 16<sup>th</sup> Century in England.

# Attorney-client privilege

## Elements:

1. A communication
2. Made between privileged persons
3. In confidence.
4. For the purpose of seeking, providing, or obtaining legal assistance to the client.

# Attorney-client privilege

## Oops—Part 1.—Common mistakes

You draft a memo to the port's director and you want to protect some information from public disclosure and so you cc the port's attorney. Privileged?

You're in a meeting during which business is discussed and you want to protect the contents of that meeting so you invite the port's attorney to sit in. Is the entire meeting privileged and not subject to discovery?

# Attorney-client privilege

You as a port commissioner speak to the port's attorney about some non-port legal issues affecting your personal business. Privileged?

There's a criminal investigation of your port with a focus on you (as commissioner) by a state or federal agency. You speak to the port's lawyer about what happened and to plan strategy. Privileged?

# Attorney-client privilege

## Waiver

The client “owns” the privilege—Only the client can decide whether to waive or give up the privilege.

Waiver can occur voluntarily (by the client) or by accident (talking in an elevator, leaving confidential memos in a public area, sending an email to the wrong person).

# Attorney-client privilege

Waiver (cont.)

The real question in waiver is how broad is the extent of the waiver? Is it only the particular communication or is it everything that relates to that communication?

The scary part is that there are courts that have ruled that once the privilege is waived for a topic, everything relating to that topic is waived, even if it was an accidental waiver.

# Public Disclosure

Keep in mind there's two sets of laws that affect this discussion: the disclosure laws and the public records laws.

Different terminology for the same thing—FOIA (Freedom of Information), Sunshine Laws

# Public Disclosure

Many of the disclosure laws have a provision stating that they are to be “liberally construed” in favor of disclosure.

Translation—all ties go to disclosure.

# Public Disclosure

Most state disclosure laws recognize certain categories of exemptions, but the exemptions are to be narrowly construed so as not to frustrate the purpose of the disclosure laws.

In other words, if an exemption doesn't fit exactly, then it doesn't apply.

# Public Disclosure

What are “documents” that are subject to disclosure?

It’s way more than paper—faxes, emails, digitally stored information—anything in the port’s possession that is a medium with information.

# Public Disclosure

Metadata—the new frontier and trap for the careless

Metadata is the hidden digital information that is stored on every document (including emails, word processing documents, spread sheets, slides, etc.) produced on a computer which indicates time and date of creation, tracking of edits, etc.).

# Public Disclosure

WA case involving metadata

Email between two citizens mentioning O'Neil is forwarded to Deputy Mayor Fimia. Fimia referenced it at a city council meeting. O'Neil requests to see the email. After receiving it, she requests the metadata of the original email. Fimia can't find it, and probably deleted the original along with its metadata. O'Neil sued the city for violating the Public Disclosure Act for failing to provide the requested metadata.

# Public Disclosure

WA metadata case (cont.)

WA Supreme Court rules in favor of O'Neil

The Court suggests the city be allowed to search Fimia's home computer to see if it can retrieve the original metadata.

We don't know if this is merely an outlier or a harbinger.

# Public Disclosure

## Social Media

Includes electronic bulletin boards, Facebook, blogs, Twitter.

Public officials who seemingly conduct discussion of public business on these mediums may be creating public records that need to be stored as a public record.

It gets dangerous when other port commissioners start commenting on the posts—see discussion on open public meetings.

# Open Public Meetings

General rule—All public business has to be conducted in meetings open to the public with adequate notice in advance.

Has the same expansive interpretation concept as the disclosure laws—to be liberally construed to favor allowing the public to see what government is doing.

# Open Public Meetings

Most states have exceptions for executive sessions, but, like the disclosure law exemptions, they're to be narrowly construed. If it doesn't fit exactly, then there's no executive session allowed for that topic.

Examples of executive session items: Discussion with legal counsel on litigation matters or relating to legal risks; national security, labor negotiation strategy, employee disciplinary actions.

# Open Public Meetings

## Oops, part 2

1. Port commissioners attend an AAPA seminar in Biloxi and go out and have dinner together. Public meeting violation?
2. Two out of five members sit down and talk port business. Violation?

# Open Public Meetings

Oops, part 2 (cont.)

3. One commissioner sends out an email to fellow commissioners on a port project and gets feedback. Violation?
4. A Commissioner has a Facebook account and posts comments regarding port business. Other commissioners are “Facebook friends” and start commenting. Violation?

# Questions?