



# FIRST THINGS FIRST

*Ready for School. Set for Life.*

## Conflict of Interest Guidance for Regional Partnership Councils

### I. Conflict of Interest Statutes

#### A. Standard

A.R.S. § 38-503 sets out the legal standard for when public officers, including Council members, have to recuse themselves because of a conflict of interest:

A. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

B. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

First Things First's statutes then supplement the standard: "... no regional partnership council member shall vote on, or participate in the discussion of, any grant proposal in which any entity by which they are employed or on whose board they serve has a substantial interest, as defined by section 38-502." A.R.S. § 8-1173(C).

In short, the key is whether a substantial interest exists. "Substantial interest" refers to "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11).

#### B. Three-Part Test

A Council member can determine whether a substantial interest exists by applying a three-part test. The test asks the following:

1. Could the decision affect, either positively or negatively, an interest of the Council member, the Council member's relative, the Council member's employer or a (non-First Things First) board on which the Council member serves?
2. Is the interest a pecuniary or proprietary interest (i.e., financial or ownership interest)?
3. Is the interest something that is not statutorily designated as a "remote interest"?

If a Council member answers yes to all three questions, then the member has a substantial interest (i.e., conflict) that requires full disclosure and recusal. If the Council member answers no to any of the questions, then the interest is not a substantial interest and does not create a conflict requiring disclosure or recusal.

### **1. Relatives**

When it comes to relatives, the conflict of interest laws have a specific definition: “the spouse, child, child's child, parent, grandparent, brother or sister of the whole or half blood and their spouses and the parent, brother, sister or child of a spouse.” A.R.S. § 38-502(9). Said another way, “relative” includes:

- The spouse, the spouse’s parents and siblings (in-laws), and the spouse’s children (step-kids).
- The grandparents, parents, siblings, children and grandchildren and all of their spouses.

Relative does not include aunts, uncles, nieces, nephews or cousins.

### **2. Pecuniary or Proprietary Interests**

Pecuniary interests relate to money, and proprietary interests relate to ownership. These concepts refer to something a person will gain or lose and include both direct and indirect interests. In contrast to direct and indirect interests, contingent or speculative interests do not count. General sympathy, feeling or bias, including ideological views, also do not count as pecuniary or proprietary interests. *See Hughes v. Jorgenson*, 203 Ariz. 71, 74 (2002).

For example, if a Council member owns a business that is applying for a First Things First grant, then the member has a direct interest. The member also has an interest if the member works for a grant applicant. On the other hand, if a member is merely close friends with a grant applicant, the member does not have a pecuniary or proprietary interest.

### **3. Remote Interests**

The conflict of interest laws designate 10 specific pecuniary or proprietary interests as “remote interests.” *See* A.R.S. § 38-502(10). Remote interests do not create a conflict. *See* A.R.S. § 38-502(11). Therefore, even if a Council member, the member’s relative, the member’s employer or another board on which the member serves has a pecuniary or proprietary interest, the member does not have a substantial interest (and thus no conflict of interest) if the interest qualifies as one of the 10 remote interests.

Here are general descriptions of the more common remote interests:

- Non-salaried officer of a nonprofit corporation.
- Insignificant stock ownership.
- Recipient of public services generally available.

- Member of a trade, business, occupation, profession or class of persons consisting of at least ten members with an interest which is no greater than the interest of the other members.
- Officer or employee of another governmental agency unless the interest provides a direct benefit on the officer or employee.

Under the final remote interest listed above, indirect interests are considered remote when a Council member works for another government body. Accordingly, if a Council member works at a University and a grant will fund the member's services, the member has a direct interest and a conflict; but, if the grant instead only affects another department, the member has a remote interest and no conflict. To help determine whether the interest is direct, a Council member should consider these questions:

- Will these grant funds be used by your agency to pay all or a portion of your salary?
- Will these grant funds increase your department's budget, or prevent your budget from being cut?
- Will you receive any other direct benefit as a result of your employer's receipt of these grant funds?

A "yes" answer to any of these questions indicates that the interest is direct and that this particular remote interest does not apply.

If there is reason to believe an interest may be remote, refer to A.R.S. § 38-502(10) for the actual language of the remote interest to make sure.

## **II. Dealing with a Conflict**

If a Council member has a substantial interest, then the member must fully disclose the conflict and not participate in any way in the matter.

### **A. Disclosure**

#### **1. Duty**

Council members with a substantial interest in a contract, sale, purchase, service or decision must "make known" that interest in the official records of the Council. *See* A.R.S. § 38-503(A)-(B). Under the law, a Council member can make known a substantial interest in either of two ways: (1) filing a signed paper that fully discloses the substantial interest or (2) fully disclosing the substantial interest during a public meeting. *See* A.R.S. § 38-502(3). The disclosure, whether provided in a signed document or memorialized in official meeting minutes, must be filed by First Things First staff in a special file for disclosures of substantial interests. *See* A.R.S. §§ 38-502(3)-(4), 38-503(A)-(B) & 38-509. Currently, it is First Things First's practice to have Council members complete a signed, written disclosure even if they also disclose the substantial interest during a meeting and to attach a copy of the written disclosure to the meeting minutes.

## **2. Procedure**

When a conflict arises, the initial full disclosure needs to be made before or during the first Council meeting at which the Council member needs to recuse him or herself. This initial full disclosure of a substantial interest requires more than simply stating, "I declare a conflict." A.R.S. § 38-502(3). At a minimum, the Council member should set out what the interest is and, if the interest belongs to a relative, identify that relative.<sup>1</sup> However, once a member has already made known the substantial interest by fully disclosing it in a written, signed disclosure or at a meeting, then at a subsequent meeting where the same conflict presents itself, the member may simply declare that the member has a conflict because the interest has already been fully disclosed. It is important for a Council member with a conflict to repeat that the member has a conflict at every meeting at which the matter is discussed so that it is clear in the minutes, to the other Council members and to the public that the member with the conflict is not going to participate in the matter in any way.

During the course of a meeting, conflicts should be disclosed before anyone begins discussion of the item. As a best practice, the Chair should ask members to identify conflicts they have on any agenda item at the beginning of the meeting. This will avoid the need to ask for conflicts on each individual matter and will help ensure that conflicts are made known before any discussion begins. If conflicts have been disclosed at the start of a meeting, when the Council arrives at the item(s) on the agenda with a conflict, the Chair can remind the Council that certain members will not participate in the discussion or vote on that matter.

While it is not the responsibility of staff to police conflicts, it is not appropriate for staff to ignore conflict issues. Staff should bring undeclared conflicts that they notice to the member's attention in a professional manner. If the situation persists, staff should bring the circumstances to the attention of the Sr. Director for the region and, if it warrants, the Chief Regional Officer.

### **B. Participation**

#### **1. General Rule**

As has been noted above, if a Council member has a substantial interest (i.e., conflict) with regard to a matter, the member must refrain from discussing, voting on or otherwise participating in any manner as a Council member with respect to the matter.

A member with a conflict cannot do or say anything that in any way potentially influences other council members and should not display any body language, comment or do anything that suggests the member's opinion. If it helps a member to avoid participation, the member can

---

<sup>1</sup> Of course, Council members should not look to minimally disclose a substantial interest since the law requires "fully" disclosing it. An obvious, direct interest might be fully disclosed in a sentence or two, whereas a complicated, indirect interest might require a more lengthy explanation. If the interest relates to an organization, as it commonly does, the disclosure should include the name of the organization and the member's or relative's connection to the organization (e.g., position) as part of setting out what the interest is.

choose to exclude him or herself from the room while the matter is being discussed and considered.<sup>2</sup>

Council members should remember that discussions at meetings sometimes jump from one topic to another and back again, so any member with a conflict should remain aware of the duty to not participate in a particular matter throughout the meeting.

## **2. Quorum and the Rule of Impossibility**

Council members with a conflict do not count toward a quorum. In order for a Council to maintain quorum requirements for a particular agenda item, there must be at least 6 Council members attending who do not have a conflict on that item.

The rule of impossibility comes into play when a Council cannot act because too many members have a conflict of interest under A.R.S. § 38-503. In that situation, the law allows members who have made known their conflicts to participate (e.g., discuss and vote) so that the Council can act. *See* A.R.S. § 38-508(B).

Importantly, the rule of impossibility can only be used by an 11-member Council when a majority of the full membership has made known a substantial interest as described above. This means that at least 6 members of a Council have made known (i.e., fully disclosed) their substantial interests (i.e., conflicts) in the official records. *See* Arizona Agency Handbook §§ 7.11.1 & 8.8 (2013). The rule of impossibility does not apply to attendance problems.

For example, imagine hypothetically that 9 of 11 Council members attend a meeting. At the meeting, 5 members present make known a substantial interest on a particular decision. Based on only these hypothetical facts, the rule of impossibility cannot be used and the Council will have to wait until another meeting when more members without a conflict can attend to discuss the matter. However, if in addition to the 5 members present who make known they have a substantial interest, 1 of the 2 absent members had previously filed<sup>3</sup> a written, signed disclosure on the same matter, then the rule of impossibility may be used because there are a total of 6 members (a majority of the entire membership) who have made known that they have a substantial interest. Similarly, the rule of impossibility can also be used when at least 6 members present at a meeting make known a substantial interest on the record even if only 9 members (instead of all 11) are in attendance. Again, the key is that a majority of the entire membership (6 or more Council members) has made known a substantial interest. If only 1 to 5 Council members have a conflict, then the rule of impossibility cannot be used even if that leaves the Council without a quorum.

---

<sup>2</sup> Leaving the room must be entirely voluntarily, as a Council does not have the right to prevent one of its members from attending and listening to an open meeting.

<sup>3</sup> For example, the previous disclosure could have been made earlier in the same day of the meeting, the day before, at the last meeting or some other time. If a Council member knows that he or she has a conflict on an agenda item for an upcoming meeting, the member can file the conflict of interest disclosure in advance of the meeting. In the right situation, an advance disclosure could make the difference in being able to invoke the rule of impossibility.

When deciding whether the rule of impossibility can be invoked, the Council should make sure that the declared conflicts are (i) current and (ii) potential legal conflicts under A.R.S. § 38-503. The fact that a member disclosed a substantial interest at some time in the past does not automatically mean that the member still has the same substantial interest today. Therefore, staff should confirm with the member that a formerly disclosed substantial interest still exists before a Council relies on that former disclosure to invoke the rule of impossibility. Also, some members might declare a “conflict” due to general sympathy, feeling or bias toward an organization or person without having a “substantial interest” (i.e., pecuniary or proprietary interest) in the matter. For instance, a member might say he or she has a conflict because the member’s friend is a grant applicant, even though that alone does not create a legal conflict. A member’s elective recusal for a reason other than a substantial interest described in A.R.S. § 38-503, which requires a pecuniary or proprietary interest, does not count toward invoking the rule of impossibility.

### **III. Council Member Guidance**

Regional Partnership Council members are appointed for their specific expertise. Council members may participate in discussions of a general nature that do not involve specifications or the award of a particular grant. For example, discussions related to needs and assets, strategies, and annual funding plans are likely allowed as long as they remain general in nature. Once discussions reach a point where they are specific rather than general, such as how much money to allocate to a specific area in which the Council member could be a grant applicant, specific discussions on the desired scope of work for a request for grant applications (RFGA), or an evaluation and award of a grant, Council members must declare any conflict and no longer participate.

Finally, when a Council member owns or works for an organization that already has a grant agreement with First Things First, the member should disclose the conflict and not participate in any Council discussions about the organization’s grant performance, including financial and program data reports.