



OLYMPUS
RISK INSIGHTS

PREVENTING PUBLIC OFFICIALS' ERRORS & OMISSIONS CLAIMS

Public Officials have many duties and responsibilities as stewards for their cities, counties, districts, and other public agencies. In the discharge of those duties there are circumstances to avoid, which could lead to a public official errors and omissions claim.

Public Officials claims are the least frequent type of claim that occurs with public agencies. Claims are based upon an allegation of a wrongful act, error, or omission on the part of a public official. When a claim arises it typically is very costly to defend and settle, with an average litigation time of 6.5 years, and an average defense cost of \$1.1 million.

Most public officials' claims arise the following areas:

- Undisclosed conflicts of interest by individual officials.
- Dispirit or discriminatory treatment in the process of:
 - Delivery of services.
 - Approval related to new development.
 - Charging of impact fees.
- Organization exceeding statutory authority.
- Individual officials committing the organization to a position, without the approval of the quorum of elected officials.
- Making decisions without a fully constituted board.
- Meeting ad-hoc outside of public meetings or discussing aspects of a decision through email, text, or phone calls.
- Violation of open meetings statutes

Conflicts of Interest

Conflicts of interest may be active, such as an official doing work that could benefit from a board/council/commission decision. Many years ago, a Mayor and City Council voted against a competing development that was planned for their community, to ensure that their planned development would benefit from the lack of competition. Other examples include elected officials failing to disclose that a relative may benefit from the sale of surplus property or other assets.

Conflicts of interest may also be more subtle. These circumstances can be difficult to convey, particularly when decisions may benefit those that we work with or that we associate.

The key to avoiding a public officials' errors & omissions claim is it to have a process set for disclosure of potential conflicts of interest. After disclosure is made, officials should recuse themselves from any discussions in question. Public officials may want to err on the side of caution, as the open meeting record may be perceived differently than their intent.

Disparate or Discriminatory Treatment

To assure fairness in the delivery of services, it is essential to have clearly defined policies and procedures. The policies and procedures define the methodology and application of services and assure that resource allocation is established by a priority that is clearly defined. A good example is the maintenance and repair of roads, where a clearly defined process for road repair is outlined and followed for the application of capital assets and routine maintenance. In the absence of a clearly defined procedure, road work or repair may appear to be arbitrary, which could lead to a challenge of disparate or discriminatory treatment.

A significant area of litigation is the setting of impact fees and the approval for new development. If a developer challenges that fees that are proposed or the conditions imposed for the development, these items need to be set with objective standards which are independent of the public officials. Even though the public may have voice through public meetings in the approval process, the criteria set for the development cannot be made based upon criticism or clamor. An example would be if a business that provides counseling for disadvantaged youth was required to meet a more rigorous business license or permit process than other businesses in the area.

Another area of caution is if public officials become involved in the operating details of the entity. The operating details are best handled by the professional managers that are hired to manage the day-to-day operations, who are intimately familiar with the policies and procedures of the organization.

Exceeding Statutory Authority

Public agencies are empowered to provide services within a territory, service area or boundary. They are also authorized to provide services according to their organizational charter and the budget that has been approved for those services. In the past, claims have arisen from agencies using those resources for an activity that is not in harmony with their statutory responsibilities.

These types of claims may be avoided by crafting clearly defined agreements for newly developed services, interlocal cooperation or in providing services that are complimentary to other public agencies.

Individual Official Committing the Entity to a Position Outside of the Normal Approval Process

Public officials often form strong working relationships that are essential to completing the mission of their organization. Claims could arise if individual officials make statements to the public such as, “I think I can get the rest of the board to support this.” This can cause detrimental reliance due to one individual board members assurance and may not reflect a board’s ultimate decision. Even though elected officials can discuss the merits of a proposition, they should be careful not to promise or commit the entire board to an action. The best response is “thanks for your input, I’m sure the board will consider this in their regular board meeting.”

Deciding Without a Fully Constituted Board

Most decisions are made in a full board meeting, after a thoughtful dialog and review process. At times, circumstances may lead to a meeting with an incomplete quorum. If an urgent decision must be made, it is essential to follow a process of scheduling and publicizing a new emergency meeting. Even if a decision made without a fully constituted board is later is ratified by a complete quorum, this decision may result in litigation. As these outcomes are often costly to remedy or defend, the best recourse is to schedule meetings with a full board, if possible.

Meeting Ad-Hoc Outside of Board Meeting

Board members may have social and business interaction outside of their official duties. If an emotionally charged or complex issue is pending for review, it may be easy to carry the item into open dialog outside of a board meeting, or in phone calls, emails, social media or other communication. The dialog and basis of official decisions must be part of the public record, for later review and discussion. If portions of the dialog are missing, it may be the basis for a potential error or omission claim.

Violation of Open Meetings Statutes

The purpose of open meetings statutes is to provide greater transparency in the formulation of decisions made by elected or appointed officials. The statutes require notification, open access, and a record of the discussion of the meeting, which may be reviewed by the impacted parties of a decision. There are a few exceptions to the open meeting laws, with the most common being the discussion of sensitive personnel issues and litigation. An action taken by a governing body could be challenged if the open meetings process is not followed and recorded appropriately.

Elected and appointed officials provide an invaluable service to their communities. Fortunately, challenges that result in public officials’ errors & omissions claims are rare as most follow the advice of legal counsel and avoid circumstances that could give rise to a claim. This allows public officials to perform their historic mission and provide significant service to their communities.