

To Inform or Not to Inform

The ethics behind keeping your governing body in the know

By Robert J. Wood and Alan Bojorquez | Mar 01, 2024 | PM MAGAZINE - ARTICLE



There is a balancing of interests, obligations, prohibitions, and exceptions involved in determining *what* local government managers must disclose to their governing board, to *whom* the disclosure should be made, and even *when* and *where* that disclosure should take place.

In the course of processing those choices, it may also help to achieve clarity on *why* the manager is divulging that information. When discussing ethics and responsibilities, we typically focus on and emphasize, rightly so, the duty and importance of informing the governing body. That is the default position, but there are legitimate and even necessary exceptions.

Because of the scope and complexity of managers' responsibilities and relationships, it is not always obvious whether the manager has a duty to share information. While it might seem easy to adopt a rule of "just tell council everything," there are sometimes countervailing obligations to be discreet and maintain the confidential nature of the data.

Rather than attempting to provide managers with concrete, all-encompassing answers — an impossible task given the range and variety of situations that managers face — this article offers a process or framework to help managers structure their analysis and formulate their own decisions. We hope that by utilizing a sound procedure, managers will arrive at ethical, defensible conclusions that enable them to disclose when required and maintain confidences when needed — while always maintaining their integrity.

The Story

The following story is based on real events. The names and places have been left out in order to protect the innocent — and even the not-so-innocent.

A Call from the District Attorney

District Attorney (DA): Your mayor is under investigation. You are not allowed to tell anyone about the investigation. If you do, we can charge you with interfering with an investigation.

Manager: Well, that is a problem because I am required to inform my city council of everything that happens in my city.

DA: I don't know what to tell you other than — you can't tell anyone. Do you know what the investigation is about?

Manager: No, but I have narrowed it down to about five possibilities. How many guesses do I get?

DA: Your police chief recorded two conversations with your mayor. You were present, but you are not under investigation. The investigation is for interference with a police investigation.

Manager: OK. I'm still going to need five guesses.

The manager knew which conversations the district attorney was referring to, but did not know that they had been recorded by the police chief. The manager's first thought — what did I say during those conversations?

Background

A councilmember backed out of her driveway into a public street and hit a car driven by a worker doing some sort of job on her street. Within an hour of the accident, the mayor was at city hall to discuss the incident with the police chief and manager, explaining how the councilmember was not at fault for the collision and directing the police chief to make that finding in the investigation. City staff learned much later that the mayor and the councilmember were having an affair. This came out because the councilmember got upset that the mayor was also having an affair with her best friend.

What was recorded? Two different conversations that involved the mayor, the police chief, and the manager — one was in the chief's office and one was in the mayor's office.

After the Manager's Call from the District Attorney

As soon as the manager hung up with the DA's office, he did what any manager should do — he called his city attorney. They discussed the ethical responsibilities that they both had — the city attorney to his "client" (more about that later) and the manager to the city council (governing body). The morning after the call from the DA, the manager visits the police chief in his office:

Manager: Did you maybe record some conversations that I was involved in?

Chief: You're good. I have reviewed them multiple times. You didn't say anything wrong. In fact, you told the mayor to drop it multiple times. You told him that it was illegal to interfere with an investigation and warned him that he was heading in a really bad direction. You come out looking great.

Then the manager had a conversation with the police chief about recording their conversations (that was likely recorded). The manager called the ICMA's ethics advisor to discuss the matter and also called the chair of his state association's ethics committee.

Disclosure

After the conversations with the city attorney, ICMA ethics advisor, and the ethics committee chair, the manager concluded that if a councilmember were under investigation, and he (the manager) was not able to tell the full council, he would tell the mayor — to fulfill his ethical duty and so that he could not later be accused of hiding something from the council. In this case, since he could not tell the mayor, he should inform the vice mayor. He fully informed the vice mayor of the facts of the investigation and the reasons that he could not share all of the information with the remaining members of the council. We will come back to that later.

Investigation

The mayor was investigated. It appeared that the DA's office concluded that there was enough evidence to pursue prosecution because the DA told the mayor that if he withdrew from the next election (which was a few months away and he had already signed up to run), they would drop the case. If he stayed in the race, they would prosecute. The mayor agreed to the deal, but missed the deadline to remove his name from the ballot by 15 minutes. Was that intentional? Of course, he wanted the city clerk to overlook that and remove his name. The clerk, the attorney, the manager, and even the state's election oversight agency all agreed that the city could not remove the mayor's name from the ballot since he had missed the deadline.

The mayor ended up campaigning for another candidate. A local television station even did a news story complete with video of him knocking on doors saying that you will see his name on the ballot, but you should vote for this other person instead.

Council Learns of Investigation

At a regular, properly-noticed meeting of the council, the manager informed councilmembers of the investigation (which was now mostly closed and the mayor was already aware) in closed session. The mayor lashed out at the manager and city attorney for not informing him of the investigation earlier on. The pro-mayor faction on the council (including the councilmember whose car accident started the police investigation and who was "involved" with the mayor) was also unhappy with the manager and attorney. The anti-mayor faction of the council was overjoyed to learn of the mayor's predicament, but mad that the manager and attorney did not tell them. They, of course, wanted to beat the mayor over the head with it to score political points.

In order to make it clear that he had fulfilled his ethical obligations, the manager shared with council that he had fully informed the vice mayor — grateful that he had taken that step early on. However, the vice mayor stated that she had no memory of such a conversation. Of course, there was no way for the manager to prove that he had that conversation, so the conflict just sort of faded away. There was no real resolution or hashing out of the issues. The mayor lost the election and left office shortly thereafter.

Let's look at the important elements of the ethical responsibilities of both the manager and city attorney in all situations where informing the governing body may be required. Are they the same? Are they in conflict?

Your Assessment/Self-Evaluation

The following are useful questions to ask when you find yourself in a complex situation involving competing demands — ethical, legal, professional, practical, political, etc.

What's the Situation?

Unique challenges arise when wrestling with whether you have a duty to inform the governing body of instances in which a mayor or councilmember:

- Is under investigation.
- Is an opposing party to the city in a court case (civil/criminal).
- Is the subject of an ethics complaint.
- Has interests adverse to the city.
- Is taking actions contrary to the city.
- Did something personal that has official implications.

Who's The Boss?

Who do you work for? Attaining a sense of clarity on your relationship to the other parties can help you assess the situation properly.

- Is the mayor or councilmember your direct supervisor with routine oversight or management responsibilities?
- Or, are they a member of a board, council, or commission to whom you report?

Often it is useful to temporarily set aside the practical realities of how you have been informally operating recently, and instead go back to the beginning of your time in the position to refresh yourself on the formalities of how the relationship was established. Determine if your reporting relationship or chain of command was set out in one of the following:

- Job posting.
- Job description.
- Employment agreement.
- County/city/town charter.
- Ordinance.
- Personnel policy.
- Organizational chart.
- State law.

Having traced back the roots of the relationship, it is time to reconcile how those instruments relate to the custom, tradition, or culture of your organization. On a daily basis, how have things been done in actuality?

Why Keep it Confidential?

If you decide to maintain the confidentiality of the information, you should have a sense of clarity about your reasons for being discreet. Considering the true story with which we opened this article, there was clearly a legitimate public interest in maintaining the integrity of the law enforcement investigation being conducted into the mayor's activities. Other potentially valid reasons for withholding information could include:

- Statutory designations of information as confidential.
- An ordinance or local policy creating confidentiality.
- Nondisclosure agreements.
- Preservation of privileges (e.g., attorney-client).
- Pending/anticipated/ ongoing litigation.
- Court orders (gag orders, subpoenas, etc.).
- Pending nature of contract negotiations with another party.
- Ongoing investigations by an oversight agency (e.g., EEOC, USDOJ, EPA, etc.).
- Fear that information will be leaked.

- Spoilation or destruction of evidence.
- Political sensitivity.
- Personal privacy/embarrassing or salacious matter (romantic/sexual nature).
- Other.

What Is the Purpose of Disclosure?

Early in your analysis, you should contemplate the reason(s) for divulging (or not divulging) the information. It might be clear that a mayor or councilmember needs the information in order to perform their required duties. Perhaps they need to be told so that they may avoid doing something that could make the situation worse. In the end, your impetus for sharing the information may simply be satisfying a sense of ethical duty to not keep the matter to yourself.

What Are the Ethical Considerations?

The ICMA Code of Ethics is one of the most important factors when deciding whether to disclose information and how to go about that sometimes delicate task. This approach is central to the commitment to honesty and integrity as outlined in Tenet 3 and the guideline on public confidence.

Tenet 3. *Demonstrate by word and action the highest standards of ethical conduct and integrity in all public, professional, and personal relationships in order that the member may merit the trust and respect of the elected and appointed officials, employees, and the public.*

Guideline: Public Confidence. *Members should conduct themselves so as to maintain public confidence in their position and profession, the integrity of their local government, and in their responsibility to uphold the public trust.*

Tenet 5's mandate to provide elected officials with facts can be interpreted to create an obligation to share data even when there are valid reasons to maintain confidentiality.

Tenet 5: *Submit policy proposals to elected officials; provide them with facts, and technical and professional advice about policy options; and collaborate with them in setting goals for the community and organization.*

The guideline for Tenet 10 calls upon ICMA members to openly share data with the council.

Tenet 10: *Resist any encroachment on professional responsibilities, believing the member should be free to carry out official policies without interference, and handle each problem without discrimination on the basis of principle and justice.*

Guideline: Information Sharing. *The member should openly share information with the governing body while diligently carrying out the member's responsibilities as set forth in the charter or enabling legislation.*

Though the mandate to disclose is strong, it cannot be absolute. No general code of conduct or ethical guidelines should be blindly applied in a vacuum. Thus, when burdened with sensitive data, managers are encouraged to evaluate the totality of circumstances when choosing a path forward.

Call a Friend?

One benefit of professional development through organizations such as ICMA is the expansive network of colleagues and formal assistance available to members to call upon in times of need. In the course of a manager striving to be a better ethical decision maker, it is often wise to reach out to someone with experience and a willingness to help:

- Trusted managers in other localities.
- Ethics committee chair of your state management association.
- Ethics experts or trainers.
- ICMA ethics director Jessica Cowles.

In addition to the resources made available through ICMA, state associations, and colleagues, a manager facing such dilemmas should consider calling upon other individuals who may be in a position to offer guidance, such as:

- A local government attorney.
- An independent counsel or investigator.
- Law enforcement.

Scope of Disclosure?

Once the manager has determined that they must disclose the information and has decided with whom they should share it, there may arise the question of how much to share. Need they tell all that they know, or might the situation be better served by saying as little as possible?

Uniformity?

Managers must avoid the appearance of “playing games” with information or playing favorites, as such can raise the question of whether you are applying your duty consistently.

- Are you required to inform the mayor/council on every item?
- Are there council committees or liaisons?
- How soon must you spread the word?
- Are there considerations related to state laws or other laws regarding meetings, public information, freedom of information statutes, etc.?

Once general rules are formulated, possible exceptions could include:

- Political/campaign issues that do not involve city business.
- Salacious stories of romantic or sexual entanglements.
- Civil/criminal/ethical matters of personal business where there is not a clear duty to inform an individual — and there may even be a prohibition.
- Litigation when a city fears a leak/unauthorized disclosure or interference.
- Personnel/HR matters that involve privacy concerns.
- A matter involving the manager or attorney?

By What Method?

When a manager is ready to provide the information, they must select from a range of options — weighing convenience, formality, custom, statutory requirements and limits, etc.

- Verbal conversation (individual discussion via telephone, videoconference, or in-person).
- Oral briefing during a meeting (public or closed).
- Memorandum.
- Email message.
- Text message.
- Social media.

While these choices are not listed in a hierarchical manner of preference, there are obviously some selections better suited for conveying weighty data — especially when taking into account the impact of public information or freedom of information requirements.

Conclusion

Local government managers are often in a position to discover or otherwise be entrusted with delicate information. Once in possession of sensitive data, managers must determine if they have a duty to share that material with their governing bodies. Often a simple email update, phone call, or briefing is sufficient. But on occasion, managers have a more difficult task of carefully evaluating the complexity of the situation and making strategic decisions that put them in precarious positions. Managers must perform a balancing act beyond simple self-preservation to consider their ethical obligations, legal duties, and responsibilities to the broader community.



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