



公職人員 之利益衝突迴避制度

System on Recusal of Public Servants Due to Conflicts of Interest

壹、前言

公職人員在執行職務時，涉及本身或一定親屬關係者之利益有關的事件，為避免因參與其事，致其相關作為或不作為，引發民眾質疑公正與否或不信任，而忌避不參與其事，謂之利益衝突迴避。

目前我國有關公職人員利益衝突迴避制度之規定散見於各種法律、法規命令及行政規則中，這些法規多是依據公務員之身分或職務特性所量身打造，彼此之間並無從屬關係，故適用之對象、範圍及違反之效果亦各有不同，常令人有無所適從之感，自「公職人員利益衝突迴避法」公佈後，有關公務員利益迴避之規定已有專法規定，除其他法律另有嚴格規定外，一律適用本法，成為公務人員利益衝突迴避之基準法。

貳、公職人員利益衝突迴避法簡介

一、立法目的

促進廉能政治，端正政治風氣，有效遏阻貪污腐化暨不當利益輸送，乃本法之立法目的，其性質上係屬陽光法案之一環。

二、適用對象

Part I Forward

When Public servants performed the duty, which involve those interests in itself or certain relatives benefit's at relevant events, they shall avoid to participate due to conflicts of interests that may trigger the question of justice or mistrust from civilian, this is called Recusal of Public Servants Due to Conflicts of Interest. At present the regulations of Recusal of Public Servants Due to Conflicts of Interest in our country system spread over in all sorts of laws and regulations. Most of these laws are tailor made for the public servants status or duty characteristics, and they do not have subordination relation among each other, therefore the applying objects, range and violation effects are also different, which confused themselves from time to time. After the promulgation of Act on Recusal of Public Servants Due to Conflicts of Interest, the stipulation on Recusal of Public Servants Due to Conflicts of Interest is executed except other more stringent regulation of other laws, it is becoming the benchmark act for public servants to bypass the conflicts of interests.

Part II Introduction of Act on Recusal of Public Servants Due to Conflicts of Interest

1. Purpose of legislation

It is enacted to promote uncorrupted and efficient politics and to well form politics ethics by establishing norms to be followed by public servants for recuse due to conflicts of interest, so that corruption and conveyance of unjust interests can be efficiently eliminated. The nature of the act is a part of Sunshine Act.

2. Application target



適用對象之範圍如過廣，不僅無助於推動廉能政治，反有礙於行政效能，為求本法之合理可行，任現職且擔任重要決策或易滋弊端業務之人員，始有納入本法加以規範之必要，故本法乃參照公職人員財產申報法第2條第1項之規定，將本法所稱公職人員之範圍，限定為公職人員財產申報法第2條第1項所定之人員，並非所有之公職人員均有本法之適用。

三、關係人之意義

本法所定公職人員之關係人，其範圍如下：一、公職人員之配偶或共同生活之家屬。二、公職人員之二親等以內親屬。三、公職人員或其配偶信託財產之受託人。四、公職人員、第1款及第2款所列人員擔任負責人、董事、監察人或經理人之營利事業。

四、利益之概念

本法所稱利益，包括財產上利益及非財產上利益。財產上利益如下：一、動產、不動產。二、現金、存款、外幣、有價證券。三、債權或其他財產上權利。四、其他具有經濟價值或得以金錢交易取得之利益；非財產上利益，指有利公職人員或其關係人於政府機關、公立學校、公營事業機構之任用、陞遷、調動及其他人事措施。

五、利益衝突之意義

本法所稱利益衝突，指公職人員執行職務時，得因其作為或不作為，直接或間接使本人或其關係人獲取利益者。所謂「獲取利益」，係指獲取私人利益，不包括獲取公益之情形。且此所謂「利益」不以「不法利益」為限，縱係「合法利益」亦在本法規範之列，但如所涉之利益係屬「不法利益」，則每涉及貪瀆罪責。

六、請託關說之禁止

In case the term referred in this act is too wide, it will not help to promote uncorrupted politics, but also disturb the efficiency of administration. In order to look for feasible way for execute this act, the term "Public Servant" referred to in this Act means the persons only specified in Paragraph 1 of Article 2 of the Act on Property-Declaration by Public Servants, it does not apply to everyone.

3.The definition of "related persons of a public servant"

The term "related persons of a public servant" referred to in the Act is hereby defined as follows:

- (1) The spouse of a public servant or the family members living together with the public servant.
- (2) Relatives of the public servant by the second degree of kinship.
- (3) Trustees of the trust property consigned by the public servant or his spouse.
- (4) Any for-profit enterprise in which the public servant and the persons specified in above subparagraph 1 and 2 hold posts of as follows: C.E.O., director, supervisor or manager.

4. The concept of interests

The term "interests" referred to in this Act includes property interests and non-property interests.

Property interests include:

- (1) Movable property and immovable property.
- (2) Cash, deposits, foreign currencies, and securities.
- (3) Obligatory right or other property right.
- (4) Other interests with economic value or that can be acquired through money exchange.

Non-property interests means the appointment, promotion, transfer and other personnel measures in favor of a public servant or his related persons in the government organs, public schools or national enterprises (hereinafter referred to as the "organ").

5 The definition of "conflicts of interest"

The term "conflicts of interest" referred to in this Act means the public servant obtains interests by himself or his related persons either directly or indirectly through any act or omission in the course of performing his official duties. The term "obtains interest" means obtains private interest; it does not include public interest. The so called "interest" is limited to "illegal interest", but even legal interest is covered in this act. In case of illegal interest, it will be corruption.



公職人員之關係人不得向機關有關人員關說、請託或以其他不當方法，圖其本人或公職人員之利益。其中所稱關說、請託，指其內容涉及機關業務具體事項之決定或執行，且因該事項之決定或執行致有不當影響特定權利義務之虞者。

七、迴避之種類

本法所定之迴避計有以下三種：一、自行迴避：即公職人員知有利益衝突者，應即自行迴避。二、命令迴避：即公職人員之服務機關或上級主管機關知有應自行迴避而未迴避情事者，應命該公職人員迴避。三、申請迴避：即公職人員有應自行迴避之情事而不迴避者，利害關係人得申請其迴避。

八、知有迴避義務者之處理

公職人員知有迴避義務者，應依下列規定辦理：一、民意代表，不得參與個人利益相關議案之審議及表決。二、其他公職人員應停止執行該項職務，並由職務代理人執行之。前述情形，公職人員應以書面分別向公職人員財產申報法第4條所定機關報備。但公職人員雖有迴避義務，惟如由其執行並不影響該業務之運作，且無損及公益之虞，而認該公職人員無須迴避者，其服務機關或上級機關得命其繼續執行職務，以避免公務之延宕。

九、知有迴避義務者違反之效果

公職人員知有迴避義務者，而於自行迴避前所為之行為，其法律效力如下：一、民意代表以外之公職人員於自行迴避前，對該項事務所為之同意、否決、決定、建議、提案、調查等行為均屬無效，應由其職務代理人重新為之。二、如公職人員係民意代表，其於自行迴避前所為之行為效力，本法並未加以規定，此係屬立

6 Prohibit to lobby

Related persons of a public servant shall not seek interests for himself or for the aforementioned public servant by requesting relevant persons in the organ, speaking for the same, or by other improper means. "Requesting or speaking" referred to in Article 8 of the Act denotes those the contents of which involve decision-making or implementation of concrete business of the organ, and where there are possibilities of adversely affecting specific rights and obligations by such decision or implementation of business.

7. Type of recusal

There are 3 kinds of recuse:

- (1) Recuse by themselves: public servant shall recuse himself as soon as he is aware of the conflicts of interest.
- (2) Recuse by order: Where the organ with which the public servant serves or the superior organ is aware that the public servant obliged to recuse fails to recuse, it shall order him to recuse.
- (3) Application for recuse: In case there is events should be recuse by themselves but not yet recuse, the interest related person may apply to let them recuse.

8 The treatment of aware of the obligation of recusal

Where a public servant is aware of the obligation of recusal, he is obligated to act in accordance with following provisions:

- (1) In case as a legislator / councilor, the public servant is prohibited to participate in the deliberation and voting on the proposal involving his personal interests.
- (2) In case other than the preceding subparagraph, the public servant shall cease to perform his official duty, and that duty shall be exercised by the duty agent.

Under the circumstance stated in the above paragraph, the public servant shall notify in writing to the organs prescribed by Article 4 of the Act on Property-Declaration by Public Servants for record.

Under the circumstance stated in the first paragraph, if the organ with which the public servant serves or the superior organ deems it not requisite for the public servant to recuse, it may instruct the public servant to keep on performing his official duties.

9 Violation of recusal obligation

The liability for those behavior before the public servants recuse themselves while knowing there is recuse obligation is as followings:

- (1) Actions such as consent, denial, decision, and suggestion, proposal



法有意之疏漏。蓋因民意代表(例如立法委員)所為法律案、預算案之審議，攸關國計民生至鉅，如因其有利益衝突情事未自行迴避而致行為無效，影響原已通過之法律案、預算案，恐非人民之福，故本法第11條有關行為效力之規定，於訂定之初，不得不將其排除，解釋上應依個別情形分別判斷之。

十、違反迴避規定之制裁

(一) 第14條規定，違反第7條規定之「公職人員不得假借職務上之權力、機會或方法，圖其本人或關係人之利益。」或第8條規定之「公職人員之關係人不得向機關有關人員關說、請託或以其他不當方法，圖其本人或公職人員之利益。」等規定者，處新台幣100萬元以上500萬元以下罰鍰；所得財產上利益，應予追繳。

(二) 第15條規定，違反第9條規定之「公職人員或其關係人，不得與公職人員服務之機關或受其監督之機關為買賣、租賃、承攬等交易行為。」者，處該交易行為金額1倍至3倍之罰鍰。

(三) 第16條規定，違反第10條第1項規定之「公職人員知有迴避義務者，民意代表不得參與個人利益相關議案之審議及表決。其他公職人員應停止執行該項職務，並由職務代理人執行之。」者，處新台幣100萬元以上500萬元以下罰鍰。

(四) 第17條規定，違反第10條第4項規定之「服務機關或上級機關知有應自行迴避而未迴避情事者，應命該公職人員迴避。」或第21條規定之「公職

or investigation made by a public servant other than legislator/councilor in respect of the issue involved before recusal shall be null and void and all the preceding actions shall be renewed by his duty agent.

(2) In case as a legislator/councilor, the liability for those behavior before they recuse themselves while knowing there is recuse obligation is not stipulated in this act, it seems the deliberate mistake during legislation. Since the act legislated by legislator/councilor, and the review of the budget have great impact of the country, in case the issue involved became null and void due to not self recusal, it will affect those laws, budgets been passed and it will be mishap of the people, therefore it was eliminated inevitably. The explanation can be done only case by case.

10 Penalty of the violation of recuse regulation

(1) According to the regulation of Article 14, for those in violation of the provisions of Article 7 "The public servant obtains interests by himself or his related persons either directly or indirectly through any act or omission in the course of performing his official duties" or Article 8, "Related persons of a public servant shall not seek interests for himself or for the aforementioned public servant by requesting relevant persons in the organ, speaking for the same, or by other improper means", a penalty of between NTD 1 million to 5 million shall be imposed while any property interests gained there from shall be pursued and confiscated.

(2) According to the regulation of Article 15, to those in violation of the provisions of Article 9, "A public servant and his related persons shall not conduct transactions such as sales, lease and contracting etc. with the organ with which the public servant serves or the organs under his supervision", a penalty of 1 to 3 times of the amount of the transaction involved shall be imposed.

(3) According to the regulation of Article 16 to those in violation of the provision of Paragraph 1 of Article 10 "In case as a legislator/councilor, the public servant is prohibited to participate in the deliberation and voting on the proposal involving his personal interests", a penalty of between NTD 1 million to 5 million shall be imposed.

(4) According to the regulation of Article 17 to any public servant who violates of the provisions of Paragraph 4 of Article 10 "Where the organ with which the public servant serves or the superior organ is aware that the public servant obliged to recuse fails to recuse, it shall order him to recuse" or Article 21 "Upon confirmation through investigation that the above application to be in consistent with facts, the public servant subject to the application shall be ordered



人員有應自行迴避之情事而不迴避者，利害關係人得申請其迴避」，而其拒絕迴避者，處新台幣150萬元以上750萬元以下罰鍰。

(五) 第18條規定，依前二條處罰後再違反者，連續處罰之。

十一、違反本法規定而涉及其他法律責任者之處理

公職人員或其關係人違反本法規定者，除可依本法規定科處罰鍰外，如涉及其他法律責任（例如刑事責任、民事責任或行政責任）者，仍應依有關法律處理之。

參、違反公職人員利益衝突迴避法案例

◆ 案例一

陳君前於擔任基隆市成功國民小學校長時，係公職人員利益衝突迴避法（以下簡稱本法）第2條所定之公職人員，竟於90年1月間僱用其配偶與前妻所生之子之配偶尹君為學校工友。尹君依本法第3條第2款之規定，係陳君之關係人，如將其僱用為該校工友，將使尹君獲取本法第4條第3項之非財產上利益，此與陳君所執行之職務有利益衝突，應依本法第6條之規定自行迴避。本法所稱「非財產上利益」指有利公職人員或其關係人於政府機關、公立學校、公營事業機構之任用、陞遷、調動、及其他人事措施，本法第4條第1項、第3項分別有明文規定，是各機關非依公務人員任用法任用之其他各類人員（如聘用、僱用技工、工友、臨時人員）亦均屬此範疇。

陳君明知尹君其係一親等姻親關係，為其關係人，且本法業於89年7月12日施行，陳君自不能辯稱因不知法律而免除其責任。況公務人員任用法第26條規定：「各機關長官對於配偶及三親等以內血親、姻親，不得在本機關任用，或任用為直接隸屬機關之長官。對於本

to recuse and that order shall not be refused by the public servant", for refusing to recuse, a penalty of NTD 1.5 million to 7.5 million shall be imposed.

(5) According to the regulation of Article 18, to the violators act in violation again after penalty has been imposed pursuant to the above two articles, consecutive penalties shall be imposed

11. Violation of this act and involve with other liability

Where penalties imposed, involved as a result of violation this Act (such as Criminal responsibility, civil liability or administrative responsibility) the case shall also be dealt with under the application of relevant acts.

Part III Examples of violation of Act on Recusal of Public Servants Due to Conflicts of Interest

◆ Example 1

Ms. Chen was assuming the principle of Chengkung Primary school in Keelung city and classified as the public servant stipulated in article 2 of Act on Recusal of Public Servants Due to Conflicts of Interest (hereinafter refer to as this act), and hired the son's spouse of her spouse's ex-wife as school fellow worker Ms. Yin. Ms. Yin was obviously the related persons of Ms.Chen by the Paragraph 3 of Article 2, in case the hiring of Ms. Yin as fellow worker of the school will allow Ms. Yin to obtain other property right listed in the Paragraph 3 of Article 4 which should be conflicted with the duty of Ms. Chen and should recuse by herself to comply with the regulation of article 6. The term of "other property right" in this act means the interest obtained by means of hiring, promotion, transfer, and other personnel measures which stipulated in the Paragraph 1, 3 of Article 4, even if the hiring of other non public servants are also belongs to this scope(such as recruit, hiring technician, fellow worker, temporary staff) .

Ms. Chen is aware of Ms. Yin is her relative, and belongs to related persons, besides this act had been implemented since July 12, 2000, Ms. Chen can not claim not knowing the Act to immune her responsibility. At the mean time, the article 26 of Civil Service Employment Act "The commanding officer of each organization shall not hire their spouse and relatives within 3rd degrees in the same organization, nor appoint as supervisor of the subsidiary under his direct command. The unit chief shall recuse to hire the relatives of their supervisors of the organization..." The Ministry of Civil service explained by letter "The employment of each organization must comply with article 26 of Civil Service Employment Act related to the recuse employment regulations", and the Central Personnel Administration of Executive Yuan also explained by letter "The employment of contract staff must



機關各級主管長官之配偶及三親等以內血親、姻親，在其主管單位中應迴避任用。．．」，銓敘部函釋略以「各機關聘用人員仍應適用公務人員任用法第26條有關迴避任用之規定。」，及行政院人事行政局函釋略以「約僱人員應比照聘用人員之規範，仍應適用公務人員任用法第26條有關迴避任用之規定。」，是陳君身為校長，對於學校工友之僱用有核批之權，當知上開規定，本應自行迴避，不得僱用關係人尹君，卻未迴避，仍批示予以僱用，並報請基隆市政府核備，致違反本法之迴避規定。案經法務部於92年5月間，依本法第16條之規定處以罰鍰新臺幣100萬元，對其而言，堪稱不論精神上、財產上均深受重擊，殊值吾人警惕。

◆ 案例二

甲係某行政機關之首長，其兄乙係一家民間成衣工廠的老闆，某天乙得知甲所服務的機關即將辦理一批員工運動服採購案，乙想藉此機會參加採購案之投標，連忙向甲打探該項員工運動服採購案的細節，包括運動服質料、款式、顏色，甚至該項採購案之整體金額等；甲認該項運動服採購案的預算金額超過100萬元，依政府採購法規定須辦理「公開招標」，該運動服採購案之規格條件，以及整體預算金額等資料遲早會對外公告，以吸引符合條件之多家廠商參與投標，所以提前告訴乙應該無妨。乙知悉後並進一步詢問甲有關採購案的「底價」金額，甲雖有參與運動服採購案之底價訂定過程且清楚最後核定之底價金額，但若將金額告訴乙則算「洩漏底價」，乙的工廠很可能因此得標，但係違反政府採購法之規定，因此甲並未將底價金額告訴乙。到了運動服採購案開標的日子，最後結果由乙經營的成衣工廠得標，此時甲心想自己謹守分際而乙也得標是不錯的結局，殊不知甲嗣後卻遭人檢舉，檢舉人係參加運動服採購案

refer to the regulation of employment act and to comply with the article 26 of Civil Service Employment Act." As a principle of school, Ms. Chen had the authority to employ fellow worker, and should be aware of preceding regulations to recuse and not to hire related person Ms. Yin, she did not recuse and even approved to hire Ms. Yin instead and presented to Keelung city government for final approval that lead to the violation of this act. She had been punished by Ministry of Justice in May 2003 with NT\$ 1 Million by article 16 of this act. She suffered serious impact both in psychology and in property which shall be used as a warning to others.

◆ Example 2

Mr. A is a chief officer in one of the administration organization, his brother Mr. B is the owner of one private garment factory. Mr. B found out one day that Mr. A's organization is going to process a lot of sport wears purchasing case for its staff. Mr. B would like to join the bid and queried the sport wears purchase case detail including sport wears material, style, color and even the overall budget etc., from Mr. A; Mr. A claimed that the budget of this sport wear purchase is over 1 Million and shall use "Open bid" to conformed to Governmental purchasing regulations, therefore the specifications and conditions, and overall budget shall be promulgated sooner or later for attracting more bidder to join the bid. He thought it should be no harm to tell Mr. B in advance. Mr. B asked Mr. A further the "bottom price" of the case; however, Mr. A did not disclose the bottom price to Mr. B even though he participated the determination process and is aware of sport wear bottom price. He is aware that it will violate the Governmental purchasing regulations if he told Mr. B the bottom price to lead the possible award of the bid. But the factory running by Mr. B awarded the bid finally and Mr. A believed that he did follow the regulation and welcome the award of Mr. B anyway. Mr. A was accused later on by reporter of another unhappy manufacturer C that lost the bid once he heard that A & B are brother relationship. C claimed that A shall recuse to avoid unfair matter, hence he filed accusation to the organization Mr. A is served. Based on the regulation of "Act on Recusal of Public Servants Due to Conflicts of Interest", Mr. A of this example is a chief of administration organization that belongs to article 2 of this act "public servants", and his brother B is belongs to paragraph 2 of article 3 "relatives of the public servant by the second degree of kinship" as relative, hence by article 9 of this act, "A public servant and his related persons shall not conduct transactions such as sales, lease and contracting etc. with the organ with which the public servant serves or the organs under his supervision." Related person B of this example (second degree relationship) is contracting the sport wear purchase case with the organization serviced by Mr. A which violated apparently the article 9 of this act, the organization



卻未得標之另一家廠商丙，丙因未得標心生不快，加上聽聞甲與乙是親兄弟關係，心想甲應該迴避以避免不公平情事，因此向甲服務之機關提出檢舉。

依「公職人員利益衝突迴避法」規定，本案例中甲為行政機關首長，屬於本法第2條「公職人員」之範圍，而其哥哥乙則屬於本法第3條第2款「公職人員之二親等以內親屬關係」之「關係人」範圍內，所以依照本法第9條：「公職人員或其關係人，『不得』與公職人員服務之機關或受其監督之機關為買賣、租賃、承攬等交易行為」；而案例中關係人乙（二親等兄弟關係）卻與公職人員甲服務之機關為運動服製作之採購案承攬行為，明顯違反本法第9條之規定，甲所服務之機關可依本法第15條規定，對乙所經營之成衣工廠，處以交易金額（運動服採購案之得標金額）1至3倍之罰鍰。本案例經另一廠商丙檢舉違反「公職人員利益衝突迴避法」後，經甲服務之行政機關成立小組查證並研商後，認為甲乙兩兄弟雖未認知「公職人員利益衝突迴避法」規定，但客觀上兩人之親屬關係以及得標承攬行為等事實相當明確，決定以違反「公職人員利益衝突迴避法」之「違法投標行為」作原因，撤銷乙成衣工廠得標之資格，重新辦理該機關運動服採購案之公開招標（依據政府採購法），並且將乙承攬甲服務機關採購案之行為，以違反「公職人員利益衝突迴避法」第9條規定，依同法第15條對乙成衣工廠處以交易金額（本運動服採購案之得標金額為新台幣112萬元）1倍之罰鍰。所以本案例結果乙非但沒有賺得利潤，反而賠上112萬元之罰鍰損失，足引為借鏡。

是故，期以此二案為例，督促各同仁重視自身權利義務，對於相關法律多所了解，俾免違法仍不自知，致受重罰，實屬憾事！

參考資料：公職人員利益衝突迴避法

served by Mr. A can punish Mr. B's factory by article 15 of this act at 1 to 3 times of trade value (the award value of sport wear purchase case). The organization serviced by Mr. A established a team to investigate and study the case after receiving the accusation from C company which violating "Act on Recusal of Public Servants Due to Conflicts of Interest", they found out that both A & B were not aware of the regulation of "Act on Recusal of Public Servants Due to Conflicts of Interest", but they are no doubt relatives and the award was obviously true, therefore they decided to terminate the award qualification of B's company based on the excuse of violation of "illegal bidding behavior" of "Act on Recusal of Public Servants Due to Conflicts of Interest", and process again open bid of sport wear for that organization (follow the government purchase law), at the same time they punished B's company double value penalty (the award value of the sport wear bid was NT\$1.12 Million) by the excuse of violation article 9, 15 of Act on Recusal of Public Servants Due to Conflicts of Interest. Therefore the result of this case is B did not obtain any profit, but lost NT\$1.12 Million penalty instead. This is a good example for us.

We hope that our colleagues shall pay more attention to their own rights and obligation to understand related laws further via these two cases for preventing from being not aware of violation of regulations that leads to severe regretful punishment.

Reference: Act on Recusal of Public Servants Due to Conflicts of Interest

