

Legacy money) can apply to their specific situations. The kind of framework we suggest would help organizations conduct the type of specific analysis and documentation required to comply with the “directly related to and necessary for” requirement state law has placed on using Legacy money.

Finally, we suggest the department follow the process used by the Department of Administration, Office of Grants Management, in developing the state’s grants management policies and best practices. We think that approach produced documents that have been particularly helpful to state agencies and nonprofit agencies that compete for and administer state grants.

CONFLICTS OF INTEREST

Conflicts of interest are a persistent concern in the public sector. In general terms, a conflict of interest in the public sector exists when a person has a personal relationship, organizational affiliation, or other interest—for example, a financial interest—that inappropriately influences the person’s performance of a public responsibility. The most common concern is that a person will use a public position to inappropriately obtain a personal financial benefit.

In contrast, we found that:

- **There are concerns that some people involved in recommending how Legacy money should be used have conflicts of interest because of their affiliations with organizations that receive Legacy money.**

There are varying opinions about what constitutes a conflict of interest.

The issue raised relative to the Legacy Amendment illustrates that there can be significant differences of opinion about what constitutes a conflict of interest. These differences, in part, reflect the fact that most people have a general concept of what they believe constitutes a conflict of interest. However, determining whether a conflict actually exists for a specific person in a specific situation often requires a detailed assessment of the conflict of interest laws and policies that are applicable to that person, as well as a detailed assessment of the relationship, affiliation, or interest that allegedly has created the conflict. The fact that Minnesota’s conflict of interest laws and policies themselves vary to some degree also contributes to differences of opinion—and confusion—about whether a conflict exists for a specific person in a specific situation.

For the discussion that follows, we define three types of conflicts of interest as follows:

- **A potential conflict of interest** occurs when a person in a public position has a relationship, affiliation, or other interest that, according to applicable laws and/or policies, would create an inappropriate influence *if the person is called on to make a decision or recommendation* that would affect one or more of those relationships, affiliations, or interests. Conflict of interest laws and policies typically provide a process—such as recusal from a decision or recommendation—to ensure that a potential conflict does not become an actual conflict.

- **An actual conflict of interest** occurs when a person in a public position *makes a decision or recommendation* even though they have a relationship, affiliation, or other interest that, according to the applicable law and/or official policy, constitutes an inappropriate influence on the person making the decision or recommendation.
- **The appearance of a conflict of interest** typically includes what the applicable law and/or policy defines as a conflict or potential conflict of interest, but it may also include other relationships, affiliations, or interests that, although not specified in an applicable law or policy, a “reasonable person” believes would inappropriately influence a person making a decision or recommendation.

It is important to keep in mind that when a person in a public position declares that he or she has a potential conflict of interest it does not mean the person has done something wrong. In fact, some potential conflicts are not created by the person in a public position but by others, such as a family member accepting employment or a position on a board of directors. Moreover, when a person in a public position declares a potential conflict of interest and acts appropriately to resolve it, the person is upholding important principles of good government.

It is also important to keep in mind that, as mentioned above, Minnesota’s conflict of interest laws and policies differ to some degree in what they define as a conflict or potential conflict. They also differ in terms of their expectation about avoiding even “the appearance of a conflict.”²⁴ In addition, they vary as to the consequence they provide for noncompliance. For example, the conflict of interest law that applies to employees in the executive branch of state government provides for disciplinary action for noncompliance, but other state laws and policies are silent on the consequences for noncompliance.²⁵ However, to a large extent, all conflict of interest laws and policies are effective only to the degree that people subject to them reveal the relationships, affiliations, and interests that could create a conflict.

Minnesota’s conflict of interest laws and policies also differ some in defining what constitutes a conflict.

Legacy Amendment Concerns

As noted previously, conflict of interest concerns have been raised about the way the Legacy Amendment is being implemented. For example, an editorial in the *StarTribune* on January 16, 2010, criticized the role and composition of an advisory group formed to create a vision, plan, and goals for the Arts and Cultural Heritage Fund. The editorial said: “...the presence of a high-powered lobbyist sitting on [the group] has understandably led to conflict-of-interest concerns and speculation that panel members set up the rules to steer money to

²⁴ For example, the state’s *Conflict of Interest Policy for State Grant-Making* says: “Minnesota state agencies must work to deliberately avoid both actual and perceived conflicts of interest related to grant-making at both the individual and organizational levels.” See Department of Administration, Office of Grants Management, *Policy 08-01*.

²⁵ Of course, even without a conflicts of interest law or policy stating a consequence, it is possible that the most serious conflict of interest violation—using a public position to obtain unauthorized personal gain—could constitute a crime and be subject to criminal prosecution.

In this evaluation, we examine the conflict of interest issue generally and did not investigate allegations concerning individuals.

their organizations.”²⁶ In addition, articles in the *StarTribune* on February 27, 2011, and September 24, 2011, raised concerns about organizational affiliations some members of the Lessard-Sams Outdoor Heritage Council have with organizations that periodically ask the council to endorse their requests for money from the Outdoor Heritage Fund.²⁷

It is within the OLA’s authority and responsibility to investigate alleged conflicts of interest. However, consistent with the scope and purpose of this evaluation, we examined the conflict of interest issue broadly and did not assess concerns about individuals. We examined the state’s conflict of interest laws, policies, and procedures and how they are being applied within the organizations involved in implementing the Legacy Amendment.

Conflict of Interest Laws, Policies, and Procedures

Overall, we found that:

- **Minnesota has several conflict of interest laws and policies relevant to Legacy-related concerns, and most of the organizations covered by these laws and policies have taken steps to obtain compliance from the people affected.**

Some of the laws and policies apply to public employees and officials generally and some apply specifically to people serving on a board, council, or other organization involved with the Legacy funds. We summarize both types below.

Generally Applicable Laws, Policies, and Procedures

Minnesota Statutes 2011, 10A.07, applies to public officials generally, and specifically to legislators and citizen members of the Lessard-Sams Outdoor Heritage Council, Clean Water Council, Minnesota State Arts Board, and Board of Water and Soil Resources.²⁸

²⁶ Editorial, “Artful dodging on Legacy funding,” *StarTribune*, January 16, 2010.

²⁷ Mike Kaszuba, “Conflict of interest questions arise on Legacy panel,” *StarTribune*, February 27, 2011; Mike Kaszuba, “State panel member has ties to group getting funds,” *StarTribune*, September 24, 2011.

²⁸ The law provides that legislators make conflict of interest disclosures “to the presiding officer of the body of service” and provides that resolution of a conflict will be decided within the body of service. Legislators are also subject to the ethical standards established by the body in which they serve. Beyond noting that *Minnesota Statutes 2011, 10A.07*, applies to legislators, we did not address conflict of interest concerns related to legislators during this evaluation. Citizen members of the Clean Water Council were made subject to the law by a provision enacted in 2011. See *Laws of Minnesota 2011, First Special Session, chapter 6, art. 2, sec. 12*. Members of the Minnesota State Arts Board and Board of Water and Soil Resources are subject to the law because it applies to “a state board or commission that has either the power to adopt, amend, or repeal [administrative] rules.” See *Minnesota Statutes 2011, 10A.01, subd. 35(6)*.

According to the law, a conflict of interest exists when:

...a public official...who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business, unless the effect on the official is no greater than on other members of the official's business classification, profession, or occupation....

The law requires the public official to acknowledge the conflict and resolve it by not voting on the matter in question if possible.

Minnesota Statutes 2011, 43A.38, is the state's *Code of Conduct for Employees in the Executive Branch*. In addition to defining various actions as allowed or not allowed, the law outlines what constitutes a conflict of interest for an employee in the executive branch and what is required to resolve the conflict. The law's most relevant provision identifies the following as a conflict for an employee in the executive branch of state government:

Use or attempted use of the employee's official position to secure benefits, privileges, exemptions or advantages for the employee or the employee's immediate family or an organization with which the employee is associated which are different from those available to the general public.

Minnesota Statutes 2011, 16B.98, mandated the commissioner of the Department of Administration to develop a policy "to prevent conflicts of interest for employees, committee members, or others involved in the recommendation, awarding, and administration of grants." The resulting policy, produced by the Department of Administration, Office of Grants Management, contains the following statement:

Minnesota state agencies must work to deliberately avoid both actual and perceived conflicts of interest related to grant-making at both the individual and organizational levels. When a conflict of interest concerning state grant-making exists, transparency shall be the guiding principle in addressing it. Every state employee and grant reviewer shall be responsible for identifying where an actual or perceived conflict of interest exists and for informing appropriate parties. State agencies and employees must take affirmative actions to avoid, minimize or otherwise mitigate the impacts of actual or perceived conflicts of interest.²⁹

The policy establishes definitions for individual and organizational conflicts of interest and procedures for avoiding both.

Some state laws and policies encourage people to avoid even the "appearance" of a conflict of interest.

²⁹ Minnesota Department of Administration, Office of Grants Management, *Policy 08-01*.

Laws and Policies Applicable to Specific Legacy Organizations

To examine how conflicts of interest specifically related to Legacy funds are handled, we reviewed the conflict of interest policies for four organizations that allocate Legacy funds: the Lessard-Sams Outdoor Heritage Council, Minnesota State Arts Board, Clean Water Council, and the Department of Natural Resources Parks and Trails Division. Table 3.2 outlines the conflict of interest laws and policies that apply to these four organizations, which are further discussed below.

Table 3.2: Conflict of Interest Provisions for Select Organizations

Organization	Conflict of Interest Provisions that Apply
Lessard-Sams Outdoor Heritage Council	<i>Minnesota Statutes</i> , 10A.01, subd. 35, and 10A.07 <i>Minnesota Statutes</i> , 16B.98 <i>Minnesota Statutes</i> , 97A.056 Council Policies Council Practices
Clean Water Council	<i>Minnesota Statutes</i> , 10A.01, subd. 35, and 10A.07 <i>Minnesota Statutes</i> , 114D.30
Department of Natural Resources	<i>Minnesota Statutes</i> , 10A.01, subd. 35, and 10A.07 <i>Minnesota Statutes</i> , 16B.98 <i>Minnesota Statutes</i> , 43A.38 Office of Grants Management <i>Policy 08-01</i> Agency Practices
Minnesota State Arts Board	<i>Minnesota Statutes</i> , 10A.01, subd. 35, and 10A.07 <i>Minnesota Statutes</i> , 16B.98 <i>Minnesota Statutes</i> , 43A.38 <i>Minnesota Statutes</i> , 129D Office of Grants Management <i>Policy 08-01</i> Board Policies Board Practices

SOURCE: Office of the Legislative Auditor.

Lessard-Sams Outdoor Heritage Council. The law that created the council states the following:

Conflict of interest. (a) A council member may not be an advocate for or against a council action or vote on any action that may be a conflict of interest. A conflict of interest must be disclosed as soon as it is discovered. The council shall follow the policies and requirements related to conflicts of interest developed by the Office of Grants Management under section 16B.98. (b) For the purposes of this section, a conflict of interest exists when a person has an organizational conflict of interest or direct financial interests and those interests present the appearance that it will be difficult for the person to impartially fulfill the person's duty. An organizational conflict of interest exists when a person has an affiliation with an organization that

is subject to council activities, which presents the appearance of a conflict between organizational interests and council member duties. An organizational conflict of interest does not exist if the person's only affiliation with an organization is being a member of the organization.³⁰

There are several conflict of interest laws and policies that apply to the Outdoor Heritage Council and Arts Board.

To facilitate compliance with these requirements, the Lessard-Sams Outdoor Heritage Council developed a conflict of interest notification form that all members must complete prior to evaluating projects seeking support from the Outdoor Heritage Fund. The completed forms are posted on the council's Web site. Additionally, there is dedicated time at every council meeting for members to disclose any potential or actual conflict of interest. According to legislative staff, members who have an actual or perceived conflict of interest with a given applicant have typically recused themselves when the council has discussed the related organization.

Minnesota State Arts Board. As noted above, members of the Arts Board are subject to one of the state's general conflict of interest laws (*Minnesota Statutes* 2011, 10A.07). But, according to its executive director, the board uses other provisions of law, as well as board policies and practices, to address conflict of interest concerns.

For example, *Minnesota Statutes* 2011, 129D.02, subdivision 1, provides the following:

No member [of the board] shall within two years prior to appointment have received or applied for, in the member's name, a grant, loan or other form of assistance from the board or its predecessor, the State Arts Council. No more than four of the members shall during their terms of office be officers, directors or employees of recipient sponsoring organizations.

The provision addresses potential conflicts of interest for board members with both a retrospective and a prospective requirement. That is, board members' associations—both currently and two years prior—are considered when determining whether a conflict of interest exists.

According to board practice, members who have a conflict of interest must declare the conflict and abstain from the relevant vote, and the conflict is recorded in the board minutes. Additionally, the board's annual report includes a list of members and their associated conflicts of interest. Consistent with the law stated above, if a person received a State Arts Board grant *in their own name* within the previous two years, he or she is not eligible to serve on the board. However, a person who was part of an organization that received a grant may serve on the board, but by board practice, that member cannot vote on grants for that organization.

³⁰ *Minnesota Statutes* 2011, 97A.056, subd. 4.

The Arts Board also has rules that apply to its advisory panels.

The board does not currently require members to sign a conflict of interest statement. However, the executive director told us the board plans to start a process that will require members to declare, review, and annually verify their conflicts. The process will encompass the current practice of requiring board members to consider the affiliations of a spouse or child in determining whether they have a potential conflict. The executive director told us it would also be considered a conflict of interest if a board member was providing consulting service—paid or unpaid—to an organization that is seeking a grant from the board, and it might be considered a conflict if a board member simply had a “significant relationship” with the organization (for example, the board member was a “founder” of the organization).

In addition to the laws and practices that address conflicts of interest of board members, the board has adopted administrative rules that address potential conflicts of people appointed to its advisory panels. As discussed in Chapter 2, the board’s advisory panels play an important role in reviewing grant applications and recommending grant recipients.

According to the board’s administrative rules, panel members “shall have expertise and experience in a particular area of the arts, arts funding, or administration; in-depth knowledge of the Minnesota arts community....”³¹ To address the potential for conflicts of interest, state law says “no member of an [Arts Board] advisory committee shall serve on a committee to which the member has an application pending for a grant, loan, or other form of assistance from the board....”³² In addition, the board’s administrative rules define in considerable detail what would constitute a conflict of interest for a member of an advisory panel and what action would be required if a conflict exists. Specifically, it says: “The panel member may not be present for any discussion or vote on those applicants with which the conflict exists.”³³

Speaking generally about the conflicts of interest issue, the board’s executive director noted that the allocation of public resources for the arts is well served by having people involved who are knowledgeable, experienced, and committed. It would, she said, be harmful to exclude them; instead, the solution is to rigorously apply conflict of interest laws, policies, and procedures.

Clean Water Council. The statute that governs the Clean Water Council contains the following provision related to conflicts of interest:

A Clean Water Council member may not participate in or vote on a decision of the council relating to an organization in which the member has either a direct or indirect personal financial interest. While serving on the Clean Water Council, a member shall avoid any potential conflict of interest.³⁴

³¹ *Minnesota Rules* 1900.0410, subp. 3.

³² *Minnesota Statutes* 2011, 129D.04, subd. 1(8).

³³ *Minnesota Rules* 1900.0410, subp. 6.

³⁴ *Minnesota Statutes* 2011, 114D.30, subd. 3.

The Clean Water Council was the only organization we reviewed that had not paid close attention to conflict of interest concerns.

However, representatives of the Clean Water Council told us the council has not discussed conflict of interest concerns. They indicated that the council does not set aside time on its agenda for members to identify potential conflicts of interest, nor does the council require members to sign a conflict of interest declaration form. In addition, they asserted that conflict of interest concerns are not relevant for the Clean Water Council because they are not making recommendations to fund specific organizations or for specific projects; rather, the council's funding recommendations focus on broad programs. Additionally, they noted that the agency representatives on the council are nonvoting and are not members of the recommending subcommittee. In summary, they told us that conflicts of interest are simply not an issue for the council.

Department of Natural Resources / Parks and Trails Division. As discussed in Chapter 2, the Department of Natural Resources (DNR) is responsible for administering some of the money from the Parks and Trails Fund. One of DNR's roles is to grant money to various local governments and private nonprofit organizations for parks and trails of regional significance outside of the Twin Cities metropolitan area.³⁵

Officials and employees in DNR's Parks and Trails Division are principally responsible for the grant making process that distributes this Legacy money. Like other state officials in the executive branch of state government, they are subject to *Minnesota Statutes 2011, 43A.38, the Code of Conduct*, and the state's *Conflict of Interest Policy for State Grant-Making*, established by the Office of Grants Management in the Department of Administration. The definitions and requirements of the law and policy were discussed above.

The division has developed practices to implement the state law and policy. Specifically, all of the officials and employees involved in reviewing and awarding Legacy grants must annually complete a form prescribed by the Office of Grants Management. On the form, officials and employees must disclose any actual or potential conflicts of interest and indicate whether they will abstain from participating in some or all of the grant review process.

Discussion

As demonstrated by the information above, the organizations and people involved in implementing the Legacy Amendment are subject to various conflict of interest laws, policies, and procedures. In Table 3.3, we illustrate some of the differences among these various laws, policies, and procedures by analyzing three hypothetical conflict of interest situations. We designed these scenarios to illustrate how different conflict of interest laws and policies apply in different situations.

³⁵ By law, DNR is not eligible for these funds.

Table 3.3: Conflict of Interest Hypothetical Situations

Hypothetical Situation 1: Pro Bono Consultant

Mary Jones is a retired CEO of a Minnesota company and, for the past several years, she has been a pro bono consultant to Citizen Action, a nonprofit organization. Ms. Jones serves on a state panel that recommends funding for programs and projects. At its next meeting, the panel will consider an application for Legacy funding from Citizen Action. Based on the applicable laws and policies, the relationship between Ms. Jones and Citizen Action:

- Would not be considered a conflict of interest if Ms. Jones was a member of the Lessard-Sams Outdoor Heritage Council.
- Would not be considered a conflict of interest if Ms. Jones was a member of the Clean Water Council.
- Would be considered a conflict of interest if Ms. Jones served on an advisory panel of the State Arts Board.
- Would probably be considered at least the appearance of a conflict of interest by some people if Ms. Jones was a member of any of the panels listed above.

Hypothetical Situation 2: Board Member

Dr. Roger Smith is a respected professor at the University of Minnesota and a board member on TrueNorth, a nonprofit organization. Dr. Smith is also on a state council that recommends Legacy funding, and TrueNorth has a funding request before the council. Based on the applicable laws and policies, Dr. Smith's affiliation with TrueNorth:

- Would be considered a conflict of interest if Dr. Smith was a member of the Lessard-Sams Outdoor Heritage Council.
- Would not be considered a conflict of interest if Dr. Smith was a member of the Clean Water Council.
- Would be considered a conflict of interest if Dr. Smith was a member of the Minnesota State Arts Board.
- Would probably be considered at least the appearance of a conflict of interest by some people if Dr. Smith was a member of any of the panels listed above.

Hypothetical Situation 3: Different Disclosure Requirements

Betty Nelson is on a panel reviewing applications for Legacy funding. Her husband works for Minnesota Forever, a nonprofit organization that is requesting Legacy funding. Ms. Nelson is not certain whether her husband's employment with this organization creates a conflict of interest for her. Based on the applicable laws and policies:

- If Ms. Nelson was a citizen appointed to the Lessard-Sams Outdoor Heritage Council, she would be required to disclose in writing this potential conflict of interest.
- If Ms. Nelson was a citizen appointed to the Clean Water Council she would not be required to disclose this potential conflict of interest.
- If Ms. Nelson was a citizen appointed to the Minnesota State Arts Board, she would be required to disclose (but not in writing) this potential conflict of interest.
- If Ms. Nelson was an employee of the Parks and Trails Division in the Department of Natural Resources, she would be required to disclose in writing this potential conflict of interest.
- If Ms. Nelson was a member of any of the panels listed above, she would probably be considered by some people to have at least the appearance of a conflict of interest.

SOURCE: Office of the Legislative Auditor.

Except for the Clean Water Council, we found that the organizations we reviewed have paid considerable attention to conflict of interest concerns. As noted above, the representatives of the Clean Water Council we interviewed simply did not think they needed to address conflict of interest concerns given the council's broad programmatic recommendations. We disagree with that perspective and recommend the following:

RECOMMENDATION

The Clean Water Council should develop policies and procedures to ensure that its members are aware of and adhere to Minnesota Statutes 2011, 114D.30, subdivision 3, concerning conflicts of interest.

We make this recommendation not because we are aware of any conflict of interest violations—or allegations—concerning any member of the council, but because conflicts of interest are a serious and persistent concern. Avoiding conflicts of interest always deserve a high level of attention, especially by organizations and citizens that have been vested with legal authority to advise on the allocation of public money.

On that basis, we also recommend the following:

RECOMMENDATION

All of the organizations and individuals involved in implementing the Legacy Amendment should be vigilant in ensuring that conflict of interest concerns are given serious consideration.

We recognize, however, that vigilance will not completely eliminate conflict of interest concerns. In fact, we anticipate that conflicts of interest will remain an “ongoing concern” throughout the life of the Legacy Amendment. In part, that reflects a general concern about conflicts of interest in the public sector, particularly when large amounts of public money are involved. But it also reflects the history of the Legacy Amendment. The amendment was proposed and supported by many of the organizations that are now closely involved in its implementation; some of them have representatives on Legacy-related advisory panels, and some receive Legacy money. That will continue to raise conflict of interest concerns.

Some people might suggest that the best solution would be to eliminate even the appearance of conflicts by not appointing people to state-created, Legacy-related councils, boards, and task forces who have affiliations or relationships with Legacy-related organizations. However, we accept that there is value to the state in having people on Legacy-related groups who are knowledgeable about and committed to the public purposes supported by the Legacy Amendment. We acknowledge that they are likely to have relationships and affiliations that will

create at least the appearance of conflicts. While some people find that inappropriate and unacceptable, we think the best resolution is for the state to maintain strong conflict of interest policies and procedures and, as we recommend above, for the affected organizations and individuals to vigorously adhere to them. It will also be important for the state to use other mechanisms, such as the Open Meetings Law, to help ensure transparency and accountability in the application of the conflict of interest laws, policies, and procedures.³⁶

LEGACY OUTCOMES

The ultimate Legacy-related ongoing concern is whether money is being used in ways that will achieve the outcomes sought by the Legacy Amendment.

Concerns about “supplement not substitute,” administrative costs, and conflicts of interest are important, but for most people the ultimate concern is whether Legacy money is used to achieve the outcomes proposed in the Legacy Amendment. As mentioned in the Introduction, we did not design this evaluation to assess what outcomes have been achieved so far with Legacy money. That kind of evaluation would have to focus on specific programs and projects being supported with money from Legacy funds. This evaluation was designed to provide an initial overall assessment of how the Legacy Amendment has been implemented. Given the amount of money being raised by the Legacy Amendment and high expectations that Legacy money will have a significant impact, we anticipate that requests for in-depth evaluations will be forthcoming. In fact, as a result of conducting this assessment, we will be better prepared to help the Legislative Audit Commission identify Legacy-funded programs, projects, and activities that need a more in-depth evaluation.³⁷

However, in conducting this evaluation, we could not completely avoid the issue of how Legacy money is being used and whether those uses are likely to achieve the outcomes intended by the Legacy Amendment. Media reports have frequently raised the issue, as did people we interviewed. We heard testimonials that Legacy money is accomplishing great things, assertions that the money is being wasted, and many opinions in between. Some of what we heard—and what is in media reports—simply reflects attitudes about the Legacy Amendment itself, both for and against. Regardless of the point of view, it is always appropriate to raise concerns and questions about the effectiveness of public expenditures, and we found:

- **Concerns have been raised about how some Legacy money is being used and whether those uses will achieve the results called for in the Legacy Amendment.**

In this section, we highlight four concerns—one for each fund—about how Legacy money is being used. The concerns involve (1) purchasing land, (2) improving water quality, (3) supporting parks and trails, and (4) funding arts and cultural heritage projects.

³⁶ *Minnesota Statutes* 2011, chapter 13D.

³⁷ As provided for in *Minnesota Statutes* 2011, 3.97, subd. 3a, evaluation topics addressed by the Office of the Legislative Auditor are approved by the Legislative Audit Commission. For more information about the commission’s topic identification and selection process, see the OLA Web site at <http://www.auditor.leg.state.mn.us/ped/topsel2.htm>.