



FPPC Update

Thursday, October 6, 2016 General Session; 8:00 – 9:30 a.m.

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This image shows a full page of blank white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page, providing a template for writing or drawing. There are no margins, text, or other markings present.

FPPC UPDATE: OCTOBER 2016

While it has been a rather slow period for the FPPC in terms of adopting new regulations, the agency is in the midst of an ambitious endeavor, the Political Reform Act Revision Project. I will focus most of my paper on that development, followed by a summary of some recent opinion letters and enforcement actions of interest.

POLITICAL REFORM ACT REVISION PROJECT

In its webpage focused on the project, the FPPC notes – in what will be a revelation to city attorneys who provide conflict of interest advice – that the Act has become “a body of law that can be hard to understand, overly complex, and inconsistent.”

At the direction of the Commission Chair, Jodi Remke, the Commission has partnered with Boalt Hall, UC Davis Law School and California Forward “to conduct a comprehensive review and revision of the Act to ensure decades of amendments are given clarity and continuity.”¹ In other words, much of the work on this project is being done by law students.

According to the agency’s webpage, the project requires “balancing the Commission’s mandate to provide strict enforcement while promoting accessibility to the public and transparency to the political system.” The FPPC has identified four goals for the program:

- Redraft the Act with “plain English” using the simplest, most straightforward language to express ideas and minimize legalese.
- Incorporate key provisions from regulations into the Act.
- Reorganize the Act in order to have all related provisions in the same chapter with self-explanatory titles for each chapter and section.
- Repeal or amend current statutes that are inaccurate or inoperative as a result of judicial decisions and other changes in law.

The FPPC has indicated that, apart from this last bullet point, there is no intention to make any substantive changes to the Act.

¹ California Forward describes itself as “the state’s leading organization on smart government and innovation with extensive experience stewarding public and stakeholder input to help solve California’s most stubborn issues.”

The FPPC Committee has been reviewing and commenting on the proposed changes. On June 8, the Committee sent initial comments to the FPPC in which it identified sections of the Act of interest to city attorneys that should be included in the Project.

The FPPC established two comments periods: August 3, 2016 to September 30, 2016, and November 7, 2016 to December 2, 2016. The FPPC Committee submitted comments regarding proposed changes to many parts of the Act during the initial comment period. It likely will do so again in the second comment period, assuming there additional significant changes.

Alison Leary from the League attended a meeting with FPPC staff regarding the Project, and reported the following comments that were made about the project

- There is concern about how the amendments will affect existing case law, regulations, and advice letters.
 - Chair Remke explained that all of the existing regulations and advice letters would remain in effect.
 - She explained that, once this process is complete, the FPPC will amend its regulations to adjust the cross-references.
 - She noted that, in the future, a wholesale cleanup and streamlining of the regulations may be in order.
 - Chair Remke made clear that they made edits intended to reduce ambiguities in the Act by including clarifications that have developed through case law, advice letters, or FPPC regulations.
- Some participants thought the reorganization of provisions went too far and made things more confusing. Others thought it didn't go far enough—they would like the Act to look more like a “how to guide” for the members of the public who use it (ex: organizing the act by filing type: state v. local; candidate v. ballot measure; etc.).
 - The FPPC seemed especially amenable to comments that were in favor of reorganizing the act further.
- Many thought the number of cross-references should be reduced, so that someone reading the Act would not have to flip back and forth through different provisions to figure out what it says.

As noted, one of the stated goals of the Project is to reorganize the Act in order to have all related provisions in the same chapter. One obvious consequence of this change is

that virtually every section in the Act has been renumbered. So the primary conflict of interest section of the Act – currently section 87103 – will now become section 89101.

You can find out more about the Project at <http://www.fppc.ca.gov/the-law/21st-century-PRA.html>.

OPINION LETTERS

The following opinion letters of interest were issued by the FPPC in recent months.

Conflict of Interest

Marcia L. Scully A-16-011. The Act's conflict of interest provisions requires an official to disqualify from budget decisions that will foreseeably have a material financial effect on the board members' interests, or those of his or her spouse. However, if a water district board member's business completely and unequivocally renounces any financial benefits resulting from the budget decision during the budget year, the board member may participate in the decision since the decision will not have a foreseeable, material financial effect on his financial interests.

Michael A. Guina A-16-002. A Mayor may participate in decisions regarding a pedestrian path within 500 feet of her residence because it is unlikely that the small improvement will have a measurable impact on her residence.

Minh C. Tran A-16-024. A planning commissioner may participate in decisions regarding the wine industry even though her husband works for a winery when the impact of the decisions will affect all wineries in the unincorporated areas of the county and wineries make up 35% of businesses in that jurisdiction. The planning commissioner may not, however, participate in decisions regarding the County's Climate Action Plan because she has a nexus in the decision at issue based on her employment.

Ruthann G. Ziegler A-16-025. The public generally exception applies to all councilmembers who have property within 500 feet of the decision areas when the only decisions at issue relate to sidewalk additions and improvements.

Michael C. Ghizzoni A-16-028. A County Supervisor was advised that she was prohibited from discussing constituent complaints with County departments when such complaints could result in enforcement actions against the developer of a project located within 75 feet of her home. She would be prohibited because the complaints and the discussion of them with County departments were inextricably interrelated to a previous

governmental decision on the project in which she had a conflict. The Supervisor's Chief of Staff would not be prohibited from discussing the complaints with County staff, because the Chief of Staff had no conflict in the matter.

Kristin Gaspar A-16-033. Mayor may participate in decisions made by the City concerning a lawsuit filed against it by a property development firm despite the fact that the attorney for the firm is a source of income to the Mayor. The attorney is a client of the Mayor's physical therapy company which thereby creates a financial interest in the attorney. However, decisions made by the city concerning the lawsuit will not have a financial effect on the financial interest.

John Bakker A-16-038. Hotel decisions, a subpart of the Grafton Plaza Project, are discrete in relationship to the entire plan and can be segmented from other decisions about the plan. However, Regulation 18706(a)(3) requires that the decisions in which the official has a conflict of interest must be considered first and a final decision reached by the agency without the disqualified official's participation. Consequently, the Vice Mayor could only participate in the segmented hotel decisions after all the project decisions for which he has a conflict are decided.

Corrine L. Neuffer A-16-049. The Act does not permit the City of San Diego Planning Commission to invoke the "legally required participation" exception since three of seven commissioners were disqualified under the Act and a fourth commissioner stated that he would voluntarily abstain. Because a quorum of commissioners not disqualified under Section 87100 could be convened with respect to the decision at issue, the Planning Commission may not invoke the exception.

Brian A. Pierik I-16-040. A city councilmember who owns a lodging business located within the Atascadero Tourism Business District and serves on the district's advisory board may not address the city council to give an update regarding district matters. If a city staff member gives the update, he must recuse himself and leave the room for the duration of the report and any discussion. However, under the personal interest exception, he may address the city council regarding district matters to represent his personal interests provided he recuses himself from voting on the matter, leaves the dais to speak from the same area as the members of the public and limits his remarks solely to his personal interests.

Fred Galante A-16-067. Councilmembers who live with adult children that are applicants for a low-income housing project may participate in project decisions because it is not foreseeable at this time that the decisions will affect the councilmembers' financial interests, including their personal finances

Thomas J. Ballanco A-16-080. A County Planning Commissioner may participate in Planning Commission decisions relating to commercial cannabis land use ordinance despite being a member and employee of a limited liability company engaged in research, development, marketing and distribution of cannabis-based therapeutic products. The decisions will not have a reasonably foreseeable, material financial effect on his financial interests.

Leigh-Anne Harrison-Bigbie A-16-083. A public cemetery manager was advised that the Act's conflict of interest provisions did not prohibit her from selling pre-need insurance to those looking to pay funeral costs in advance. The cemetery manager's duties include selling of grave sites, book keeping, preparation of Trustee meetings, and burial arrangements when the need arises. The manager is not involved in negotiations with clients or price setting and is not involved in any governmental decisions that would have a reasonably foreseeable financial effect upon the pre-need insurance company or the prospective clients.

Kyle Jones A-16-122. A city employee may communicate with the city in the same manner as any other member of the general public to represent his own personal interest in property in connection with the city's abandonment of city property on which the city relocated the employee's driveway to his home.

Chris Becnel, JD CPA A-16-097. Merely holding a private sector position is not in itself a conflict of interest under Section 1090 or the Act for an elected councilmember. However, the councilmember will have a conflict of interest under both Section 1090 and the Act in decisions regarding the contract with the councilmember's nonprofit employer.

Rae Bell Argobast A-16-060. A Board member of the Alleghany County Water District may vote to select between two proposed water plans where both plans would have some effect on property owned by the corporation of which she is the secretary and a shareholder. It is not reasonably foreseeable that the decision will materially affect the corporation because the effects are speculative.

Ariel Pierre Calonne A-16-89. Allowing food truck vending for a two-hour window in the area where the councilmember's restaurant is located would not create enough competition to contribute to a change in the value of the restaurant because the mobile food service would operate for a limited durations and sells to a different clientele than the restaurant. Therefore, the councilmember is not prohibited from participating in the decision of whether to adopt the draft ordinance because it will not have a foreseeable and material financial effect on his interests.

Randy Haney A-16-120. A city councilmember that owns a landscape company may participate in modifications to the city leaf blower ordinance where it is not reasonably foreseeable that decisions relating to the leaf blower ordinance will have a material financial effect on his business or on his personal finances. Under the facts provided, the business' current use of leaf blowers is limited and marginal to the business, and power leaf blowers play only a limited a part of his landscape design and installation services. Additionally, the councilmember has no financial affiliation with any landscape maintenance business.

Section 1090

Scott Chadwick A-16-090. Section 1090 prohibits the city from contracting with a corporate contractor where that contractor was also the prime consultant pursuant to a prior contract with the city and in that capacity advised the city and exerted influence over the city staff's formation of the second contract.

Hilda Cantu Montoy A-16-136. A councilmember may vote to ratify warrants for payments previously made on a consent calendar, even though it includes a warrant to his spouse, because the approval of the warrant is ministerial in nature. Under a Section 1090 analysis, the councilmember has a noninterest under Section 1091.5(a)(6), where the warrant involves the existing employment of his spouse (his spouse has been employed as an independent contractor to teach classes for the Kerman City Parks and Recreation Department since 2014). His noninterest pursuant to Section 1091.5(a)(6) does not require his recusal or disclosure for this decision.

Andreas C. Rockas A-16-017. A nonprofit that oversees a Joint Powers Authority (JPA) was advised that one executive from the JPA could participate in merger negotiations with another JPA even though his salary and job status may be affected as a result of the merger and Section 1090 applied because the rule of necessity applied.

Gifts and Honoraria

Nick Clair A-16-115. Raffle prizes won by public officials in three separate random drawings at the CSDA Annual Conference attended by public officials and other individuals not regulated by the Act are "gifts." Despite the fact that will be received in a competition, the competition is related to the official status of the officials, and thus constitute a "gift" to those officials within the meaning of the Act.

Humberto Peraza A-16-116. Under the Act, the value of airfare, lodging, and meals provided by the American Israel Public Affairs Committee (AIPAC) to a public official

to attend its Hispanic Outreach Summit, less the official's cost to register for the Summit, would be a reportable gift subject to limits. The value of the admission to the Summit and associated conference materials, however, would not be a gift under the Act provided that the purpose of the Summit is primarily to convey information to assist the official in the performance of the official's duties.

Colleen Winchester A-16-023. Because travel, lodging, and subsistence payments (paid by a non-profit entity) are reasonably related to a councilmember's speaking engagements at two separate policy issue-related events, the payments are not subject to gift limits. However, the payments are reportable gifts and acceptance of gifts above the \$460 amount from either non-profit entity may prohibit the councilmember from participating in governmental decisions affecting those sources.

Honorable Jeffrey S. Bostwick A-16-064. A superior court judge asked whether his attendance, his wife's attendance, and his guest's attendance at an award event held for volunteers of the Boy Scouts of America is a reportable gift under the Act. The event will take place at the host's home while the host is present. The host is a personal friend whom the judge has known since 2011. The cost will exceed \$50. The hospitality and long-term close personal friend exceptions apply to the gift reporting requirement for requestor and his wife.

Evann Whitelam A-16-071(a). A tour of the PG&E Energy Education Center, the 4.4-mile shuttle ride between the PG&E Energy Education Center and the Diablo Canyon Power Plant, and the Diablo Canyon Power Plant tour itself are not considered a single site for purposes of Regulation 18942.1(c)(2). However, under the facts presented, each of the phases, including the travel, qualify as informational material and would not be a gift. Informational material provided to an official for the purpose of assisting him or her in performing official duties (and that does not also provide a personal benefit) is not reportable.

Alan Seem I-16-079. The requestor sought advice regard a trip for mayors to China. The trip was aimed at improving business cooperation between China and the Silicon Valley and helping create jobs and increase economic activity in both China and the Silicon Valley. The principal purpose of the 2016 China Trip is to facilitate investment and international trade, and promote communications between China and the Silicon Valley region. The requestor was advised that the travel would be reportable but not subject to the Act's gift limit to the extent the travel payments would be from governmental entities and a nonprofit that fit the requirements for tax exempt status under Section 501(c)(3) of the Internal Revenue Code, and the activities covered were for a Legislative or governmental purpose, or an issue of state, national, or international public policy

Vicky Green A-16-084 Section 1090 is not applicable to Loud and Clear Inc., an independent contractor hired by the town of Windsor to design the town's A/V system, such that it may not bid on the upcoming A/V project. In this matter, the business provided technical expertise in drafting an equipment list and system flow-chart and did not exert considerable influence over the decisions of town staff

Ronald J. Powell, Ph.D A-16-036. The Political Reform Act's prohibition on a designated employee's acceptance of honoraria does not prohibit a First 5 San Bernardino Commissioner from accepting payment for giving a speech, conducting a training or publishing an article in connection with the Commissioner's consulting business because the business is a "bona fide business." The prohibition on the acceptance of honoraria does not prohibit the Commissioner from accepting payment for authoring a book because authoring a book does not fall within the prohibition's scope.

Mass Mailing

Mass Mailing Kathrine Pittard A-16-107. The mass mailing provisions do not prohibit the agency from paying for inserts in a local newspaper that will include interviews of two elected officials. Under Regulation 18901, the newspapers distributed are excluded from the mass mailing restrictions because the newspapers are sent in response to unsolicited requests. Moreover, the inserts are not restricted under Regulation 18901.1 because they are not campaign related. However, in regard to the copies of the insert the agency will receive from the newspaper and distribute separately, the agency may not send more than 200 copies of the insert to a person's residence, place of business, or post office box including copies mailed to organizations or other governmental agencies.

Section 84308

William M. Wright A-16-055. Under the unique facts presented, the formation of a Recreation and Park District is an entitlement for use and subject to the provisions of Section 84308. The term "entitlement for use" does not have a set legal meaning. In this case, because a small group of specific, identifiable persons will derive financial benefits from and will be directly affected by this decision, formation of the district will have a direct substantial financial impact upon the applicants and is considered an "entitlement for use."

Conflict of Interest Code

John Bakker I-16-062. A city, which contracts with consultants, is responsible for ensuring that its conflict of interest code designates all public officials who make or

participate in making decisions including the consultants and that the disclosure categories are tailored to the duties performed by the designated positions. Moreover, the city's filing officer is required to determine whether required statements of economic interests have been filed and notify promptly all persons who have failed to file a statement.

ENFORCEMENT ACTIONS.

FPPC No. 15/1307. County failed to timely file a Lobbyist Employer report for the period of October 1, 2014 through December 31, 2014, in violation of Government Code Section 86117. **Total Proposed Penalty \$425.**

FPPC No 14/574. Member of City Council, failed to timely file an Assuming Office Statement of Economic Interest and an Annual Statement of Economic Interest for the year of 2013, in violation of Government Code Sections 87202 and 87203. **Total Proposed Penalty: \$1,400.**

FPPC No. 15/073. A member of the City Council attempted to use his official position to influence a governmental decision in which he had a financial interest, by speaking before the Planning Commission regarding the approval of SmithTech USA's application for the subdivision of two tracts of land owned by a client, in violation of Government Code Section 87100. **Total Proposed Penalty: \$3,000.**

FPPC No. 15/1355. Water Agency produced and mailed 7,269 copies of the August 12, 2015 letter at public expense. The letter individually named each member of the Board of Directors, and was sent in concert with the Board of Directors. Agency produced and sent the August 12, 2015 letter, in violation of Government Code Section 89001, and Regulations 18901 and 18901.1. **Total Proposed Penalty: \$3,000.**

FPPC No. 15/2078. School District produced and sent approximately 19,009 copies of a brochure at public expense, featuring the photographs and names of the members of the governing board, in violation of Government Code Section 89001. **Total Proposed Penalty: \$2,000.**

FPPC No. 16/465. School District produced and sent approximately 5,000 copies of a booklet at public expense containing quotations from and credits to two members of the governing board obtained for the purpose of inclusion in the mailer, in violation of Government Code Section 89001. **Total Proposed Penalty: \$2,000.**

FPPC No. 14/1316. A member of the Board of Directors for a municipal water district failed to disclose his interests in business entities, real property and sources of income on his 2012, 2013 and 2014 Annual Statements of Economic Interests, in violation of Government Code Sections 87206 and 87207. **Total Proposed Penalty: \$6,000.**