

4. Fair Political Practices Commission (FPPC) Reporting Requirements

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MEMORANDUM

TO: Commissioners
Sacramento Local Agency Formation Commission

FROM: Nancy C. Miller
Miller, Owen & Trost

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RE: Government Code Section 84308 and Financial Contributions to Commissioners

Questions regarding the application of Government Code section 84308 have recently arisen. Section 84308 applies if a Commissioner has received a contribution of:

- more than \$250;
- from an individual or entity;
- that is lobbying and/or participating in a proceeding before the Commission;
- involving a license, permit, or other entitlement for use;
- Twelve (12) months prior to the proceeding, during the proceeding **and** three (3) months after the proceeding; and
- And the contributor has a financial interest in the outcome of the proceeding. (Gov. Code, § 84308.)

If these requirements are met, the Commissioner must either disclose the contribution and withdraw from the proceeding or return the contribution, depending on the circumstances. The following memo attempts to clarify some of the requirements but we strongly recommend that if you have any questions that you seek our advice or advice from the Fair Political Practices Commission ("FPPC") directly.

A. Application to Local Agency Formation Commissions

Courts have found that section 84308 applies to LAFCo members. (*City of Agoura Hills v. Local Agency Formation Commission* (1988) 198 Cal.App.3d 480, 496-499.)

B. General Rules of Section 84308

1. ***Section 84308 does not apply to a Sphere of Influence proceeding.*** Based on this limitation, sphere of influence proceedings are generally not subject to section 84308 because they involve general planning and general policy decisions where

the interests affected are “many and diverse.” (*City of Agoura Hills v. Local Agency Formation Commission* (1988) 198 Cal.App.3d 480, 498-499; FPPC Advice Letter A-04-079.)

2. *Section 84308 does apply to a Change of Organization or Reporganization.*

Section 84308 applies only to proceedings involving a license, permit, or other entitlement for use. Change of Organizations and reorganizations are subject to Section 84308. (*City of Agoura Hills v. Local Agency Formation Commission* (1988) 198 Cal.App.3d 480, 498-499; FPPC Advice Letter A-04-079.)

3. *Contributions in Excess of \$250 may not be made during the LAFCo Proceeding and Three Months After a Final Decision.*

Section 84308 states: “No officer of an agency shall accept, solicit, or direct a contribution of more than \$250 from any party, or his or her agent or from any participant, or his or her agent, while a proceeding involving a license, permits, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the officer knows or has reason to know that the participant has a financial interest.” (Gov. Code, § 84308, subd. (b).) Section 84308 also bars parties, participants, and their agents from contributing more than \$250 to any Commissioner during a proceeding and for three months afterwards. (Gov. Code, § 84308, subd. (d).) If a Commissioner does accept such a contribution, he or she must disclose it and cannot participate in the proceeding.

4. *Contributions may not be made Twelve Months Prior to the LAFCo Proceeding*

Section 84308 also requires officers of an agency and parties, participants and their agents to disclose any campaign contribution of more than \$250 given or received in the 12 months prior to the proceeding. (Gov. Code, § 84308, subd. (c), (d).) If a party or participant, or their agent, has contributed more than \$250 in the previous 12 months and has a financial interest in the proceedings, the Commissioner who received the contribution must not participate in the proceeding.

5. *Return of Contribution May be Made*

If a Commissioner receives a contribution that would otherwise require disqualification and the Commissioner returns the contribution within 30 days from the time that he or she knows or should have known about the contribution, the Commissioner may participate in the proceeding. (Gov. Code, § 84308, subd. (c).)

6. *Party and Participant are Defined by the Statute*

A party is “any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.” (Gov. Code, § 84308, subd. (a)(1).)

A participant is “any person who is not a party but who actively supports or opposes a particular decision in a proceeding” and who has a financial interest in the decision. (Gov. Code, § 84308, subd. (a)(2).) A person actively supports or opposes a decision “if he or she lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence the officers of the agency.” (Gov. Code, § 84308, subd. (a)(2).)

7. *Financial Interest in a Proceeding*

An officer knows or has reason to know that a person has a financial interest in the decision in a proceeding if: “(1) The person is a party; or (2) The person is a participant and reveals facts in his or her written or oral support or opposition before the agency which make the person’s financial interest apparent.” (2 Cal. Code Regs. § 18438.7.) A financial interest exists if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of an individual’s economic interests distinguishable from its effect on the public generally.¹ (Gov. Code, § 87103.)

C. *Additional Issues*

The questions below were raised in connection with the application of section 84308. Our answers are based on our independent research and on oral advice provided by the Fair Political Practices Commission (“FPPC”). If a situation arises in which application of section 84308 is unclear, the best course of action is to request an advice letter from the FPPC, which are issued 21 days after a request is made.

¹ Section 84308 defines a financial interest by relying on the definition in the Political Reform Act: “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
- (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- (e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the commission to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.” (Gov. Code, § 87103.)

1. *Does Government Code section 84308 apply to people who work on the project but who do not appear at an agency hearing, lobby officials or act to exert influences, such as a traffic consultant or an engineer?*

Government Code section 84308 **does not appear to apply** to someone who works for the applicant, but does not appear before the agency, lobby an agency officer, or act to influence officers through some other means, such as sending independent correspondence. Section 84308 is intended to address people with a financial interest in the outcome of a decision who personally appear before the agency, lobby in person the officers or employees of an agency, or otherwise act to influence officers of the agency. (Gov. Code, § 84308, subd. (a)(2).) It is not intended to limit the right to contribute of someone who does not carry out these acts.

In advice letter A-03-094, the FPPC considered a case where the Port of Stockton filed an application that was acted upon by the City of Stockton's Planning Commission. A member of the Board of Directors for the Port of Stockton was a potential donor to a member of the Planning Commission. The Director did not participate in the hearing or otherwise act to influence the Commission regarding the Port's application and did not have any financial interest in the outcome of that hearing.

Based on these facts, the FPPC found that the Director was not a participant under section 84308 because "he does not have any financial interests in the Planning Commission's decision" and he "did not participate in the hearing (and presumably by this reference, did not engage in any other active support or opposition with respect to a Planning Commission decision in this proceeding)." However since there is very little FPPC decision making on this issue and though we consulted with the FPPC and they agreed, any question should be directed to the FPPC..

2. *Is a spouse considered an agent under section 84308?*

A spouse is considered an agent under section 84308. However, section 85308 states that the contributions of spouses **are not** aggregated. Therefore, each spouse could contribute up to \$250 without triggering the requirements of section 84308.

3. *How does aggregation work under section 84308?*

To determine if the aggregation requirement applies, you must look at the person who has made the contribution and determine if that person could control the contribution of another entity, such as a corporation. If that is the case, then the contributions of the individual and the corporation would be aggregated.

Aggregation would not apply to the contribution of a person or entity that is not appearing before the agency, lobbying the agency's officers or employees in person or otherwise acting to influence the agency's officers. Further, for someone who is appearing on behalf of an applicant, such as an independent law firm, contributions would not be aggregated because the applicant does not have control over the law firm's contributions and the law firm does not have

control over the applicant's contributions. However an employee of a business entity that is appearing before the Commission will be aggregated with other employees and principals of that business entity. (FPPC Advice Letter I-04-149.)

4. *How does section 84308 apply to an alternate board member who does not attend the meeting?*

Whether or not an alternate board member actually appears, lobbies, or otherwise acts to exert influence in a proceeding, section 84308 would require disclosure or return of a campaign contribution over \$250. Since proceedings can cover more than one meeting and the prohibition extends for three months after a final decision is rendered, the alternate is subject to section 85308 whether or not they actually attend the meeting.

The FPPC advice attorney stated that the only way section 84308 would not apply is if the bylaws expressly excluded the alternate member from appearing at a proceeding. LAFCo policies do not include such a provision.

D. Conclusion

If there is any question with respect to the applicability of Section 84308 please contact the firm or the FPPC directly so that you may receive an individual opinion. The rules are not always clear so we encourage the Commission to seek our advice or the FPPC directly in the event of a question.