

Meeting Minutes
Fair Political Practices Commission
Law and Policy Committee Meeting
May 9, 2023
10:00 am

The Law and Policy Committee meeting was called to order at 10:04 a.m.

- 1. Public Comment for items not on the agenda.**
- 2. Approval of April 6, 2023, minutes.**

MOTION: To approve April 6, 2023, Committee minutes. Moved by Commissioner Baker, seconded by Chair Miadich. The motion was approved 2-0.

- 3. Proposed Repeal, Adoption and Amendment of Levine Act Regulations (18438-18438.8, 18705)**

Kevin Cornwall, Commission Counsel presented several proposed amendments to Levine Act Regulations updating each regulation, as well as a PowerPoint presentation.

Chair Miadich discussed and inquired about the significance of the distinction in Section 84308(c)'s language referring to an officer's knowledge or reason to know of a participant's financial interest for purposes of recusal, as opposed to the statute's disclosure requirement, which makes no reference to knowledge of the participant's financial interest. Mr. Cornwall discussed that the statute would require the official disclose when they know or have a reason to know the participant's financial interest in the decision and the official would be required to recuse unless they were able to pay down or return the contribution. Chair Miadich stated the statute does not require disclosure of contributions from anybody by the public official other than participants and parties. Chair Miadich explained he understood that under the statute, when an officer discloses a contribution from an individual as a "participant," the officer is stating that the individual meets the statutory criteria to be considered a "participant," including having a financial interest and, therefore, the officer must recuse unless they pay down the contribution. Mr. Cornwall stated his agreement that an officer who knows about a participant's contribution and financial interest has a duty to disclose and

recuse. Chair Miadich stated that he understood that because “participant” has a statutory definition, there is an implied duty on the part of the public official, prior to disclosure, to have made some determination that the individual has a financial interest, or else the individual would not be a “participant.” Mr. Cornwall agreed. Commissioner Baker stated she was uncertain about whether she would consider it a “duty” of the officer, but that an officer may be overly cautious. Chair Miadich stated he agreed from a practical standpoint, but that the legislature chose to define “participant” as someone with a financial interest and did not see how a public official could disclose someone as a “participant” without inherently knowing the individual has a financial interest. Commissioner Baker stated she agreed with grounding in the statutory language but was not sure about interpreting it as an officer having undertaken a duty to confirm a participant’s financial interest prior to making a disclosure. Chair Miadich asked whether, under Section 84308(c), it is staff’s understanding that a public official has a duty to disclose contributions exceeding \$250 from a participant on the record of the proceeding. Mr. Cornwall confirmed they have a duty to disclose. Chair Miadich expressed that he did not see any other way to interpret the requirement other than involving a duty to ascertain knowledge of the individual’s financial interest, otherwise the disclosure requirement would be rendered somewhat meaningless. Mr. Cornwall added that the duty to ascertain an individual’s financial interest is implied by the fact that the statute not only refers to whether an officer “knows,” but also whether the officer has “reason to know” about a participant’s financial interest. Commissioner Baker asked whether there had been prior participation by or outreach to different types of governmental agencies, such as school boards, water boards, and CSAC. Mr. Cornwall stated that he did not reach out to the specific identified organizations others than those who had been provided notice via the Commission’s listservs. The organizations that had participated in the regulatory process and that staff had been in contact with so far were generally broader, statewide organizations.

Commissioner Baker asked if there was a way to reach out to CSAC, school board associations, and water boards. Mr. Cornwall presented a hypothetical fact pattern in which Section 84308 would be implicated. Commissioner Baker asked about the relevance of news coverage with respect to an officer's knowledge or "reason to know." Mr. Cornwall responded that there are too many variables when taken into consideration, such as the different types of boards, agencies, and jurisdictions in order to presume knowledge based on media coverage. Chair Miadich asked about the form of disclosure required since the statute requires such disclosure as a part of the process within 30 days. Mr. Cornwall confirmed the statute does not specify beyond putting it into the agency's official records. Chair Miadich asked whether an individual who has already made an initial disclosure has an obligation to make an additional disclosure when making an appearance during a proceeding. Mr. Cornwall stated, "no." Chair Miadich asked whether the 30-day disclosure timeline comes from the statute or by virtue of regulation and Mr. Cornwall stated it was by virtue of regulation. Chair Miadich discussed whether an initial disclosure made prior to an appearance in the proceeding, without subsequent disclosure during the appearance, would frustrate the transparency goal of the statute. Commissioner Baker agreed and discussed potential solutions, including having agency staff or officers reiterate the prior disclosures during a public meeting. She also asked about the statutory basis for the proposed 30-day disclosure requirement. Mr. Cornwall added that aside from the party's initial disclosure requirement, the officer has a disclosure requirement at the proceeding. He also stated the statute does not expressly state that the return has to be made prior to participation in the proceeding within that 30-day window and that the Commission had the regulatory authority to adopt a provision allowing officers to take part in a proceeding prior to making a contribution return within 30 days. General Counsel Dave Bainbridge stated all agencies operate differently and it impacts the drafting regulations, and agencies' ability to comply

with regulations. Chair Miadich asked whether an officer would have an obligation to disclose a contribution at a public meeting if, prior to the meeting, the officer paid down the contribution to below \$250. Mr. Cornwall stated that the contributor would have had a duty to disclose the contribution exceeding \$250 within 30 days of making the contribution, but the officer would not have had a duty to disclose a contribution at the meeting if it had been paid down to less than \$250. General Counsel Bainbridge clarified that in some contexts, contributions are considered “received” under the Act even if there was return of the contribution later on, there are certain contexts where a contribution is not considered received, which may impact disclosure requirements. Chair Miadich asked about FPPC’s view on the obligations of public officials and local government staff to inquire when somebody stands and testifies at a meeting whether the person has made a contribution or has a financial interests. Mr. Cornwall clarified that there is not a proactive duty to inquire, but the statute applies where an officer has “reason to know” of a financial interest, and an officer has a “reactive” duty in terms of considering facts known or volunteered. Mr. Cornwall discussed the potential complex considerations and difficulties in determining whether a participant has a financial interest. Chair Miadich asked whether one of the reasons staff is proposing interpreting Section 84308 to permit the return of contributions after an official has taken part in a proceeding is to address scenarios where something comes up during a meeting but there is not time or an ability to determine whether there is a disqualifying financial interest. Mr. Cornwall stated that it was. General Counsel Bainbridge noted that the statutory definition of “participant” refers to a financial interest under Section 87100 of the Act.. Commissioner Baker asked about additional scenarios in which Section 84308 might apply, such as an individual upset about a Cell tower’s impact on aesthetics. Mr. Cornwall stated that it would depend on the facts, because a participant’s “financial interest” is based on Section 87100, which is clarified by the Commission’s regulations.

Commissioner Baker asked about situations involving contributors whose legal names may differ from the names they use to identify themselves at public meetings. Mr. Cornwall stated that the disclosure requirements applying to parties and officers will often provide an opportunity to clarify discrepancies. It is more difficult with respect to participants who are not required to disclose their contributions, but the proposed 30-day return window would allow officers to return contributions after taking part in the proceeding. General Counsel Bainbridge stated that the scenario would be affected by whether the Commission considers an officer to have knowledge or reason to know of a contribution based on the contribution having been reported. Commissioner Baker asked Mr. Cornwall to discuss how public protests outside of a city council building would fall outside of the regulations. Mr. Cornwall explained that Section 84308 refers to participation within the proceeding. One-on-one meetings with officers would be considered attempts to influence a proceeding, but picketing would not. Chair Miadich noted that under Regulation 18438.4(d), communications made to the public would not be included within the scope of the regulations. Chair Miadich asked whether, under Regulation 18438.3, an agent's compensation has to come from the party. Mr. Cornwall stated he read the regulation to not require that the party be the person compensating the agent and, also, in many instances where a third-party is paying someone to act as an agent, it could be that the third-party themselves constitutes an agent or is considered part of the party depending on their relationship.

Chair Miadich asked about Regulation 18438.1(d)(1) through (d)(3) and whether there would be an instance in which a person would be a member of a board or commission but not appointed or elected. Mr. Cornwall stated that there will be overlap between the regulatory definitions but that they attempt to cover the various scenarios in which a person could be an "officer" under Section 84308. More clarification will be presented at a later date to confirm and update this regulation.

4. Legislative Update.

Lindsey Nakano, Senior Legal Counsel discussed status updates on the bills affecting the PRA, including for bills placed on the suspense file in the Appropriations Committees. Chair Miadich asked if, under AB 37, staff members do not pay reimbursement for the security equipment, will be considered a reportable gift. Ms. Nakano will present an answer to the question after doing research. Commissioner Baker added to this discussion stating the author should make the amendments to AB 37 in regard to requiring reimbursement of security equipment for candidates and elected officers, that those amendments should be requested from the elected official, and that she'd like to keep the subject of reimbursement from staff open for further discussion. Chair Miadich and Commissioner Baker agreed on direction to request amendments to require a reimbursement mechanism, and Chair Miadich directed Ms. Nakano to craft amendment language that would create a reimbursement requirement for officials. Commissioner Baker requested clarification on SB 724 if this only applies to state officers. Ms. Nakano confirmed this bill only applies to state officers. Commissioner Baker stated that she was curious why [the author] wouldn't expand the bill to local officeholders and whether this is something under consideration.

5. Discussion of items for June 2023 Committee meeting.

MOTION: To adjourn the meeting. Moved by Commissioner Baker, seconded by Chair Miadich. The motion was approved 2-0.

The meeting adjourned at 12:42 p.m.