



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 5, 2025

James R. Sutton
Rutan & Tucker
150 Post Street, Suite 405
San Francisco, CA 94108

Re: Your Request for Informal Assistance
Our File No. I-25-045

Dear Mr. Sutton:

This letter responds to your request for advice regarding Section 84308 of the Political Reform Act (the “Act”).¹ Given that your questions are general in nature and based on limited facts, we treat your request as one for informal assistance.²

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

You have posed numerous questions generally relating to Section 84308 and its provisions regarding “agents,” as discussed below.

CONCLUSION

We have provided general informal assistance regarding several of your questions, but the majority are overly broad and hypothetical to address at this time. We encourage you to seek additional advice when faced with a situation involving these or similar questions.

FACTS AS PRESENTED BY REQUESTER

Your law firm represents many real estate entities that are seeking approval for land use entitlements for cities throughout the state. Those entities’ principals and employees also make political contributions to candidates for city office. You are seeking guidance regarding recent

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

amendments to Section 84308, as well as related regulations. In your request for assistance, you pose numerous questions, which are quoted in italics in the Analysis section below.

ANALYSIS

The Act's "pay to play" restrictions, contained in Section 84308, aim to ensure that officers of government agencies are not biased by contributors or potential contributors of significant campaign contributions who might appear before them in a proceeding involving a license, permit, or entitlement for use. Section 84308 is aimed not only at actual corruption or bias but also the appearance of corruption or bias.

Section 84308 defines "agent" as a person who "represents [a] party or participant for compensation and appears before or otherwise communicates with an agency for the purpose of influencing the proceeding on behalf of a party or participant." (Section 84308(h)(1).) Effective January 1, 2025, Section 84308 was recently amended to provide, "[a]n agent to a party or participant shall not make a contribution in any amount to an officer during the time periods described in [Section 84308(e)(2)]"—that is, "during the proceeding and for 12 months following the date a final decision is rendered by the agency in the proceeding." (Section 84308(e)(2)-(3).)

You have not provided any facts regarding a particular scenario that an identified client of yours is facing but, rather, have posed numerous general questions relating to recent amendments to Section 84308. Consequently, we have provided general information where relevant, and we encourage you to seek additional advice when you are able to provide additional information regarding a specific scenario.

1. *New Prohibition On "Agent" Contributions*

New subsection (c)(3) states that "agents" to parties seeking land use entitlements may no longer make contributions in any amount to elected officials who have the authority to approve the entitlement or contract. Because this new prohibition was not mentioned in the January 6, 2025 FPFC staff memorandum about updating the regulations to incorporate the new amendments to section 84308, we would appreciate the FPFC confirming that agents of applicants are no longer allowed to make contributions once the application has been submitted and for 12 months after the vote.

Yes. As the language quoted above reflects, your understanding is correct that the statute prohibits agents from making contributions once an application has been submitted and for 12 months after a final decision is rendered by the agency.

2. *In-House Employees of Real Estate Entities Who Do Not Communicate With City Officials*

New subsection (h)(1) defines agents to include in-house employees of an entity who "appear before or otherwise communicates with" city officials about a land use entitlement. Could you please confirm that in-house employees of the entity who do not appear before or otherwise communicate with city officials about the entitlement therefore may still contribute to city officials? Could you also please confirm that in-house employees of the entity who are working on the entitlement or contract – reviewing submissions to the city, strategizing with the entity's lobbyists,

answering inquiries from the public about the project, etc. – also may still contribute as long as they do not communicate directly with city officials about the entitlement?

Yes, to both questions. Section 84308 defines “agent” as a person who “represents [a] party or participant for compensation and appears before or otherwise communicates with an agency for the purpose of influencing the proceeding on behalf of a party or participant.” (Section 84308(h)(1).) Consequently, an in-house employee who does not appear before or otherwise communicate with agency officials regarding an entitlement for use proceeding would not qualify as an agent and, therefore, would not be prohibited from making a contribution under Section 84308(e)(3).

3. In-House Employees Who Communicate With the Planning Department But Not the City Council

Do in-house employees of an entity seeking an entitlement qualify as “agents” if they only communicate with city officials or employees in the city’s planning department but not with city councilpersons or city council staff? Typically, the city’s planning department reviews a land use application for technical compliance with all requirements and perhaps makes a recommendation to the city council, but decision-making authority or granting or denying the application rests solely with the city council. Do in-house employees qualify as agents if they never communicate with the city officials who have the authority to make a final decision in the proceeding?

Yes. The Act’s definition of “agent” is based on communication with the “agency,” not particular officials with final decision-making authority. With limited exceptions not relevant here, Section 84308 incorporates the Act’s general definition of “agency.” (Section 84308(a)(3); Section 82003.) In the context of local government agencies, the term agency means “a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.” (Section 82041.) Consequently, an employee who communicated with a city’s planning department for the purpose of influencing the proceeding on behalf of a party or participant, but did not communicate with city councilmembers or city council staff, would still qualify as an agent and be subject to Section 84308(e)(3)’s prohibition on contributions.

4. Terminated Agents

If a real estate entity terminates its relationship with an outside consultant who had qualified as an agent because he or she communicated with city officials on behalf of the entity, does the consultant cease to be an agent upon termination? If the consultant has made a contribution over \$500 to a city councilperson before the real estate entity submits the land use application to the city, and is then terminated, would this contribution still trigger recusal when the proceeding comes before the city council? Could the consultant make a contribution to a city councilperson if he or she is terminated after the land use application has been submitted?

The Act does not contain any provision regarding “termination” of agent status. Consequently, in the absence of specific circumstances to consider, we cannot provide specific advice at this time.

With respect to a consultant's ability to make a contribution after they are no longer retained as an outside consultant for the real estate entity, and in the absence of specific facts to consider, we would generally and conservatively advise against such conduct. Again, Section 84308 does not contain any provisions regarding "termination" of agent status. Rather, the Legislature established a prohibition that applies for a specific time period—while the proceeding is pending and for 12 months after a final decision is reached. If an individual could make a contribution immediately after they were no longer retained as a consultant, the purpose of the statute could easily be defeated, for example, by having the consultant relationship "end" and then having the former consultant make contributions to the relevant public officials. Again, we are not providing definitive advice regarding this question, but, as a general matter, it appears more likely that such conduct would be prohibited based on the statutory language and legislative intent.

Topics 5 Through 7

You have posed several additional questions, as quoted below:

5. *Providing "technical data or analysis" to city.*

New subsection (h)(4) exempts an applicant's in-house employees and outside consultants providing "technical data or analysis" to the city about a pending land use entitlement. Does this exception cover the CFO of the entity providing information to the city about the entity's finances and funding? Does this exception cover an employee of the entity answering questions from the city about the entity's insurance coverage? An employee who provides information to the city about a poll which the real estate entity took of residents' opinions of the project?

6. *Providing submissions of a "similar nature."*

New subsection (h)(4) also exempts an applicant's in-house employees and outside consultants making "submissions" to the city of a "similar nature" to "architectural and engineering drawings." Does this exception apply to a geology firm explaining the geologist's study of the site's excavation needs to the city? A public affairs firm's summary of comments made by the public about the project at community outreach meetings? An environmental consultant preparing and submitting an EIR?

7. *Discretionary appeal from planning commission decision.*

Often times, municipal codes allow an otherwise final decision of a planning commission on a land use application to be appealed to the city council. The appeal would take place after the planning commission makes its final decision and is entirely discretionary by the project applicant or project opponents. Whether a project applicant or opponent chooses to initiate an appeal after a planning commission decision depends on myriad factors, including cost, the likelihood of success, the possibility of an acceptable compromise, etc.; that is, regardless of whether the planning commission approves or disapproves the application, there is no way of knowing for certain during or even after the planning commission proceeding whether the decision will be appealed to the city council. The matter does not come within the city council's jurisdiction and would not appear on an agenda for a city council meeting unless and until the project applicant or a project opponent chooses to appeal the planning commission's decision. Does the "proceeding" before the city

council become “pending” when the appeal is filed for purposes of determining whether contributions from parties, agents and participants are allowed?

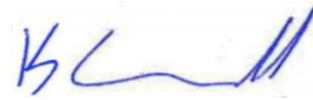
Given the numerous circumstances that could affect our analyses and conclusions, these questions are overly broad and hypothetical for the purpose of providing informal assistance. (See Regulation 18329(c)(4)(C).) If you are faced with a situation similar to the scenarios described in these questions, we encourage you to seek additional advice when you are able to provide facts regarding that particular situation.

If you have other questions on this matter, please contact me at kcornwall@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

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