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ATTORNEY PROGRAM

The More You Know: A Public Services Announcement on California's New Governance and Ethics Laws

Speakers:

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The More You Know

**A Public Service Announcement on
California's New Governance and
Ethics Laws**

Bios



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Session Objectives

- Understand what the Levine Act is, why it was enacted, and how it was recently amended by the Legislature
- Determine the types of proceedings and individuals subject to the Levine Act and the distinctions between them
- Provide helpful hypotheticals and examples
- Explore best practices and novel issues
- Provide a brief overview of other recent governance and ethics law updates and election year reminders

What is the Levine Act?

- Government Code section 84308
- California law originally enacted in 1982, in response to *Los Angeles Times* Article
- Aimed at combatting “pay-to-play” through campaign contributions
- Amended in 2022 to apply to local elected officials
- FPPC Regulations adopted in 2023 (2 CFR 18438 *et seq.*)

Limits, Recusal, and Disclosure

- **Limits contributions** to \$250 from a source with a financial interest in certain proceedings pending or recently decided
- **Officers must recuse** themselves from proceedings if contribution of \$250 received in last 12 months, **or return the** portion of a contribution exceeding \$250
- Applies to contributions from **parties, participants, and agents**
- **Disclosure** by officers and contributors
- Violations may result in fines of up to **\$5,000 per violation**

Actions the Levine Act Applies To

- The restrictions and requirements **only** apply in a specific context: proceedings involving a license, permit, or other entitlement for use, such as certain contracts.
- Section 84308 **does not apply** to proceedings involving general policy decisions (i.e., ordinances, or rules where the interests affected are many and diverse). It also **does not apply** to ministerial (i.e., completely objective) decisions.

Entitlement for Use Proceedings

- These proceedings involve **specific, identifiable parties directly affected** by the proceeding or **participants that would experience a substantial financial impact**.
- Generally, ask, “does this proceeding involve an identifiable person or persons seeking some type of permission, allowance, or contract specific to them, from the government agency?”
- Again, Section 84308 **does not apply** to proceedings involving general policy decisions or rules where the interests affected are many and diverse. It also **does not apply** to ministerial (i.e., completely objective) decisions.

Examples for Water Agencies

- Contracts
 - Includes **most agency contracts**: professional services, agreements with developers, real property transactions (e.g., easements), etc.
 - Exceptions on next slide
- Licenses and permits
- Agency formation or reorganization actions, including annexations
- Leak adjustments or similar individual actions
- Rules affecting a small industry with limited businesses
- Also, many more potential proceedings for land use or other agencies

Entitlement for Use Proceedings Generally DO NOT Include

- Applications decided solely on objective criteria (ministerial)
- General ordinances or resolutions
- Internal policies
- Certain contracts:
 - Competitively bid (awarded to lowest responsive, responsible bidder)
 - Labor
 - Personal employment

Entitlement for Use Proceeding Examples

- A consultant reaches out to a district's Board of Directors regarding a potential amendment to a specific contract between the consultant and the water district.
 - The amendment process **would qualify** as an entitlement for use proceeding.
- A consultant reaches out to the Board of Directors regarding the need for changes to the District's contracting process generally (e.g., RFP thresholds).
 - This **likely would not qualify** as an entitlement for use proceeding given the general application and numerous potential consultants such a change would apply to.

Entitlement for Use Proceeding Examples

- At a Board of Directors meeting, a non-profit organization advocates in favor of the District allocating more unrestricted funds to recreational purposes the District's reservoir
 - Because the issue relates to a general policy decision (allocation of District budget), it **would not qualify** as an entitlement for use proceeding.
- The Board approves the additional funding. The Board then considers a contract with the non-profit to provide recreational services to the community at the reservoir.
 - Unless the contract was competitively bid (lowest responsive, responsible bidder), the contract and contracting process **would qualify** as an entitlement for use proceeding

Who Does Section 84308 Apply to?



Officers



Parties



Participants



Agents

Officers

- Section 84308 defines “officer” to include two categories:
 - 1) Candidates for office; and
 - 2) Officers of the agency
- FPPC regulations further define “officer of the agency” to include:
 - 1) Elected Officials;
 - 2) Board & Commission Members;
 - 3) Chief Executives of the Agency; and
 - 4) Agency employees with decisionmaking authority in the proceeding, who are candidates for office or have been candidates within the preceding 12 months



Officers

- “Agency employees with decisionmaking authority in the proceeding, who are candidates for office or have been candidates within the preceding 12 months”
- Who does this apply to?
 - Example: A district employee with discretion to approve or reject a contract, and who is running for a position on the local school board, city council, etc.
- This person does not have to be a member of a district’s board, city council, or planning commission to be an “officer of the agency”



Excluded Officers

- Very few officers and agencies are excluded from the scope of Section 84308:
 - Courts or any agency in judicial branch;
 - The Legislature;
 - The Board of Equalization;
 - Constitutional Officers (e.g., Governor, Lieutenant Governor, Secretary of State)
- If an individual is an elected or appointed official at the local level (or running for such an office), they are subject to Section 84308.



Requirements for Candidates

- For someone who is just a candidate for office, but doesn't act as a decisionmaking employee in the proceeding, **Section 84308 does not restrict how much can be contributed to them or how much they can accept beyond ordinary contribution limits.**
- However, if the candidate wins and takes office, they will **likely be required to either recuse** themselves from the proceeding **or return** the excess portion of the contribution.



Requirements for Officers of the Agency

- Section 84308 places more immediate restrictions on those who qualify as an “officer of the agency.”
- Prohibited from accepting, soliciting, or directing a contribution greater than \$250 from a party, participant, or their agent while the entitlement for use proceeding is pending, and for 12 months after a final decision in the proceeding.
- Officers of the agency who have received a contribution exceeding \$250 within the past 12 months must either recuse themselves or return the excess contribution.
 - Must also disclose such contributions.



Requirements for Parties

- Section 84308 defines a “party” as “any person who files an application for, or is **the subject of, a proceeding** involving a license, permit, or other entitlement for use.”
 - Examples: applicants, claimants, respondents, contracting parties
- Parties and their agents **cannot contribute more than \$250** to an officer of the agency **while the entitlement for use proceeding is pending, and for 12 months after** a final decision in the proceeding.
- Parties **must disclose** any contribution greater than \$250 they have made to an officer of the agency within the 12 months prior to the entitlement for use proceeding.



Participants

- A “participant” in an entitlement for use proceeding is a person (or entity) who:
 - (1) is **not a party**; but
 - (2) who **actively supports or opposes** a particular decision in a proceeding involving a license, permit, or other entitlement for use; and
 - (3) who **has a financial interest** in the decision.



Requirements for Participants

- Like parties, participants **cannot contribute more than \$250** to an officer of the agency **while the entitlement for use proceeding is pending**, and for 12 months after a final decision in the proceeding.
- Unlike parties, participants are **not required to disclose** any contribution greater than \$250 they have made to an officer of the agency within the 12 months prior to the entitlement for use proceeding.



Active Support or Opposition

- **Communication** with an officer or employee of an agency **for the purpose of influencing** a decision
 - Can be made via agent
 - Examples: Providing public comment during a meeting, directing a message to an officer or employee via phone, e-mail, U.S. mail, or in person
- Does **not** include communications made to the public outside the proceeding
 - Examples: Protesting outside government buildings, publishing op-ed articles, advertisements



Financial Interests

- An individual generally has a “financial interest” in an entitlement for use proceeding if it would have a **reasonably foreseeable, material financial effect** on one or more of their economic interests.
- To determine “reasonable foreseeability,” ask:
 - Is a material financial effect a **realistic possibility**, and not just hypothetically or theoretically possible?



Material Financial Effects

- To determine if a proceeding would have a reasonably foreseeable material financial effect on an individual or entity's economic interest to qualify them as a "participant," **different standards apply based on the type of economic interest involved**, including:
 - Business entity interests;
 - Real property interests; and
 - Source of income interests.
- These are the same standards that apply when a public official is determining if they have a conflict of interest in a governmental decision.



Agents

- A person is an “agent” of a party or participant in a pending entitlement for use proceeding if the person:
 - **Represents** that party or participant **for compensation**; and
 - Appears before or otherwise **communicates** with the governmental agency **for the purpose influencing** the proceeding.
- An agent’s contributions are combined with those of the party or participant they represent for purposes of calculating the \$250 contribution limit.
- Like parties, agents’ contributions exceeding \$250 within the past 12 months must be disclosed.



How Does Section 84308 Affect Employees?

- **Most employees will not qualify as agents** because their work does not involve representing a company, non-profit, or other entity in the entitlement for use proceeding and they are not communicating with the government agency for the purpose of influencing the proceeding.
- If an employee *does* meet those criteria, they will qualify as an agent for purposes of Section 84308.
- **An employee qualifying as a “participant” is also a limited scenario** and will only occur if they take part in the proceeding (e.g., provide public comment) and the proceeding would have a reasonably foreseeable, material financial effect on one of their economic interests, including their employer.



Training Progress

- What is the Levine Act?
- Why was it created?
- What does it generally require?
- What types of proceedings does it apply to?
- Who does it apply to?
- **Now let's address:**
 - How is the \$250 contribution calculated?
 - What is the distinction between a participant and an agent?
 - When is a proceeding "pending?"
 - What does disclosure require?
 - What if a party or participant has already contributed more than \$250?

How is the \$250 Contribution Calculated?

- The \$250 limit applies to any 12-month period.
 - Example: A consulting company contributes \$100 to a Board Member on January 1, then submits a proposal to the District on January 2. At that point, an entitlement for use proceeding is pending with respect to the company. During the next 12 months, the company may only contribute an additional \$150 to that Board member.
 - Example: A developer submits a request for annexation into the District on January 1, 2024, and on January 2, 2024 contributes \$250 to a Board Member on January 2. On January 2, 2025, the request is still pending with no final decision having been made. The developer may contribute another \$250 to the Board Member, even though the proceeding is still pending, because it has been 12 months since any contribution was made.

Aggregation

- Contributions by a party or participant are combined with contributions by:
 1. Their respective agent(s) (e.g., the employee paid to represent the non-profit at the proceeding);
 2. Those who direct or control the party's/participant's contribution (e.g., a CEO or CFO);
 3. Entities with contributions controlled by that same person or a majority of the same persons (e.g., a “parent organization” with contributions controlled by the same person(s))
 4. The majority owner and other entities majority-owned by that person.

NOTE: Contributions by **non-compensated** non-profit officers are **not aggregated**

Participants vs. Agents

Participants	Agents
• <u>Not</u> a party or representative of party	• Representative of party or participant
• Must have personal financial interest	• Does not have personal financial interest
• Uncompensated in connection w/ proceeding	• Compensated in connection w/ proceeding
• Contributions are <u>not</u> combined w/ contributions by party	• Contributions <u>are</u> combined w/ contributions by party or participant agent is representing

Participants vs. Agents Example

- A non-profit focused on water quality has submitted an application to the District's Parks and Recreation Committee for an event permit that would allow the non-profit to host a large fundraising and issue awareness event at the District's reservoir/park.
 - The non-profit is a party to the proceeding.
- The non-profit has an employee who serve as the organization's Community Outreach Coordinator. In her capacity as an employee, she writes to the District's Director of Parks and Recreation and appears at a Parks and Recreation Committee meeting to express support for the application and how the event will benefit the District.
 - The Outreach Coordinator is an agent in the proceeding.
- Another employee of the nonprofit is not authorized or tasked with speaking on behalf of the organization, but submits a public comment in their personal capacity because the issue is important to them and they believe the event will be beneficial to the community. Because the employee's source of income—the non-profit organization—is the subject of the proceeding, the employee automatically has a financial interest in the proceeding.
 - The employee qualifies as a participant in the proceeding.

Example Continued

- At the same Parks and Recreation Committee meeting, a District resident offers a public comment, stating that while they agree that the issue is important, they think a different park located in a less residential neighborhood is a more appropriate venue. The resident explains that he lives directly access the street from the entrance of the park where the event is proposed, and traffic from the proposed event would prevent him from hosting his weekly garage sale.
 - Here, the resident also qualifies as a participant in the proceeding.
- One of the members of the Parks and Recreation Committee is running for re-election to the Board of Directors. What is the relevant contribution limit for everyone involved?

Non-Profit	Outreach Coordinator (Agent)	Other Employee (Participant)	City Resident (Participant)
\$250 <u>combined</u>		\$250	\$250

When Do These Restrictions and Requirements Apply?

- Parties, participants, and agents are prohibited from contributing more than \$250 while the **proceeding is pending** and for 12 months after a final decision is rendered.
- For parties, participants, and their agents, an entitlement for use proceeding is **“pending”** when it is **before the jurisdiction of the agency for its decision or other action**.
 - Examples:
 - After a developer submits an application to the District/City;
 - After a proposal for a contract has been submitted or negotiations have begun.

“Pending” for an Officer

- For officers, an entitlement for use proceeding is “pending” when either:
 - 1) The decision is **before the officer for the officer’s consideration**;
 - Example: A developer’s agreement for construction of District facilities is placed on the Board of Directors’ meeting agenda for discussion or decision.
 - 2) The officer **knows or has reason to know a proceeding** involving a license, permit or other entitlement for use **is before the jurisdiction of the agency** for its decision or other action, and it is **reasonably foreseeable the decision will come before the officer** in the officer’s decisionmaking capacity.
 - Example: Two months before the developer’s agreement comes before the Board, the General Manager has lunch with a Board Member and discusses the agreement with the Board Member.

What is a Party Required to Disclose?

- When a party has contributed more than \$250, in the aggregate, to an officer of the agency, the party must disclose:
 - The **amount of the contribution(s)** made within the past 12 months; and
 - The **names** of the persons whose contributions are required to be aggregated with the party (e.g., contributions by the party's agent or the company officer who directs and controls the party's contributions).
- Generally, **disclosure must be made on the date the party files** the application or other request initiating the proceeding.

What is an Officer Required to Disclose?

- An officer is required to disclose any contribution the officer knows or has read to know of, either orally or in writing, **on the public record at the beginning of a public meeting**, if a meeting is held regarding the proceeding.
- If an officer learns of a contribution during a public meeting, the officer must make the disclosure on the public record **prior to continuing to take part in the proceeding**.
- If no public meeting is held, **written disclosure** must be entered into the agency's official records.
- The officer is required to disclose: (1) that they have received **contributions from the party, participant, or agent** of more than \$250 within the past 12 months; and (2) the **names of the contributors**.

What if a Party or Participant Contributed More Than \$250 Before the Proceeding?

- A party or participant does not violate Section 84308 by contributing more than \$250 to an officer of an agency **before** an entitlement for use proceeding is pending.
- However, the officer will likely either have to recuse themselves from the proceeding or return the portion of the contribution exceeding \$250.
- An officer is eligible to return a contribution within 30 days from the time the officer knows, or should have known, about the contribution and the proceeding.

Penalties

- Administrative enforcement proceeding by FPFC, including penalties of up to \$5,000 per violation
- Criminal misdemeanor proceeding
- Civil action

Legal Challenge

Family Business Association of California, et al. v. Fair Political Practices Commission (Case No. 34-2023-00335169-CU-MC-GDS)

- Alleged that updated version of Levine Act was unconstitutional and an unlawful amendment to the PRA, among other claims
- Dismissed on June 16, 2023
- Deadline to file an appeal has passed

Pending Legislation

- AB 2911 (McKinnor)
Would raise \$250 threshold to \$1,500
- SB 1243 (Dodd)
Would narrow application (contributions of \$1,000+, changes time periods, exempts housing developments)
- SB 1181 (Glazer)
Would require information about Levine Act disclosure to be included on agendas

Notable FPPC Advice Letters

- Applies to contributions to candidates for a political party's county central committee
- Applies to proceedings for small contracts like purchase orders
- Strong mayor may participate in proceeding *due to necessity*, but still may not solicit, direct or receive prohibited contributions
- Contracts or proceedings under delegated authority are still subject to the \$250 limit (e.g., party cannot donate more than \$250 to Board members while a contract proposal is pending with the General Manager or department head or 12 months after)
- Competitively bid contract for sale of property is exempt

Outstanding Issues

- Proceedings arising out of a closed session item (e.g., settlement agreement)
- Change orders to competitively bid contracts

Best Practices

- Revise application forms and RFPs to require applicants and proposers to disclose any contributions made to officers or candidates when they submit the application
- Add a standing agenda item reminding officers to disclose contributions
- Provide training to officers

Resources

FPPC Resources:

- Section 84308 Guide for Officers (PDF)
- Section 84308 Guide for Parties, Participants, and Agents (PDF)
- Section 84308 webpage
- Email the FPPC at advice@fppc.ca.gov with any requests for informal assistance or formal advice

Other Recent Governance / Ethics Laws

Effective January 1, 2024:

- AB 557, extends statutory authority for full or partial teleconference meetings during Governor-declared States of Emergency
- AB 334, clarifies Government Code section 1090 and its application to independent contractors who might work on multiple phases of the same project

Other Election Year Reminders

- Behested payments - Form 803
 - Elected officials' disclosure of payments for charitable, legislative or governmental purposes when the official is involved in requesting the payments
- Prohibition on expenditure of public funds or resources for or against ballot measures
 - Government Code §§ 82013, 82015, 82025, 82031, 82041.5, 89001, 89002; 2 CFR 18420.1, 18901.1; *Stanson v. Mott*, etc.
- Mass mailings at public expense
 - 200+ tangible items featuring an elected official using public funds
 - Exceptions further limited within 60 days of election (letterhead/roster, meeting announcement, event announcement, business cards)

Questions?
