

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18361.4. Probable Cause Proceedings.

(a) Probable Cause. Under Sections 83115.5 and 83116, probable cause exists when the evidence sufficiently supports a reasonable belief or strong suspicion that the Act has been violated.

(b) Probable Cause Report. To commence probable cause proceedings pursuant to Sections 83115.5 and 83116, the Chief of Enforcement shall direct Enforcement Division staff to prepare a probable cause report that contains a written summary of the law and evidence that supports a finding of probable cause that each alleged violation of the Act has occurred, as well as a description of any exculpatory evidence indicating a violation alleged in the report did not occur. The probable cause report may include hearsay evidence, including declarations of investigators or others relating the statements of witnesses or concerning the examination of physical evidence.

(c) No probable cause hearing will take place until at least 21 calendar days after Enforcement Division staff provides the following, by service of process or registered or certified mail with return receipt requested, to each respondent:

(1) A copy of the probable cause report;

(2) Notification that each respondent has the right to respond in writing to the probable cause report and to request a probable cause conference at which the respondent may be present in person and represented by counsel, notification of all deadlines to file a written response, and request a probable cause conference;

(3) If the Commission met in executive session on this matter pursuant to Regulation 18361.2, a copy of any staff memoranda submitted to the Commission at that time along with the recording of any discussion between the Commission and the staff at the executive session as required in subdivision (b) of Regulation 18361.2; and

(4) A probable cause checklist form which includes information regarding a respondent's options for a probable cause conference, written response, and evidence, as well as the respondent(s) best contact information, available dates, and preferred method of service.

(d) Response to Probable Cause Report; Request for Probable Cause Conference; Waiver.

(1) Not later than 21 calendar days following service of the probable cause report, or the date records were sent pursuant to (d)(3), a respondent may submit a written response to the probable cause report. The response should contain a summary of law and evidence that supports a finding that the probable cause report fails to establish probable cause that any or all of the alleged violations of the Act occurred. Any response shall be filed with the Commission Assistant by electronic mail at CommAsst@fppc.ca.gov or U.S. mail, who will send a copy, to all parties named in the probable cause report within 2 business days.

(2)(A) Not later than 21 calendar days following service of the probable case report, or the date records were sent pursuant to subdivision (d)(3), any respondent may request a probable cause conference which shall be filed with the Commission Assistant by electronic mail at CommAsst@fppc.ca.gov or U.S. mail, who will provide a copy to all other parties named in the probable cause report and forward the request to the hearing officer assigned to the matter from the Legal Division within two business days. The Commission Assistant shall schedule the probable cause conference and if the probable cause checklist has not been returned, make efforts to obtain the information from the respondent(s).

(B) If a respondent requests a probable cause conference later than 21 days following service of the probable cause report or the date records were sent pursuant to subdivision (d)(3), the assigned hearing officer may grant the request based on good cause, including a showing by respondent that they did not timely receive the probable cause report after it was served, or some other circumstance reasonably justifying respondent's failure to timely request the hearing. However, no late request for a probable cause conference shall be granted if the assigned hearing officer has already issued an order for an Accusation to be served on the respondent.

(C) The conference shall proceed no later than 75 days after receipt by the Commission Assistant of the filed request for a probable cause conference, or 75 days after the date records are sent pursuant to subdivision (d)(3), unless the assigned hearing officer extends the time for good cause based on an extension request filed by any party with the Commission Assistant. If respondent requests a probable cause conference but the probable cause conference does not timely proceed, the Commission assistant shall set a probable cause conference to occur within 14 calendar days and provide notice of the conference to all parties. The hearing officer shall conduct the conference informally.

(3) Within 21 calendar days following the service of the probable cause report, a respondent may request by electronic mail at CommAsst@fppc.ca.gov or U.S. mail a copy of all records in the possession of the Enforcement Division obtained for purposes of that investigation that are not readily available public records or otherwise in the possession of the requesting respondent, except records that it claims are confidential, were received in response to an administrative subpoena, or otherwise contain protected information, as required in subdivision (d)(3)(B). For purposes of this subdivision, the term “readily available public records” includes

any statements, reports or other records available to the public in electronic format on a government agency website.

(A) The Enforcement Division will provide copies of the requested records upon payment of a fee for direct costs of duplication or provide electronically without cost. The Enforcement Division shall provide such records by electronic mail or U.S. mail to all respondents, with a copy to the Commission Assistant. A respondent may submit a written response to the probable cause report described in subsection (1) no later than 21 calendar days after the evidence is sent. The records produced by the Enforcement Division pursuant to this subdivision shall be considered the final production at the Probable Cause level and is not appealable.

(B) If requested by respondent, the Enforcement Division shall provide a description of records withheld, which shall include the following information:

- (i) the date of the record;
- (ii) the identity of the author(s);
- (iii) the identity of the recipient(s);
- (iv) the specific ground for which the objection to produce the record is made; and
- (v) the current location of the record.

(4) If a respondent fails to file a timely response, make a timely request for a probable cause conference, or appear for a probable cause conference, the respondent waives the right to further probable cause proceedings under Section 83115.5, and the Enforcement Division may transmit copies of the Probable Cause Report, Request for a Finding of Probable Cause, and Order that an Accusation be Prepared to the Commission Assistant requesting that a hearing officer from the Legal Division find probable cause based on the information provided. Upon a

finding of probable cause, the hearing officer will issue an Order Finding Probable Cause and serve it on all parties.

(5) The hearing officer may extend any of the time limits in subdivision (d) if good causes exists.

(e) Rebuttal. Not later than 14 calendar days following the date the response was filed with the Commission Assistant, Enforcement Division staff may submit any evidence or argument in rebuttal to the response which shall be filed with the Commission Assistant by electronic mail at CommAsst@fppc.ca.gov who will provide a copy to all parties. These are the only briefings to be considered by the hearing officer when making the determination of probable cause.

(f) Probable Cause Conference. The conference shall be closed to the public unless a respondent requests, and all other respondents agree, to a public conference. If the conference is not public, then only the parties named in the probable cause report, their legal counsel or representative and Enforcement Division staff shall have the right to be present and participate. Any party may send a request to the Commission Assistant at least 7 days before the probable cause conference that the hearing officer allow witnesses to participate in the probable cause conference. The request shall identify each witness and summarize the subject of the witness's testimony, and be sent to all parties. The hearing officer, in making this determination, shall consider the relevancy of the witness' proposed testimony, whether the witness has a substantial interest in the proceedings, and whether fairness requires that the witness be allowed to participate. Representatives of any civil or criminal prosecutor with jurisdiction may attend the conference at the discretion of the hearing officer if they agree to respect the confidential nature of the proceedings. If the conference is not open to the public, then the conference may be

conducted in whole or in part by telephone or videoconference. The Enforcement Division shall record the probable cause conference. The hearing officer may determine whether there is probable cause based solely on the probable cause report, any responses or rebuttals, evidence submitted, and any arguments presented at the probable cause conference by the parties. The hearing officer may, based on a showing of good cause, permit any party to submit additional evidence at or after the probable cause conference if the additional evidence is summarized at the probable cause conference. Only evidence that confirms or disproves a statement made at the probable cause conference may be submitted after the conference.

(g) Finding of Probable Cause. A finding of probable cause by the hearing officer does not constitute a finding that a violation occurred. The hearing officer shall not make a finding of probable cause if presented with clear and convincing evidence that, at least 21 working days prior to the alleged violation, the respondent requested written advice from the Commission staff pursuant to Section 83114(b), disclosed truthfully all the material facts, and committed the acts complained of in reliance on formal advice of Commission staff or because of Commission staff's failure to provide advice. If the hearing officer makes a finding of probable cause, then the Enforcement Division shall prepare an Accusation pursuant to Section 11503 and have it served upon the person or persons who are subjects of the probable cause finding. The hearing officer shall publicly announce the finding of probable cause. The announcement shall contain a summary of the allegations and a cautionary statement that the respondent is presumed to be innocent of any violation of the Act unless a violation is proved in a subsequent proceeding. The Chief of the Enforcement Division shall be responsible for the presentation of the case in support of the Accusation at an administrative hearing held pursuant to Section 83116.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 83115, 83115.5 and 83116, Government Code.

HISTORY

1. New section filed 10-26-2004; operative 11-25-2004 (Register 2004, No. 44).
2. Amendment filed 7-18-2007; operative 8-17-2007. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements) (Register 2007, No. 29).
3. Amendment filed 12-7-2011; operative 1-6-2012. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2011, No. 49).
4. Amendment filed 11-16-2020; operative 1-1-2021 pursuant to Cal. Code Regs., tit. 2, section 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2020, No. 47).