

## Fair Political Practices Commission

### Memorandum

**To:** Chairman Schnur, Commissioners Garrett, Hodson, Montgomery, and Rotunda

**From:** John W. Wallace, Assistant General Counsel  
Scott Hallabrin, General Counsel  
Roman Porter, Executive Director

**Subject:** Adoption of Amendments to Regulation 18313.5

**Date:** January 18, 2011

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#### **Proposed Commission Action and Staff Recommendation**

Adopt amendments to Regulation 18313.5 concerning online posting of information relating to Commission investigations.

#### **Background and Reasons for Proposed Adoption of New Regulation**

In an effort to provide the public with greater transparency of the Commission's enforcement activity, in February 2007, the Commission's communications staff began responding to inquiries regarding enforcement complaints filed with the Commission.<sup>1</sup> Staff confirmed the receipt of sworn complaints and acknowledged whether an investigation was opened in response to this complaint. Prior to this time, the Commission would neither confirm nor deny the receipt of a complaint or the initiation of an investigation, unless there was some evidence the complainant had already made the complaint public.

In connection with this change, the Commission also began to strictly comply with Section 83115 of the Act. This statute requires the Commission to notify complainants in writing if the Commission takes or plans to take action on the complaint, together with the reasons for such action or nonaction. Moreover, in May 2008, the Commission added a new parallel requirement to Regulation 18360 (with the support of the regulated community),<sup>2</sup> which requires the Executive Director to provide the subject of a sworn complaint with copies of these same documents. The decisions undertaken at the time were initiated with the intent to ensure fair access to this public information by all parties (media, public, individual named in a complaint).

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<sup>1</sup> See September 17, 2010 letter from FPPC Executive Director Roman Porter. (Attachment 1.)

<sup>2</sup> See May 16, 2008 letter from Deborah Kaplan on behalf of the California Political Attorneys Association and April 21, 2008 comment letter from Lance Olson. (Attachment 2.)

### **Public Records Act**

All of the documents discussed above are public records and made readily available through Public Record Act requests from the media, public officials, law firms, and any other person who requested them. Under the Public Records Act, all documents are deemed public unless an express exception exists.

Generally, all transparency laws and policies are based on the same purposes. For example, Section 54950 of the Government Code provides:

“The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

The California Public Records Act (CPRA) contains a similar express declaration of the CPRA’s purpose: “the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.” (Section 6250.)

The Supreme Court described the Public Records Act in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 as follows:

“The Public Records Act, section 6250 et seq., was enacted in 1968 and provides that ‘every person has a right to inspect any public record, except as hereafter provided.’ (§ 6253, subd. (a).) We have explained that the act was adopted ‘for the explicit purpose of “increasing freedom of information” by giving the public “access to information in possession of public agencies.” ’ (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [230 Cal.Rptr. 362, 725 P.2d 470].) As the Legislature declared in enacting the measure, ‘the Legislature . . . finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.’ ” (Section 6250.)

Moreover, in *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, the Supreme Court stated:

“Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.”

### **Prior Commission Action on Regulation 18313.5**

After review of the Commission's processes, it was later determined in September 2010, that the Commission could improve its efforts at making certain the public and media are provided with information in a more even-handed and less burdensome manner. Staff found that providing the media with verbal acknowledgement of receiving a complaint or initiating an investigation was inherently biased, since an inquiry would only be made if a reporter had been "tipped off" about a complaint or investigation, or if the reporter were "fishing" for a story. Additionally, since these documents are public records, it seemed unduly burdensome to require members of the public, the media, and campaign staff to submit a formal Public Records Act request for documents that could easily and routinely be redacted and posted online, consistent with other Commission documents.

The decision to post all notices of investigations and their complaints normalizes the information that is provided to the media and public, is consistent with the Public Records Act, and provides an opportunity for the media and public to better scrutinize the operations of the Commission's Enforcement Division.

In May 2010, Regulation 18313.5 was enacted to codify many of the Commission's online posting practices. It provides in pertinent part:

"(a) Not later than 10 days after issuance or receipt by the Commission, the Commission shall post the following information on its website:

"(1) Commission opinions issued pursuant to subdivision (a) of Section 83114.

"(2) Staff advice letters issued pursuant to subdivision (b) of Section 83114.

"(3) Warning, advisory, and closure letters issued by the Enforcement Division.

"(4) Behested payments reports filed with the Commission pursuant to subdivision (b)(2)(B)(iii) and (b)(3) of Section 82015."

At the time Regulation 18313.5 was proposed, staff described the purpose of the regulation as follows:

"The Commission's goal was to make it easier for individuals visiting the website to gain access to important public information regarding Commission activities concerning the enforcement and interpretation of the Political Reform Act as well as other informational reports the Commission deems related to its purposes."

As noted above, in September of 2010 the Commission staff began posting these materials on its website. This decision was based, in part, on the following: (1) the Act and regulations require the release of enforcement investigation notice letters and the associated sworn complaints to the complainant and the person subject to the complaint, and (2) that once these documents were released to the complainant and the person subject to the complaint, there was no justification under the Public Records Act to withhold these documents and the requirement to request these documents is burdensome, in light of current technology.

### **How Notification Letters are Posted**

With respect to investigations based on sworn complaints, the Enforcement Division posts the investigation confirmation letters and initial complaint form. In regard to investigations initiated by the Enforcement Division, the Enforcement Division posts the notice letters and letters on which the investigation is based, if any.<sup>3</sup> With the posting, the website cautions:

“Within 14 days of receiving a complaint signed under penalty of perjury, the Fair Political Practices Commission must inform the complainant of whether or not we will investigate their allegations. The FPPC has begun posting enforcement cases that staff determined, as of September 9, 2010, warrant further investigation. **At this time the Commission has not made any determination about the validity of the allegations made, or about the culpability, if any, of the persons identified below.** (Bold in original).

“Commission staff does not provide status updates on investigations. Investigations are resolved with a determination of no wrongdoing, through advisory or warning letters, issuance of administrative fines, and in some instances civil lawsuits. Once a case is closed, a link to the document discussing the method of closure will be provided.”<sup>4</sup>

### **Public Meetings**

On October 20, 2010, Commission staff held an interested persons meeting to discuss this posting decision. Several issues were discussed, including the manner in which the information was posted on the website, as well as posting other enforcement information on the website. Staff received supportive comments from members of the public and Common Cause, but negative feedback from the California Political Attorneys Association (the “CPAA”). The CPAA advocated rolling the web posting and press policies back to those that existed prior to the decisions of February 2007. They advocated that the Commission cease confirming or denying that investigations were

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<sup>3</sup> The Commission redacts addresses, telephone numbers, e-mail addresses, signatures, and personal financial information before posting to the website.

<sup>4</sup> A copy of the Investigations web page is attached as Attachment 3.

initiated and to cease confirming or denying even the fact that a complaint had been received. They further advocated that no information or documents related to an enforcement action should be released or acknowledged by the Commission, prior to the final disposition of the matter. The CPAA letters raise a variety of concerns that appear to be only satisfied with a total information embargo until the matter is settled or resolved by this Commission after administrative adjudication, which staff does not support.

In light of the comments made at the Interested Persons Meeting, staff had an additional meeting with CPAA representatives where they raised the possibility of posting responses to complaints filed by persons subject to investigation. Staff considered this request and cannot recommend implementation due to the following concerns:

1. **Timing Issues:** Once a decision has been reached to investigate a complaint, any information obtained by the Enforcement Division would be part of an ongoing investigation and the Commission will not release these documents. Thus, any posting-of-responses rule could only apply to the period before the Enforcement Division determines whether or not to investigate a complaint (generally within 14 days).
2. **Process Issues:** It would not be feasible or proper for the agency to review for content the responses received prior to investigation. Subjectively picking and choosing which responses or parts of responses should be posted raises a specter of favoritism or bias in the editing/selection process. Thus, staff's position is that the posting of the responses would need to be an "all or none" process.
3. **Content Issues:** There is a significant concern that the unedited responses will contain cross accusations, the identification of potential witnesses, or other inappropriate content that could harm the investigation or otherwise try the matter in public on the Commission's website. Thus, even within the narrow time constraints of the first consideration, in light of the second consideration, posting of responses could lead to more harm than good.
4. **Balance Issues:** If the Commission began posting responses to complaints, undoubtedly, complainants would want to submit their counter responses, resulting in our website becoming a Commission facilitated medium for campaign messages.

On January 7, 2011, we received a comment letter from Vigo G. Nielsen, Jr. of Nielsen, Merksamer, Parrinello, Gross, & Leoni, LLP regarding the memorandum posted for the December Commission meeting. In essence, Mr. Nielsen suggested that the burden of the added task of posting and redacting responses to complaints would be insignificant. Mr. Nielsen's assertion seems to be based on the erroneous assumption that the Enforcement Division already performs substantive redaction of complaints. In fact, the Enforcement Division does not perform any substantive redaction of complaints.

Rather, the Enforcement Division only redacts specific types of information -- such as signatures, addresses, and telephone numbers.

As noted above, review, redaction, and posting of response letters creates an entirely new level of complexity to the posting of information on the website. Mr. Nielsen acknowledged that the regulation should not create a campaign forum or debate page -- but Mr. Nielsen fails to recognize that this policing of the content of responses required to avoid campaign messages puts the enforcement division in the inevitable position of having to censor documents that could create an appearance of favoritism.

Finally, Mr. Nielsen also stated that the Commission should simply adjust calendars and/or current regulations in order to assume these new duties. Obviously, staff would oppose delaying the investigation of complaints or in any way making the enforcement investigation process dependent on the review, redaction, or posting of responses to complaints on our website.

Based on all of these considerations, it is not advisable to post responses on the website. We do note the current process of confirming the receipt of complaints and the initiation of investigations has been in place for more than three years without any apparent harm to individuals subject to investigation or to the political process. The posting of enforcement documents policy has been in place for more than three months (during a statewide election), and there is no evidence to suggest that the practice of posting otherwise public documents on our website has had any detrimental affect on any election in the state.<sup>5</sup> In fact, Enforcement Chief Gary Winuk, who is in charge of the division that receives and investigates complaints regarding violations of the Act, stated that he has seen no evidence that there has been an increase in frivolous or unwarranted complaints since the Commission began posting this information in September 2010.

### **Other Issues**

In an effort to respond to concerns raised by CPAA members, Commission staff has already made changes to the process and the appearance of the posting page. For example, we included language in the regulation requiring the removal of the posting after a specified period of time, so this information is not on the Commission's website in perpetuity. In addition, CPAA raised a concern about posting the complaints in alphabetical order since the first name on the list, alphabetically, could stay at the top of

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<sup>5</sup> In their October 19, 2010 letter submitted in response to the notice of the October 20, 2010 Interested Person Meeting, the CPAA stated that the posting of complaint information has led to increased media coverage of FPPC investigations. (Attachment 4.) However, no supporting data was included. The letter also referenced a news article in the Santa Rosa Press Democrat to support the argument that posting complaints was "causing" articles to be printed. However, upon review of the article, we noted that (1) the complainant provided information that was used by the reporter (and may have initiated the article), and (2) while the article did note the fact that the Commission was conducting an investigation, the article noted that "no determination about the validity of the complaint" had yet been made. Finally, the title of the article did not refer to an FPPC investigation.

the list for a longer period of time. In order to address this, we reordered the list of names by case number, rather than alphabetically, with the most recent cases appearing on top. This means that the name at the top of the list will constantly change as new cases are posted. We also amplified the disclaimer language on the posting page to highlight text that the CPAA felt was the most important.

Others provided comments about making it easier to identify individuals subject to investigation and in addition to the reordering of cases, we added a search function so members of the media and public are able to locate specific individuals, without having to know the corresponding case number, or scroll through each listing.

### **Proposed Amendments to Regulation 18313.5**

The proposed amendment to Regulation 18313.5 would add “Notices of Investigations” to the list of items to be posted on the website. The amendment includes:

- Posting timelines for investigations based on sworn complaints and staff initiated investigations.
- The type of information that will be redacted to preserve privacy rights and where necessary to protect the investigation.
- And finally, the amendment establishes timelines for removal of the information upon completion of the case.

#### ***Attachments:***

1. September 16, 2010 letter from FPPC Executive Director Roman Porter.
- 2a. May 16, 2008 letter from Deborah Kaplan on behalf of the CPAA
- 2b. April 21, 2008 comment letter from Lance Olson.
3. A copy of the Investigations webpage
4. October 19, 2010 CPAA letter submitted in response to the notice of the October 20, 2010 Interested Person Meeting.
5. January 7, 2011, comment letter from Vigo G. Nielsen, Jr.

1 Amend 2 Cal. Code Regs. Section 18313.5 to read:

2 **§ 18313.5. Online Posting.**

3 (a) Except as otherwise provided below, not ~~Not~~ later than 10 days after issuance  
4 or receipt by the Commission, the Commission shall post the following information on its  
5 website:

6 (1) Commission opinions issued pursuant to subdivision (a) of Section 83114.

7 (2) Staff advice letters issued pursuant to subdivision (b) of Section 83114.

8 (3) Notices of Investigations: As described below, letters from the Enforcement  
9 Division to complainants and persons subject to investigation confirming that the  
10 Enforcement Division will investigate the complaint, along with the initial complaint  
11 letter or form.

12 (A) Investigations based on sworn complaints: The Commission will post the  
13 Notice of Investigation letter not later than 10 days after the date the letter has been sent  
14 by the Enforcement Division. The Commission will also post the sworn complaint that  
15 was the basis of the investigation with the Notice of Investigation letter.

16 (B) Staff initiated investigations: In regard to investigations initiated by the  
17 Enforcement Division staff, the Commission will post the Notice of Investigation letter, if  
18 any is sent, not later than 10 days after the date the letter has been sent by the  
19 Enforcement Division. In addition, the Enforcement Division will post the letters, if any,  
20 on which the investigation is based with the Notice of Investigation letter.

21 (C) Regarding the disclosure in subdivision (3)(A) and (B) above, addresses,  
22 telephone numbers, e-mail addresses, personal financial information, and signatures will  
23 be redacted from the documents before posting to the website. At the discretion of the

1 Executive Director or his or her designee, the following may be redacted: personal  
2 information not otherwise covered by this regulation, and the names of complainants or  
3 witnesses named in complaints, if release would interfere with an on-going investigation.

4 At the discretion of the Executive Director or his or her designee, publicly available  
5 information about governmental entities may be excluded from redaction;

6 (D) These documents will be removed 60 days after final disposition of the  
7 complaint, or within one-year after the date the complaint was received, whichever is  
8 longer.

9 ~~(3)~~ (4) Warning, advisory, and closure letters issued by the Enforcement  
10 Division. The address and signature will be redacted from the documents before posting  
11 to the website.

12 ~~(4)~~ (5) Behested payments reports filed with the Commission pursuant to  
13 subdivision (b)(2)(B)(iii) and (b)(3) of Section 82015.

14 (b) The Commission shall also post on its website all statements of economic  
15 interests required to be filed with the Commission on or after January 1, 2010, by elected  
16 officers in their elected capacity. The address, telephone number, and signature block of  
17 the elected official's statement will be redacted from the cover page of the document  
18 before posting to the website. The statement of economic interests will be posted as soon  
19 as possible after the document is filed with the Commission.

20 (c) The information required to be posted on the Commission's website under  
21 subdivision ~~(a)~~ (a)(1), (a)(2), (a)(4) and (b) shall remain posted on the website until the  
22 members of the Commission approve its removal.

- 1 NOTE: Authority cited: Section 83112, Government Code. Reference: Section 81002
- 2 and 83113, Government Code.



**FAIR POLITICAL PRACTICES COMMISSION**

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September 16, 2010

To: Chairman Schnur

Cc: Commissioners Garrett, Hodson, Montgomery and Rotunda

From: Roman Porter, Executive Director

Re: Posting notices of open investigations on FPPC's website

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You asked me to provide you and the Commissioners with historic information regarding the Commission's policy of making available to the public information related to enforcement cases and the recent application of this policy as it relates to posting information about investigations on the Commission's website. Additionally, you asked that I respond to some of the concerns raised in the September 13, 2010 letter submitted by James Harrison of Remcho, Johansen & Purcell, on behalf of the California Political Attorneys Association Executive Committee.

## **Background**

The Commission's policy of providing information relating to enforcement cases has evolved over the 35 years of its existence. The main thrust of this evolution has been how closely the Commission has adhered to the provisions of the California Public Records Act (CPRA).<sup>1</sup> A review of Commission documents provides a window into the impetus for the current course of action and that, for a time, there seemed to be a persistent misunderstanding of the application of CPRA as it relates to enforcement documents.

### ***San Jose Mercury News v. FPPC*,<sup>2</sup> and the California Public Records Act**

In the summer of 1987, the Commission lost a legal challenge in *Mercury News*, where the plaintiff's sought enforcement related documents that were ultimately withheld by the Commission, based on the understanding at the time of the requirements within CPRA. In that case, the Commission's Enforcement Division opened an investigative file into an allegation of a conflict-of-interest violation of former Assembly member Frank Vicencia, where staff ultimately closed the file prior to issuing a probable cause report.

In its defense, the FPPC asserted that probable cause proceedings are conducted in private (unless the subject wants them public) and therefore the law implies that all documents created and maintained leading up to a probable cause proceeding should also be kept private. In this particular case, a probable cause conference was never held and Commission staff asserted that all documents were protected from disclosure, unless that confidentiality is waived by the subject of the investigation. In its ruling, the court recognized that in some instances information should be withheld from the public and the Legislature makes exemptions for this. However, the court noted:

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<sup>1</sup> [California Public Records Act](#) is found in Government Code Sections 6250 et. seq.

<sup>2</sup> *San Jose Mercury News v. FPPC*, No. 343115, Sacramento Superior Court (1987).

If the Legislature had intended that all investigatory records and information prepared and obtained prior to the probable cause proceeding be private, it would have included them in the Section 83115.5 privilege, when it was drafted, or in a later amendment.<sup>3</sup>

The provisions within CPRA provide only two mechanisms by which an agency can withhold public documents.<sup>4</sup> The first is through a specific exemption and the second through a balancing test.<sup>5</sup> The Commission previously asserted that the “law enforcement” exemption contained within section 6254(f) of CPRA shielded disclosure of *all* documents within an investigative file.

While the court in *Mercury News* agreed that the Commission’s investigative files were compiled for law enforcement purposes, since certain violations of the Political Reform Act are punishable as misdemeanors, the decision by the California Supreme Court in *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal. 3d 440, determined that this right to withhold disclosure is not absolute. And in determining when these documents can be withheld, the court in *Mercury News* looked to the five factors of disclosure set forth in *South Coast Newspapers, Inc. v. City of Oceanside* (1984) 160 Cal. App. 3d 261, 265, as identified in the Freedom of Information Act, and determined that none of the indicators to withhold disclosure applied in the case.<sup>6</sup>

Additionally, the court determined that the Commission’s reliance on the balancing test found in Government Code Section 6255, failed to allow withholding all documents, due to the inability of the Commission to demonstrate how the public interest in withholding the information clearly outweighed the interest of disclosure. Ultimately, the court withheld some documents after an in camera review. The Commission did not file an appeal, and to comply with the decision, repealed and readopted Commission regulation 18362, in its current form.

### **Commission Regulation 18362**

Commission regulation 18362 (a) provides that “access to complaints, responses thereto, and investigatory files and information shall be granted in accordance with the requirements if the Public Records Act . . . .” This regulation was last amended in 1987, as discussed above.

### **The role of the FPPC Chairperson**

For the past 23 years, it has been the Commission’s policy to provide documents consistent with the requirements with CPRA, which declares, “In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”<sup>7</sup>

There is no question that various Chairmen and Chairwomen of the Commission have chosen their own methods of applying this policy, consistent with their role as the presiding officer of the Commission as they “ . . . speak for and represent the Commission in communications with the public, the press and government institutions,” and “provide daily oversight of the management of the FPPC.”<sup>8</sup>

Since 1999, there have been three different procedures of how to address media inquiries of the Commission, coinciding with the tenure of three different Commission Chairs. There have likely been other procedures in place based on the will of other Chairmen; however, no documentation could be located demonstrating this.

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<sup>3</sup> Quoted at page 5, lines 20-24.

<sup>4</sup> Public documents are defined within [Government Code Section 6252](#).

<sup>5</sup> [Government Code Section 6253.1\(d\)\(2\)](#)

<sup>6</sup> These factors are now no longer required based on the finding in *Williams v. Superior Court*, 5 Cal. 4<sup>th</sup> 337 (1993), that determined the investigatory exemptions within the Freedom of Information Act and the CPRA are distinct.

<sup>7</sup> [Government Code Section 6250](#)

<sup>8</sup> Fair Political Practices Commission Statement of Governance Principles Section II, C and D as found within the Briefing Book for FPPC Commissioners, revised March 2009.

### **Press guidelines of 1999, 2007 and today**

At the October 8, 1999, meeting of the Commission, the “Press Policies and Guidelines,” were presented for discussion. Although a version of these guidelines distributed throughout the agency after that meeting indicates they were “approved by the Commission,” a review of the meeting minutes indicate that there was minimal input from the Commissioners, other than two complimentary comments, and no vote was taken.<sup>9</sup>

A central theme to these guidelines was that “It has long been the policy of the FPPC not to discuss details of ongoing investigations—or even to confirm that an investigation is being conducted.” Additionally, “If the person or persons who filed a formal complaint release it publicly, we can confirm whether or not we have received a complaint from that source, but no other information can be released.”

Despite the stated rule of not verbally confirming information to reporters or the public as it relates to an enforcement matter, this was not true with regard to the production of documents. **“Reporters requesting information on closed investigations which did not result in a fine are advised to make a Public Records Act Request for that information ...”** (emphasis in original). Access to information contained within open enforcement cases was not mentioned, although one assumes this was because information of this type was never provided.

At the February 7, 2007, meeting of the Commission, a memo was presented for the Commission’s discussion titled, “Updated news communications guidelines,” where there was a continuation of the decision that “communications staff will not confirm or deny receipt of a complaint or the existence of an open investigation.” Additionally, these updated guidelines state **“The FPPC does not allow access to any pending enforcement cases until the case is closed, an accusation is issued, a civil complaint is filed, or a settlement is presented to the Commission.”** (emphasis added). As reflected in meeting minutes, during this hearing the Commission and staff discussed problems with the then current practice and that “The thought in this version was to not advertise the fact that if you can claim you have knowledge of this complaint, we’ll confirm it” that the concept was to “approach it on a case-by-case basis.”<sup>10</sup>

Upon Chairman Johnson’s arrival on February 14, 2007, he informed communications staff that they would now respond to reporter’s inquiries about the receipt of sworn (previously formal) complaints and whether an investigation was opened in response to this complaint. This was done without prior consultation with other Commissioners, or discussing the change at a Commission hearing. There is no documentation of this new approach to responding to reporter’s questions.

This change, among others made at this time by Chairman Johnson, elicited a letter from the California Political Attorneys Association where they raised numerous questions and objections, more central to enforcement procedures regarding complaints and investigations, which were addressed by a response letter from Chairman Johnson and in memoranda outlining the amendment to regulations 18360 and 18361.<sup>11</sup>

During this time, the Commission also began posting information about behested payment reports and on November 8, 2007, the Commission’s website was updated to reflect this emphasis in providing public access to information, which remains today:

“ ... to further the purposes of the Political Reform Act, the Commission is committed to policies and procedures for providing public information to the media ... public records are provided by the Commission in accordance with the Political Reform Act, the California Public Records Act (CPRA) and any other applicable authority or regulation ...”

<sup>9</sup> Approved minutes of the October 8, 1999, meeting of the Commission, p.14. item #17.

<sup>10</sup> [Approved minutes](#) of the February 7, 2007, meeting of the Commission, p. 11 and 13, item 12.

<sup>11</sup> November 7, 2007 letter from the California Political Attorneys Association; November 9, 2007, response to CPAA from Chairman Johnson; [December 26, 2007](#), [January 25, 2008](#), and [May 7, 2008](#) staff memoranda regarding adoption of Regulations 18360 and 18361.

### **Providing information to the public**

After serving as interim Communications Director for several months, on August 31, 2007, I was officially appointed to that position. An issue that I was immediately concerned with what appeared to be a seemingly persistent misapplication of the provisions within CPRA as it applied to the disclosure of information contained within enforcement investigative files that were still open. After many discussions with the Chairman, Executive Director, and the Chiefs of the Enforcement and Legal Division, it was agreed that the Commission needed to modify the manner that enforcement documents were withheld and come up with an overall approach to more easily provide the public and media access to public documents. This effort took time and evolved into the current practice.<sup>12</sup>

Part of a larger approach to conforming the Commission's disclosure efforts to CPRA, is the recognition that it encourages creative methods of disclosure:

“except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.”<sup>13</sup>

In embracing the concept of providing the most streamlined access to public documents possible, Chairman Johnson began, and Chairman Schnur has continued, an effort to move as much public information onto the Commission's website as possible. Since this decision to implement the 23 year Commission policy of providing information consistent with the provisions within CPRA, the following information has been provided:

- When asked, we confirm when we have receive a sworn complaint (since Spring 2007)
- When asked, we indicate when we have opened an investigation (since Spring 2007)
- [Behested payment reports](#) are online (since November 2007)
- [Gift to Agency Reports](#) are online (February 2009)
- [Tickets provided by an Agency Reports](#) are online (February 2009)
- [Enforcement case closure letters](#) are online (August 2009)<sup>14</sup>
- [Statements of Economic Interests](#) of Elected Officials are online (since April 2010)<sup>15</sup>
- [Commission advice letters](#) (previously only available through paid legal research sites)
- [Sworn complaints resulting in an investigation](#) and the confirming letter (September 2010)

### **Responses to the September 13, 2010, CPAA letter**

As discussed above, the decision to post the sworn complaint and Commission letter stating it is opening an investigation is in no way a departure from the 23 year Commission policy of providing access to enforcement complaint files. This decision is consistent with the well-established policy of providing full, timely and meaningful disclosure of Commission documents.

The California Political Attorneys Association expressed concerns in their letter that the online disclosure informing the public of the decision to open an investigation “could have a determinative effect on the outcome of an election,” because a political opponent can use a screen-shot of our website to show we have begun an investigation and use it in a political communication. A political operative can already do this by using the actual letter sent by the Commission to the complaining individual, since they are informed of our intent to investigate within 14 days of their filing a complaint. When the aforementioned changes to the enforcement procedures in Regulation 18360 were discussed by the Commission in 2007 and 2008, the CPAA sent a comment letter to the Commission, stating:

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<sup>12</sup> See [Guidelines for Access to Public Records](#)

<sup>13</sup> [Government Code Section 6253\(e\)](#)

<sup>14</sup> This resulted in a series of letters from CPAA and staff responses: September 8 and 30, 2009 letters from CPAA; [approved minutes](#) of the September 10, 2009, meeting of the Commission, p. 4-5, item 28.

<sup>15</sup> Currently, only the 2009 statements of members of the Legislature and Constitutional Officers are [online](#)

“The CPAA Task Force believes the Commission has moved in the right direction on this issue. We believe the proposed regulations represent a good first step in revising the Commission’s enforcement procedures to conform to the [Political Reform] Act’s enforcement provisions and locking in better due process protections for potential Respondents in enforcement proceedings. These changes will also benefit complainants, Commissioners, and the public generally.”<sup>16</sup>

Additionally, the letter raises due process concerns as an element of objection, determining that the online posting of investigation letters will “eviscerate Section 83115.5 of the Act, which mandates notice to a Respondent 21 days before the FPPC’s ‘consideration’ of an alleged violation at a *private* probable cause hearing” (emphasis in original), continuing, “This provision was intended to prevent the FPPC from publicizing charges against a public official until the official has an opportunity to rebut them.”

I note that the two operative statutes in effect are Government Code Sections 83115 and 83115.5. The provision providing for a probable cause hearing to determine whether or not there is sufficient evidence to “lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a proposed respondent committed or caused”<sup>17</sup> a *violation* is found in 83115.5, which was adopted by the Legislature in 1976.

The requirement to inform a complainant of whether or not the Commission will commence an *investigation*, within 14 days of receiving their complaint, was an original component of the Act and was amended by the Legislature in 1985, striking references to “state,” effectively expanded the reach to complaints made against local officials as, well as state officials.

It is evident that these are two distinctly separate provisions that are not mutually exclusive. Had there been a concern that an individual’s due process rights would be abridged by the disclosure, to the complaining party, that an investigation were underway, the Legislature would have refrained from compelling the Commission to “notify in writing the person who made the complaint of the action, if any, the Commission has taken or plans to take on the complaint, together with the reasons for such action or nonaction.”<sup>18</sup> The Legislature had two opportunities to correct the due process claims stated in CPAA’s letter; during the 1976 adoption of 83115.5, or the 1985 amendment of 83115, but refrained on both occasions.

CPAA argues that while providing a letter indicating an investigation is underway—to an individual who has a vested interest in publicizing that investigation—has not resulted in due process violations, the posting of these notices on the Commission’s website will.

Several primary and general elections have occurred at the state and local level since Chairman Johnson’s decision in February 2007 to acknowledge receipt of complaints and the initiation of investigations. During that time, CPAA has not come before the Commission with concerns that the due process rights of an individual were abridged based on the Commission acknowledging the receipt of a complaint, or an open investigation, or from providing the complainant with a letter informing them the Commission has opened an investigation.

There are undoubtedly situations where political operatives use official information from the FPPC and other governmental bodies to attack their opponents or obfuscate the issues. This information is factual and the Commission can not dictate how it is used by a private individual. The consistency applied to informing the public of the enforcement staff’s decision to open an investigation and the ease by which the public and media will learn of this information is wholly consistent with longstanding Commission policy and does not impinge upon the due process rights of individuals seeking a probable cause conference.

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<sup>16</sup> May 16, 2008, [letter from CPAA](#) responding to [item 7](#) on the May 19, 2008 Commission meeting

<sup>17</sup> [Commission Regulation 18361.4](#)

<sup>18</sup> [Government Code Section 83115](#).



May 16, 2008

**BY PERSONAL DELIVERY**

Honorable Ross Johnson, Chairman  
& Commissioners Remy, Huguenin, Leidigh and Hodson  
Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814

**RE: FPPC AGENDA ITEM 7 (MAY 19, 2008 COMMISSION MEETING)**

Dear Chairman Johnson & Commissioners:

The California Political Attorneys Association Enforcement Task Force (CPAA Task Force) writes this letter regarding the proposed amendments to Regulations 18360 and 18361.

The CPAA Task Force believes the Commission has moved in the right direction on this issue. We believe the proposed regulations represent a good first step in revising the Commission's enforcement procedures to conform to the Act's enforcement provisions and locking in better due process protections for potential Respondents in enforcement proceedings. These changes also will benefit complainants, Commissioners and the public generally. With respect to specifics, we would support the regulations if you:

- (1) Amend proposed Regulation 18360, as proposed by Lance H. Olson, Esq., in his April 21, 2008 letter.
- (2) Amend proposed Regulation 18360 to include a specific provision with respect to the opportunity of Respondents to respond to complaints, copies of which they have received under proposed subdivision (f) of Regulation 18360. We do not propose that such an amendment contain either a specific deadline for such responses from Respondents or for any Commission action in response to such responses.

**Comment:** The CPAA Task Force agrees that the proposed procedures as drafted enable Respondents to take advantage of the opportunity to obtain a copy of the

complaint against them to seek early termination of unmerited complaints against them. However, the reason to include a specific provision for responses to complaints is to provide a “roadmap” to those Respondents who may be less familiar with the Commission’s practical procedures than CPAA’s members. While we recommend this approach as a means to promote Commission efficiency and reduction of the backload of genuine complaints, we do not recommend that such procedures should lock the Commission or its enforcement staff into unachievable deadlines to respond to Respondents’ replies.

- (3) Amend proposed Regulation 18361 to provide specifically that the Executive Director will not, with respect to enforcement activity, make recommendations as to action on enforcement matters to the Commission, while the Executive Director is participating in the investigative or enforcement activities of the Enforcement Division.

**Comment:** The CPAA Task Force also believes the amendments to regulation 18360 and 18361 reflect an acknowledgment of the potential due process problems that arise when the Executive Director participates in enforcement decision-making. While the Commission staff’s proposed solution provides for disqualification and delegation of probable cause duties, provides a case-by-case resolution of the problem, the CPAA would prefer a more explicit acknowledgment that the Executive Director will not be involved in making recommendations concerning enforcement investigations or prosecutions, as an across-the-board rather than a case-by-case approach to addressing this due process issue.

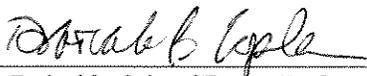
We also believe that the Commission should not stop with the adoption of these amendments. As outlined in previous communications, we strongly believe the Commission should:

- (4) Calendar on your regulatory calendar, notice and adopt further amendments to the other 18360 regulations that are consistent with the pending regulatory amendments. See CPAA Letter of March 12, 2008, and Charles H. Bell, Jr. Letter of February 13, 2008, attachment. We are particularly interested in providing similar guarantees in the procedures by which the Commission decides to initiate civil litigation.
- (5) Calendar on the Commission agenda an action item for the Commissioners’ consideration of a Statement of General Enforcement Principles, giving the staff direction to prepare a proposed set of principles and the public an opportunity to comment on the proposed set of principles.

Hon. Ross Johnson, Chairman  
Commissioners Remy, Huguenin, Leidigh & Hodson  
May 16, 2008  
Page 3

We appreciate the opportunity to address these issues. We understand that several CPAA members will be present and available to offer their perspectives and comments on these issues at the May 19, 2008 Commission meeting.

Very truly yours,



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On Behalf of the CPAA Enforcement Task Force

Charles H. Bell, Jr.  
BELL McANDREWS & HILTACHK LLP

Deborah B. Caplan  
OLSON HAGEL & FISHBURN LLP

Jenny Eddy  
NIELSEN MERKSAMER PARRINELLO MUELLER & NAYLOR

Law Offices of

OLSON

HAGEL &

FISHBURN

LLP

April 21, 2008

Mr. Michael Salerno  
Executive Director  
California Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814

**RE: Proposed FPPC regulation 18360 Amendments**

Dear Mr. Salerno:

I write to suggest an amendment to the proposal to amend regulation 18360. I understand the proposal will come up for adoption at the Commission's May 8 meeting. In paragraph (f)(2) I suggest the following language: "Provide a person who is the subject of the formal complaint with a copy of the complaint immediately upon receipt of the complaint and a copy of any notification sent to the complainant pursuant to paragraph (f)(1) at the same time the notification is sent to the complainant."

Thank you.

Very truly yours,

**OLSON HAGEL & FISHBURN LLP**



LANCE H. OLSON

LHO/sjg

Lance H. Olson  
Bruce J. Hagel  
Diane M. Fishburn  
Elizabeth L. Gade  
Deborah B. Caplan  
N. Eugene Hill  
Richard C. Miodich  
Richard R. Rios  
Rebecca J. Olson  
William B. Tunick



# California Fair Political Practices Commission

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## FPPC Investigations

- Interested Persons
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  - More...
- Education & Training
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Within 14 days of receiving a complaint signed under penalty of perjury, the Fair Political Practices Commission must inform the complainant of whether or not we will investigate their allegations. The FPPC has begun posting enforcement cases that staff determined, as of September 9, 2010, warrant further investigation. **At this time the Commission has not made any determination about the validity of the allegations made, or about the culpability, if any, of the persons identified below.**



Commission staff does not provide status updates on investigations. Investigations are resolved with a determination of no wrongdoing, through advisory or warning letters, issuance of administrative fines, and in some instances civil lawsuits. Once a case is closed, a link to the document discussing the method of closure will be provided.

Results per page: 10

Match:  any search words  all search words

Name	Case #	Notice of Investigation/Complaint	Case Disposition
Tripp, Richard	10-1045	<a href="#">Complaint Letter</a>	
Holmes, Jeffrey	10-1044	<a href="#">Complaint Letter</a>	



Pillsbury Winthrop Shaw Pittman LLP  
2600 Capitol Avenue, Suite 300 | Sacramento, CA 95816-5930 | tel 916.329.4700 | fax 916.441.3583

Liane M. Randolph  
tel 916.329.4714  
liane.randolph@pillsburylaw.com

October 19, 2010

VIA HAND DELIVERY

Chairman Dan Schnur  
Fair Political Practices Commission  
428 J Street  
Suite 620  
Sacramento, CA 95814

Re: October 20<sup>th</sup> Interested Persons Meeting

Dear Chairman Schnur:

The CPAA has previously expressed its concerns about the public confirmation of complaints and investigations. We appreciate the opportunity to attend the interested persons meeting on October 20 and look forward to discussing our concerns in more detail. We view the interested persons meeting as a helpful opportunity to present these concerns so that any proposed regulatory amendment or FPPC policies will address them.

You have indicated that you welcome a debate about the underlying policy concerning the public acknowledgment of pending investigations inherited from your predecessor. At the outset, we want to clarify that our objection is related to the FPPC's release of any information about an investigation – including the complaint and the confirmation of an ongoing investigation. Much of the public comments about this policy change relate to the issue of whether it is acceptable to have complaints disclosed to the public only on request or proactively on the FPPC website. We hope this Interested Persons meeting will address the underlying 2007 policy change to disclose uninvestigated complaints - not just the question of posting them on the internet.

As mentioned previously, our membership has grave concerns about the practice of disclosing the fact that an investigation is under way. Recently, the Orange County District Attorney had the opportunity to opine about this very issue. In a report about an investigation into potential conflict of interest violations involving the Orange

County Fair Board, the District Attorney criticized the publicizing of an investigation. The Report involved allegations of conflict of interest, among other potential violations, by the Fair Board. Ultimately, the investigation concluded that there was no violation of the law. In the Report's concluding comments, District Attorney Tony Rackauckas stated, "This Report culminates an investigation into allegations which were publicly aired *before* the OCDA ("Orange County District Attorney's Office") had an opportunity to investigate their accuracy. Publicly leaking allegations before an investigation can be conducted, may not only unfairly damage reputations, but also deter reports to law enforcement, inhibit witness cooperation, result in concealment or destruction of evidence and delay or even derail an investigation." (Report of the District Attorney, Investigation into Conflict of Interest Allegations Against the Orange County Fair Board, page 43, emphasis in original.) This compelling statement by an official charged with enforcing the same laws enforced by the FPPC should be taken seriously.

Contrast the sobering caution of the District Attorney with the FPPC's flashing "Investigations" banner on the FPPC website. The FPPC uses an internet advertising technique to attract attention to unproven allegations. Even if the FPPC feels compelled to make this information public, doing so in such a attention-grabbing fashion gives the complaints far more weight than the typical public information posted on the website. At a minimum, if the FPPC insists on continuing to post this information, it should do so in the same manner it posts advice letters, fact sheets and Commission agendas.

The flash with which the FPPC emphasizes these uninvestigated complaints is just one aspect of the serious due process concerns that arise from this policy. The complaint is a one-sided summary of uninvestigated facts and unanalyzed conclusions of law. It is posted on the official agency website accessible to Commissioners and administrative law judges potentially for months accompanied only by a short form letter indicating that the FPPC is investigating. There is no opportunity for the respondent to provide any facts or analysis to provide context or an explanation. If a respondent chooses to provide an explanation, would that information be posted as well? If some respondents post explanations but other do not, will that create the appearance that the respondents who do not choose to post a response have acceded to the complaint? We are interested in hearing from staff how they plan to address this fundamental due process issue.

In a comment letter supporting the FPPC's decision, the California Broadcaster Association noted that it "trusts the Commission will consider some protective initiatives to guard against misuse of the disclosure during an election." We are very curious as to what specific regulatory initiatives the staff would propose to guard against such misuse. For example, no one would seriously argue that the penalty for failing to report a gift because of a misreading of an exception to the gift limit would

warrant forfeiture of office. But that could easily be the effect of a routine FPPC investigation blown out of proportion by press coverage right before an election.<sup>1</sup> We would like to hear staff's response to the CBA's comment about protective measures.

We would also like to hear the staff's explanation as to why this policy does not conflict with Government Code section 83115.5. That section requires that the probable cause process remain private until an actual finding of probable cause is made. While a respondent has an opportunity to make a probable cause proceeding public under Regulation 18361.4(d), the FPPC has no legal right to publicize the proceedings. This provision was apparently meant to allow the FPPC to conduct its investigation in private until the point at which it had fully investigated the allegations and determined that probable cause existed to proceed. We are interested in hearing the staff's analysis of the authority to publicize investigations in advance of the statutorily permitted time frame.

The September 16, 2010, memorandum by Roman Porter to the Commission attempts to address some of these issues but does not provide a full explanation and context. According to the memo, staff is apparently relying on the San Jose Mercury News v. FPPC case. The summary of that case presented in the memo indicates that the case involved a closed proceeding, not an open investigation. There is clearly a difference between the two. It is not a stretch to understand why the court found that withholding a closed case file did not serve the public interest. As a result of the San Jose case, the FPPC has long made available closed investigation files.

Open investigations are a completely different matter. As the Orange County District Attorney discussed, providing public information about pending investigations can have serious consequences. Is the FPPC taking the position that ongoing investigation files are subject to disclosure upon request as well?<sup>2</sup> Are the complaint and letter

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<sup>1</sup>The FPPC has only been posting complaints for a short time and already press coverage of the FPPC's investigations have increased. Shortly after one of the first confirmations of an FPPC investigation appeared on the website, a press article followed. The very first line of the article points out that the "Fair Political Practices Commission is investigating a complaint..." A fact clearly considered more noteworthy than the mere filing of a complaint.  
<http://www.pressdemocrat.com/article/20100922/ARTICLES/100929804?Title=Complaint-filed-against-Mendocino-supes-candidate>

<sup>2</sup>The memo also implies that the press policy was amended on February 7, 2007, to provide access to the investigation file on a case by case basis. That is not correct. The discussion was related merely to whether the Commission should confirm the receipt of a complaint that had been publicized by the complainant. Previously, the Commission had not even confirmed official receipt of the complaint. The discussion had nothing to do with publicizing how the FPPC planned to respond to  
(... continued)

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confirming an investigation the only documents subject to disclosure? If they are, what is the authority for distinguishing between those documents and other documents in the file? If they are not, does the staff believe that the Public Records Act does not permit the withholding of investigatory files when the case is not yet completed? If so, then the same problem apparently identified by Mr. Porter arises – investigatory files will only be released if requested by a savvy observer. To solve that problem, will the FPPC begin posting investigatory documents on the website as they are compiled during the course of an investigation?

Lastly, we would like staff to more clearly articulate the public interest in this policy. It is easy during the heat of a campaign to make errors in filings. Posting the uninvestigated complaints allows for no context as to the seriousness of the violation. Twenty-four hour reports filed a day late and missing sub-vendor violations are given the same treatment as complex laundering schemes. The stated policy of deterrence makes no sense in this circumstance. The complete enforcement process allows for the possibility of warning letters, reduced fines or a list of mitigating factors, permitting the FPPC to encourage careful adherence to the rules while at the same time avoiding unnecessary chilling of core First Amendment activity. Since the complaints and investigation letters are posted without a filter, inadvertent violations are treated the same as knowing and willful ones. It is puzzling how public embarrassment will deter inadvertent violations.

Posting the complaints online does not resolve the question of the seriousness or willfulness of the violation any more expeditiously. The investigation will still need to proceed at a normal pace to determine whether enforcement action is warranted. Therefore, even a willful violation will not be identified any more quickly through this process. Given that, we are interested in hearing an articulation of how posting uninvestigated complaints and confirming the investigation of those complaints serves the public interest.

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(... continued)

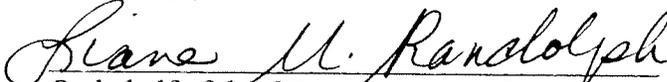
the complaint. As the memo points out, the policy continued the longstanding practice of not disclosing documents from open cases.

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While we appreciate many of the motivations and explanations for maximizing disclosure and transparency, we believe that the reversal of years of Commission practice has raised many unresolved questions that deserve clear resolution so as not to undermine the effectiveness of, and public confidence in, the enforcement process. We look forward to discussing these issues at the interested persons meeting.

Very truly yours,

  
On behalf of the CPAA Executive Committee:



James C. Harrison, President  
REMCHO JOHANSEN & PURCELL, LLP

Steven G. Churchwell, Esq.  
DLA PIPER LLP

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Bradley W. Hertz, Esq.  
REED & DAVIDSON LLP

cc: Commissioners Garrett, Hodson, Montgomery and Rotunda  
CPAA Members  
Assistant General Counsel John Wallace



**VIA EMAIL ONLY**

**TO:** Chairman and Commissioners  
California Fair Political Practices Commission

**FROM:** Chip Nielsen

**DATE:** January 7, 2011

**RE:** Proposed Amendments to Regulation 18313.5

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Based on the staff memo of November 24, 2010, I would like to share my personal views on the proposed amendments and ask that you not follow your staff's recommendation to limit postings to complaints and exclude responses.

On page 5 of the staff memo, five reasons are offered against public postings of any kind of response from those to be investigated. I address each in order:

1. **Timing Issues:** I trust the Commission and the staff can overcome this concern by adjusting calendars and/or current regulations to allow both redacted complaints and redacted responses to be posted publicly if the Commission agrees that it is sound public policy to post responses.
2. **Process Issues:** The staff currently redacts information from complaints, and if this regulation were to allow only a respondent's direct rebuttal of the alleged violation to be posted, staff should be able to similarly redact the rest of the response. There is no reason that posting a response must be "all or nothing" as that is not the standard applied to the complaint.

For example, if the complaint states that A did not file a report, what is the harm for the public to know that A claims A did file it and cites a Cal Access link? A's supportive arguments or statements of mitigation would be redacted.

3. **Content Issues:** Since judgment is already required in redacting an argumentative complaint, the regulation should be able to apply the same standard to the redacting of a response.

- 4. Balance Issues:** This will be moot if appropriate redaction applies to both complaints and responses, and the regulation should state that counter-responses will not be posted. I agree with the staff that the regulation should not facilitate campaign messages.

In summary, respondents should have the same and equal standing as complainants. The public benefits from such parity.

Respectfully submitted.

VGN/djf