

1 Amend 2 Cal. Code Regs., Section 18361.4 to read:

2 §18361.4. Probable Cause Proceedings.

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

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

14 (c) Service of Probable Cause Report. ~~No probable cause hearing will take place until at~~
15 ~~least 21 calendar days after~~ The Enforcement Division staff shall ~~provides~~ provide the following,
16 by service of process or registered or certified mail with return receipt requested, to each
17 respondent:

18 (1) A copy of the probable cause report;

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

1 (3) If the Commission met in executive session on this matter pursuant to Regulation
2 18361.2, a copy of any staff memoranda submitted to the Commission at that time along with the
3 recording of any discussion between the Commission and the staff at the executive session as
4 required in subdivision (b) of Regulation 18361.2; and

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

8 ~~(d) Response to Probable Cause Report; Request for Probable Cause Conference; Waiver.~~
9 Written Response to Probable Cause Report. Not later than 21 calendar days following service of
10 the probable cause report, or the date records were sent pursuant to ~~(d)(3)(g)(1)~~, a respondent
11 may submit a written response to the probable cause report. The response should contain a
12 summary of law and evidence that supports a finding that the probable cause report fails to
13 establish probable cause that any or all of the alleged violations of the Act occurred. Any
14 response shall be filed with the Commission Assistant by electronic mail at
15 CommAsst@fppc.ca.gov or U.S. mail, who will send a copy, to all parties named in the probable
16 cause report within 2 business days.

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

1 ~~probable cause conference and if the probable cause checklist has not been returned, make~~
2 ~~efforts to obtain the information from the respondent(s).~~

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

10 ~~(C) The conference shall proceed no later than 75 days after receipt by the Commission~~
11 ~~Assistant of the filed request for a probable cause conference, or 75 days after the date records~~
12 ~~are sent pursuant to subdivision (d)(3), unless the assigned hearing officer extends the time for~~
13 ~~good cause based on an extension request filed by any party with the Commission Assistant. If~~
14 ~~respondent requests a probable cause conference but the probable cause conference does not~~
15 ~~timely proceed, the Commission assistant shall set a probable cause conference to occur within~~
16 ~~14 calendar days and provide notice of the conference to all parties. The hearing officer shall~~
17 ~~conduct the conference informally.~~

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

1 ~~(d)(3)(B). For purposes of this subdivision, the term “readily available public records” includes~~
2 ~~any statements, reports or other records available to the public in electronic format on a~~
3 ~~government agency website.~~

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

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

13 ~~(i) the date of the record;~~

14 ~~(ii) the identity of the author(s);~~

15 ~~(iii) the identity of the recipient(s);~~

16 ~~(iv) the specific ground for which the objection to produce the record is made; and~~

17 ~~(v) the current location of the record.~~

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

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

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

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

11 (f) Request for Probable Cause Conference.

12 (1) Not later than 21 calendar days following service of the probable case report, or the
13 date records were sent pursuant to (g)(1), any respondent may request a probable cause
14 conference which shall be filed with the Commission Assistant by electronic mail at
15 CommAsst@fppc.ca.gov or U.S. mail, who will provide a copy to all other parties named in the
16 probable cause report and forward the request to the hearing officer assigned to the matter from
17 the Legal Division within two business days. The Commission Assistant shall schedule the
18 probable cause conference based on the parties' stated availability and if the probable cause
19 checklist has not been returned, make efforts to obtain the information from the respondent(s).

20 (2) If a respondent requests a probable cause conference later than 21 days following
21 service of the probable cause report, or the date records were sent pursuant to (g)(1), the assigned
22 hearing officer may grant the request based on good cause, including a showing by respondent
23 that they did not timely receive the probable cause report after it was served, or some other

1 circumstance reasonably justifying respondent’s failure to timely request the hearing. However,
2 no late request for a probable cause conference shall be granted if the assigned hearing officer
3 has already issued an order for an Accusation to be served on the respondent.

4 (g) Request for Records.

5 (1) Within 21 calendar days following the service of the probable cause report, a
6 respondent may request by electronic mail at CommAsst@fppc.ca.gov or U.S. mail a copy of all
7 records in the possession of the Enforcement Division obtained for purposes of that investigation
8 that are not readily available public records or otherwise in the possession of the requesting
9 respondent, except records that it claims are confidential, were received in response to an
10 administrative subpoena, or otherwise contain protected information, as required in subdivision
11 (g)(3). For purposes of this subdivision, the term “readily available public records” includes any
12 statements, reports or other records available to the public in electronic format on a government
13 agency website.

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

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

23 (A) the date of the record;

1 (B) the identity of the author(s);

2 (C) the identity of the recipient(s);

3 (D) the specific ground for which the objection to produce the record is made; and

4 (E) the current location of the record.

5 (h) Conference Scheduling; Extensions. The conference should proceed no later than 75
6 days after receipt by the Commission Assistant of the filed request for a probable cause
7 conference. If a conference does not proceed within 75 days, the hearing officer shall set a
8 probable cause conference to occur within 14 calendar days and provide notice of the conference
9 to all parties. The hearing officer may grant no further extension of time for the conference
10 unless mutually requested by a respondent and the Enforcement Division.

11 (i) Waiver. If a respondent fails to file a timely response, make a timely request for a
12 probable cause conference, or appear for a probable cause conference, the respondent waives the
13 right to further probable cause proceedings under Section 83115.5, and the Enforcement Division
14 may transmit copies of the Probable Cause Report, Request for a Finding of Probable Cause, and
15 Order that an Accusation be Prepared to the Commission Assistant requesting that a hearing
16 officer from the Legal Division find probable cause based on the information provided. Upon a
17 finding of probable cause, the hearing officer will issue an Order Finding Probable Cause and
18 serve it on all parties.

19 (~~f~~) (j) Probable Cause Conference. The hearing officer shall conduct the conference
20 informally. The conference shall be closed to the public unless a respondent requests, and all
21 other respondents agree, to a public conference. If the conference is not public, then only the
22 parties named in the probable cause report, their legal counsel or representative and Enforcement
23 Division staff shall have the right to be present and participate. ~~Any party may send a request to~~

1 ~~the Commission Assistant at least 7 days before the probable cause conference that the hearing~~
2 ~~officer allow witnesses to participate in the probable cause conference. The request shall identify~~
3 ~~each witness and summarize the subject of the witness's testimony, and be sent to all parties. The~~
4 ~~hearing officer, in making this determination, shall consider the relevancy of the witness'~~
5 ~~proposed testimony, whether the witness has a substantial interest in the proceedings, and~~
6 ~~whether fairness requires that the witness be allowed to participate. Representatives of any civil~~
7 ~~or criminal prosecutor with jurisdiction may attend the conference at the discretion of the hearing~~
8 ~~officer if they agree to respect the confidential nature of the proceedings. If the conference is not~~
9 ~~open to the public, then the The conference may be conducted in whole or in part by telephone or~~
10 ~~videoconference. The Enforcement Division shall record the probable cause conference. The~~
11 ~~hearing officer may determine whether there is probable cause based solely on the probable~~
12 ~~cause report, any responses or rebuttals, evidence submitted, and any arguments presented at the~~
13 ~~probable cause conference by the parties. The hearing officer may, based on a showing of good~~
14 ~~cause, permit any party to submit additional evidence at or after the probable cause conference if~~
15 ~~the additional evidence is summarized at the probable cause conference. Only evidence that~~
16 ~~confirms or disproves a statement made at the probable cause conference may be submitted after~~
17 ~~the conference.~~

18 (g) (k) Finding of Probable Cause. A finding of probable cause by the hearing officer
19 does not constitute a finding that a violation occurred. The hearing officer shall not make a
20 finding of probable cause if presented with clear and convincing evidence that, at least 21
21 working days prior to the alleged violation, the respondent requested written advice from the
22 Commission staff pursuant to Section 83114(b), disclosed truthfully all the material facts, and
23 committed the acts complained of in reliance on formal advice of Commission staff or because

1 of Commission staff's failure to provide advice. If the hearing officer makes a finding of
2 probable cause, then the Enforcement Division shall prepare an Accusation pursuant to Section
3 11503 and have it served upon the person or persons who are subjects of the probable cause
4 finding. The ~~hearing officer~~ Commission shall publicly announce the finding of probable cause.
5 The announcement shall contain a summary of the allegations and a cautionary statement that the
6 respondent is presumed to be innocent of any violation of the Act unless a violation is proved in
7 a subsequent proceeding. The Chief of the Enforcement Division shall be responsible for the
8 presentation of the case in support of the Accusation at an administrative hearing held pursuant
9 to Section 83116.

10 Note: Authority cited: Section 83112, Government Code. Reference: Sections 83115,
11 83115.5 and 83116, Government Code.