



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 14, 2024

Bradley Russi
Deputy City Attorney
City and County of San Francisco
1 Dr. Carlton B. Goodlett Place, Room 234
San Francisco, CA 94102-4682

Re: Your Request for Informal Assistance
Our File No. I-24-037

Dear Mr. Russi:

This letter responds to your request for advice on behalf of San Francisco City Attorney David Chiu regarding Section 84308 (“the Levine Act”) of the Political Reform Act (the “Act”).¹ Because your request for advice does not pertain to a specific governmental decision, we are treating your request as one for informal assistance.²

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

QUESTION

Under Section 84308, could City Attorney Chiu establish a screening process to preemptively recuse himself from certain city contracts, such that he could accept, solicit, or direct contributions from parties, participants, and agents involved in those contracts?

CONCLUSION

City Attorney Chiu may establish a screening process to avoid any involvement in, or knowledge of, contracts reviewed by other attorneys in his office to prevent inadvertently violating Section 84308 by accepting a contribution of greater than \$250 from a party, participant, or agent who has, or is seeking, a contract with the City. However, the parties, participants, and agents involved in contracts with the City (and other entitlement for use proceedings) would still be

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

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

prohibited from making contributions greater than \$250 to officers of the agency—including City Attorney Chiu—while their proceeding is pending and for 12 months thereafter.

FACTS AS PRESENTED BY REQUESTER

Under the San Francisco Charter, the City Attorney is an elective office. The City Attorney serves as legal counsel to the City, its departments, employees, elected officials, and officers. The Office of the City Attorney employs over 300 attorneys and professional staff. The Office enters into service contracts with outside law firms and other vendors that provide legal support and other services to the Office.

City Attorney Chiu seldom participates in the contracting process, including the solicitation, the selection of vendors, and the negotiation of contracts that the Office awards. City Attorney Chiu has generally delegated to the Managing Attorney authority over the contracting process including authority to enter into contracts on behalf of the Office. For purposes of Section 84308, City Attorney Chiu proposes to formally screen himself from all contracts valued at less than \$100,000. This screen would include a written delegation of authority to the Managing Attorney to approve and enter into such contracts and a separate written memorandum establishing a screen so that City Attorney Chiu does not participate in the process of awarding such contracts. The Office would distribute the screen to staff responsible for contracting decisions.

Your office proposes limiting the delegation and screen to smaller contracts, because San Francisco law already regulates contributions with respect to contracts valued at \$100,000 or more.

ANALYSIS

The Act's "pay to play" restrictions, contained in Section 84308, aim to ensure that officers of government agencies are not biased by contributors or potential contributors of large campaign contributions who might appear before them in a proceeding involving a license, permit, or entitlement for use. Section 84308 is aimed not only at actual corruption or bias but also at the appearance of corruption or bias that may occur if a public officer were to solicit or accept contributions from a party or financially interested participant while a proceeding is pending before the public officer's agency, or has recently concluded.

In relevant part, Section 84308(b) prohibits an officer from accepting, soliciting, or directing a contribution greater than \$250 from a party or participant in an entitlement for use proceeding while the proceeding is pending and for 12 months after a final decision is rendered. For an officer, a proceeding is "pending" when (1) the decision is before the officer for the officer's consideration; or (2) the officer knows or has reasons to know of a proceeding and it is reasonably foreseeable the decision will come before the officer in the officer's decisionmaking capacity. (Regulation 18438.2.)

Section 84308(c) requires, "[p]rior to rendering any decision" in an entitlement for use proceeding, that an officer disclose a contribution greater than \$250 that the officer has received within the preceding 12 months and generally prohibits the officer from making, participating in

making, or in any way attempting to use the officer's official position to influence a decision in the entitlement for use proceeding if such a contribution has occurred within that time frame. A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits the official's agency to any course of action, or enters into any contractual agreement on behalf of the official's agency. (Regulation 18704(a).) A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review. (Regulation 18704(b).) A public official uses an official position to influence a governmental decision if the official: (1) contacts or appears before any official in the official's agency or in an agency subject to the authority or budgetary control of the official's agency for the purpose of affecting a decision; or (2) contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within the official's authority or on behalf of the official's agency in making the contact. (Regulation 18704(c).)

Similar to the prohibitions and requirements that apply to public officers, Section 84308(e)(2) prohibits parties, participants, and agents from contributing more than \$250 to any officer of the agency while an entitlement for use proceeding is pending and for 12 months after a final decision is rendered by the agency in the proceeding. Section 84308(e)(1) and Regulation 18438.8(b) also require a party to disclose on the record of the proceeding any contribution greater than \$250 made to any officer of the agency within the preceding 12 months by the party or party's agent.

Regulation 18438.1(d) defines the term "officer of an agency" as follows:

An officer of an agency includes only those persons who may make, participate in making, or in any way attempt to use their official position to influence a decision in the license, permit, or entitlement for use proceeding, or who exercise authority or budgetary control over the agency or officers who may do so, and:

- (1) Serve in an elected position, including any official appointed to an elected position due to an interim vacancy or an election otherwise canceled because the official was the sole candidate for the position;
- (2) Serve as a member of a board or commission;
- (3) Serve as the chief executive of a state agency or county, city or district of any kind; or
- (4) Have decisionmaking authority with respect to the proceeding involving a license, permit, or other entitlement for use and is also a candidate for elected office or has been a candidate for elected office in the 12 months prior to the proceeding.

City Attorney Chiu is an "officer of an agency," given his status as an elected official who exercises authority over the City Attorney's Office where other attorneys would take part in the City's contracting processes.

City Attorney Chiu has proposed establishing a screening process, such that he would preemptively recuse himself from City contracts valued at less than \$100,000 and thereby avoid

inadvertently violating Section 84308 by accepting contributions from parties, participants, and agents involved in entitlement for use proceeding of which he has no part or knowledge. By refraining from making, participating in making, or attempting to use his official position to influence the City's decisions related to such contracts, he would avoid violating Section 84308(b). Instead, another attorney from his office could take part in the contracting process. However, as noted above, separate from City Attorney Chiu's obligations under Section 84308(b), Section 84308(e)(2) also prohibits parties, participants, and their agents from contributing more than \$250 to "any officer" of the agency, including City Attorney Chiu, while the contract is pending and for 12 months thereafter. In other words, parties, participants, and agents would still be prohibited from contributing more than \$250 to City Attorney Chiu while the contract is pending and for 12 months after a final decision is rendered. (See *Freeman* Advice Letter, No. A-23-145 [advising party is prohibited from contributing more than \$250 to a city councilmember even if contract with city would not come before the city councilmember for a decision].)

Similarly, if City Attorney Chiu employed the proposed screening process such that he had pre-emptively recused himself from taking part in the relevant contracts, had no involvement in the contractual proceedings whatsoever, and had no knowledge of the contracts or the contracting parties, he would not be required to disclose contributions made to him within the preceding 12 months. Again, however, parties and agents (though not participants) would still be required to disclose any contributions greater than \$250 made to any City officer, including City Attorney Chiu, within the preceding 12 months. (Section 84308(e)(1); Regulation 18438(b).)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

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