FAIR POLITICAL PRACTICES COMMISSION
428 J Street ● Suite 620 ● Sacramento, CA 95814-2329
(916) 322-5660 ● Fax (916) 322-0886

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

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).[1] 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,[2] 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:

[1] California Public Records Act is found in Government Code Sections 6250 et. seq.
[2] *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.[3]

The provisions within CPRA provide only two mechanisms by which an agency can withhold public documents.[4] The first is through a specific exemption and the second through a balancing test.[5] 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.[6]

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 investigative 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."[7]

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."[8]

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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[3] Quoted at page 5, lines 20-24.
[4] Public documents are defined within Government Code Section 6252.
[5] Government Code Section 6253.1(d)(2)
[6] These factors are now no longer required based on the finding in *Williams v. Superior* Court, 5 Cal. 4th 337 (1993), that determined the investigatory exemptions within the Freedom of Information Act and the CPRA are distinct.
[7] Government Code Section 6250
[8] 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.[9]

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). Acesss 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."[10]

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.[11]

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 …"

[9] Approved minutes of the October 8, 1999, meeting of the Commission, p.14. item #17.
[10] Approved minutes of the February 7, 2007, meeting of the Commission, p. 11 and 13, item 12.
[11] 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.[12]

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."[13]

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)[14]
- Statements of Economic Interests of Elected Officials are online (since April 2010)[15]
- 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:

[12] See *Guidelines for Access to Public Records*
[13] Government Code Section 6253(e)
[14] 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.
[15] 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."[16]

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"[17] 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."[18] 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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[16] May 16, 2008, letter from CPAA responding to item 7 on the May 19, 2008 Commission meeting
[17] Commission Regulation 18361.4
[18] Government Code Section 83115.