

## **Advisory Bodies and Conflicts of Interest:**

### **Government Code Section 87104 Frequently Asked Questions**

The California Environmental Protection Agency (CalEPA) is releasing this Frequently Asked Questions (FAQ) document to provide guidance on common questions that arise around conflicts of interest for advisory body members, and in particular, Government Code section 87104's application to members of advisory bodies. Although Government Code section 87104 applies to "public official[s]" generally, this FAQ focuses on the application of the statute to advisory body members who are not state employees and is not intended to address other public officials who are also covered by the statute.

In addition, this FAQ discusses Government Code section 87104's application to the advisory bodies of CalEPA and its six Boards, Departments and Offices (BDOs): the California Air Resources Board (CARB), Department of Pesticide Regulation (DPR), Department of Resources Recycling and Recovery (CalRecycle), Department of Toxic Substances Control (DTSC), Office of Environmental Health Hazard Assessment (OEHHA), and State Water Resources Control Board and nine Regional Water Quality Control Boards (Water Boards). This FAQ was developed in consultation and coordination with those BDOs.

This FAQ does not constitute legal advice to advisory body members, nor does it provide any options for alternative relief or safe harbor from potential violations. For other questions or legal advice on Government Code section 87104, advisory body members should contact their own legal counsel and/or the Fair Political Practices Commission.

#### **(1) What does Government Code section 87104 say?**

The text of the statute states the following:

*(a) A public official of a state agency shall not, for compensation, act as an agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance before, or any oral or written communication to, the official's state agency or any officer or employee thereof, if the appearance or communication is for the purpose of influencing a decision on a contract, grant, loan, license, permit, or other entitlement for use.*

*(b) For purposes of this section, "public official" includes a member, officer, employee, or consultant of an advisory body to a state agency, whether the advisory body is created by statute or otherwise, except when the public official is representing the official's employing state, local, or federal agency in an appearance before, or communication to, the advisory body.*

The statute, with limited exceptions, thus restricts (a) members of advisory bodies to a state agency (among others) (b) from making formal or informal appearances or oral or written communications (c)

to the member's state agency (d) for the purpose of influencing a decision on a contract, grant, loan, license, permit, or other entitlement for use (e) if the appearance or communication is compensated by a third party.

## **(2) What is the purpose of Government Code section 87104?**

One of the primary purposes of Government Code section 87104 is to prohibit conflicts of interest by members of state advisory bodies who are not necessarily subject to other conflict of interest provisions of the Political Reform Act. The Legislature adopted this provision to close that gap and to prohibit conflicts of interest by advisory body members regarding certain decisions by the agency they advise. Relatedly, a key purpose of the statute is to limit the conduct of state advisory body members when they are paid by private parties to lobby their agency.<sup>1</sup>

## **(3) Which CalEPA and BDO entities are covered by Government Code section 87104?**

Government Code section 87104 applies to members of all state advisory bodies, whether created by statute or otherwise. This means that Government Code section 87104 applies broadly to: all state bodies created within and/or administered by CalEPA and/or a BDO and falls within the definition of a "state body" under the Bagley-Keene Act (Gov. Code, § 11121.); and other bodies created for the purpose of advising executive leadership or officials at CalEPA and/or a BDO and composed of non-state employees.

Government Code section 87104 does not apply to non-state employees who participate in staff-convened working groups to advise agency staff or who are contracted by a state agency for consulting services to agency staff – as distinct from executive leadership -- when those groups are also not otherwise subject to the Bagley-Keene Act.

As of January 2, 2024, CalEPA and the BDOs have the following active advisory bodies, subject to Government Code section 87104:

### **Existing CalEPA and BDO Advisory Bodies:**

CalEPA: (1) Independent Emissions Market Advisory Committee; (2) Site Designation Committee; (3) Tribal Advisory Committee; (4) Border Relations Council; and (5) Refinery Task Force.

CARB: (1) Assembly Bill 617 Consultation Group; (2) Environmental Justice Advisory Committee (EJAC); (3) Research Screening Committee; (4) Scientific Review Panel on Toxic Air Contaminants; and (5) Natural and Working Lands Expert Advisory Committee (jointly appointed with the California Natural Resources Agency under AB 1757 (C. Garcia, Stats. 2022, ch. 341). In the future, CARB will convene a sixth advisory committee pursuant to Assembly Bill 2446 (Holden, Stats. 2022, ch. 352).

CalRecycle: (1) Carpet Stewardship Advisory Committee; (2) Mattress Recycling Organization Committee; (3) Producer Responsibility Advisory Board; (4) Illegal Dumping Technical Advisory Committee; (5) Enforcement Advisory Committee.

**DPR:** (1) Pest Management Advisory Committee, (2) Agricultural Pest Control Advisory Committee, (3) Pesticide Registration and Evaluation Committee, (4) Pesticide Registration and Evaluation Subcommittee for Pesticide Contamination Prevention Act (5) Environmental Justice Advisory Committee to be convened pursuant to Assembly Bill 652 (Lee, Stats. 2023, ch. 662.).

**DTSC:** (1) Green Ribbon Science Panel; (2) Exide Technical Advisory Group; (3) Environmental Justice Advisory Council; (4) Aerojet Superfund Site Community Advisory Group; (5) Richmond Southeast Shoreline Area Community Advisory Group; (6) Stringfellow Community Advisory Group.

**OEHHA:** (1) Scientific Guidance Panel; (2) Synthetic Turf Scientific Advisory Panel; (3) Scientific Review Panel on Toxic Air Contaminants; (4) Carcinogen Identification Committee;\* (5) Developmental and Reproductive Toxicant Committee.\*

**Water Board:** (1) Wastewater Operator Certification Program Advisory Committee; (2) Drinking Water Operator Certification Program Advisory Committee; (3) SADW/SAFER Advisory Committee; (4) Environmental Laboratory Technical Advisory Committee (ELTAC); (5) Direct Potable Reuse Expert Review Panel; (6) California Water Quality Monitoring Council; (7) Statewide Advisory Committee on Cooling Water Intake Structures; (8) Constituents of Emerging Concern Science Advisory Panel; (9) Regulatory Advisory Group for the Biostimulation, Cyanotoxins, and Biological Condition Provisions; (10) Groundwater Quality Monitoring Advisory Committee; and (11) Stanislaus, Tuolumne, and Merced Working Group (Bay-Delta Plan, Implementation Section for LSJR Flow Objectives)

\*OEHHA's Carcinogen Identification Committee and Developmental and Reproductive Toxicant Committee are decision-making bodies and not technically "advisory." However, like advisory bodies, they are composed of members who are not necessarily subject to other conflict of interest code provisions of the Political Reform Act but who are "public officials" covered by Government Code section 87104.

#### **Future Advisory Bodies:**

Members of a CalEPA or BDO advisory body that is created by statute or otherwise after January 2, 2024, when this FAQ was finalized, would be subject to Government Code section 87104 for the duration of their membership of that advisory body.

#### **(4) To whom does Government Code section 87104 apply?**

The statute applies to members of advisory bodies. The rule is personal to the advisory body member. Government Code section 87104 does not apply to other individuals employed by the advisory body member's employer to the extent the other individual is not also a member, officer, employee, or consultant of the advisory body to the state agency. The statute does not apply to government employees making communications on behalf of their agency to the advisory body.

#### **(5) With what agency are advisory body members' communications regulated?**

Government Code section 87104 only limits advisory body members from making certain communications to their own state agency. It does not limit communications with other state agencies so long as the member is not also an advisory member of those other agencies.

Advisory body members are prohibited from appearances and communications, for compensation, to the state agency that the body advises for purposes of influencing decisions on contracts and grants and other items covered by Government Code section 87104. The statute does not, however, govern advisory body members' communications with state agencies that the advisory body does not advise. Each BDO is a separate government agency. So, with one exception noted below, members of a BDO advisory body are not prohibited from appearances or communications before other entities within the CalEPA umbrella that the advisory body does *not* advise, or communications with CalEPA at the agency level. For example, a member of a DPR advisory body is not ordinarily prohibited from appearing or communicating with CARB for compensation to influence decisions on a CARB contract.

Certain advisory bodies may provide advice to more than one state agency. In those cases, or if you are unsure about what constitutes your "state agency" or for any other reason, please contact staff for assistance.

Note that CalEPA and CARB have a unique relationship because CARB provides administrative support services to CalEPA, including on CalEPA's grants and contracts. CARB makes decisions on CARB contracts and grants and both CARB and CalEPA make decisions on CalEPA contracts and grants. To implement Government Code section 87104 regarding CalEPA and CARB contracts and grants, the following applies:

- CARB advisory body members are prohibited from making the communications or appearances described in this FAQ to CARB about CARB and CalEPA contracts and grants, and to CalEPA about CalEPA contracts and grants.
- CalEPA advisory body members are prohibited from making the communications or appearances described in this FAQ to CARB and CalEPA for CalEPA contracts and grants.

## **(6) What topics can advisory body members communicate with their agency about?**

Government Code section 87104 only applies to compensated communications and appearances for the purpose of influencing certain types of government decisions, in particular, decisions on specific contracts, grants, loans, licenses, permits, or other entitlements for use (referred to herein as a "covered decision"). As a result, advisory body members can communicate or appear before their BDO for compensation, for the purpose of influencing a wide array of decisions by that BDO, including decisions on proposed regulations, programs, or policies. Government Code section 87104 also does not apply to CalEPA or BDO decisions in designing a program or policy regarding grants, contracts, or permits generally. The statute only prohibits compensated communications and appearances for the purpose of influencing *specific* decisions on contracts, grants, loans, licenses, permits, or other covered decisions.

In addition, the statute only prohibits compensated communications on behalf of another. As a result, advisory body members may communicate with their agency on matters related to their personal interests. For example, certain members of the Water Boards' Operator Certification Advisory Committees are required to have a Water Board Operator Certificate, a type of license, to serve on the Committee. These members may communicate with the Water Boards for the purpose of

renewing the member's certificate. This communication about the member's personal interest would be a permissible communication on the member's own behalf, not a prohibited communication on behalf of another.

## **(7) What types of communications and appearances does Government Code section 87104 prohibit?**

As noted above, Government Code section 87104 prohibits compensated communications by advisory body members for the purpose of influencing their BDO's decisions on contracts, grants, loans, licenses, permits, or other covered decisions. The following are examples of prohibited communications or appearances:

- **Voting:** The advisory body member is prohibited from voting on a matter if the advisory body in the vote is making recommendations or decisions regarding a specific grant, contract, permit or other covered decision, and if the advisory body member receives compensation for the purpose of influencing that decision. Voting in a public meeting of an advisory body would constitute a formal appearance before the state body.
- **Speaking to the agency:** The advisory body member is prohibited from appearing before or communicating with the agency, for compensation, at a formal meeting or hearing, in non-public meetings, in phone calls, or in writing (including emails), for the purpose of influencing a covered decision. This is applicable to the entirety of the contracting or permitting process and not just during formal public comment periods.
- **Submission of a contract bid, loan application, or grant application that identifies the member:** Submitting a bid for a contract or application for a loan or grant to the agency that is signed or otherwise submitted by an advisory body member, that identifies the advisory body member as completing tasks in a scope of work, or that lists the member as an administrator, fiscal sponsor, principal investigator, or co-principal investigator constitutes a prohibited communication.<sup>2</sup> Submission of the bid or application constitutes the prohibited communication, even if the advisory body member does not otherwise advocate to the agency on behalf of the bid or contract. Note that contract, loan, and grant proponents must follow all applicable requirements requiring identification of individuals performing contract, loan, or grant work. Failure to do so could constitute a violation of the contract, loan, or grant process and may result in rescission of the contract, loan, or grant.
- **Communications related to a subcontract, subaward, subgrant, or amendment to a contract, loan, or grant that identifies the member.** The subcontract or subaward cannot identify the advisory body member as performing work under the contract; a loan or grant application that includes a subgrant cannot identify the advisory body member as performing work under the loan or grant; the same is true for an amendment to a loan, grant, or contract. In addition, an advisory body member may not communicate to the agency about a decision to authorize a subcontract, subaward, subgrant or amendment that identifies them as performing work under the contract, loan, or grant. As noted above, contract, loan, and grant proponents must follow all applicable requirements regarding identification of individuals performing contract, loan, or grant work, including work under subcontracts or subgrants. Failure to do so could constitute a violation of the contract, loan, or grant process and may result in rescission of the contract, loan, or grant.

## (8) When does the statute apply to grants, loans, and contracts involving advisory body members?

Government Code section 87104 applies once an individual is appointed to an advisory body and continues for the duration of their membership on the advisory body. In other words, starting on their day of appointment and until their appointment ends and is not renewed, the advisory body member is not allowed to make any prohibited appearances or communications to influence a decision on a specific contract, loan, grant, or other funding mechanism by the state agency that their body advises. The law does not apply before that time, and no longer applies once an individual resigns from an advisory body or their appointment as an advisory body otherwise ends. The following are some examples of when an appearance or communication is prohibited depending on when the appearance or communication is made versus the date of an individual's appointment to a CalEPA or a BDO advisory body.

- Contract, loan, or grant awarded and executed *before* member appointed to advisory body:** If an individual identified as performing work under a contract, loan, or grant with the agency is later appointed as an advisory body member, there is no prohibited appearance or communication because the individual was not an advisory body member at the time the contract bid or grant application was submitted and executed. The executed grant, loan, or contract can continue in effect and the work under it can continue to be performed. Note however, once appointed, the advisory body member cannot make communications or appearances for compensation for purposes of influencing any further decisions on that contract, loan, or grant, such as amendments or extensions.
- Contract, loan, or grant proposed to be awarded or executed *while* member serves on advisory body:** If, while an individual is a member of an advisory body, an entity submits a contract bid or loan or grant application that identifies the advisory body member as performing work under the contract, loan, or grant, then submission of the bid or loan or grant application is a prohibited communication. The contract bid or loan or grant application is not eligible for award or execution because of the prohibited communication. It is not enough for the member to refrain from otherwise voting on or speaking to the agency about the contract, loan, or grant. The submission of the contract bid or loan or grant application listing the member's name is itself the prohibited communication.
- Contract, loan, or grant proposed to be awarded and executed *after* advisory member resigns or appointment lapses:** If an advisory body member resigns or is no longer serving on an advisory body, contract bids and loan and grant applications identifying the former advisory member may be submitted to the agency. Submission of a contract bid or loan or grant application identifying a former advisory body member are not prohibited communications. The contract bid or loan or grant application would be eligible for award (assuming it satisfies eligibility requirements).

## (9) When is a communication or appearance “for compensation”?

Government Code section 87104 prohibits advisory body members from communications and appearances “for compensation” for the purpose of influencing covered decisions. This means that

advisory body members cannot influence agency decisions when being paid any form of compensation for the communication that is made for purposes of influencing a covered decision.<sup>3</sup> Members, however, can appear on a voluntary basis on behalf of a non-profit, if they receive no compensation from the non-profit.<sup>4</sup> Salaries by an employer or third party, one-time payments, or stock options, and all other forms of compensation would meet the definition of “compensation.” There is a limited exception contained in section 87104, subdivision (b) if the advisory body member is a public employee and is representing their “employing state, local, or federal agency in an appearance before, or communication to, the advisory body.” In those instances, the compensation paid by the state, local, or federal agency is not prohibited compensation.

**(10) Can an advisory body member write a letter of support for another organization’s application or bid for an individual contract, loan, grant license, or permit?**

The answer to this question depends on whether the communication is “for compensation.” If the advisory body member writes a letter of support for an application or bid for an individual contract, grant, loan, license, or permit by an organization, the activity is not prohibited if and only if it is not done for compensation. An example would be if the advisory body member writes the letter of support on a voluntary basis on behalf of an organization from which they receive no compensation.

If any compensation is involved behind the communication, then the communication is prohibited. When the advisory body member’s employer supports the loan application, grant application, contract bid, license application, or permit application, the appearance or communication is presumptively prohibited because the advisory body member receives compensation from their employer.

If no compensation is involved, then the communication is permissible. This might occur, for example, when the communication is on behalf of a non-profit and the member receives no compensation from the non-profit.<sup>5</sup>

**(11) Is an advisory body member’s employer or other employees of the employer prohibited from communicating with or appearing before CalEPA or a BDO on contracts, loans, or grants?**

No. The prohibition in Government Code section 87104 is personal to advisory body members and does not extend to their employers or co-workers.

In terms of submitting contract bids, loan applications, or grant applications, this means that an advisory body member’s employing organization can apply for a CalEPA or BDO contract or loan or grant if it has more than one employee, the other employees are identified on the contract bid or grant application, and the member is not identified on the contract bid, loan application, or grant application. However, the member would of course be prohibited from advocating in favor of their employer’s bid or application.

If, however, an advisory body member’s employer employs only the member, that organization will effectively be prohibited from submitting a contract bid, loan application, or grant application, because submission of a bid or a loan or grant application identifying an advisory body member is itself a prohibited communication.



While Government Code section 87104 may thus impact small organizations more than larger ones, the Legislature adopted the statute for the important purpose of avoiding conflicts of interest.

### **(12) Is an advisory body member prohibited from supporting or opposing a decision or appeal of a license or permit?**

Permit decisions, and permit appeals, are subject to the same restrictions as loans, grants and contracts. Thus, the answer to this question depends on whether the communication is “for compensation.” (See also Questions 9 and 10.)

As an example, DTSC issues permits to facilities that manage hazardous waste, and decisions on hazardous waste permits are subject to appeal to the Board of Environmental Safety. Where an organization supports or opposes the issuance of a permit, a member of an advisory body that advises DTSC and the Board of Environmental Safety is prohibited from making a communication to DTSC and the Board of Environmental Safety if the communication is for compensation and for the purpose of influencing the decision on the permit. This means that an advisory body member who is employed by an organization that supports or opposes a permit decision (including a permit decision and a permit appeal) is presumptively prohibited from communicating with DTSC or the Board of Environmental Safety regarding the permit decision, because the advisory body member receives compensation from their employer. However, other persons who are employed by the same organization and who do not serve as advisory body members, are not subject to the prohibition, since the limitations of Government Code section 87104 are personal to the advisory body member; they are not imputed to others in the member’s employing organization. An advisory body member who receives no compensation from an organization that supports an appeal may communicate with or appear before the Board of Environmental Safety about that appeal.<sup>6</sup>

### **(13) What are the consequences of violating Government Code section 87104?**

Knowing or willful violations of Government Code section 87104 may be misdemeanors, subject to the greater of \$10,000 or three times the amount unlawfully received. Additionally, a CalEPA or BDO decision may be voidable and set aside if a court determines that a violation of Government Code section 87104 has occurred and that the official action might not otherwise have been taken or approved if not for the prohibited communication.<sup>7</sup>

### **(14) Where can I find more information?**

More information on Government Code section 87104 and its implementation can be found by visiting the Fair Political Practices Commission’s website at: <https://fppc.ca.gov/>.

Individuals can seek advice through the following Fair Political Practices Commission advice portal: <https://fppc.ca.gov/advice.html>.

Below are select Fair Political Practices Commission Advice Letters on Government Code section 87104’s implementation:

- 1995: [Advice Letter # 95407](#).



- 1996: [Advice Letter # 96-153](#).
- 2008: [Advice Letter # 08-192](#).
- 2008: [Advice Letter # 08-183](#).
- 2009: [Advice Letter # 09-150](#).
- 2009: [Advice Letter # 09-025](#)

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<sup>1</sup> FPPC Advice Letters #08-192 at pp. 4, 08-183 at p. 5.

<sup>22</sup> FPPC Advice Letters #08-192 at pp. 5, 08-183 at p. 6.

<sup>3</sup> FPPC Advice Letter #08-192 at p. 6.

<sup>4</sup> FPPC Advice Letter #95407 at pp. 5-6.

<sup>5</sup> FPPC Advice Letter #95407 at pp. 5-6.

<sup>6</sup> FPPC Advice Letter #95407 at pp. 5-6.

<sup>7</sup> FPPC Advice Letter #08-103 at p. 7.