

**DOCKETED**

<b>Docket Number:</b>	22-ALT-01
<b>Project Title:</b>	2022-2023 Investment Plan Update for the Clean Transportation Program
<b>TN #:</b>	242324
<b>Document Title:</b>	FAQs for CEC Advisory Bodies re Government Code Section 87104
<b>Description:</b>	N/A
<b>Filer:</b>	Spencer Kelley
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	3/15/2022 9:45:40 AM
<b>Docketed Date:</b>	3/15/2022

## Political Reform Act and Government Code § 87104 FAQs for CEC Advisory Bodies

The following answers are based on the CEC's interpretation of the law as of March 2022, and are provided as a courtesy to assist members of CEC advisory bodies. However, the CEC is not providing legal advice. The answers provided are based on specific, commonly encountered scenarios, but the details of a particular situation could change the analysis. This information does not provide a defense to, protection against, or immunity from, potential Fair Political Practices Commission enforcement or prosecution by law enforcement agencies including the Attorney General. You may directly contact the Fair Political Practices Commission for legal advice or a legal opinion on which you may rely. You are encouraged to seek independent legal counsel if you have any concerns about the advice given or issues presented.

### **Q 1: What is Government Code section 87104?**

A1. Government Code section 87104 is a provision under the California Political Reform Act which states:

*(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.*

Under this statute, members of CEC's advisory bodies are prohibited from making any formal or informal appearance before, or any oral or written communication to, the CEC on behalf of any other entity for compensation, if intended to influence the CEC's decision on a contract, grant, loan, license, permit, or other entitlement for use. The statute designates members of advisory bodies as "public officials" for purposes of this statute, and prohibits an advisory body member from being paid by their employer or a client to communicate with their state appointing agency to attempt to influence the agency's decision on a contract, grant, loan, license, permit, or other entitlement.

### **Q 2: To what advisory bodies at the CEC does Government Code section 87104 apply?**

A 2. Currently, the members of the Disadvantaged Communities Advisory Group (DACAG), Clean Transportation Program Advisory Committee (CTP Advisory Committee), and the Lithium Valley Commission (LVC) are subject to this restriction imposed by the Government Code section 87104.

**Q 3: What constitutes a “formal or informal appearance” and “oral or written communication” prohibited by Government Code section 87104?**

A 3. Prohibited communication include letters, emails, phone calls, meetings, or any other form of oral or written communication, either in or outside of public meetings of the advisory body, with a CEC Commissioner or staff that attempts to influence a CEC decision on any contract, grant, loan, permit, license, or other entitlement. Government Code section 87104 also prohibits appearance of members of advisory bodies in applications for funding or permit applications submitted to the CEC. Specifically, members of advisory bodies may not be named in an application or signatories to an application or document that executes an agreement for CEC funding or a CEC permit.

**Q 4: May members of advisory bodies promote their organization as a candidate for a CEC contract, grant, loan, license, permit, or other entitlement?**

A 4. No. Members of advisory bodies who appear before or communicate to the CEC on behalf of another entity for compensation may not attempt to influence a CEC decision on any contract, grant, loan, permit, license, or other entitlement. However, members of advisory bodies may advocate for general policies, programs, or funding allocations related to the interest group or community that they are appointed to represent. Members of advisory bodies may discuss and advocate for a position with a CEC Commissioner or staff, such as for or against legislation, policies, or programs, so long as the member is not attempting to influence a decision by CEC in favor of the member’s employer or client. This prohibition is applicable to individual advisory body members and does not apply to other individuals who have the same employer or client as the advisory body member.

- Example #1: Advisory Body Member A (Member A) works for Company B, which manufactures solar panels. During a meeting of the Advisory Body, Member A states that Company B has received grant funding in the past; has successfully demonstrated a new technology under those grants; and that the CEC Investment Plan under consideration should be drafted with a large amount of funds allocated for the manufacture of solar panels so that Company B may have opportunity to apply for additional CEC funding. In this example, Member A’s statements would constitute a prohibited communication for the purpose of influencing a decision on a grant, in violation of Government Code section 87104. Member A could, however, make statements generally supportive of funding more solar panel manufacturing as long as there is no reference to Company B or an attempt to influence a specific CEC grant decision.
- Example #2: Member C works for Company D, which manufactures hydrogen vehicles. Member C signs a letter on Company D’s letterhead, addressed to a CEC Commissioner, which advocates for CEC funding for the manufacture of hydrogen vehicles; specifically references Company D’s work under a past grant agreement; and expresses a desire to do additional such work in the future. In this example, Member C’s letter would constitute a prohibited communication for the purpose of influencing a decision on a grant, in violation of Government Code section 87104. Member C could, however, make statements generally supportive of funding more hydrogen vehicles without reference to Company D.

- Example #3: Advisory Body Member E (Member E) works for Company F, which installs electric vehicle infrastructure. Company F has applied to a grant solicitation, and CEC has issued a Notice of Proposed Awards which lists Company F as a proposed awardee. Member E calls a CEC Commissioner to discuss details of the proposed award. In this example, Member E's communication with the Commissioner would constitute a prohibited communication for the purpose of influencing a decision on a grant, in violation of Government Code section 87104.
- Example #4: Advisory Body Member G is known to be a subject matter expert in building decarbonization. CEC staff emails Member F to solicit input on the CEC's potential investment criteria and priorities under a proposed grant solicitation. Member G is free to share information about the benefits of particular decarbonization technologies, strategies, and incentives, and even advocate for policy positions or funding allocations. However, Member G should not reference the organization they work for as an example of entity that should receive funding under CEC's solicitation. If Member G describes how their organization is more qualified than other entities to achieve the objectives of the solicitation to influence the CEC's decision, that would be a prohibited communication in violation of Section 87104.

**Q 5: Can a member of an advisory body apply for CEC funding?**

A 5. No. Government Code section 87104 prohibits advisory body members who are paid by another entity, such as an employer or client, from appearing in funding applications submitted to the CEC. However, the entity may apply for funding, so long as the advisory body member does not sign or appear by name in the application or agreement documents for the entity. This means that an advisory body member's name should not appear at all in any bid package as a principal investigator, key partner, or other resource of a contractor or subcontractor.

**Q 6: Can an advisory body member's employing entity or client apply for funding opportunities or permits from the CEC?**

A 6. Yes, as long as the advisory body member is not named in the application, nor a signatory to the application or document that executes the agreement or entitlement for use. The prohibition is personal to the advisory body member. If the member's employer or client applies for funding or a permit from the CEC, the advisory body member's name should not appear in the application or bid package.

**Q 7: Are there any exceptions to the prohibition on "formal or informal appearance" and "oral or written communication"?**

A 7. Yes. A limited exception under Government Code section 87104(b) allows advisory body members who represent state, local, or federal government agencies to engage in communications on behalf of their public employer in an appearance before or communication to the advisory body, even if the communication is intended to advocate for their agencies to receive CEC funding.

- Example 1: Member A is an employee of State Agency B, which regulates air emissions. During a

public meeting of the advisory body of which Member A is a member, Member A advocates for funding a grant administered by State Agency B. This is permissible under the exception to Government Code section 87104 for members representing state, local, or federal agencies to advocate for their agencies to receive funding from the CEC.

- Example 2: Assume the same facts as Example 1 above, except that Member A advocates for the funding via an e-mail to a CEC Commissioner or CEC staff. This would not be permissible under Government Code section 87104, as the exception only applies to communications to the advisory body.

**Q 8: May advisory body members representing nonprofit organizations be exempted from this restriction?**

A 8. Not if the member is compensated. Government Code section 87104 prohibits advisory body members who are paid by their employer or client from appearing before or communicating to the CEC if the intent is to influence a CEC decision on a contract, grant, loan, permit, license, or other entitlement, regardless of whether the employer or client is a for-profit or nonprofit entity. However, if the advisory body member receives no compensation or reimbursements from or on behalf of the nonprofit entity (i.e., volunteering their services entirely for free), then they may appear before or communicate to the CEC regarding a funding or permit decision on behalf of that nonprofit entity.

**Q 9: Why should members of an advisory body be restricted in communicating with a government agency, when members of the public generally are not?**

A 9. Government Code section 87104 was added to the Political Reform Act in 1994 specifically to prohibit advisory body members from attempting to influence a state agency decision on a contract, grant, loan, license, permit, and other entitlement, if the members are being compensated for such activities. The Fair Political Practice Commission has determined that the Political Reform Act does not bar anyone from serving on an advisory body, but does in fact limit a person's conduct once they are appointed. After a member's term ends, whether that be by resignation, termination, or otherwise, that individual is not be subject to the prohibitions under Government Code section 87104.

**Q 10: I thought that members of the DACAG, CTP Advisory Committee, and LVC were not public officials and did not have to disclose their financial interests on a Form 700.**

A 10. That is correct – these advisory body members are not “public officials” for purposes of reporting their economic interests, nor for most of the other rules that disqualify persons from government decision-making under the Political Reform Act. Government Code section 87104 is a stand-alone rule that deems advisory body members “public officials” only for this statute, which prohibits appearances and communications on behalf of their employers or clients for compensation in an attempt to influence any CEC decision on a contract, grant, loan, license, permit, or other entitlement for use.

**Q 11: If advisory body members are prohibited from influencing the state agency's decision on a contract, grant, loan, license, permit, or other entitlement, what can they communicate about?**

A 11. Advisory body members can communicate to the CEC about policies, general funding allocations, or other issues outside of specific CEC decisions on contracts, grants, loans, permits, licenses, or other entitlements for use. Members can also provide information about recommended policies or programs, as long as the members are not being compensated to discuss their entity or client as a potential provider of the program or services subject to the CEC's funding or permitting decisions.

**Q 12: What are the consequences of violating Government Code section 87104?**

A 12. An advisory body member who knowingly or willfully violates Government Code section 87104 may be guilty of a misdemeanor and up to the greater of \$10,000 or three times the amount unlawfully received. Additionally, a CEC 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.

**Q 13. Can a member of an advisory body host a site visit for CEC Commissioners and staff at a project location of a proposed power plant subject to the CEC's jurisdiction under Government Code section 87104?**

A 13. Yes, as long as prohibited communications are not made at the site visit. A member can host the site visit as long as the member does not communicate with CEC in an attempt to influence a CEC decision on a license, permit or other entitlement, such as a decision to exempt the project from the CEC's exclusive certification jurisdiction.