

ORDINANCE NUMBER O-_____ (NEW SERIES)

ADOPTED ON _____

AN ORDINANCE AMENDING THE SAN DIEGO MUNICIPAL CODE BY AMENDING CHAPTER 2, ARTICLE 6, DIVISION 4, BY AMENDING SECTIONS 26.0401, 26.0402, 26.0404, 26.0405, 26.0406, 26.0407, 26.0408, 26.0409, 26.0410, 26.0411, 26.0412, 26.0413, 26.0414, AND 26.0415; AND BY ADDING SECTIONS 26.0420, 26.0421, 26.0422, 26.0423, 26.0424, 26.0425, 26.0430, 26.0431, 26.0432, 26.0435, 26.0436, 26.0437, 26.0438, 26.0439, 26.0440, 26.0443, 26.0445, 26.0447, 26.0450, 26.0455, AND 26.0456; AND BY RESERVING FOR FUTURE USE SECTIONS 26.0426, 26.0427, 26.0428, 26.0429, 26.0433, 26.0434, 26.0441, 26.0442, 26.0444, 26.0446, 26.0448, 26.0449, 26.0451, 26.0452, 26.0453, AND 26.0454; BY AMENDING CHAPTER 2, ARTICLE 7, DIVISION 1, SECTION 27.0103; BY AMENDING CHAPTER 2, ARTICLE 7, DIVISION 29, SECTIONS 27.2963 AND 27.2971; AND BY AMENDING CHAPTER 2, ARTICLE 7, DIVISION 40, SECTION 27.4027; ALL RELATING TO CREATING INVESTIGATION AND ENFORCEMENT PROCEDURES FOR THE CITY OF SAN DIEGO ETHICS COMMISSION.

WHEREAS, the public's confidence in the City and its officials requires that City officials fulfill their duties faithfully and honestly, and in the public's interest, rather than for reasons of private gain or special interests; and

WHEREAS, there is a need to restore the public's confidence in the City and its officials; and

WHEREAS, in response to that need, on June 5, 2001, the City Council adopted an ordinance, which is on file with the Office of the City Clerk as Ordinance No. O-18945, and

[Corrected 1/30/2002]

codified as San Diego Municipal Code sections 26.0401 to 26.0415, establishing an Ethics Commission for the City of San Diego; and

WHEREAS, Section 26.0414(d) of the aforementioned ordinance describes the responsibilities and duties of the Ethics Commission to include “propos[ing] a formal complaint and investigation procedures for violations of the City’s governmental ethics laws, subject to City Council approval”; and

WHEREAS, at numerous public meetings the Ethics Commission has met and deliberated to discuss a proposed ordinance to establish complaint and investigation procedures; and

WHEREAS, the proposed ordinance establishing complaint and investigation procedures for the Ethics Commission has been reviewed and considered by the City Council Committee on Rules, Finance and Intergovernmental Relations; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 2, Article 6, Division 4, of the San Diego Municipal Code is hereby amended by amending Sections 26.0401, 26.0402, 26.0404, 26.0405, 26.0406, 26.0407, 26.0408, 26.0409, 26.0410, 26.0411, 26.0412, 26.0413, 26.0414, and 26.0415, to read as follows:

§26.0401 Purpose and Intent

It is the purpose and intent of the City Council to establish an Ethics Commission, which shall have the powers and duties set forth in this Division. The purposes of the *Commission* shall be to monitor, administer, and enforce the City’s governmental ethics laws, propose new governmental ethics law reforms, conduct

investigations, refer violations to appropriate enforcement agencies, audit disclosure statements, and advise and educate City officials and the public about governmental ethics laws.

§26.0402 Definitions

Each word or phrase that is defined in this Division appears in the text of this Division in italicized letters. For purposes of this Division, the following definitions shall apply:

Administrative Enforcement Order means a final decision of the *Commission* containing a finding of a violation of *Governmental Ethics Laws*.

Administrative Hearing means an administrative hearing, open to the public, following the *Commission's* determination that *Probable Cause* exists to believe that a violation of *Governmental Ethics Laws* has occurred.

Business day means any day except a Saturday, Sunday, or holiday listed in San Diego Municipal Code section 21.0104, unless otherwise specified.

Commission means the City of San Diego Ethics Commission created by City of San Diego Ordinance O-18945, codified in Chapter 2, Article 6, Division 4 of the San Diego Municipal Code.

Complainant means a person or entity that makes a complaint alleging violations of *Governmental Ethics Laws*.

Draft Administrative Complaint means a document prepared by the *Executive Director* that identifies the *Governmental Ethics Laws* allegedly violated by the

Respondent, the acts or omissions with which the *Respondent* is charged, and the penalties the *Commission* is seeking to impose for each violation listed.

Exculpatory Information means information tending to show that the *Respondent* has not committed the alleged violations.

Executive Director means the Executive Director of the *Commission* who has been selected by the *Commission* and confirmed by a majority of the City Council in accordance with Section 26.0411, or the Executive Director's designee.

Filing Officer means the Clerk of the City of San Diego charged with the duties and responsibilities prescribed in title 2, sections 18110 and 18115 of the California Code of Regulations.

Final Administrative Complaint means a document prepared by the *Executive Director* that identifies the *Governmental Ethics Laws* allegedly violated by the *Respondent*, the acts or omissions with which the *Respondent* is charged, the penalties the *Commission* is seeking to impose for each violation listed, and which is consistent with any findings made by the *Commission* following the *Probable Cause Hearing*.

Governmental Ethics Laws mean state and local laws governing campaign contribution limits, campaign contribution disclosure, campaign expenditure disclosure, statements of economic interests, receipt and disclosure of gifts, conflicts of interest, lobbying registration and disclosure, and other matters proposed by the *Commission* and adopted by a majority of the City Council.

Mitigating Information means information tending to excuse or reduce the significance of the *Respondent's* conduct.

Parties means the *Commission*, through actions of the *Petitioner*, and the *Respondent*.

Person has the same meaning as that term is defined in San Diego Municipal Code section 11.0210.

Petitioner means the *Executive Director*, or any other individual appointed by the *Commission*, who prepares and presents the case against the *Respondent* at the *Probable Cause Hearing* or at the *Administrative Hearing*.

Preliminary Review means an examination of the facts contained within a complaint for the sole purpose of determining whether the subject of the complaint is appropriate for consideration by the *Commission*.

Presiding Authority means either the full *Commission*, an ad hoc subcommittee of three Commissioners, or someone selected by the *Commission* from a list of pre-qualified individuals, to conduct the *Probable Cause Hearing* or the *Administrative Hearing*.

Presiding Authority's Recommendation means a written report prepared by the individual or ad hoc subcommittee conducting the *Administrative Hearing* that contains findings of fact, a summary of the evidence supporting each finding, a preliminary determination of whether or not the *Respondent* violated

Governmental Ethics Laws, findings to support the preliminary determination, and a recommended penalty for each violation.

Probable Cause means evidence sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a violation of *Governmental Ethics Laws* has been committed and that the *Respondent* committed or caused the violation.

Probable Cause Hearing means an administrative hearing, closed to the public unless otherwise requested by the *Respondent*, for the purpose of ascertaining whether *Probable Cause* exists.

Probable Cause Recommendation means a written report prepared by the individual or ad hoc subcommittee conducting the *Probable Cause Hearing* that contains a recommendation to the *Commission* regarding whether or not *Probable Cause* exists.

Probable Cause Report means a document prepared by the *Executive Director* following a formal investigation, and containing a summary of law and evidence gathered through the investigation, including any relevant *Exculpatory Information* and *Mitigating Information*.

Respondent means a person or entity that is alleged in a complaint to have violated *Governmental Ethics Laws*.

Subpoena means a written order requiring a witness's appearance at a *Probable Cause Hearing* or *Administrative Hearing* to give testimony.

Subpoena duces tecum means a written order requiring the production of books, papers, records, or other items material to the violation of *Governmental Ethics Laws* at issue.

§26.0404 Appointment

- (a) The Mayor shall appoint all seven members of the *Commission* from a pool of nominees submitted by the members of the City Council and City Attorney. The Mayor's appointments are subject to confirmation by a majority of the City Council.

- (b) The *Commission* shall reflect the diversity of the City which it serves. At least one of the members of the *Commission* shall be a person who has held an elective governmental office and at least two of the members of the *Commission* shall be attorneys in good standing with the California Bar Association. No more than three members of the *Commission* shall be registered with the same political party.

- (c) The Mayor shall make the initial appointments to the *Commission* in the following manner. Each member of the City Council and the City Attorney shall nominate seven candidates, including at least one person who has held an elective governmental office, at least two attorneys in good standing with the California Bar Association, and no more than three persons registered with the same political party. The members of the City Council and the City Attorney shall identify the requirements fulfilled by each of their nominees. The nominations shall reflect the diversity of the City. If the Mayor reasonably believes that the pool of nominees is not large enough, or does not provide nominees who meet the professional

background or political party requirements of Section 26.0404(b), the Mayor may call for additional nominees.

- (d) The Mayor shall fill any subsequent vacancies on the *Commission* in the following manner. When a vacancy occurs, the Mayor shall send a memorandum to the City Attorney and City Council stating the requirements for the vacant position. Each member of the City Council and the City Attorney shall nominate one candidate for each vacancy on the *Commission*. The nominations and appointments shall be made so that the requirements of Section 26.0404(b) with respect to professional background and political party membership are maintained. If the Mayor reasonably believes that the pool of nominees is not large enough, or does not provide nominees who meet the professional background or political party requirements of Section 26.0404(b), the Mayor may call for additional nominees.
- (e) The Members of the *Commission* shall elect a Chairperson annually, on July 1, or as soon thereafter as possible. No person shall serve as Chairperson of the *Commission* for more than two consecutive one-year terms.

§26.0405 Terms

The members of the *Commission* shall serve four-year terms beginning on July 1 and ending on June 30. Three of the Mayor's initial seven appointees shall serve

two-year terms. A member who has served two complete, consecutive four-year terms shall be ineligible for reappointment for four years after leaving office.

§26.0406 Qualification of Members

Each member of the *Commission* shall comply with the following qualifications during his or her tenure on the *Commission*:

- (a) [No change in text.]
- (b) No member of the *Commission* shall make a financial contribution to, or publicly support or oppose, a candidate for City office.
- (c) No member of the *Commission* shall become a candidate for elective governmental office during his or her tenure on the *Commission*, and for twelve months thereafter. Each prospective Commissioner shall sign a written declaration agreeing not to run for elective governmental office for at least twelve months after completion of service on the *Commission*, and waiving the legal right to challenge this provision.
- (d) No member of the *Commission* is permitted to act as a lobbyist required to register with the City pursuant to Chapter 2, Article 7, Division 40 of this Code.

§26.0407 Failure to Comply With Qualifications

Failure to comply with any of the qualifications listed in Section 26.0406 shall constitute an automatic resignation from the *Commission*. For purposes of Section 26.0406(c), a Commissioner becomes a candidate for City office upon filing a declaration of candidacy or filing a statement of organization for a

candidate controlled committee, whichever occurs first. Whether a Commissioner has become a candidate for other elective governmental office for purposes of Section 26.0406(c) shall be governed by the appropriate laws and regulations.

§26.0408 Termination

The City Council may remove a member of the *Commission* for cause by a vote of a majority of the members of the Council. Before the Council may remove a member of the *Commission*, written charges shall be made against the *Commission* member and an opportunity afforded for public hearing before the Council upon such charges.

§26.0409 Quorum

- (a) [No change in text.]
- (b) A vote to impose a sanction shall require the concurring vote of five members of the *Commission*. For purposes of this section, a sanction includes any civil fine or other penalty established by the City Council pursuant to Section 26.0414(f).

§26.0410 Reimbursement for Expenses

The members of the *Commission* shall be reimbursed for reasonable expenses incurred in the performance of their official duties, pursuant to City Administrative Regulations.

§26.0411 Staff and Budget

The *Commission* shall employ a staff consisting of no less than a full time executive director, a clerical assistant, and an investigator. The selection of an

executive director shall be subject to confirmation by a majority of the City Council. The City Attorney shall provide legal services to the *Commission*, however, the *Commission* may hire outside counsel to advise the *Commission* and to take action as the *Commission* may direct on matters which directly involve the City Attorney, his or her office, a campaign for City Attorney, or other matters presenting a conflict of interest for the City Attorney, subject to City Council approval. The City Council shall appropriate a reasonable budget for the *Commission*.

§26.0412 Conflict of Interest Code

A conflict of interest code shall be adopted for the members and staff of the *Commission*, subject to City Council approval pursuant to Chapter 2, Article 6, Division 1 of this Code. All members of the *Commission* shall be required to complete and file statements of economic interests in accordance with the conflict of interest code.

§26.0413 Jurisdiction of the Ethics Commission; Statute of Limitations

- (a) The authority of the *Commission* to conduct investigations and take administrative enforcement actions shall extend to all elected officials of the City; all candidates for City office; all committees required to file any disclosure forms with the Office of the City Clerk pursuant to Chapter 2, Article 7, Division 29 of this Code; all unclassified employees of the City who are required to file conflict of interest disclosure forms pursuant to a conflict of interest code; all consultants to the City who are required to file

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conflict of interest disclosure forms pursuant to a conflict of interest code;
all members of City boards and commissions who are required to file
conflict of interest disclosure forms pursuant to a conflict of interest code;
and all lobbyists registered with the City pursuant to Chapter 2, Article 7,
Division 40, of this Code.

- (b) The *Commission's* investigative and enforcement authority is limited to violations of *Governmental Ethics Laws* that are not preempted by state or federal law.
- (c) The *Commission* shall have no jurisdiction over actions or events that occurred prior to July 1, 2001.
- (d) No administrative action alleging a violation of *Governmental Ethics Laws* shall be commenced more than three years after the date of the violation.
- (e) The date of service of a *Draft Administrative Complaint* upon the *Respondent* constitutes the commencement of an administrative action.
- (f) For the purposes of this section, the date of the violation means the earliest date when the *Filing Officer* or the *Commission* has or should reasonably have knowledge of the violation and its cause, and a suspicion of wrongdoing. Suspicion shall be examined from an objective standpoint of what is reasonable for the *Filing Officer* or the *Commission* to know or suspect under the facts of the situation.

[CORRECTED 1/30/2002]

§26.0414 Responsibilities and Duties of the Ethics Commission

The *Commission* shall have the following responsibilities and duties:

- (a) [No change in text.]
- (b) To issue formal and informal advice and opinions to any person regarding the governmental ethics laws within the *Commission's* jurisdiction. The *Commission* shall have the right to issue either informal advice or formal opinions at its discretion in response to requests for advice. The *Commission* may seek advice and opinions from the Fair Political Practices Commission as it deems appropriate. Elected officials of the City and City department heads, including the City Manager, may require the *Commission* to issue a formal opinion in response to an inquiry, provided that sufficient information is provided to the *Commission* to enable the *Commission* to provide a formal opinion.

No person who acts in good faith based upon a formal opinion issued to him or her by the *Commission* shall be subject to administrative penalties for so acting, provided that the material facts are as stated in the opinion request.
- (c) [No change in text.]
- (d) To propose formal complaint and investigation procedures for violations of the City's *Governmental Ethics Laws*, subject to City Council approval. The procedures shall include reasonable safeguards for protecting candidates for elective office from frivolous complaints made during the

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last ninety days prior to an election, and shall provide procedural due process rights to individuals under investigation by the *Commission*. The *Commission* shall receive complaints from anyone wanting to report *Governmental Ethics Law* Violations, however, complainants must identify themselves to the *Commission*.

- (e) To investigate and enforce violations of *Governmental Ethics Laws*, including referral to other enforcement agencies when appropriate. The *Commission* shall be empowered to subpoena documents and witnesses, subject to a City Charter amendment granting subpoena authority to the *Commission*. Subject to the California Public Records Act, no record or information contained in any investigation or investigatory file shall be disclosed to any person other than a respondent or his or her representative, the City Attorney, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation, prior to a final determination as to its merit.
- (f) To propose to the City Council, for its approval, an ordinance establishing civil fines or penalties for violations of the City's governmental ethics laws, which the *Commission* shall have the power to levy or impose, and the procedures therefore.
- (g) [No change in text.]

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- (h) To publish an annual report describing the activities of the *Commission* during the previous year, including the number of complaints handled and investigations conducted, the types of violations alleged, and the action taken in response to complaints received and investigations conducted.
- (i) [No change in text.]

§26.0415 Interference With Complainants

It is unlawful to use or threaten to use any official authority, including discipline or termination, to discourage, restrain or interfere with any person acting in good faith to make a complaint to the *Commission*.

Section 2. That Chapter 2, Article 6, Division 4, of the San Diego Municipal Code is hereby amended by adding new sections 26.0420, 26.0421, 26.0422, 26.0423, 26.0424, 26.0425, 26.0430, 26.0431, 26.0432, 26.0435, 26.0436, 26.0437, 26.0438, 26.0439, 26.0440, 26.0443, 26.0445, 26.0447, 26.0450, 26.0455, and 26.0456, to read as follows:

§26.0420 Investigation and Enforcement Procedures

The Investigation and Enforcement Procedures of the *Commission*, set forth at Sections 26.0420 to 26.0456, are promulgated in order to ensure the fair, just, and timely resolution of complaints presented to the *Commission* that allege violations of *Governmental Ethics Laws* by:

- (a) Setting and maintaining objective standards for the investigation and enforcement of matters brought before the *Commission*; and

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- (b) Eliminating any political or improper influence in the investigation of persons accused of ethics violations; and
- (c) Protecting the privacy rights of those accused of ethics violations by maintaining the confidentiality during the pendency of each proceeding; and
- (d) Setting and enforcing reasonable time limits within which enforcement proceedings should be completed; and
- (e) Coordinating and sharing with other governmental agencies the responsibility for investigating complaints, whenever consistent with the interests of justice.

§26.0421 Filing of Complaints

Complaints may be filed with the *Commission* in accordance with the following provisions:

- (a) Any *Person* may file a formal complaint alleging violations of *Governmental Ethics Laws*. The *Executive Director* shall process and review all formal complaints. Formal complaints must be made in writing on a form specifically provided by the *Commission*, and must be dated, verified, and signed by the *Complainant* under penalty of perjury. If the *Complainant* is an entity, the complaint must be dated, verified, and signed under penalty of perjury by an authorized officer or agent of the entity. Formal complaints must include the following information, upon the *Complainant's* information and belief:

- (1) The name and address of the *Complainant*, and the telephone number at which the *Complainant* may be reached during normal business hours; and
- (2) the name and any known addresses and telephone numbers of the *Respondent*; and
- (3) the title or position of the *Respondent*, if known; and
- (4) the *Governmental Ethics Law* allegedly violated; and
- (5) the facts constituting each alleged violation; and
- (6) the names, addresses, and telephone numbers of persons with knowledge of the facts constituting an alleged violation, if known; and
- (7) an identification of documents or other evidence that may prove the facts constituting the alleged violation, if known.

(b) Any *Person* may file an informal complaint alleging violations of *Governmental Ethics Laws*. The *Executive Director* shall have no obligation, but has the discretion, to review and process informal complaints.

- (1) Informal complaints include the following: written complaints that are not verified or signed under penalty of perjury; written complaints that do not contain all of the information required by Section 26.0421(a); unwritten complaints; and referrals from other governmental agencies.

- (2) The *Executive Director* shall not review or process informal complaints that do not contain the name and address of the *Complainant*.
- (c) Notwithstanding the provisions of Section 26.0421(a) and (b), the *Commission*, individual Commissioners, the *Executive Director*, and the staff of the *Commission*, shall not directly submit complaints to the *Commission* unless such complaint arises from the discovery of an apparent violation of *Governmental Ethics Laws* in the course of an official *Commission* investigation, an official audit, or in the course of the *Commission's* official review of campaign, lobbying, and conflict of interest forms. In such cases, the *Commission* shall vote in closed session whether the apparent violation warrants the initiation of a complaint, and upon the concurring vote of at least four Commissioners, shall instruct the *Executive Director* to file a complaint on behalf of the *Commission*.
- (d) The *Commission* shall not receive complaints at public meetings. The *Commission* shall urge the public in the strongest terms possible not to make complaints at public meetings.

§26.0422 Preliminary Review

- (a) The *Executive Director* shall, within five *business days* of receipt of a formal complaint, issue a letter to the *Complainant* acknowledging that the complaint has been received and is being processed.

(1) The letter shall be in substantially the following form:

“The City of San Diego Ethics Commission has received your complaint alleging conduct by the above-named Respondent that may be within the Commission’s investigative and enforcement authority. The Ethics Commission is currently conducting a Preliminary Review of the information contained in the complaint. During the Preliminary Review, the Commission will not be investigating any facts alleged in your complaint, but will simply be making a determination regarding whether or not (a) the Commission has jurisdiction over the subject of the complaint; or (b) the complaint contains allegations already acted upon by the Commission; or (c) the Commission is presently investigating the same allegations from a different complaint; or (d) the complaint consists of opinions or frivolous accusations.

The Ethics Commission will make reasonable efforts to complete the Preliminary Review within thirty calendar days, or within fifteen calendar days if the complaint was received within ninety calendar days of a municipal election and alleges violations by a candidate seeking office at that election. After the Preliminary Review, your complaint may be presented to the Ethics Commission for a vote on whether or not to conduct a formal investigation.

Please do not provide any additional information to the Commission at this time. During the Preliminary Review process, the Ethics Commission will only consider information contained in the complaint.”

- (2) The *Executive Director* shall have no obligation to send such notification to the *Complainant* if the complaint is an informal complaint filed with the *Commission* pursuant to Section 26.0421(b).
- (b) The *Executive Director* shall make reasonable efforts to complete a *Preliminary Review* within thirty calendar days of the receipt of each complaint.
 - (1) Failure of the *Executive Director* to complete the *Preliminary Review* within thirty calendar days shall not preclude the *Commission* from pursuing administrative remedies against the *Respondent* in accordance with these procedures.
 - (2) The purpose of the *Preliminary Review* is not to determine the truth or falsity of the allegations, but to determine whether the subject of the complaint is appropriate for consideration by the *Commission*.
- (c) Notwithstanding Section 26.0422(b), a *Preliminary Review* based on a formal complaint received by the *Commission* within ninety calendar days of a municipal election and alleging violations by a candidate seeking

office at that election shall be completed by the *Executive Director* within fifteen calendar days of receipt of such complaint.

(d) After completing a *Preliminary Review*, the *Executive Director* may determine that the allegations in the complaint do not warrant a formal investigation for any of the following reasons:

(1) The *Commission* has no jurisdiction over the allegations made in the complaint. A matter is outside the jurisdiction of the *Commission* if:

(A) the subject of the complaint is a *Person* who is not identified in Section 26.0413(a) as being within the scope of the *Commission's* investigative and enforcement authority; or

(B) the complaint does not allege a violation of *Governmental Ethics Laws*; or

(C) the allegations made in the complaint pertain to actions or events that occurred prior to July 1, 2001.

(2) The complaint restates other complaints containing essentially similar or identical allegations that have already been disposed of, and the evidence presented does not warrant reopening the previous case; or

(3) the allegations contained in the complaint are already under investigation by the *Commission*; or

- (4) the complaint consists of expressions of opinion rather than factual allegations regarding the *Respondent's* conduct, or consists of frivolous or absurd accusations.
- (e) If, after completing the *Preliminary Review*, the *Executive Director* determines that a formal investigation is not warranted for one or more of the reasons set forth in Section 26.0422(d), the *Commission* and its staff shall take no further action in the matter, except as follows:
 - (1) The *Executive Director* may refer the complaint to another governmental or law enforcement agency for appropriate action.
 - (2) The *Executive Director* shall issue a letter to the *Complainant* and *Respondent* within five *business days* of making the determination, indicating why a formal investigation by the *Commission* will not be conducted. Such a letter is not a conclusive finding and is not intended to be used as evidence in any enforcement action initiated by another agency.
- (f) Public disclosure of documents related to the disposition of matters at the *Preliminary Review* stage is subject to the provisions of Section 26.0455.

§26.0423 Determination Following Review

- (a) If the *Executive Director* determines that the allegations in the complaint warrant further action, the *Executive Director* shall make a recommendation to the *Commission* within thirty calendar days of the completion of the *Preliminary Review*. The recommendation shall be

made in closed session pursuant to Section 54956.9 of the California Government Code. The *Executive Director* shall recommend one of the following courses of action:

- (1) That the *Commission* initiate a formal investigation of the allegations made in the complaint; or
 - (2) that the *Commission* refer the complaint or the *Complainant* to another governmental or law enforcement agency.
- (b) After hearing the *Executive Director's* recommendation, the *Commission* shall vote in closed session on whether to conduct a formal investigation or to refer the matter to another agency. Either action shall require the concurring vote of four members of the *Commission*.
- (c) If the *Commission* fails to vote in favor of commencing a formal investigation, the *Commission* and its staff shall take no further action in the matter, except as follows:
- (1) The *Commission* may instruct the *Executive Director* to refer the complaint or the *Complainant* to another governmental or law enforcement agency for appropriate action.
 - (2) Within five *business days* of the *Commission's* decision, the *Executive Director* shall issue a letter to the *Complainant* and *Respondent* indicating that no formal investigation of the complaint will be conducted.

- (3) A letter from the *Executive Director* indicating that no formal investigation will be conducted by the *Commission* is not a conclusive finding and is not intended to be used as evidence in any enforcement action initiated by another government agency.
- (d) If the *Commission* votes in favor of conducting a formal investigation of the complaint, the *Commission* shall instruct the *Executive Director* to commence a formal investigation.
- (e) Public disclosure of documents related to the disposition of matters at the *Preliminary Review* stage is subject to the provisions of Section 26.0455.

§26. 0424 Formal Investigation

- (a) The *Executive Director* shall make reasonable attempts to complete a formal investigation into the allegations contained in the complaint within 180 calendar days of the *Commission's* decision to commence the investigation, but in no event shall the formal investigation take more than 360 calendar days to complete.
- (b) Failure of the *Executive Director* to complete a formal investigation within 360 calendar days shall not preclude the *Commission* from pursuing administrative remedies against the *Respondent* in accordance with these procedures.
- (c) As part of a formal investigation, the *Executive Director* may interview *Persons* with knowledge of the facts alleged in the complaint, and may

seek the production of books, papers, records, and other items material to the investigation of a complaint.

- (1) The *Executive Director* shall make a reasonable effort to obtain such books, papers, records, and other items on a voluntary basis.
- (2) The *Executive Director*, in his or her discretion, may seek the issuance of a *Subpoena duces tecum* to obtain books, papers, records, and other items.
- (3) A *Subpoena duces tecum* shall be issued only at the discretion of the *Commission*, following a concurring vote of at least four of the Commissioners in closed session.
- (4) All *Subpoenas duces tecum* issued pursuant to this section shall be processed in accordance with the procedures set forth at Section 26.0445.

(d) The *Executive Director* shall periodically report to the *Commission*, in closed session, on the status of all pending matters, both during and after a formal investigation. Failure to report to the *Commission* concerning the status of an investigation shall not affect the validity of any information or documentation obtained during the investigation.

§ 26.0425 Determination Following Investigation

(a) At the conclusion of the formal investigation, the *Executive Director* shall present to the *Commission* all relevant evidence obtained during the course

of the investigation. The presentation shall be made in closed session pursuant to Section 54956.9 of the California Government Code.

(b) Based on a review of the evidence presented by the *Executive Director*, the *Commission* shall, by a concurring vote of at least four members, determine whether there is cause to believe that the *Respondent* violated *Governmental Ethics Laws*; and, if so, whether to pursue administrative remedies against the *Respondent*.

(1) If the *Commission* determines there is no cause to believe that the *Respondent* violated *Governmental Ethics Laws*, then the *Commission* shall take no further action in the matter, except that the *Commission* may refer the matter to another agency for appropriate action.

(2) If the *Commission* determines there is cause to believe that the *Respondent* violated *Governmental Ethics Laws*, but decides not to pursue administrative remedies against the *Respondent*, the *Commission* shall take no further action in the matter, except that the *Commission* may refer the matter to another agency for appropriate action.

(3) If the *Commission* determines there is cause to believe that the *Respondent* violated *Governmental Ethics Laws* and also decides to pursue administrative remedies against the *Respondent*, the

Commission shall order that a *Probable Cause Hearing* be conducted.

- (c) Notwithstanding the provisions of Section 26.0425(b), the *Commission* shall not order that a *Probable Cause Hearing* be conducted and shall not refer the matter to another agency if it is presented with clear and convincing evidence that, prior to the alleged violation:
- (1) The *Respondent* had requested and obtained a formal written opinion from the *Commission* or its staff; and
 - (2) the *Respondent*, in requesting the opinion, disclosed truthfully all the material facts pertinent to the case; and
 - (3) the *Commission* or its staff issued a formal, written opinion; and
 - (4) the *Respondent* committed the acts or violations alleged in the complaint in good faith reliance upon the formal, written opinion of the *Commission* or its staff.
- (d) If the *Commission* determines that it will take no further action on the complaint, it shall instruct the *Executive Director* to issue, within five *business days* of the *Commission's* determination, a letter to the *Complainant* and *Respondent* indicating the basis for its determination. A letter from the *Executive Director* indicating that no administrative remedies will be pursued by the *Commission* is not a conclusive finding and is not intended to be used as evidence in any enforcement action initiated by another government agency.

- (e) Public disclosure of *Commission* investigatory records is subject to the provisions of Section 26.0455.

§26.0430 Preparation for Probable Cause Hearing

- (a) Concurrent with ordering that a *Probable Cause Hearing* be conducted, the *Commission* shall:
 - (1) Direct the *Executive Director* to schedule a *Probable Cause Hearing* on a date no later than ninety calendar days from the date the *Commission* ordered the hearing, however such date may be extended beyond ninety calendar days upon a showing of good cause by either *Party* and the approval by the *Presiding Authority*.
 - (2) Direct the *Executive Director* to prepare a *Probable Cause Report* and a *Draft Administrative Complaint*. The *Probable Cause Report* shall contain sufficient information to justify the issuance of a *Draft Administrative Complaint*.
- (b) As soon as practicable, but no later than thirty calendar days after ordering that a *Probable Cause Hearing* be conducted, the *Commission* shall take the following action:
 - (1) Appoint a *Petitioner* to prepare and present the case against the *Respondent* to be heard at the *Probable Cause Hearing*. The *Executive Director* shall serve as the *Petitioner* unless the *Commission*, at its discretion, selects someone else from a list of pre-qualified individuals retained to serve as *Petitioners*.

(2) Appoint a *Presiding Authority* to conduct the *Probable Cause Hearing*. At the discretion of the *Commission*, the *Presiding Authority* shall be one of the following:

- (A) The entire *Commission* sitting as a hearing panel; or
- (B) an ad hoc subcommittee composed of three Commissioners; or
- (C) someone selected from a list of individuals who have been pre-qualified to meet or exceed minimum qualification criteria for training and experience as established by the *Commission*.

(c) The *Executive Director* shall cause the *Respondent* to be served with the following materials at least sixty calendar days prior to the date of the *Probable Cause Hearing*:

- (1) A copy of the *Probable Cause Report*; and
- (2) a copy of the *Draft Administrative Complaint*; and
- (3) written notice of the date, time, and location of the *Probable Cause Hearing*. The notice shall be in substantially the following form:

“You are hereby notified that a hearing will be held before a Presiding Authority appointed by the City of San Diego Ethics Commission on the ____ day of _____, 20____, at the hour of _____, at (location), upon the allegations made in the Draft Administrative Complaint.

You have a right to attend the hearing, and may be represented by legal counsel or any other representative of your choosing. You may present any relevant evidence, including the testimony of witnesses, and will be given an opportunity to cross-examine all witnesses testifying against you. The hearing shall be closed to the public unless each person named as a Respondent in the Probable Cause Report requests in writing that the hearing be open to the public.”

- (4) written notice that the *Respondent* has the right to respond in writing to the *Probable Cause Report*; and
 - (5) written notice that the *Respondent* has a right to attend the *Probable Cause Hearing* and be represented by legal counsel or any representative of his or her choosing.
 - (6) These materials may be served in accordance with the provisions set forth in Section 26.0443.
- (d) The *Respondent* may submit a written response to the *Probable Cause Report*. The response may contain legal arguments, a summary of evidence, and any *Exculpatory Information* or *Mitigating Information*. Each response must be filed with the *Executive Director* and served on all other *Respondents* listed in the *Probable Cause Report*, at least twenty-one calendar days prior to the date of the *Probable Cause Hearing*.

- (e) The *Petitioner* may collect evidence to refute statements made in the *Respondent's* response, and may submit a written rebuttal to the *Respondent's* response. The *Respondent* shall be served with a copy of such rebuttal at least ten calendar days prior to the date of the *Probable Cause Hearing*.
- (f) The *Petitioner* and *Respondent* may seek a *Subpoena* or *Subpoena duces tecum* in connection with the *Probable Cause Hearing* pursuant to the provisions of Section 26.0445. Procedures for issuing, serving, objecting to, or enforcing a *Subpoena* or *Subpoena duces tecum* in connection with the *Probable Cause Hearing* shall be as set forth in Section 26.0445.
- (g) At the *Presiding Authority's* discretion, additional material may be submitted as part of the response or rebuttal.
- (h) The time limitations of this section may be extended or shortened by the *Presiding Authority* for good cause shown.
- (i) The *Petitioner* or *Respondent* may request that preliminary matters, not related to the merits of the hearing, be heard by the *Presiding Authority* prior to a *Probable Cause Hearing* in accordance with Section 26.0447.

§26.0431 Probable Cause Hearing

- (a) Unless all *Respondents* named in the Probable Cause Report request that the *Probable Cause Hearing* be held in public, the hearing shall be closed to the public.

[CORRECTED 1/30/2002]

- (b) Formal rules of the California Evidence Code shall not apply to a *Probable Cause Hearing* held pursuant to these procedures.
- (c) The *Presiding Authority* shall have the authority to administer oaths and affirmations at the *Probable Cause Hearing*.
- (d) The *Presiding Authority* may continue the *Probable Cause Hearing* based on good cause shown by one of the *Parties* to the hearing, if the *Presiding Authority* determines that due process has not been adequately afforded.
- (e) The *Presiding Authority* shall find that *Probable Cause* exists only if the *Presiding Authority* determines that the evidence is sufficient to lead a person of ordinary caution and prudence to believe that a violation has been committed and that the *Respondent* may have committed or caused the violation.
 - (1) If the *Presiding Authority* is the entire *Commission* sitting as a hearing panel, it shall conclude the *Probable Cause Hearing* by conducting deliberations in accordance with the provisions of Section 26.0432.
 - (2) If the *Presiding Authority* is an ad hoc subcommittee composed of three Commissioners, such subcommittee shall take the matter under submission and, based on the concurrence of at least two members of the subcommittee, make a recommendation regarding whether or not probable cause exists. Reasonable effort shall be made to submit a *Probable Cause Recommendation* to the

Commission within thirty calendar days of the conclusion of the *Probable Cause Hearing*.

- (3) If the *Presiding Authority* is an individual selected pursuant to Section 26.0430(b)(2)(C), such individual shall take the matter under submission and make a recommendation regarding whether or not probable cause exists. Reasonable effort shall be made to submit a *Probable Cause Recommendation* to the *Commission* within thirty calendar days of the conclusion of the *Probable Cause Hearing*.

§26.0432 Probable Cause Determination

- (a) As soon as practicable following the *Probable Cause Hearing* and the receipt of any *Probable Cause Recommendation*, the *Commission* shall make a *Probable Cause* determination.
 - (1) The determination shall be made in closed session pursuant to California Government Code section 54956.9 by a concurring vote of at least four Commissioners.
 - (2) If an individual was selected from a pre-qualified list to serve as *Presiding Authority* pursuant to Section 26.0430(b)(2)(C), the *Commission* may request that such individual attend the closed session meeting to discuss any issue relevant to the *Probable Cause Hearing*.

- (3) The *Commission* shall find that *Probable Cause* exists only if it determines that the evidence is sufficient to lead a person of ordinary caution and prudence to believe that a violation has been committed and that the *Respondent* may have committed or caused the violation.
 - (4) Any member of the *Commission* may be disqualified from participating in the *Probable Cause* determination in accordance with the provisions set forth in Section 26.0447(b).
 - (5) A determination by the *Commission* regarding the existence of *Probable Cause* shall be based on the entire record of the proceedings. Each Commissioner who participates in the determination shall state for the record that he or she personally heard or read the testimony (either in person or by listening to a recording or by reading a transcript prepared by a court reporter) and reviewed the evidence, or otherwise reviewed the entire record.
 - (6) The *Commission* may elect to remand the matter to the *Presiding Authority* for further proceedings.
- (b) If the *Commission* determines that *Probable Cause* does not exist, the *Commission* shall take no further action on the complaint and the *Executive Director* shall notify each *Complainant* and *Respondent* in writing of the *Commission's* decision within five *business days* of the decision.

[CORRECTED 1/30/2002]

- (c) If the *Commission* determines that *Probable Cause* exists, the *Commission* shall announce in open session that it has determined there is *Probable Cause* to believe that the *Respondent* may have violated a *Governmental Ethics Law* and that the matter shall be heard at a public *Administrative Hearing*. The announcement shall contain a summary of the allegations and a cautionary statement that the *Respondent* is presumed to be innocent unless and until such time that the allegations are proven to be a violation at the *Administrative Hearing*.
- (d) Public disclosure of records relating to the *Probable Cause Hearing* is subject to the provisions of Section 26.0455.

§26.0435 Preparation for Administrative Hearing

- (a) Concurrent with electing to proceed with a public *Administrative Hearing*, the *Commission* shall:
 - (1) direct the *Executive Director* to schedule an *Administrative Hearing* on a date no later than ninety calendar days from the date the *Commission* ordered the hearing, however such date may be extended beyond ninety calendar days upon a showing of good cause by either *Party* and the approval by the *Presiding Authority*; and
 - (2) direct the *Executive Director* to prepare a *Final Administrative Complaint*.
 - (A) If the *Commission* finds that *Probable Cause* exists for every allegation listed in the *Draft Administrative*

Complaint, then the *Final Administrative Complaint* will be substantially identical to the *Draft Administrative Report*.

(B) If the *Commission* finds that *Probable Cause* does not exist for one or more of the allegations listed in the *Draft Administrative Report*, it shall instruct the *Executive Director* to prepare a *Final Administrative Complaint* that does not contain such allegations.

(C) The *Executive Director* shall make available to the public a copy of the *Final Administrative Complaint*.

(b) As soon as practicable, but no later than thirty calendar days after ordering that a public *Administrative Hearing* be conducted, the *Commission* shall take the following action:

(1) Appoint a *Petitioner* to prepare and present the case against the *Respondent* to be heard at the *Administrative Hearing*. The *Executive Director* shall serve as the *Petitioner* unless the *Commission*, at its discretion, selects someone else from a list of pre-qualified individuals retained to serve as *Petitioners*.

(2) Appoint a *Presiding Authority* to conduct the *Administrative Hearing*. At the discretion of the *Commission*, the *Presiding Authority* shall be one of the following:

(A) The entire *Commission* sitting as a hearing panel; or

- (B) an ad hoc subcommittee composed of three Commissioners; or
- (C) someone selected from a list of individuals who have been pre-qualified to meet or exceed minimum qualification criteria for training and experience as established by the *Commission*.

(c) The *Executive Director* shall cause the *Respondent* to be served with the following materials, in accordance with Section 26.0443, at least sixty calendar days prior to the date of the *Administrative Hearing*:

- (1) A copy of the *Final Administrative Complaint*; and
- (2) written notice of the date, time, and location of the hearing. The notice shall be in substantially the following form:

“You are hereby notified that a public hearing will be held before a Presiding Authority appointed by the City of San Diego Ethics Commission on the ____ day of _____, 20____, at the hour of _____, at (location), upon the allegations made in the Final Administrative Complaint.

You have a right to attend the hearing, and may be represented by legal counsel or any other representative of your choosing. You may present any relevant evidence and will be given an opportunity to cross-examine all witnesses testifying against you. You may request the issuance of subpoenas to

compel the attendance of witnesses and the production of books, papers, records, or other items by applying to the Presiding Authority in care of the City of San Diego Ethics Commission on or before (date).”

- (d) The *Parties* shall be entitled to pre-hearing discovery in accordance with the provisions for discovery set forth in the California Administrative Procedures Act. However, upon request, the *Presiding Authority* may, at its discretion, allow the *Parties* to conduct additional discovery other than what is provided for in the California Administrative Procedures Act. The *Presiding Authority* shall resolve any discovery dispute.
- (e) The *Petitioner* and *Respondent* may seek *Subpoenas* and *Subpoenas duces tecum* in connection with the *Administrative Hearing* pursuant to the provisions of Section 26.0445. Procedures for issuing, serving, objecting to, or enforcing a *Subpoena* or *Subpoena duces tecum* in connection with the *Administrative Hearing* shall be as set forth in Section 26.0445.
- (f) Not later than seven calendar days prior to the public *Administrative Hearing*, the *Petitioner* shall, and any *Respondent* may, submit an administrative hearing brief to the *Presiding Authority*.
 - (1) Any brief shall outline significant legal arguments and evidence to be presented at the hearing.

- (2) A brief shall not exceed twenty-five pages in length except by permission of the *Presiding Authority* and by a showing of good cause.
- (3) When a brief is submitted by any *Party* pursuant to this subsection, a copy shall be served on the same date of the submission to all other *Parties* to the *Administrative Hearing*.
- (g) The time limitations of this section may be extended or shortened by the *Presiding Authority* for good cause shown.
- (h) The *Petitioner* or *Respondent* may request that preliminary matters, not related to the merits of the hearing, be heard by the *Presiding Authority* prior to an *Administrative Hearing* in accordance with Section 26.0447.

§26.0436 Administrative Hearing

- (a) The *Administrative Hearing* shall be open to the public.
- (b) The *Presiding Authority* is authorized and empowered to administer oaths and affirmations.
- (c) The *Petitioner* bears the burden of proof at the *Administrative Hearing* to establish, by a preponderance of the evidence, the existence of a violation of *Governmental Ethics Laws*.
- (d) The rules relating to the admissibility of evidence at the *Administrative Hearing* are set forth as follows:
 - (1) All *Parties* shall have the right to call and examine witnesses under oath or affirmation, to introduce exhibits, to cross-examine

opposing witnesses on any relevant matter even though that matter was not covered in direct examination, to impeach any witness, and to rebut evidence presented against the *Party*.

(2) Any relevant evidence shall be admitted if it is the sort of evidence that responsible persons are accustomed to relying upon in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of the evidence over objection in a civil or criminal action.

(3) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil or criminal action. An objection is timely if it is made before the *Presiding Authority* takes the case under submission.

(4) The *Presiding Authority* has the discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will require an undue consumption of time.

(e) The *Administrative Hearing* shall be recorded, and the recording shall be retained by the *Commission*.

[CORRECTED 1/30/2002]

- (1) A copy of the recording shall be provided to the *Respondent* upon request.
 - (2) The *Respondent* may ask that a certified court reporter attend and make a transcript of the hearing. In such event, the *Respondent* shall provide copies of the transcript to the *Commission* and any other *Respondents*. The costs of making the transcript and making copies of the transcript shall be borne by the *Respondent* requesting the court reporter.
- (f) The *Presiding Authority* may continue the *Administrative Hearing* based on good cause shown by one of the *Parties* to the hearing if the *Presiding Authority* determines that due process has not been adequately afforded.
- (g) At the conclusion of the *Administrative Hearing*, the *Presiding Authority* shall act as follows:
- (1) If the *Presiding Authority* is the entire *Commission* sitting as a hearing panel, it shall conclude the *Administrative Hearing* by conducting deliberations in accordance with the provisions of Section 26.0438.
 - (2) If the *Presiding Authority* is an ad hoc subcommittee composed of three Commissioners, such subcommittee shall take the matter under submission and, based on the concurrence of at least two members of the subcommittee, make a recommendation regarding whether a violation has been committed, whether the *Respondent*

committed or caused the violation, and what penalty, if any, should be imposed. The recommendation shall be submitted to the *Commission* in accordance with Section 26.0437.

- (3) If the *Presiding Authority* is an individual selected pursuant to Section 26.0435(b)(2)(C), such individual shall take the matter under submission and make a recommendation regarding whether a violation has been committed, whether the *Respondent* committed or caused the violation, and what penalty, if any, should be imposed. The recommendation shall be submitted to the *Commission* in accordance with Section 26.0437.

§26.0437 Presiding Authority's Recommendation

- (a) The *Presiding Authority* shall make reasonable efforts to provide the *Commission* with a *Presiding Authority's Recommendation* within twenty calendar days of the conclusion of the *Administrative Hearing*.
- (b) The *Presiding Authority's Recommendation* shall, at a minimum, contain findings of fact, a summary of the evidence supporting each finding, conclusions of law, a preliminary determination of whether or not the *Respondent* violated *Governmental Ethics Laws*, and a recommended penalty for each violation.
- (c) If the *Presiding Authority* is an individual selected pursuant to Section 26.0435(b)(2)(C), such individual shall include in the *Presiding Authority's Recommendation* an initial determination regarding whether or

not the *Respondent* violated *Governmental Ethics Laws*, but shall have no vote in the final decision of the *Commission*.

- (d) Within five *business days* of the *Commission's* receipt of the *Presiding Authority's Recommendation*, the *Executive Director* shall serve or mail a copy of this document to the *Respondent*, as well as to the *Petitioner*, if the *Executive Director* is not serving in the capacity of *Petitioner*.
- (e) Within ten *business days* of the service or mailing of the *Presiding Authority's Recommendation*, the *Petitioner* and the *Respondent* may submit to the *Commission* a brief of no more than fifteen pages in response to the *Presiding Authority's Recommendation*.
- (f) Within forty-five calendar days of the mailing of the *Presiding Authority's Recommendation*, the *Commission* shall conduct an open meeting to discuss and vote on whether or not the *Respondent* violated *Governmental Ethics Laws*. As soon as practicable, the *Executive Director* shall serve or mail notice of the open meeting to the *Respondent* and the *Complainant*.
- (g) At the open meeting, prior to the *Commission* making a final determination regarding whether or not the *Respondent* committed a violation of *Governmental Ethics Laws*, each *Party* shall be allowed oral argument of no more than twenty minutes.

[CORRECTED 1/30/2002]

- (h) At the open meeting, the *Commission* shall discuss and consider the *Presiding Authority's Recommendation* and any responsive briefs, and after hearing any oral argument by the *Respondent* or *Petitioner*, shall deliberate in accordance with Section 26.0438.
- (i) The provisions of this section do not apply when the *Presiding Authority* is the entire *Commission* sitting as a hearing panel.

§26.0438 Deliberation of the Commission

- (a) For every allegation contained in the *Final Administrative Complaint*, the *Commission* shall discuss and vote, in open session, whether or not the *Respondent* committed a violation of *Governmental Ethics Laws*.
- (b) In accordance with the provisions set forth in Section 26.0447(b), for any new grounds arising after the *Probable Cause Hearing*, any member of the *Commission* may be disqualified from participating in the open meeting discussion and vote on whether or not the *Respondent* violated *Governmental Ethics Laws*.
- (c) Notwithstanding subsection (a), the *Commission*, by the concurring vote of at least four Commissioners, may, in lieu of finding a violation of *Governmental Ethics Laws*, refer all or part of the matter to the *Presiding Authority* for further proceedings.
- (d) Regardless of whether the *Commission* sat as the hearing panel or acted on the recommendation of an ad hoc subcommittee or an individual, it shall

require the concurring votes of at least four Commissioners to find a violation of *Governmental Ethics Laws*.

- (e) A determination by the *Commission* that the *Respondent* violated *Governmental Ethics Laws* shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings. Each Commissioner who votes shall state for the record that he or she personally heard or read the testimony (either in person or by listening to a recording or by reading a transcript prepared by a court reporter) and reviewed the exhibits admitted into evidence, or otherwise reviewed the entire record of the proceedings.
- (f) For each finding of a violation of *Governmental Ethics Laws*, the *Commission* shall vote on the penalty to be imposed. In determining the penalty to be imposed, the *Commission* shall consider all of the relevant circumstances surrounding the matter, including, but not limited to:
 - (1) the severity of the violation; and
 - (2) the presence or absence of any intention to conceal, deceive, or mislead; and
 - (3) whether the violation was deliberate, negligent, or inadvertent; and
 - (4) whether the *Respondent* demonstrated good faith by consulting the *Commission* staff for written advice, and such written advice does not constitute a complete defense; and

[CORRECTED 1/30/2002]

- (5) whether the violation was an isolated incident or part of a pattern, and whether the violator has a prior record of violations of *Governmental Ethics Laws*; and
 - (6) the existence of any *Mitigating Information*; and
 - (7) the degree to which the *Respondent* cooperated with *Commission* staff by providing full disclosure, remedying a violation, or assisting with the investigation.
- (g) Regardless of whether the *Commission* sat as the hearing panel or acted on the recommendation of an ad hoc subcommittee or an individual, it shall require the concurring votes of at least five Commissioners to impose a penalty on the *Respondent*.
- (h) A final decision made by the *Commission* regarding whether or not the *Respondent* committed a violation of *Governmental Ethics Laws* shall be expressed in a written resolution containing the results of the voting and identifying the vote or abstention of each Commissioner who participated in the proceedings.

§26.0439 Administrative Enforcement Order

- (a) A final decision of the *Commission* that contains a finding of a violation of *Governmental Ethics Laws* shall be expressed in writing in an *Administrative Enforcement Order* prepared by the *Commission*.

- (b) The *Administrative Enforcement Order* may contain orders and penalties that:
 - (1) require the violator to cease and desist the violation; and/or
 - (2) require the violator to file any reports, statements, or other documents or information required by law; and/or
 - (3) require the violator to pay a monetary penalty to the General Fund of the City of San Diego in accordance with the provisions of Section 26.0440; and/or
 - (4) publicly reprimand the *Respondent*.
- (c) The *Administrative Enforcement Order* shall become final on the date it is served on the *Respondent*. The order shall be served on the *Respondent* pursuant to the provisions of Section 26.0443.
- (d) Failure of the *Respondent* to comply with the terms of an *Administrative Enforcement Order* is a misdemeanor and subjects the *Respondent* to the penalties set forth in Chapter 1 of this Code.
- (e) The ninety-day statute of limitations contained in California Code of Civil Procedure section 1094.6 shall apply to judicial review of enforcement decisions made pursuant to this section.

§26.0440 Administrative Fines

- (a) The maximum fine for any violation of *Governmental Ethics Laws* is \$5,000. The actual fine imposed for any violation may range from

zero (\$0) to five thousand dollars (\$5,000), in accordance with the *Commission's* assessment of the severity of the violation.

- (b) Failure of the *Respondent* to pay any fine assessed by the *Commission* is a misdemeanor and subjects the *Respondent* to the penalties set forth in Chapter 1 of this Code.

§26.0443 Service of Documents

- (a) Service of any document relating to the procedures set forth in this Division may be made by any individual who is not less than eighteen years of age. Documents may be served by any *Commission* employee.
- (b) Service may be made by personally delivering a copy of materials to a *Person*. Personal delivery means handing the materials to a *Person* or the *Person's* attorney or designated agent for service of process; or leaving it at the *Person's* office or at the *Person's* attorney's or designated agent's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or leaving it at the *Person's* dwelling house or usual place of abode with some person at least eighteen years of age then residing therein.
- (c) If the *Person's* name and address are known, service may be made by certified mail return receipt requested or by overnight mail. If service is made by mail, three calendar days shall be added to the period prescribed for a response. Service by mail is complete upon mailing.

§26.0445 Subpoenas and Subpoenas Duces Tecum

- (a) The *Commission* shall have the authority to issue *Subpoenas* and *Subpoenas duces tecum* pursuant to Section 41(d) of the San Diego Charter, and in accordance with the provisions of these procedures and the California Administrative Procedures Act.
- (b) During the formal investigation of a complaint, the *Executive Director* may seek *Subpoenas duces tecum* by submitting a written request to the *Commission*. The *Commission* shall grant the request only after a concurring vote of at least four of the Commissioners in closed session. The *Commission* shall not issue a *Subpoena duces tecum* during a formal investigation unless it finds, based on information submitted to it in writing, that the information to be requested in the *Subpoena duces tecum* is material to a specific matter then under investigation.
- (c) After the *Commission* has appointed a *Presiding Authority* to conduct the *Probable Cause Hearing* or *Administrative Hearing*, the *Petitioner* and *Respondent* may seek *Subpoenas* and *Subpoenas duces tecum* in accordance with the following procedures:
 - (1) All requests for a *Subpoena* must be submitted no later than twenty calendar days before a scheduled hearing; all requests for a *Subpoena duces tecum* must be submitted no later than thirty-five calendar days before a scheduled hearing.

[CORRECTED 1/30/2002]

- (2) The *Petitioner* may seek *Subpoenas* and *Subpoenas duces tecum* by submitting a written request to the *Commission*. The *Commission* shall grant or deny the request within five calendar days of receipt of the request following a concurring vote of at least four of the Commissioners in closed session.
- (3) The *Respondent* may seek *Subpoenas* and *Subpoenas duces tecum* by submitting a written request with the *Executive Director*, who shall promptly forward the request to the *Presiding Authority*. The *Presiding Authority* shall grant or deny the request within five calendar days of receipt of the request.
- (4) All requests for a *Subpoena* or *Subpoena duces tecum* shall be accompanied by a declaration specifying the name and address of the witnesses and setting forth the materiality of their testimony. If the production of documents or records is sought, the declaration shall identify those items with specificity, set forth the materiality of the items, and state that the witness has the items in his or her possession or under his or her control.
- (5) A *Subpoena* or *Subpoena duces tecum* shall not be issued unless the information submitted pursuant to Section 26.0445(c)(4) states that the *Person* to be subpoenaed, or the information to be requested in the *Subpoena duces tecum*, is material to a specific matter at issue in the *Probable Cause Hearing* or *Administrative Hearing*.

- (d) In the event a *Subpoena duces tecum* seeks either the production of personal or financial records of a consumer, as that term is defined in California Code of Civil Procedure section 1985.3, notice to that consumer shall be given as required by Section 1985.3.
- (e) *Subpoenas* shall be served at least ten calendar days before the time required for attendance. *Subpoenas duces tecum* shall be served at least twenty-five calendar days before the time required for the production of the requested documents. A *Subpoena* or *Subpoena duces tecum* shall be served in accordance with the provisions set forth in Section 26.0443.
- (f) The subpoenaing *Party* must serve a copy of the *Subpoena* or *Subpoena duces tecum* on every other *Party* to the administrative proceeding.
- (g) A *Person* served with a *Subpoena* or *Subpoena duces tecum* may object to its terms by filing written objections with the *Commission* no later than seven calendar days before the time required for attendance and/or production of the requested documents. If the *Subpoena* or *Subpoena duces tecum* was issued by a *Presiding Authority* other than the full *Commission*, the written objection shall be promptly forwarded to the *Presiding Authority*.
 - (1) If the *Subpoena* or *Subpoena duces tecum* was issued by the *Commission* at the request of the *Executive Director* or *Petitioner*, the *Commission* shall rule, in closed session, on the objections and/or issue an order in writing within five calendar days of receiving the written objections.

- (2) If the *Subpoena* or *Subpoena duces tecum* was issued by the *Presiding Authority* at the request of the *Respondent*, the *Presiding Authority* shall rule on the objections and/or issue an order in writing within five calendar days of receiving the written objections.
- (3) A failure to file a timely objection with the *Commission* or *Presiding Authority* constitutes a waiver of all grounds for any objection.
- (4) All petitions for judicial review of any *Commission* or *Presiding Authority* ruling or order concerning objections to a *Subpoena* or *Subpoena duces tecum* must be filed by the tenth calendar day following the date of the ruling or order by the *Commission* or *Presiding Authority*.
- (h) If the *Party* serving the *Subpoena duces tecum* consents, the custodian of records or documents that is the subject of a *Subpoena duces tecum* may satisfy the *Subpoena duces tecum* by delivering the requested documents together with an affidavit in compliance with California Evidence Code section 1561.
- (i) It is unlawful for any *Person* to refuse to obey a *Subpoena* or *Subpoena duces tecum* issued by the *Commission* or *Presiding Authority*. Failure to obey a *Subpoena* or *Subpoena duces tecum* constitutes contempt and may be prosecuted as a misdemeanor.
- (j) If any *Person* refuses to attend or testify or produce any papers as required by a *Subpoena* or *Subpoena duces tecum*, the *Executive Director*, on behalf

of the *Commission* or *Presiding Authority*, may petition the San Diego Superior Court for an order compelling the person to attend and testify and to produce the papers required by the *Subpoena* or *Subpoena duces tecum*, in accordance with the standards and procedures set forth in the California Administrative Procedures Act.

- (k) A witness, other than an officer or employee of the City of San Diego, appearing pursuant to a *Subpoena*, shall receive, upon request after complying with the *Subpoena*, the same mileage and fees allowed by law to a witness in a civil case pending in the San Diego Superior Court.
- (l) All costs related to a *Subpoena* or *Subpoena duces tecum*, including photocopying, service, witness, and mileage fees, shall be borne by the *Party* requesting the *Subpoena* or *Subpoena duces tecum*.
- (m) The *Commission* shall develop policies and procedures relating to the issuance of *Subpoenas* and *Subpoenas duces tecum* in formal investigations, *Probable Cause Hearings*, and *Administrative Hearings*, including the form of such documents and related costs.

§26.0447 Pre-Hearing Matters

- (a) The *Petitioner* or *Respondent* may request that preliminary matters, not related to the merits of the hearing, be heard by the *Presiding Authority* prior to a *Probable Cause Hearing* or an *Administrative Hearing*. If the request is granted, those motions or matters shall be noticed in a timely fashion, and a

preliminary hearing shall be held and conducted by the *Presiding Authority*.

Such preliminary matters may include, but are not limited to, the following:

- (1) Motions regarding procedural matters; and
- (2) disqualification of any *Person* from participation in the *Probable Cause Hearing* or the *Administrative Hearing*; and
- (3) discovery; and
- (4) any other matters not related to the truth or falsity of allegations made in the *Probable Cause Report*, the *Draft Administrative Complaint*, or the *Final Administrative Complaint*.

(b) Any member of the *Presiding Authority* is subject to disqualification for bias, prejudice, interest, or for any other reason for which a judge may be disqualified in a court of law.

(1) A member of a *Presiding Authority* may voluntarily disqualify himself or herself and withdraw from the proceedings for any reason, including reasons based on bias, prejudice, or interest in the proceeding. Once disqualified, that individual shall not participate in any discussion, deliberation, or voting pertaining to the pending complaint.

(A) Notwithstanding Section 26.0447(b)(1), the *Parties* may choose to accept any member of the *Presiding Authority* by waiving the disqualification in a written statement, signed by all *Parties*, that recites the grounds for disqualification.

- (B) A waiver is effective only when signed by all *Parties*, accepted by the *Presiding Authority*, and included in the record.
- (2) Any *Party* may seek to compel the disqualification of any member of the *Presiding Authority* by filing an affidavit with the *Commission*, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that the member should be disqualified.
- (A) Where the request seeks to compel the disqualification of a member of the *Commission*, the disqualification shall be determined by a concurring vote of at least four members of the *Commission*. The Commissioner who is the subject of the request for disqualification shall not participate in the vote or in any deliberations or discussions preceding the vote.
- (B) Where the request seeks to compel the disqualification of an individual appointed pursuant to Section 26.0430(b)(2)(C) or Section 26.0435(b)(2)(C), the disqualification shall be determined by a concurring vote of at least four members of the *Commission*.
- (3) If any disqualified Commissioner was part of a three-member ad hoc subcommittee of the *Commission* appointed pursuant to Section 26.0430(b)(2)(B) or Section 26.0435(b)(2)(B), the disqualified

Commissioner may be replaced by a substitute Commissioner appointed by the *Commission*.

- (c) At any time before or during the *Probable Cause Hearing* or the *Administrative Hearing*, the *Petitioner* and *Respondent* may propose a stipulation as to any procedural matter, fact, or substantive matter, and upon the approval of the *Presiding Authority* such stipulation shall have the full force of an order of the *Presiding Authority*.

§26.0450 Settlements

Settlement negotiations and settlement of pending matters may occur at any point after *Preliminary Review*, subject to the following:

- (a) All settlement negotiations shall be conducted on behalf of the *Commission* by the *Executive Director* in accordance with this section.
- (b) The *Executive Director* may enter into a proposed stipulation with the *Respondent* with regard to anything that could be ordered by the *Commission* under its authority pursuant to San Diego Municipal Code section 26.0414, including partial or full settlement of a matter.
- (c) Before presentation to the *Commission*, any proposed stipulated settlement negotiated between the *Executive Director* and *Respondent* shall:
 - (1) contain a recitation of the facts pertinent to the violation; and
 - (2) refer to each violation alleged in the *Draft Administrative Complaint*, or if one has been prepared, the *Final Administrative Complaint*, and state whether or not the stipulation will cause the discharge of each

such alleged violation. If a *Draft Administrative Complaint* has not yet been prepared, one shall be prepared before a proposed stipulation may be reached between the *Executive Director* and *Respondent*; and

(3) be in the form of a proposed *Administrative Enforcement Order*.

(d) In any proposed *Administrative Enforcement Order* presented to the *Commission*, the *Respondent* shall acknowledge by signing such document, that he or she:

(1) agrees to hold the City harmless, waiving any right to challenge the administrative process or the legal validity of the *Administrative Enforcement Order* in a court of law; and

(2) agrees to abide by all terms of the *Administrative Enforcement Order*.

(e) A proposed *Administrative Enforcement Order* based on a stipulated settlement shall have no force and effect until approved by the *Commission* as provided in subsection (g).

(f) The *Executive Director* shall, without unreasonable delay, submit any proposed *Administrative Enforcement Order* signed by the *Respondent*, along with a *Draft Administrative Complaint* or *Final Administrative Complaint*, to the *Commission* for consideration at a closed session meeting of the *Commission*.

- (g) A proposed *Administrative Enforcement Order* based on a stipulation shall become a final *Administrative Enforcement Order* only if the *Commission* approves the stipulation by a concurring vote of four Commissioners, except that if the stipulation imposes a penalty on the *Respondent*, it shall become a final *Administrative Enforcement Order* only if approved by a concurring vote of five Commissioners.
- (h) The *Commission's* approval of a stipulation shall be expressed in a written resolution containing the results of the voting and identifying the vote or abstention of each Commissioner who participated in the proceeding.
- (i) The *Executive Director* is authorized to sign an *Administrative Enforcement Order* on behalf of the *Commission* upon approval of the stipulation by the *Commission* as set forth in subsection (g).
- (j) Public disclosure of the stipulation is subject to the provisions of Section 26.0455.

§26.0455 Disclosure of Commission Records

- (a) The purpose of this section is to advance the public's interest under the Public Records Act to access information concerning the conduct of the *Commission* in a manner that will not compromise the *Commission's* ability to conduct effective and confidential investigations into alleged violations of *Governmental Ethics Laws*.

[CORRECTED 1/30/2002]

- (b) The *Commission* and its staff shall not make public comments regarding a pending matter until the *Commission* has made a *Probable Cause* determination regarding the matter or until the matter is closed.
- (c) Members of the public shall not be granted access to any document prepared by, or received by, the *Commission*, including investigatory files, related to a pending matter, until the *Commission* has made a *Probable Cause* determination or until the matter is closed.
- (d) Following the *Commission's Probable Cause* determination, members of the public shall have access to the *Final Administrative Complaint*, but shall not be granted access to any other document prepared by, or received by, the *Commission*, including investigatory files related to a pending matter, except in accordance with subsection (e) below.
- (e) When a matter is closed by the *Commission* prior to the initiation of a formal investigation and the matter is not referred to any other governmental or law enforcement agency, the complaint and any documents prepared by the *Commission* relative to the disposition of the matter shall be made available to the public. Records arising from, or relating to, any matter where a formal investigation has been initiated or any matter that has been referred to another governmental or law enforcement agency shall not be disclosed to the public until all of the following occurrences have taken place:
 - (1) The *Commission* has closed the matter; and

- (2) the statute of limitations applicable to the *Commission's* enforcement of the alleged violation has expired; and
 - (3) the statute of limitations applicable to all governmental or law enforcement agencies that have jurisdiction over the alleged violation has expired; and
 - (4) all litigation and administrative proceedings initiated by any other governmental or law enforcement agency with jurisdiction over the alleged violation have reached final conclusion.
- (f) When *Commission* materials are requested by members of the public, the *Executive Director* shall review the requested materials prior to its release and prior to any claim of exemption in order to determine that the requirements of the Public Records Act have been satisfied.
- (g) Documents made available to the public by this section may be examined in the offices of the *Commission* following a request made in writing specifically identifying the documents sought.
- (h) Documents made available to the public by this section may not be removed from the offices of the *Commission*, but may be copied by *Commission* staff as soon as practicable following a request made in writing specifically identifying the documents sought. Any person requesting copies of materials pursuant to this subsection shall reimburse the *Commission* \$0.10 per page for each page copied.

- (i) A matter is considered closed for the purposes of this section if the *Commission* makes a determination that it will take no further action on the alleged violation by declining to pursue administrative enforcement or by issuing an *Administrative Enforcement Order*.
- (j) Notwithstanding the disclosure provisions of this section, individual items of information in the following categories may be segregated and withheld if, on the particular facts, the *Executive Director* determines that the public interest in non-disclosure clearly and substantially outweighs the public interest in disclosure:
 - (1) the names of juvenile witnesses; or
 - (2) personal or otherwise private information related or unrelated to the investigation if the disclosure would constitute an unwarranted invasion of privacy; or
 - (3) the identity of a confidential source; or
 - (4) the identity of the *Complainant*; or
 - (5) secret investigative techniques or procedures; or
 - (6) information which, if disclosed, would create a credible risk of endangering any individual; or
 - (7) information which, if disclosed, would endanger the successful completion of an investigation where the prospect of enforcement proceedings is concrete and definite.

§26.0456 Other Governmental and Law Enforcement Agencies

- (a) No action or inaction by the *Commission* or the *Executive Director* shall prevent any other governmental or law enforcement agency from pursuing a separate enforcement action based on the same allegations and facts presented to the *Commission*.
- (b) Nothing in this Division creates a duty on the part of the *Commission* or the *Executive Director* to refer any matter to any other governmental or law enforcement agency.

Section 3. That Chapter 2, Article 6, Division 4, of the San Diego Municipal Code is hereby amended by reserving for future use Sections 26.0426, 26.0427, 26.0428, 26.0429, 26.0433, 26.0434, 26.0441, 26.0442, 26.0444, 26.0446, 26.0448, 26.0449, 26.0451, 26.0452, 26.0453, and 26.0454.

Section 4: That Chapter 2, Article 7, Division 1, of the San Diego Municipal Code is amended by amending Section 27.0103, to read as follows:

§27.0103 Definitions

Terms specific to this article are defined in this section. Defined terms are noted by italics.

Ballot Materials through Circulator [No change in text.]

Clerk means the City Clerk of the City of San Diego.

Council means the City Council of the City of San Diego.

District General Election through Elective Office [No change in text.]

Enforcement Authority means the City of San Diego Ethics Commission. Nothing in this article limits the authority of the City Attorney, any law enforcement authority, or any prosecuting attorney to enforce the provisions of this Article under any circumstances where the City Attorney, law enforcement agency, or prosecuting attorney otherwise has lawful authority to do so.

Measure means any City Charter amendment or proposition which is:

(a) and (b) [No change in text.]

Person has the same meaning as that term is defined in San Diego Municipal section 11.0210.

Petition through Voter [No change in text.]

Section 5: That Chapter 2, Article 7, Division 29, of the San Diego Municipal Code is amended by amending Sections 27.2963 and 27.2971, to read as follows:

§27.2963 Enforcement Authority — Duties, Complaints, Legal Action, Investigatory Powers

- (a) Any *person* who believes that a violation of any portion of this Division has occurred may file a complaint with the *Enforcement Authority*.
- (b) The *Enforcement Authority* shall have such investigative powers as are necessary for the performance of the duties prescribed in this Division. The *Enforcement Authority* may demand and shall be furnished records of campaign *contributions* and expenses at any time.

- (c) The *Enforcement Authority* shall determine whether required statements and declarations have been filed as required and, if so, whether they conform with the requirements of this Division.
- (d) The *Enforcement Authority* may elect to enforce the provisions of this Division administratively pursuant to Chapter 2, Article 6, Division 4, or may otherwise recommend or refer enforcement actions to the City Attorney or other law enforcement agency with jurisdiction.

§27.2971 Penalties

- (a) Any *person* who violates any part of this Division, or who counsels, aids, abets, advises, or participates with another to commit any such violation, is guilty of a misdemeanor and is subject to the penalties set forth in Chapter 1 of this Code.
- (b) In addition to being subject to the penalties set forth in Chapter 1 of this Code, any *person* found guilty of violating Sections 27.2941 or 27.2947, or both, shall be required to forfeit the amount received in violation of this Division and pay over these funds to the *City Treasurer* for deposit in the *City's* General Fund.
- (c) If, after an *election*, a *candidate* or office holder is convicted in a court of law of a violation of any provision of this Division, the *election* to office of such *candidate* or office holder shall be void and the office shall become vacant immediately upon the later of the following two dates:

- (1) The date of the *candidate* or office holder's conviction in a court of law; or
- (2) the date the *candidate* would have taken office, if the *candidate* is not an incumbent. In the event of a vacancy resulting from application of Section 27.2971(c), the vacancy shall be filled in accordance with the procedures set forth in the *City Charter* for the filling of vacant *City* offices.
- (d) If a *candidate* is convicted in a court of law of violating any provision of this Division any time prior to the *election*, the candidacy shall be terminated immediately and the *person* shall be no longer eligible for *election*.
- (e) Any *person* convicted in a court of law of a violation of any provision of this Division shall be ineligible to hold a *City elective office* for a period of five years from and after the date of the conviction.
- (f) Any limitation of time prescribed by law within which prosecution for a violation of any part of this Division must be commenced shall not begin to run until the *City's* discovery of the violation.

Section 6. That Chapter 2, Article 7, Division 40, of the San Diego Municipal Code is amended by amending Section 27.4027, to read as follows:

§27.4027 Enforcement Authority: Duties, Complaints, Legal Action, Investigatory Powers

- (a) Any *Person* who believes that violation of any portion of this Division has occurred may file a complaint with the *Enforcement Authority*.

- (b) The *Enforcement Authority* shall have such investigative powers as are necessary for the performance of the duties prescribed in this Division. The *Enforcement Authority* may demand and shall be furnished records of *Lobbying Activity Expenses* at any time.
- (c) The *Enforcement Authority* shall determine whether required statements and declarations have been filed as required and, if so, whether they conform with the requirements of this Division.
- (d) The *Enforcement Authority* may elect to enforce the provision of this Division administratively pursuant to Chapter 2, Article 6, Division 4, or may otherwise recommend or refer enforcement actions to the City Attorney or other law enforcement agency with jurisdiction.

Section 7. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 8. That this ordinance shall take effect and be in force on the thirtieth day from and after its passage, except that those provisions of this ordinance amending Chapter 2, Article 6, Division 4, by adding Section 26.0445 shall not take effect or be in force unless and until a proposition amending Section 41 of the City Charter is passed by a majority of the voters, in a form as submitted to the qualified voters of the City for consideration at the March 5, 2002 Special Election, as stated in Ordinance No. O-19002, approved by the City Council on November 5, 2001.

Should the aforementioned proposition fail to pass by a majority vote of the electorate at the Special Election conducted on March 5, 2002, the City Clerk is directed not to publish Section 26.0445 in the Municipal Code of the City of San Diego.

APPROVED: CASEY GWINN, City Attorney

By _____
Richard A. Duvernay
Deputy City Attorney

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