

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: August 20, 2008

TO: The Committee on Rules, Open Government and Intergovernmental Relations

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Investigation and Enforcement Procedures (SDMC §26.0401 et seq.)

The Ethics Commission's Investigative and Enforcement Procedures were adopted by the City Council on February 11, 2002. The Commissioners and Commission staff have worked with the current procedures for more than six years, and have identified the following provisions that require amendment or that should be added to the Municipal Code:

A. Appointment and Qualifications of Commissioners

A1. Election of Chairperson

The Commission recommends amending the procedures to state that the election of a new Chairperson will take place at the last Commission meeting in June (instead of the first meeting in July). This change will create a more orderly transition and will enable the newly-elected Chairperson to prepare to run the July Commission meeting.

A2. Seeking Elective Office

The current procedures prohibit Ethics Commissioners from becoming candidates for any city, county, state, or federal elective office while they are Commissioners and for twelve months thereafter. The language in the prohibition refers to elective office in the "City," which is defined to include only the City of San Diego, and not other cities. The Commission therefore recommends amending the language in the definition of "elective governmental office" in order to clarify that the prohibition applies to any city office.

A3. Qualifications – Housekeeping Amendment

The Commission recommends some housekeeping amendments with respect to language that addresses the various qualifications applicable to Commissioners. When the procedures were last modified in December of 2006, several changes were incorporated into SDMC section

26.0404(c), including allowing a former candidate or former campaign officer to fill a seat on the Commission that previously had to be filled by a former elected official. As a result, there are several redundancies in the various subsections that merit streamlining.

B. Witness Testimony

B1. Prohibition on Providing False Evidence

The Commission recommends adding a provision making it unlawful for anyone within the Commission's jurisdiction to provide false information or documentation during a Commission investigation or at a Commission hearing. There have been several instances over the past few years in which individuals have not been entirely truthful with the Commission staff during the course of an investigation, and Commissioners have repeatedly opined that the Municipal Code should include a prohibition on providing false information or documents. Adding this prohibition should serve as an additional incentive for witnesses and respondents to be truthful and forthcoming during the course of a Commission investigation.

C. Probable Cause and Administrative Hearings

As a result of recent experience with the various hearing procedures delineated in the Municipal Code, the Commission recommends the following amendments:

C1. Probable Cause Determination

Instead of requiring the full Commission to make a probable cause determination (which requires Commissioners who were not members of the Presiding Authority to listen to a recording or read a transcript of the Probable Cause Hearing), the Commission recommends changing the procedures to enable the Presiding Authority (one Commissioner, an ad hoc subcommittee of three Commissioners, or an individual volunteer) to make the probable cause determination. It is relevant to note that, in other jurisdictions, the agency staff makes the probable cause determination.

C2. Subcommittee for Pre-Hearing Matters

The Commission recommends adding a provision to reflect the Presiding Authority's ability to appoint an ad hoc subcommittee of one to three Commissioners to consider and decide pre-hearing matters in advance of a Probable Cause Hearing or an Administrative Hearing. In the event that the Presiding Authority is the full Commission, the appointment of an ad hoc subcommittee would eliminate the need for the Commission to schedule and notice a Commission meeting in accordance with the Brown Act in order to decide pre-hearing matters. It would also afford the Respondent an opportunity to participate in the discussion of pre-hearing matters, which is not currently permitted when a matter is considered by the full Commission in closed session.

C3. Probable Cause Hearings in Public

The procedures state that a Probable Cause Hearing will be closed to the public unless the Respondent requests that it be open to the public. The Commission recommends language to clarify that a request from a Respondent to hold a Probable Cause Hearing in public must be made in writing. This change will ensure that there is no dispute or miscommunication regarding the Respondent's request.

C4. Probable Cause Hearing – Evidentiary Standards

The Commission recommends incorporating by reference the evidentiary guidelines for Administrative Hearings into the section concerning Probable Cause Hearings (currently the provision that addresses Probable Cause Hearings is silent with respect to evidentiary guidelines).

D. Subpoenas

D1. Subpoenas of Witnesses During Investigation

In March of 2002, the voters approved a ballot measure granting the Ethics Commission the power to subpoena witnesses and documents in accordance with procedures adopted by the City Council. Subsequently, the procedures adopted in 2002 state that the Commission may issue document subpoenas during an investigation or in connection with a hearing. With respect to witness subpoenas, however, the procedures only mention the Commission's ability to compel witness testimony at a hearing. The Commission recommends adding language to clarify that the Commission may issue witness subpoenas during the course of a Commission investigation. This proposed change is consistent with the original intent and express language of the City Charter.

D2. Issuance of Hearing Subpoenas

The Commission recommends changes to the procedures associated with the issuance of subpoenas in connection with administrative hearings to ensure that the Petitioner and the Respondent are subject to substantially the same process. The procedures currently provide that a Respondent's requests for hearing subpoenas are submitted to the Executive Director, who will in turn forward them to the Presiding Authority. The Petitioner's requests, on the other hand, must be submitted to the full Commission, even when the Presiding Authority is an entity other than the full Commission. Changing the procedures to allow the Presiding Authority to respond to subpoena requests from both the Petitioner and the Respondent will provide for a more consistent and expeditious process.

D3. Objections to Investigative Subpoenas

With respect to written objections to the Commission's investigative subpoenas, the Commission proposes changes that would provide some additional flexibility with regard to when it must

meet to consider these objections. Rather than force the Commission to meet within five days of receiving objections to an investigative subpoena (as is currently required), and rather than require the Commission to wait until its next regularly scheduled meeting (which could be a month after the objections are received), the Commission recommends modifying the procedures to state that with respect to investigative subpoenas the Commission shall consider objections at a special or regular meeting so long as the matter is considered no later than its next regularly-scheduled meeting. Additionally, the Commission recommends adding language to clarify that an investigative subpoena shall be stayed pending the Commission's ruling on the objections.

D4. Objections to Hearing Subpoenas

With respect to subpoenas issued in connection with a hearing, the Commission recommends maintaining the current five day limit for considering objections, but adding a provision allowing the Presiding Authority, or an ad hoc subcommittee designated by the Presiding Authority (see discussion above in section C2), to consider objections to subpoenas as well as requests for subpoenas (see discussion above in section D2).

D5. Service of Subpoenas

Finally, the Commission recommends a minor change to clarify that the requirement concerning service of subpoenas on all parties only applies to subpoenas requested in connection with a Probable Cause Hearing or Administrative Hearing, and not to investigative subpoenas.

E. Miscellaneous

The Commission recommends the following additional miscellaneous updates in order to ensure that the procedures adequately reflect current Commission practices:

E1. Service of Documents

Clarify that service of documents by mail can be effected by certified or overnight mail to a person's attorney or designated agent. (Currently the procedures address this option only in the subsection concerning personal service.)

E2. Stipulations

Clarify that fully-executed stipulations are public documents.

E3. Disclosure of Records

In section 26.0455, which pertains to the disclosure of Commission records, clarify that subsections (d) and (e) are intended to apply to the prohibition contained in subsection (c).

For your convenience we have drafted the attached strike-out version reflecting proposed changes to selected portions of the procedures. We look forward to discussing these proposed

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changes with you at the Rules Committee meeting on September 3, 2008. If you have any questions, please contact me at your convenience.

Stacey Fulhorst
Executive Director

Enclosure

cc: Catherine Bradley, Chief Deputy City Attorney