CITY OF SAN DIEGO ETHICS COMMISSION

SUMMARY

The City of San Diego (City) Ethics Commission (Commission) was established in 2001. The Commission is currently governed by both the City Charter and Municipal Ordinance.

The San Diego Ethics Commission monitors, administers and enforces the City's Governmental ethics laws, proposes new governmental ethics law reforms, conducts investigations, refers violations to appropriate enforcement agencies, audits disclosure statements, and advises and educates city officials and the public about governmental ethics laws. (San *Diego Municipal Code Chapter 2 Article 6 Division 4 26.0401)*

The 2008/2009 San Diego County Grand Jury (Grand Jury) undertook this study to assess the continuing independent existence of the Commission.

The Commission is currently governed by both the City Charter and the Municipal Code. The City Charter provides the authority for the Commission to exist and act as an independent entity monitoring, enforcing and administering local and state ethics laws relating to political activities of elected officials, candidates for office, appointed officials in the City and lobbyists. San Diego City Municipal Code Ordinances (Ordinance) adopted by the San Diego City Council (Council) are the laws that guide their actions. The Council controls budgeting, staffing and investigative procedures through the Municipal Code.

When City Council members are the subject of an investigation and are found to have violated existing laws there is a potential for retribution against the Commission through reduction of the budget and or staffing. The Grand Jury undertook this study to assess the impact of this potential conflict of interest and whether that could affect the continued independent long term existence of the Commission.

The Grand Jury found that a change in governance of the Commission would eliminate any potential for conflict of interest for those who are governed by ethics laws.

The Grand Jury concluded that additional language in the City Charter would ensure the long term existence of the Commission with adequate funding and staffing levels to conduct the duties of the Commission.

The Grand Jury also looked at the recent request of the Commission to have subpoena power for testimony extended to the Executive Director of the Commission during the course of an investigation prior to an official hearing conducted by the Commission. The Grand Jury concluded this would serve the public interest.

PURPOSE AND BACKGROUND

The purpose of the Grand Jury study was to explore:

- Options for the governance of the City of San Diego Ethics Commission; and
- Possible improved efficiencies and effectiveness in conducting investigations through updates in ordinances relating to subpoena power.

PROCEDURES

To get a basic understanding of what the Ethics Commission is about, how it functions now under charter and ordinance, and how it could function under some other manner of governance, the Grand Jury researched the history, governing documents and progress reports of the Ethics Commission from the inception of the Commission in 2001. Council members, members of the City Attorney's Office and Commission representatives also were interviewed.

DISCUSSION

The Commission was originally established in 2001 by the City. In addition to unlawful conflicts of interest, the Commission also oversees election campaign and lobbying laws through investigations, administrative hearings and imposes penalties. In addition the Commission provides education and training of City officials, political and appointed office holders, and candidates and lobbyists. The Mission Statement of the Commission: To preserve public confidence in our City government through education, advice and the prompt and fair enforcement of local governmental ethics laws.

It is the Commission's job to educate, advise, investigate, report on and enforce existing ethics laws. The Commission was set up to be an independent impartial resource with the responsibility and authority to enforce state and local ethics laws. The Commission is mandated to investigate and enforce ethics law violations equally, without preferential treatment for any individual or organization.

San Diego is one of a few cities in California which has a dedicated ethics commission. Other jurisdictions rely on the California Fair Political Practices Commission. A dedicated ethics commission makes it possible for any citizen to file a complaint locally against city officials for alleged ethics violations.

The Commission in San Diego is composed of seven volunteer members appointed by the Mayor from a pool of nominees submitted by the City Council and the City Attorney. The Mayor's appointments are subject to confirmation by a majority of the City Council and serve four year terms.

The Commission staff currently consists of an Executive Director, a General Counsel, a Senior Investigator, Investigator, an Auditor (Financial Investigator) a

Program Manager (Advice and Education) and an Executive Secretary. The Ethics Commission is an independent City department that does not report to the Mayor or City Council. The Commission staff reports directly to the ethics commissioners.

Ethics Commission Jurisdiction includes:

- Elected officials of the city, candidates for City office, persons regulated by or subject to Chapter 2, Article 7, Division 29 of the Municipal Code;
- All committees and treasurers for committees required to file any disclosure form with the Filing Officer (City Clerk);
- Any person who makes a campaign contribution in support of or opposition to a city candidate or ballot measure;
- Consultants to the City who are required to file economic interest disclosure forms pursuant to a conflict of interest code,
- Members of City boards and commissions who are required to file economic interest disclosure forms pursuant to a conflict of interest code,
- Officers, directors, members of boards of directors, employees, and consultants of the San Diego Housing Commission,
- Members of Corporations wholly owned by the City who are required to file economic interest forms pursuant to a conflict of interest code,
- Members of Project Area Committees,
- Lobbyists registered, or persons required to be registered as lobbyists, with the City pursuant to Chapter 2, Article 7, Division of 40, of the Municipal Code.

The Ethics Commission is responsible for processing complaints. The Commission may initiate ethics investigations within their jurisdiction on their own.

The Ethics Commission is governed by City Ordinance. The Commission was established with a basis in the City Charter then expanded by the City Council via Ordinance. The Charter establishes the Commission as a legitimate City entity. City Ordinances are where the Commission gets its funding and support. This is controlled by the City Council.

City Charter Section 41(d) Ethics Commission says:

- For so long as an Ethics Commission remains established by the ordinance of the Council, the Executive Director of the Commission shall be appointed by the Commission, subject to confirmation by the Council, and shall thereafter serve at the direction and pleasure of the Commission.
- The Commission may, in accordance with complaint and investigative procedures approved by the ordinance of the Council, subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, paper records, or other items material to the performance of the Commission's duties or exercise of its powers.

- The Ethics Commission shall be authorized to retain its own counsel, independent of the City Attorney, for legal support and guidance in carrying out its responsibilities and duties.

The language in Section 41(d) is significant because of the key phrase "for so long as an Ethics Commission remains established by ordinance of the Council". This provision does not guarantee ongoing existence of the Commission should the Council decide to disband it. The Charter is silent about any budget. The Commission depends solely on the City Council for its existence as that is the only source of Commission funding.

There is also specific mention in the Charter about maintaining Independent Counsel so long as the Commission exists. The Ethics Commission General Counsel shall provide legal services to the Commission. The General Counsel may be an employee of the Commission hired by the executive director, or an independent contractor hired by the executive director.

In addition to the San Diego City Charter and the San Diego Municipal Code the Commission is governed by San Diego Ethics Commission Operating Policies. The Commission also must comply with other laws, such as the Ralph M. Brown Act, the Political Reform Act of 1974, plus Council policies, to assure citizens the right to attend Commission meetings. Commission meetings are to be conducted in full view of the people and the news media with limited exceptions.

In addition to Ethics law enforcement, Commission Operating Policies say the Commission is responsible for providing ethics training and education. The Commission provides ethics training for elected office holders, candidates for elected or appointed office, campaign managers, fundraisers, treasurers and members of City boards or committees.

The Ethics Commission also has the authority to propose updates and/or changes to ethics ordinances. Updates or changes can not be implemented unless the Council and the City Attorney approve them. Collaboration between the Commission, Council and City Attorney help to assure vital checks and balances are in place.

In 2008 the Commission requested the power to issue a subpoena for testimony during an investigation prior to a Commission hearing. The legal advisor for the Commission opined several reasons for seeking this power:

- Sometimes, information can be acquired in the investigative process that would preclude having to hold a hearing.
- The increased subpoena power would improve efficiency and shorten investigations, saving time.
- Being subpoenaed would make it easier for some witnesses who have to get permission to take the time off from work to not appear to be "overly cooperative" in being a witness.

Originally, Commission authority did not include subpoena power. In 2001 it was the opinion of the City Attorney's office that the power to subpoena witnesses and documents could not be granted to the Commission by ordinance. A Charter amendment approved by the majority of voters was required. The voters gave the Ethics Commission subpoena authority with 66.6% voting on March 5, 2002, in favor of Proposition B (Subpoena Power to the Ethics Commission – City of San Diego. Question: Shall the City Charter be amended to grant subpoena power to the San Diego Ethics Commission?).

The Council/ City Attorney asserted in 2008 that because subpoena power language in the charter amendment did not specifically include authority to subpoena witnesses during investigations the voters did not mean for the added power to be included. The Commission recently sought authority to clarify its power to subpoena witnesses to testify during ethics violation investigations when witnesses refuse to testify voluntarily. It was stated during Grand Jury interviews that current standard procedure is for the Commission to have witnesses testify voluntarily during investigations without subpoena. However, witnesses sometimes refuse to appear or testify.

In response to the Commission request to modify the ordinance on subpoena power to include the power to subpoena for testimony during the investigative process, the City Attorney's Office, on behalf of the Council, submitted to the Commission additional language needed in the proposed ordinance changes to include:

- Safeguarding of witness's rights;
- Mandatory comprehensive training for Commission investigators,
- How interviews would be conducted and recorded;
- Witness ability to provide their own attorney during interviews; and
- Constitutional rights issues and decisions arising out of the questioning process.

The modifications sought are currently in the hands of the Commission to address the issues raised by the City Attorney before being presented to the Council for approval.

The January 2008 Ethics Commission's annual report documented the following accomplishments:

- Requests for informal advice increased from 475 in 2007 to 830 in 2008.
- Implementation of new lobbying laws resulted in lobbying firms and organizational lobbyists registering more than 500 lobbyists in 2008 compared to 165 in 2007.
- 81 complaints were processed.
- $6500.00 in administrative fines were levied via negotiated stipulated agreements.

- Only one case was not settled. That case was adjudicated in an administrative hearing conducted by the Commission. The decision in that case is on appeal.

FACTS AND FINDINGS

Fact: The San Diego Ethics Commission was established by the City of San Diego in 2001.

Fact: The enabling Ordinance (O-18945) for the Ethics Commission was adopted in 2001.

Fact: The City Charter 41(d) allows the Ethics Commission to exist for as long as it is established by Ordinance of the Council.

Fact: The City Council can repeal the enabling Ordinance and it controls the funding of the Ethics Commission.

Fact: City Council members have been found in violation of the ethics rules by the Commission.

Finding #01: Any action of the City Council to reduce or eliminate funding or to curtail investigative authority of the Commission could be perceived as presenting a conflict of interest.

Fact: The citizens of San Diego voted overwhelmingly, on March 5, 2002, to give the Ethics Commission subpoena power.

Fact: Subpoena power for testimony is currently allowed but only for official hearings of the Ethics Commission.

Fact: The Ethics Commission has offered reasons for the Executive Director to have subpoena power for testimony during an investigation.

Fact: The City Attorney's office has raised concerns about individual rights during the investigative process if a person is compelled to appear before a Commission investigator to answer questions.

Fact: The City Council has the authority to approve subpoena power for testimony for the Ethics Commission during the investigative process.

Finding #02: Subpoena power for testimony during the investigative process would better serve the citizens of San Diego by: shortening the investigative process, providing protection for people who provide information to the investigator and often eliminate the need for a Commission hearing as the information provided has disproved the allegation(s).

RECOMMENDATIONS

The 2008/2009 San Diego County Grand Jury recommends that the San Diego City Council:

09-41: **Place a measure on the ballot to amend the City Charter to ensure the Ethics Commission is annually funded and staffed at a minimal level to conduct the duties of the Ethics Commission and will identify a revenue source to fund the Ethics Commission.**

09-42: **By Ordinance clarify the powers of the Ethics Commission to allow the Executive Director to issue subpoenas for testimony during the investigative process of an alleged ethics violation.**

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

(a) As to each grand jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

(b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:

(1) The recommendation has been implemented, with a summary regarding the implemented action.

(2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.

(3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the

governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

(c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

Responding Agency	Recommendations	Date
San Diego City Council	**09-41, 09-42**	**9/1/09**