

**CITY OF SAN DIEGO
ETHICS COMMISSION**

M E M O R A N D U M

DATE: November 2, 2015

TO: Members of the San Diego Ethics Commission

FROM: Christina M. Cameron, General Counsel

SUBJECT: Legal Considerations in Light of Recusal Request Related to the 2016 City Attorney Race

Introduction and Background

The purpose of this memo is to provide a review of the legal considerations in connection with the request of Rafael Castellanos (“Castellanos”) that the San Diego Ethics Commission (“Commission”) recuse itself from any enforcement related to the 2016 election for San Diego City Attorney (“City Attorney Race”).

Castellanos requests the Commission recuse from any enforcement activities in the City Attorney Race for the following reasons:

- Another candidate for City Attorney, Gil Cabrera (“Cabrera”) is a former Commissioner and former Chair of the Commission.
- Cabrera was retained by the Commission in the past to provide legal services.
- Many of the Commission’s current staff members worked for the Commission when Cabrera was on the Commission and retained by the Commission.

Underlying Facts

In addition to Castellanos and Cabrera, the other candidates in the City Attorney Race are Maura Elliott and Robert Hickey.

Cabrera served as a member of the Commission from 2005 to 2010. He was Chair of the Commission from 2007 to 2009. Cabrera’s first term ended in June 2009. Pursuant to City Council Policy, Commissioners whose terms have ended continue to serve until a replacement is named. Commission Minutes reflect Cabrera resigned in March 2010. In April, 2010, a replacement was appointed by the City Council.

Cabrera was retained by Commission staff as Special Legal Counsel for two specific enforcement matters. That retention began in approximately September 2012 and ended in April 2013.

Only one (1) current Commissioner was on the Commission during Cabrera’s service on the Commission (Clyde Fuller, 2007 to 2010). Only two (2) of the current Commissioners were on the Commission during the time Mr. Cabrera was retained by the Commission (Deborah Cochran and Clyde Fuller).

The Commission Executive Director is selected by the Commission and confirmed by a majority of the City Council. See San Diego Municipal Code (“SDMC”) § 26.0411. Only the Executive Director serves at the pleasure of the Commission. Other Commission staff are hired, fired and supervised by the Executive Director. Stacey Fulhorst (“Fulhorst”) has served as the Commission’s Executive Director since December 2003. Given her service during Cabrera’s tenure, Fulhorst voluntarily chose to recuse herself from involvement in any enforcement matters related to the City Attorney Race. The Commission’s General Counsel has been assigned to oversee any enforcement matters related to the City Attorney Race.

Analysis

A. Due Process Considerations

Procedural due process requires that before the government may deprive an individual of life, liberty, or property interest (including a monetary fine), that individual must be given notice and an opportunity to be heard before an impartial decision maker. This includes administrative enforcement activities like those undertaken by the Commission. See SDMC § 26.0414.

B. Systematic Procedural Safeguards

The SDMC sections establishing the Commission includes several systematic safeguards intended to ensure the Commission will be comprised of Commissioners who can be fair and impartial, including the following:

- No more than three (3) members of the Commission can be registered with the same political party. SDMC § 26.0404 (b).
- A person who ran as a candidate against a current City elected official, or who served in a staff capacity for the campaign of such a candidate, cannot be nominated to serve on the Commission. *Id.*
- Commissioners may not make financial contributions to candidates for City office. SDMC § 26.0406 (c).
- Commissioners may not participate in supporting or opposing a candidate for office or a city ballot measure – this includes engaging in fundraising activities and making public endorsements. SDMC § 26.0406(d).
- No member of the Commission may become a candidate for elective office during his/her service on the Commission or for 12 months thereafter. SDMC § 26.0406 (e).
- No member of the Commission may be a registered lobbyist. SDMC 26.0406 (f).

Commissioners who do not adhere to these limitations may be removed from the Commission.

C. Recusal and Disqualification

In addition to the systemic safeguards described above, when a matter is set for a Probable Cause or Administrative Hearing, the SDMC provides for both voluntary self-recusal and compelled disqualification at the request of a party on the basis of bias, prejudice, or any other reason for which a judge may be disqualified in a court of law. SDMC §26.0447.

It is incumbent on each Commissioner, therefore, to consider whether he or she can be fair and impartial in a given investigative or enforcement matter. Even when a Commissioner believes

he or she can be impartial, that Commissioner can still recuse if an appearance bias would suggest a lack of impartiality. This is a personal decision that each Commissioner must make for himself or herself on a case by case basis. When a party seeks to disqualify a Commissioner, the unchallenged members of the Commission determine whether to disqualify the challenged Commissioner by a vote of at least four (4) of the remaining Commissioners. (SDMC §26.0447(b)(2)(A). The SDMC does not explicitly provide for disqualification of the entire Commission.

D. Fair Political Practices Commission

Castellanos suggests that as an alternative to enforcement by the Commission, matters related to City Attorney Race could instead be referred to the Fair Political Practices Commission (“FPPC”).

While the SDMC provides that the Commission may make referrals to other governmental agencies when appropriate (SDMC § 26.0414(e)), those other government agencies can only investigate and enforce those matters that fall within their jurisdiction.

The SDMC contains numerous provisions that are applicable only to elections held in the City of San Diego which the FPPC could not enforce. Accordingly, if the entire Commission were disqualified or recused itself, there would be no local oversight of the City Attorney Race.

The FPPC enforces state ethics and campaign finance laws contained in the Political Reform Act (Cal. Gov’t Code §§ 81000 et seq.). The FPPC will not enforce local laws that are stricter than state law. Attached to this memorandum is a comparison between state law and San Diego law in this regard. For example, state law does not provide any campaign contribution limits for candidates in local elections. Therefore, if the FPPC were the sole agency responsible for oversight of the 2016 City Attorney Race, the individual contribution limit and numerous other local campaign laws could not be enforced by the FPPC.

Since the FPPC’s ordinary jurisdiction is state law, special legislation would be required in order for it to enforce local laws. While this has happened on one (1) occasion, there is no guarantee it would happen here and it is unlikely it could happen quickly enough for there to be meaningful enforcement in the City Attorney Race.¹

Conclusion

Administrative enforcement agencies, like the Commission, are required to ensure that respondents in any enforcement matter receive procedural due process including a fair and impartial decision-maker. Systematic provisions ensure that Commissioners do not participate in city elections and that the composition of the Commission is politically balanced. Due to her service during Cabrera’s tenure on the Commission, the Executive Director has voluntarily recused herself from any participation in investigations or enforcement related to the City Attorney Race. When an investigation becomes the subject of a Probable Cause or Administrative Hearing, there are procedures for the disqualification and recusal of individual Commissioners. Referral of enforcement to the FPPC would likely mean that significant local election provisions would not be enforced as to the City Attorney Race.

¹ In 2013, San Bernardino County became the first local government agency in California to have the FPPC enforce its local campaign laws. In order for this to occur, special state legislation was adopted that applied only to San Bernardino County. Unlike San Diego, at the time the legislation was adopted, San Bernardino completely lacked any body for enforcement and oversight. In San Bernardino, the FPPC stepped in to enforce all of the local election laws, not to provide enforcement in just one race.

COMPARISON OF DUTIES

Ethics Commission & the Fair Political Practices Commission

Provides Advice & Enforcement Regarding Local Campaign Matters	ETHICS COMMISSION	FPPC
Recordkeeping Requirements	X	X
Filing Campaign Statements	X	X
Contribution Limits for Individuals	X	
Contribution Limits for Political Parties	X	
Restrictions on Time Period of Contribution	X	
Transfers and Carryovers	X	
Loan Limits & Interest Prohibition	X	
Cash Contributions	X	X (in part)
Filing Third Pre-Election Report	X	
Election Designations (Primary, General, etc.)	X	
Reporting Cumulative Contributions on Campaign Statement	X	
Online Filing	X	
Pre-Primary Contributions for General Elections	X	X (in part)
\$200 Cumulative Limit on Anonymous Contributions	X	
Use of Campaign Funds	X	X
Notification Regarding Contribution Solicitations	X	
Solicitation of Campaign Contributions from City Employees	X	
Prohibition on Contributions from Organizations & Organization Bank Accounts	X	
Contribution Limits for Recall Elections	X	
Obligation to Return Contributions	X	X (in part)
Return of Contributions – Mistaken Identity	X	
180 Day Vendor Debt Rules	X	
Legal Defense Funds	X	X (in part)
Mass Campaign Literature	X	X (in part)
Telephone Communications	X	X (in part)
Billboard Advertising	X	X (in part)
Disclosure of \$10,000 contributors on candidate advertisements	X	X (\$50,000)
Disclosure of \$10,000 contributors on ballot measure advertisements	X	X (\$50,000)

Provides Advice & Enforcement Regarding Local Campaign Matters	ETHICS COMMISSION	FPPC
Disclosure of Electioneering Communications	X	
Slate Mailers		X
Surplus Funds Rules	X	X

Provides Advice & Enforcement Regarding the Lobbying of City Officials	ETHICS COMMISSION	FPPC
Registration of Contract Lobbyists	X	
Registration of In-House Lobbyists	X	
Disclosures from Expenditure Lobbyists	X	
Quarterly Reports for Lobbying Entities	X	
Contribution Disclosures by Lobbyists	X	
Fundraising Disclosures by Lobbyists	X	
Campaign Contract Disclosures by Lobbyists	X	
City Contract Disclosures by Lobbyists	X	
Limits on Gifts From Lobbyists	X	
Laws Regarding Misrepresentation and Deception	X	

Provides Advice & Enforcement Regarding Gifts, Loans, Disclosures, Conflicts, etc.	ETHICS COMMISSION	FPPC
Gifts	X	X
Travel Payments	X	X
Loans	X	X
Honoraria	X	X
Annual Disclosure of Economic Interests	X	X
Semi-annual gift reporting	X	
Disqualification based on Economic Interest	X	X
Financial Interest in Contract (§1090)	X	
Disqualification of City Officials in Municipal Decisions Involving Benefactors (Conflicts of Interest)	X	
Solicitation of Campaign Contributions from City Employees	X	
Future Employment	X	X
Lobbying Activities of Former Officials	X	X (elected officials only)
Unlawful Use of City Resources	X	

Provides Advice & Enforcement Regarding Gifts, Loans, Disclosures, Conflicts, etc.	ETHICS COMMISSION	FPPC
Unlawful Use of City Position, Badge, Uniform	X	
Use of Position to Induce Person to Provide Economic Benefit or Gain	X	
Use of City Resources, Facilities to Support Candidacy	X	
Engaging In Outside Employment While on City Time	X	
Disclosure of Confidential Information	X	

Other Matters	ETHICS COMMISSION	FPPC
Audits City Campaign Statements	X	low priority if City is selected in drawing
Audits City Lobbying Statements	X	
Provides Live Trainings For City Officials	X	
Provides Online Trainings for City Officials	X	state law only – limited to few officials
Provides Live Trainings for Lobbyists	X	
Provides Live Trainings for Candidates & Treasurers	X	
Tracks 1,300+ City Officials for Compliance with Biennial Training Requirement	X	
Prepares Fact Sheets & FAQs specific to City's laws	X	
Prepares & Updates Candidate Manual and Committee Manual specific to City's Campaign laws	X	
Prepares & Updates Lobbying Manual specific to City's Lobbying Ordinance	X	
Monitors & Reports on Effectiveness of Lobbying and Campaign Laws	X	
Provides Formal Written Advice	1-2 weeks	state law only; typically takes longer
Provides Informal Telephonic Advice	X	state law only
Provides Informal Advice Through E-mail	X	state law only
Monitors State and Federal Statutes, Regulations, and Court Cases for Impact on Local Campaign Laws, Lobbying Laws, and other Ethics Laws	X	
Proposes Amendments to Local Campaign Laws, Lobbying Laws, and other Ethics Laws	X	