

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: September 9, 2009

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.)
Docketed for Rules Committee Consideration on September 16, 2009

The Ethics Commission's Investigative and Enforcement Procedures were adopted by the City Council on February 11, 2002. The Commission has worked with these procedures for seven years and, as a result of its experience, is recommending that the Municipal Code be amended to expand the Commission's subpoena power to include witness subpoenas during investigations and to add a prohibition on the provision of false evidence. These two recommendations are discussed in greater detail below.

The recommended changes were originally part of a larger package of proposed amendments presented to the City Council in October of 2008. Although the City Council approved the remainder of the proposed changes, the Council sent these two items back to the Rules Committee for further discussion in light of concerns raised by the Office of the City Attorney. As explained in detail below, the Ethics Commission has since conferred with the City Attorney's Office and incorporated additional language into the proposed amendments in order to address the previously-expressed concerns.

It is relevant to note that the concerns previously expressed by the City Attorney's Office were delineated in a memorandum dated October 9, 2008, which was prepared during the administration of the previous City Attorney. The current City Attorney, Jan Goldsmith, has advised the Commission that his office will not be providing any input on the policy decisions that accompany the recommended changes. Instead, he has recommended the addition of several provisions to mitigate concerns previously raised by his office. Each of City Attorney Goldsmith's suggestions has been incorporated into the proposed amendments.

In the event that some Councilmembers might have lingering concerns about the issues raised in the October 2008 City Attorney report, we have obtained an independent legal opinion from the law firm of McDougal Love Eckis Boehmer Foley & Lough. The memorandum was drafted by Lisa Foster, who was a Deputy City Attorney in the San Diego City Attorney's Office for fourteen years. She worked in the City Attorney's Public Policy Unit until 2005, when she joined

her current firm where she specializes in public agency law. Specific aspects of Ms. Foster's analysis of the Commission's proposed amendments are discussed in detail below.

Subpoenas of Witnesses During Investigation

Background:

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 approved by the City Council. The procedures adopted by the City Council and memorialized in the Municipal Code provide that the Commission may issue document subpoenas during an investigation and in connection with a hearing. With respect to witness subpoenas, however, the procedures currently provide that the Commission may compel witness testimony only at a hearing.

Proposed Amendment:

The Commission recommends adding language to the Municipal Code to state that the Commission may issue witness subpoenas during the course of a Commission investigation.

Rationale:

If adopted, the proposed amendment will achieve the following:

- ✓ It will ensure that the Commission has the necessary tools to conduct effective investigations into alleged violations of campaign laws, lobbying laws, and ethics laws.
- ✓ It will enable the Commission to conduct a thorough investigation prior to scheduling a hearing.
- ✓ It will provide a layer of protection for witnesses who fear retaliation for voluntarily cooperating with a Commission investigation.

It is relevant to note that a recent report issued by the San Diego County Grand Jury (filed June 3, 2009) concluded that "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)."

It is also relevant to note that comparable administrative ethics enforcement agencies throughout the state (e.g., Los Angeles Ethics Commission, San Francisco Ethics Commission, and the Fair Political Practices Commission) have the ability to subpoena witnesses during investigations. In other jurisdictions, the subpoena authority is delegated to the staff, whereas in San Diego all requests for subpoenas must be submitted to and approved by the Ethics Commission, thereby providing another layer of oversight.

Legal Issues:

Although the Ethics Commission consistently provides a host of rights and protections to respondents and witnesses during the course of its enforcement activities, we have incorporated

the following provisions into the draft ordinance in order to alleviate any concerns regarding due process considerations:

- The proposed amendments contain a provision requiring that investigatory subpoenas specify the area of inquiry.
- The amendments include language stating that witnesses have the right to legal representation during questioning.
- In addition to referencing the Administrative Procedures Act, the amendments refer to specific California Government Code sections relating to the issuance and service of investigative subpoenas.
- The amendments require that Commission staff make an effort to obtain information and documents on a voluntary basis before asking the Commission to issue a subpoena (except in extraordinary circumstances), and clarify that the Commission will not issue a subpoena unless it finds that there is good cause to do so.
- The amendments provide that each witness shall have the right to request that the interview be recorded, and to obtain a copy of the recording.
- In addition to referencing applicable provisions of the Code of Civil Procedure, the amendments refer to California Government Code sections 7465 and 7474, which relate to the issuance of subpoenas for financial records.
- The amendments refer to California Government Code sections 11180 through 11191 with respect to the process for petitioning the San Diego Superior Court for an order to enforce a Commission subpoena, and they clarify that the failure to obey a subpoena may be considered contempt and prosecuted as a misdemeanor only after a person has failed to comply with a San Diego Superior Court order enforcing the subpoena.

As explained above, City Attorney Jan Goldsmith has advised the Ethics Commission that the foregoing provisions alleviate his concerns regarding the legality of the proposed amendments. In addition, he advised us that his office will not be making any recommendations on related policy decisions.

During the prior City Attorney administration, however, a memorandum was issued to the Mayor and Council concerning the proposed amendment. This memorandum included the following opinions: (1) the voters did not intend for the Commission to have the ability to subpoena witnesses during investigations, and (2) a comprehensive set of procedures for the protection of witnesses and guidance for investigators is necessary. As explained above, the Commission has obtained an independent opinion from attorney Lisa Foster. Ms. Foster concluded as follows with respect to the opinions previously expressed by the City Attorney's Office:

- (1) The conclusion that voters did not intend to grant the Commission the power to subpoena witnesses during an investigation is inconsistent with the fundamental rules of construction that apply to the interpretation of ballot measures. Because the language of

the initiative is clear and unambiguous, there is no need to attempt to determine voter intent by examining other factors. Instead, the ballot measure language specifically refers to the need for subpoena powers during investigations, and contains no language suggesting that the subpoena power be limited to hearings only.

- (2) Because the City Attorney's Office did not cite any legal authority to support the proposition that a comprehensive set of procedures are necessary, this opinion appears to be based on a policy concern regarding potential abuse of the Commission's subpoena power, rather than a legal analysis. In fact, as a matter of law, the U.S. Supreme Court (*Hannah v. Larche*, 363 U.S. 420 (1960)) has determined that constitutional due process protections are not afforded to persons involved in an administrative fact-finding investigation conducted by a government agency (although they apply to respondents at administrative hearings that are initiated by an agency after a fact-finding investigation).
- (3) Despite the fact that the Commission is not legally required to recognize any due process rights for witnesses contacted during the course of an investigation, the current as well as the proposed procedures provide numerous significant protections for subpoenaed witnesses. According to Ms. Foster's analysis, there is no legal basis for requiring any additional procedures.

As the Court noted in the above-cited case, if due process rights were afforded to individuals involved in a fact-finding investigation, it "would make a shambles of the investigation and stifle the agency in its gathering of facts." *Id.* at 444. In other words, it is important that agencies like the Ethics Commission have the flexibility necessary to conduct an effective investigation without being bound by a rigid set of procedures. This belief is underscored by the complete lack of codified investigative procedures in other comparable jurisdictions.

Prohibition on Providing False Evidence

Background:

There have been several instances over the past few years in which individuals have knowingly provided false evidence to the Commission (both verbally and in writing) during the course of an investigation.

Proposed Amendment:

The Commission recommends adding a provision to the Municipal Code making it unlawful for anyone within the Commission's jurisdiction to knowingly provide false information or documentation regarding a material fact during a Commission investigation or at a Commission hearing.

Rationale:

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. In addition, it will provide an important administrative remedy in the event that someone knowingly provides false evidence.

Legal Issues:

The memo distributed by the City Attorney's Office in October of 2008 included an opinion that the proposed amendment is preempted by the state perjury law codified at Penal Code section 118. According to the attached memorandum from attorney Lisa Foster, however, the proposed prohibition is not preempted by state law because it is different in scope and remedy, and because it does not contradict state law.

Moreover, Ms. Foster found no authority to support the proposition that the state law fully occupies the field of false information laws. In fact, false information ordinances are extremely common in local law and have coexisted with state law for many years. By way of example, the San Diego Municipal Code contains at least thirteen different false information provisions, one of which subjects people who "mislead" the City's outside auditors to criminal misdemeanor penalties, and was unanimously approved by the City Council on June 22, 2009. Furthermore, during her research Ms. Foster identified twelve municipal codes for other cities in San Diego County that contain false information provisions.

In addition to the preemption issue, the City Attorney's Office verbally recommended that an independent hearing officer (instead of the Ethics Commission) serve as the ultimate adjudicator with respect to alleged violations of this provision. The City Attorney's Office also suggested that the Commission's proposed amendments incorporate existing sections of the Municipal Code applicable to the use of "Enforcement Hearing Officers" at administrative hearings. (SDMC §§ 12.0806, 12.0807). The Commission concurs with these suggestions and has incorporated the relevant language into the proposed amendment.

For your convenience we have drafted the attached strike-out version reflecting proposed changes to selected portions of the Commission's procedures. We look forward to discussing these proposed amendments with you at the Rules Committee meeting on September 16, 2009. If you have any questions, please contact me at your convenience.

Stacey Fulhorst
Executive Director

Attachments

cc: Catherine Bradley, Chief Deputy City Attorney