



# City of San Diego Ethics Commission

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## HEARING PROCEDURES

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Approved by the Ethics Commission \_\_\_\_\_, 2009

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# HEARING PROCEDURES

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## **ARTICLE I - PURPOSE**

§1.01 The purpose of these procedures is to establish a uniform set of guidelines to be followed following the ordering of a Probable Cause Hearing or an Administrative Hearing by the City of San Diego Ethics Commission [Commission]. At the discretion of the Commission or the hearing's Presiding Authority, and when warranted by good cause, deviations from these procedures are permissible.

## **ARTICLE II - CONSISTENCY WITH EXISTING LAW**

§2.01 These procedures are to be interpreted consistent with the language set forth in the Ethics Commission's investigation and enforcement proceedings that are codified at Chapter 2, Article 6, Division 4 of the San Diego Municipal Code. In the event of a discrepancy between these procedures and the language of the Division 4 of the Municipal Code, Division 4 shall govern.

§2.02 These procedures are also to be interpreted consistent with the provisions of the California Administrative Procedures Act set forth in the California Government Code at sections 11370, et seq. In the event of a discrepancy between these procedures and the language of the Administrative Procedures Act, these procedures shall govern.

## **ARTICLE III - DEFINITIONS**

For purposes of these procedures:

§3.01 "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.

§3.02 "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.

§3.03 "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.

§3.04 "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 San Diego Municipal Code section 26.0411, or the Executive Director's designee.

§3.05 "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.

§3.06 “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, and lobbying registration and disclosure.

§3.07 “Parties” means the Petitioner and the Respondent(s).

§3.08 “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.

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

§3.10 “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.

§3.11 “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.

§3.12 “Respondent” means a person or entity that is alleged in a complaint to have violated Governmental Ethics Laws, and who is a party to a Probable Cause Hearing or Administrative Hearing.

§3.13 “Service” means delivery of one or more documents in accordance with San Diego Municipal Code section 26.0443.

§3.14 “Subpoena” means a written order requiring a witness’s appearance at a Probable Cause Hearing or Administrative Hearing to give testimony, and authorized in accordance with the provisions of San Diego Municipal Code section 26.0445.

§3.15 “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, and authorized in accordance with the provisions of San Diego Municipal Code section 26.0445.

Other terms used in these procedures shall be defined in accordance with their usage in common language, except where such terms are defined in Chapter 2, Article 6, Division 4 of the San Diego Municipal Code. In the event of a discrepancy between the common language definition of a word and the definitions contained in Division 4 of the Municipal Code, Division 4 shall govern.

## ARTICLE IV - PRE-HEARING CONFERENCE

- §4.01 At the request of the Petitioner or Respondent, or by order of the Presiding Authority, the Presiding Authority may conduct a Pre-Hearing Conference prior to the Probable Cause Hearing or the Administrative Hearing. The Presiding Authority shall set the time and place for the Pre-Hearing Conference, and shall give reasonable written notice to all parties.
- §4.02 The Pre-Hearing conference may deal with one or more of the following matters:
- (a) Preparation of stipulations;
  - (b) Clarification of issues;
  - (c) Rulings on identity and limitation of the number of witnesses;
  - (d) Objections to proffers of evidence;
  - (e) Order of presentation of evidence and cross-examination;
  - (f) Rulings regarding issuance of Subpoenas and Subpoenas duces tecum;
  - (g) Exchange of discovery prior to an Administrative Hearing;
  - (h) Schedules for the commencement and conduct of a hearing;
  - (i) Exchange of witness lists and of exhibits or documents to be offered in evidence at a hearing;
  - (j) The disqualification of any person from participation in the hearing; and,
  - (k) Any other matters that may promote the orderly and prompt conduct of the hearing.
- §4.03 The Presiding Authority may conduct all or part of the Pre-Hearing Conference by telephone, videoconferencing, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.
- §4.04 The Presiding Authority shall issue a Pre-Hearing Order incorporating the matters determined at the Pre-Hearing Conference. The Presiding Authority may direct one or more of the parties to prepare the Pre-Hearing Order.
- §4.05 Nothing in this Article precludes the parties to the hearing from engaging in discussions with each other, outside the scope of a Pre-Hearing Conference, on any matter listed in section 4.02.
- §4.06 Whether or not a particular procedural matter, fact, or substantive matter is made part of a Pre-Hearing Conference, the parties to the hearing may stipulate as to such fact or matter, and upon the approval of the Presiding Authority, that stipulation shall have the full force of an order of the Presiding Authority.

## **ARTICLE V - DISQUALIFICATION OF PRESIDING AUTHORITY**

- §5.01 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 for cause in a court of law.
- §5.02 A member of a Presiding Authority may voluntarily disqualify himself or herself for any of the reasons identified in section 5.01. Once disqualified, that individual shall not participate in any discussion, deliberation, or voting pertaining to any matter that is the subject of the hearing.
- §5.03 Notwithstanding section 5.02, 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.
- §5.04 A waiver is effective only when signed by all parties, accepted by the Presiding Authority, and included in the record of the hearing.
- §5.05 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 hearing officer appointed by the Commission, the disqualification shall be determined by a concurring vote of at least four members of the Commission.
- §5.06 If any disqualified Commissioner was part of a three-member ad hoc subcommittee of the Commission, the disqualified Commissioner may be replaced by a substitute Commissioner appointed by the Commission.

## **ARTICLE VI - CONTINUATION OF THE HEARING**

- §6.01 The Presiding Authority may continue the Probable Cause Hearing or the Administrative Hearing for good cause shown by one of the parties to the hearing or by any member of the Presiding Authority.

## **ARTICLE VII - SUBPOENAS**

- §7.01 Subpoenas and Subpoenas duces tecum may be requested by any party to the hearing.
- §7.02 Prior to a Probable Cause Hearing, a Respondent may seek a Subpoena or Subpoena duces tecum in furtherance of its own investigation into matters relevant to the hearing. However, a Respondent is not authorized to use a subpoena to obtain documentation from

the Commission. Commission documentation will be provided to Respondents prior to the hearing in accordance with Article IX.

- §7.03 Prior to an Administrative Hearing, a Respondent may seek a Subpoena or Subpoena duces tecum in furtherance of its own investigation into matters relevant to the hearing, and is also entitled to conduct pre-hearing discovery in accordance with Article VIII. However, a Respondent is not authorized to use a subpoena to obtain documentation from the Commission. Commission documentation will be provided to Respondents prior to the hearing in accordance with Articles VIII and IX.
- §7.04 Requests for Subpoenas and Subpoenas duces tecum must be made in accordance with San Diego Municipal Code section 26.0445.
- §7.05 Requests for Subpoenas must be submitted no later than twenty calendar days before the hearing.
- §7.06 Requests for Subpoenas duces tecum must be submitted no later than ~~twenty~~ thirty-five calendar days before the hearing.

#### **ARTICLE VIII - DISCOVERY**

- §8.01 After service of the Final Administrative Complaint, but prior to the date of the Pre-Hearing Exchange of Information as provided for in Article IX, any Respondent may request from any other party to the hearing:
- (a) the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; and,
  - (b) an opportunity to inspect and make a copy of any of the following in the possession or custody or under the control of any other party to the hearing:
    - (1) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;
    - (2) Statements of witnesses then proposed to be called to testify at the hearing and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (1) above;
    - (3) All writings that any other party then proposes to offer in evidence;
    - (4) Investigative reports made by or on behalf of any other party pertaining to the subject matter of the proceeding, to the extent that these reports (a) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the hearing, or (b) reflect matters perceived by the investigator in the course of his or her investigation, or (c) contain or include by attachment any statement or writing described above in (1) to (3), inclusive, or summary thereof. For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or

other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of these oral statements.

- §8.02 In the event that a material witness is unavailable to testify at the hearing, any party may petition the Presiding Authority for an order that the testimony of that material witness be taken by deposition in the manner prescribed by law for depositions in civil actions under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. The petitioner shall serve notice of the deposition and a copy of the petition on the other parties at least 10 days before the deposition.
- §8.03 Requests for discovery must be made in writing. While no particular form must be used, the request must clearly and plainly state the information or items sought. Requests for discovery must be served on the party from whom the discovery is sought as well as all other parties. ~~either personally or by certified mail return receipt requested.~~
- §8.04 The party responding to the discovery request shall respond within ten calendar days, and shall ensure that all other parties to the hearing are provided with a copy of all documents that are produced. Each party receiving a copy of such documents shall be responsible for photocopying expenses incurred on its behalf.
- §8.05 If a Respondent claims that a responding party has failed to comply with a request for discovery pursuant to this Article, the Respondent may request a Pre-Hearing Conference in accordance with Article IV for the purpose of seeking to compel discovery.
- §8.06 Nothing in this Article shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

#### **ARTICLE IX - PRE-HEARING EXCHANGE OF INFORMATION**

- §9.01 No later than ~~twenty-one~~ thirty calendar days prior to the Probable Cause Hearing or the Administrative Hearing, all parties to the hearing shall ~~mail or deliver to~~ serve on all other parties a list of all witnesses and a copy of all exhibits or documents that the party anticipates offering into evidence at the hearing.

#### **ARTICLE X - VENUE**

- §10.01 The hearing shall be held at the offices of the Commission unless the Commission, at its discretion, selects a different place to conduct the hearing.
- §10.02 Probable Cause Hearings 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.
- §10.03 Administrative Hearings shall be open to the public.



## ARTICLE XI - COUNSEL

- §11.01 Each Respondent has the right to attend the hearing, and may be represented by legal counsel or any other representative of his or her choosing.
- §11.02 The Petitioner has the right to be advised by ~~legal counsel provided by the San Diego City Attorney's Office~~ its General Counsel. If the General Counsel is unavailable or not able to advise the petitioner due to a conflict-of-interest, petitioner has the right to secure alternative legal counsel.
- §11.03 The Presiding Authority has the right to be advised by legal counsel ~~provided by the San Diego City Attorney's office~~ of its own selection, but in no event shall it be advised by the same legal counsel identified in section 11.02.

## ARTICLE XII - CHRONOLOGY OF THE HEARING

The chronology contained in this Article provides the basic order of proceedings during the hearing. The Presiding Authority, at its discretion, may modify this chronology in the interests of conducting an efficient and expedient hearing, unless such modification prevents due process from being afforded to all parties to the hearing.

- §12.01 The Presiding Authority calls the matter for hearing and asks the parties and counsel to identify themselves.
- §12.02 If the hearing is a Probable Cause Hearing, the following documents shall be made a part of the record: the notice of hearing; the Draft Administrative Complaint; the Probable Cause Report; any response to the Probable Cause Report filed by the Respondent; any rebuttal to Respondent's response to the Probable Cause Report; and any waivers as to the disqualification of a member of the Presiding Authority.
- §12.03 If the hearing is an Administrative Hearing, the following documents shall be made a part of the record: the notice of hearing; the Final Administrative Complaint; Petitioner's administrative hearing brief; any administrative hearing brief submitted by a Respondent; and any waivers as to the disqualification of a member of the Presiding Authority.
- §12.04 The Presiding Authority takes official notice of the capacity of all Respondents and the status of the Petitioner.
- §12.05 Any party may make an opening statement. If the Petitioner and Respondent both wish to make an opening statement, the Petitioner proceeds first. The Respondent may reply after the Petitioner's opening statement or may reserve an opening statement until after the Petitioner concludes his or her case.
- §12.06 The Petitioner puts on his or her case first.
- §12.07 The Respondent puts on his or her case after the Petitioner concludes its case. If there is more than one Respondent, the order of presentation may be decided by mutual agreement of the Respondents or, if necessary, by the discretion of the Presiding Authority.

- §12.08 After the initial presentation of evidence by both sides, the parties, beginning with the Petitioner, may introduce evidence in rebuttal. Such evidence should be limited to matters already raised in the presentation of the Petitioner's or Respondent's case.
- §12.09 Each party may make a closing argument. The Petitioner proceeds first. The Respondent proceeds after the Petitioner's closing argument. The Petitioner may conclude the closing arguments with a rebuttal.
- §12.10 These procedures do not authorize the making of a motion for dismissal or a motion for nonsuit at any time during the hearing.

### **ARTICLE XIII - EVIDENCE**

- §13.01 Oral evidence shall be taken only on oath. The oath may be administered by the Presiding Authority. The oath is obtained by an affirmative response to the following statement: "~~You do~~ Do you solemnly state, under penalty of perjury, that the evidence that you shall give in this matter shall be the truth, the whole truth, and nothing but the truth."
- §13.02 Each party shall have these rights:
- (a) To call and examine witnesses;
  - (b) To introduce exhibits;
  - (c) To cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;
  - (d) To impeach any witness regardless of which party first called him or her to testify.
- §13.03 A party may redirect and recross, subject only to the limitations imposed by the Presiding Authority.
- §13.04 The Petitioner may call and examine any Respondent as if under cross-examination even if that Respondent does not first testify in his or her own behalf.
- §13.05 The hearing need not be conducted according to the provisions of the California Evidence Code. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.
- §13.06 Hearsay evidence may be used. However, at an Administrative Hearing, 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 civil actions. An objection is timely if made before submission of the case.

§13.07 The rules of privilege shall be effective to the extent that they are applicable in a court of law as governed by Division 8 of the California Evidence Code.

§13.08 The Presiding Authority has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

#### **ARTICLE XIV - EX PARTE COMMUNICATIONS**

§14.01 Except as otherwise provided in this section, while the proceeding is pending, the Presiding Authority and members of the Ethics Commission shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication.

§14.02 No pleading, letter, document, or other writing shall be filed by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to the proceeding.

§14.03 Communications prohibited under section 14.01 do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the presiding authority when the opposing party has had a default entered pursuant to Article XV.

§14.04 If, while the proceeding is pending, the Presiding Authority or the Ethics Commissioners receive a communication of a type that would be in violation of this Article, he or she shall, promptly disclose the content of the communication on the record and give all parties an opportunity to address it.

#### **ARTICLE XV - DEFAULT**

§15.01 In the event a Respondent fails to appear at a hearing, the Presiding Authority may direct that the scope of the hearing be narrowed. At its discretion, the Presiding Authority may conduct a hearing notwithstanding the absence of the Respondent or, in the alternative, dispense with the hearing and take under submission Respondent's express written admissions, stipulations entered into between the parties, and any other written evidence submitted by a party present at the hearing.

§15.02 In the event of the Respondent's default, and within seven business days after a decision by the Commission that either (1) there is probable cause to believe that the Respondent has committed a violation of Governmental Ethics Laws, or (2) the Respondent has committed a violation of Governmental Ethics Laws, the Respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The Commission, in its discretion, may vacate the decision and grant a re-hearing on a showing of good cause. As used in this section, good cause includes, but is not limited to, any of the following:

- (a) Failure of the person to receive notice of the hearing; or
- (b) Mistake, inadvertence, surprise, or excusable neglect.

#### **ARTICLE XVI - JUDICIAL REVIEW**

§16.01 Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure.

§16.02 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 by the Commission.