

**CITY OF SAN DIEGO  
ETHICS COMMISSION**

**Office of the Executive Director**

**M E M O R A N D U M**

**DATE:** November 10, 2010

**TO:** Chair and Members of the San Diego Ethics Commission

**FROM:** Stacey Fulhorst, Executive Director

**SUBJECT:** Request for Documents Associated with Pending Litigation  
Docketed for Ethics Commission open session meeting on November 18, 2010

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The City of San Diego is currently defending a lawsuit brought by Scott Kessler, a former City employee, who has alleged that his employment was terminated in retaliation for providing certain documents to the Ethics Commission. Mr. Kessler was a witness in an Ethics Commission investigation conducted several years ago, during the course of which he provided the staff with the subject documents. In addition, as discussed in further detail below, Mr. Kessler was the subject of a separate investigation (Case No. 2007-73) that resulted in a dismissal when the investigation revealed that Mr. Kessler did not have a financial interest that would trigger disqualification.

A key issue in the retaliation litigation is whether or not Mr. Kessler has exhausted his administrative remedies. (In many situations, the law requires that a plaintiff first submit an administrative claim with the appropriate agency before pursuing civil litigation.) Janice Brown, the attorney retained to defend the City in the litigation, points out that Mr. Kessler has not filed a complaint with the Ethics Commission alleging retaliation in violation of the Ethics Ordinance (SDMC section 27.3573). In response, Mr. Kessler asserts that he communicated with the Office of Ethics and Integrity [OEI] and that a reasonable person would have concluded that this was sufficient to exhaust the relevant administrative remedies.

OEI was a department established by the Mayor to implement the City's "norms and values." This department (which was dissolved in late 2008) never had jurisdiction over the Ethics Ordinance, which includes SDMC section 27.3573. Moreover, Mr. Kessler had been previously advised that the Ethics Commission, not OEI, had jurisdiction over the Ethics Ordinance. Specifically, during the course of the Commission's investigation in Case No. 2007-73 (unrelated to the retaliation claim), the Commission staff advised Mr. Kessler of the difference between the Ethics Commission and OEI, and told him that, in the future, he should obtain advice concerning conflict of interest laws from the Ethics Commission rather than from OEI.

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Mr. Kessler had reason, therefore, to know that a retaliation claim under the Ethics Ordinance should be submitted to the Ethics Commission and not to OEI.

In connection with Mr. Kessler's retaliation lawsuit, the City Attorney's Office and Ms. Brown have requested relevant documentation contained in the investigative file for Case No. 2007-73. The disclosure of records contained in a Commission investigative file is primarily governed by SDMC section 26.0455, which provides that a matter must be closed and all applicable statutes of limitations expired before investigative materials will be released. I have reviewed the investigative file for Case No. 2007-73 and determined that the conditions in SDMC section 26.0455 have been met, and the records are generally now available to the public. In reviewing the file, however, I found that the information provided to Mr. Kessler concerning OEI and the Ethics Commission was documented in a May 8, 2008, closed session memorandum. (The OEI issue was not well documented elsewhere as it was not germane to the investigation.)

Memoranda prepared for the closed session portion of Ethics Commission meetings are communications between the Commission and its attorney, and are therefore protected by the attorney-client privilege. Because there is information in the above-referenced closed session memorandum that is relevant to the pending litigation, Ms. Brown has requested that the Commission waive the attorney-client privilege with respect to the portion of the memorandum that addresses the subject issue.

I have, therefore, asked the Chair to docket this matter for your consideration at our upcoming meeting on November 18, 2010. Note that, because this matter will be considered in open session and because all backup materials provided to the Commission in connection with open session items must also be made available to the public, I cannot provide you with a copy of the closed session memorandum or recite the relevant language contained therein; doing so would violate the attorney-client privilege (of which a partial waiver is now being sought).

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Stacey Fulhorst  
Executive Director