

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: June 12, 2008

TO: Chair and Members of the San Diego Ethics Commission

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Investigation and Enforcement Procedures (SDMC §26.0401 et seq.)

In accordance with the Commission's legislative calendar for 2008, the Ethics Commission will begin discussion of several proposed changes to the Commission's Investigative and Enforcement Procedures at its June 12, 2008, meeting. A summary of the issues proposed for discussion is as follows:

A. Appointment and Qualifications of Commissioners

A1. Election of Chairperson

Staff recommends amending the procedures to state that the election of a new Chairperson will take place at the last Commission meeting in June (instead of the first meeting in July). This change will create a more orderly transition and will enable the newly-elected Chairperson to prepare to run the July Commission meeting.

A2. Seeking Elective Office

Several current and former Commissioners have asked about the provision that prohibits former Commissioners from becoming candidates for any city, county, state, or federal elective office for twelve months after leaving the Commission. Specifically, some have questioned whether this prohibition should only apply to local governmental offices, and not to state or federal offices. Accordingly, the Commission might want to consider whether this section of the procedures should be modified, or whether it serves its intended purpose as currently drafted. It is relevant to note that other jurisdictions limit their elective office restrictions to their respective cities and/or counties.

In addition, the current prohibition refers to elective office in the "City," which is defined to include only the City of San Diego, and not other cities. It appears that the original intent was to apply the prohibition to all cities, since it clearly applies to all counties and states. Therefore,

while considering this provision, the Commission may want to determine whether it should refer only to the City of San Diego, to all cities within the County of San Diego, or to all cities in the state or country.

A3. Qualifications – Housekeeping Amendment

Finally, staff recommends some housekeeping amendments with respect to language that addresses the various qualifications applicable to Commissioners. When the procedures were last modified in December of 2006, several changes were incorporated into SDMC section 26.0404(c), including allowing a former candidate or former campaign officer to fill a seat on the Commission that previously had to be filled by a former elected official. As a result, there are several redundancies in the various subsections that merit streamlining.

B. Witness Testimony

B1. Prohibition on Providing False Evidence

Staff recommends adding a provision making it unlawful for anyone within the Commission's jurisdiction to provide false information or documentation during a Commission investigation or at a Commission hearing. There have been several instances over the past few years in which individuals have not been entirely truthful with the Commission staff during the course of an investigation, and Commissioners have repeatedly questioned why the current procedures do not include a prohibition on providing false information or documents. Adding this prohibition may serve as an additional incentive for witnesses and respondents to be truthful and forthcoming during the course of a Commission investigation.

C. Probable Cause and Administrative Hearings

As a result of recent experience with the various hearing procedures delineated in the SDMC, the Commission may want to consider proposing the following amendments:

C1. Probable Cause Determination

Instead of requiring the full Commission to make a probable cause determination (which requires Commissioners who were not members of the Presiding Authority to listen to a recording or read a transcript of the Probable Cause Hearing), change the procedures to enable the Presiding Authority (one Commissioner, an ad hoc subcommittee of three Commissioners, or an individual volunteer) to make the probable cause determination. It is relevant to note that, in other jurisdictions, the agency staff makes the probable cause determination.

C2. Subcommittee for Pre-Hearing Matters

Add a provision to reflect the Presiding Authority's ability to appoint a subcommittee of one to three Commissioners to consider and decide pre-hearing matters in advance of a Probable Cause Hearing or an Administrative Hearing. In the event that the Presiding Authority is the full Commission, the appointment of a subcommittee would eliminate the need for the Commission

to schedule and notice a Commission meeting in accordance with the Brown Act in order to decide pre-hearing matters. It also affords the Respondent an opportunity to participate in the discussion of pre-hearing matters, which would not be permitted if the matters were considered by the full Commission in closed session. Although the Commission has adopted this approach in practice, it seems appropriate to codify this option in the procedures.

C3. Probable Cause Hearings in Public

Clarify that a request from a Respondent to hold a Probable Cause Hearing in public must be made in writing. This change will ensure that there is no dispute or miscommunication regarding the Respondent's request.

C4. Probable Cause Hearing – Evidentiary Standards

Consider incorporating the evidentiary guidelines for Administrative Hearings into the section concerning Probable Cause Hearings (currently the provision that addresses Probable Cause Hearings is silent with respect to evidentiary guidelines).

D. Subpoenas

D1. Subpoenas of Witnesses During Investigation

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 adopted by the City Council. Subsequently, procedures adopted in 2002 state that the Commission may issue document subpoenas during an investigation or in connection with a hearing. With respect to witness subpoenas, however, the procedures only mention the Commission's ability to compel witness testimony at a hearing. The staff recommends revising the procedures to clarify that the Commission may issue witness subpoenas during the course of a Commission investigation. This change would be consistent with the original intent and express language of the City Charter. It is relevant to note that the FPPC and other local agencies issue witness subpoenas during the course of administrative investigations. Staff has conferred with the staff at these other agencies and learned that the use of witness subpoenas in certain types of investigations can be critical to a successful outcome.

D2. Issuance of Investigative Subpoenas

The Commission may also want to consider proposing changes to the provisions that require the full Commission (by a concurring vote of at least four Commissioners) to approve subpoenas requested by staff during the course of an investigation. Because this requirement can delay the progress of an investigation, the Commission may want to recommend amendments that permit the Executive Director to issue subpoenas (as is the case with the FPPC and the Los Angeles Ethics Commission) or that permit the Commission Chairperson and/or Vice-Chairperson to issue subpoenas upon the request of the Executive Director.

D3. Issuance of Hearing Subpoenas

Staff recommends additional changes so that the Petitioner and Respondent will be subject to substantially the same rules with respect to the issuance of hearing subpoenas. The procedures currently provide that a Respondent's requests for hearing subpoenas are submitted to the Executive Director, who will in turn forward them to the Presiding Authority. The Petitioner's request, on the other hand, must be submitted to the full Commission, even when the Presiding Authority is an entity other than the full Commission. Changing the procedures to allow the Presiding Authority to respond to subpoena requests from both the Petitioner and the Respondent will provide for a more consistent and expeditious process.

D4. Objections to Investigative Subpoenas

With respect to written objections to the Commission's investigative subpoenas, the Commission may want to propose amendments that would provide some additional flexibility with regard to when it must meet to consider these objections. Rather than force the Commission to meet within five days of receiving objections to an investigative subpoena, and rather than require the Commission to wait until its next regularly scheduled meeting (which could be a month after the objections are received), staff recommends modifying the procedures to state that with respect to investigative subpoenas the Commission shall consider objections at a special or regular meeting so long as the matter is considered no later than its next regularly-scheduled meeting. Additionally, staff recommends adding language to clarify that an investigative subpoena shall be stayed pending the Commission's ruling on the objections.

D5. Objections to Hearing Subpoenas

With respect to subpoenas issued in connection with a hearing, staff recommends maintaining the current five day limit, but adding a provision allowing the Presiding Authority, or a subcommittee designated by the Presiding Authority (see discussion above), to consider objections to subpoenas (as well as requests for subpoenas, per above discussion in section C2).

D6. Service of Subpoenas

Finally, staff recommends a minor change to clarify that the requirement concerning service of subpoenas on all parties only applies to subpoenas requested in connection with a Probable Cause Hearing or Administrative Hearing, and not to investigative subpoenas.

E. Miscellaneous

Staff recommends the following additional miscellaneous updates in order to ensure that the procedures adequately reflect current Commission practices:

E1. Service of Documents

Clarify that service of documents by mail can be effected by certified or overnight mail to a person's attorney or designated agent. (Currently the procedures address this option only in the subsection concerning personal service.)

E2. Stipulations

Clarify that fully-executed stipulations are public documents.

E3. Disclosure of Records

In section 26.0455, which pertains to the disclosure of Commission records, clarify that subsections (d) and (e) are intended to apply to the prohibition contained in subsection (c).

After the Commission has had an opportunity to consider and discuss the foregoing proposals, the Commission staff will prepare draft amendments based on Commission direction.

Stacey Fulhorst
Executive Director