OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

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Item Number: 1

Response to Grand Jury Report "City of San Diego Ethics Commission"

On June 3, 2009 the San Diego County Grand Jury issued a report to the City Council entitled "City of San Diego Ethics Commission." The Ethics Commission, which was originally established in 2001, provides education, advice and the enforcement of local ethics laws for the City government.

The Grand Jury Report assessed the Ethics Commission and its continued existence as an independent entity, and included two findings and two recommendations. The City Council is required to provide comments to the Presiding Judge of the San Diego Superior Court on each of the findings and recommendations made in the Grand Jury Report by September 29, 2009. The IBA has developed draft responses on behalf of the City Council for each of the findings and recommendations presented in the Grand Jury Report.

In preparing the proposed responses, the IBA has met with the City Attorney and the staff of the Ethics Commission to review factual information regarding current regulations which govern the Commission; and subpoena power during the investigation process. The proposed responses address the Grand Jury findings and recommendations as directly as possible based on factual information, previous Council or Committee actions, and additional IBA research.

The proposed responses to the Grand Jury findings and recommendations are presented below.

FINDINGS

For each finding in the Grand Jury Report, the City Council shall respond by either agreeing or disagreeing wholly or partially with the finding. For each finding to which the response is disagree wholly or partially, the response shall specify the portion of the finding that is disputed and include an explanation of the reasons for the disagreement.

Finding 01: Any action of the City Council to reduce or eliminate funding or to curtail investigative authority of the Commission could be perceived as presenting a conflict of interest.

Proposed Response: **Disagree**
One of the key duties of the City Council is to adopt an annual budget that is balanced and fiscally responsible. The budget must be balanced using very limited resources while addressing numerous critical needs and financial obligations. Passing an annual budget that is balanced and fiscally sound is a top priority of the City Council. The City of San Diego's budget process includes a number of checks and balances, which brings transparency and objectivity to the process, therefore minimizing perceived conflicts of interest. Both the Executive and Legislative branches are involved, as well as analysis by the Office of the Independent Budget Analyst. The public is a key part of the process with hundreds of citizens participating at budget hearings conducted by the City Council's Budget and Finance Committee and the full City Council.

In April of each year, the Mayor releases a Proposed Budget to the City Council and the public. The process includes a two week period from the delivery of the Proposed Budget to the City Council for a comprehensive review by the Office of the Independent Budget Analyst. The City Council then holds a series of public hearings to obtain input from San Diego residents, from which the City Council develops budget priorities and recommends modifications to the Proposed Budget. After a May Revise is released by the Mayor and an additional review by the IBA, the City Council's Budget and Finance Committee deliberates and provides the full City Council with recommendations for final budget modifications. After the Council adopts their final revisions to the budget, the Mayor has the power to veto any changes made by the Council. The Council may overturn the Mayor's veto with a majority vote.

The Ethics Commission is funded within the City's General Fund consistent with other independent entities including the City Attorney, the Independent Budget Analyst, the City Auditor and the City Clerk. The City's General Fund has experienced serious erosion of its revenue base over the past several years due to the declining economy. Over the past four fiscal years, the City has had to eliminate 874 positions city-wide to balance its budget.

Municipal Code section 26.0411 mandates that a reasonable level of resources be provided to the Commission and states that "the Ethics Commission staff must consist of no less than a full time Executive Director, a Clerical Assistant and an investigator." Despite the serious fiscal challenges facing the City for the past four fiscal years, the Ethics Commission staffing has exceeded this mandated level as detailed in the following table.

Ethics Commission Budget				
	FTE	PE	NPE	Total
Fiscal Year 2007	8.00	$ 954,260	$ 54,125	$ 1,008,385
Fiscal Year 2008	8.00	$ 978,481	$ 42,625	$ 1,021,106
Fiscal Year 2009	8.00	$ 963,685	$ 42,614	$ 1,006,299
Fiscal Year 2010	7.00	$ 832,519	$ 58,768	$ 891,287

In addition, after reviewing the Ethics Commission's adjustments for FY 2007 to FY 2010, annual budget changes are consistent with those experienced by other General Fund departments. Based on this review, the Ethics Commission has been funded in excess of Municipal Code requirements, treated objectively and fairly and in the same manner as other critical City programs and services.

The Grand Jury finding also discusses the ability of the City Council to curtail investigative authority of the Commission and whether this can also be seen as a conflict of interest. Municipal Code section 26.0424 outlines the investigation process. The authority of the Executive Director includes the ability to seek only subpoenas duces tecum (subpoenas for records) and does not allow for the subpoena of witnesses. Furthermore, the Executive Director must receive approval by the Commission to issue such a subpoena.

The City Council has the authority to curtail (or expand) investigative authority of the Commission by way of amending the Municipal Code through an Ordinance. Each Ordinance must first be vetted through a City Council Committee hearing, where the City Department, City Attorney, Mayoral staff, the public and other interested parties have a chance to review and comment. If it proceeds to the full City Council, parties are again able to testify and a majority vote of the City Council must be received for it to pass and become effective.

Finding 02: 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).

Proposed Response: **Partially Agree**
The Executive Director must conduct formal investigations in accordance with Municipal Code section 26.0424, which states that the Director seek subpoenas duces tecum (subpoenas for records) and does not allow for the subpoena of witnesses. When a subpoena duces tecum is requested by the Director, the Commission retains discretion to grant or deny the request. After the Director completes the investigation, the results are presented to the Commission in closed session.

At the October 13, 2008 City Council Hearing a discussion was held on amendments to the Ethics Commission's investigation and enforcement procedures, which included a discussion on subpoena power. The Executive Director and Commissioners of the Ethics Commission spoke to the benefit of issuing subpoenas for testimony during the investigation process. Benefits they discussed include:

- Such a subpoena would add a layer of protection to witnesses as many do not want to appear overly cooperative to superiors by providing the Commission with information. Due to the inability to issue such subpoenas, witnesses have not been as willing to speak with the Commission.
- The ability to issue investigative subpoenas may help eliminate the need for a full administrative hearing, which is held publicly and utilizes more resources of both the Ethics Commission and the individual on trial.

The City Attorney's office stated at the October 2008 hearing that if subpoena power is extended during the investigative stage, witness "safeguards" should be put in place. The City Attorney recommended that the Commission first submit for Council approval comprehensive procedures to ensure the protection of the rights of subpoenaed witnesses during the investigative process, and guidance for investigators conducting the interrogations.

RECOMMENDATIONS

For each recommendation in the Grand Jury Report, the City Council shall respond that the recommendation either has been implemented, has not yet been implemented but will be implemented in the future, requires further analysis, or will not be implemented.

Recommendation 09-41: **Place a measure on the ballot to amend the City Charter to ensure the Ethics Commission is annually funded and staffed at a minimal level to conduct the duties of the Ethics Commission and will identify a revenue source to fund the Ethics Commission.**

Proposed Response: **Will not be implemented.**

As previously stated in Finding 01, the Ethics Commission budget has been adequately funded and treated consistently with other General Fund departments. Furthermore, Municipal Code section 26.0411 states that the Ethics Commission must be staffed at a minimum level and that the City Council must appropriate a reasonable budget for the Commission. Despite serious fiscal challenges, Commission resources have consistently exceeded the mandated staffing level. Therefore, we believe a ballot measure of this nature is not necessary.

Recommendation 09-42: **By Ordinance clarify the powers of the Ethics Commission to allow the Executive Director to issue subpoenas for testimony during the investigative process of an alleged ethics violation.**

Proposed Response: This recommendation requires further analysis.
As discussed in Finding 02, at the October 2008 City Council meeting, the issue of subpoena power, among others, was returned to the Rules Committee for further discussion. The City Attorney's Office recommended that the Commission first submit for Council approval comprehensive procedures to ensure the protection of the rights of subpoenaed witnesses during the investigative process, and guidance for investigators conducting the interrogations. This issue is scheduled to be heard at the Rules Committee in the fall of 2009.

[SIGNED]

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