

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

**Michael J. Aguirre**  
CITY ATTORNEY

October 9, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

**PROPOSED CHANGES TO THE ETHICS COMMISSION INVESTIGATIVE AND  
ENFORCEMENT PROCEDURES**

**INTRODUCTION**

The City of San Diego Ethics Commission proposed a number of changes to its investigative and enforcement procedures in a memorandum to the Rules, Open Government and Intergovernmental Relations Committee dated August 20, 2008. These matters were considered at the Rules Committee meeting September 3, 2008. The Committee members raised concerns in two areas, returning those proposals to the Commission for reconsideration in light of the Committee's comments. One returned proposal involved proposed delegation of the Commission's subpoena authority to an individual, who may or may not be a Commission member, or to a body less than the full Commission. The other proposed changes were forwarded to the Council for consideration.

The Ethics Commission summarized the forwarded proposals in its memorandum to the City Council dated September 12, 2008. Two weeks later, the Ethics Commission made additional changes which are described in a September 26, 2008 memorandum. The September 26, 2008 memorandum notes that the changes were made in response to concerns expressed by this Office. However, the changes did not completely resolve the issues, and some new proposals raise additional concerns that are included in the discussion below.<sup>1</sup>

This Office has concerns in three general areas:

1. The power to subpoena witnesses for Commission investigations.
2. The delegation of the Commission's discretionary subpoena authority to other than the full Commission.

---

<sup>1</sup> The Commission's September 26, 2008 memorandum reminds the Council that the Ethics Commission has its own legal counsel. However, the City Attorney's Office has a separate duty to review the ordinance and advise the City Council of issues that might expose the City to legal challenges. In this case, significant red flags were raised in connection with the proposal to expand the Commission's power to subpoena witnesses in the investigative stage and the creation of a new crime to submit false information to the Commission. These issues take time to review and research. This Office sees no urgency in adopting the proposals and in light of the significant questions raised, recommends the matters be referred back to the Ethics Commission and the Rules Committee for further discussion.

3. The creation of a new offense.

For the reasons explained in this report, this Office recommends the City Council decline to extend the Commission's authority to subpoena individuals during formal investigations. Alternatively, we suggest the Council return the proposed changes related to that matter to the Commission for the development of procedures to ensure the protection of the rights of subpoenaed individuals, and guidelines for investigators. This Office recommends the Council return to the Commission section 26.0445(c)(2), which delegates the Commission's subpoena authority to less than the full Commission for further consideration with matters returned to them by the Rules Committee on September 3, 2008. In the interim, we recommend interlineation of the section as a temporary correction. This Office also recommends against the enactment of a new offense that seems unrelated to the Commission's core responsibility to monitor, administer and enforce governmental ethics laws, and which may be preempted by state laws.

## DISCUSSION

### I. Summary of Existing Enforcement Procedures.

The City Charter permits the City Council to create the City of San Diego Ethics Commission, and to establish its duties and responsibilities by ordinance. S.D. Charter §41(d). The Commission is a seven-member appointed Commission, with membership balanced to achieve political neutrality. SDMC §§ 26.0404, 26.0406.<sup>2</sup> Its eight major responsibilities are outlined in section 26.0414. Primary among them is the Commission's obligation to educate and to provide advice to persons under its jurisdiction. § 26.0414(a) and (b). Fifth on the list is the Commission's obligation to investigate and enforce violations of the local ethics laws. § 26.0414(e). Sections 26.0420 through 26.0456 set forth the investigation and enforcement procedures to be used by the Commission. We summarize these procedures to assist the Council's understanding of the issues.

*Complaints.* The Executive Director of the Commission receives and reviews formal, and may review informal, complaints submitted by individuals or groups of individuals. §§ 26.0421, 26.0422. The Director may determine no further action is required by the Commission for reasons provided in the Code. § 26.0422(e). If the Director feels further Commission action is warranted, the Director makes a recommendation to the Commission. *Id.*; also § 26.0423. If the Commission decides a formal investigation is justified, the Commission instructs the Executive Director to begin one. § 26.0423.

*Investigation.* The Director must conduct formal investigations in accordance with section 26.0424. That section permits the Director to seek only subpoenas duces tecum (subpoenas for *records*) from the full Commission during the formal investigation. §§ 26.0424,

---

<sup>2</sup> Future section references are to the San Diego Municipal Code unless indicated otherwise.

26.0455(b) The Director must make reasonable efforts to obtain records on a voluntary basis. § 26.0424(c)(1). The Commission retains discretion to grant or deny the request for such subpoenas. § 26.0424 (c)(3). The Director presents the investigation results to the Commission in closed session. § 26.0425.

*Probable Cause Hearing.* The Commission may take no further action, or decide that a Probable Cause hearing should be conducted. § 26.0425. If the latter, the Commission instructs the Director to schedule a Probable Cause hearing. § 26.0430. The Commission selects the Director, or a qualified volunteer, to represent it (the petitioner) at the Probable Cause hearing, and appoints a Presiding Authority to conduct the hearing. *Id.* The Presiding Authority for a Probable Cause hearing may be 1) a three-member ad hoc committee of the Commission; 2) one member of the Commission, or 3) a qualified volunteer<sup>3</sup> selected by the Commission, who is not a Commission member. § 26.0430(b). The respondent is served with necessary pleadings and may file responsive statements or legal arguments before the Probable Cause hearing. § 26.0430.

The Probable Cause hearing is closed to the public unless the respondent requests it to be open. § 26.0431. The Presiding Authority conducting the Probable Cause Hearing takes the matter under submission and recommends to the full Commission whether or not probable cause exists. *Id.* The Commission makes the final decision whether or not probable cause exists in a closed session meeting. § 26.0432. The decision that probable cause exists is announced at an open meeting, and the Director is instructed to schedule an Administrative hearing that is open to the public. §§ 26.0432, 26.0435.

*Subpoenas.* At both the Probable Cause and the Administrative *hearing* stages, both sides may seek subpoenas to compel the attendance and testimony of *witnesses*, in addition to the production of *records*. The petitioner may seek such subpoenas from the Commission, which has discretion to grant or deny the requests. §§ 26.0430(f), 26.0435(e), 26.0445(c). By contrast, the respondent may seek such subpoenas only from the hearings' Presiding Authority, which group or individual is given discretion to grant or deny the requests. §§ 26.0430(f), 26.0435(e), 26.0445(c). Objections to subpoenas are decided by the individual or group issuing the subpoena. § 26.0445(g).

*Administrative Hearing.* The Commission selects either the Director or a qualified volunteer to represent it at the Administrative hearing and appoints a Presiding Authority to conduct the hearing. § 26.0435. The Presiding Authority for an Administrative hearing is: 1) the entire Commission; 2) a three-member ad hoc committee of the Commission; or 3) a qualified volunteer selected by the Commission, who is not a Commission member. *Id.* If the full Commission hears the matter, it deliberates and decides in open session whether there has been a violation and what the penalty should be. §§ 26.0436, 26.0438. If the Presiding Authority is less than the full Commission, it recommends to the full Commission whether there is a violation and

---

<sup>3</sup> The Code does not indicate how such volunteers are qualified or selected.

what the penalty should be, and the full Commission makes the final decision in open session. §§ 26.0436, 26.0437. The Commission may assess administrative fines up to \$5000 per violation. § 26.0440.

## **II. Proposed Changes to the Ethics Ordinance**

### **A. Witness Subpoenas During Investigations.**

The Commission has existing authority to compel the attendance of witnesses, to administer oaths, and to compel the production of documents by subpoena at its Probable Cause and Administrative hearings. §§ 26.0402, 26.0430, 26.0435 and 26.0445(c). The Commission proposes ordinance changes pursuant to San Diego Charter section 41(d), which permit it to subpoena witnesses to appear and give testimony in connection with Commission *investigations*. See Memo Sept. 12, 2008, para. D1, proposed changes to § 26.0402 and 26.0445(b); Memo Sept. 26, 2008, proposed addition of § 26.0443(d). The Commission also proposes significant new changes to section 26.0445(b) in its September 26, 2008 memorandum: 1) to provide the Director with the authority to administer oaths to witnesses during investigations; 2) to give the Director sole discretion to decline to seek information on a voluntary bases before requesting an investigative subpoena; and 3) to remove the requirement that justification for investigative subpoenas be made in writing. See 26.0445(b) [Sept. 26 strikeout version pps. 7 to 8 of 16.]<sup>4</sup> These new proposals have not been considered by the Rules Committee.

*Charter section 41(d) and voter intent.* We look to San Diego Charter section 41(d)<sup>5</sup> to determine whether voters intended the Commission have the authority to subpoena witnesses during investigations when they enacted Charter section 41(d), and, if voters did not, whether that section now permits the City Council to provide the Commission with that authority.

Voter-approved changes to a city charter are interpreted in the same manner as are

---

<sup>4</sup> It's unclear why the new powers for the Director are placed in this section related to subpoenas, rather than section 26.0424 which delineates the Director's powers during Commission investigations. The failure to harmonize these changes with existing § 26.0424 creates the potential for conflicts and ambiguities.

<sup>5</sup> Charter section 41(d) provides: "For so long as an Ethics Commission remains established by ordinance of the Council, the Executive Director of the Commission shall be appointed by the Commission, subject to confirmation by the Council, and shall thereafter serve at the direction and pleasure of the Commission. *The Commission may, in accordance with complaint and investigation procedures approved by ordinance of the Council, subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records, or other items material to the performance of the Commission's duties or exercise of its powers.* The Ethics Commission shall be authorized to retain its own legal counsel, independent of the City Attorney, for legal support and guidance in carrying out its responsibilities and duties." (emphasis added)

changes made to the state's constitution. *Woo v. Superior Court*, 83 Cal. App. 4th 967, 975 (2000). There is a presumption that voters approving charter changes are aware of existing related laws and intend their enactments conform to them. *In re Lance W.*, 37 Cal. 3d 873, 890, n. 11 (1985); *Howard Jarvis Taxpayer's Ass'n v. County of Orange*, 110 Cal. App. 4th 1375, 1385 (2003). This latter rule is especially pertinent because the legislative history of the section shows the City Council enacted the ordinances contemplated within Charter section 41(d) just before the election at which voters approved the Charter section. It is also true that when comparing similar laws on the same topic, if a law with reference to one subject contains a given provision, "the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." *People v. Drake*, 19 Cal.3d 749, 755 (1977).

The Commission proposed Charter section 41(d) to the Rules Committee by letter dated September 14, 2001. The Committee approved the language with one deletion on September 26, 2001, forwarding it to the City Council. The Council approved the measure for voter approval at the March 5, 2002 election on November 5, 2001. *See* O-19002.

At two public hearings of the Rules Committee on December 5, 2001, and January 9, 2002, the Commission proposed a draft ordinance of its enforcement procedures for approval. Then as now, the ordinance included the authority to subpoena both witnesses and records for the two administrative hearings, but *only* the power to subpoena records during investigations in proposed sections 26.0445 and 26.0424(c)(1). This version was approved by the Committee and forwarded to the City Council.

Commission memorandum to the City Council dated January 16, 2002 in support of the proposed ordinance summarized its significant provisions. There was no mention of any Commission intent to subpoena witnesses during the investigative phase of the enforcement process. The ordinance was introduced by the City Council at a public meeting January 29, 2002, and adopted at a second meeting February 11, 2002. *See* O-19034. It specifically provided that section 26.0445 would not take effect unless the measure adding section 41(d) to the City Charter was approved by the voters. The voters were notified of the ordinance and the contingent implementation of the subpoena section by publication of the digest of the ordinance on February 25, 2002.

The City Attorney provided no impartial analysis of the measure in the ballot materials submitted to the voters in March 5, 2002, but instead signed the argument in favor of the measure. The argument told voters in part that "The Ethics Commission . . . needs the power to require witnesses to testify under oath and to produce documents that are needed to investigate alleged violations." Ballot Pamphlet, Primary Elect. (March 5, 2002) Argument in favor of Prop. B. No argument was raised in opposition.

We have considered the number of public hearings held by the Council and its Committee on the measure and its related ordinance, and the information available to voters (and to the officials supporting section 41(d)). This Office concludes that voters intended to provide the Commission only with the same authority to issue subpoenas that was expressed in the ordinance adopted by the City Council just before the March 5, 2002 election. That ordinance, provided the Commission with authority to subpoena only records during its investigatory process. The express omission of authority for the Commission to subpoena witnesses during investigations, when that authority was expressly provided for at Commission hearings provides ample evidence that voters and the Council intended not to provide that subpoena power at the investigative stages.

It would not be surprising to limit unsupervised investigative subpoena power for witnesses during investigations. For example, when a grand jury issues investigative subpoenas, compelling a witness to attend, the witnesses are questioned before the grand jury. When witnesses are compelled to appear by subpoena at Commission hearings, they are questioned before a Presiding Authority. However, Commission investigations are generally conducted in private by the Executive Director and staff, without supervision. Moreover, the September 26, 2008 revisions proposed by the Commission provide greater authority for the Executive Director, distancing investigations even further from Commission supervision. While the City expects all Commission employees will act appropriately, the process is filled with peril for the unwary. As one Utah Supreme Court Justice remarked “compulsory inquisitorial power . . . over both citizens and government officials is fraught with examples of abuses of similar powers by government officials.” *Matter of Criminal Investigation, 7th District Court No. CS-1, 754 P.2d 633, 660 (1988) (Stewart, J., dissenting).*

Our conclusion that neither the voters, nor the officials supporting the enactment of Charter section 41(d), intended the subpoena power granted initially to the Commission to include the power to subpoena witnesses during investigations does not end our analysis.

*Council’s authority to authorize subpoenas of witnesses during formal investigations.* It is also true that Charter provisions are construed in favor of the exercise of the power over municipal affairs and “against the existence of any limitation or restriction thereon which is not expressly stated in the charter . . . .” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 170 (1994), citing *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 599 (1949). We have also considered that the City Council has full authority to control the existence of the Ethics Commission by ordinance. In addition, the Commission may only use its subpoena power “in accordance with complaint and investigation procedures approved by ordinance of the Council.” Charter § 41(d).

The Charter does not expressly limit the Council’s authority to give the Commission additional power to issue subpoenas for witnesses during Commission investigations. Thus, this Office concludes the City Council may grant the Commission the power to subpoena witnesses

during investigations if it chooses to do so. The exercise of that power, however, must occur in accordance with investigation procedures also approved by the Council. Unfortunately, existing Commission procedures do not encompass compelled witness testimony during the investigatory process, nor do they provide guidance to the investigators confronting these witnesses. Presumably, this is because this process was never initially contemplated by the Commission.

*Recommendation.* This Office recommends against the proposed changes related to the expansion of the Commission's authority to subpoena witnesses during the investigatory process at this time, because it is inconsistent with the original intent of the voters enacting Charter section 41(d), and because no Commission procedures exist to provide witnesses with necessary protections of their rights, or investigators with necessary guidance during such investigative interrogations.<sup>6</sup>

Alternatively, if the Council wishes to consider expansion of the Commission's investigative authority at a future date, we recommend the Council return the matter to the Commission, requiring 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. The Commission may consider whether any provisions of the Administrative Procedures Act should be modified and/or recommended for incorporation into local ordinance procedures. They may also wish to address additional issues such as: how the interviews are to be conducted and recorded?; will those who are the target of the investigation be subject to such subpoenas, or be notified they are the target?; will an attorney be permitted to accompany the witness during the interview?; and who will decide any claims of privilege that may arise during the questioning process?

#### **B. Delegation of the Witness Subpoena Power at Hearings.**

On September 3, 2008, the Rules Committee returned to the Commission proposed changes delegating the Commission's subpoena power to individuals or groups less than the full Commission for further consideration. One concern raised at the meeting was the legal propriety of such delegation when the Charter apparently provides the subpoena authority only to the full Commission, a politically balanced group. The origins of Charter section 41(d) are instructive.

*Charter section 41(d) authorizes the Commission to subpoena witnesses.* The Commission originally proposed the Charter section 41(d) language to the Rules Committee, by letter dated September 14, 2001. The Committee approved the language, but made one significant change on September 26, 2001, expressly deleting from the second sentence of the section language that would have permitted the Commission to delegate its subpoena power to

---

<sup>6</sup> The suggestion in the Commission's September 26, 2008 memorandum that the Commission be permitted to consider the Administrative Procedures Act as *guidance* in dealing with subpoenaed witnesses is inadequate to meet these requirements.

others. The original language proposed by the Commission with the Committee's deletion is: "The Commission, ~~or any person designated by the Commission,~~ may, in accordance with complaint and investigation procedures approved by ordinance of the Council, subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, . . . ." It appears from this early action that the City Council intended only the full Commission to have the authority to issue subpoenas in accord with procedures the Council approved. It is also plain that the implementing ordinance establishing procedures related to subpoenas made the decision whether or not to issue *any* subpoena a discretionary one.

*Delegation of subpoena power to the Presiding Authority.* In reviewing the existing ordinance for this report, however, this Office noticed that section 26.0445(c)(3) contains a similar provision to those causing concern at the Committee meeting. This provision was inserted in the original ordinance submitted by the Commission in 2002, and may have gone unnoticed in the 67 page ordinance. It gives a *Presiding Authority*, which can be less than the full Commission, at either a Probable Cause or Administrative hearing, the discretionary choice whether to grant or deny a *respondent's* request for subpoenas.<sup>7</sup> The full Commission is never the Presiding Authority at a Probable Cause hearing, but may preside at an Administrative hearing.<sup>8</sup>

*Recommendation.* There is a legitimate legal question whether the Charter, which authorizes subpoena power only for the politically neutral "Commission," permits the delegation of this power to less than the full Commission, or to non-Commission members. If the Charter does permit the City Council to delegate these discretionary decisions by ordinance, there is a further question whether such delegation is proper in the absence of guidelines providing a framework for the proper exercise of that discretion. The Commission is currently considering the Committee's concerns related to this topic with the matters returned to them on September 3, 2008. This Office would like additional time to fully analyze these concerns. Accordingly, this Office recommends that the City Council return section 26.0445(c)(3) to the Commission for further consideration.

In the interim, should the Council desire to conform section 26.0445(c)(3) to reflect the Council's intent that only the full Commission have the authority to issue subpoenas, this Office recommends the following change by interlineation to the section:

(c) After the *Commission* has appointed a *Presiding Authority* to conduct the  
*Probable Cause Hearing* or *Administrative Hearing*, the *Petitioner* and

---

<sup>7</sup> The petitioner, by contrast, seeks subpoenas from the full Commission. § 26.0445(c)(2).

<sup>8</sup> The presiding authority at a Probable Cause hearing is: 1) a three-member ad hoc committee of the Commission; 2) one member of the Commission; or 3) a qualified volunteer selected by the Commission, who is not a Commission member. § 26.0430(b). The Presiding Authority for an Administrative hearing may be the full Commission; a three-member ad hoc committee of the Commission; or a qualified volunteer. § 26.0435.



*Respondent* may seek *Subpoenas* and *Subpoenas duces tecum* in accordance with the following procedures:

(1) All requests for a *Subpoena* must be submitted no later than twenty calendar days before a scheduled hearing; all requests for a *Subpoena duces tecum* must be submitted no later than thirty-five calendar days before a scheduled hearing.

(2) The *Petitioner* may seek *Subpoenas* and *Subpoenas duces tecum* by submitting a written request to the *Commission*. The *Commission* shall grant or deny the request within five calendar days of receipt of the request following a concurring vote of at least four of the Commissioners in closed session.

(3) The *Respondent* may seek *Subpoenas* and *Subpoenas duces tecum* by ~~submitting a written request with the *Executive Director*, who shall promptly forward the request to the *Presiding Authority*. The *Presiding Authority* shall grant or deny the request within five calendar days of receipt of the request. in the same manner provided to the *Petitioner*.~~

### **C. Creation of a New Offense.**

The Ethics Commission's "investigative and enforcement authority is limited to violations of *Governmental Ethics Laws* that are not preempted by state or federal law." § 26.0413. *Governmental Ethics Laws* are further defined in the Municipal Code to include "local laws governing campaign contribution limits, campaign contribution disclosure, campaign expenditure disclosure, statements of economic interests, receipt and disclosure of gifts, conflicts of interest, lobbying registration and disclosure, and other matters proposed by the *Commission* and adopted by a majority of the City Council." § 26.0402.

The City Council may certainly enlarge the Commission's enforcement area if it so chooses, by amending the ordinance. The Commission proposes to do that by creating a new offense in section 26.0416. This would make it unlawful for a person under the Commission's jurisdiction to knowingly (a) make false statements regarding material facts or (b) submit written materials containing false information regarding material facts during a Commission investigation or at Commission hearings. See Com'n Memo Sept 12, 2008, Para. B1. The version submitted with the September 26, 2008 memorandum imposes only administrative fines as sanctions for the unlawful behavior. However this section does not merely regulate particular activity; it prohibits more general conduct and provides sanctions for its violations. See, e.g., *Cohen v. Bd. of Supervisors*, 40 Cal.3d 277, 293-300 (1985). This Office believes the section may be preempted in large part by state law already providing sanctions for such conduct.

Those who testify at Commission hearings do so under oath, and in its September 26, 2008 memorandum, the Commission proposes to give its Director authority to administer oaths to witnesses compelled to appear during Commission investigations. §§ 26.0431(c), 26.0436(b), and 26.0445(b) (September 26, 2008 version).<sup>09</sup> However those who testify falsely at Commission hearings, or before officers who may properly administer oaths, and those who provide false statements in sworn documents submitted under oath violate California perjury laws. Cal. Pen. Code § 118;<sup>00</sup> *People v. Ziady*, 8 Cal. 2d 149, 157-158 (1937); *People v. Brown*, 125 Cal. App. 2d 83 (1954); *also see People v. Griffini*, 65 Cal. App. 4th 581, 586-597 (1998).

*Preemption issues.* Cities may enact and enforce local ordinances within their city limits, but only if the local legislation does not conflict with state law. A conflict exists if the local legislation duplicates or contradicts the state law. A local ordinance duplicates state law when it is coextensive with state law. It contradicts state law when it is inimical to or cannot be reconciled with state law. *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1067-1068 (2007).

The new section appears to conflict with the state perjury statutes. It is duplicative and coextensive with state law to the extent it prohibits and sanctions those who provide materially false testimony or documents under oath. This would include any statements made under oath to the Director during investigations if the Council enacts that provision. The proposed penalty may also be contradictory to the state law because it provides only administrative fines for conduct punishable as a felony offense under state laws. This Office concludes that a court would likely find the proposed new ordinance to be preempted by the state law and void to the extent it attempts to prohibit and penalize the same conduct encompassed by state law.

The proposed language does not limit the unlawful behavior to sworn statements or documents. To the extent the Commission contemplates enforcement of this provision against persons making unsworn statements or providing any documents during investigations or at any hearing, the offense would greatly expand the Commission's jurisdiction. It would permit the

---

<sup>09</sup> We raised our legal concern earlier in this report to the proposal the Commission issue subpoenas to witnesses for investigative purposes.

<sup>00</sup> California Penal Code section 118 provides: “ (a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury. ¶ This subdivision is applicable whether the statement, or the testimony, declaration, deposition, or certification is made or subscribed within or without the State of California.

(b) No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant. Proof of falsity may be established by direct or indirect evidence.

Commission to further investigate and potentially fine violators up to \$5000.00 for each statement or document, even absent a legal duty imposed on them by an oath, to tell the truth to Commission investigators. There are very few California laws that penalize verbal lies made to officials, even those made to sworn police officers investigating allegations of serious crimes. *See e.g. Cal. Pen. Code §§ 148, 148.5; People v. Seijas*, 36 Cal.4th 291, 305-307 (2005).

*Recommendation.* This Office recommends against the creation of a new offense that significantly expands the Commission's jurisdiction beyond their core function and which may be preempted to a large extent by state laws governing the same conduct.

### **CONCLUSION**

This Office recommends the City Council deny the proposed changes that would give the Commission authority to subpoena individuals during formal commission investigations for the reasons stated in this report. Alternatively, we recommend the Council return that request to the Commission for the development of procedures to ensure the protection of the rights of subpoenaed individuals and guidelines for investigators.

This Office suggests the Council also return to the Commission section 26.0445(c)(2), which delegates the Commission's subpoena authority to less than the full Commission, for further consideration in conjunction with matters returned to them by the Rules Committee on September 3, 2008. If desired the Council may amend that section by interlineation as suggested in the report.

Last, this Office recommends against the enactment of a new offense in section 26.0416, which appears unrelated to the Commission's core responsibility to monitor administer and enforce governmental ethics laws, and which may be preempted by state laws.

Respectfully submitted,

MICHAEL J. AGUIRRE  
City Attorney

JAK:nda  
RC-2008-24