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(O-2007-39)

ORDINANCE NUMBER O- **19555** (NEW SERIES)

DATE OF FINAL PASSAGE **DEC 06 2006**

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 6, DIVISION 4 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 26.0402, 26.0404, 26.0406, 26.0407, 26.0408, 26.0411, 26.0413, 26.0414, 26.0415, 26.0421, 26.0422, 26.0431, 26.0445, AND 26.0450, ALL RELATING TO THE ESTABLISHMENT OF THE ETHICS COMMISSION AND TO THE ETHICS COMMISSION'S INVESTIGATION AND ENFORCEMENT PROCEDURES

WHEREAS, the City Council adopted Ordinance No. O-18945 on June 5, 2001, creating Chapter 2, Article 6, Division 4 of the San Diego Municipal Code, and thereby establishing an Ethics Commission for the City of San Diego; and

WHEREAS the above-referenced Division of the San Diego Municipal Code sets forth various mandatory qualifications for members of the Commission; and

WHEREAS, difficulties in filling all the seats on the Ethics Commission have prompted a re-evaluation of the necessary qualifications for its members; and

WHEREAS, amending the San Diego Municipal Code in the manner described in this Ordinance will widen the pool of individuals from which nominations to the Ethics Commission may be made; and

WHEREAS, the City Council adopted Ordinance No. O-19034 on February 11, 2002, creating investigation and enforcement procedures for the Ethics Commission within Chapter 2, Article 6, Division 4 of the San Diego Municipal Code; and

WHEREAS, over the past several years, the Ethics Commission has discovered that these investigation and enforcement procedures, because of their prohibition against the Commission self-

generating complaints, have resulted in uneven enforcement of governmental ethics laws and allowed the Commission to be inappropriately used to advance partisan political agendas; and

WHEREAS, amending these procedures would enhance the ability of the Ethics Commission to fairly and expeditiously enforce violations of the City's governmental ethics laws; and

WHEREAS, the Ethics Commission has also discovered the need to clarify certain provisions within Chapter 2, Article 6, Division 4 of the San Diego Municipal Code, including the identities of those individuals subject to the jurisdiction of the Ethics Commission, the ongoing responsibilities of the Ethics Commission, safeguards for individuals providing witness testimony to the Ethics Commission, the Commission's preliminary review process and hearing procedures, and the contents of Ethics Commission stipulations; and

WHEREAS, as a result of voter approval of Proposition E in the November 2004 general election, City Charter sections 40 and 41 were amended to require that the Ethics Commission retain legal counsel independent of the City Attorney's Office; and

WHEREAS, San Diego Municipal Code section 26.0411, which states that the City Attorney shall provide legal services to the Commission, is presently in conflict with the City Charter, and must be amended to ensure consistency between these two bodies of law; and

WHEREAS, at numerous public meetings the Ethics Commission has discussed proposed amendments to Chapter 2, Article 6, Division 4 of the San Diego Municipal Code; and

WHEREAS, the proposed Ordinance amending Chapter 2, Article 6, Division 4 of the San Diego Municipal Code has been reviewed and considered by the City Council Committee on Rules, Finance and Intergovernmental Relations;

WHEREAS, the City Council concurs with the proposals recommended by the Ethics Commission, with certain amendments thereto; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 2, Article 6, Division 4 of the San Diego Municipal Code is hereby amended by amending sections 26.0402, 26.0404, 26.0406, 26.0407, 26.0408, 26.0411, 26.0413, 26.0414, 26.0415, 26.0421, 26.0422, 26.0431, 26.0445, and 26.0450, to read as follows:

**§ 26.0402 Definitions**

Each word or phrase that is defined in this Division appears in the text of this Division in italicized letters. For purposes of this Division, the following definitions shall apply:

*Administrative Enforcement Order through Business Day* [No change in text]

*City* means the City of San Diego or any of its organizational subdivisions, agencies, offices, commissions, or boards. *City* includes corporations wholly owned by the *City*, such as the San Diego Data Processing Corporation, San Diego Convention Center Corporation, Centre City Development Corporation, Southeast Development Corporation, and any other corporations for which the *City* is the sole shareholder. *City* also includes the San Diego Housing Commission. *City* does not include any joint powers authority in which the *City* is a member, unless the agreement creating the particular authority requires the joint powers authority to comply with the *City's Governmental Ethics Laws*.

*Commission through Draft Administrative Complaint* [No change in text]

*Elective governmental office* means any *City*, county, state, or federal elective office. It includes an office held by an individual appointed to fill a vacancy in an elective office. It does not include an elective position on a city neighborhood planning group, planning area committee, town council, business improvement district, or similar group.

*Exculpatory Information through Parties* [No change in text]

*Person* means any individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, labor union, or any other organization or group of persons acting in concert.

*Petitioner through Preliminary Review* [No change in text]

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

*Presiding Authority's Recommendation through Subpoena duces tecum* [No change in text]

**§ 26.0404 Appointment**

(a) through (b) [No change in text]

(c) The Mayor shall make the initial appointments to the *Commission* in the following manner. Each member of the City Council and the City Attorney shall nominate seven candidates, including at least one person who has been a candidate for an *elective governmental office*, has worked as a treasurer or other high level position in a campaign for *elective governmental office*, or has held an *elective governmental office*, at least two attorneys in good standing with the California Bar Association, and no more than three persons registered with the same political party. Each nominee shall be a qualified elector of the City of San Diego, although when a person with unique qualifications is available to serve, and who is a qualified elector of San Diego County but not the City of San Diego, an exception may be made and such person may be considered

eligible for nomination to the *Commission*. No person who ran as a candidate against a current elected *City Official*, or who served in a staff capacity for the campaign of such a candidate, shall be eligible for nomination to the *Commission*. The members of the City Council and the City Attorney shall identify the requirements fulfilled by each of their nominees. The nominations shall reflect the diversity of the community. If the Mayor reasonably believes that the pool of nominees is not large enough, or does not provide nominees who meet the professional background or political party requirements of Section 26.0404(b), the Mayor may call for additional nominees.

- (d) [No change in text]
- (e) The members of the *Commission* shall elect a Chairperson annually, on July 1, or as soon thereafter as possible. A member may serve as Chairperson of the *Commission* for no more than two consecutive one-year terms; however, a member who has served two consecutive one-year terms as Chairperson is eligible to serve again as Chairperson after an interval of one year has passed.

**§ 26.0406 Qualification of Members**

Each member of the *Commission* shall comply with the following qualifications during his or her tenure on the *Commission*:

- (a) Each Commissioner shall be a qualified elector of the County of San Diego.
- (b) Each Commissioner shall be of high moral character and integrity.
- (c) No member of the *Commission* shall make a financial contribution to a candidate for *City* office.
- (d) No member of the *Commission* shall participate in a campaign supporting or opposing a candidate for *City* office, nor shall any member of the *Commission*

participate in a campaign supporting or opposing a *City* ballot measure unless such measure expressly pertains to the activities or authority of the *Commission* or to the laws under the jurisdiction of the *Commission*. Participating in a campaign includes engaging in fundraising activities and making public endorsements with regard to a *City* candidate or measure. •

- (e) No member of the *Commission* shall become a candidate for *elective governmental office* during his or her tenure on the *Commission*, and for twelve months thereafter. Whether or not a Commissioner has become a candidate for *elective governmental office* will be determined by applying the appropriate laws and regulations governing the office sought. Each prospective Commissioner shall sign a written declaration agreeing not to run for *elective governmental office* for at least twelve months after completion of service on the *Commission*, and waiving the legal right to challenge this provision.
- (f) No member of the *Commission* is permitted to act as a lobbyist required to register with the City pursuant to Chapter 2, Article 7, Division 40 of this Code.

**§ 26.0407 Failure to Comply With Certain Qualifications; Automatic Resignation**

A Commissioner's failure to comply with the qualifications listed in Section 26.0406 (a) or (c) shall be treated as if the Commissioner had automatically resigned from the *Commission*. The City Clerk may post a notice of vacancy for the position on the *Commission* as if the Commissioner had resigned in fact.

**§ 26.0408 Removal for Cause**

Failure to comply with the qualifications listed in Section 26.0406(b), (d), (e), or (f) shall constitute cause for purposes of determining whether a member should be removed from the *Commission*. The City Council may remove a member of the

*Commission* for cause by a vote of a majority of the members of the Council. Before the Council may remove a member of the *Commission*, written charges shall be made against the *Commission* member and an opportunity afforded for public hearing before the Council upon such charges.

**§ 26.0411 Staff and Budget**

The *Commission* shall employ a staff consisting of no less than a full time *Executive Director*, a clerical assistant, and an investigator. The selection of an *Executive Director* shall be subject to confirmation by a majority of the City Council. The *Commission* shall retain its own legal counsel, independent of the City Attorney, for legal support and guidance in carrying out its responsibilities and duties. The City Council shall appropriate a reasonable budget for the *Commission*.

**§ 26.0413 Jurisdiction of the Ethics Commission; Statute of Limitations**

- (a) The authority of the *Commission* to conduct investigations and take administrative enforcement actions shall extend to all current and former
- (1) elected officials of the *City*;
  - (2) candidates for *City* office;
  - (3) *persons* regulated by or subject to Chapter 2, Article 7, Division 29 of this Code, including all committees and treasurers for committees required to file any disclosure form with the *Filing Officer*, as well as any *person* who makes a campaign contribution in support of or opposition to a *City* candidate or ballot measure;
  - (4) employees of the *City*, other than classified employees as that term is defined in San Diego City Charter section 117, who are required to file economic interest disclosure forms pursuant to a conflict of interest code;

- (5) consultants to the *City* who are required to file economic interest disclosure forms pursuant to a conflict of interest code;
- (6) members of *City* boards and commissions who are required to economic interest disclosure forms pursuant to a conflict of interest code;
- (7) officers, directors, members of boards of directors, employees, and consultants of the San Diego Housing Commission and of corporations wholly owned by the *City* who are required to file economic interest disclosure forms pursuant to a conflict of interest code;
- (8) members of Project Area Committees; and,
- (9) lobbyists registered, or *persons* required to be registered as lobbyists, with the *City* pursuant to Chapter 2, Article 7, Division 40, of this Code.

(b) through (e) [No change in text]

- (f) For the purposes of section 26.0413(d), the date of the violation means the earliest date when the *Filing Officer* or the *Commission* has, or reasonably should have, knowledge of the violation and its cause, and a suspicion of wrongdoing. Suspicion shall be determined from an objective standpoint of what is reasonable for the *Filing Officer* or the *Commission* to know or suspect under the facts of the situation.

**§ 26.0414 Responsibilities and Duties of the Ethics Commission**

The *Commission* shall have the following responsibilities and duties:

- (a) [No change in text]
- (b) To issue formal and informal advice and opinions to any *person* regarding the *Governmental Ethics Laws* within the *Commission's* jurisdiction. The *Commission* shall have the right to issue either informal advice or formal



opinions at its discretion in response to requests for advice. The *Commission* may seek advice and opinions from the Fair Political Practices Commission as it deems appropriate. Any *person* who comes under the *Commission's* jurisdiction as described in SDMC section 26.0413 may request that the *Commission* issue a formal opinion in response to an inquiry, provided that sufficient information is provided to the *Commission* to enable the *Commission* to provide a formal opinion.

No *person* who acts in good faith based upon a formal opinion issued to him or her by the *Commission* shall be subject to administrative penalties for so acting, provided that the material facts are as stated in the opinion request.

- (c) To perform ongoing review of the *Commission's* procedures for conducting audits, to propose changes in those procedures as necessary, and to conduct audits of campaign and lobbying disclosure forms. Any changes to the *Commission's* audit procedures shall be subject to City Council approval. The Office of the City Clerk shall continue to be the central filing office for all campaign, lobbying, and statement of economic interest disclosure forms which must be filed with the *City* and shall continue to perform the duties required of the Clerk under SDMC section 27.2985.
- (d) To perform ongoing review of the *Commission's* formal complaint and investigation procedures for violations of the *City's Governmental Ethics Laws*, and to propose changes to those procedures as necessary, subject to City Council approval. The *Commission* shall ensure that any procedure it proposes includes reasonable safeguards for protecting candidates for elective office from frivolous complaints made during the last ninety days prior to an election, and

provides procedural due process rights to individuals under investigation by the *Commission*. The *Commission* shall receive complaints from anyone wanting to report *Governmental Ethics Law* violations.

- (e) To investigate and enforce violations of *Governmental Ethics Laws*, including referral to other enforcement agencies when appropriate. The *Commission* shall be empowered to subpoena documents and witnesses in accordance with City Charter section 41(d) granting *subpoena* authority to the *Commission*. Subject to the California Public Records Act and City Charter section 216.1, no record or information contained in any investigation or investigatory file shall be disclosed to any *person* other than a respondent or his or her representative, the *Commission's* enforcement staff and legal counsel, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation, prior to a final determination as to its merit.
- (f) To perform ongoing review of the *City's* existing *Governmental Ethics Laws* and the *Commission's* enforcement procedures, and to propose updates of those laws to the City Council for its approval.
- (g) To publish an annual report describing the activities of the *Commission* during the previous year, including the number of complaints handled and investigations conducted, the types of violations alleged, and the action taken in response to complaints received and investigations conducted.
- (h) To adopt additional rules and regulations, subject to approval of the City Council, to carry out the purposes of this Division.

**§ 26.0415 Interference With Complainants and Witnesses**

It is unlawful to use or threaten to use any official authority, including discipline or termination, to discourage, restrain, or interfere with any person acting in good faith to make a complaint or provide information to the *Commission*.

**§ 26.0421 Filing of Complaints**

Complaints may be filed with the *Commission* in accordance with the following provisions:

- (a) [No change in text]
- (b) Any person may file an informal complaint alleging violations of *Governmental Ethics Laws*. The *Executive Director* shall have no obligation, but has the discretion, to review and process informal complaints. Informal complaints include the following: written complaints that are not verified or signed under penalty of perjury; written complaints that do not contain all of the information required by Section 26.0421(a); unwritten complaints; anonymous complaints; and referrals from other governmental agencies.
- (c) The *Commission*, individual Commissioners, the *Executive Director*, and the staff of the *Commission*, may submit a complaint for *Preliminary Review* on their own initiative.
- (d) [No change in text]

**§ 26.0422 Preliminary Review**

- (a) through (d) [No change in text]
- (e) After completing a *Preliminary Review*, the *Executive Director* may determine that the allegations in the complaint do not warrant a formal investigation for any of the following reasons:

- (1) The *Commission* has no jurisdiction over the allegations made in the complaint. A matter is outside the jurisdiction of the *Commission* if:
    - (A) the subject of the complaint is a *person* who is not identified in Section 26.0413(a) as being within the scope of the *Commission's* investigative and enforcement authority; or
    - (B) the complaint does not allege a violation of *Governmental Ethics Laws*; or
    - (C) the allegations made in the complaint pertain to actions or events that occurred prior to July 1, 2001.
  - (2) The complaint restates other complaints containing essentially similar or identical allegations that have already been disposed of, and the evidence presented does not warrant reopening the previous case; or
  - (3) The allegations contained in the complaint are already under investigation by the *Commission*; or
  - (4) The complaint consists of speculation, opinion, frivolous contentions, or absurd accusations; or
  - (5) The complaint consists entirely of one or more non-material violations that were previously discovered in a *Commission* audit and, in the *Executive Director's* judgment, were appropriately excused or remedied; or
  - (6) The complaint consists entirely of one or more material findings of a *Commission* audit, and the *Commission* has already voted against initiating an enforcement action based on those findings.
- (f) If, after completing the *Preliminary Review*, the *Executive Director* determines that a formal investigation is not warranted for one or more of the reasons set

forth in Section 26.0422(e)(1), (2), (4), (5), or (6), the *Commission* and its staff shall take no further action in the matter, except as follows:

- (1) The *Executive Director* may refer the complaint to another governmental or law enforcement agency for appropriate action.
- (2) The *Executive Director* shall issue a letter to the *Complainant* and *Respondent* within five *business days* of making the determination, indicating why a formal investigation by the *Commission* will not be conducted. Such a letter is not a conclusive finding and is not intended to be used as evidence in any enforcement action initiated by another agency.

(g) [No change in text]

**§ 26.0431 Probable Cause Hearing**

(a) through (d) [No change in text]

(e) The *Presiding Authority* shall find that *Probable Cause* exists only if the *Presiding Authority* determines that the evidence is sufficient to lead a person of ordinary caution and prudence to believe that a violation has been committed and that the *Respondent* may have committed or caused the violation.

(1) If the *Presiding Authority* is one Commissioner, the *Presiding Authority* shall take the matter under submission, and make a recommendation regarding whether or not probable cause exists. Reasonable effort shall be made to submit a *Probable Cause Recommendation* to the *Commission* within thirty calendar days of the conclusion of the *Probable Cause Hearing*.

(2) If the *Presiding Authority* is an ad hoc subcommittee composed of three Commissioners, such subcommittee shall take the matter under

submission and, based on the concurrence of at least two members of the subcommittee, make a recommendation regarding whether or not probable cause exists. Reasonable effort shall be made to submit a *Probable Cause Recommendation* to the *Commission* within thirty calendar days of the conclusion of the *Probable Cause Hearing*.

- (3) If the *Presiding Authority* is an individual selected pursuant to Section 26.0430(b)(2)(C), such individual shall take the matter under submission and make a recommendation regarding whether or not probable cause exists. Reasonable effort shall be made to submit a *Probable Cause Recommendation* to the *Commission* within thirty calendar days of the conclusion of the *Probable Cause Hearing*.

**§ 26.0445 Subpoenas and Subpoenas Duces Tecum**

- (a) The *Commission* has the authority to issue *subpoenas* and *subpoenas duces tecum* pursuant to Section 41(d) of the San Diego Charter, and in accordance with the procedures in this Division. The *Commission* may refer to the California Administrative Procedures Act for guidance in exercising its authority to issue *subpoenas* and *subpoenas duces tecum*.
- (b) through (m) [No change in text]

**§ 26.0450 Settlements**

Settlement negotiations and settlement of pending matters may occur at any point after *Preliminary Review*, subject to the following:

- (a) through (b) [No change in text]
- (c) Before presentation to the *Commission*, any proposed stipulated settlement negotiated between the *Executive Director* and *Respondent* shall:


- (1) contain a recitation of the facts pertinent to the violation; and
  - (2) refer to each violation and state whether or not the stipulation will cause the discharge of each such alleged violation; and
  - (3) include an Order reflecting any obligations of the *Respondent*, including the payment of any monetary fine.
- (d) In any proposed stipulation presented to the *Commission*, the *Respondent* shall acknowledge by signing such document, that he or she:
- (1) agrees to hold the City harmless, waiving any right to challenge any procedural rights provided by the San Diego Municipal Code; and
  - (2) agrees to abide by all terms of the stipulation.
- (e) A proposed stipulated settlement shall have no force and effect until approved by the *Commission* as provided in subsection (g).
- (f) The *Executive Director* shall, without unreasonable delay, submit any proposed stipulation signed by the *Respondent* to the *Commission* for consideration at a closed session meeting of the *Commission*.
- (g) A proposed stipulation shall become final only if the *Commission* approves the stipulation by a concurring vote of four Commissioners, except that if the stipulation imposes a penalty on the *Respondent*, it shall become final only if approved by a concurring vote of five Commissioners.
- (h) The *Commission's* approval of a stipulation shall be reflected in the *Commission's* report regarding closed session actions.
- (i) The *Executive Director* is authorized to sign a stipulation on behalf of the *Commission* upon approval of the stipulation by the *Commission* as set forth in subsection (g).

(j) Public disclosure of the stipulation is subject to the provisions of Section 26.0455.

Section 2. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 3. This ordinance shall take effect and be in force on the thirtieth day from and after its final passage.


APPROVED: MICHAEL J. AGUIRRE, City Attorney

By   
Catherine M. Bradley  
Chief Deputy City Attorney

CMB:jab  
10/04/2006  
Or.Dept:Ethics  
O-2007-39

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of NOV 28 2006.

ELIZABETH S. MALAND  
City Clerk

By   
Deputy City Clerk

Approved: 12-6-06  
(date)

  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

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JERRY SANDERS, Mayor