

# **SAN DIEGO CITY ETHICS COMMISSION:** **CAN IT ATTAIN ITS PURPOSE?**

## **SUMMARY**

The creation of an Ethics Commission was listed by Mayor Richard Murphy as his #1 goal for 2002. Its purpose was to assure the general public that the investigating and disciplining of San Diego City personnel would be done in a manner which would give the public the confidence that elected and appointed officials were making decisions for the right reasons; i.e., the law, facts, and public interest.

The San Diego County Grand Jury has investigated the Ethics Commission to determine if, as presently constituted, it is capable of attaining its stated goals. The Grand Jury found that while the Ethics Commission ordinance, [San Diego Municipal Code Chapter 2, Article VI, Division 4] is a promising beginning, there still is room for improvement. Our recommendations address the process of selecting Ethics Commissioners, handling of existing and potential conflicts of interest, amending the Ethics ordinance and defining the duties of the Ethics Commission Executive Director.

## **PURPOSE OF THE STUDY**

The San Diego County Grand Jury addressed the following questions:

1. What was the purpose for establishing the Ethics Commission?
2. Since elected officials might become targets of the Ethics Commission investigations, should they have the responsibility for making nominations to it?
3. How do commissioners, consultants, and/or the Executive Director of the Ethics Commission stay ethical? How foolproof are the safeguards?
4. Is the Ethics Commission capable, as currently organized, of accomplishing its stated purpose?

## **BACKGROUND INFORMATION**

The public desire for the creation of an Ethics Commission arose in the wake of various scandals involving gifts and campaign contributions to city officials by those doing business with the city, including prominent sports team owners. Further, the City Attorney's office seemed incapable over the years of investigating complaints of political corruption and prosecuting offenders. According to press accounts between September 1996 and October 1999, the City Attorney's office received 476 complaints alleging

campaign law violations, but managed to prosecute only one.<sup>1</sup> Public sentiment demanded that some type of ethical committee be created to deal with the spreading suspicion that, too often, public decisions were made to serve private rather than public interests. The establishment of an Ethics Commission should provide an institutional framework for ensuring that when breaches of the public trust did occur, they would be investigated thoroughly and impartially. Any discipline imposed as a result of any such breach must be seen as necessary, fair, and severe enough to act as a deterrent. While the manner in which investigations are conducted is important, the selection of those who would oversee such inquiries is much more critical. As guardians of the public trust, the Ethics Commissioners must be individuals in whom the public would have a natural and unqualified confidence.<sup>2</sup>

On August 7, 2001, the San Diego City Council enacted San Diego Municipal Code Chapter 2, Article VI, Division 4, creating an Ethics Commission for the purposes of:

- Monitoring, administering and enforcing the City’s governmental ethics law and proposing new governmental ethics law reforms.
- Conducting investigations, referring violations to appropriate enforcement agencies and auditing disclosure statements.
- Advising and educating City officials and the public about governmental ethics laws.<sup>3</sup>

## **PROCEDURES EMPLOYED**

The investigation consisted of a review of all public information available on the City of San Diego’s website related to the Ethics Commission as adopted by the San Diego City Council.

In addition to published material, personal interviews were held with the Mayor of the City of San Diego, the Executive Director of the Ethics Commission, and other individuals familiar with the Ethics Commission and its charge.

---

<sup>1</sup> Matt Potter, City Lights Column, San Diego Reader, 7 October 1999. Matt Potter, “The Art of Cash Harvest,” San Diego Reader 5 October 2000.

<sup>2</sup> Charles Walker, “Changing San Diego’s election laws,” The San Diego Union-Tribune 6 December 2002. “. . . the public expects – demands actually – integrity, honesty, fairness and accountability from its officials. I’m equally aware of the enormous challenge an administration faces when it is responsible for policing itself and holding its own officials accountable.” Charles Walker is Executive Director of the City of San Diego’s Ethics Commission.

<sup>3</sup> The City of San Diego Ethics Commission website, 14 November 2002, <http://www.sandiego.gov/city-clerk/boards-commissions/ethics.shtml>

## FACTS AND FINDINGS

- A. The Ethics Commission consists of seven commissioners who were nominated by the eight City Council members and the City Attorney. These nine individuals each nominated seven people, forming a pool of 63 nominees. The Mayor then chose seven people to serve as members of the Ethics Commission.

The Grand Jury finds that:

1. The same elected officials who may be subject to an Ethics Commission investigation (City Council members and the City Attorney) nominate the people who may ultimately be called upon to conduct investigations of the nominators or cite them for violations.
2. The seven Ethics Commissioners should be appointed by the Mayor from a pool of City of San Diego citizens nominated by a panel of retired judges or chosen through some random process.

- B. One of the current Ethics Commissioners is an attorney. Either he or his law firm has represented a business with extensive dealings involving City projects and partnerships.

The Grand Jury finds that:

1. The Ethics Commission was created to prevent a repeat of the type of problems that arose in the past from improper conduct such as that by a former City Councilmember who participated in a stock transaction with a local businessperson. The Ethics Commissioner (referred to in B. above) has or has had business relationships with a similar business entity.
2. This creates a potential conflict of interest which could have been avoided had this commissioner not been appointed by the Mayor. The commissioner in question should have recognized the potential conflict of interest and never accepted the appointment.

- C. The Executive Director of the Ethics Commission is chosen by the Ethics Commission.
- D. The Executive Director of the Ethics Commission is in charge of receiving and processing all complaints filed with the Ethics Commission [San Diego Municipal Code §26.0421(a)].
- E. The Ethics Commission may take investigative action after a complaint is filed by a private citizen, or as a result of the uncovering by the Ethics Commission itself of apparent violations of governmental ethics laws. [San Diego Municipal Code §26.0421(a), (c)].

- F. The Executive Director of the Ethics Commission has the sole discretion to determine whether a formal or informal complaint [San Diego Municipal Code §26.0421 (a) (b)] will be submitted for further review by the Ethics Commission or be rejected without further action [San Diego Municipal Code §26.0422 (d)].

The Grand Jury finds that:

1. A committee of the Ethics Commissioners should investigate or at least review all complaints. The Executive Director might make recommendations but should not have the final say as to the fate of a complaint. How these complaints are dealt with is the responsibility of the Ethics Commission, not the Executive Director.

- G. Any member of the Ethics Commission may voluntarily disqualify himself or herself and withdraw from a specific proceeding for any reason. These reasons may be based on bias, prejudice or interest in the proceeding. However, the other commissioners may choose not to accept this withdrawal of a Commissioner by waiving the disqualification in a written statement [San Diego Municipal Code §26.0447(b)(1)&(b)(1)(A)].

The Grand Jury finds that:

1. The waiving of the disqualification clause should be deleted from the ordinance because once a Commissioner believes s/he has a bias, or is prejudiced, s/he should remain permanently disqualified from that particular proceeding.

- H. Appointments made to the Ethics Commission shall reflect the diversity of the City it serves. The San Diego Municipal Code [San Diego Municipal Code §26.0404 Appointment] states “the *Commission* shall reflect the diversity of the City which it serves. At least one of the members of the *Commission* shall be a person who has held elective governmental office and at least two of the members of the *Commission* shall be attorneys in good standing with the California Bar Association. No more than three members of the *Commission* shall be registered with the same political party.”

The Grand Jury finds that:

1. The Mayor of San Diego stated to the Grand Jury that he made every attempt to select a Commission with ethnic diversity representative of the community. There is ethnic diversity on the Ethics Commission.
2. There were originally three attorneys serving on the Ethics Commission.

The Grand Jury fails to see how requiring two or more attorneys reflects the diversity of the City. Other professions, such as Certified Public Accountants, educators, business people or any other profession might be equally as representative.

3. Political party affiliation is not an appropriate criterion for a non-partisan commission. The Ethics Commissioners should be appointed for their integrity, not their party affiliation.
  - a. Of the seven original Commissioners three are registered Democrat, three are registered Republican and one is registered Non-Partisan.<sup>4</sup>
  - b. It will be difficult for the Mayor to replace Commissioners while keeping in mind the “diverse” roles that must be filled without sacrificing the most qualified nominees. This is a problem that is presently facing the Mayor. Recently, one of the Ethics Commissioners was appointed to the Superior Court bench requiring her resignation from the Ethics Commission. Since she was a registered Democrat, no Republican can be considered as a replacement. That eliminates approximately 45 percent of San Diego residents from consideration for the position. This situation becomes more acute if the one Non Partisan commissioner would have to be replaced. No Republican or Democrat could be chosen as a replacement, so approximately 90 percent of San Diego residents would be disqualified to fill this position.<sup>5</sup>
  - c. A qualification for membership on the Ethics Commission is that “each Commissioner shall be a qualified elector of the City of San Diego.” [San Diego Municipal Code §26.0406]
4. “A person who has held elective governmental office” [San Diego Municipal Code §26.0404] should not be one of the criteria for appointment to the Ethics Commission.
- I. The City Attorney is both a nominating authority and subject to investigation by the Ethics Commission. In addition he is also the legal counsel to the Mayor, and the City Council.<sup>6</sup> Because of conflicts, the City Attorney should not serve as legal counsel for the Ethics Commission, as he currently does.

---

<sup>4</sup> According to information obtained from San Diego County Registrar of Voters, 4 February 2003.

<sup>5</sup> For the sake of the example, we assume that 45 percent of the registered voters are Democrat, 45 percent are Republican, and 10 percent are others.

<sup>6</sup> The City of San Diego City Attorney’s website, 12 February 2002,

<http://genesis.sannet.gov/infospc/templates/attorney/about-office.jsp> “The City Attorney serves San Diego as the chief legal advisor and misdemeanor prosecutor. . . .the City Attorney provides legal guidance and support for elected City officials, City departments, and boards and commissions; represents the City before judicial and administrative bodies in Civil proceedings; and prosecutes misdemeanor crimes.”

## COMMENDATIONS

The Grand Jury recognizes that the Ethics Commission in its present form is the outcome of a series of compromises. These resulted in a number of shortcomings being incorporated in the enabling ordinance. Nevertheless, it does reflect the skills and leadership of the Mayor to bring about consensus and provides a preliminary foundation that could further be improved to meet the goals of the Ethics Commission.

The Grand Jury believes the current Ethics Commission Executive Director to be a man of integrity. None of the recommendations is a reflection on him. They are rather intended to safeguard and ensure the integrity of the Ethics Commission regardless of who occupies the position of the Executive Director.

## RECOMMENDATIONS

**The Grand Jury recommends that the City Council of San Diego take the following actions in regard to San Diego Municipal Code Ch. 2, Article VI, Div. 4:**

- 03- 01:** Amend the process for selecting the pool of potential Ethics Commissioners by removing the City Council and City Attorney as the nominating authorities. Instead use a procedure, such as a panel of retired judges or some random process as the instruments of choosing potential Commissioners from a pool of volunteering San Diegans. The Mayor should continue to be the appointing authority.
- 03-02:** Amend the Ethics ordinance to provide for a process of prescreening nominees to the Ethics Commission for potential conflicts of interest. People who act as lobbyists, consultants, or attorneys (including their firms) for those having business under consideration by the City Council should be scrutinized for such conflicts.
- 03-03:** Delete from the Ethics ordinance the requirement that no more than three members of the Commission shall be registered with the same political party and add, "The Ethics Commission is a non-partisan body." If, however, the City Council insists there be a restriction on the party affiliation of the Ethics Commissioners it should be provided that there be no more than four of any one party.
- 03-04:** Delete from the Ethics ordinance the requirement that there be two or more attorneys on the Ethics Commission.

- 03-05:** Delete from the Ethics ordinance “A person who has held elective governmental office.” [San Diego Municipal Code§26.0404]
- 03-06:** Amend the Ethics ordinance to direct the Ethics Commission to hire independent legal counsel.
- 03-07:** Amend San Diego Municipal Code§26.0447(b)(1)(A) to provide that, if any Ethics Commissioner disqualifies him/herself because of a bias, prejudice or interest in the proceeding, such a disqualification cannot be waived by other Ethics Commissioners.
- 03-08:** Retain San Diego Municipal Code§26.0404 (b) “the Commission shall reflect the diversity of the City which it serves” and delete the rest of the section.

**The Grand Jury recommends that the Mayor of the City of San Diego take the following actions in regard to San Diego Municipal Code Ch. 2, Article VI, Div. 4:**

- 03-09:** Examine all Commissioners for potential conflicts of interest, including memberships in other City of San Diego Commissions, or committees, or any business having transactions with the City of San Diego.

**The Grand Jury recommends that the Ethics Commission take the following actions in regard to San Diego Municipal Code Ch. 2, Article VI, Div. 4:**

- 03-10:** Amend its Ethics Commission conflict of interest code [San Diego Municipal Code §26.0412] such that the Executive Director, after reviewing the statements of Economic Interests filed by the Ethics Commissioners, must call to the attention of the City Council and/or nominating authority any potential conflict of interest which might be ascertained from such examination.
- 03-11:** Amend procedures presently in place [San Diego Municipal Code §26.0423], which allow the Executive Director to unilaterally reject complaints.

## **REQUIREMENTS AND INSTRUCTIONS**

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such

comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

- (a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
  - (1) The respondent agrees with the finding
  - (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
  - (1) The recommendation has been implemented, with a summary regarding the implemented action.
  - (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
  - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
  - (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required by the date indicated from:

<u>RESPONDING AGENCY</u>	<u>RECOMMENDATIONS</u>	<u>DATE</u>
<b>SAN DIEGO CITY COUNCIL</b>	<b>03-01 through 03-08</b>	<b>06/04/03</b>



**MAYOR, CITY OF SAN DIEGO 03-09,**

**06/04/03**

**SAN DIEGO CITY ETHICS 03-10, 03-11  
COMMISSION**

**06/04/03**