



DENNIS J. HERRERA
City Attorney

August 25, 2014

Hon. Cynthia Ming-Mei Lee
Presiding Judge
San Francisco Superior Court
400 McAllister Street, Room 8
San Francisco, California 94102

Re: City Attorney Office's response to the June 26, 2014 Civil Grand Jury Report entitled, "Ethics in the City: Promise, Practice or Pretense"

Dear Judge Lee:

In accordance with Penal Code Sections 933 and 933.05, the City Attorney's Office submits the following response to the Civil Grand Jury Report entitled, "Ethics in the City: Promise, Practice or Pretense" issued on June 26, 2014. The Grand Jury requested that this office respond to the report.

For each Civil Grand Jury finding for which you ask a response from the City Attorney's Office, you asked that we either:

1. agree with the finding; or
2. disagree with it, wholly or partially, and explain why.

For each Civil Grand Jury recommendation for which you ask a response from the City Attorney's Office, you asked that we report either:

1. the recommendation has been implemented, with a summary explanation; or
2. the recommendation has not been implemented but will be within a set timeframe as provided; or
3. the recommendation requires further analysis. The officer or agency head must define what additional study is needed. The Grand Jury expects a progress report within six months; or
4. the recommendation will not be implemented because it is not warranted or reasonable, with an explanation.

Accordingly, the City Attorney's Office responds as follows:

Finding/Recommendation No. 1:

Finding 1a.

The Ethics Commission lacks resources to handle major enforcement cases. These include, for example, cases alleging misconduct, conflict of interest, violating campaign finance and lobbying laws, and violating post-employment restrictions.

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City Attorney's Office Response to Finding 1a.

Partially disagree. The City Attorney's Office defers to the Ethics Commission's agreement with this finding, but this Office is not aware of any specific major enforcement case that the Ethics Commission, due to a lack of resources, has declined to bring where there was otherwise sufficient evidence of a violation. Regardless, the Ethics Commission would benefit from additional resources to increase its ability to handle major enforcement matters without impacting the Commission's ability to handle its other duties and responsibilities.

Finding 1b.

The Ethics Commission has only two investigators.

City Attorney's Office Response to Finding 1b.

Agree.

Finding 1c.

The confidentiality required of Ethics Commission investigations runs counter to the Commission's other duties to make information more public and to increase the transparency of government.

City Attorney's Office Response to Finding 1c.

Disagree. The San Francisco Charter requires the Ethics Commission to conduct its investigations "in a confidential manner," and provides that certain records relating to investigations must be kept confidential to the extent permitted by state law. Charter § C3.699-13(a). Despite this Charter restriction on how it must conduct its investigations, the Ethics Commission must still comply with the same public meeting and records laws that apply to all City agencies, including providing advance public notice of its meetings and taking its actions publicly.

Finding 1d.

The District Attorney, City Attorney and the Fair Political Practices Commission have more substantial investigative staffs.

City Attorney's Office Response to Finding 1d.

Agree.

Finding 1e.

The Fair Political Practices Commission has been very active in bringing enforcement actions, and handles enforcement for some local units of California government.

City Attorney's Office Response to Finding 1e.

Agree.

Finding 1f.

Enforcement is best handled outside of the environment of political partisanship and preferences.

City Attorney's Office Response to Findings 1f.

Agree.

Recommendation 1.

The Jury recommends a contract with the Fair Political Practices Commission for at least a two-year pilot basis to enforce both state and related San Francisco law violations.

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City Attorney's Office Response to Recommendation 1.

The City Attorney's Office does not have the authority to implement Recommendation 1. If requested, the City Attorney's Office will assist the Ethics Commission with implementing this recommendation, though this recommendation may first require an amendment to state law, *see* Cal. Govt. Code section 83123.5.

Finding/Recommendation No. 2:

Finding 2.

In some instances, improper campaign contributions were returned to the contributor rather than forfeited to the City as required by City law. The Jury found no record of the Commission acting to waive or reduce the forfeiture.

City Attorney's Office Response to Finding 2.

Disagree. The Civil Grand Jury has not provided any specific facts about the improper contributions that the Ethics Commission allegedly mishandled. In the absence of more specific allegations, the City Attorney's Office has no basis for concluding that the Ethics Commission has inappropriately returned contributions and must presume that the Ethics Commission has appropriately followed City law.

Recommendation 2.

The Board of Supervisors should request an independent audit by the City Attorney to determine whether prohibited contributions were forfeited to the City as required by law.

City Attorney's Office Response to Recommendation 2.

Recommendation 2 is a policy matter for the Board of Supervisors. If requested, the City Attorney's Office will assist the Board of Supervisors with implementing this recommendation (assuming sufficient budget authorization is provided to the City Attorney's Office to cover the costs of that review).

Finding/Recommendation No. 3:

Finding 3.

A broader citizen's right of action to enforce ethics laws will provide assurance to the public that the laws will be enforced.

City Attorney's Office Response to Finding 3.

Partially disagree. The City Attorney's Office partially disagrees with Finding 3 because the Campaign and Governmental Conduct Code currently provides a qualified private right of action to San Francisco residents that may already provide sufficient assurance to the public. Section 3.242(c) states: "any resident may bring a civil action on behalf of the people of San Francisco to enjoin violations of or compel compliance with a conflict of interest or governmental ethics law," after notifying the City Attorney of the resident's intent to file and providing an opportunity for the City Attorney to pursue the same matter.

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Recommendation 3.

The Jury recommends that the Ethics Commission and the Board of Supervisors act to enhance the Citizen's Right of Action to enforce all of the City's ethics laws, with an award of attorney fees and a share of any penalties going to the City for a successful filer, as was provided by Proposition J.

City Attorney's Office Response to Recommendation 3.

Recommendation 3 is a policy matter for the Ethics Commission, the Board of Supervisors, and the Mayor. If requested, the City Attorney's Office will assist the Ethics Commission, the Board of Supervisors, and the Mayor with implementing this recommendation.

Finding/Recommendation No. 11:

Finding 11.

The role of e-mail and text messages in governmental decision-making has not been fully discussed and explored. Rules on preservation of e-mails in public records are very hazy and some departmental officials told the Jury they routinely delete e-mail. Guidance from the City Attorney on preservation of e-mail is non-specific. There is no guidance regarding text messages. There is no policy that applies to private e-mails and text messages that further public decision-making.

City Attorney's Office Response to Finding 11.

Disagree. The City Attorney's Office has provided guidance on the issues addressed in this finding. The Office's Good Government Guide has provided guidance on these issues for several years. The most recently released update of the Guide, published online on August 18, 2014, provides the following guidance regarding record retention requirements and e-mail (on page 116):

E-mail and other electronic records are subject to the records retention laws. As with paper records, some electronic records fit the definition of "records" in the retention context. But most do not.

The vast majority of public records in the City's possession do not fall under the definition of "records" within the meaning of records retention law. Therefore, the City may destroy these records at any time. For example, as a general rule, employees may immediately dispose of phone message slips, notes of meetings, research notes prepared for the personal use of the employee creating them, and the large majority of e-mail communications..

The Good Government Guide also provides the following guidance regarding text messages and emails, including those on personal electronic devices (on pages 88-89):

The first element of the definition of public record—that it is a "writing"—is immensely expansive. It encompasses any handwriting, typewriting, printing, photostating, photographing, photocopying, transmission by e-mail or fax, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols. Cal. Govt. Code § 6252(g).

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This concept of a writing goes beyond the traditional written form. It may consist of communications in any medium that contains encoded information, such as a computer tape, video recording, cassette recording, voicemail, text message, photograph, or movie. E-mails including attachments are writings within the meaning of the Public Records Act. Yet, while it is clear that electronic records are “writings” under the Act, many principles developed under the Act preceded the current era of electronic communications, and those principles and others are in some respects still evolving to catch up with this sweeping technological change.

* * *

The third element of the definition—that a public record is “prepared, owned, used, or retained by a state or local agency”—is expansive, too. In particular, there may be instances where the City does not own a record that is nonetheless considered a public record. For example, while courts have not definitively resolved the issue, City officials and employees, in an abundance of caution, should assume that work they perform for the City on personal computers or other personal communications devices may be subject to disclosure under the public records laws. Such a record meets the first two elements of the definition of public record; the remaining question is whether, under the circumstances, the law would consider the record prepared or used by the City.

Lastly, the Good Government Guide also provides the following additional guidance on text messages (on page 141):

Neither the Brown Act nor Sunshine Ordinance addresses text messaging during meetings, and there is no definitive case law on the subject. The City Attorney’s Office strongly discourages the practice.

Text messaging or use of other personal electronic communications devices during meetings is especially problematic when the policy body is holding an adjudicative hearing, such as a hearing to grant or suspend a permit, that will affect individual private interests. Text messaging during such a hearing could enable a member to surreptitiously communicate with one of the parties, or receive evidence or direction as to how to vote, from an outside party, that other members of the body and the parties do not see. These circumstances may undermine the integrity of the proceeding and raise due process concerns.

Even outside the adjudicative context, text messaging or use of other personal electronic communications devices during any meeting of a policy body presents serious problems. The Brown Act and Sunshine Ordinance presume that public input during a meeting will be “on the record” and visible to those who attend or view a tape of the meeting. But members of the public will not observe the text messages that members of the policy body receive during the meeting. Hence the public will not be able to raise all reasonable questions regarding the basis for the policy body’s actions. And text messaging among members of the policy body concerning an agenda item or other business of the body could lead to an unlawful seriatim meeting in the midst of a formal meeting.

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Text messages that policy body members send or receive during a meeting may in fact have nothing to do with the body's business. But a member of the public observing the meeting, not knowing the contents of the text messages, may assume otherwise. To avoid the problems associated with text messaging or similar electronic communications during meetings, we recommend that policy bodies adopt a rule prohibiting or regulating the practice.

It is an open question whether text messages, or similar communications over a personal electronic device, that a member of a policy body sends or receives either during or outside a meeting, that relate to the conduct of the body's business, are public records. There is a strong argument that they are, and out of an abundance of caution, members of policy bodies should assume that communications on personal electronic devices may be subject to disclosure if the communication would otherwise be a public record subject to disclosure.

As these excerpts demonstrate, the City Attorney's Office has provided guidance on preservation of e-mail, text messages, and e-mails and text messages sent using personal communication devices. But as these excerpts acknowledge, the law concerning these issues is unclear and continues to develop. For example, on June 25, 2014, the California Supreme Court agreed to review a decision holding that messages sent by public officials using personal communication devices are not subject to the California Public Records Act, *see City of San Jose v. Superior Court*, 225 Cal.App.4th 75 (Mar. 27, 2014). We expect the Supreme Court will provide its ruling sometime in the next year. The City Attorney's Office will monitor this appeal and will continue to provide guidance on legal developments on these issues to its clients and the public at-large.

Recommendation 11.

The Ethics Commission in conjunction with the City Attorney should develop a policy to ensure preservation of e-mails and text messages consistent with preservation of other public records. The policy, along with policies on preservation of public records, should be made available for public comment. Once it is completed and published it should be made available on City Attorney and Ethics Commission web pages that lists each Department, its policy, and how to obtain documents.

City Attorney's Office Response to Recommendation 11.

Recommendation 11 is a policy matter for the Ethics Commission and other appropriate City agencies, such as the Board of Supervisors and the Mayor. If requested, the City Attorney's Office will assist the Ethics Commission and other appropriate City agencies with the implementation of this recommendation, likely through legislation that would establish a City-wide protocol regarding preservation of public records.

Finding/Recommendation No. 17:

Finding 17a.

There is useful information in the calendars of City Officials that should be readily available to the public.

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City Attorney's Office Response to Finding 17a.

Agree.

Finding 17b.

The Jury found calendar entries that did not meet the law's requirements, particularly in listing the meeting's subject matter and attendee names. As a result, it is not possible to crosscheck lobbyists' reports on their meetings with City officials with the calendar reports from the City officials.

City Attorney's Office Response to Finding 17b.

Partially disagree. The Sunshine Ordinance requires the calendars maintained by the Mayor, the City Attorney, and department heads to include "the time and place of each meeting or event attended" and "a general statement of issues discussed," but it does not require the listing of attendee names. *See* Admin. Code § 67.29-5. This Office agrees that the lack of attendee names may make it difficult to crosscheck lobbyists' disclosure reports with these official calendars. But the Sunshine Ordinance does not require officials subject to the calendar requirement to include this additional information in their calendar entries, although those officials may do so voluntarily.

Finding 17c.

The training currently provided on the Sunshine Ordinance contains no materials on the keeping of official calendars as required by the Ordinance.

City Attorney's Office Response to Finding 17c.

Partially disagree. The City Attorney's Office's bi-annual Sunshine Ordinance training has not addressed the issue because most of the attendees, such as members of City boards and commissions, are not subject to this calendar requirement. But, for a number of years, the City Attorney's Office's Good Government Guide has provided the following guidance on the Sunshine Ordinance's calendar requirement:

The Mayor, City Attorney, and department heads must keep and maintain a daily calendar. Admin. Code § 67.29-5. The calendar must record the time and place of each meeting or event the official attended, excluding purely personal or social events at which no City business is discussed that did not take place at City offices or the offices or residences of people who do substantial business with the City or are substantially financially affected by City actions. For meetings not otherwise publicly recorded, the calendar must include a general statement of the issues discussed. The Sunshine Ordinance does not require the official to include on the calendar the names of individuals attending the meeting.

Calendars must be available to any requester three business days after the "calendar entry date." Admin. Code § 67.29-5. The calendar entry date is not when the meeting or event was physically entered into the calendar, but rather is the date that the meeting or event actually took place. The official need not disclose calendars in advance of the calendar entry date.

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This excerpt appears on pages 114-115 of the Good Government Guide, updated most recently on August 18, 2014.

Recommendation 17a.

The Ethics Commission staff should collect the official calendars prepared under the Sunshine Ordinance monthly, convert them to electronic form and post them online.

City Attorney's Office Response to Recommendation 17a.

Recommendation 17a is a policy matter for the Ethics Commission. If requested, the City Attorney's Office will assist the Ethics Commission with the implementation of this recommendation.

Recommendation 17b.

The City Attorney and the Ethics Commission ensure that those officials subject to the calendar requirement, and their administrative staff, be trained on the law's requirements.

City Attorney's Office Response to Recommendation 17b.

In cooperation with the Ethics Commission, the City Attorney's Office will implement this recommendation by including a discussion of the Sunshine Ordinance's calendar requirements in its bi-annual ethics and sunshine training.

Finding/Recommendation No. 23:

Finding 23.

While the Charter mandates the City Attorney represent the Ethics Commission, conflicts have arisen repeatedly, and the Ethics Commission has had to obtain outside counsel. We find these instances of conflict are likely to continue, and that the Commission is best represented by a consistent set of lawyers who are not City employees.

City Attorney's Office Response to Finding 23.

Disagree. This Finding does not consider the central role of the City Attorney in advising the City and its constituent agencies. Charter section 6.102 designates the elected City Attorney as the legal representative of the City as a whole. With one City Attorney representing the City, the City speaks with one voice on legal issues and avoids the chaos, as well as tremendous taxpayer expense, that would result if each City department could freely hire its own counsel to represent its view of the City's interests. The more frequent use of outside counsel could have significant consequences on the consistency and continuity of legal advice provided to City agencies, boards, and commissions.

The Ethics Commission has not "repeatedly" obtained outside counsel due to conflicts of interest. In its separate response, the Ethics Commission stated that it has used outside counsel on only three occasions, and at the August 18, 2014 Commission meeting to discuss its responses, the Civil Grand Jury's representative did not dispute this figure. Rather, the Civil Grand Jury's representative explained that the Jury used the word "repeatedly" in this Finding because the Jury counted the number of meetings rather than the number of discrete matters

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where the Commission used outside counsel. So, for example, when the City retained outside counsel for the official misconduct proceedings regarding Sheriff Mirkarimi, the Civil Grand Jury considered this matter as requiring the “repeated” use of outside counsel because the Ethics Commission held a number of meetings on the matter. In fact, the Ethics Commission has rarely used outside counsel for legal advice, nor is there any basis to conclude it is “likely” that the Ethics Commission will need to use outside counsel for future matters.

On the limited occasions when the City Attorney’s Office has agreed to provide the Ethics Commission with outside counsel, this Office has always relied on its reciprocal relationship with other Bay Area public law offices, such as the Oakland City Attorney’s Office and the Santa Clara County Counsel’s Office, to obtain such counsel for the Commission. These public law offices have substantial familiarity with the types of legal issues that face the Ethics Commission, and they typically do not require the Commission to expend any of its budget on these additional legal services. But, like the San Francisco City Attorney’s Office, their resources are limited.

Recommendation 23.

That the Ethics Commission apply to the City Attorney for permission to engage outside counsel for advice and recommendations.

City Attorney’s Office Response to Recommendation 23.

Partially disagree. As explained above, the Ethics Commission has rarely requested or relied on outside counsel to step into the shoes of the City Attorney’s Office for particular matters. As this history reflects, there is no need for the Ethics Commission to apply to the City Attorney for permission to engage outside counsel, except in extremely rare circumstances.

Notably, the Ethics Commission cannot freely engage its own outside counsel. Charter section 15.102 mandates that the City Attorney serve as “the legal advisor of the Commission.” The Charter also sets out a specific procedure by which any elected official, department head, board or commission may request outside counsel. The Ethics Commission may employ this process, but only if it has reason to believe that the City Attorney has “a prohibited financial conflict of interest under California law or a prohibited ethical conflict of interest under the California Rules of Professional Conduct.” *See* S.F. Charter § 6.102(1). Since the voters adopted section 6.102 in 2001, the Ethics Commission has not invoked this procedure.

Finding/Recommendation No. 27:

Finding 27.

The Charter requires that proposals to amend campaign finance and ethics laws explain how the change will assist in furthering the purpose of the law. The Ethics Commission proposals have not included any statements showing that its proposals will further the purposes of the law.

City Attorney’s Office Response to Finding 27.

Partially disagree. The Campaign and Governmental Conduct Code (not the Charter) provides that the Board of Supervisors may amend the Campaign Finance Reform Ordinance or the Government Ethics Ordinance if any such amendment “further the purposes” of those laws.

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See Campaign & Governmental Conduct Code §§ 1.103, 3.204. Neither section requires the proposed amendments to explicitly explain how the amendments would further those purposes.

Recommendation 27.

When a bill is proposed or passed to amend campaign finance and ethics laws, it should specify how it “furtheres the purposes of this Chapter.”

City Attorney’s Office Response to Recommendation 27.

Recommendation 27 is a policy matter for the Ethics Commission and the Board of Supervisors. If requested, the City Attorney’s Office will assist the Ethics Commission and the Board of Supervisors with the implementation of this recommendation.

We hope this information is helpful.

Very truly yours,



DENNIS J. HERRERA
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cc: Angela Calvillo, Clerk of the Board of Supervisors (via e-mail)
Elena Schmid, Foreperson, San Francisco Civil Grand Jury
John St.Croix, Executive Director, Ethics Commission (via e-mail)
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