

SAN FRANCISCO'S ETHICS COMMISSION:

THE SLEEPING WATCH DOG



CIVIL GRAND JURY
CITY AND COUNTY OF SAN FRANCISCO
2010-2011

THE CIVIL GRAND JURY

The Civil Grand Jury is a government oversight panel of volunteers who serve for one year. It makes findings and recommendations resulting from its investigations.

Reports of the Civil Grand Jury do not identify individuals by name.
Disclosure of Information about individuals interviewed by the jury is prohibited.
California Penal Code, section 929

STATE LAW REQUIREMENT

California Penal Code, section 933.05

Each published report includes a list of those public entities that are required to respond to the Presiding Judge of the Superior Court within 60 to 90 days as specified. A copy must be sent to the Board of Supervisors. All responses are made available to the public.

For each finding the response must:

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

As to each recommendation the responding party must report that:

- 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.

SAN FRANCISCO'S ETHICS COMMISSION: THE SLEEPING WATCHDOG

SUMMARY

This report focuses on issues related to investigations performed by the Commission. These include fines and enforcement irregularities, the excessive influence of the Executive Director in conjunction with the abdication of oversight by the Ethics Commissioners, the membership of the Commission, and audit procedures. This is not meant to be a definitive report on the Ethics Commission.

BACKGROUND

On July 12, 1993, the San Francisco Board of Supervisors voted 7-4 to place Proposition K on the November ballot. In the election pamphlet they asked San Francisco voters:

Shall an Ethics Commission be created, with the power to:

- Administer the City's campaign contributions, determine conflict of interest, lobbying and whistle-blowing laws;
- Investigate alleged violations of these laws and impose penalties under certain circumstances; and
- Submit ordinances relating to governmental ethics directly to the voters?

Arguing in favor of Proposition K, the Board of Supervisors noted in the pamphlet:

- The people of San Francisco are in danger of losing faith in our city government.
 - Every few weeks another scandal arises and public confidence sinks to new lows.
 - We need an Ethics Commission to turn things around at City Hall.
- Proposition K will establish an independent body to clean up our city government.

Rebuttal in the voter's pamphlet argued Proposition K would merely set up a useless commission paralyzed by conflicts-of-interest. Those in opposition to this proposed measure put forth the question:

"Can San Francisco afford to waste millions of dollars on a commission destined to entrench San Francisco City Hall status quo?"

Voters approved Proposition K, and the Ethics Commission was created.

Citizens/voters are entitled to the complete Ethics Commission story. The focus of this report, however, is limited to an examination of the arbitrary method by which fines are determined, enforcement irregularities, the failure to provide adequate transparency, the excessive influence of the Executive Director over commission members leading to the commission members abdicating their responsibilities to serve as our independent watchdog, and investigations performed by Ethics Commission staff.

The Civil Grand Jury asks this question:

Are the citizens of San Francisco well served by its Ethics Commission?

DISCUSSION

There are a number of areas where the procedures and rules followed by the Ethics Commission staff are at odds with its stated mission “to practice and promote the highest standards of ethical behavior in government.”¹

Arbitrary Fines

The Ethics Commission collects revenue from a number of sources such as lobbyists’ fees, campaign consultant fees, and fines under their jurisdiction. In 2010, the Ethics Commission entered into four enforcement cases (entitled Stipulation, Decision and Orders)² for complaints before the commission. The fines ranged from \$76 to \$4,000. These fines were reduced, through negotiation between the Ethics Staff and complainant, rather than assessing the maximum fine of up to \$5,000 established by the charter.³

In our interviews with the ethics commission staff we asked about variances in the fines. We heard reasons for fine reduction such as being a first-time candidate, a first-time campaign official, or cooperating with the commission staff. Since 2008, all enforcement summaries cite the mitigating factor, “Respondent was cooperative with staff’s investigation.”

When a violation has been established, the Commission staff engages in negotiations with the alleged violator or their counsel to determine the fine. This puts the Ethics Commission staff in a recurring negotiating role with the city employees, campaign consultants, campaign staff or lobbyists to establish the fine. This is most irregular and vulnerable to manipulation against the public interest.

In [Complaint No. 16-080516⁴](#), a campaign committee originally failed to list a San Francisco Supervisor as a Controlling Officeholder. The “oversight” wasn't corrected until 34 *days after the election*. This misrepresents the campaign to the voters. This violation resulted in a mere \$100 fine for the committee and treasurer of the committee.

The following table indicates the variable nature of the fines collected by the Ethics Commission. The total fines from the enforcement summaries since 2004 are as follows:

CALENDAR YEAR	FINE AMOUNT
2010	\$ 5,226
2009	\$ 8,000
2008	\$ 5,100
2007	\$ 5,817
2006	\$ 4,350
2005	\$ 33,260
2004	\$ 100,000

The arbitrary nature of the fines can best be seen in Ethics Complaint [No. 20-050906](#) against San Franciscans for Affordable Clean Energy. The minutes from the monthly meeting held on June 11, 2007, record the statement of Richard Mo, the Ethics Commission Chief Enforcement Officer:

“... the \$26,700 settlement offer was only an opening to a good faith negotiation but that the Respondent declined to engage in any settlement until she retained an attorney, then offering \$500. Mr. Mo stated that just because probable cause hearings are rare, does not mean that enforcement in those instances is biased. He stated that staff attempted to engage in settlement negotiations.”

In the final settlement the fine was reduced to \$267, or 1% of the original fine.

Sunshine Ordinance Not Enforced

The Sunshine Ordinance Task Force advises the Board of Supervisors and provides information to other City departments on appropriate ways to implement the Sunshine Ordinance (Chapter 67 of the Administrative Code); ensures that deliberations of commissions, boards, councils and other agencies of the City and County are conducted before the people; and guarantees that City operations are open to the people's review.

Under the Sunshine Ordinance, the Task Force also makes a determination if a Sunshine violation exists. If a violation is found, the official involved must disclose the information requested. If the public official doesn't comply, the case is sent to the Ethics Commission for enforcement.

Since October 2004 through December 2010 there have been 18 cases where the Sunshine Ordinance Task Force has requested that the Ethics Department enforce a violation of the ordinance. In all 18 cases the commission has not taken ANY action for violation of the Sunshine Ordinance. In eight of the 18 cases, the disposition was “dismissed because facts did not support finding of willful failure to discharge duties imposed by Sunshine Ordinance.” Based on a recommendation for dismissal by the Executive Director, the other ten cases were “dismissed because facts did not support finding of violation.”⁵

None of these cases were ever heard at an open hearing before the Ethics Commission.

Because of the Ethics Commission’s lack of enforcement, no city employee has been disciplined for failing to adhere to the Sunshine Ordinance. The Commission has allowed some city officials to ignore the rulings of the Sunshine Ordinance Task Force.

On the Ethics Commission web site it indicates its duties as:

- Filing and auditing of campaign finance disclosure statements
- Campaign consultant registration and regulation
- Lobbyist registration and regulation
- Filing officer for statements of economic interest
- Administration of the Whistleblower program
- Investigations of ethics complaints
- Enforcement education and training
- Providing advice and statistical reporting

It is interesting to note here that there is no mention of the Sunshine Ordinance at all. Yet, for the period February 2010 through April 2011, 38% of the pending investigations are Sunshine referrals.⁶

Investigation Delays

The City Charter does not prevent the Ethics Commission investigators from pursuing an investigation after a 14-day notification period simultaneously with the District Attorney or City Attorney.⁷

“If the commission, upon the sworn complaint or on its own initiative, determines that there is sufficient cause to conduct an investigation, it shall investigate alleged violations of this charter or city ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics. A complaint filed with the commission shall be investigated only if it identifies the specific alleged violations which form the basis for the complaint and the commission determines that the complaint contains sufficient facts to warrant an investigation.”

The Ethics Commission won't begin an investigation until the District Attorney and City Attorney have decided not to pursue the matter. While there is the possibility of duplication of effort, the number of times when the District Attorney or City Attorney had pursued an investigation is limited. This delay before the Commission starts their investigation, in one case nine months, provides more than enough time for documents to become lost, employees to change departments, and accounts from interviewees to fade. The person bringing a complaint before the Commission deserves timely action.

Ethics Commission Composition

Currently, elected officials appoint all Ethics Commissioners. As stated in the City Charter, a member appointed by the Mayor must have a background in public information and public meetings. A member appointed by the City Attorney must have a background in law as it relates to government ethics. A member appointed by the Assessor must have a background in campaign finance. The remaining two members, appointed by the District Attorney and Board of Supervisors, must be broadly representative of the general public. A listing of current commission members is located in Appendix A.

“Nothing is more important to an ethics program than ensuring that an ethics commission is seen as independent, and not a pawn of politicians. People will not trust the advisory opinions and enforcement decisions of an ethics commission consisting of people with even presumed ties to politicians. Since trust is the principal goal of an ethics program, this is unacceptable.”⁸

- CityEthics.org

Ethics Commissioners are appointed by elected politicians over whom the Commission has enforcement responsibility. While the commission members we interviewed indicated they were not subject to political pressure, there is an appearance of a conflict of interest. A negative and jaded perception by the public may exist because of the way the commissioners are selected and appointed.

Executive Director Controls the Agenda

At least ten days prior to the Commission's monthly meeting, a list of complaints that the Executive Director has recommended for dismissal is sent to the Commissioners. If an item noted for dismissal is not removed from that list and placed on the agenda, it will be dismissed. Based on current [Ethics Commission regulations](#)⁹ at least two of the five Commissioners must notify the Executive Director to move something from the dismissed list to the agenda. This must be done five days before the meeting to allow time for the item to be published on the agenda.

However, because of the Open Meeting Law (the [Brown act](#))¹⁰ it is difficult for the members to talk to other commissioners about an item prior to the actual meeting, as this might violate the law. The Open Meeting Law prohibits Commissioners from contacting more than one half of the members. On the Ethics Commission a Commissioner can only contact one other Commissioner. If there were more than five commissioners this might not be much of an issue.

If a commission member is interested in moving an item to the agenda, it is difficult for that commissioner to get support from another commissioner because of the Open Meeting Law. One commissioner estimated that only 15-25% of the requests for an item to be scheduled are moved to the agenda. Because these items are covered in the closed session, the 15-25% estimate can't be verified. Additionally the commissioners are not notified about which specific items are scheduled for the closed session making it difficult to prepare for the meeting. One of the commissioners stated there was an expectation that "...the commission should support the Executive Director in his decision to dismiss a case".

Tracking Requests

In the process of our investigations we had asked the Ethics Commission staff for specific record-keeping information. Following our requests for certain relevant documents the staff was unable to promptly produce all the documents related to our investigation.

The Ethics Commission provides a critical service to campaigns, lobbyists and employees of the city by providing telephone support to answer questions. The Ethics Commission should be credited for implementing recommendations from the 2004-2005 Civil Grand Jury [report](#).

However, the staff could not provide data on the number of information requests they responded to, nor did they have a method for tracking these information requests or a record of what was discussed in the call.

Random Audit Process

An area where the Ethics Commission operates with complete transparency and with little chance of the appearance of undue influence concerns the process whereby campaign committees are picked for random audits. The staff determines the number of yearly audits possible.

In [2011](#) seven random campaign audits are scheduled: three for committees where activity was between \$10,000 and \$100,000, and four where the committee's activity was over \$100,000. There are no audits of committees with spending below \$10,000. The names of the committees in the audit pool are then placed in a box for random selection.

The following three committees were randomly chosen because they received between \$10,000 and \$100,000:

- Noe Valley Democratic Club
- Protect Our Benefits
- Laura Spanjan for Supervisor 2010

The following four committees were randomly chosen for audit from the over \$100,000 pool:

- Standing Up to Save San Francisco - No on Measures B and K/Yes on Measures J and N, a Coalition of Teachers, Nurses Public School Parents and Labor Organizations
- Phil Ting for Assessor 2010
- San Francisco Forward , Sponsored by San Francisco Chamber of Commerce
- San Francisco Labor and Neighbor Member Education/Political Issues Committee, Sponsored by the San Francisco Labor Council

Commission Meetings Not Televised

Television access for members of the public who are unable to attend these commission meetings is a valuable service. Currently a number of commissions provide funding to SFGOVTV.ORG to broadcast their meetings and widen public access. These include: the Entertainment Commission, Disability Commission, Small Business Commission, Taxicab Commission and the Transportation Commission. Other City commissions such as the Police Commission and the Planning Commission that adjudicate issues televise their sessions.

The Ethics Commission currently makes audio recordings of its meetings available and has a

Facebook page to provide information to the public, but does not televise their meetings.

After a recent Rules Committee meeting where the candidates for the Ethics Commission were interviewed, the *San Francisco Bay Guardian* [quoted](#)¹¹ Supervisor Kim saying, "I absolutely support televising the Ethics Commission."

CONCLUSION

The Ethics Commission was established to provide a valuable service to the residents of San Francisco and is intended to be an independent watchdog.

The issues where the Jury found items that should be improved are:

- Setting fines
- The excessive influence of the Executive Director
- The Commissioners' abdication of oversight responsibilities
- The membership of the Commission, and
- Broadcasting Commission meetings.

This report is not meant to be a definitive report on the Ethics Commission. We will leave that investigation to a future Jury.

METHOD OF INVESTIGATION

The Civil Grand Jury interviewed members of the Ethics Commission staff, members of the Ethics Commission, and members of the community with experience in governmental ethics.

While we asked to speak with all members of the Ethics Commission, only two volunteered to be interviewed. The jury also reviewed the Ethics Commission enforcement summaries, procedures and web site.

FINDINGS AND RECOMMENDATIONS

Finding 1

Having the Ethics Commission staff establish the fine and then enter into negotiations could be viewed as lacking a strong and effective operating system that could lead to questions of fairness and transparency.

Recommendation 1.1

The Ethics Commissioners should establish a fixed fine structure for violations or apply the maximum allowed fine.

Recommendation 1.2

If the respondent disagrees with the fine a request may be made for a public hearing. This will allow the commissioners to exercise discretion over the fines process.

Finding 2

The failure of the Ethics Commission to enforce Sunshine Ordinance Task Force actions weakens the goal of open government and reduces the effectiveness of the Sunshine Ordinance.

Recommendation 2

All Sunshine Ordinance Task Force enforcement actions deserve a timely hearing by the Ethics Commission.

Finding 3

Waiting for the District Attorney or City Attorney to inform the Ethics Commission that they are not going to pursue a case causes unnecessary delays.

Recommendation 3

After the 14-day window, Ethics Commission investigations should start.

Finding 4

Currently commissioners are appointed by elected officials. In turn, the staff and commissioners scrutinize campaign expenditures and activities of those same elected officials. The Civil Grand Jury feels this leads to the appearance of impropriety.

Recommendation 4

The City Charter should be changed to add four additional commission members appointed by

non-partisan community organizations and individuals such as: The League of Women Voters, Society of Professional Journalists, The San Francisco Labor Council, The Bar Association of San Francisco, and the Dean of UC Hastings Law School.

Finding 5

The Ethics Commissioners have relinquished their authority to the Executive Director concerning items recommended for dismissal.

Recommendation 5

The commissioners should amend section VI. A in the *Ethics Commission Regulations For Investigations and Enforcement Proceedings* to require review and a vote on investigations recommended for dismissal.

Finding 6

The Ethics Commission staff does not appear to have a proper database to track issues efficiently.

Recommendation 6

The Ethics Commission staff should create or modify their database to increase search and tracking capabilities.

Finding 7

In the context of open government, providing audio recordings of the Commission meetings does not provide enough transparency.

Recommendation 7

To maximize transparency, the San Francisco Ethics Commission should broadcast their meetings on the SFGOVTV television network.

GLOSSARY

CGJ	San Francisco Civil Grand Jury
EC	Ethics Commission
FPPC	California Fair Political Practice Commission
PROPOSITION K	passed 11/93; created the Ethics Commission, transferring ethics functions then divided among five city departments to a single Ethics Commission
PROPOSITION N	passed 11/95; called for the enforcement and administration of the Campaign Finance Reform Ordinance.
PROPOSITION G	passed 11/97; Campaign Consultants Ordinance; mandated, expanded audits of financial statements filed by candidates and political committees.
PROPOSITION J	passed 11/00; 'the taxpayer protection amendment' was intended to reduce the influence of gifts and prospective campaign contributions on the decisions of public officials.
PROPOSITION O	passed 11/00; amended the San Francisco Campaign Finance Reform Ordinance, by providing for the limited public campaign financing of candidates for the Board of Supervisors.
PROPOSITION C	passed 11/03; transferred the task of handling the whistleblower telephone hotline to the Controller's Office
PROPOSITION E	passed 11/03; revised and updated the City's conflict of interest laws, requiring all City departments, boards, and commissions to develop statements identifying "incompatible activities."

San Francisco City Charter The fundamental law of the City of San Francisco

APPENDIX A

ETHICS COMMISSIONERS AND TERMS¹²

COMMISSION MEMBER	APPOINTING OFFICER	TERM START DATE	TERM END DATE
Beverly Hayon	Mayor	January 6, 2011	February 1, 2012
Benedict Y. Hur, Esq.	Assessor	March 2, 2010	February 1, 2016
Dorothy S. Liu, Esq.	Board of Supervisors	April 6, 2011	February 1, 2017
Jamienne S. Studley, Esq.	City Attorney	January 23, 2007	February 1, 2014
Charles L. Ward	District Attorney	June 30, 2006	February 1, 2013

ENDNOTES

1. <http://www.sfethics.org/ethics/2009/05/ethics-commission-mission-code-and-information.html>
2. <http://www.sfethics.org/ethics/2009/05/enforcement.html>
3. In San Francisco Charter Section C3.699-13 - INVESTIGATIONS AND ENFORCEMENT PROCEEDINGS states in the Administrative Orders and Penalties section "Pay a monetary penalty to the general fund of the City of up to five thousand dollars (\$5,000) for each violation or three times the amount which the person failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater. Penalties that are assessed but uncollected after 60 days shall be referred to the bureau of delinquent revenues for collection."
4. http://sfarchive.org/agencies/ethics/www.sfgov.org/site/uploadedfiles/ethicscomm/Research/BAYVIEWSTIP_FINAL.pdf
5. Enforcement Summaries last updated Dec, 15 2010
<http://www.sfethics.org/ethics/2009/05/enforcement.html>
6. Based on data from pending complaints in the Executive Director's Report, the January, 2010 report was not included because there was not one in January.
7. From C3.699-13 in the City Charter
"If the commission, upon the receipt of a sworn complaint of any person or its own initiative, has reason to believe that a violation of this charter or City ordinances relating to campaign finance, lobbying, conflicts of interest or governmental ethics has occurred, the commission immediately shall forward the complaint or information in its possession regarding the alleged violation to the District Attorney and City Attorney. Within ten working days, after receipt of the complaint or information, the District Attorney and City Attorney shall inform the commission in writing regarding whether the district attorney or City Attorney has initiated or intends to pursue an

investigation of the matter.

Within 14 days after receiving notification that neither the District Attorney nor City Attorney intends to pursue an investigation, the commission shall notify in writing the person who made the complaint of the action, if any, the commission has taken or plans to take on the complaint, together with the reasons for such action or non-action. If no decision has been made within 14 days, the person who made the complaint shall be notified of the reasons for the delay and shall subsequently receive notification as provided above.”

8. <http://www.cityethics.org/node/770>
9. <http://www.sfethics.org/files/regulations.jan.2010.pdf> section VI. A.
10. http://ag.ca.gov/publications/2003_Main_BrownAct.pdf
11. from San Francisco Bay Guardian 04.12.11 http://www.sfbg.com/2011/04/12/seeking-watchdogs_watchdog?page=0,1
12. <http://www.sfethics.org/ethics/2009/05/commission-members.html>

FINDINGS	RECOMMENDATIONS	RESPONSES REQUIRED
<u>Finding 1</u> Having the Ethics Commission staff establish the fine and then enter into negotiations could be viewed as lacking a strong and effective operating system that could lead to questions of fairness and transparency.	<u>Recommendation 1.1</u> The Ethics Commissioners should establish a fixed fine structure for violations or apply the maximum allowed fine. <u>Recommendation 1.2</u> If the respondent disagrees with the fine a request may be made for a public hearing. This will allow the commissioners to exercise discretion over the fines process.	Ethics Commission
<u>Finding 2</u> The failure of the Ethics Commission to enforce Sunshine Ordinance Task Force actions weakens the goal of open government and reduces the effectiveness of the Sunshine Ordinance.	<u>Recommendation 2</u> All Sunshine Ordinance Task Force enforcement actions deserve a timely hearing by the Ethics Commission.	Ethics Commission Board of Supervisors City Attorney
<u>Finding 3</u> Waiting for the District Attorney or City Attorney to inform the Ethics Commission that they are not going to pursue a case causes unnecessary delays.	<u>Recommendation 3</u> After the 14-day window, Ethics Commission investigations should start promptly.	Ethics Commission District Attorney City Attorney

<u>Finding 4</u> Currently commissioners are appointed by elected officials. In turn the staff and commissioners scrutinize campaign expenditures and activities of those same elected officials. The Civil Grand Jury feels this leads to the appearance of impropriety.	<u>Recommendation 4</u> The City Charter should be changed to add four additional commission members appointed by non-partisan community organizations and individuals such as: The League of Women Voters, Society of Professional Journalists, The San Francisco Labor Council, and the Dean of UC Hastings Law School.	Ethics Commission Board of Supervisors Mayor
<u>Finding 5</u> The Ethics Commissioners have relinquished their authority to the Executive Director concerning items recommended for dismissal.	<u>Recommendation 5</u> The commissioners should amend section VI. A in the <i>Ethics Commission Regulations For Investigations and Enforcement Proceedings</i> to require review and a vote on investigations recommended for dismissal.	Ethics Commission
<u>Finding 6</u> The Ethics Commission staff does not appear to have a proper database to track issues efficiently.	<u>Recommendation 6</u> The Ethics Commission staff should create or modify their database to increase search and tracking capabilities.	Ethics Commission
<u>Finding 7</u> In the context of open government, providing audio recordings of the Commission meetings does not provide enough transparency.	<u>Recommendation 7</u> To maximize transparency, the San Francisco Ethics Commission should broadcast their meetings on the SFGOVTV television network.	Ethics Commission Board of Supervisors Mayor
