

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA  
City Attorney

OFFICE OF THE CITY ATTORNEY

DIRECT DIAL: (415) 554-4748  
E-MAIL: tara.collins@sfgov.org

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Hon. Katherine Feinstein  
Presiding Judge  
San Francisco Superior Court  
400 McAllister Street, Room 008  
San Francisco, CA 94102

Re: City Attorney's Office's Response To The June 20, 2011 Civil Grand Jury Report  
Entitled "San Francisco's Ethics Commission: The Sleeping Watch Dog"

Dear Judge Feinstein:

Under Penal Code Sections 933 and 933.05, the City Attorney's Office submits the following response to the Civil Grand Jury Report entitled "San Francisco's Ethics Commission: The Sleeping Watch Dog" and issued on June 20, 2011 (the "Report"). 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 one of the following:

1. that the recommendation has been implemented, with a summary explanation of how it was implemented;
2. that the recommendation has not been implemented, but will be implemented in the future, with a time frame for the implementation;
3. that the recommendation requires further analysis, with an explanation of the scope of that analysis and a time frame for the officer or agency head to be prepared to discuss it (less than six months from the release of the Report); or
4. that the recommendation will not be implemented because it is not warranted or reasonable, with an explanation of why that is. (California Penal Code §§933, 933.05)

Of the seven findings and corresponding recommendations in the Report, the Grand Jury asked the City Attorney's Office to respond to the two Findings and Recommendations listed below.

**Finding and Recommendation 2**

**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.*

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**Recommendation 2:** *All Sunshine Ordinance Task Force enforcement actions deserve a timely hearing by the Ethics Commission*

**City Attorney's Office Response to Finding 2**

The City Attorney's Office agrees that compliance with laws requiring open meetings and access to public records is fundamental to the legitimacy of City government. To ensure openness and transparency, the City must take appropriate steps whenever City officials intentionally violate these laws. And the City Attorney agrees that the Commission has in several instances dismissed enforcement actions based on referrals from the Sunshine Ordinance Task Force (the "Task Force"), because the Commission found that those cases did not involve willful violations of the City's Sunshine Ordinance (the "Ordinance").

But the City Attorney's Office disagrees with Finding 2 to the extent the finding suggests that by failing to follow the Task Force's recommendations the Ethics Commission (the "Commission") has failed to enforce the Ordinance. As we explain below, in all of the instances the Report cites, the Commission, based on its review of the facts and circumstances in the record before it, found that the City employees or officials did not willfully violate the Ordinance—a requirement for the Commission to impose penalties. We are not in a position to second guess those decisions that the Commission made.

In the 18 cases referenced in the Report where the Task Force forwarded a complaint to the Commission, the Commission concluded that the charged City officials had not violated the Ordinance or had not done so willfully. In one recent case the Commission decided after the Grand Jury issued its Report, the Commission unanimously concluded that a City officer had willfully violated the Ordinance. The outcome of the 18 cases mentioned in the Report does not seem to support the Grand Jury's finding that the Commission has failed to enforce the Ordinance. Rather, in its role as adjudicator, the Commission concluded based on the facts presented to it that the charged City officials in those proceedings had not willfully violated the Ordinance.

Still, we agree that the Commission's enforcement process could be further improved. The Commission has taken steps in recent years to make its handling of Sunshine-related matters more transparent by requiring that hearings on those matters be held in public. And as explained below, we have been assisting the Commission in its efforts over the past year to revise its procedures further through a public process involving input from the Task Force.

In August 2010, the Commission's staff drafted proposed regulations setting procedures for the Commission's enforcement of complaints alleging violations of the Ordinance. Under the City Charter, the Commission has the power to adopt regulations interpreting and administering the Ordinance. *See* S.F. Charter § 15.102. The proposed regulations would clarify ambiguities in the Ordinance and establish a new enforcement process for Sunshine-related matters. The Commission forwarded the proposed regulations to the Task Force for comment on August 17, 2010, and the Task Force responded with written comments on August 1, 2011. The City Attorney's Office understands that the Commission will be considering the Task Force's comments at a meeting in the near future. Once formally adopted, the regulations could have the effect of clarifying the enforcement process and advancing the City's goal of ensuring compliance with all applicable open meetings and public records laws.

**City Attorney's Office Response to Recommendation 2**

The City Attorney's Office agrees that all complaints filed with the Commission should be handled in a timely manner, in compliance with legal deadlines. But other than continuing to

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serve as the Commission's legal advisor, the City Attorney's Office does not play a role in deciding whether or how to implement this recommendation.

### **Finding and Recommendation 3**

**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 promptly.*

### **City Attorney's Office Response to Finding 3**

We disagree with Finding 3 because the Ethics Commission does not have to wait to undertake its own investigation of a particular matter for the District Attorney and the City Attorney to notify the Ethics Commission that they will not pursue a case.

Charter section 3.699-13 creates the basic framework for investigations and enforcement proceedings that the Commission handles for alleged violations of local laws related to campaign finance, lobbying, conflicts of interest and governmental ethics. Under section 3.699-13(a), whenever the Commission receives a complaint or information giving the Commission reason to believe that a violation has occurred, the Commission must "immediately . . . forward the complaint or information in its possession regarding the alleged violation to the district attorney and city attorney." See S.F. Charter § 3.699-13(a). Within 10 business days after receiving the complaint or information, the District Attorney and City Attorney must "inform the commission in writing regarding whether the district attorney or city attorney has initiated or intends to pursue an investigation of the matter." See *id.* Following longstanding internal procedures, the City Attorney's Office always responds to the Commission within 10 business days of receiving a forwarded complaint.

The Charter does not prohibit the Commission's staff from initiating investigatory activity during the Charter-prescribed period when the District Attorney or City Attorney are considering whether to initiate their own investigations. Delaying the start of an investigation until the 10-business-day review period has expired could prejudice an investigation if neither the District Attorney, City Attorney or the Commission were able to secure the evidence during that period and evidence were to disappear as a result. We understand that because of this concern, the Commission's staff sometimes begins investigations during that period if the staff determines that the situation warrants immediate action. We are not aware of, and the Report does not identify, any specific circumstance when the Commission's failure to initiate an investigation during the 10-business day period has caused "unnecessary delays" that have hindered an investigation.

### **City Attorney's Office Response to Recommendation 3**

The Report recommends that "[a]fter the 14-day window, Commission investigations should start promptly." We agree that Commission investigations should start promptly. But as we discuss above, the City Attorney's 10-business day review period mandated by the Charter does not prohibit the Commission from beginning its own investigation before the end of that period, where the Commission staff determines it is appropriate to do so. Accordingly, other than continuing as the Commission's legal advisor, the City Attorney's Office does not play a role in deciding whether or how to implement this recommendation.

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Also, we are not certain what the Report means when it refers to the 14-day window. The Charter requires the District Attorney and City Attorney to respond to the Commission within 10 business days of receiving the complaint. Possibly the Report refers to "14 days" instead of 10-business days as a rough estimate of how many calendar days are included in the 10 business day period, though the 10-business day period could be shorter or longer than 14 calendar days. Section 3.699-13(a) separately refers to a 14-day window, but that period begins only *after* the District Attorney and City Attorney respond to the referral. The Charter provides that within 14 days after receiving responses that the District Attorney and City Attorney will not pursue an investigation, the Commission must notify the complainant of the actions the Commission has taken or plans to take, or, if the Commission has not yet decided what action to take, the Commission must notify the complainant of the reason for the delay. *See* S.F. Charter § 3.699-13(a). That 14-day deadline does not involve the City Attorney and, like the 10-business day review period, does not prevent the Commission from taking any earlier steps to pursue an investigation.

We appreciate the role of the Civil Grand Jury and the work it does, and we hope that this information is helpful.

Very truly yours,



DENNIS J. HERRERA  
City Attorney