

BOARD of SUPERVISORS



City Hall
Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. 554-5184
Fax No. 554-5163
TDD/TTY No. 544-5227

DATE: September 2, 2014
TO: Members of the Board of Supervisors
FROM: *AC* Angela Calvillo, Clerk of the Board
SUBJECT: 2013-2014 Civil Grand Jury Report "Ethics in the City: Promise, Practice or Pretense"

We are in receipt of the following required responses to the San Francisco Civil Grand Jury report released June 26, 2014, entitled: **Ethics in the City: Promise, Practice or Pretense**. Pursuant to California Penal Code, Sections 933 and 933.05, the City Departments shall respond to the report within 60 days of receipt, or no later than August 25, 2014.

For each finding the Department response shall:

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

As to each recommendation the Department shall 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.

The Civil Grand Jury Report identified the following City Departments to submit responses (attached):

- Office of the District Attorney
(Received August 21, 2014, for Findings 1a through 1f and Recommendation 1)
- Ethics Commission
(Received August 25, 2014, for Findings 1a through 1f, 3 through 5, 6a through 6e, 7 through 16, 17a through 17c, 19, 20, 21a, 21b, 22, 23, 24a through 24c, 25a, 25b, 26, 27, 28a, 28b, and 29 and Recommendations 1 through 5, 6a, 6b, 7 through 13, 14a through 14d, 15, 16, 17a, 17b, 19, 20a, 20b, and 21 through 29)
- Ethics Commission Executive Director
(Received August 25, 2014, for Findings 4, 5, 7, 12 through 15, 17a through 17c, 21a, 21b, 23, 25a, 25b, 26, and 27 and Recommendations 4, 5, 7, 12, 13, 14a through 14d, 15, 17a, 17b, 21, 23, and 25 through 27)
- Office of the City Attorney
(Received August 25, 2014, for Findings 1a through 1f, 2, 3, 11, 17a through 17c, 23, and 27 and Recommendations 1, 2, 3, 11, 17a, 17b, 23, and 27)

- Office of the Mayor and the Chief Data Officer
(Received August 25, 2014, for Findings 4, 5, 20, 24a through 24c, and 26 and Recommendations 4, 5, 20a, 20b, 24, and 26)
- Sunshine Ordinance Task Force
(Received August 28, 2014, for Findings 11, 12, 17a through 17c, and 20 and Recommendations 11, 12, 17a, 17b, 20a, and 20b)

These departmental responses are being provided for your information, as received, and may not conform to the parameters stated in California Penal Code, Section 933.05 et seq. The Government Audit and Oversight Committee will consider the subject report, along with the responses, at an upcoming hearing and will prepare the Board’s official response by Resolution for the full Board’s consideration.

C:

Honorable Cynthia Ming-mei Lee, Presiding Judge
Elena Schmid, Foreperson, 2013-2014 San Francisco Civil Grand Jury
Antonio Guerra, Mayor’s Office
Roger Kim, Mayor’s Office
Joy Bonaguro, Chief Data Officer
Ben Rosenfield, Controller
Asja Steeves, Controller’s Office
George Gascon, District Attorney
Sharon Woo, District Attorney’s Office
Jon Givner, Deputy City Attorney
Rick Caldeira, Legislative Deputy
Severin Campbell, Budget and Legislative Analyst’s Office
Matt Jaime, Budget and Legislative Analyst’s Office
John St. Croix, Ethics Commission
Allyson Washburn, Sunshine Ordinance Task Force
Victor Young, Office of the Clerk of the Board



George Gascón
District Attorney

JUNE D. CRAVETT
Assistant Chief District Attorney
DIRECT DIAL: (415) 551-9537
E-MAIL: JUNE.CRAVETT@SFGOV.ORG

August 21, 2014

The Honorable Cynthia Ming-mei Lee
Presiding Judge
Superior Court of California
City and County of San Francisco
400 McAllister Street, Room 008
San Francisco, CA 94102-4512

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2014 AUG 21 PM 3:09

Re: In the Matter of the 2013-2014 Civil Grand Jury Report "Ethics in the City: Promise, Practice or Pretense"—District Attorney's Response

Dear Judge Lee:

Pursuant to California Penal Code sections 933 and 933.05, I write to provide the District Attorney's response to Findings 1a through 1f, and to Recommendation 1, of the Civil Grand Jury's report entitled "Ethics in the City: Promise, Practice or Pretense," issued in June 2014.

Finding No. 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.

Response to Finding No. 1a: The District Attorney defers to the Ethics Commission's response to this finding.

Finding No. 1b: The Ethics Commission has only two investigators.

Response to Finding No. 1b: The District Attorney agrees with this finding.

Finding No. 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.

Response to Finding No. 1c: The District Attorney disagrees with this finding. The Commission is in the same position with respect to the timing of any public disclosure of violations whether the investigation is conducted by the Commission, the City Attorney, the District Attorney or the Fair Political Practices Commission. In order to insure that the investigation of an ethics complaint is not compromised, public disclosure typically must wait until the investigation is complete.

Letter to The Honorable Cynthia Ming-mei Lee
Page 2
August 21, 2014

Finding No. 1d: The District Attorney, City Attorney and the Fair Political Practices Commission have more substantial investigative staffs.

Response to Finding No. 1d: The District Attorney agrees with this finding.

Finding No. 1e: The Fair Political Practices Commission has been very active in bringing enforcement actions, and handles enforcement for some local units of California government.

Response to Finding No. 1e: The District Attorney has insufficient information to agree or disagree with this finding.

Finding No. 1f: Enforcement is best handled outside of the environment of political partisanship and preferences.

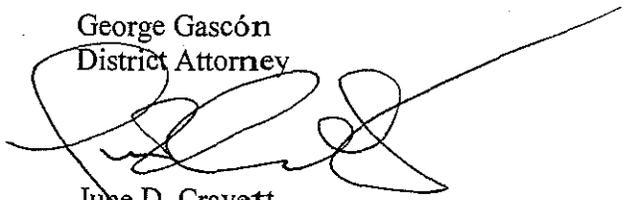
Response to Finding No. 1f: The District Attorney agrees that enforcement of ethics violations should be free from political partisanship and preferences. The District Attorney does not agree with this finding to the extent it implies this cannot be accomplished when enforcement is handled by local agencies.

Recommendation No. 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.

Response to Recommendation No. 1a: The recommendation will not be implemented by the District Attorney. The District Attorney has no role in contracting on behalf of the City. Additionally, the enforcement authority of the Ethics Commission is governed by the San Francisco Charter (see Section 3.699-12).

Respectfully,

George Gascón
District Attorney



June D. Cravett
Assistant Chief District Attorney



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR
CHAIRPERSON

PAUL A. RENNE
VICE-CHAIRPERSON

BRETT ANDREWS
COMMISSIONER

BEVERLY HAYON
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

August 22, 2014

The Honorable Presiding Judge Cynthia Ming-mei Lee
400 McAllister Street, Department 206
San Francisco, CA 94102

Re: Civil Grand Jury Report: Ethics in the City

Dear Judge Lee:

The Ethics Commission recognizes the sincere efforts of the 2013-14 Civil Grand Jury and the amount of work put into their report, which covers a broad range of issues. The Commission also appreciates that the Civil Grand Jury has made a number of positive and helpful suggestions for improvement in the regulation and enforcement of the City's campaign and conflict-of-interest laws.

The Commission's response to the Civil Grand Jury report is attached.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Y. Hur", with a long horizontal stroke extending to the right.

Benedict Y. Hur
Chairperson

Cc: Board of Supervisors

Ethics in the City: Promise Practice or Pretense

Response to Findings and Recommendations

California Penal Code, section 933.05

San Francisco Ethics Commission

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.

Finding 1b: The Ethics Commission has only two investigators.

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.

Finding 1d: The District Attorney, City Attorney and the Fair Political Practices Commission have more substantial investigative staffs and larger budgets.

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.

Finding 1f: Enforcement is best handled outside of the environment of political partisanship and preferences.

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.

Findings 1a: Agree. While the Ethics Commission acknowledges that, like many agencies, it does not have the full resources it could use in carrying out its mission, it is productive in resolving its enforcement cases.

Finding 1b: Agree. The Ethics Commission currently has two investigators; a third position exists but remains vacant because it is unfunded.

Finding 1c: Disagree. There is nothing inconsistent with the confidentiality requirements relating to enforcement actions and the Ethics Commission's role in making information public and promoting transparency of government. The confidentiality of investigations is required by the Charter; it has no impact on the other duties of the Commission not related to investigations/enforcement.

Finding 1d: Agree. Other, larger law enforcement entities do have more investigative staffs; they also generally have a larger workload than their resources can easily accommodate.

Finding 1e: Agree, partially. While the FPPC handles enforcement matters for the County of San Bernardino, and otherwise initiates some enforcement actions in local jurisdictions, they generally do not enforce local laws.

Finding 1f: Agree. However, the budget process is the primary attachment of the Ethics Commission to the City; the Commission has not experienced undue influence as a result of this relationship.

Recommendation 1: Will not be implemented. The Ethics Commission sees no need for this and it is possible that the Charter would prohibit such a contract. Currently, the FPPC is not allowed to do this under state law (a pilot program exists between the FPPC and the County of San Bernardino, but this is the only jurisdiction allowed under existing statute).

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.

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.

While the Commission does not have knowledge of any improper contributions, it does recommend that the Board of Supervisors request an independent audit by the City Attorney.

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.

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.

Finding 3: Agree.

Recommendation 3: Will be implemented. The Ethics Commission will investigate to determine whether an enhancement to a Citizens Right of Action would accomplish the further assurance to the public that the laws would be enforced.

Finding 4: Some information currently reported and posted is not put into the standard searchable electronic format. The Jury specifically finds that contract approval forms, Form 700

forms, behested payments forms, and Lobbyists on Behalf of the City forms can be converted to a searchable format before they are posted.

Recommendation 4: That contract approval forms be converted to a format which allows searches by the name of the official, by the name of the contractor, the value of contracts and the date the contract was signed. Behested payments information should be filed electronically in a format that allows for searches and data aggregation. Form 700s should be formatted to allow data to be searched on income sources, outside employment, gift sources and travel.

Finding 4: Partially agree. There is some information filed with the Ethics Commission not currently in searchable electronic format.

Recommendation 4: Partially implemented/partially will not be implemented. Converting each type of form into such a format requires expensive development of software platforms. This particular recommendation would be extremely expensive. Over time, the Commission plans to develop such platforms for most if not all of the filings it administers. Lack of funding for development means that the addition of the various forms will be done as resources are made available. It should be noted, for example, that 2014 is the first time ever that all Form 700 financial disclosures filed with the Ethics Commission had to be submitted electronically. This was an important, but technically difficult step. Since there is no specified state electronic schema for these forms, creating a searchable database would be risky as it might not conform to state standards when they are eventually promulgated. But it is a desirable goal and will be accomplished eventually. Absent the proper software, data would have to be entered manually. This is unrealistic as the cost would be higher in terms of staff time and attendant issues would arise such as transfer error.

The Commission has already made great progress in moving its many filings into electronic databases, and there should be no doubt that this will continue. San Francisco is ahead of the majority of jurisdictions in this area. For example, The New York Times recently noted that the Federal Election Commission takes weeks and in some cases more than a month to process campaign finance filings of federal candidates, whereas in San Francisco this information is processed in a matter of minutes.

Note: this recommendation includes Behested Payment Forms, which are not filed with the Ethics Commission.

Finding 5: Required filings are treated independently and cannot easily be cross searched electronically using common data reference fields like name and organization to access and aggregate information types, such as dollar amounts, that cross between filings.

Recommendation 5: The Ethics Commission work to develop a common format database for data posted to DataSF, initially aiming to combine campaign, lobbying and Form 700 data.

Finding 5: Disagree partially. This assertion is not completely accurate. The Commission compiles all campaign and lobbyist filings on DataSF so that the information may be searched and aggregated. In fact, the Commission uses the campaign and lobbyist data on DataSF to aggregate and visualize the data on the Commission's web dashboards.

A recent report by the Mayor's Office describes "how the San Francisco Ethics Commission uses DataSF to increase transparency by summarizing and creating visualizations related to ethics data and reports." Further, the report states "Our top referrer is the Ethics Commission, see Figure 12, which has made extensive use of DataSF not only as a publishing platform but as a means to create dashboards and visualizations on its own site. See Figure 13 on the next page for a screenshot showing how the Ethics Commission creates visualizations using the DataSF platform and then embeds the visualizations into a web page. This makes them the top embedders, i.e. the top data visualizations that have been viewed within an external website."

Further, according to "Governing" magazine, the U.S. Open Data Census in March of this year rated San Francisco as the "best city for open data" in the country. The study involved gives both our lobbyist reporting system and our campaign finance system perfect scores.

Recommendation 5: Partially implemented/partially awaiting state action. The Commission notes that the campaign and lobbyist data are already available in a common database format on DataSF. Form 700 data is not on DataSF because a state data schema has yet to be defined by the Fair Political Practices Commission and the Commission will revisit this issue by February 2015.

Finding 6a: City officials, both those in elective office and political appointees, may create separate committees to raise funds and campaign for political party office such as the Party Central Committees, as well as separate committees to raise funds and campaign for ballot measures or to contribute to other candidate. There are no limits on contributions to these committees.

Finding 6b: If candidates seek election to local political party committees during the same election cycle while also seeking election to an official City position, including supervisor, candidate committee rules do not apply. Thus while being limited to a \$500 cap in a City contest (or even an outright prohibition on contributions), donors may contribute additional funds through the back door of a political party contest.

Finding 6c: The rise of major donors, and the potential for further influence following the recent U.S. Supreme Court decisions may well influence elections far beyond what political party affiliation has historically done.

Finding 6d: Corporations may not contribute directly to a candidate for City office but may instead contribute to a business association that contributes to a candidate, or to a nonprofit that spends on behalf of a candidate, or to another committee controlled by the candidate or officeholder, or through an independent expenditure committee.

Finding 6e: Corporate money is being funneled into local campaigns through a web of nonprofit organizations. The Jury cannot determine whether the main effect is to hide the true source of contributions or if this shields illegal contributions from disclosure. The Ethics Commission has not discussed a disclosure strategy to make this information public.

Recommendation 6a: The Commission should proactively look at ways to track back 501(c) (3) & (4) money to real donors before the start of campaigns where this kind of money will be important; its true source should be identified.

Recommendation 6b: The Commission should propose ordinance amendments to require disclaimers in mailings, ads, door hangers and other voter outreach materials funded by committees whose individual donors are not identified to the satisfaction of a reasonable person which states, “this is paid for by (insert organization name) funded by anonymous donors in this campaign cycle.”

Findings 6a – 6b: There is no disagreement with these statements.

Finding 6c: Agree. However there is no evidence provided in the report that proves this to be true locally (the trend in San Francisco in recent years has been a reduction in the number of Major Donors).

Finding 6d: Agree.

Finding 6e: Not enough information is provided in the report to agree.

Recommendation 6a: Newly implemented. Effective July 1, 2014, a new state law requires “Multipurpose Organizations,” including nonprofits and federal and out-of-state PACs spending on state and local elections to report as political committees and disclose those donors who are the sources of funds used for political purposes. However, absent qualifying as a campaign committee under state law, nonprofit organizations appear to be generally entitled to keep their donors confidential. (Ref. 26 USC 6103/6104/7431; NAACP vs. Alabama, 357 US 449 [1958]).

Recommendation 6b: The Ethics Commission require further analysis of this recommendation and will include a discussion of the merits as part of its upcoming consideration of a package of proposals for changes in the Campaign Finance Reform Ordinance (CFRO) anticipated later this year.

Finding 7: The Ethics Commission provides written information only in English although San Francisco has strong political participation from communities and officials whose first language is not English and who require guides and educational materials relevant to their needs.

Recommendation 7: The Ethics Commission should make guides and educational materials available in the major languages as is done in other City Departments.

Finding 7: Agree. This is correct for the time being.

Recommendation 7: Will be implemented. The Commission will make guides in education materials as is done in other departments.

Finding 8: The current definition of “lobbyist” and “contacts” does not provide the public with sufficient information to understand how City Hall decisions are influenced despite the intent of the law.

Recommendation 8: The lobbyist ordinance should be reviewed and amended to provide clearer public disclosure of contacts with City officials regarding the interests of clients, and who should be required to register and make disclosures.

Finding 8: Partially agree. The ordinance was recently amended and updated at the Board of Supervisors (changes not in effect at time Finding was written).

Recommendation 8: Currently under implementation. The new definitions and provisions have been drafted into regulations by the Ethics Commission staff and will be reviewed by the Commission at its regular July 2014 meeting. These new provisions and regulations should be in effect by the end of the calendar year.

Finding 9: The effort to influence City Hall decisions is not limited to contacts with City officials but also includes outreach to community, political and nonprofit organizations as well as to the general public through television ads, mailers, robocalls, polling, and other strategies. In 2010 the Ethics Commission proposal was approved by the Board to eliminate reporting on these expenditures.

Recommendation 9: The requirement for disclosure of all expenditures aimed at influencing City Hall decisions should be reinstated in the law with full public disclosure.

Finding 9: Agree. Under the change, which was part of a successful simplification of the lobbyist registration process, Expenditure Lobbyists would still have to register paid lobbyists, but the expenditures made to influence public opinion were no longer captured when the changes went into effect. Prior to the change, only five organizations had ever reported expenditure lobbying: In 2007, the California Urban Issues Project reported expenditures of \$46,400 and the Small Property Owners of SF reported spending \$1,000. In 2009, the California Urban Issues Project reported \$1,702, the SF Common Sense Coalition reported \$58,110 and the SF Firefighters Local 798 reported \$367,350. Because the actual number of such reported expenditures were so few, it was not

a controversial decision to drop this requirement due to the limited benefit provided; at the time, no public objection was made.

Recommendation 9: Will be implemented should the Board of Supervisors adopt a measure; the Commission will ensure that any such measure is enforced. Within the next 12 months the Ethics Commission will consider re-examining whether or not there is a need to make further changes to the lobbying ordinance to enhance public disclosure of expenditures aimed at influencing City Hall decisions.

Finding 10: People holding themselves out as "strategic advisors" provide advice on ways to influence City decision-making.

Recommendation 10: Work of "strategic advisors" that provide guidance on winning approvals from City officials and/or the public should be reviewed by the Ethics Commission for possible inclusion in the lobbyist registration and/or campaign consultant law.

Finding 10: Unable to agree. This finding is not adequately explained in the report making it difficult to respond.

Recommendation 10: Will not be implemented. Regulating activity that is not lobbying and that is not campaign consulting would appear to be outside of the Ethics Commission's jurisdiction since it would not involve government contacts or campaign activity.

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.

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.

Finding 11: Partially agree. The City document retention policy does not require retention of correspondence for any specific period of time; this would include e-mails. Departments are free to create more restrictive rules as they find necessary.

Recommendation 11: Needs further analysis subject to an upcoming Supreme Court ruling. The City's document retention policy does not appear hazy. The Administrative Code requires each department to have its own policy and schedule regarding retention. The concept regarding the regulation of text messages is understandable, but compares to the regulation of telephone calls. The process for overseeing these activities seems untenable and would likely require incredible resources, although it should be the subject of continued discussion. The questions and issues in the area of private texts and private e-mails are currently under debate in the California court system; the most current ruling states that these items are not in the public domain. However, the issue is now to be heard by the California Supreme Court; the subsequent ruling should dictate the City's course of action.

Finding 12: Many departments have failed to post their sources of outside funding, as required by the Sunshine Ordinance.

Recommendation 12: The Jury recommends that the Ethics Commission and the Sunshine Ordinance Task Force review departmental web sites for compliance and notify non-compliant departments to immediately post their sources of outside funding, or face a show-cause before the Ethics Commission on why the information has not been posted.

Finding 12: The Commission does not have enough information to respond to this finding so it cannot yet agree.

Recommendation 12: Will be partially implemented. The Commission Director will direct staff to notify all departments to remind officials and employees to follow this requirement and ensure that such postings are easy to locate on departmental web sites.

Finding 13: When violations of the standards in a departmental Statements of Incompatible Activities are enforced departmentally as a disciplinary matter, the Ethics Commission is not notified and the discipline is not disclosed to the public.

Recommendation 13: All violations of departmental Statements of Incompatible Activities should be disclosed to the Ethics Commission and posted on the Commission's web site.

Finding 13: Agree. Normally, departments are required to keep employee disciplinary measures confidential. In accordance with the Civil Service Commission's "Citywide Employee Personnel Records Guidelines," all employee personnel records—including records of completed/resolved/sustained disciplinary actions—must be maintained only in the employee's Official Employee Personnel File ("OEPF"). How long a disciplinary action remains in the OEPF and what is removed from an OEPF will vary depending on departmental policy and the applicable collective bargaining agreement. Employees' OEPFs are maintained in their departments; the Ethics Commission does not have access to those files. Thus, only the department head would have

information regarding disciplinary matters. Moreover, even if the Ethics Commission did have that information, the right of privacy in the California Constitution protects employees from unwarranted disclosure of confidential information. Cal. Const. Art. I, Section 1. Accordingly, as information regarding disciplinary actions taken against an employee is considered a confidential personnel matter/ confidential personnel information it is not normally disclosable. In addition, there are a number of other state laws protecting employee privacy not mentioned here.

Recommendation 13: Will not be implemented. The Commission's position is that this cannot be implemented when it violates employee privacy rights.

Additionally, only a narrow range of five types of employee misconduct is disclosable, and even then ONLY when such matters are "confirmed." The "Good Government Guide" indicates that the process for determining if such matters are confirmed is "unclear." Further, the Guide states that "The privacy issues pertaining to these types of personnel records can be complex, and other considerations in addition to privacy, such as the need to maintain effective investigations, may be relevant."

The categories not exempt from disclosure are: 1) personal dishonesty, 2) misappropriation of public funds, resources or benefits, 3) unlawful discrimination against another on the basis of status, 4) abuse of authority, and 5) violence.

The disclosable categories are not necessarily addressed in each departmental SLA. Therefore, in order to carry out this recommendation, the Ethics Commission would have to take each reported case of employee misconduct, analyze whether it meets the disclosable threshold under local law, and then compare it with the requirements of the individual departmental SLA. There are at least 53 different departmental SLAs in existence; administering this proposal would be both difficult and incredibly time consuming and possibly incite a legal challenge.

Finding 14: The Ethics Commission has increased compliance by notifying any employee who fails to file Form 700 within 30 days after the deadline that he or she must file or face potential penalties.

Recommendation 14a: The Ethics Commission should continue to routinely notify all non-filers of their obligation within 30 days of the state filing deadline.

Recommendation 14b: The Ethics Commission should recommend dismissal for any officer or employee who fails to file 90 days after the deadline.

Recommendation 14c: The Ethics Commission should recommend dismissal for any officer or employee who files a Statement of Economic Interest (Form 700) that is inaccurate and relevant to the position they hold.

Recommendation 14d: Now that all Form 700 filers file electronically, the Ethics Commission should require that all Form 700s be filed with them as well as with the Department filing officer.

Finding 14: Agree.

Recommendation 14a: Implemented. The Commission already does this.

Recommendation 14b & c: Will be implemented in amended form. If someone has failed to file within 90 days, the Ethics Commission will recommend to the appointing authority suspension of that person until they have filed.

Recommendation 14d: Will be implemented in the future. The Ethics Commission has already discussed doing this and it is an eventual goal. 2014 is the first year that Forms 700 filed with the Commission have been filed exclusively electronically. The Director notes that while this process was successful and resulted in only five non-filers as of this writing, it was also difficult to convert the many filers to a new process. The Commission needs a few years to settle into the new process but would like to introduce a change wherein all Form 700 filers in the City file directly with the Ethics Commission electronically. We envision doing this in the foreseeable future; a set timeframe is not possible because it will largely be determined by available funding.

Finding 15: The disclosures in Form 700 filings also may reveal violations of San Francisco laws that are enforced locally. This includes compensated advocacy before other commissions and arrangements that violate the locally adopted and enacted Statements of Incompatible Activities for each department.

Recommendation 15: The Ethics Commission should audit and act on violations disclosed through Form 700 filings of local prohibitions such as compensated advocacy and incompatible activities, and enforce these violations with strong action.

Finding 15: Agree.

Recommendation 15: Implemented. The Ethics Commission already does this. The Director notes that while we do not have the staffing resources to audit all Form 700 filings, we do review a portion of them based on investigative criteria, complaints filed and other information that is brought to our attention.

Finding 16: City officials travel expenses can be covered by gifts made by individuals, lobbyists, business associations, corporations or any other source, including those with financial interests in matters to be decided by the official. The public disclosure is limited to a list of donors or donor organizations contributing \$500 or more, but without specifying the total

amount of the gift. Additionally, a significant amount of travel expenses are paid through organizations that do not disclose the names of the original donors.

Recommendation 16: The Ethics Commission should require full disclosure of contributions or payments for official travel of City officials, including the actual amount contributed and the names of the original donors. The official should also disclose what official business was conducted, including meetings, who participated in the meetings, topics, speeches given, ceremonies attended and other information.

Finding 16: Agree. Gifts of travel are governed by a myriad of state and local rules; additional disclosure may be advisable.

Recommendation 16: Requires further analysis. The Ethics Commission will conduct more analysis on this item in its upcoming plans for proposed changes to the Governmental Ethics Ordinance (GEO) anticipated next year. The Board of Supervisors will need to concur.

Finding 17a: There is useful information in the calendars of City Officials that should be readily available to the public.

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.

Finding 17c: The training currently provided on the Sunshine Ordinance contains no materials on the keeping of official calendars as required by the Ordinance.

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.

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.

Findings 17a – 17c: Agree. Although there is a lack of explanatory information in the report, the Ethics Commission will not dispute these findings, except to note that the ordinance does not require attendee names.

Recommendation 17a: Will not be implemented. The Ethics Commission does not have the staffing resources to do this; other priorities are wanting already. The Ethics Commission recommends that departments should collect the official calendars prepared under the Sunshine Ordinance monthly, convert them to electronic form and post them online.

Recommendation 17b: Will be implemented. The Director will work with the City Attorney's office to include this item in future annual Sunshine Trainings (although it does not apply to the vast majority of those who receive the training).

Finding 18: The Board of Supervisors is not subject to this calendar requirement. Many members did provide their calendars upon request, and the information in their calendars will be helpful for public understanding of their work.

Recommendation 18: The Board of Supervisors should adopt a rule subjecting themselves to the public calendar requirement of the Sunshine Ordinance.

N/A

Finding 19: The public record will be better served if post-public employment restriction waivers are granted by Commission resolutions that indicate the specific grounds for granting the waiver. In at least one instance, the Ethics Commission inappropriately interpreted the "extreme hardship" standard to grant a post-public employment restriction waiver.

Recommendation 19: The Commission should grant or deny post-public employment restriction waiver applications by resolutions that indicate specifically how the decision meets the conditions of the ordinance.

Finding 19: While in agreement with the first sentence of this finding, the Ethics Commission did not misinterpret the standard and disagrees with that part of the statement.

Recommendation 19: Will be implemented. The Commission approves of this idea and will issue written resolutions for future decisions when waivers are granted.

Finding 20: Both the Ethics Commission and the Sunshine Ordinance Task Force act in good faith. They are authorized to come to similar ends—transparency in government. However, there are legal and procedural differences between their process and their legal requirements. Therefore, the results of their work are not in harmony with each other.

Recommendation 20a: The Mayor's Office should establish a blue-ribbon committee of experts and stakeholders in open government, sunshine, and transparency, including former Sunshine Task Force members. The Committee of Experts should review and update the Sunshine Ordinance as necessary and should report to both entities and the Board of Supervisors recommendations that would result in coordination and respect for the functions of each entity.

Recommendation 20b: For now, arrangements should be made jointly by the Ethics Commission and the Sunshine Ordinance Task Force to have complaints heard by an independent hearing officer who would develop a consistent legally sufficient record of the case

for the decision of each body. This would allow the meetings of the Task Force and the Commission to focus on broader policy issues.

Finding 20: Generally agree. Unlike the Sunshine Ordinance Task Force, which is an advisory body, the Ethics Commission is a law enforcement agency with the ability to impose monetary and other sanctions and its procedures are more substantial. Often, differences are based more on interpretive actions.

Recommendation 20a: The Ethics Commission defers to the Mayor's office.

Recommendation 20b: Will not be implemented. The Ethics Commission does not agree with this finding and believes it is in the public's best interest to have the Commission continue to investigate and hear Sunshine Referrals and complaints. Further, there is no mechanism in the Sunshine Ordinance to do this.

Finding 21a: The policy-making powers of the Ethics Commission are vested in the Commission itself, not in the Executive Director (absent express delegation by the Commission).

Finding 21b: The current structure where staff provides much of each Commission meeting's content creates the impression that the Commission is not an independent policy-making body.

Recommendation 21: The Board of Supervisors should provide the Commissioners an Executive Secretary separate from the existing Commission's employee base who will, among other duties, prepare the Commission's agendas, maintain minutes, lists of complaints, serve as a liaison for public input and interested persons meetings and assist a Commission member to be the parliamentarian.

Finding 21a: Agree.

Finding 21b: Disagree.

Recommendation 21: Will not be implemented in the foreseeable future. The Ethics Commission's staffing priorities are for more investigators and auditors. The Commission notes that, while in an ideal world a Commission Secretary is desirable, for a commission this small it is not an urgent need.

Finding 22: While the Commission's Bylaws authorize committees, no committees have been established or meet. One result is that all matters requiring deliberation by the Commission are heard only once a month, in a process that can extend for many months and sometimes for years. If the Commission acts through its committee structure, issues can be explored and brought to the full Commission in a more developed state, thus providing a better basis for the Commission's actions.

Recommendation 22: The Commissioners should use their committee structure to focus on Ethics Commission issues. In the weeks between monthly meetings, each commissioner could

take the lead on issues of concern to the Ethics Commission, such as developing policies on emerging campaign finance issues, transparency matters, complaint processing and training. This structure would allow for more interaction with the public and the regulated community.

Finding 22: Partially agree. Some Commission deliberations have extended for months but not for years, notwithstanding one case of extended delay created at the request of and as a courtesy to the Sunshine Ordinance Task Force.

Recommendation 22: May be implemented. The Commission will consider using committees on an as-needed basis. The committee system was designed for larger bodies. A commission of only five members using a committee system would likely entail a larger number of meetings unwieldy for such a small body and would result in redundant sessions. Commissioners are volunteers donating a great deal of their time and wisdom to the city and have managed to conduct business appropriately. As needed, special meetings have been conducted to move more sizable or difficult issues before the Commission. Even Roberts Rules of Order states that the formality necessary in a large assembly would hinder the business of a small board.

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.

Recommendation 23: That the Ethics Commission apply to the City Attorney for permission to engage outside counsel for advice and recommendations.

Finding 23: Mostly disagree. The Ethics Commission has obtained outside counsel only three times.

Recommendation 23: Needs further analysis. This Ethics Commission is willing to discuss the merits of this with the City Attorney, but has concerns about continuity and costs. Under the Charter, it is ultimately not the Commission's decision to make.

Finding 24a: The Jury was unable to locate and the Ethics Commission was unable to provide copies of any reports or notes of oral presentations to the Mayor or to the Board of Supervisors as required in the Charter to report annually on the effectiveness of San Francisco's ethics laws.

Finding 24b: The Jury was unable to locate any reports that reviewed changes in laws aimed at transparency and ethical conduct adopted in other jurisdictions that might be relevant to San Francisco. The only references were to changes based on court decisions that lessened public disclosure and protections against the influence of money in politics, even when those decisions were not based on San Francisco cases.

Finding 24c: The proper standard to judge the effectiveness of laws is to consider their ability to achieve the purposes set forth in each law when it was enacted.

Recommendation 24: The Mayor and the Board of Supervisors should request an annual written report from the Ethics Commission that meets the standards set out in the Charter for annual reviews of the effectiveness of the City's laws. This report should be posted on the Ethics Commission web site.

Finding 24a - c: No disagreement. Although the report states the need for constant adaptation of pertinent laws to deal with changing circumstances, it also fails to report that the Ethics Commission has vigorously reviewed the laws under its purview on an ongoing basis for just these reasons.

Recommendation 24: Will be implemented. The Commission will provide a report.

Finding 25a: Periodic reviews of filed information are essential to ensure its validity.

Finding 25b: The Ethics Commission has undertaken little to no monitoring and auditing of the content of Lobbyists, Campaign Consultants, Conflict of Interest and Governmental Ethics filings beyond fines for late filing of statements; nor have they actively monitored whether former City employees abide by the restrictions on dealing with their former departments.

Recommendation 25: The Ethics Commission should begin to focus staff resources on monitoring and auditing other items within the Ethics Commission jurisdiction unrelated to campaigns such as the following ordinances: Conflict of Interest, Governmental Ethics, The Lobbyist Ordinance, Campaign Consultant Ordinance, and the Sunshine Ordinance.

Finding 25a – b: While true, this finding describes a huge volume of work. We disagree with the characterization of “little to no.”

Recommendation 25: Partially implemented. Provided with sufficient resources, more work in the area will be accomplished. The Commission staff does much more of this work than the finding indicates, but lacks the staff and resources to do this work on a comprehensive basis. As it is, the staff can only audit a few non-publicly financed campaigns each year due to resource limitations. The Commission notes that additional auditors are needed just for campaign finance; extending the audit reach is a desirable notion, but like many of these recommendations, this one comes with costs but no suggestions on how to meet them. Note: recent changes in the lobbyist ordinance will require audits of lobbyists in the future.

Finding 26: The Ethics Commission, though its staff, can catalog information reported elsewhere that is relevant for supplemental understanding of information currently reported locally. Links to this information would be a logical addition to the Ethics Commission web site.

Recommendation 26: The Ethics Commission should determine information reported elsewhere that is relevant for supplemental understanding of information currently reported locally, and provide links to it on the Ethics Commission web site, if it cannot be imported and posted.

Finding 26: Disagree. The concept is too broad to understand appreciably.

Recommendation 26: Already implemented. The Commission already provides links to the Secretary of State's CAL-Access database and material on the Fair Political Practices Commission web site. The Ethics Commission Staff will continue to link to other relevant web sites where appropriate. The Commission adds that it should be noted that the Commission's website is already considered among the best and most comprehensive sites in the country.

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.

Recommendation 27: When a bill is proposed or passed to amend campaign finance and ethics laws, it should specify how it "further the purposes of this Chapter".

Finding 27: Disagree. There is no basis for this finding.

Recommendation 27: Already implemented. All proposed changes to existing ordinances are accompanied by comprehensive staff memoranda explaining the details and purposes of the proposed changes.

Finding 28a: The Commission has not taken an active role in questioning the propriety of actions that skirt the edges of legality. This inquiry can feed into reports on the effectiveness of laws, and also remind public officials that they can be called to account for the appearance of impropriety.

Finding 28b: The general public needs an opportunity to talk to the Ethics Commission about their expectations and beliefs on ethical behavior of public officials. This initial discussion may help to highlight matters that appear to be improper.

Recommendation 28: That the Commission hold hearings, whether through their committees or in the full Commission, to ask the public to report matters that appear improper, then call the responsible officials before the Commission to account for and defend their actions.

Finding 28a: Disagree. There is no basis for this finding. The Ethics Commission staff frequently discusses the appropriateness of the behavior of public officials and whether such behavior warrants investigation. Such discussion often prompts changes to ordinances, rules and regulations.

Finding 28b: No disagreement. The public is free to, and very frequently does, communicate to the Commission through public comments and written and electronic messages.

Recommendation 28: Will not be implemented. Allowing anyone to force public officials to appear before the Ethics Commission to defend themselves against such charges invites anyone with personal agendas to create punitive actions against public officials – at will – whether there is a basis or not for such accusations. This proposal does not regard actual law-breaking, but merely the appearance of impropriety and calls Constitutional issues directly into consideration.

Finding 29: The Findings and Declarations of Proposition J clearly articulate many public concerns with role of money in politics and should be re-adopted, perhaps adapted to be part of the general conflict of interest law - Chapter 2 of Article III of the C&GCC.

Recommendation 29: That the Ethics Commission hold a hearing on "Proposition J Revisited" to consider how some of its concepts apply today and whether the "public benefit" definition includes elements that should be incorporated into sections of the C&GCC, and specifically consider offering amendments to C&GCC which re-incorporate its Findings and Declarations into current San Francisco law, and to consider placing these amendments on the ballot.

Finding 29: Disagree. The intents and purposes of Proposition J were redrafted, clarified and expanded by Proposition E in 2003, in apparent response to concerns that existing law was outdated, inadequate and confusing (and, as noted below, subject to a court challenge). The Board of Supervisors unanimously voted to place the measure on the ballot by a vote of 10-0, and all eleven supported the measure (Ammiano, Daly, Dufty, Gonzalez, Hall, Maxwell, McGoldrick, Newsom, Peskin, Sandoval and Ma. Ma was not present for the vote.). This measure was also supported by Common Cause. The measure was also supported unanimously at the Ethics Commission by Commissioners Melbostad, Planthold, Garcia and McCoy. Proposition E was adopted with support from 62% of the voters.

Recommendation 29: Needs further analysis. City laws prevent all City officials and employees from accepting anything of value for the duties they perform. In addition, local ordinance identifies a number of "restricted sources" who may not make donations to candidates and office holders. Note: The language in Proposition J was determined to be unconstitutional by the Los Angeles Superior Court in 2002. That ruling still stands and there is no reason to believe that it would fare differently in San Francisco, indicating that a measure to readopt Proposition J, as written, would be fruitless. The Commission intends to include this issue as part of a larger discussion of the conflict-of-interest and campaign finance rules.



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR
CHAIRPERSON

August 22, 2014

PAUL A. RENNE
VICE-CHAIRPERSON

The Honorable Presiding Judge Cynthia Ming-mei Lee
400 McAllister Street, Department 206
San Francisco, CA 94102

BRETT ANDREWS
COMMISSIONER

Re: Civil Grand Jury Report: Ethics in the City

BEVERLY HAYON
COMMISSIONER

Dear Judge Lee:

PETER KEANE
COMMISSIONER

The 2014 Civil Grand Jury produced a report regarding the Ethics Commission. In 13 of their findings/recommendations, they requested that both the Ethics Commission and the Ethics Commission Executive Director respond to those sections.

JOHN ST. CROIX
EXECUTIVE DIRECTOR

My responses must concur with those of my Commissioners. They are attached.

Sincerely,


John St. Croix
Executive Director

Cc: Board of Supervisors

Ethics in the City: Promise Practice or Pretense
Response to Findings and Recommendations
California Penal Code, section 933.05
San Francisco Ethics Commission Executive Director

Finding 4: Some information currently reported and posted is not put into the standard searchable electronic format. The Jury specifically finds that contract approval forms, Form 700 forms, behested payments forms, and Lobbyists on Behalf of the City forms can be converted to a searchable format before they are posted.

Recommendation 4: That contract approval forms be converted to a format which allows searches by the name of the official, by the name of the contractor, the value of contracts and the date the contract was signed. Behested payments information should be filed electronically in a format that allows for searches and data aggregation. Form 700s should be formatted to allow data to be searched on income sources, outside employment, gift sources and travel.

Finding 4: Partially agree. There is some information filed with the Ethics Commission not currently in searchable electronic format.

Recommendation 4: Partially implemented/partially will not be implemented. Converting each type of form into such a format requires expensive development of software platforms. This particular recommendation would be extremely expensive. Over time, the Commission plans to develop such platforms for most if not all of the filings it administers. Lack of funding for development means that the addition of the various forms will be done as resources are made available. It should be noted, for example, that 2014 is the first time ever that all Form 700 financial disclosures filed with the Ethics Commission had to be submitted electronically. This was an important, but technically difficult step. Since there is no specified state electronic schema for these forms, creating a searchable database would be risky as it might not conform to state standards when they are eventually promulgated. But it is a desirable goal and will be accomplished eventually. Absent the proper software, data would have to be entered manually. This is unrealistic as the cost would be higher in terms of staff time and attendant issues would arise such as transfer error.

The Commission has already made great progress in moving its many filings into electronic databases, and there should be no doubt that this will continue. San Francisco is ahead of the majority of jurisdictions in this area. For example, The New York Times recently noted that the Federal Election Commission takes weeks and in some cases more than a month to process campaign finance filings of federal candidates, whereas in San Francisco this information is processed in a matter of minutes.

Note: this recommendation includes Behested Payment Forms, which are not filed with the Ethics Commission.

Finding 5: Required filings are treated independently and cannot easily be cross searched electronically using common data reference fields like name and organization to access and aggregate information types, such as dollar amounts, that cross between filings.

Recommendation 5: The Ethics Commission work to develop a common format database for data posted to DataSF, initially aiming to combine campaign, lobbying and Form 700 data.

Finding 5: Disagree partially. This assertion is not completely accurate. The Commission compiles all campaign and lobbyist filings on DataSF so that the information may be searched and aggregated. In fact, the Commission uses the campaign and lobbyist data on DataSF to aggregate and visualize the data on the Commission's web dashboards.

A recent report by the Mayor's Office describes "how the San Francisco Ethics Commission uses DataSF to increase transparency by summarizing and creating visualizations related to ethics data and reports." Further, the report states "Our top referrer is the Ethics Commission, see Figure 12, which has made extensive use of DataSF not only as a publishing platform but as a means to create dashboards and visualizations on its own site. See Figure 13 on the next page for a screenshot showing how the Ethics Commission creates visualizations using the DataSF platform and then embeds the visualizations into a web page. This makes them the top embedders, i.e. the top data visualizations that have been viewed within an external website."

Further, according to "Governing" magazine, the U.S. Open Data Census in March of this year rated San Francisco as the "best city for open data" in the country. The study involved gives both our lobbyist reporting system and our campaign finance system perfect scores.

Recommendation 5: Partially implemented/partially awaiting state action. The Commission notes that the campaign and lobbyist data are already available in a common database format on DataSF. Form 700 data is not on DataSF because a state data schema has yet to be defined by the Fair Political Practices Commission and the Commission will revisit this issue by February 2015.

Finding 7: The Ethics Commission provides written information only in English although San Francisco has strong political participation from communities and officials whose first language is not English and who require guides and educational materials relevant to their needs.

Recommendation 7: The Ethics Commission should make guides and educational materials available in the major languages as is done in other City Departments.

Finding 7: Agree. This is correct for the time being.

Recommendation 7: Will be implemented. The Commission will make guides in education materials as is done in other departments.

Finding 12: Many departments have failed to post their sources of outside funding, as required by the Sunshine Ordinance.

Recommendation 12: The Jury recommends that the Ethics Commission and the Sunshine Ordinance Task Force review departmental web sites for compliance and notify non-compliant departments to immediately post their sources of outside funding, or face a show-cause before the Ethics Commission on why the information has not been posted.

Finding 12: The Commission does not have enough information to respond to this finding so it cannot yet agree.

Recommendation 12: Will be partially implemented. The Commission Director will direct staff to notify all departments to remind officials and employees to follow this requirement and ensure that such postings are easy to locate on departmental web sites.

Finding 13: When violations of the standards in a departmental Statements of Incompatible Activities are enforced departmentally as a disciplinary matter, the Ethics Commission is not notified and the discipline is not disclosed to the public.

Recommendation 13: All violations of departmental Statements of Incompatible Activities should be disclosed to the Ethics Commission and posted on the Commission's web site.

Finding 13: Agree. Normally, departments are required to keep employee disciplinary measures confidential. In accordance with the Civil Service Commission's "Citywide Employee Personnel Records Guidelines," all employee personnel records—including records of completed/resolved/sustained disciplinary actions—must be maintained only in the employee's Official Employee Personnel File ("OEPF"). How long a disciplinary action remains in the OEPF and what is removed from an OEPF will vary depending on departmental policy and the applicable collective bargaining agreement. Employees' OEPFs are maintained in their departments; the Ethics Commission does not have access to those files. Thus, only the department head would have information regarding disciplinary matters. Moreover, even if the Ethics Commission did have that information, the right of privacy in the California Constitution protects employees from unwarranted disclosure of confidential information. Cal. Const. Art. I, Section 1. Accordingly, as information regarding disciplinary actions taken against an employee is considered a confidential personnel matter/confidential personnel information it is not normally disclosable. In addition, there are a number of other state laws protecting employee privacy not mentioned here.

Recommendation 13: Will not be implemented. The Commission's position is that this cannot be implemented when it violates employee privacy rights.

Additionally, only a narrow range of five types of employee misconduct is disclosable, and even then ONLY when such matters are "confirmed." The "Good Government Guide" indicates that the process for determining if such matters are confirmed is "unclear." Further, the Guide states that "The privacy issues pertaining to these types of personnel records can be complex, and other considerations in addition to privacy, such as the need to maintain effective investigations, may be relevant."

The categories not exempt from disclosure are: 1) personal dishonesty, 2) misappropriation of public funds, resources or benefits, 3) unlawful discrimination against another on the basis of status, 4) abuse of authority, and 5) violence.

The disclosable categories are not necessarily addressed in each departmental SLA. Therefore, in order to carry out this recommendation, the Ethics Commission would have to take each reported case of employee misconduct, analyze whether it meets the disclosable threshold under local law, and then compare it with the requirements of the individual departmental SLA. There are at least 53 different departmental SLAs in existence; administering this proposal would be both difficult and incredibly time consuming and possibly incite a legal challenge.

Finding 14: The Ethics Commission has increased compliance by notifying any employee who fails to file Form 700 within 30 days after the deadline that he or she must file or face potential penalties.

Recommendation 14a: The Ethics Commission should continue to routinely notify all non-filers of their obligation within 30 days of the state filing deadline.

Recommendation 14b: The Ethics Commission should recommend dismissal for any officer or employee who fails to file 90 days after the deadline.

Recommendation 14c: The Ethics Commission should recommend dismissal for any officer or employee who files a Statement of Economic Interest (Form 700) that is inaccurate and relevant to the position they hold.

Recommendation 14d: Now that all Form 700 filers file electronically, the Ethics Commission should require that all Form 700s be filed with them as well as with the Department filing officer.

Finding 14: Agree.

Recommendation 14a: Implemented. The Commission already does this.

Recommendation 14b & c: Will be implemented in amended form. If someone has failed to file within 90 days, the Ethics Commission will recommend to the appointing authority suspension of that person until they have filed.

Recommendation 14d: Will be implemented in the future. The Ethics Commission has already discussed doing this and it is an eventual goal. 2014 is the first year that Forms 700 filed with the Commission have been filed exclusively electronically. The Director notes that while this process was successful and resulted in only five non-filers as of this writing, it was also difficult to convert the many filers to a new process. The Commission needs a few years to settle into the new process but would like to introduce a change wherein all Form 700 filers in the City file directly with the Ethics Commission electronically. We envision doing this in the foreseeable future; a set timeframe is not possible because it will largely be determined by available funding.

Finding 15: The disclosures in Form 700 filings also may reveal violations of San Francisco laws that are enforced locally. This includes compensated advocacy before other commissions and arrangements that violate the locally adopted and enacted Statements of Incompatible Activities for each department.

Recommendation 15: The Ethics Commission should audit and act on violations disclosed through Form 700 filings of local prohibitions such as compensated advocacy and incompatible activities, and enforce these violations with strong action.

Finding 15: Agree.

Recommendation 15: Implemented. The Ethics Commission already does this. The Director notes that while we do not have the staffing resources to audit all Form 700 filings, we do review a portion of them based on investigative criteria, complaints filed and other information that is brought to our attention.

Finding 17a: There is useful information in the calendars of City Officials that should be readily available to the public.

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.

Finding 17c: The training currently provided on the Sunshine Ordinance contains no materials on the keeping of official calendars as required by the Ordinance.

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.

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.

Findings 17a – 17c: Agree. Although there is a lack of explanatory information in the report, the Ethics Commission will not dispute these findings, except to note that the ordinance does not require attendee names.

Recommendation 17a: Will not be implemented. The Ethics Commission does not have the staffing resources to do this; other priorities are wanting already. The Ethics Commission recommends that departments should collect the official calendars prepared under the Sunshine Ordinance monthly, convert them to electronic form and post them online.

Recommendation 17b: Will be implemented. The Director will work with the City Attorney's office to include this item in future annual Sunshine Trainings (although it does not apply to the vast majority of those who receive the training).

Finding 21a: The policy-making powers of the Ethics Commission are vested in the Commission itself, not in the Executive Director (absent express delegation by the Commission).

Finding 21b: The current structure where staff provides much of each Commission meeting's content creates the impression that the Commission is not an independent policy-making body.

Recommendation 21: The Board of Supervisors should provide the Commissioners an Executive Secretary separate from the existing Commission's employee base who will, among other duties, prepare the Commission's agendas, maintain minutes, lists of complaints, serve as a liaison for public input and interested persons meetings and assist a Commission member to be the parliamentarian.

Finding 21a: Agree.

Finding 21b: Disagree.

Recommendation 21: Will not be implemented in the foreseeable future. The Ethics Commission's staffing priorities are for more investigators and auditors. The Commission notes that, while in an ideal world a Commission Secretary is desirable, for a commission this small it is not an urgent need.

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.

Recommendation 23: That the Ethics Commission apply to the City Attorney for permission to engage outside counsel for advice and recommendations.

Finding 23: Mostly disagree. The Ethics Commission has obtained outside counsel only three times.

Recommendation 23: Needs further analysis. This Ethics Commission is willing to discuss the merits of this with the City Attorney, but has concerns about continuity and costs. Under the Charter, it is ultimately not the Commission's decision to make.

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Recommendation 25: The Ethics Commission should begin to focus staff resources on monitoring and auditing other items within the Ethics Commission jurisdiction unrelated to campaigns such as the following ordinances: Conflict of Interest, Governmental Ethics, The Lobbyist Ordinance, Campaign Consultant Ordinance, and the Sunshine Ordinance.

Finding 25a – b: While true, this finding describes a huge volume of work. We disagree with the characterization of “little to no.”

Recommendation 25: Partially implemented. Provided with sufficient resources, more work in the area will be accomplished. The Commission staff does much more of this work than the finding indicates, but lacks the staff and resources to do this work on a comprehensive basis. As it is, the staff can only audit a few non-publicly financed campaigns each year due to resource limitations. The Commission notes that additional auditors are needed just for campaign finance; extending the audit reach is a desirable notion, but like many of these recommendations, this one comes with costs but no suggestions on how to meet them. Note: recent changes in the lobbyist ordinance will require audits of lobbyists in the future.

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Finding 26: Disagree. The concept is too broad to understand appreciably.

Recommendation 26: Already implemented. The Commission already provides links to the Secretary of State's CAL-Access database and material on the Fair Political Practices Commission web site. The Ethics Commission Staff will continue to link to other relevant web sites where appropriate. The Commission adds that it should be noted that the Commission's website is already considered among the best and most comprehensive sites in the country.

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.

Recommendation 27: When a bill is proposed or passed to amend campaign finance and ethics laws, it should specify how it "furthers the purposes of this Chapter".

Finding 27: Disagree. There is no basis for this finding.

Recommendation 27: Already implemented. All proposed changes to existing ordinances are accompanied by comprehensive staff memoranda explaining the details and purposes of the proposed changes.



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.

Page 2
August 25, 2014

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.

Page 3
August 25, 2014

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.

Page 4
August 25, 2014

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).

Page 5
August 25, 2014

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.

Page 6
August 25, 2014

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.

Page 7
August 25, 2014

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.

Page 8
August 25, 2014

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

Page 9
August 25, 2014

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.

Page 10
August 25, 2014

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 “furthers 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
City Attorney

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)
Jesse Smith, Chief Assistant City Attorney (via e-mail)
Jon Givner, General Counsel to the Board of Supervisors (via e-mail)
Andrew Shen, Deputy City Attorney (via e-mail)
Joshua White, Deputy City Attorney (via e-mail)



August 25, 2014

The Honorable Cynthia Ming-mei Lee
Presiding Judge
Superior Court of California, County of San Francisco
400 McAllister Street
San Francisco, CA 94102

Dear Judge Lee:

Pursuant to Penal Code sections 933 and 933.05, the following is in reply to the 2013-2014 Civil Grand Jury report, *Ethics in the City: Promise, Practice or Pretense*.

First, I would like to thank the Jury for their interest in ethics and their work in drafting this report. Residents deserve ethical government decision-making and administration. When ethical behavior is absent, trust in government to perform effectively and in the public interest is lost.

It should be noted that the Jury states that "officials at all levels have impeded actions intended to establish a culture of ethical behavior" and that "Jury members were concerned about reports of apparent improper actions by City officials and departments with little or no evident enforcement responses." I respectfully disagree with these statements – no actual misdeeds or examples are provided as evidence in the report.

Citizens should understand that City leaders and staff conduct themselves responsibly, professionally, and ethically. Officeholders and decision makers must follow extensive local and state regulations and disclosure requirements which include the following:

- Public access to meetings
- Public records access
- Campaign finance disclosures
- Statement of economic interests disclosure
- Gift disclosures
- Gift of travel disclosures
- Behested payments disclosures
- Lobbyist disclosures
- Annual ethics and sunshine training
- Sources of outside funding disclosures
- Post-public employment restrictions
- Public officials calendar disclosure
- Whistleblower protections
- San Francisco Ethics Commission and Sunshine Reform Task Force enforcement
- State enforcement of the Political Reform Act through the Fair Political Practices Commission

Leaders and staff regularly comply with these requirements. On the rare occasions when those required to comply do not, remedy and enforcement can be sought through the Ethics Commission, Sunshine Reform Task Force, and Fair Political Practices Commission.

Thoughtful suggestions to improve the many laws, regulations, and procedures already in the Charter and administrative code are welcome. Just recently, the Board of Supervisors strengthened the lobbying ordinance. But it should be restated that the ethics laws in San Francisco are already comprehensive and wide in scope.

The Mayor's Office response to the Civil Grand Jury's findings and recommendations is as follows:

Finding 4: Some information currently reported and posted is not put into the standard searchable electronic format. The Jury specifically finds that contract approval forms, Form 700 forms, behested payments forms, and Lobbyists On Behalf Of the City forms can be converted to a searchable format before they are posted.

Response: *Agree.* Some information filed with the Ethics Commission is not currently in a searchable electronic format.

Recommendation 4: That contract approval forms be converted to a format which allows searches by the name of the official, by the name of the contractor, the value of contracts and the date the contract was signed. Behested payments information should be filed electronically in a format that allows for searches and data aggregation. Form 700s should be formatted to allow data to be searched on income sources, outside employment, gift sources and travel.

Response: *Recommendation partially implemented. (Recommendation will not be implemented for behested payments which are not filed with the Ethics Commission.)*

The Ethics Commission notes that they plan on implementing this recommendation over time as resources become available. Converting each type of form into a searchable format requires the development of software platforms. Absent the proper software, data would have to be entered manually. Manual entry is an unattractive option for the Ethics Commission due to the cost of staff time and the potential for transfer error.

It should be noted that 2014 is the first time that all Form 700 financial disclosures filed with the Ethics Commission had to be submitted electronically. Since there is no specified state electronic schema for these forms, creating a searchable database would be risky as it might not conform to state standards when they are eventually promulgated.

San Francisco is ahead of the majority of jurisdictions in this area and processes filings in a matter of minutes. The Federal Election Commission takes weeks and in some cases more than a month to process campaign finance filings of federal candidates.

Finding 5: Required filings are treated independently and cannot easily be cross searched electronically using common data reference fields like name and organization to access and aggregate information types, such as dollar amounts, that cross between filings.

Response: *Disagree in part.* Required filings are treated independently. However, campaign and lobbyist filings are compiled on DataSF and the information can be searched, aggregated, and visualized for effect.

Recommendation 5: The Ethics Commission work to develop a common format database for data posted to DataSF, initially aiming to combine campaign, lobbying and Form 700 data.

Response: *Recommendation partially implemented/partially awaiting state action.* The Ethics Commission and its Executive Director note in their response that campaign and lobbyist data are already available in a common database format on DataSF. Form 700 data is not on DataSF because a state data schema has yet to be defined by the Fair Political Practices Commission.

Finding 20: Both the Ethics Commission and the Sunshine Ordinance Task Force act in good faith. They are authorized to come to similar ends – transparency in government. However, there are legal and procedural differences between their process and their legal requirements. Therefore, the results of their work are not in harmony with each other.

Response: *Agree.* Unlike the Sunshine Ordinance Task Force, which is an advisory body, the Ethics Commission is a law enforcement agency with the ability to impose monetary and other sanctions and its procedures are more substantial. Often, differences are based more on interpretive actions.

Recommendation 20a: The Mayor's Office should establish a blue-ribbon committee of experts and stakeholders in open government, sunshine and transparency, including former Sunshine Task Force members. The Committee of Experts should review and update the Sunshine Ordinance as necessary and should report to both entities and the Board of Supervisors recommendations that would result in coordination and respect for the functions of each entity.

Response: *Recommendation will not be implemented, not warranted.* The establishment of a new committee is not necessary to revise San Francisco campaign and ethics laws. The Ethics Commission can submit legislation directly to the Board of Supervisors. Additionally, proposed revisions to the Sunshine Ordinance can be offered by experts and stakeholders outside of the committee process. Most recently, Supervisor David Chiu proposed changes to the lobbying ordinance that were eventually approved by the Board of Supervisors.

Recommendation 20b: For now, arrangements should be made jointly by the Ethics Commission and the Sunshine Ordinance Task Force to have complaints heard by an independent hearing officer who would develop a consistent legally sufficient record of the case for the decision of each body. This would allow the meetings of the Task Force and the Commission to focus on broader policy issues.

Response: *Recommendation will not be implemented.* There is no procedure in the voter adopted Sunshine Ordinance to allow for adjudication of complaints by an independent hearing officer. The Ethics Commission is the officially appointed body that investigates referrals and complaints from the Sunshine Reform Task Force.

Finding 24a: The Jury was unable to locate and the Ethics Commission was unable to provide copies of any reports or notes of oral presentations to the Mayor or to the Board of Supervisors as required in the Charter to report annually on the effectiveness of San Francisco's ethics laws.

Finding 24b: The Jury was unable to locate any reports that reviewed changes in laws aimed at transparency and ethical conduct adopted in other jurisdictions that might be relevant to San Francisco. The only references were to changes based on court decisions that resulted in less public disclosure and less protection against the influence of money in politics even when those decisions were not based on San Francisco cases.

Response (24a and 24b): *Disagree in part.* The Executive Director of Ethics Commission is in regular contact with both the Legislative and Executive Branch. The Ethics Commission provides comment and analysis of the legislative changes proposed by the Board of Supervisors.

Finding 24c: The proper standard to judge the effectiveness of laws is to consider their ability to achieve the purposes set forth when they were enacted.

Response: *Agree.*

Recommendation 24: The Mayor and the Board of Supervisors should request an annual written report from the Ethics Commission that meets the standards set out in the Charter for annual reviews of the effectiveness of the City's laws. This report should be posted on the Ethics Commission web site.

Response: *Recommendation will not be implemented, not warranted.* This recommendation appears unnecessary. The City Charter mandates an annual review of law effectiveness, not a written review. The Ethics Commission and the Executive Director communicate to the Mayor and Board through memos, oral testimony, in-person meetings and the Annual Report.

Finding 26: The Ethics Commission, though its staff, can catalog information reported elsewhere that is relevant for supplemental understanding of information currently reported locally. Links to this information would be a logical addition to the Ethics Commission web site.

Response: *Agree in part.* The Ethics Commission already provides links to information not reported in San Francisco.

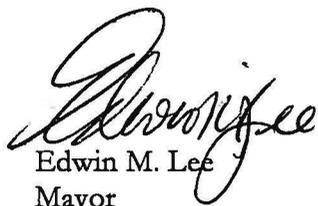
Recommendation 26: The Ethics Commission should determine information reported elsewhere that is relevant for supplemental understanding of information currently reported locally, and provide links to it on the Ethics Commission web site, if it cannot be imported and posted.

Response: *Recommendation already implemented.* The Commission's website is already considered among the best and most comprehensive sites in the country. Links to the Secretary of State's CAL-Access database and material on the Fair Political Practices Commission web site are easy to access. The website will continue to link to other relevant web sites where appropriate.

Mayoral Response to the Civil Grand Jury – Ethics in the City
August 25, 2014

Thank you again for the opportunity to comment on this Civil Grand Jury report.

Sincerely,

A handwritten signature in black ink, appearing to read "Edwin M. Lee".

Edwin M. Lee
Mayor

A handwritten signature in blue ink, appearing to read "Joy Bonaguro".

Joy Bonaguro
Mayor's Chief Data Officer

SUNSHINE ORDINANCE
TASK FORCE



City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. (415) 554-7724
Fax No. (415) 554-7854
TDD/TTY No. (415) 554-5227

August 28, 2014

The Honorable Cynthia Ming-mei Lee
Presiding Judge
Superior Court of California, County of San Francisco
400 McAllister Street, Room 008
San Francisco, CA 94102-4512

RE: Response – 2013-2014 Civil Grand Jury Report - Ethics in the City: Promise, Practice or Pretense

Dear Judge Lee:

Pursuant to California Penal Code Sections 933 and 933.5 please find listed below the Sunshine Ordinance Task Force (SOTF) response to the Civil Grand Jury Report – Ethics in the City: Promise, Practice and Pretense.

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.

The SOTF partially disagrees with finding No. 11.

E-mail messages related to City business that are received or sent by City officers and employees are public records and should be retained under a Department's record retention policy and schedule approved pursuant to San Francisco Administrative Code Section 8.3, which provides, *inter alia*: "Current records and storage records less than five years old may be destroyed or otherwise disposed of if their destruction or other disposition within a shorter length of time will not be detrimental to the City and County or defeat any public purpose." (San Francisco Administrative Code Section 8.3.) The SOTF is mindful that public business may increasingly be conducted via mixed private/public e-mail accounts, and that this simultaneously raises privacy and ethical concerns as well as challenges for enforcing public records regulations as to these quasi-public accounts. Text messages may or may not be public "records"; a court case (*City of*

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San Jose v. Santa Clara County Superior Court [Smith], S218066) is now considering that issue.

There is no uniform retention requirement for e-mail communications, let alone text messages. Department heads are permitted to destroy records, provided that "the retention period applicable to them [is] set forth in a schedule for the systematic retention and destruction of records that is prepared by the department head, approved by the Mayor or the Mayor's designee, or the board or commission concerned." (San Francisco Administrative Code Section 8.3.)

As noted by the Grand Jury, guidance from the City Attorney as to both e-mail and text messages could be more clear. The SOTF may issue its own guidance to City Departments as to e-mail and text message retention and production under its power to "provide information to other City departments on appropriate ways to implement the Sunshine Ordinance" (Sunshine Ordinance Section 67.30(c).)

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 list each Department, its policy, and how to obtain documents.

The recommendation requires further analysis.

The Sunshine Ordinance Task Force, in conjunction with the City Attorney's Office and Ethics Commission, should develop policies to ensure preservation of e-mails and text messages consistent with preservation of other public records. Before adoption, these policies would be made available for public comment. The finalized policies would then be sent to all City agencies, boards, commissions, and departments and made available on the SOTF's website. Each City agency, board, commission, and department web site should include, in a similar section (i.e., "About Us" or "For More Information"), the applicable Record Retention Policy and Schedule and information about how to request public records, including contact information and forms, if applicable. The SOTF, through the Compliance and Amendments Committee and the Education, Outreach, and Training Committee, intends to review these issues in the next 6 months.

In addition, it should be noted that California Government Code Section 34090 states that the destruction of records less than two years old is not authorized. Section 8.3 of San Francisco Administrative Code, however, authorizes destruction of records in less than two years if this would not be detrimental to the City and County or defeat any public purpose. This section of the Administrative Code should be amended to comply with California Government Code Section 34090.

Finding 12: Many departments have failed to post their sources of outside funding, as required by the Sunshine Ordinance.

The SOTF agrees with finding No. 12.

Sunshine Ordinance Section 67.29-6 plainly states, “No official or employee or agent of the city shall accept, allow to be collected, or direct or influence the spending of, any money, or any goods or services worth more than one hundred dollars in aggregate, for the purpose of carrying out or assisting any City function *unless the amount and source of all such funds is disclosed as a public record and made available on the website for the department to which the funds are directed*”.

Recommendation 12: The Jury recommends that the Ethics Commission and the Sunshine Ordinance Task Force review departmental websites for compliance and notify non-compliant departments to immediately post their sources of outside funding, or face a show-cause hearing before the Ethics Commission on why the information has not been posted.

The recommendation requires further analysis.

The SOTF, through its Compliance and Amendments Committee and/or its Education, Outreach, and Training Committee, shall review the web sites of each City agency, board, commission, and department for compliance and shall develop a model for content required by Sunshine Ordinance Section 67.29-6. This said, the SOTF is mindful of its limited resources to regularly review and monitor each departmental web site for compliance with this provision alone and to notify non-compliant departments. The SOTF is also skeptical that the Ethics Commission has the power to order a show-cause hearing in the manner that the Jury recommends.

Finding 17a: There is useful information in the calendars of City Officials that should be readily available to the public.

The SOTF agrees with finding No. 17a.

Sunshine Ordinance Section 67.29-5 provides, *inter alia*, “The Mayor, The City Attorney, and every Department Head shall keep or cause to be kept a daily calendar wherein is recorded the time and place of each meeting or event attended by that official.”

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.

The recommendation will not be implemented because it is not warranted or reasonable.

Having official calendars available at one central place or website – e.g., via the Ethics Commission’s collection of official calendars, or on a central open data API – would facilitate the public’s ability to locate those official calendars. This recommendation would shift responsibility from Department Heads to the Ethics Commission. However, there is no reason why various departments should not be responsible for making

calendars on their own websites as well. Additionally, barring possible technology and resource barriers that are presently unknown to the SOTF, the SOTF can provide static links on its own website to the public calendars of all city departments and agencies. The SOTF, through its Compliance and Amendments Committee and/or its Education, Outreach, and Training Committee, intends in the next 6 months to review departments' and agencies' compliance and urge department heads to maintain their calendars permanently and post them on their websites no later than "three business days subsequent to the calendar entry date." The Task Force will also incorporate the Sunshine Ordinance's public calendar requirements into its education and outreach materials.

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.

The SOTF agrees with finding No. 17b.

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.

The recommendation requires further analysis.

The SOTF, through its Education, Outreach, and Training Committee, assists with the annual training provided by the City Attorney under the Sunshine Ordinance. As noted above, the Task Force's Compliance and Amendments Committee and/or the Education, Outreach, and Training Committee intends in the next 6 months to review compliance with the Sunshine Ordinance's calendar requirements and to conduct a larger review of all existing Sunshine Ordinance training materials and programs, with the intent of better tailoring these training materials and programs to the audience (Elected Officials, Members of Board and Commissions, Commission Secretaries, Department Heads, Department Head Secretaries, Public Information Officers, etc.). Efforts by the City Attorney and the Ethics Commission with respect to this recommendation should be coordinated with the SOTF. Keeping with the best practices of open government, the SOTF also urges that the Board of Supervisors adhere to the public calendar requirements of other city departments and agencies.

Finding 17c: The training currently provided on Sunshine Ordinance contains no materials on the keeping of official calendars as required by the Ordinance.

The SOTF agrees with finding No. 17c.

Finding 20: Both the Ethics Commission and the Sunshine Ordinance Task Force act in good faith. They are authorized to come to similar ends - transparency in government. However, there are legal and procedural differences between their process and their legal requirements. Therefore, the results of their work are not in harmony with each other.

The SOTF partially disagrees with finding No. 20.

The SOTF refers very few matters to the Ethics Commission for enforcement. Although this reflects in part a view that not all Sunshine Ordinance violations merit referral for enforcement, it has also not fostered a greater agreement or understanding as to the appropriate burden to show or enforce a violation, willful or not. As illustrated by earlier SOTF responses, there remains ample terrain for collaboration and coordination between these separate but overlapping bodies.

Recommendation 20a: The Mayor's Office should establish a blue-ribbon committee of experts and stakeholders in open government, sunshine, and transparency, including former Sunshine Ordinance Task Force members. The Committee of Experts should review and update the Sunshine Ordinance as necessary and should report to both entities and the Board of Supervisors recommendations that would result in coordination and respect for the functions of each entity.

The recommendation requires further analysis.

The SOTF strongly encourages efforts by any office or entity to further the aims of transparent and open government. Nonetheless, whether a blue-ribbon committee is created or not, the SOTF has the power and duty to "propose to the Board of Supervisors amendments to the Sunshine Ordinance" pursuant to San Francisco Administrative Code Section 67.30(c). The SOTF, through its Compliance and Amendments Committee, intends in the next 6 months to initiate a new review of the Sunshine Ordinance to, in part: (1) identify sections of the Sunshine Ordinance which overlap and/or conflict with the rules governing the city's Ethics Commission, and (2) identify areas of the Sunshine Ordinance that should be updated to reflect new technologies implemented since its passing. Such a review should consider the views of City agencies, boards, commissions, and departments as to both policy goals and practical implementation issues; the views of "experts and stakeholders in open government, sunshine, and transparency, including former Sunshine Ordinance Task Force members;" and the views of the City Attorney and the Ethics Commission in order to foster greater harmony among those entities involved.

Recommendation 20b: For now, arrangements should be made jointly by the Ethics Commission and the Sunshine Ordinance Task Force to have complaints heard by an independent hearing officer who would develop a consistent legally sufficient record of the case for the decision of each body. This would allow the meetings of the Task Force and the Commission to focus on broader policy issues.

The recommendation requires further analysis.

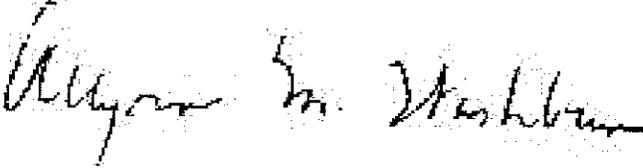
The SOTF would be interested in fully vetting a proposal to have particularly complex cases heard by an independent hearing officer in order to develop complete and legally sufficient records.

Regarding whether this recommendation is warranted at this time: The SOTF is keenly aware of the backlog in its caseload and concerted efforts are already underway to address it. In particular, the SOTF has scheduled an additional full SOTF meeting each month through the end of this year and has reinstated a complaint procedure to focus and narrow the issues in dispute. Further, the SOTF intends in the next 6 months to review and update its bylaws and complaint procedures, review due process regarding SOTF complaints and referrals, and review SOTF and Ethics Commission procedures regarding referrals. The SOTF will seek public comment on any proposed changes to the bylaws and complaint procedures.

Regarding whether the recommendation is feasible: SOTF members have raised several concerns, including how this hearing officer would be selected in order to ensure expertise and impartiality, how this hearing officer would be compensated, and how his or her independence would be assured.

The Sunshine Ordinance Task Force would like to thank the Civil Grand Jury. If there is any follow up needed, please let us know.

Sincerely,

A handwritten signature in cursive script that reads "Allyson M. Washburn".

Allyson Washburn, Chair
Sunshine Ordinance Task Force

- c. Members, Board of Supervisors
- Angela Calvillo, Clerk of the Board
- Government Audit and Oversight Committee Clerk