

On Monday, June 20, 2011, the San Francisco Civil Grand Jury released a report entitled: “San Francisco’s Ethics Commission: The Sleeping Watch Dog.” This document serves as the Ethics Commission’s official response to that report.

Before responding to the findings of the Civil Grand Jury, the Ethics Commission wishes to convey its disappointment in the tone and tenor of the report. The Commission strives for improvement at all times, but also works under the reality of a heavy work load and limited resources. The CGJ had an opportunity to make objective and helpful criticisms of the Ethics Commission’s work and chose instead to offer a politicized review that does not take into account the limitations place on the Commission by the City’s financial straits and by the Charter provisions that created the Ethics Commission in the first place. Most specifically, the Commission takes exception to the title of the report. Anyone who sees the title but does not take the trouble to read the report will almost certainly adopt a negative attitude towards the Commission without knowing whether that negativity is justified or even how. The Civil Grand Jury knows, or should know, that such a result is neither objective nor helpful in improving the performance of the Commission.

Finding 1

The CGJ suggests: Recommendation 1.1) using a fixed fine structure or always applying the maximum allowable fine, and Recommendation 1.2) allowing the respondent to request a public hearing if he/she disagrees with the fine. The Commission disagrees with this finding and the recommendations.

The Civil Grand Jury suggests a fixed fine structure. This would disallow any consideration of individual circumstances and create unintended consequences much like “zero tolerance” and “three strikes” laws. The Commission believes that the punishment should fit the crime. The CGJ assumes that staff is incapable of negotiating fair fines that fit individual situations and calls this process “vulnerable to the manipulation against the public interest.” It does not say how or why. Indeed, negotiating settlements is a central part of any prosecutor's job. In the criminal justice system, prosecutors regularly negotiate with criminal defendants to encourage them to plead guilty to lesser charges and face less stiff penalties. This role serves both government efficiency and the interests of justice. Further, the current process provides for review of all settlements to ensure that the staff's proposed agreements are fair and serve the City's goals. Under the current process, all negotiated settlement agreements and their attendant proposed fines are sent to the individual Commission members for consideration and approval. If more than one Commissioner disapproves of the proposal, it is automatically calendared for a closed-session discussion at a Commission meeting. While the Commission agrees with staff recommendations more often than not, there are times when the Commission redirects staff to further negotiations. Further, any respondent who cannot or will not reach a settlement agreement with staff will have his or her case heard in a closed-session probable cause hearing. At the respondent’s request, this hearing can be held in public. After a finding of probable cause, a public hearing on the merits is scheduled. The Commission believes this system is more logical and fairer than the “one size fits all” approach recommended by the CGJ.

Finding 2

The CGJ accuses the Ethics Commission of failure to enforce the City's Sunshine Ordinance: Recommendation 2) states that Sunshine Ordinance Task Force actions should have a timely hearing. The Commission agrees with this finding and states that it already endeavors to meet this goal.

However, this recommendation hardly dovetails with the discussion that precedes it. The Civil Grand Jury assumes that because the Ethics Commission has dismissed 18 referrals from the Sunshine Ordinance Task Force, somehow this is a failure of Ethics to do its job. The Ethics Commission stands by its decisions in this area. A nineteenth complaint in which the Ethics Commission staff has recommended a finding of misconduct has been pending at the Commission since October of 2010. The CGJ did not include this information in its report. The item has been pending for this lengthy period at the behest of the original complainant, who coincidentally *is a Member of the Sunshine Ordinance Task Force*. What the CGJ neglected to consider is the fact that the Sunshine Ordinance Task Force routinely ignores the advice of its City Attorney as well as due process considerations, resulting in a pattern of findings and referrals that are ill-founded both factually and legally. Further, the Civil Grand Jury chose to ignore that the Ethics Commission proposed several reforms on how it handles Sunshine referrals starting in May 2010 and, in particular, that the Sunshine Task Force has had these reforms under its consideration since August 2010. (*See August 17, 2010 memo from the Ethics Commission to the SOTF re: Regulations regarding Enforcement of Sunshine Ordinance Complaints*). The Commission is ready to execute reforms but as a courtesy is awaiting the comments and suggestions of the SOTF.

Finding 3

The CGJ suggests that the Commission not wait for the City Attorney or District Attorney to assert jurisdiction before beginning an investigation: Recommendation 3) suggests beginning an investigation immediately upon close of the 14-day reply window. The Commission has no issue with this suggestion; however, the Investigative Staff must have discretion in determining which cases to prioritize based on current circumstances. Additionally, since staff resources are limited, it does not make sense to duplicate the work of other law enforcement agencies.

Finding 4

The CGJ believes that the appointment of Ethics Commissioners by elected officials leads to the appearance of impropriety and Recommendation 4) suggests the addition of four Commission members appointed by non-governmental entities. The Commission is neutral on this suggestion.

The Commission believes that it is the behavior of the Commission that reflects its integrity, not its set-up. The voters chose this arrangement specifically in order to ensure that the Commission is not subject to the control of any elected official. The Commission will not second-guess their wisdom. Indeed, on one occasion the voters rejected an alternative budgeting plan that was

presented to them. There are measures in place to reduce the likelihood of actual conflicts of interest in decision-making. For example, Commissioners may serve only one six-year term, reducing the likelihood that they would curry favor to ensure reappointment. They are appointed by an array of officials, not just the Mayor or the Board of Supervisors. They may be removed only pursuant to Charter section 15.105 for official misconduct; thus, the voters ensured that the Commissioners would act independently of their appointing authorities. Commissioners are also subject to both state and local conflict of interest and incompatibility laws. Should the voters determine to change the composition of the Commission by adopting a Charter amendment, the Commission would abide by the voters' decision.

Finding 5

The CGJ believes that the Executive Director has too much discretion in proposing dismissal of individual complaints, Recommendation 5) suggests that regulations be amended to require an actual discussion of each recommendation for dismissal and a vote on such recommendations. The Commission believes that the streamlined process now in place is a more effective use of resources and disagrees with this recommendation.

Ethics staff members prepare comprehensive reports for the Commissioners regarding both dismissals and complaint settlements. Commissioners make independent decisions regarding whether to support staff recommendations or to calendar the items for Commission meetings. If more than one Commissioner has concerns about staff recommendations, the item is calendared for the next Commission meeting. Additionally, the Civil Grand Jury somehow concludes that Commissioners are not notified in advance about which cases will be on the agenda. This is not true.

Also, the Civil Grand Jury takes the Ethics Commission to task for enforcing the Brown Act open meeting laws by refusing to discuss business apart from public meetings. Allowing individual Commissioners to lobby other Commissioners about such decisions would create seriatim meetings. Under the current format, Commissioners must make informed individual decisions and not rely on the work (and potential political leanings) of their colleagues to inform their decisions. Commissioners are free, as always, to make their cases to each other – in front of each other – at Commission meetings.

Finding 6

The CGJ states that the Ethics Commission does not have a database to track issues efficiently and Recommendation 6) suggests creating or modifying a database to track issues efficiently.

The Commission believes that the Civil Grand Jury is referencing document requests when it makes this recommendation about "issues." The Ethics Commission is concerned that the CGJ had some difficulty in obtaining documents from our staff and will endeavor to improve on this function. Customer service is a high priority for us. When official document requests are presented to the Commission, a single staff member is assigned to log the request, when it arrived and from whom. The log includes the name of staff responsible for responding and when

the request was filled. When individual staff members receive document requests, they do not always have them logged into this system and staff will be instructed to ensure that all requests for documents or information are logged properly.

Finding 7

The CGJ suggests that audio recordings of Commission meetings do not provide enough transparency and Recommendation 8) suggests that Commission meetings be televised. The Commission is neutral on this finding.

Given the City's limited fiscal resources, placing the Ethics Commission on SFGTV would increase costs and/or displace coverage of another commission or other body; such factors are not addressed in the report. As the Commission has been short-staffed during its entire history, its budget priorities will reflect staffing needs before all other expenses; asking to be televised is too much of a luxury at this time. Further, the Ethics Commission notes that it has been in the forefront in the use of enhanced audio coverage of meetings, web availability of information about matters within the Commission's jurisdiction and creative and comprehensive use of social media, including but not limited to Twitter, RSS, Facebook and iTunes, all of which provide greater outreach at minimal cost (*see* Ethics Commission Memo of July 8, 2010 re: Commission Outreach and Education).

This concludes the Ethics Commission response to the Civil Grand Jury report of June 20, 2011.