



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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COMMISSIONER

LEEANN PELHAM
EXECUTIVE DIRECTOR

Date: October 13, 2016

To: Members of the Ethics Commission

From: Jessica Blome, Deputy Director, Enforcement & Legal Affairs

Subject: **AGENDA ITEM 5 – Enforcement Program Report for the October 17, 2016 Commission Meeting**

Summary

This report provides programmatic and operational information related to the Enforcement Program. This report also responds to the Commission's request for information related to pending complaints alleging violations of laws within the subject matter jurisdiction of the Ethics Commission.

Action Requested

No action is required by the Commission, as this item is only for informational purposes.

Michael Petrelis v. Steve Kawa, Update

At the Commission's request, on September 29, I sent a letter to Steve Kawa, the Mayor's Chief of Staff, asking him to determine whether his electronic calendar for the months of July, August, and September 2015 could be recovered from data backup files in the City system. My letter to Mr. Kawa is provided as Attachment 1 to this Enforcement Report. The Commission asked Staff to send this letter during its September 26, 2016, regular meeting. Mr. Kawa responded on Friday, October 7 to report that he is working with the Department of Technology to locate the missing electronic calendar entries and may be able to recover them from a separate server due to an unrelated litigation hold. Mr. Kawa's letter is provided as Attachment 2 to this Enforcement Report. Mr. Kawa stated he would investigate the possibility of recovering his electronic calendar entries from the separate server and provide us with an answer as soon as possible. As of the date of this report, Staff has not received any further information from Mr. Kawa. Mr. Petrelis has received copies of both letters.

Ongoing Programmatic Review and Policy Development Plan

Beginning this year, the Commission and public have been provided with regular updates on the number and age of matters that make up the Commission's enforcement caseload. As part of the Executive Director's monthly report, overview data has been provided about matters in Preliminary Review as well as complaints formally under investigation. Going forward, that information will now be a regular part of this monthly Enforcement Report. Attachment 3 provides updated information about the enforcement caseload through October 11, 2016.

During its regularly scheduled meeting in September, the Commission asked Staff to report causes for delays the investigation of outstanding complaints with the Commission. This report details the efforts Staff have undertaken are pursuing to evaluate the enforcement process, identify inefficiencies, and develop reforms to ensure the timely review, investigation, and prosecution of administrative enforcement actions.

A. Current Enforcement Process

The San Francisco Charter requires the Ethics Commission to conduct investigations of alleged violations of the Charter and city ordinances related to campaign finance, lobbying, conflicts of interest, and governmental ethics laws. SF Charter § C3.699-13. In addition, the Commission is responsible for enforcing certain aspects of the Whistleblower Ordinance, § 4.105, and Sunshine Ordinance, §§ 67.34, 37.35(d). On July 5, 1997, the Commission adopted its Regulations for Investigations and Enforcement Proceedings. The Commission enumerated several goals in the Preamble to the Enforcement Regulations, which were designed to ensure the "fair, just, and timely resolution of complaints presented to the Commission." Enforcement Regulations, § I. The Commission hoped to set and maintain "objective standards" for the investigation and prosecution of matters before the Commission; eliminate any political or improper influence in the investigation and prosecution of person accused of ethics violations; protect the privacy rights of those accused of ethics violations; set and enforce reasonable time limits within which enforcement proceedings should be completed; coordinate and share with other governmental agencies the responsibility for investigations and prosecutions of complaints; and delegate to the Commission staff maximum discretion in the handling and resolution of complaints at staff level, while retaining oversight of those staff activities. The Enforcement & Legal Affairs Program is committed to achieving these goals. This section of the report, therefore, explains the current process Staff must use to investigate and prosecute alleged violations of laws under the Commission's jurisdiction.

Preliminary Review of Filed Complaints

According to the Charter, the Commission must conduct investigations "upon a sworn complaint of any person" or on its own initiative if it "has reason to believe that a violation" of the Charter or city ordinances related to campaign finance, lobbying, conflicts of interest, or governmental ethics has occurred. Investigations are confidential. SF Charter § C3.699-13(a). Staff refers to this phase of inquiry as Preliminary Review. As shown in Attachment 3, 84 matters are under Preliminary Review as of October 11, 2016.

The 1997 Enforcement Regulations (last amended on March 29, 2013) govern Staff's consideration of matters in Preliminary Review. According to Section IV(A) of the Enforcement Regulations, Preliminary

Review may include reviewing relevant documents, communicating with the complainant, informally interviewing the respondent, and any other inquiry necessary to determine whether a full investigation is warranted.

If, after Preliminary Review, Staff does not have reason to believe a violation of law has been committed, the Executive Director may dismiss the complaint. The regulations articulate the following non-exhaustive list of reasons that merit dismissal:

1. Credible evidence clearly refutes the allegations;
2. The allegations, if true, do not constitute a violation of law within the Commission's jurisdiction;
3. The complaint contains an expression of opinions, rather than specific allegations;
4. The allegations contained in the complaint are already under investigation, or already have been resolved, by the Commission or another law enforcement agency.

Each month, the Executive Director provides a written summary to the Commission of each complaint dismissed, including the reasons for dismissal. This summary is confidential, because the Charter requires all complaints to be considered and investigated confidentially "to the extent permitted by state law." SF Charter § C3.699-13(a). This report helps provide accountability by the Executive Director for his or her enforcement decisions and supports the Commission's general oversight role.

Investigation of Filed Complaints

Under the Charter, if Staff has "reason to believe" a violation of the law has been committed, Staff must "immediately" forward the complaint to the District and City Attorneys, who have ten days to inform Staff whether they intend to pursue an investigation into the allegedly unlawful conduct. Once the District and City Attorneys have responded with their decision, Staff has fourteen days to decide whether to pursue its own investigation of the complaint. Staff can only investigate a sworn complaint if the complaint itself "identifies the specific alleged violations which form the basis for the complaint," and Staff determines that the complaint contains sufficient facts to warrant an investigation. Staff has subpoena power and may depose witnesses and respondents during its investigation. The investigation and any records associated with it are considered confidential "to the extent permitted by state law." SF Charter § C3.699-13(a).

If, after a thorough investigation, the Executive Director does not believe a violation of the law has been committed, then Staff must prepare a "clear and concise" statement supporting the Executive Director's decision for consideration by the Commission. The Commission may then approve the dismissal, direct Staff to investigate the allegations further, or order Staff to prepare a Probable Cause Report.

Probable Cause Report and Hearing

If after, a thorough investigation, the Executive Director has probable cause to believe a violation of the law has been committed, then Staff must prepare a Probable Cause Report (PCR) for the Commission to consider during a confidential hearing. Under the Charter, the PCR must include a summary of the evidence Staff intends to present to the Commission at a hearing. The respondent has a right to be represented by counsel at the proceeding. The Probable Cause Hearing must be held privately, unless the respondent requests in writing that it be public. According to the Commission's Enforcement

Regulations, the entire Commission must sit as a hearing panel to conduct the Probable Cause Hearing unless “otherwise decided by the Commission.” Section VIII(A)1. If the Commission determines probable cause exists, then it must proceed with a hearing on the merits of the complaint.

Hearing on the Merits

Following a determination of probable cause, the Executive Director must issue an Accusation. The Accusation, not unlike the PCR, must clearly specify the laws the respondent has violated along with a summary of the evidence against the respondent. The Executive Director must deliver a copy of the Accusation to the respondent ten days after the Commission’s probable cause determination. The Accusation is a public document, and the parties may engage in discovery after it has been issued. In addition, the parties are entitled to file briefs with the Commission, arguing the merits of their positions in advance of the Hearing on the Merits. Once again, the Enforcement Regulations require the Commission to sit as the hearing panel to hear the merits of a case, “unless otherwise decided by the Commission.” Section VIII(C)1. The Commission may otherwise hire a hearing officer or designate an individual commissioner to hear the case and file a report and recommendation for decision by the Commission.

B. Areas for Identified for Improvement

When I stepped into the role of Deputy Director over Enforcement & Legal Affairs on August 15, comprehensive programmatic review of the enforcement process was a top priority. Indeed, Staff had already placed the review on its Annual Policy Plan. Since my onboarding, we have engaged in a robust analysis of the enforcement process in order to determine whether and what inefficiencies existed that were hampering the goals of the program, i.e. the fair, objective, timely resolution of complaints; the protection of privacy rights of those accused of ethics violations; and coordinate with other government agencies where possible, etc. Collectively, we have identified three areas for improvement. We are taking immediate steps to resolve these issues to the extent possible, and we have identified long-term solutions as well. First, we will increase investigative resources available to the Enforcement & Legal Affairs Program and pursue opportunities for collaboration with other government agencies. Second, we are evaluating potential revisions to the Enforcement Regulations that will help us timely resolve complaints. Third, we are working to develop a system for identification of Staff priorities and will seek clarification regarding the Commission’s priorities through a series of programmatic reviews.

(1) Staffing & Opportunities for Collaboration

The Charter requires Staff to undertake a robust and detailed investigations process; indeed, each complaint alleging specific violations of the law requires several hours of staff time just to complete Preliminary Review. In order to accommodate this workload, the Commission has historically employed four, full-time investigators. As the Commission is no doubt aware, the Commission last employed four, full-time investigators in 2009. That year, the first of four investigators left, and the Executive Director could not fill the vacancy due to budget shortfalls related to the 2008 financial crisis. Similarly, in 2011, the second of four investigators left, and the Executive Director could not fill that position either. In May 2016, one of the Commission’s two investigators left, leaving a single remaining investigator. Understaffing has impacted Staff’s ability to timely review matters in Preliminary Review and investigate formal complaints. For a written summary and visual account, see page 8 of this report and Attachment 3, respectively.

For its operating budget beginning in FY2017, the Commission requested and received budget approval to fund a third existing investigator position for which the Commission had authority but no funding. Importantly, two new investigative positions were also created and funded. With these new staff resources, the Enforcement Division will have a staff of four investigators this fiscal year. As this month's Executive Director report notes, we are continuing to work closely with the Department of Human Resources to launch the recruitment for these three vacancies this month.

In the interim, Staff is working diligently to evaluate all complaints as they come in. The Commission's only investigator, intakes complaints, evaluates them to determine whether they allege specific facts to justify an investigation, prepares dismissals or district/city attorney referral memos where appropriate, and investigates when necessary. I, as the Deputy Director over Enforcement & Legal Affairs, evaluate those determinations and either confirm or deny her initial recommendation upon Preliminary Review. The Executive Director ultimately decides whether dismissal is appropriate. For a depiction of the number and types of matters under Preliminary Review (pre-investigation) and formal complaints (investigation undertaken), please see Attachment 3. Once Staff decides to initiate a formal investigation into a complaint, the complaint is logged as a "formal complaint." Staff meet formally each month to discuss progress investigating each of the 23 open formal complaints and evaluate evidence gathered and assign next steps to ensure the cases are managed diligently.

We are also reinforcing partnerships as appropriate and seeking opportunities for collaboration. On October 6, staff met with Deputy City Attorney Andrew Shen to discuss matters in Preliminary Review older than 12 months to help evaluate cases and identify next steps.

In September, the Executive Director, Deputy City Attorney Andrew Shen, and I travelled to Sacramento to meet with FPPC leadership. We discussed our ongoing programmatic review of San Francisco's enforcement program and asked for guidance from the FPPC regarding how its process works. We also discussed the potential for joint investigations going forward and agreed to undertake joint investigations whenever appropriate. As a direct result of this meeting, Staff developed an enforcement referral process for internal referral of Staff initiated complaints resulting from routine compliance checks and audits. For example, if during a routine compliance check, Staff determines that a committee may have violated disclaimer requirements under the Campaign Finance Reform Ordinance, a standardized process now exists for Staff to alert the Enforcement & Legal Affairs Program to a potential CFRO violation. This proactive approach builds on existing staff expertise to identify possible violations more timely, helps ensure consistency in referrals office-wide, and therefore also supports more timely case resolution.

Finally, upon reviewing our list of formal complaints, we wanted to understand what happens with matters referred to the district and city attorneys as required by SF Charter section C3-6.999-13(a). The Executive Director, Investigator, and I met with the district and city attorneys in September to discuss matters their offices are investigating. Our conversation was productive, and all parties agreed to be more transparent about their respective investigations going forward. We also learned that the district attorney reserves the right to ask Staff to refrain from pursuing an administrative investigation until the district attorney has completed his criminal investigation in order to prevent conflicts caused by dueling interviews or premature warnings to criminal suspects.

(2) Enforcement Regulations

The San Francisco Charter is specific in its description of the investigations and enforcement process. According to the Charter, enforcement is bifurcated into two distinct hearing phases. First, Staff confidentially investigates complaints before presenting evidence to the Commission during a confidential Probable Cause Hearing. See SF Charter § C3.699-13(a). The Commission's Enforcement Regulations require most of the investigative process to occur after Preliminary Review and before the Probable Cause Hearing because the regulations require Staff to issue an Accusation ten days after a finding of probable cause. Due to this short timeframe, Staff has little opportunity for meaningful investigation or discovery after the Probable Cause Hearing. As a result, Staff prepares and presents the entirety of its case to the Commission during the Probable Cause Hearing. If the Commission finds probable cause exists, it must then hold an open administrative Hearing on the Merits of the case.

In other words, the Commission hears the same evidence twice, and the same commissioners who make probable cause determinations also make final merits determinations. Arguably, this process is not fair to either the complainant or the respondent. Commissioners who hear all of Staff's evidence and find probable cause will not likely change their minds after hearing the same evidence again during the hearing on the merits. Moreover, in practice, when the Commission hears the evidence twice as a full panel, the Commission is spending twice as much time on each complaint than necessary, which means Staff is spending twice as much time on each complaint than necessary.

Potential solutions for this problem already exist in the Enforcement Regulations. Indeed, the regulations already permit the Commission to "assign one of its members to conduct the probable cause hearing and submit a report and recommendation to the Commission." Enforcement Regulations, § VIII(A)(1). The regulations also permit the Commission to designate an outside hearing officer to preside over a hearing on the merits or designate an individual commissioner or outside hearing officer to hear the case and file a report and recommendation for a merits decision with the Commission. Enforcement Regulations § VIII(C)(1). Staff will likely recommend the Commission adopt this strategy as soon as an opportunity presents itself.

The immediate use of hearing officers at either the probable cause or administrative hearing phase of the enforcement process will no doubt improve efficiencies and help Staff quickly resolve complaints. However, this is not the only solution available to the Commission. As the Commission knows, the Executive Director included a programmatic review and regulatory update for the enforcement process in her Annual Policy Plan. As currently planned, Staff have targeted developing a set of recommended changes to the Enforcement Regulations and processes in November. As further internal planning has continued, Staff now anticipates first holding a series of Interested Persons meetings in November to engage stakeholders in the revision process. Staff plan to disseminate a set of questions in advance of these meetings to gather qualitative data about the public's perception and past parties' frustrations or suggestions for improvement. At the conclusion of this information-gathering process, Staff will analyze the public's suggestions in developing a set of revisions for the Enforcement Regulations designed to eliminate inefficiencies and improve the enforcement process generally. Our goal will be to publish these recommended changes in advance of the December regular Commission meeting and call for public comment during the meeting and for thirty days thereafter. Using this approach, Staff will analyze all verbal and written public comments received on the proposed revisions, respond to comments where appropriate, and deliver a set of recommended changes for the Commissions' approval during its February regular commission meeting.

(3) Priority Identification and Clarification

The Ethics Commission has jurisdiction over city ordinances related to campaign finance, lobbying, conflicts of interest, and governmental ethics. The Commission also serves as the hearing officer when the Mayor files written charges of official misconduct with the Commission or the Board of Supervisors. Finally, the Commission has jurisdiction over the investigation and enforcement of certain provisions in the Whistleblower and Sunshine Ordinances.

In its twenty-three-year history, the Commission has only handled two charges of official misconduct filed by the Mayor's Office. The majority of the Commission's enforcement matters involve the first category of complaints: campaign finance, lobbying, conflicts of interest, and governmental ethics. Nevertheless, a minority of complaints involving retaliation under the Whistleblower Ordinance and violations of the Sunshine Ordinance take precedence over investigations of governmental ethics laws simply because the law requires Staff to move quickly to resolve complaints under those ordinances, whether the allegations are more severe than competing matters involving governmental ethics laws or not.

Whistleblower Ordinance: The Ethics Commission has jurisdiction over two separate provisions of the Whistleblower Ordinance.

First, section 4.105 of the Whistleblower Ordinance gives "any person" the right to "file a complaint with the Ethics Commission . . . alleging that a city officer or employee has engaged in improper government activity by:

Of

- (1) violating local campaign finance, lobbying, conflicts of interest, or governmental ethics laws, regulations, or rules;
- (2) violating the California Penal Code by misusing City resources;
- (3) creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's city position; or
- (4) abusing his or her city position to advance a private interest."

The Ethics Commission must investigate complaints that allege violations of number 1—local campaign finance, lobbying, conflicts of interest, and governmental ethics laws—only. Staff must refer complaints alleging numbers 2 through 4 to the appropriate agency with jurisdiction. Employees who file complaints with the Commission are protected from retaliation by their supervisors. Because these provisions of the Ordinance require Staff to investigate matters over which it has subject matter expertise, these complaints are handled in the routine course of business.

Second, if a city officer or employee or former city officer or employee believes he has been retaliated against, he may file a complaint with the Ethics Commission. The Ethics Commission must investigate complaints alleging retaliation, whether the underlying conduct falls under the Commission's jurisdiction or not. Retaliation complaints often involve employees alleging complicated personnel matters. Ethics Commission Staff have not typically had specific background or subject matter expertise in these areas, making it difficult to investigate such sensitive and complicated matters as efficiently as possible without additional training. As a result, these matters can be extraordinarily taxing on investigative resources. To deal with this provision of the Whistleblower Ordinance, employment law experience would be a beneficial skillset for an Investigator/Legal Analyst.

Sunshine Ordinance: The Sunshine Ordinance provides for Ethics Commission enforcement power over provisions of that law in two circumstances:

- (1) To “handle” complaints involving allegations of willful violations of the Sunshine Ordinance, Brown Act, or Public Records Act by elected officials and department heads under Section 67.34; and
- (2) If enforcement action is not taken by a city or state official 40 days after a complaint is filed under Section 67.35(d).

The Commission has adopted Enforcement Regulations for handling complaints under the Sunshine Ordinance. The Regulations are frequently described as having two “tracks” for investigations. The first track—complaints that fall under Chapter Two of the regulations—governs referrals from the Sunshine Ordinance Task Force for enforcement of matters involving willful violations by city officers or employees or non-willful violations by anyone. These matters must be considered by the Commission at its “next regular Commission meeting.” Most of the complaints received by the Commission fall into this “track,” so they must be treated as first priorities in order to ensure they are heard at the “next regular Commission meeting.” Each time Staff must prioritize these referrals, Staff necessarily ignores older complaints involving governmental ethics laws that fall under the Commission’s regular jurisdiction.

The second “track” for investigations—complaints that fall under Chapter Three of the regulations—governs matters involving willful violations by elected officials and department heads, review of any Sunshine Ordinance Task Force Order that the district and city attorneys failed to enforce, and Staff-initiated complaints. Though unintended, this provision may give complainants the right to file an original complaint with the Ethics Commission for the investigation of any violation of the Sunshine Ordinance. Staff, consequently, spends a lot of time reviewing produced public records to determine whether redactions are proper, evaluating request/production timelines to determine whether records were improperly destroyed to prevent disclosure, etc. These inquiries require significant resource investment and often immediate prioritization. If Staff determines that a violation of the Sunshine Ordinance has occurred, it must schedule a hearing for the “next regular Commission meeting.” As a practical matter, this once again means Staff must ignore other pending matters in order to expeditiously prepare for the expedited hearing on the outstanding Sunshine matter.

In the same way that Staff has been researching and evaluating effective solutions for the enforcement process generally, Staff has been evaluating solutions for effective investigation and enforcement of complaints alleging violations of the Sunshine Ordinance. Based on our initial research and evaluation, beginning in September, Staff concluded that it was not required to initiate complaints on behalf of complainants who file their original complaints with the Commission. Instead, Staff is asking complainants to first file their complaints with the Sunshine Ordinance Task Force and come back to the Commission if the respondent fails to comply with the Task Force’s order.

In addition, Staff is researching and analyzing the best ways to revise the Sunshine Ordinance and Regulations, so they are clear, effective, and meet the Commission’s enforcement goals. Staff plans to hold a series of Interested Persons meetings in December and January to engage stakeholders in the revision process. Staff will disseminate a set of questions in advance of these meetings to gather qualitative data about the public’s perception and past parties’ frustrations or suggestions for improvement. At the conclusion of this information-gathering process, Staff will analyze the public’s suggestions to develop a set of revisions for the Sunshine Ordinance and Regulations that should

eliminate inefficiencies and improve the enforcement process generally. Staff will publish these recommended changes in advance of the Commission's regular meeting in February and call for public comment during the meeting and for thirty days thereafter. Staff will analyze all verbal and written public comments received on the proposed revisions, respond to comments where appropriate, and deliver a set of recommended changes for the Commissions' approval during its May 2017 regular commission meeting.

Enforcement Caseload Data

As noted above, Staff has provided charts in Attachment 3 that summarize matters in Preliminary Review and pending Formal Complaints by number, age, and type as of October 11, 2016. As of October 11, 2016, Staff is evaluating 84 matters in Preliminary Review. Notably, of the 84 matters in Preliminary Review, 25% of those matters involve complaints received after the September 2016 Commission meeting.

Staff agrees with the Commission and the public that complaints filed with the Commission are taking too long to resolve. Staff is diligently working to identify causes for delay and potential solutions, some of which are noted above. The number of matters in Preliminary Review has doubled since the Commission's second staff investigator left in May 2016, leaving the Commission with a single investigator. We also understand that a number of complaints filed during the transition between executive directors could neither be dismissed nor approved for investigation because no executive director was present to make the relevant decision.

Moreover, until current leadership changes, both investigators were responsible for myriad non-enforcement related duties, including taking commission meeting minutes and compiling them into an approvable format; administrating the day-to-day advice and compliance tasks for the lobbyists and campaign consultants programs; and managing public records requests received by the Commission from members of the public (in conjunction with the Commission's data analyst). Investigators will focus 100% of their time investigating and enforcement governmental ethics laws going forward.

Finally, because of the size and nature of the November 2016 election, we are seeing a natural increase in the frequency of complaints related to current ballot measures and candidates running for city-elective office. Staff is currently focused on developing a system for prioritization of these new and existing complaints. In accord with the law, we must treat complaints filed under the Whistleblower and Sunshine Ordinances as priorities, but we are also treating complaints related to the current election as top priority. Then as time allows, we are reviewing and evaluating matters under Preliminary Review from oldest to newest.

Undoubtedly, the Commission and public should see improvement as soon as the Enforcement & Legal Affairs Program is fully staffed and new investigators are trained. To that end, we continue to research investigator functionalities and specializations at ethics commissions similar in size and purpose to ours, such as Los Angeles, Oakland, and San Diego. As an initial matter, we are considering filling at least one investigator with a candidate who has personnel or employment experience, so s/he can handle complaints of retaliation. We look forward to our continuing efforts to improve the enforcement process in order to earn the public's trust in the Commission's enforcement process. If you have any suggestions, please do not hesitate to send them to me.



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

PAUL A. RENNE
CHAIRPERSON

September 29, 2016

PETER KEANE
VICE-CHAIRPERSON

Mr. Steve Kawa
Chief of Staff

BEVERLY HAYON
COMMISSIONER

Office of the Mayor
steve.kawa@sfgov.org

DAINA CHIU
COMMISSIONER

By email only

QUENTIN L. KOPP
COMMISSIONER

RE: Request for Data Backup Files
In the matter of SFEC Complaint No. 04-160718, Michael Petrelis v. Steve Kawa

LEEANN PELHAM
EXECUTIVE DIRECTOR

Dear Mr. Kawa:

As you know, the Ethics Commission considered the above-referenced matter at its regular meeting on September 26, 2016. At the conclusion of the Commission's hearing, the Commission voted 4-0 to adopt Staff's recommendation as follows:

1. The Sunshine Ordinance does not require you to retain an electronic calendar, and
2. You did not violate the Sunshine Ordinance by failing to produce your electronic calendar to Mr. Petrelis for the months of July, August, and September 2016.

Nevertheless, during the course of the hearing, the Commission became interested in determining whether your deleted electronic calendar entries for the months of July, August, and September 2015 can be retrieved through an investigation or examination of data backup files. Please consider this letter a formal request by the Commission to determine whether the electronic calendar entries that you deleted from your calendar for those months were preserved on a data backup system that can be retrieved for production to the Commission.

I look forward to hearing from you before October 7 with a response about any backup files and, if they exist, to provide an estimated time frame for retrieval and disclosure so that the Commission can review that response and any additional information at its next regularly scheduled commission meeting in October.

Sincerely,

/s/ Jessica L. Blome

Deputy Director
Enforcement & Legal Affairs

C: Victor Young, victor.young@sfgov.org
Michael Petrelis, mpetrelis@aol.com



Jessica L. Blome
Deputy Director
Enforcement & Legal Affairs
Ethics Commission
Steve.Kawa@sfgov.org
Sent via email only

Item 5 - Attachment 2

October 7, 2016

**Re: Request for Data Backup Files
In the matter of SFEC Complaint No. 04-160718, Michael Petrelis v. Steve Kawa**

Dear Ms. Blome:

I write in response to your September 29, 2016 letter in which you request, on behalf of the Ethics Commission, information regarding whether my deleted electronic calendar entries for the months of July, August, and September 2015 could be retrieved through an investigation or examination of data backup files.

To obtain the information requested in your letter, our office consulted with Norman Goldwyn, Information Technology Director for the Mayor's Office and the General Services Agency, who provided us with the following information. The electronic calendar entries in question were in Microsoft Outlook. As a general matter, once deleted items are emptied from an Outlook user's trash can, they can be retrieved by the user only for a 14-day period, by using the "Recover from Deleted Items" feature under the folder tab of Outlook. After the 14 days has run, they are no longer recoverable and the City does not have any back-up files or other mechanism for retrieving such deleted items. If a user's account is de-licensed – which can occur either when an employee moves to a different City department or separates from the City – there is a 30-day window to retrieve the user's mailbox from Microsoft's cloud. But such retrieval would only be able to access deleted items that are still in the user's trash can and had not yet been emptied from the trash can; items that had been emptied from the trash can would not be recoverable. After that 30-day period, the mailbox files are permanently deleted from Microsoft's cloud and are completely irretrievable.

Mr. Goldwyn searched the trash cans in the Outlook accounts for me and two other Mayor's Office staffers who had access to my Outlook calendar, and he determined that those trash cans do not contain any deleted items pre-dating June 2016. Accordingly, calendar entries from 2015 are no longer retrievable either from Mayor's Office computers or from the Microsoft cloud.

However, Mr. Goldwyn did ascertain that in October 2014, the Department of Technology (DT) placed my Outlook account, as well as the account of the two staffers who had access to my calendar, on what is termed a "litigation hold." Generally, this type of "hold" is used in the context of an investigation or litigation where the City may have a legal interest or duty to preserve documents related to a particular matter. It is my understanding that litigation holds are

1 DR. CARLTON B. GOODLETT PLACE, ROOM 200
SAN FRANCISCO, CALIFORNIA 94102-4681
TELEPHONE: (415) 554-6141



used for discovery in litigation or for particular legal proceedings, and not for public records requests. It appears that the hold on my account is in fact not related to litigation, but rather was implemented by DT in 2014 during a migration to a new email system, and the hold was inadvertently never lifted.

According to Mr. Goldwyn, if an employee's email account is on a litigation hold, even if the employee empties his or her trash can and therefore the email is no longer visible or accessible from the employee's computer, it is accessible via an "e-discovery portal" located on Microsoft's cloud. It is possible that data files being retained pursuant to this litigation hold may include files related to calendar entries from July, August and September 2015, but we do not know at this time. Because Mr. Goldwyn does not have access to any data that is on litigation hold for the Mayor's Office, he referred us to DT for further investigation. We have reached out to DT for information regarding whether calendar entries (as opposed to emails) could be searched for and recovered from the litigation hold, and the procedure, time, and costs of conducting such a search and data extraction from the e-discovery portal. We have not yet received an answer from DT, but will follow up with another letter to the Commission as soon as we do.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Kawa".

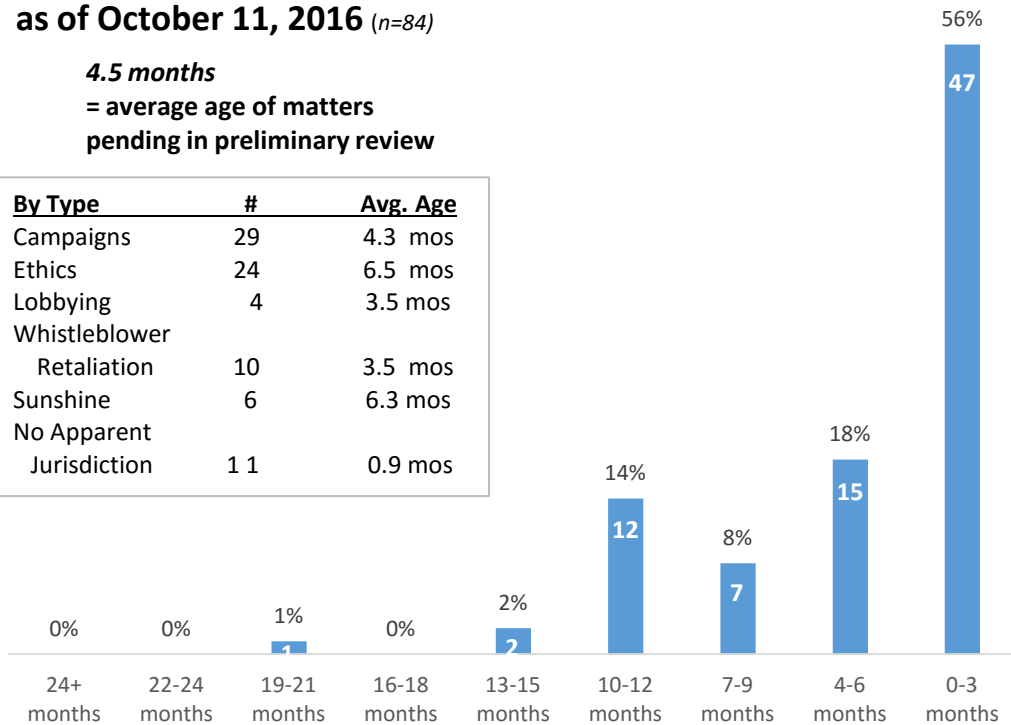
Steve Kawa
Chief of Staff

cc: Michael Petrelis, mpetrelis@aol.com
Norman Goldwyn, GSA

Age of Matters in Preliminary Review as of October 11, 2016 *(n=84)*

4.5 months
= average age of matters
pending in preliminary review

By Type	#	Avg. Age
Campaigns	29	4.3 mos
Ethics	24	6.5 mos
Lobbying	4	3.5 mos
Whistleblower		
Retaliation	10	3.5 mos
Sunshine	6	6.3 mos
No Apparent Jurisdiction	1 1	0.9 mos

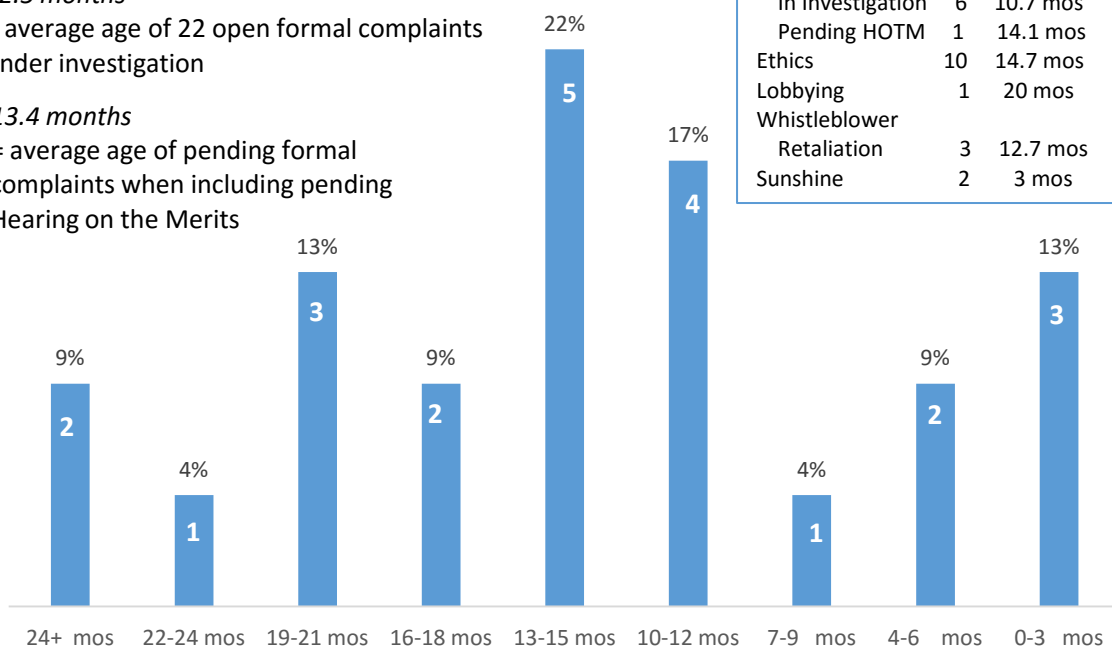


Age of Open Formal Complaints Caseload as of October 11, 2016 *(n=23)*

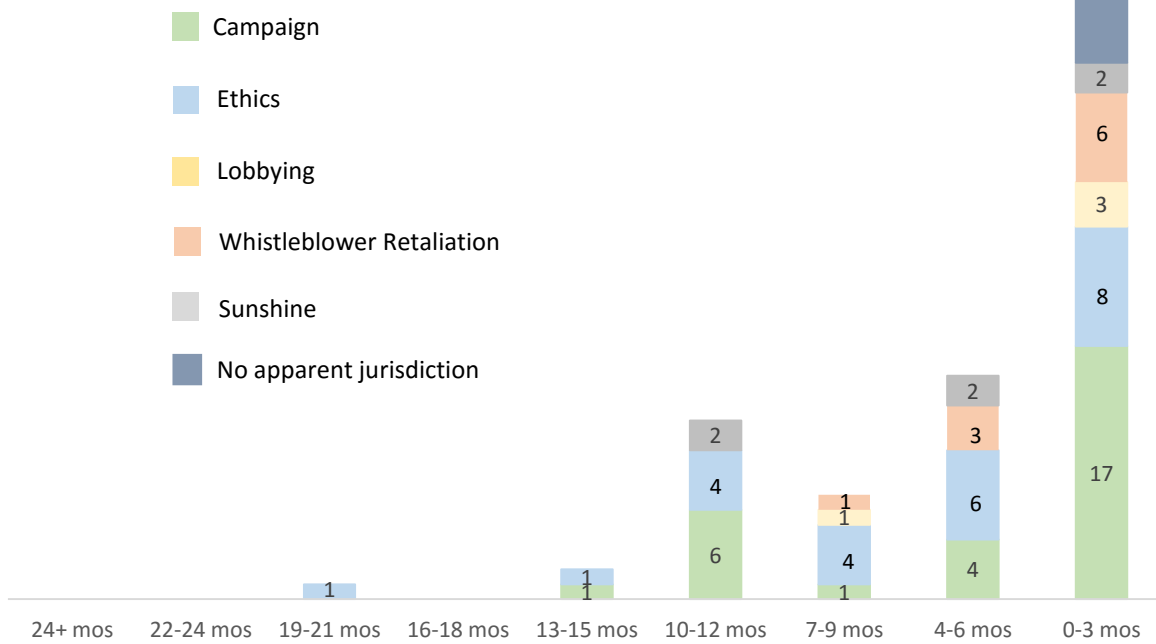
12.5 months
= average age of 22 open formal complaints
under investigation

13.4 months
= average age of pending formal
complaints when including pending
Hearing on the Merits

By Type	#	Avg Age
Campaigns		
In Investigation	6	10.7 mos
Pending HOTM	1	14.1 mos
Ethics	10	14.7 mos
Lobbying	1	20 mos
Whistleblower		
Retaliation	3	12.7 mos
Sunshine	2	3 mos



Caseload of Matters Under Preliminary Review (PR), by Age and Type
as of October 11, 2016 (n=84)



Caseload of Open Formal Complaints , by Age and Type
as of October 11, 2016 (n=23)

