



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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LEEANN PELHAM
EXECUTIVE DIRECTOR

Date: May 17, 2017

To: Members of the Ethics Commission

From: LeeAnn Pelham, Executive Director

Re: **AGENDA ITEM 8: Information Requested by Commissioner Kopp Regarding Process to Obtain Independent Legal Counsel for Ethics Commission**

Summary: This memorandum discusses Staff's research in response to Commissioner Kopp's April 24, 2017, request for information about securing possible independent legal counsel for the Ethics Commission.

Action Requested: No action is required by the Commission, as this memorandum is provided at this time for informational purposes only.

Background

At the April 24, 2017, regular meeting of the Ethics Commission, Commissioner Kopp asked Staff to provide the Commission with research about the process for amending existing law to omit the requirement that the Commission be represented by the Office of the San Francisco City Attorney. Commissioner Kopp also asked for recommendations for Charter language that would provide the Commission with its own independent legal counsel separate from the City Attorney's Office. This memorandum provides information in response to that request.

San Francisco Charter Section 15.102 provides that "[t]he City Attorney shall be the legal advisor of the Commission."¹ Under the San Francisco Charter generally, the City Attorney "shall represent" the City and County in legal proceedings "with respect to which it has an interest," except that any elected officer, department head, board or commission may engage counsel other than the City Attorney for legal advice regarding a particular matter where the person has "reason to believe that the City Attorney may have a prohibited financial conflict of interest under California law or a prohibited conflict of interest under the California Rules of Professional Conduct," subject to certain limitations and conditions identified in San Francisco

¹ See Attachment 1 for sections of San Francisco city law referenced in this memorandum.

Charter § 6.102. See SF Charter § 6.102(a) (last amended Nov. 2002²). To obtain outside counsel, either the City Attorney or an outside judge must consent and agree that the City Attorney has a qualifying conflict of interest. *Id.* Among the City Attorney’s duties enumerated in the City Charter, the City Attorney shall “[u]pon request, provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County.” Charter § 6.102.4.

Charter Amendment Process

The San Francisco Charter gives the Ethics Commission authority to submit to the electors at the next succeeding general election “[a]ny ordinance which the Supervisors are empowered to pass relating to conflicts of interest, campaign finance, lobbying, campaign consultants, or governmental ethics.” SF Charter § 15.102. The Charter, however, does not give the Commission authority to submit Charter amendments to the electors. Amending the Charter, therefore, including provisions that would affect the structure and authority of the Ethics Commission, would require action by a majority of the Board of Supervisors or qualification of a proposed amendment through the ballot initiative process. See SF Municipal Elections Code § 305(a).

To submit a proposed Charter Amendment to the Board of Supervisors for its consideration, a Supervisor must introduce the amendment at a regular board meeting “held not less than 168 days prior to the election at which it is to be acted upon by the electors.” Board Rule 2.22.1

To qualify a proposed Charter Amendment for the ballot through the initiative process, the proponent must gather at least 51,340 valid signatures of registered San Francisco voters. See California Secretary of State Report of Registration as of February 10, 2017.³ This number equals 10 percent of the total number of registered San Francisco voters as reported by the Department of Elections in its most recent official report of registration to the Secretary of State prior to the proponent’s submission of the “Notice of Intent to Circulate Petition.” California Elections Code § 9255(a), (c)(2). Proposed ballot initiatives must be submitted to the voters “at the next election held no fewer than 102 days after the date said measure is received by the Director of Elections.” *Id.*

² In November 2002, fifty-five percent of voters approved Proposition E, which removed the following sentence from Section 15.102, Rules and Regulations related to the Ethics Commission: “If the City Attorney determines in writing that he or she cannot, consistent with the rules of professional conduct, provide advice sought by the Commission, the City Attorney may authorize the Commission to retain outside counsel to advise the Commission.” See San Francisco Voter Information Pamphlet and Sample Ballot, p. 60 (Nov. 6, 2001) available at https://sfpl.org/pdf/main/gic/elections/November6_2001.pdf. Proposition E also added the process for any elected official, department head, or commission to seek permission from the City Attorney to obtain outside counsel through the process now described in Section 6.102 of the Charter and discussed above. *Id.* at p. 61-62. In other words, prior to November 2002, only the Ethics Commission could seek permission from the City Attorney to hire outside counsel to cure a perceived or actual conflict of interest posed by the City Attorney’s representation of the Commission in a matter. *Id.* After November 2002, any elected official, department head, or commission could do so. *Id.*

³ Data available at <http://elections.cdn.sos.ca.gov/ror/ror-pages/ror-odd-year-2017/county.pdf>.

Legislative History & Precedent for Ethics Agencies' Independent Counsel

Prior Legislative History

On November 8, 2005, voters considered whether to approve "Proposition C for Clean Government," a Board-sponsored Charter Amendment relating to the Ethics Commission budget and outside counsel.⁴ According to the Voter Handbook, Proposition C would have authorized the Commission to retain outside counsel in a few narrow instances: to advise the Commission on any audit, fine, penalty, or complaint involving the City Attorney or an employee of the City Attorney's Office. *Id.* Consent of the City Attorney or a determination by an outside judge would no longer be required. *Id.* If the Commission believed that the City Attorney had a conflict of interest in other matters, consent of the City Attorney or a determination by a retired judge would still be required. *Id.* Fifty-nine percent of voters voted against Proposition C, so it did not pass.⁵

Approaches Elsewhere

There are other California ethics agencies that retain independent counsel for all agency business. At the state level, the Political Reform Act authorizes the Fair Political Practices Commission (FPPC) to appoint and discharge "counsel" consistent with applicable civil services laws. PRA § 83107. The general counsel to the FPPC is a full-time, in-house attorney who reports to the FPPC's full-time agency head, the Commission Chair. In addition to her duties as counsel to the Commission, the FPPC's general counsel leads a team of lawyers and support staff to advise members of the Commission and staff on the interpretation and analysis of laws, court decisions, and rules and regulations affecting the Commission. The general counsel also coordinates outside litigation strategy, and coordinates the development of legislative proposals, regulations and Commission opinions. The FPPC general counsel has a counterpart in the Chief of the Enforcement Division, who oversees that agency's enforcement program. That division allows the FPPC to fully separate its day-to-day advice and policy functions from its enforcement obligations.

At the local level, the San Diego Ethics Commission has had independent counsel for over a decade. On November 2, 2004, 77 percent of San Diego voters approved Proposition E, which amended Sections 40 and 41(D) of the San Diego Charter to provide independent counsel for its Ethics Commission in all circumstances. Proposition E asked voters: "Shall the City Charter be amended to enable the Ethics Commission to retain its own legal counsel, rather than be represented by the City Attorney whose clients include City Officials who may be investigated by the Ethics Commission?"⁶ The San Diego City Charter now provides: "The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney."⁷ San Diego's independent attorney is on contract with the Ethics Commission. She reports

⁴ See San Francisco Voter Information Pamphlet, p. 42, Sept. 9, 2005, available at https://sfpl.org/pdf/main/gic/elections/November8_2005.pdf.

⁵ San Francisco Department of Elections, Results Summary Nov 2005, available at <http://sfgov.org/elections/results-summary-nov-2005>.

⁶ See City of San Diego Sample Ballot and Voter Information Pamphlet, November 2004, available at <https://www.sandiego.gov/sites/default/files/legacy/city-clerk/pdf/pamphlet041102.pdf>.

⁷ San Diego City Charter Section 40, available at <http://docs.sandiego.gov/citycharter/Article%20V.pdf>.

directly to the Ethics Commission's Executive Director on matters as needed, but she retains full-time employment with a local law firm.

Sample Language

At the April meeting, Commissioner Kopp asked for recommendations for Charter language that could provide the Commission with its own independent legal counsel separate from the City Attorney's Office. The following language provides one approach to a Charter Amendment. It would provide independent legal counsel for the Ethics Commission that is a full-time employee who reports to the agency's Executive Director and is exempt from the City's civil service rules.

1. Related to the Ethics Commission: San Francisco City Charter Section 15.102

~~The City Attorney shall be the legal advisor of the Commission.~~ The Commission shall have its own legal counsel independent of the City Attorney who is exempt from the competitive civil service selection process under Charter Section 10.104(13).

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Based on the Commission's May 22nd discussion and any further questions it may have, Staff can assist with additional research for the Commission's review and consideration.

Agenda Item 8, Attachment 1

SF Charter Sec 15.102. Rules and Regulations

The Commission may adopt, amend and rescind rules and regulations consistent with and related to carrying out the purposes and provisions of this Charter and ordinances related to campaign finances, conflicts of interest, lobbying, campaign consultants and governmental ethics and to govern procedures of the Commission. In addition, the Commission may adopt rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records. The Commission shall transmit to the Board of Supervisors rules and regulations adopted by the Commission within 24 hours of their adoption. A rule or regulation adopted by the Commission shall become effective 60 days after the date of its adoption unless before the expiration of this 60- day period two-thirds of all members of the Board of Supervisors vote to veto the rule or regulation.

The City Attorney shall be the legal advisor of the Commission.

Any ordinance which the Supervisors are empowered to pass relating to conflicts of interest, campaign finance, lobbying, campaign consultants or governmental ethics may be submitted to the electors at the next succeeding general election by the Ethics Commission by a four-fifths vote of all its members.

(Amended November 2001)

SF Charter Section 6.102. City Attorney

The City Attorney shall:

1. Represent the City and County in legal proceedings with respect to which it has an interest; provided that any elected officer, department head, board or commission may engage counsel other than the City Attorney for legal advice regarding a particular matter where the elected officers department head, board or commission has reason to believe that the City Attorney may have a prohibited financial conflict of interest under California law or a prohibited ethical conflict of interest under the California Rules of Professional Conduct with regard to the matter, subject to the following limitations and conditions.

The elected officer, department head, board or commission shall first present a written request to the City Attorney for outside counsel. The written request shall specify the particular matter for which the elected officer, department head, board or commission seeks the services of outside counsel, a description of the requested scope of services, and the potential conflict of interest that is the basis for the request. Within five working days after receiving the written request for outside counsel, the City Attorney shall respond in writing to the elected officer, department head, board or commission either consenting or not consenting to the provision of outside counsel. If the City Attorney does not consent to the provision of outside counsel, the City Attorney shall state in the written response why he or she believes that there is no conflict of interest regarding the particular matter.

If the elected officer, department head, board or commission continues to believe there are adequate grounds for outside counsel despite the City Attorney's response that there is no conflict of interest, the elected officer, department head, board or commission may, within thirty days after receiving the City Attorney's response, refer the issue of whether the City Attorney has a prohibited conflict of interest regarding a particular matter to a retired judge or justice of the state courts of California for resolution. If the elected officer, department head, board or commission and City Attorney cannot agree on a retired judge to hear the matter, the retired judge shall be selected at random by an alternative dispute resolution provider. If the matter is referred to a retired judge, the elected officer, department head, board or commission, subject to the budgetary and fiscal provisions of the Charter,

shall be entitled to retain outside counsel to represent it solely on the issue of whether the City Attorney has a conflict of interest regarding the particular matter.

In deciding whether the City Attorney has a conflict of interest regarding a particular matter, the retired judge shall be bound by and apply the applicable substantive law and Rules of Professional Conduct as if he or she were a court of law. To the extent practicable, the retired judge shall hear the matter within 15 days after its assignment to the retired judge, and within 15 days after the hearing, shall issue a written opinion stating the basis for the decision. The retired judge, but not the City Attorney or elected officer, department head, board or commission, shall have the power to subpoena witnesses and documents in this proceeding.

The retired judge may request that the City Attorney secure written advice from the California Fair Political Practices Commission, the State Bar of California, or the California Attorney General on the question of whether the City Attorney has a conflict of interest regarding the particular matter. Upon such a request by the retired judge, the City Attorney shall secure such written advice. The retired judge may consider, but is not bound by, written advice so secured. The decision of the retired judge shall be final for the limited purpose of determining whether or not the elected officer, department head, board or commission may retain outside counsel for the particular matter.

If the retired judge decides that the City Attorney does not have a conflict of interest regarding the particular matter, the City Attorney shall continue to be the legal adviser to the elected officer, department head, board or commission for such matter. If the retired judge decides that the City Attorney has a conflict of interest regarding a particular matter, the elected officer, department head, board or commission shall be entitled to retain outside counsel for legal advice regarding the particular matter, and the City Attorney shall thereupon cease to advise the elected officer, department head, board or commission on such matter. Any such finding of a conflict of interest shall not affect the City Attorney's role as legal advisor to the elected officer, department head, board or commission on all other matters.

If at any time after the retention of outside counsel, the City Attorney believes that there is no longer a conflict of interest, the City Attorney shall state in writing to the elected officer, department head, board or commission why he or she believes that there is no longer a conflict of interest. Within five working days after receiving the written statement from the City Attorney, the elected officer, department head, board or commission shall respond in writing, either agreeing or disagreeing that there is no longer a conflict of interest. If the elected officer, department head, board or commission agrees that there is no longer a conflict of interest regarding a particular matter, the elected officer, department head, board or commission shall cease employing outside counsel for legal advice regarding the matter, and the City Attorney shall serve as legal adviser to the elected officer, department head, board or commission regarding that matter. If the elected officer, department head, board or commission states in its written response that it believes the conflict of interest still exists, the City Attorney may, within ten working days after receiving the response of the elected officer, department head, board or commission, elect to refer the issue of whether the conflict of interest regarding the particular matter continues to exist to the same retired judge who originally heard the matter, if available. The same procedures as established herein shall apply thereafter.

In selecting outside counsel for any purpose described in this Section, the elected officer, department head, board or commission shall give preference to engaging the services of a City attorney's office, a County counsel's office or other public entity law office with an expertise regarding the subject-matter jurisdiction of the elected officer, department head, board or commission. If the elected officer, department head, board or commission concludes that private counsel is necessary, that attorney must be a member in good standing with the Bar of California who has at least five year's experience in the subject-matter jurisdiction of the elected officer, department head, board or

commission Any private counsel retained pursuant to this Section shall be subject to the conflict of interest provisions of Section 13.103.5. The cost of any of the services of outside counsel and of the alternative dispute resolution process authorized by this Section shall be paid for by the elected officer, department head, board or commission, subject to the budgetary and fiscal provisions of this Charter.

2. Represent an officer or official of the City and County when directed to do so by the Board of Supervisors, unless the cause of action exists in favor of the City and County against such officer or official;

3. Whenever a cause of action exists in favor of the City and County, commence legal proceedings when such action is within the knowledge of the City Attorney or when directed to do so by the Board of Supervisors, except for the collection of taxes and delinquent revenues, which shall be performed by the attorney for the Tax Collector;

4. Upon request, provide advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County;

5. Make recommendations for or against the settlement or dismissal of legal proceedings to the Board of Supervisors prior to any such settlement or dismissal. Such proceedings shall be settled or dismissed by ordinance and only upon the recommendation of the City Attorney;

6. Approve as to form all surety bonds, contracts and, prior to enactment, all ordinances; and examine and approve title to all real property to be acquired by the City and County;

7. Prepare, review annually and make available to the public a codification of ordinances of the City and County then in effect;

8. Prepare and make available to the public an annual edition of this Charter complete with all of its amendments and legal annotations; and

9. Establish in the Office of the City Attorney a Bureau of Claims Investigation and Administration which shall have the power to investigate, evaluate and settle for the several boards, commissions and departments all claims for money or damages. The Bureau shall also have the power to investigate incidents where the City faces potential civil liability, and to settle demands before they are presented as claims, within dollar limits provided for by ordinance, from a revolving fund to be established for that purpose. The City Attorney shall appoint a chief of the Bureau who shall serve at his or her pleasure. The chief of the Bureau may appoint, subject to confirmation by the City Attorney, investigators who shall serve at the pleasure of the chief.

10. During his or her tenure, not contribute to, solicit contributions to, publicly endorse or urge the endorsement of or otherwise participate in a campaign for a candidate for City elective office, other than himself or herself or of a City ballot measure or be an officer, director or employee of or hold a policy-making position in an organization that makes political endorsements regarding candidates for elective office or City ballot measures.

(Amended November 2001; amended November 2002)

SF Municipal Elections Code SEC. 305.

Rules for Submission of Ordinances and Charter Amendments by the Board of Supervisors.

(a) When the Board of Supervisors considers whether to submit an ordinance or Charter amendment to the voters, the following rules shall apply:

(1) The Board of Supervisors shall be prohibited from considering or deciding whether to submit an ordinance or Charter amendment to the voters unless, at least 30 days before the date of the first committee hearing concerning the proposed ordinance or Charter amendment, the following materials are delivered to the Clerk of the Board of Supervisors and available for public review:

(A) A draft of the proposed ordinance or Charter amendment that is approved as to form by the City Attorney; and

(B) A legislative digest prepared by the City Attorney.

(2) Upon receipt of the materials described in Subsection (a)(1) of this Section, the Clerk of the Board of Supervisors shall transmit a copy of the proposed ordinance or Charter amendment to the Controller. The Controller shall prepare a financial analysis of the proposed measure and deliver the analysis to the Clerk no later than the first committee hearing concerning the proposed ordinance or Charter amendment. The Board of Supervisors shall be prohibited from considering or deciding whether to submit the measure to the voters unless the Controller has provided the Board with the financial analysis required by this subsection.

(3) Any amendments to a proposed ordinance or Charter amendment shall be noticed for an additional public hearing by the Board committee designated to consider the measure. The proposed amendments shall be submitted in writing to the clerk of the designated committee and shall be available for public review no later than the time that notice of the additional hearing is published.