

RESOLUTION NO. 76954

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AMENDING REGULATIONS AND PROCEDURES FOR THE SAN JOSE ETHICS COMMISSION INVESTIGATIONS AND HEARINGS, AND REPEALING RESOLUTION 75640

WHEREAS, the San José Ethics Commission (Commission), is charged under Chapter 12.04 of the San José Municipal Code to investigate complaints alleging violations of Title 12 of the San José Municipal Code and take enforcement action where appropriate; and

WHEREAS, formal regulations are required to ensure that all interested parties are apprised of and understand the procedures by which a fair hearing will be conducted; and

WHEREAS, the City Council desires to amend the current regulations and procedures for Commission investigations and hearings contained in Resolution No. 75640 to correct process deficiencies as discovered in the conduct of investigations and hearings, to improve efficiencies, to account for the name change of the Commission and to reflect the current practice of the Commission;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. The following Regulations and Procedures as amended are hereby adopted and shall govern all proceedings before the San José Ethics Commission (Ethics Commission or Commission).

REGULATIONS AND PROCEDURES FOR SAN JOSE ETHICS COMMISSION INVESTIGATIONS AND HEARINGS

A. PREAMBLE

These Regulations and Procedures of the San José Ethics Commission are promulgated in order to ensure the fair, just, and timely resolution of complaints presented to the Commission that allege violations of City ordinances relating to the campaign finance, lobbying, conflicts of interest and certain governmental ethics ordinances set forth in Title 12 of the San José Municipal Code, by:

1. Setting and maintaining objective standards for the investigation and determination of matters brought before the Commission;

2. Eliminating any improper influence in the investigation of and determinations relating to persons alleged to have committed ethics violations;
3. Assuring reasonable time frames within which enforcement proceedings should be completed.

B. DEFINITION OF TERMS

For purposes of these Regulations and Procedures, the following definitions shall apply:

1. "Candidate" means a person who is running for City Office or is a City elected officeholder.
2. "Chair" means the elected Chair of the San José Ethics Commission. If the Chair is not available, the elected Vice-Chair may temporarily assume the duties and responsibilities of the Chair.
3. "Code Enforcement" means the Code Enforcement Division of the Planning, Building, and Code Enforcement Department which provides citywide enforcement service for all reported concerns and violations relating to neighborhood residential properties as well as commercially and industrially zoned properties.
4. "Complainant" means a person or entity that files a complaint.
5. "Complaint" means the Ethics Commission Complaint Form, completed and signed by the Complainant, which is on file with the City Clerk.
6. "Day" means calendar day, unless otherwise specifically indicated.
7. "Ethics Commission" or "Commission" means the San José Ethics Commission.
8. "Ethics Ordinances" means all ordinances found in Title 12 of the San José Municipal Code.
9. "Evaluator" means a person who is neutral and impartial, meets the qualifications in Section C and has been retained as provided herein.
10. "Exculpatory information" means information tending to show that the Respondent is not guilty of the alleged violations.
11. "Hearing" means a formal meeting of the San José Ethics Commission convened for the purpose of making determinations regarding a Complaint and conducted in accordance with the requirements in Section G.

12. "Investigator" means a person who is neutral and impartial, meets the qualifications in Section D and has been retained as provided herein.
13. "Mitigating information or circumstances" means information or circumstances tending to excuse or reduce the significance of the Respondent's conduct.
14. "Preliminary Investigation" is that investigation conducted by the Evaluator prior to any presentation to the Commission.
15. "Respondent" means a person or entity that is alleged in a complaint to have violated an Ethics Ordinance.

C. HIRING OF THE EVALUATOR

1. The City Clerk shall submit a budget request which will enable the City Council to appropriate funds anticipated for the Evaluator for a contract period of up to four (4) years.
2. The Commission shall prepare and issue a Request for Qualifications/Quotes for an Evaluator at least six months before the existing contract expires.
3. The Evaluator shall have a legal background and experience with ethics, election or political law.
4. The Evaluator shall be neutral and impartial and shall not have or appear to have any bias or favoritism toward any person or entity involved in any way with any complaint or investigation.
5. The Commission shall select the Evaluator and present the contract with the selected candidate to the Council for approval of the contract on a public agenda.
6. The contract shall have up to a four (4) year term and shall end on June 30 of an odd numbered year.
7. The contract with the Evaluator shall be subject to termination at the pleasure of the Commission.
8. The contract shall be terminated if any circumstances arise which in the judgment of the Commission would compromise the appearance of neutrality.

D. HIRING OF AN INVESTIGATOR

1. In addition to the Evaluator, if necessary, the Ethics Commission is authorized to hire an independent Investigator by contract executed by the City Clerk.

2. The Commission shall prepare and issue a Request for Qualifications/Quotes for the Investigator to conduct investigations or assist with investigations of complaints which are assigned by the Ethics Commission and to monitor compliance with the requirements of Title 12 of the San José Municipal Code as requested by the Ethics Commission.
3. The Investigator shall have experience in conducting investigations such as law enforcement, ethics or employment related investigations. Familiarity with conflict of interest, campaign finance, and lobbying laws is desirable.
4. The Investigator shall be neutral and impartial and must not have or appear to have any bias or favoritism towards any person or entity involved in any way with any complaint or investigation.
5. The contract with the Investigator shall be subject to termination at the pleasure of the Commission.
6. The contract shall be terminated if any circumstances arise which in the judgment of the Commission would compromise the appearance of neutrality.
7. The contract with the Investigator shall be administered by the City Clerk.
8. For purposes of the investigation of complaints by the Investigator, the provisions of these Regulations and Procedures which are applicable to the Evaluator shall also apply to the Investigator.

E. COMPLAINTS OF ALLEGED VIOLATIONS

1. Any person may file a complaint alleging possible violations of the campaign finance, lobbying, conflicts of interest and certain governmental ethics ordinances set forth in Title 12 of the San José Municipal Code.
2. Complaints shall only be filed with the City Clerk who shall act as the Secretary to the Commission.
3. Complaints may be filed on the complaint form that is approved by the Commission and available in the Office of the City Clerk or from the City Clerk's website. In addition, the City Clerk may accept complaints, which provide the specificity and detail, including the identity of the Complainant, as required in this Section, by letter or electronic mail.
4. Complaints shall be filed with the City Clerk in person during business hours, by mail, by electronic mail or by facsimile on a complaint form.
5. A complaint shall provide as much specificity and detail as possible, including facts constituting the alleged violations, the name and address of the person who

- is alleged to have violated an ordinance and the names and addresses of potential witnesses.
6. Written complaints which provide specificity and detail, including the identity of the Complainant, and which are filed with the City Clerk, shall be forwarded promptly to the Evaluator by the City Clerk.
 7. The following types of complaints are outside the jurisdiction of the Ethics Commission, and no action can or will be taken by the Commission regarding these types of complaints:
 - a. Complaints against the Ethics Commission, and/or its members;
 - b. Complaints against the City Clerk; and/or
 - c. Complaints alleging political sign placement or size violation which shall be forwarded promptly to Code Enforcement by the City Clerk; and/or
 - d. Complaints alleging violations other than the campaign finance, lobbying, conflicts of interest and certain governmental ethics ordinances set forth in Title 12 of the San José Municipal Code
 8. A complaint may be submitted anonymously only by calling the "Ethics Commission Anonymous Complaint Hotline" at 408-975-ANON (2666). The Complainant shall state good cause for anonymity, which is limited to (a) an employee of the City or the Successor Agency to the Redevelopment Agency who is not protected by the Civil Service system making a complaint about a supervisor in his or her chain of command; or (b) a private sector employee making a complaint about his or her employer. The Chair of the Commission shall assess whether there is good cause for anonymity. It is recommended, but not required, that the Complainant provide a telephone number or other contact information for the Chair to contact the Complainant to gather additional information about the cause for anonymity. If the Chair determines the Complainant has good cause for anonymity, the complaint shall be forwarded promptly to the Evaluator by the City Clerk. If the Chair determines that the Complainant does not have good cause for anonymity, the complaint shall not be forwarded to the Evaluator.
 9. The City Clerk shall notify the Commission members promptly that a complaint has been filed, the date the complaint was filed and the general nature of the complaint.
 10. If a member of the Commission files a complaint, that member's right to participate in the complaint process is the same as any other complaining party. However, that member shall not participate in deliberations or vote on a matter concerning such complaint.

11. Under the circumstances described in Subsection F.8., the Evaluator may file a complaint with the City Clerk as provided in this Section E alleging possible violations of the Ethics Ordinance.

F. REVIEW OF COMPLAINTS BY EVALUATOR

1. The Evaluator shall notify the Respondent of the allegations and provide the Respondent with a complete copy of the complaint immediately upon the receipt of the complaint, unless the Evaluator determines that it is necessary to delay the notification in order not to compromise the investigation.
2. The Evaluator shall review every complaint to determine whether sufficient cause exists to conduct a preliminary investigation. Sufficient cause shall exist when a complaint identifies specific facts, which if proven, would be a violation of Title 12 of the San José Municipal Code. No investigation shall be conducted if the complaint does not contain sufficient facts to demonstrate a potential violation, if the facts would not amount to a violation of law or if identical allegations have already been addressed in a prior investigation.
3. Complaints which allege violations which have occurred more than four years prior to the date of filing shall not be considered by the Commission.
4. Any City employee who is a Candidate for City office shall be treated as any other Candidate for purposes of Chapter 12.06 of the San José Municipal Code. The Evaluator shall refer any complaint where the Respondent is a classified or unclassified employee appointed by a City Council Appointee to the appointing authority for investigation and action. The Commission shall take no further action on the complaint with regard to the employee.
5. If the Complaint, on its face, does not warrant a preliminary investigation, the Evaluator shall advise the Chair. The Chair shall schedule a Hearing for consideration of the Evaluator's Report and Recommendations.
6. If the Commission, upon reviewing the Evaluator's determination of lack of sufficient cause, determines that the complaint identifies specific facts which if proven would be a violation of the Municipal Code, the Commission shall direct the Evaluator to commence an investigation.
7. If sufficient cause is found by the Evaluator, or on review by the Commission, the Evaluator shall conduct an investigation. Such investigation must include an interview with the Respondent. The investigation may also include, but shall not be limited to, the interview of the Complainant and any witnesses, as well as the review of documents and other evidence.

8. In the event the Evaluator uncovers facts and information in the course of an investigation that may implicate possible violations of the Ethics Ordinances by one or more persons or entities who are not identified as Respondents in a complaint under investigation, the Evaluator shall notify the Chair of this discovery and shall file a complaint against the new Respondent(s) with the City Clerk using the form established for such purpose. To the extent the information giving rise to the complaint relates to the circumstances of another complaint under investigation, the Evaluator shall reference this in the complaint and indicate that the complaint should be treated as an amendment of the existing complaint. In this event, the Evaluator shall notify the new Respondent(s) as well as the Complainant and Respondent(s) of the existing complaint of the new allegations and provide copies of the subject complaints to all parties. If the information giving rise to the new complaint is not related to another complaint and deserves a separate and independent investigation, the Evaluator will notify the Respondent(s) of the allegations and provide a complete copy of the complaint, unless the Evaluator determines that it is necessary to delay the notification in order not to compromise the investigation.”
9. When the Evaluator concludes an investigation, the Evaluator shall prepare a written Report and Recommendation. The Report shall contain a summary of law and evidence gathered through the investigation, including any exculpatory and mitigating information. The Evaluator may consider all relevant facts and evidence including, but not limited to hearsay evidence, and shall include in the Report all facts bearing on the weight accorded the evidence. The Report shall state whether the Evaluator concludes that a Respondent did or did not violate City law. Recommendations may include actions to be taken by the Commission or further investigation to be conducted by the Evaluator.
10. No complaint, investigative file or information contained therein, shall be disclosed to any person other than a Respondent or Respondent's representative, the City Attorney, District Attorney, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation, prior to the presentation of the Report and Recommendations to the Commission. The Evaluator, however, may communicate with the Chair of the Commission during the course of the investigation of a pending complaint in the following circumstances:
 - a. On procedural matters; or
 - b. As required for a determination that a subpoena is essential under the provisions of Section G.
11. When a complaint, investigative file or information contained therein has been released to the public by any person or entity prior to presentation of the Report and Recommendations to the Commission, the City Clerk may acknowledge receipt of the complaint and issue a statement noting that:

- a. Any given complaint may or may not actually fall within the purview of the Commission;
 - b. A complaint merely represents unsubstantiated allegations pending the results of an investigation and Hearing; and
 - c. Early release of a complaint to the public is a violation of the San Jose Municipal Code.
12. After presentation of the Report and Recommendations, complaints, related documents, and investigative files shall not be disclosed except as required by the California Public Records Act (Government Code §§ 6250 et seq.).

G. COMMISSION HEARING

1. The Evaluator shall advise the Chair of the Commission to set a Hearing at the earliest practicable date based on the projected schedule for submittal and distribution of the Evaluator's Report and Recommendations.
2. The City Clerk shall notify the Complainant and the Respondent of the date and time of the Hearing at which the complaint will be reviewed by the Commission.
3. The Evaluator's Report and Recommendations shall be delivered to the Commission, the Complainant, the Respondent and all interested parties who request the Report, three (3) business days in advance of the Commission Hearing.
4. The Commission shall consider the Report and Recommendation of the Evaluator as well as any other evidence presented at the Hearing.
5. The Respondent may, but need not, submit a written response to the Report and Recommendations. The response may contain legal arguments, a summary of evidence and any mitigating or exculpatory information.
6. The Respondent who chooses to submit a response shall deliver the response 24 hours in advance of the Commission Hearing, if possible. The Respondent shall deliver a total of eight copies of the response to the City Clerk for distribution to the Commission and the Evaluator.
7. The Respondent may appear before the Commission personally or be represented by counsel or any other person.
8. The formal Rules of Evidence shall not apply to the Hearing.
9. All testimony presented to the Commission shall be under oath or affirmation.

10. Commission members may ask questions of the Complainant, Respondent, witnesses or the Evaluator when recognized by the Chair.
11. The Commission, if necessary, may compel the testimony of witnesses and may compel the production of relevant documents to the Evaluator by subpoena, but this power may be used only as a last resort, after good faith efforts to acquire the relevant information have failed and upon a finding that the information or testimony is essential for a determination in the matter.
12. The Chair of the Commission, after consultation with the Evaluator, may subpoena witnesses and compel their attendance and testimony and require by subpoena the production of any books, papers, records or other items at a scheduled Commission Hearing. Use of the subpoena power by the Chair shall be used only after a written determination that the information or testimony is essential for a determination in the matter and material to the duties and/or exercise of the powers of the Commission and that good faith efforts to acquire relevant information have failed. The City Clerk shall notify the Commission members promptly that subpoena power has been used and shall describe the general basis for the written determination without reference to specific details of the complaint, investigative file or information contained therein.
13. Except as otherwise provided above, individual members of the Commission may not investigate complaints nor discuss pending complaints with anyone except during the course of a Hearing.
14. The Complainant is to be treated like any other witness in providing evidence. Any interested person can submit a brief to the Commission or any written argument 24 hours before the Commission Hearing, if possible. The brief or written argument must be simultaneously provided to the Respondent.
15. The Hearing shall be recorded by the City Clerk.
16. The Hearing shall be open to the public except that witnesses may be excluded at the discretion of the Commission.
17. Prior to a final determination on the merits of a complaint, there shall be no oral or written communications regarding the merits of a complaint with any person or entity unless the communication is necessary for the conduct of the investigation or except as otherwise provided above. After the final determination, the Chair shall be the sole contact with the public and media.

H. SCHEDULING

1. This process is to be completed at the earliest possible time. While timelines cannot be precise because of the nature of an investigation, timeliness is

paramount, particularly when an elections-related complaint is filed within two weeks of an election. In all cases, the Evaluator's Report and Recommendations must be submitted to the City Clerk within 30 calendar days after the Evaluator receives the complaint unless an extension has been requested and granted as provided in this section.

2. Whenever an action is required to be completed by a particular time pursuant to these Regulations or an order of the Commission, the Evaluator or Respondent may request an extension of time by filing a written request with the City Clerk. The Clerk shall promptly forward the request for an extension to the Chair of the Commission and the City Attorney's Office. In consultation with the City Clerk and the City Attorney's Office, the Chair may grant the request only upon a showing of good cause. The extension granted by the Chair shall be in writing and must specify the amount of additional time that has been granted.
3. If an extension has been granted to the Evaluator, the Evaluator shall submit a progress report on the status of the Evaluator's Report and Recommendations at each regularly scheduled meeting of the Commission until the Report has been delivered. The progress report should explain, generally, the status of the Report and Recommendations without divulging details about the Complaint or the investigation.
4. If the Chair has denied the Evaluator's request for an extension, the Evaluator shall deliver, within three (3) business days, a Report that summarizes the law and evidence gathered through the investigation up to that point, including any exculpatory and mitigating information.

I. ROLE OF THE CHAIR

1. The Chair shall make procedural determinations including but not limited to the scheduling of Hearings, time extensions and order of witnesses.
2. The Chair is free to consult with the Evaluator and the City Attorney on procedural matters. The Chair may also discuss procedural matters ex parte with the Respondent.
3. The Chair shall serve as the sole Commission contact and/or spokesperson for interactions with the public, the City Council and the media. Except for routine administrative matters within their individual areas of responsibility, the City Clerk, City Attorney, Evaluator and Investigator shall refer all inquiries to the Chair.

J. COMMISSION - FINDINGS

1. If the Commission concludes that further investigation is necessary, it shall direct the Evaluator to conduct further investigation and to report back to the Commission.
2. Upon conclusion of the final Hearing, the Commission shall issue a decision by Resolution.
3. If the Commission decides that there is sufficient evidence to establish that no violation has occurred, the Commission shall publicly announce this fact.
4. If the Commission decides that that there is insufficient evidence to establish that a violation has occurred the Commission shall publicly announce this fact.
5. A decision that a violation has occurred shall be based on a preponderance of the evidence from the entire record of the proceedings.
6. The votes of at least three members of the Commission are required to decide that a violation of Title 12 of the San José Municipal Code has occurred. Each Commission member voting on the decision of the Commission shall certify on the record that he or she has heard (either in person or by listening to a recording) or read the transcript of the testimony at the Hearing on the complaint and reviewed all the evidence in the record.
7. The Commission may refer the allegations and any information gathered in the investigation to an appropriate enforcement agency.
8. The Commission shall not impose a penalty if it is presented with clear and convincing evidence that, prior to the alleged violation:
 - a. The Respondent had requested and obtained a written opinion from the City Attorney or the California Fair Political Practices Commission (FPPC); and
 - b. The Respondent, in requesting the opinion, disclosed truthfully all the material facts pertinent to the case; and
 - c. The Respondent committed the acts or violations alleged in the complaint in good faith reliance upon the formal, written opinion of the City Attorney or the FPPC.
9. The City Clerk shall provide a copy of the Resolution of the Commission's determination to the Respondent and Complainant. A copy of the Resolution shall be posted on the Ethics Commission website.
10. The decision of the Commission shall be the final administrative determination of the City, unless the Commission makes another decision by Resolution to

impose penalties under Section K, in which case that decision shall be the final administrative determination of the City.

K. ADMINISTRATIVE ORDERS AND PENALTIES

1. If the Commission finds a violation, the Commission may:
 - a. Find mitigating circumstances and take no further action;
 - b. Issue a public statement or reprimand;
 - c. Require corrective action by a particular deadline; and/or
 - d. Impose a penalty in accordance with Chapter 12.04 of the San José Municipal Code.
2. The votes of at least three members of the Commission are required to impose any order and/or penalty for a violation of Title 12 of the San José Municipal Code. Each Commission member voting to impose any order and/or penalty for a violation must certify on the record that he or she has heard (either in person or by listening to a recording) or read the transcript of the testimony at the Hearing on the complaint and reviewed all the evidence in the record.
3. In determining if penalties should be imposed for violations of Title 12 of the San José Municipal Code and the amount of any such penalties, the Commission shall consider all the relevant circumstances surrounding the case including:
 - a. The severity of the violation;
 - b. The presence or absence of any intention to conceal, deceive, or mislead;
 - c. Whether the violation was deliberate, negligent or inadvertent;
 - d. Whether the violation was an isolated incident or pervasive enough to indicate a pattern of disregard for Chapter 12.04 of the San José Municipal Code;
 - e. Whether the Respondent has a prior record of violations of City law relating to campaign finance, lobbying, conflicts of interest, or governmental ethics;
 - f. The degree to which the Respondent cooperated with the investigation;

relevant state or federal law, but shall not participate in investigations or reviews of complaints. (SJMC § 12.04.080)

2. The Chair or the Evaluator may consult with the City Attorney at any time with regard to procedure or an interpretation of the Code, in general, and not as it applies to facts that are the subject of a pending complaint.

SECTION 2. Resolution No. 75640 is hereby repealed.

ADOPTED this 15th day of April, 2014, by the following vote:

AYES: CAMPOS, CHU, CONSTANT, HERRERA, KALRA,
KHAMIS, LICCARDO, NGUYEN, OLIVERIO, ROCHA;
REED.

NOES: NONE.

ABSENT: NONE.

DISQUALIFIED: NONE.



CHUCK REED
Mayor

ATTEST



TONI J. TABER, CMC
City Clerk