

M. D. MOYE  
PARTNER  
LABOR  
DIRECT DIAL 415 995 5092  
E-MAIL mmoye@hansonbridgett.com

January 22, 2009

**VIA EMAIL**

Kenneth J. Machado, Jr.  
33 North San Pedro Street  
San Jose, CA 95110

Re: **Complaint Before the City of San Jose Elections Commission**  
Respondent: John McEnergy IV, Tom McEnergy, Urban Markets LLC  
Nature of Complaint: Violation of Lobbyist Ordinance  
Complaint Filed: December 8, 2008  
Complainant: Anonymous

Dear Mr. Machado,

The City of San Jose Elections Commission ("Commission") has retained our firm pursuant to Chapter 12.04.080 of Title 12 of the San Jose Municipal Code ("Municipal Code") to serve as Evaluator for the above-referenced Complaint. As your letter to the Commission of January 16, 2009 concerns procedural matters related to the Complaint and to our duties as Evaluator, the City Attorney has requested that we provide a response to you.

The Commission's procedures are set forth in Resolution No. 72457 ("the Resolution"). Paragraphs E.4 and F.2 of the Resolution provide that "every" complaint shall be forwarded to the Evaluator and that the Evaluator shall review each complaint to determine if an investigation should be conducted. Our review includes determining compliance with procedural requirements of the Municipal Code and the Resolution as well as applying the standard set forth under paragraph F.2 of the Resolution. Under the Commission's established procedures, the Chair is informed of the filing of a complaint and is advised generally as to the status of pending investigations, but the Commission does not review the complaint until we file a report either recommending against an investigation or upon conclusion of an investigation.

In this instance, we determined that the Complaint alleged specific facts, which if proven, would be a violation of the Municipal Code. We also determined that the Complaint substantially complied with the applicable procedural requirements. Accordingly, we have commenced an investigation and anticipate filing a report of our findings with the Commission.

As you note, the Complaint was filed "anonymously" in that the name of the complainant was not provided. As neither the Municipal Code, nor the Resolution require a complainant to have personal knowledge of the facts purporting to underlie the complaint, the identity of the complainant typically does not impact the decision as to whether an investigation is warranted.<sup>1</sup> Rather, the filing of an anonymous complaint raises the question of whether an adequate

---

<sup>1</sup> For example, any person could file this same complaint, listing themselves as the complainant. Because, as noted above, the Complaint meets the substantive requirement for conduct of an investigation, an investigation would be required; thus, the anonymity of the complainant, in and of itself, is insufficient reason to forego an investigation.

investigation can be conducted. Consequently, as part of our evaluation we consider the extent to which the complainant appears to have personal, and/or exclusive, knowledge of facts relevant to the complaint that could impede the investigation or cause the investigation to be incomplete because a key witness - the complainant - could not be questioned. Similarly, we would consider the likelihood that the opportunity to evaluate the credibility of the complainant is a necessary element in resolving disputed evidence. To the extent either of these issues is raised, the next step would be to determine whether "good cause" for anonymity of the complainant exists such that protection of the identity of the complainant outweighs any potential prejudice to the impartiality of the investigation or the parties to the matter.

In this instance, the nature of the allegations indicate the identity of the complainant is not essential to a complete investigation that is fair and impartial. The Complaint alleges no violation that appears to depend upon the personal or exclusive knowledge of the complainant; in fact, the allegations are premised largely on objective facts ascertainable from public records and third-party interviews. We do not foresee any circumstance where obtaining information directly from the complainant would be critical to this investigation. Although the "motive" behind the filing of a complaint may relate to the credibility of a witness who purports to have personal knowledge of facts relevant to the complaint, that is not the case here. In sum, the identity of the complainant in this matter is not essential to conducting the investigation and to providing the Commission with a complete factual record for consideration of the merits of the Complaint.

As our evaluation concludes that an investigation is warranted, your proposals concerning the Commission's procedures can be addressed to the Commission in conjunction with its review of our report in this matter, or separately, as provided for under the Municipal Code. Likewise, the issue posed by the question in the first part of your letter concerning the identity of the complainant can be addressed to the Commission at the time it considers the report in this matter.<sup>2</sup>

Let me know if you have any questions concerning the foregoing.

Very truly yours,



M. D. Moye

cc: San Jose City Attorney  
San Jose City Clerk  
Chair, San Jose Elections Commission

---

<sup>2</sup> Paragraph E.6 of the Resolution provides that "[t]he Evaluator and the Commission may consider the anonymous nature of the complaint, and the reasons given for anonymity in their considerations of such complaint."