

Memorandum

TO: San Jose Elections Commission

FROM: Hanson Bridgett, LLP

DATE: April 7, 2009

RE: Supplemental Information Report

I. INTRODUCTION

Pursuant to a complaint filed on December 8, 2008 (“Complaint”), we have commenced an investigation to determine whether John McEnergy IV, Tom McEnergy, Urban Markets, LLC (collectively “Respondents”) violated Title 12 of the San Jose City Municipal Code (“Municipal Code”) by failing to register as lobbyist according to the timelines set forth in the Municipal Code and/or failing to disclose contacts with City Officials as required by the Municipal Code.

The Complaint in this matter indicated the complainant was “Anonymous.”¹ In our initial evaluation of the Complaint we determined that an investigation was warranted and that the anonymous filing would not interfere with conducting a fair, complete and impartial investigation. After commencing the investigation, the Respondents raised the issue of whether “good cause” exists for the anonymous filing. In a letter to counsel for Respondents on January 22, 2009 (“January 22 letter,” a copy of which is attached to the Agenda) we explained the procedure for evaluating the complaint and resolving the question of due process concerns in light of the anonymous filing.

In recent correspondence to the Commission on March 19, 2009 (“the March 19 letter”), Ken Machado, counsel for the Respondents, requested that the Commission “rule upon whether or not good cause for anonymity has been shown.” Mr. Machado advises that “[i]f it is then determined that there was not good cause shown for the anonymous filing, then following its own rules, the matter should be dismissed.” Mr. Machado also states “[w]e think that Resolution 72547, and specifically paragraph E(6), makes it the commission’s [sic] job” to determine good cause for anonymity. Mr. Machado clarifies that it is his view that the “good cause” finding should be made before the complaint is sent to the Evaluator. Mr. Machado describes the referral of the complaint to the Evaluator as “step number two” in the processing of complaints..

The purpose of this supplemental information report is to address issues related to complaints filed anonymously and the impact, if any, on the conduct of an investigation of such complaints. The following questions and accompanying discussion, premised on the requests

¹ Although it appeared that the intent was to file the Complaint anonymously, the Complaint lists the McManis Law Firm under the section for address and other contact information for the complainant. Mr. McManis has advised the Commission that his firm represents the individual responsible for the Complaint, but the identity of the complainant has not been disclosed.

set forth in the March 19 letter, are relevant to determining both the procedures to be followed by the Evaluator for handling complaints generally and the specific issues in the pending Complaint:

- Is it the role of the Commission to determine “good cause” for an anonymous filing before a complaint is referred to the Evaluator?
- If a complainant gives reasons for seeking anonymity, is the “good cause” standard satisfied for the purposes of initiating an investigation, even if those reasons are subject to dispute?
- If a complainant fails to give reasons for seeking anonymity or such reasons are determined to be insufficient, under what circumstances should a Complaint be dismissed?
- Was the “good cause” standard satisfied in this case?

II. EXECUTIVE SUMMARY

Is it the role of the Commission to determine “good cause” for an anonymous filing before a complaint is referred to the Evaluator?

No, see Sections III.A and III.B,2, below. The Resolution expressly provides that the Evaluator shall review the complaint and determine whether an investigation is warranted. Logically, this provision of the Resolution encompasses determination of substantive and procedural requirements set forth in the Resolution. The Resolution specifically permits the Evaluator to determine whether a complaint satisfies such requirements by empowering the Evaluator to initiate an investigation.

The Resolution has no provision requiring the Commission to determine the need for an investigation or the adequacy of a complaint except in its review of the report and recommendations submitted by the Evaluator. The Resolution specifically limits disclosure of the complaint and the investigative file before a report is presented to the Commission. Consequently, this express provision of the Resolution would appear to preclude the Commission reviewing a complaint, before it is referred to the Evaluator, for the purpose of determining “good cause.”

If a complainant gives reasons for seeking anonymity, is the “good cause” standard satisfied for the purposes of initiating an investigation, even if those reasons are subject to dispute?

Generally yes, as questions concerning the “adequacy” of the good cause can be addressed in conjunction with consideration of the merits of the complaint. See Section III.B, below. The Resolution provides no special standard for determining “good cause” and the term is generally defined as subject to the context in which it is used. The plain language of the Resolution requires no more than a reason to support the anonymous filing.

If the “good cause” is challenged, the language of the Resolution anticipates that issue being addressed when a report and recommendations are submitted to the Commission. The Resolution does not specify that such consideration goes to determination of the need for or appropriateness of an investigation (see next section). And, as noted above, the Resolution does not define a particular role for the Commission when a complaint is first filed or before receiving the Evaluator’s report. Consequently, the Resolution appears to provide that

challenges to the “adequacy” of the “good cause” is an issue to be determined in conjunction with consideration of the merits of the complaint.

If a complainant fails to give reasons for seeking anonymity or such reasons are determined to be insufficient, under what circumstances should a Complaint be dismissed?

See Sections III.B and III.C, below. A determination that the “good cause” provision has not been satisfied is a factor to consider in determining whether an investigation is warranted, but that fact alone would not appear to preclude initiating an investigation. Typically a failure to comply with an administrative requirement or a defect in compliance is viewed as either “jurisdictional” (i.e., one that deprives the Commission of authority to consider and to act on the complaint) or “procedural” (i.e., one that may be excused subject to due process considerations). The Resolution appears to treat it as a procedural defect.

The decision regarding dismissing the complaint or proceeding with an investigation is subject to the requirements of paragraphs F.2, F.3 and F.4. However, even if the complaint is proper for investigation under one of those sections, the anonymous filing raises the question of due process in the conduct of an investigation and that issue would have to be resolved before an investigation is commenced. See, January 22 letter.

Was the “good cause” standard satisfied in this case?

Yes, see Section III.C, below. The complainant cites “fear of retaliation” as the reason for the anonymous filing. While there may be some dispute as to the credibility or reasonableness of this assertion, “good cause” in this context is by its nature a subjective standard. Thus, any challenge to the reasonableness of the complainant’s belief/perception must take into account the complainant’s reasons for that belief. Practically speaking, inquiring into the state of mind of the complainant on this issue would require waiver of the anonymity that the Resolution permits. As there is no basis to declare the complainant’s belief/perception unreasonable absent such inquiry there is insufficient basis to sustain the allegation of inadequacy at this point. Because the complaint does in fact meet the standard for conducting an investigation, the issue of good cause can be addressed in considering the report and recommendations on the complaint.

As this scenario potentially poses a risk that a respondent may be prejudiced by the anonymous filing or the purposes of the Municipal Code frustrated (because the complainant is in fact using anonymity for improper motives), the proper consideration is whether investigating the complaint can be accomplished without prejudice or violation of interested parties’ rights to due process. This issue was addressed in our January 22 letter.

III. DISCUSSION

A. There Are Procedures Under Resolution 72547 and A Past Practice For Determining Whether An Investigation Should Be Conducted.

1. Procedures under the Resolution vest the Evaluator with authority to conduct the initial review of a complaint and the determination if an investigation is warranted.

Resolution 72547, which implements Title 12 of the Municipal Code, provides that “all complaints which are filed” shall be forwarded to the Evaluator. (See, Paragraph E.4)² The Resolution provides further at paragraph F.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 the 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.

Paragraph E.6 provides that a Complaint may be filed anonymously and that the “complainant must state good cause for anonymity.” That section of the regulation also 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.”

Paragraph F.5 sets forth the procedure to be followed if “the Complaint, on its face does not warrant a preliminary investigation.” Specifically, “the Evaluator shall advise the Chair [and] the Chair will schedule the Evaluator’s report and recommendations.” The Commission may direct that an investigation be conducted if it disagrees with the Evaluator’s recommendation. (Paragraph F.6) With the exception of two other situations that are not germane here, the Resolution sets forth no other standard or procedure for not conducting an investigation and dismissing a Complaint.³

2. The past practice for initiating an investigation has relied upon the Evaluator to review the complaint and determine compliance with the standards set forth in the Resolution as well as general principles of due process.

Since 2002 every complaint filed alleging a violation of Title 12 of the Municipal Code has been filed with the City Clerk and the City Clerk has forwarded the complaint to the Evaluator.⁴ The Evaluator has reviewed each complaint in accordance with the requirements of

² A proposed change to this section of the Resolution provides that the Commission members will be notified “that a complaint has been filed, the date the complaint was filed and the general nature of the complaint.” The Resolution does not provide for or require that the complaint be distributed to Commission members.

³ Paragraph F.3 provides that alleged violations occurring more than four years prior to the date of filing “will not be considered by the Commission.” Paragraph F.4 provides that the Commission “shall take no further action” on a complaint identifying as a Respondent a City employee appointed by a City Council Appointee.

⁴ Typically, the Chair has been informed that a complaint was pending and was being investigated.

the Resolution and has initiated an investigation or reported to the Commission in writing that an investigation was not warranted, with a recommendation that the matter be closed.⁵ Upon commencement of an investigation, the Evaluator typically coordinates procedural matters (i.e., reports as to status of investigation, scheduling hearings and appearances before the Commission) as provided for under paragraph F.9 of the Resolution. However, under this section the Commission members are not entitled to review the complaint or investigative materials before receiving the Evaluator's report. Paragraph F.9 provides that:

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, the 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 on procedural matters relating to a pending complaint during the course of the investigation.

The Evaluator has also reviewed complaints that have been filed anonymously.⁶ As noted in a letter to Mr. Machado on January 22, 2009, the primary focus of the review of the anonymity issue is to insure that if an investigation is warranted, it can be conducted fairly and completely. Specifically, the consideration is whether the inability to question the complainant on key issues will result in an incomplete investigation or interfere with the respondent's opportunity to participate fully in the investigation.⁷

Practical considerations have guided the Evaluator's analysis of requirements under the Resolution. For example, because the Municipal Code anticipates lay persons filing complaints, a specific form as to allegations or statement of claims has not been required. Rather, complaints are reviewed to determine the specific facts alleged and whether those facts if proven warrant an investigation. On occasion, where the factual allegations or specified violations are unclear, the Evaluator has sought clarification from the complainant and/or considered other potential violations not specified in the complaint but implicated by the factual allegations.

B. The Resolution Does Not Define "Good Cause" and Typically the Term Is Subject to Interpretation In the Context In Which It Is Used.

Neither the Resolution nor the Municipal Code define "good cause" in the context of anonymous filing. The term "good cause" appears at several places in the Municipal Code, but it is not generally defined. In some instances where the term is used, the language of the section describes what is meant by "good cause." For example:

⁵ The Commission has approved such requests by the Evaluator.

⁶ At the March 11, 2009, Commission meeting, the Evaluator noted one complaint that had been filed anonymously. There is in fact only one other occasion where an investigation was conducted and a report was filed where the identity of the complainant was unknown. There is, however, another occasion where a complaint was filed by several complainants, some of whom were identified as "Anonymous" and in one instance a complaint was intended for anonymous filing but the complainant identified himself.

⁷ Even though the anonymity of the complainant may not impede an investigation, the Evaluator will not initiate an investigation if a complaint does not meet the standard under paragraph F.2. Thus, the issue of anonymity is typically not addressed unless an investigation is warranted in the first instance.

- In Section 7.30.330: "The administrator may grant . . . a fifteen (15) day extension for **good cause** such as evidence of a good faith effort to comply and circumstances beyond the control of the dog owner/guardian . . ."
- In Section 17.20.1080: "The city manager may, on the basis of a violator's good faith efforts to correct a condition of noncompliance or for other **good cause** shown . . ."
- In Section 17.78.280: "The fire chief may extend this time at the request of a responsible person for a maximum of two years if the fire chief makes a written determination that hardship, unique circumstances, or other **good cause** exists."
- In Section 25.08.730: "Unless director determines that, due to the size of the ground transportation provider's fleet or for other **good cause**, such requirement creates an undue hardship . . ."

"Good cause" is generally defined as a "legally sufficient reason why a request should be granted or an action excused." (*Blacks' Law Dictionary*, 8th Ed.) Based on this definition and the manner in which the term is used in other sections of the Municipal Code, the definition appears to be a relative one, dependent upon the circumstances of each individual case.

1. The Resolution appears to permit a complaint to be filed anonymously for a variety of reasons.

The Resolution permits a complaint to be filed anonymously. Past experience shows anonymous filings to be the exception, rather than the rule. In this instance the question concerns grounds to excuse a complainant from identifying themselves.

As indicated in the discussion at the March 11, 2009, meeting, a key consideration for this provision appears to have been protection for a City employee fearful of retaliation as the result of filing a complaint alleging a violation of the Municipal Code. Notwithstanding this history, the Resolution does not limit "good cause" to this particular circumstance.

It would seem that there are circumstances for filing a complaint anonymously similar to the employee fearful of job retaliation. For example, a citizen may fear retribution from a political figure, a citizen (not an employee) may be concerned that a complaint against a city official may adversely affect business that they conduct with the City, and it is possible that given the publicity that is likely to surround this type of complaint, a citizen may wish to maintain privacy for reasons other than fear of retribution or retaliation. In a prior complaint (referenced in footnote 6), the complainant alleged that a former employer had engaged in conduct in violation of the Municipal Code. Although the complainant's employment had ended, he nonetheless requested anonymity, wishing to raise the issue, but not wanting to be associated with the complaint. As the complaint met the requirements of paragraph F.2 an investigation was initiated and the allegations were partially sustained. However, if an investigation had been abandoned because the complainant's "fear of retaliation" was not based on job loss, the violation would not have been addressed.

In the absence of specifically limiting language in the Resolution it would appear reasonable to interpret “good cause” as it is used in the Resolution to encompass any of the scenarios noted above. The obvious purposes behind permitting an anonymous filing are encouraging enforcement of Title 12 of the Municipal Code and in so doing protecting the complainant from actual or perceived retaliation or similar adverse consequences.

2. “Good cause” is peculiar to the person filing the complaint.

Significant to the example upon which the anonymity provision is based, is the notion that fear of job retaliation is largely a subjective consideration.⁸ Though there are circumstances where the fear of job retaliation may appear obvious and, thus, objectively determinable, in most circumstances the desire to maintain anonymity will be peculiar to the individual complainant and based on subtle or indirect concerns. Similarly, privacy concerns or fear of other types of retribution is peculiar to the complainant. As the Resolution does not specify an objective standard for determining “good cause,” the context in which it appears indicates a subjective standard is to be applied.

The complaint states “fear of retaliation” as the reason for requesting anonymity. On its face “fear of retaliation” is typically the scenario under which an anonymous act might be pursued. While there are any number of other reasons anonymity might be sought, “fear of retaliation” is not in and of itself unreasonable in this circumstance. “Good cause” as it is used in the Resolution should require no more. Any question of whether the complainant’s reasons are true, are believable, are reasonable, are the only reasons - or any similar challenges - can only be addressed by the complainant.

It seems that it would be inconsistent to require a particular statement of such cause given the general wording of the Resolution. Furthermore, it seems that the general wording recognizes the fact that from a practical standpoint it is not clear how a challenge to the statement of cause would be resolved. Any inquiry into the reasons for the anonymous filing must fairly take into account the complainant’s perspective. However, because the complainant is “anonymous” he/she cannot appear at a hearing to explain or defend his/her reasons without waiving the right to remain anonymous. As this course does not appear to be consistent with the intent reflected in the Resolution to permit an anonymous filing, any statement setting forth a perceived need for anonymity should satisfy the requirements of the Resolution.

Although this approach leaves open the possibility that a complainant might seek to file a complaint anonymously citing reasons that are without merit, there are at least three significant safeguards for the integrity of the process. First, if the complaint fails to allege facts that are sufficient to constitute a violation of the Municipal Code, no investigation will be conducted under the procedures currently in place. Second, even if the complaint alleges a violation warranting investigation, an investigation would not be conducted if it would result in prejudice to the respondent (discussed in our letter of January 22, 2009). Finally, there is adequate opportunity to assess the importance (or lack of importance) of the identity of the complainant to the merits of the complaint as part of the consideration of whether the allegations are proven,

⁸ A “subjective” standard is a legal standard that is based on conduct “peculiar to a particular person and based on the person’s individual views and experiences.” (*Black’s Law Dictionary*, 8th Ed.)

the seriousness of any proven violation, and/or what corrective action is warranted if a violation is proven. This approach appears to be consistent with both paragraphs E.6 and F.9.⁹

C. The Resolution Has No Specific Provision To Dismiss A Complaint Because “Good Cause” Has Not Been Shown.

Ultimately the Municipal Code and Resolution seek to insure that potential violations of Title 12 are investigated and its requirements fairly enforced. Overlooking or ignoring evidence of a potential violation as the result of a *possible* procedural deficiency, which deficiency does not go to the substance or merits of the allegations, appears to be counter to the intent of the ordinance:

- The Resolution sets forth specific circumstances under which an investigation is not warranted or investigation should not be conducted and lack of “good cause” for an anonymous filing or a complaint filed with “improper motive” are not one of those circumstances.

- Although the Resolution requires “good cause,” the Resolution is silent as to what happens if that requirement is not met. On the other hand, there are several requirements for a complaint that are similar in nature to the “good cause” requirement and the Resolution specifically states in which of those instances an investigation should not be conducted and the Complaint dismissed, because the requirement was not satisfied. Thus, the overall scheme of the Resolution indicates dismissal of a Complaint is not contemplated if the sole deficiency is failure to state “good cause.”

The question of whether lack of “good cause” for an anonymous filing is a jurisdictional defect (i.e., one that deprives the Commission of authority to consider and to act on the complaint) or “procedural” (i.e., one that may be excused subject to due process considerations) is not addressed directly by the language of the Resolution. Two factors suggest the Resolution treats the “good cause” requirement as a procedural issue. First, nothing in the Resolution requires dismissal of an anonymous complaint for failure to state “good cause” for the anonymous filing and the Resolution is silent as to a particular course of action if the “good cause” requirement is not satisfied. Second, the Resolution specifically identifies three circumstances/defects which if present preclude the Commission from considering and acting upon a complaint: paragraphs F.2, F.3, and F.4. As lack of “good cause” for an anonymous filing is not one of these enumerated circumstances, it would appear that this type of defect was not intended to be jurisdictional.

⁹ This approach is also consistent with past practice. We note that in the past there have been many more instances in which a complaint has been filed - by a named complainant - under circumstances that raised questions, as to the “motive” for filing the complaint. For example, the late filing of a complaint just before an election or a complaint filed by candidate A (or his/her supporters) against candidate B immediately after candidate B (or his/her supporters) files a complaint against candidate A. In these situations, provided the complaint met the standard of paragraph F.2, the Commission has addressed the issue of “motive,” if at all, in its consideration of the report and recommendations. To the extent that the Resolution is construed to require the Commission to determine whether an improper “motive” underlies an anonymous filing before an investigation is initiated, it would appear that these other circumstances, where an improper motive is also alleged, would also require a similar pre-determination. The result is the requirement for every complainant to justify or to explain his/her reasons for filing a complaint, a requirement that does not appear in the Resolution.