RESOLUTION NO. 75260

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AMENDING REGULATIONS AND PROCEDURES FOR THE SAN JOSE ELECTIONS COMMISSION INVESTIGATIONS AND HEARINGS, AND SUPERSEDING RESOLUTION NO. 75173

WHEREAS, the San Jose Elections Commission (Commission), is charged under Chapter 12.04 of the San Jose Municipal Code to investigate complaints alleging violations of Title 12 of the San Jose 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. 75173 to prohibit anonymous written complaints but permit anonymous complaints by calling the "Elections Commission Anonymous Complaint Hotline";

NOW, THEREFORE, BE IT RESOLVED BY THE CITY 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 Jose Elections Commission (Elections Commission or Commission).

REGULATIONS AND PROCEDURES FOR SAN JOSE ELECTIONS COMMISSION INVESTIGATIONS AND HEARINGS

A. PREAMBLE

These Regulations and Procedures of the San Jose Elections 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 campaign finance, lobbying, conflicts of interest and certain governmental ethics, 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 and determinations of 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. "Elections Commission" or "Commission" means the San Jose Elections Commission

2. "Complainant" means a person or entity that files a complaint.

3. "Complaint" means the Elections Commission Complaint Form, completed and signed by the Complainant, which is on file with the City Clerk.

4. "Candidate" means a person who is running for City Office or is City elected officeholder.

5. "Day" means calendar day, unless otherwise specifically indicated.

6. "Election Cycle" is that period of time from the date when a candidate files a Statement of Intention to be a Candidate to an office in accordance with Government Code § 85200 and until a candidate has been elected to that office.

7. "Ethics Ordinances" shall mean all ordinances found in Title 12 of the San Jose Municipal Code.

8. "Evaluator" means a person who is neutral and impartial, meets the qualifications in Section C and has been retained as provided herein.

9. "Exculpatory information" means information tending to show that the Respondent is not guilty of the alleged violations.

10. "Investigator" means a person who is neutral and impartial, meets the qualifications in Section D and has been retained as provided herein.

11. "Mitigating information or circumstances" means information or circumstances tending to excuse or reduce the significance of the Respondent's conduct.

12. "Preliminary Investigation" is that investigation conducted by the Evaluator prior to any presentation to the Commission.

13. "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 San Jose Elections Commission shall submit to the City Council a budget request in advance of each election cycle which will enable the City Council to appropriate funds anticipated to be needed for the Evaluator for a period of two years.

2. The Commission shall prepare and issue a Request for Qualifications/Quotes for an Evaluator in advance of the election cycle.

3. The Evaluator must have a legal background and experience with ethics, election or political law.

4. The Evaluator must be neutral and impartial and must not appear to have any reason for any bias or favoritism towards any Councilmember or candidate in any way.

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 a two year term.

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, the Elections 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 Elections Commission and to monitor compliance with the requirements of Title 12 of the San Jose Municipal Code as requested by the Elections Commission.

3. The Investigator must have experience in conducting investigations such as law enforcement, ethics or employment related investigations. Further, familiarity with conflict of interest, campaign finance, and lobbying laws is desirable.

4. The Investigator must be neutral and impartial and must not appear to have any reason for any bias or favoritism towards any elected official of the City and must be willing to forego all personal involvement in political campaigns in the County of Santa Clara.

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 Jose 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. All 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. The City Clerk must also notify the Commission members promptly that a complaint has been filed, the date the complaint was filed and the general nature of the complaint.

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. A complaint may be submitted anonymously only by calling the "Elections Commission Anonymous Complaint Hotline" at 408-XXX-XXXX. The Complainant must state good cause for anonymity, which is limited to (a) a City or Redevelopment Agency employee 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, or the Vice-Chair, if the Chair is not available, will assess whether there is good cause for anonymity. It is recommended, but not required, that the Complainant provide a telephone number for the Commissioner reviewing the call to contact the Complainant to gather additional information about the cause for anonymity. If the Commissioner reviewing the call determines the Complainant has good cause for anonymity, the complaint will be forwarded promptly to the Evaluator by the City Clerk. If the Commissioner reviewing the call determines that the Complainant does not have good cause for anonymity, the complaint will not be forwarded to the Evaluator.

7. Complaint forms shall be filed with the City Clerk in person during business hours, by mail, by electronic mail or by facsimile.

8. If a member of the Commission is a complaining party, that member's right to participate is the same as any other complaining party.

9. A member of the Commission who files a complaint may participate and vote on a matter concerning such complaint except in the following circumstances:

a. Where the member of the Commission filing the complaint is a witness who was interviewed by the Evaluator during the investigation of the complaint because of the member's personal knowledge of the alleged violation; or

b. Where a member of the Commission files a complaint based on the member's personal knowledge of facts and circumstances beyond the member's information and belief that there may be a violation of the San Jose Municipal Code.

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 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 which 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 will not be considered by the Commission.

4. Except as provided in this Subsection 4, 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. 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 Jose Municipal Code.

5. If the Complaint, on its face, does not warrant a preliminary investigation, the Evaluator shall advise the Chair. The Chair will schedule the Evaluator's Report and Recommendations on a Commission Agenda for approval.

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. 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.

9. 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 on procedural matters relating to a pending complaint during the course of the investigation. 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 will 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 meeting 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, 72 hours in advance of the Commission Hearing, if possible. The Report and Recommendations must be available at the time of the 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 must deliver the response 24 hours in

advance of the Commission Hearing, if possible. The Respondent must 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 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 or meeting. 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 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.

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 public 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 convenes to consider the complaint, 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. 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 will 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 must be in writing and must specify the amount of additional time that has been permitted.

I. ROLE OF THE CHAIR

1. Procedural Hearing Matters

   a. The Chair shall make procedural determinations including but not limited to the scheduling of hearings, time extensions and order of witnesses.

   b. 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.

   c. The Chair shall be the sole contact with the public. The Evaluator shall refer all media 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. Each Commission member who votes on the decision of the Commission must certify on the record that he or she personally 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 the entire evidence in the record.

7. The Commission may refer the allegations and any information gathered in the investigation to an appropriate law 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.

10. The decision of the Commission will 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 will 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. Impose a penalty in accordance with Chapter 12.04 of the San Jose Municipal Code.

2. The votes of at least three Commission members are required to impose orders and penalties for a violation. In order to vote to impose any order or penalty for a violation, every Commissioner must certify 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 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 this Chapter;

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;

g. Whether or not corrective actions were taken, if appropriate, in accordance with the provisions of this Chapter.

L. REFERRALS TO OTHER ENFORCEMENT AGENCIES

At any time, the Evaluator or the Commission may refer the matter to another government agency or official if the Commission determines that the agency or official may more appropriately resolve the allegations in the complaint or enforce the applicable provisions of law. A copy of all information gathered must be sent by the City Clerk's Office or City Attorney's Office to the agency or official together with the referral.

M. JUDICIAL REVIEW

1. The Resolution shall advise the Respondent that he or she can seek judicial review of the Commission decision in accordance with Chapter 1.16 of the San Jose Municipal Code.

2. Upon receipt of any complaint filed which challenges any decision of the Commission, the City Attorney will decide whether or not that Office has a conflict of interest, which precludes the City Attorney from representing the Commission in the action.

3. If the City Attorney determines that conflict exists, the City Attorney shall retain conflicts counsel to defend the lawsuit.

N. COLLECTION OF FINES

1. Fines imposed by the Commission must be paid within 100 days of the date of the Resolution. A cashier's check for the specified amount shall be remitted to the City Clerk.

2. If the civil penalties are not paid within the time specified, the Clerk should refer the debt to the Director of Finance for submission to the City's collection agency.

O. ROLE OF THE CITY ATTORNEY

1. The City Attorney may provide legal advice to the Commission related to non-complaint matters or general interpretations of the San Jose Municipal Code or 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. 75173 is hereby superseded.

ADOPTED this 26th day of January, 2010, by the following vote:

AYES:	CAMPOS, CHIRCO, CHU, HERRERA, KALRA, LICCARDO, NGUYEN, OLIVERIO, PYLE, REED.
NOES:	NONE.
ABSENT:	CONSTANT.
DISQUALIFIED:	NONE.

Chuck Reed

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk