



**Minutes for Meeting of
Thursday, November 18, 2010**

Item-1: Call to Order

Commission Chair Westfall called the meeting to order at 5:00 p.m.

Item-2: Roll Call

Present – Commission Chair Larry Westfall, Vice-Chair Lee Biddle, Commissioners Faye Detsky-Weil, Clyde Fuller, William Howatt, Jr., John O’Neill, and Bud Wetzler, and Attorney Lisa Foster

Staff – Executive Director Stacey Fulhorst, Program Manager Steve Ross, Senior Investigator Lauri Davis and Executive Secretary Kathy Hunt

Item-3: Approval of Commission Minutes

Approval of Ethics Commission Minutes of October 14, 2010

Motion: Approve
Moved/Seconded: O’Neill/Howatt
Vote: Carried Unanimously
Abstained: Biddle

Item-4: Non-Agenda Public Comment

None

Item-5: Commissioner Comment

None

Item-6: Executive Director Comment

Director Fulhorst reported on the following:

- There was a dramatic spike in hits on the Ethics Commission's website during the campaign season as a result of the candidate and ballot measure financial data posted by staff to the site.
- She attended the 40th Anniversary celebration of Common Cause on November 13, 2010. The event included honoring former Ethics Commission members Dorothy Leonard and Gil Cabrera.

Item-7: General Counsel Comment

None

Item-8: Requested Waiver of Attorney-Client Privilege

Director Fulhorst reported on a request for records from the City Attorney's Office and the City's outside counsel in connection with a lawsuit brought by former city employee Scott Kessler who alleges that his City employment was terminated in retaliation for providing documents to the Ethics Commission. She explained that an issue has arisen in the litigation concerning whether Mr. Kessler has exhausted his administrative remedies with the City. The City's attorneys maintain that Mr. Kessler was required to file a complaint with the Ethics Commission, while Mr. Kessler asserts that he communicated with the former Office of Ethics and Integrity and that a reasonable person would have concluded that this was sufficient to exhaust the relevant administrative remedies.

She related that the City's attorneys have requested that the Commission release a portion of a closed session memo prepared in connection with a prior investigation that documents a discussion between staff and Mr. Kessler concerning the differences between the Ethics Commission and the former Office of Ethics and Integrity. She advised that in order to produce the relevant portion of the memo, the Commission would need to waive its attorney-client privilege.

Mel Shapiro made the following comments :

- He believes the release of information from a closed session memo would violate the Brown Act.
- He believes Mr. Kessler exhausted his administrative remedies when he filed a claim with the City's Risk Management department.
- He is not aware of any prior complaints filed with the Ethics Commission concerning alleged retaliation.

Ms. Foster advised the Commission that the Brown Act allows but does not require discussions in closed session concerning confidential matters such as attorney-client privileged communications. She opined that there is nothing in the Brown Act that precludes the Commission from waiving the attorney-client privilege, and added

that is perfectly appropriate for the Commission to exercise this prerogative as the client.

Director Fulhorst clarified the matter was docketed for Commission consideration for the purpose of responding to a request for confidential documents. She noted that the Ethics Commission does not have any role in the dispute between Mr. Kessler and the City concerning the appropriate administrative remedies.

Josh Gruenberg, the attorney representing Scott Kessler, encouraged the Commission not to release the confidential document because he does not believe it is relevant to the case. He added that if the document is released, it should be released in full.

The Commission discussed various issues related to the request, including: the nature of the confidential information in the memo, whether it was necessary to make a determination regarding the relevancy of the information before releasing it, whether there is any precedent for the Commission waiving the attorney-client privilege, and whether the information can be obtained through other means.

Director Fulhorst noted that the Commission has not previously received a request to waive the attorney-client privilege. She generally described the nature of the requested information and stated that it was possible for the information to be obtained by taking her deposition.

Commission Chair Westfall questioned whether the Commission would be setting a precedent by waiving the attorney-client privilege.

Ms. Foster responded that it would not set a precedent, and that other similar requests could be handled on a case-by-case basis.

Commissioner Howatt suggested that the Commission deny the request to waive the attorney-client privilege if there is an alternate way to obtain the information and if there is a question as to whether the information is relevant to the litigation.

Motion: Deny the request for a waiver of the attorney-client privilege

Moved/Seconded: Howatt/Biddle

Vote: Approved by the following vote: 6/1 with O'Neill voting nay

Item-9: Use of City Equipment, Supplies, and Resources for Campaign Activities

Commission Chair Westfall commented that this item was docketed for discussion purposes in response to concerns expressed by the public regarding the use of a vehicle that appeared to be a City fire truck for campaign-related activities.

Director Fulhorst explained to the Commission that although there is a provision in the Ethics Ordinance that prohibits the use of city equipment, supplies and resources for campaign-related activities, this provision applies to candidate elections, and not ballot measures, because the state regulates various issues associated with the use of government resources in connection with ballot

measures. In addition, she explained that the provision in the City's Ethics Ordinance is intended to prevent the use of taxpayer resources for campaign-related activities, which would not apply to the use of non-City equipment or resources. Finally, she noted that any effort to regulate the use of resources that look like City equipment would likely be found unlawful by the courts as it would be considered a regulation of the content of speech protected by the First Amendment.

(There were no comments or questions from the Commission.)

Item-10: Adjournment to Closed Session

Commission Chair Westfall adjourned the meeting to Closed Session at approximately 5:40 p.m. He stated the Commission would reconvene into Open Session following the conclusion of Closed Session in order to report any action taken during the closed session portion of the meeting.

Reconvene to Open Session

Commission Chair Westfall called the meeting back into open session at approximately 6:20 p.m.

Reporting Results of Closed Session Meeting of November 18, 2010

Commission Chair Westfall reported the results of the Closed Session Meeting of November 18, 2010.

Item-1: Conference with Legal Counsel (15 potential matters)

Case No. 2010-89 - In Re: Alleged Failure to File Campaign Statements

Motion: Initiate Investigation

Vote: Carried Unanimously

Case No. 2010-91- In Re: Alleged Failure to Properly Identify Committee Sponsor and Alleged Failure to Timely File Campaign Statements

Motion: Initiate Investigation

Vote: Carried Unanimously

Case Nos. 2010-93 through 2010-104 - In Re: Alleged Failure to File Statements of Economic Interests

Motion: Initiate Investigations

Vote: Carried Unanimously

Case No. 2010-105 - In Re: Alleged Failure to Timely Amend Lobbying Registration Form and Quarterly Disclosure Report

Motion: Dismiss

Vote: Carried Unanimously

Item-2: Conference with Legal Counsel (2 potential matters)

Case No. 2010-42 – In Re: Alleged Failure to File Campaign Statements

No Reportable Action

Case No. 2010-86 – In Re: Alleged Failure to File Campaign Statements

No Reportable Action

Item-3: Conference with Legal Counsel (1 potential matter)

Case No. 2008-79 – In Re: Dante Dayacap - Alleged Misuse of City Position

No Reportable Action

Adjournment

The meeting adjourned at approximately 6:25 p.m.

Larry Westfall, Commission Chair
Ethics Commission

Katherine Hunt, Executive Secretary
Ethics Commission

THIS INFORMATION WILL BE MADE AVAILABLE IN ALTERNATIVE FORMATS UPON REQUEST.