

**MEETING MINUTES**

February 9, 2015

**I. Call to Order & Orders of the Day**

**Roll Call**

**PRESENT:** Chair Michael Smith, Vice Chair Rolanda Pierre Dixon and Commissioner Chris Peacock

**ABSENT:** All Present.

**STAFF:** Deputy City Attorney Arlene Silva, City Clerk Toni Taber, Investigator/Evaluator Steven Miller and Deputy City Clerk Ruth Krantz.

**OTHER:** Greg Dietz, Dietz & Associates, working with Hanson Bridgett LLP; Noelia Espinola, Court Reporter with Advantage Reporting Service.

**Call to Order**

The members of the San José Ethics Commission convened at 5:36 p.m. in Room W-262 of City Hall, 200 E. Santa Clara Street, CA 95113.

**Orders of the Day**

Action: Upon motion by Vice Chair Rolanda Pierre Dixon, seconded by Commissioner Chris Peacock and carried unanimously, the Commission approved the adoption of the February 9, 2015 agenda. (3-0.)

**II. Closed Session - None**

**III. Hearings – None.**

- A. Continuation of hearing on Complaint filed by Bui Dinh against Supervisor Dave Cortese filed October 14, 2014 and subsequently amended to include Councilmember Tam Nguyen, alleging violations of Title 12 of the San Jose Municipal Code. (Independent Investigator/Evaluator)

Document Filed: (1) Report from Hanson Bridgett LLP dated February 2, 2015 regarding Bui Dinh against Dave Cortese and Dave Cortese for Mayor 2014 Committee and Tam Nguyen, addressing the alleged violation of Title 12.06.910 of the San José Municipal Code – Coordination and Failure to Report Expenditure Made at Behest of Candidate. (2) Email from Dave Cortese dated February 6, 2015, requesting a continuance.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. All members of the Commission were present. On December 3, 2014 the Evaluator/Investigator submitted an initial Report to the Commission regarding the referenced complaint, recommending that the Commission close the file on this matter and take no further action. At the Ethics Commission Hearing of December 10, 2014 the Commission voted not to close the file, instead directing Hanson Bridgett LLP to conduct further investigation as follows: (a) ascertain communications between the organizers of the Event and Dave Cortese's staff; (b) obtain more information concerning expenditures associated with the Event; and (c) name Tam Nguyen as an additional Respondent to the Complaint, to the same extent as Dave Cortese.

No Complainant or Respondent was present for this hearing.

Chair Smith referenced Supervisor Cortese's email of February 6, 2015 requesting a continuance of a minimum of two weeks in order to prepare a response to the allegations since he did not receive the Evaluator/Investigator's report from the City Clerk's Office until February 5, 2015.

Greg Dietz, of Dietz & Associates responded to questions from Deputy City Attorney Arlene Silva.

Motion: Chair Michael Smith moved that, due to the Supervisor Cortese's late receipt of the Evaluator/Investigator's report of February 2, 2015, a deferral of this case be allowed. Vice Chair Rolanda Pierre Dixon seconded the motion.

Action: On a call for the question, the motion carried unanimously, with the hearing to be continued to allow the Respondent adequate time to prepare a response. (3-0.)

- B. Hearing on Complaint filed by Robert Brownstein on December 23, 2014 alleging violations of Title 12 of the San Jose Municipal Code by Sam Liccardo. (Independent Investigator/Evaluator)

Document Filed: (1) Report from Hanson Bridgett LLP dated January 23, 2015 regarding-- Violation of Title 12.21.310B of the San José Municipal Code -- Disclosure of material facts and communications; (2) Letter from Bob Brownstein, dated February 5, 2015, requesting a deferral of a decision on his complaint or, at the preference of the Commission, withdrawal of the complaint.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. All members of the Commission were present. Chair Smith addressed the nature of the hearing, indicating that neither the Municipal Code nor Council Resolution 76954 provides a procedure for withdrawal of complaints by Complainants; therefore, the Commission would proceed with the hearing, open the floor for the Complainants' comments, and decide whether the complaint contains sufficient facts to warrant a formal investigation.

Investigator/Evaluator Steven Miller presented the report, indicating that after careful examination and consideration of the new "Open Government" rules added to Title 12, and application of those rules to the Complaint, the Complaint does not identify specific facts, which if proven, would be a violation of Title 12. The Evaluator concluded that sufficient cause does not exist to conduct an investigation of this Complaint.

Chair Michael Smith swore in Complainant Robert Brownstein. Mr. Brownstein challenged the Evaluator's report, and suggested that the interpretations the Commission adopts in regard to the City's revised Open Government ordinance may set a precedent and eclipse this specific complaint. He urged the Commission to hold a study session on Open Government so that future complaints may enable San José in maintaining a strong commitment to transparency in the public sector decision-making.

No respondent was present.

Commissioners discussed the need for a future study session to identify and prioritize concerns regarding campaign and ethics regulations and policies.

Motion: Vice Chair Rolanda Pierre Dixon moved that the Commission adopt the Evaluator's report, approving the recommendation that an investigation not be conducted because the complaint does not identify specific facts which, if proven, would be a violation of the Municipal Code and closing the case file. Commissioner Chris Peacock seconded the motion.

Action: On a call for the question, the Evaluator's report and recommendation was adopted. (3-0.)

Each Commissioner certified that he or she personally heard the testimony at the hearing and reviewed the entire evidence in the record.

Chair Smith	So certified
Vice Chair Pierre Dixon	So certified
Commissioner Peacock	So certified

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, seconded by Chair Chris Peacock and carried unanimously, the Commission moved that due to mitigating circumstances the file in this matter be closed without further action. (3-0.)

Each Commissioner certified that he or she personally heard the testimony at the hearing and reviewed the entire evidence in the record.

Chair Smith	So certified
Vice Chair Pierre Dixon	So certified
Commissioner Peacock	So certified

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, seconded by Commissioner Peacock and carried, the Commission moved to direct the City Attorney to draft a Resolution on the Commission's Findings, and further, that the Commission authorizes the Chair to approve and sign the resolution. (3-0.)

Commissioner Chris Peacock left the meeting at 7:27 p.m.

#### IV. Consent Calendar

- A. Approve the Minutes of September 10, 2014 -- Regular Meeting
- B. Approve the Minutes of November 12, 2014 -- Regular Meeting
- C. Approve the Minutes of December 10, 2014 -- Regular Meeting
- D. Approve the Minutes of January 14, 2015 -- Regular Meeting

Action: Due to a lack of quorum, approval of the minutes was deferred to the next scheduled meeting of the Ethics Commission.

#### V. Reports

- A. Chair --None..
- B. City Attorney -- Deputy City Attorney Arlene Silva addressed the backlog of Ethics Commission resolutions and indicated that she will provide an update at the next meeting.
- C. City Clerk
  - 1. Legislative update -- None.
  - 2. Status of compliance with Commission resolutions -- None
  - 3. Status report on filings (Form 700, Campaign Statements, Lobbyists) - City Clerk Toni Taber, provided an update on campaign statement filings and discussed work flow in the City Clerk's Office.
  - 4. Elections update - None.
  - 5. Update on status of recruitment for open positions on the Ethics Commission -- City Clerk Toni Taber indicated that there are five viable applicants for the three positions open on the Ethics Commission, with interviews to be held at the City Council Meeting of February 24, 2015.
- D. Investigator/Evaluator -- None.

#### VI. Old Business

- A. Status, review and possible action on Gift Ordinance and Frequently Asked Questions Sheet (City Attorney) -- None.

**VI. Old Business (cont'd.)**

**B. Status on Independent Evaluator/Investigator RFQ (Attorney/City Clerk)**

Discussion: City Clerk Toni Taber indicated that this RFQ needs to be handled differently than others, in that Purchasing does not take an active role in its preparation. The Clerk's Office will take the lead on posting the RFQ and will return to the next meeting of the Ethics Commission with a formalized timeline.

Action: No action required.

**C. Ethics Commission ad hoc Subcommittee update and possible action related to Subcommittee's composition, meeting schedule or dissolution (City Attorney)**

Discussion: Deputy City Attorney Arlene Silva reported on the Ethics Commission ad hoc subcommittee created at the meeting of January 14, 2015. She clarified that there was no Brown Act violation in creating this subcommittee; but in order for the subcommittee to act where complaints are in question, three members are required. She offered options that may be considered, including the City Clerk's Office continuing its role with input from one member of the Commission acting in the capacity of ad hoc subcommittee member.

Motion: Chair Michael Smith moved to amend the subcommittee tasked for outreach to the ethnic communities to consist solely of Vice Chair Pierre-Dixon until such time that a full Ethics Commission can be assembled. Commissioner Peacock seconded the motion.

Action: On a call for the question, the motion carried unanimously, with the Clerk's Office to continue its work with outreach to ethnic communities with Vice Chair Pierre-Dixon acting as the sole ad hoc subcommittee member until such time that a full Ethics Commission panel has assembled. (3-0.)

**VII. New Business – The cancellation of the February 11, 2015 Ethics Commission Meeting was confirmed.**

**VIII. Public Comment – None**

**IX. Future Agenda Items and Adjournment**

The next regular meeting of the Ethics Commission is scheduled for Monday, March 2, 2015 at 5:30 p.m. in City Hall, Wing Room 262.

The following agenda items will be discussed at the March 2, 2015 Ethics Commission meeting:

- Continuation of discussion regarding Bui Dinh complaint against Dave Cortese filed on October 14, 2014.
- Ethics Commission ad hoc Subcommittee update
- Gift Ordinance and FAQs
- Approval of Meeting Minutes
- Status on RFQ for Evaluator/Investigator

The meeting was adjourned at 7:39 p.m.



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MICHAEL SMITH, CHAIR

ATTEST:  
ELECTIONS COMMISSION SECRETARY



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TONI J. TABER, CMC  
CITY CLERK

Rmk-EthicsMIN-20150209

Attachment: Transcript of Hearing dated February 9, 2015, Reported by Noelia Espinosa, CSR, License Number 8060, Advantage Reporting Services.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Taken on February 9, 2015

CITY OF SAN JOSE ETHICS COMMISSION

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CONDENSED TRANSCRIPT

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# REPORTER'S TRANSCRIPT OF PROCEEDINGS

<p>CITY OF SAN JOSE ETHICS COMMISSION</p> <p>REPORTER'S TRANSCRIPT OF PROCEEDINGS</p> <p>Date: Monday, February 9, 2015 Time: 5:37 p.m. Location: San Jose City Hall 200 E. Santa Clara Street City Hall Wing - Room W262 San Jose, CA 95113</p> <p>Reported By: Noelia Espinola, CSR License Number #8060</p> <p>#49198</p>	<p style="text-align: center;">Page 3</p> <p style="text-align: center;">PROCEEDINGS</p> <p>1 2 3 CHAIRMAN SMITH: We have two hearings 4 tonight. We're going to take those up front, and then 5 we'll go on to the rest of the agenda after that. 6 So the first one is the continuation of the 7 hearing of the complaint filed by -- I think it's Bui 8 Dinh. I've forgotten my pronunciations this week. 9 Anyway, this is a continuation. So... 10 It is Monday, February 9th, 2015, and this 11 hearing of the City of San Jose Ethics Commission is 12 being held in Room W-262 of San Jose City Hall. All 13 members of the Commission are present. 14 And for those of you here normally, we 15 have -- this is a five-member commission, but we 16 currently only have three members because two members 17 moved out of town. So there's three of us, and a 18 quorum is three. And any action requires a vote of 19 three, so we have to be very compatible for a while. 20 Fortunately, we are. 21 And I'm -- if you're wondering, I have a 22 script I make up so that I don't miss anything as far 23 as what the rules are and what the steps are we have to 24 take. So I will drone on a little bit. 25 The Commission will conduct a continuation of</p>
<p style="text-align: center;">Page 2</p> <p>1 2 3 APPEARANCES 4 San Jose Elections MICHAEL SMITH, Chair 5 Commission: ROLANDA PIERRE-DIXON, Vice-Chair 6 CHRIS PEACOCK 7 Staff: ARLENE F. SILVA 8 Deputy City Attorney 9 TONI TABER 10 City Clerk 11 RUTH KRANTZ 12 Deputy City Clerk 13 Independent Evaluator: HANSON BRIDGETT, LLP 14 BY: STEVEN D. MILLER, 15 Attorney at Law 16 425 Market Street 17 26th Floor 18 San Francisco, CA 94105 19 (415) 777-3200 20 The Reporter: ADVANTAGE REPORTING SERVICES 21 BY: NOELIA ESPINOLA, 22 CSR #8060 23 1083 Lincoln Avenue 24 San Jose, CA 95125 25 (408) 920-0222</p> <p style="text-align: center;">--o0o--</p>	<p style="text-align: center;">Page 4</p> <p>1 the hearing on a complaint filed with the City Clerk on 2 October 14, 2014, by Bui Dinh alleging that Dave 3 Cortese and the Dave Cortese for Mayor 2014 Committee 4 violated Section 12.06.910 of the San Jose Municipal 5 Code. Specifically, the allegation was that the 6 respondents failed to report as contributions certain 7 expenditures allegedly made at the behest of the 8 candidates. The City Clerk notified and provided a 9 copy of the complaint to the Independent Evaluator on 10 October 14th, 2014, and the Evaluator notified and 11 provided a copy to the respondents on October 15th, 12 2014. The Independent Evaluator's Report and 13 Recommendations were submitted to the City Clerk on 14 December 3rd, 2014, and copies were then provided to 15 the complainant, the original respondents and 16 commission members and posted to the city web site with 17 the agenda for a hearing held on December 10, 2014. 18 At that hearing the Commission directed that 19 the complaint be amended to include Tam Nguyen as an 20 additional respondent and also directed the Evaluator 21 to conduct further investigation. 22 The Evaluator subsequently notified and 23 provided a copy of the complaint to the additional 24 respondent on December 12th, 2014. The Independent 25 Evaluator's Supplemental Report and Recommendations</p>

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1 were submitted to the City Clerk on February 2nd, 2015,  
2 and copies were then provided to the complainant, the  
3 respondents and commission members and posted to the  
4 city web site with the agenda for tonight's hearing.

5 On April 15th, 2014, the City Council adopted  
6 Resolution 76954, which establishes the Commission's  
7 regulations and procedures pertaining to investigations  
8 and hearings. All parties to these proceedings have  
9 been provided copies of the Resolution. The  
10 regulations and procedures have been adopted in order  
11 to ensure the fair, just and timely resolution of  
12 complaints before the Commission.

13 This hearing is open to the public. It is  
14 being electronically recorded, and we have a court  
15 reporter with us to compile a transcript. The formal  
16 rules of evidence do not apply to this hearing, but all  
17 testimony will be under oath or affirmation. The  
18 complainant will be treated like any other witness in  
19 providing evidence. The Chair may compel the testimony  
20 of witnesses and may compel the production of relevant  
21 documents to the Evaluator by subpoena. Witnesses may  
22 be excluded at the discretion of the Commission.  
23 Commission members may ask questions of witnesses or  
24 the Evaluator when recognized by the Chair.

25 At this time I would like to have the

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1 complainant and respondents or their representatives  
2 identify themselves for the record. And I don't  
3 believe any of them are here.

4 Also, I'd like to have city staff and  
5 representatives of Hanson Bridgett, Commission's  
6 Independent Evaluator, please identify themselves for  
7 the record.

8 MR. MILLER: Steven Miller, Hanson Bridgett.

9 MS. SILVA: Arlene Silva, deputy city  
10 attorney.

11 MS. TABER: Toni Taber, city clerk.

12 MS. KRANTZ: Ruth Krantz, deputy city clerk.

13 CHAIRMAN SMITH: Thank you.

14 Under the Commission's regulations and  
15 procedures, the respondents may submit a written  
16 response to the Report and Recommendations. The  
17 response may contain legal arguments, a summary of  
18 evidence and any mitigating or exculpatory information.

19 As of now, we have received a response from  
20 Dave Cortese dated February 9th, 2015. That's today.  
21 Do all of the commissioners and staff have a copy?  
22 Yes?

23 Has the complainant been provided a copy of  
24 the response? Do we know? I assume the complainant  
25 got a copy?

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1 MS. KRANTZ: A copy --

2 CHAIRMAN SMITH: Did Mr. Dinh receive a copy  
3 of that?

4 MS. KRANTZ: No, he has not.

5 CHAIRMAN SMITH: He's not here. I guess we  
6 should -- I believe he's supposed to be provided a copy  
7 by procedure; is that not correct?

8 MS. TABER: Did he not receive a copy of this  
9 or --

10 CHAIRMAN SMITH: This is the --

11 MS. KRANTZ: The response from --

12 CHAIRMAN SMITH: The complaint from  
13 Mr. Cortese. He probably hasn't because it just came  
14 in this morning.

15 MS. KRANTZ: Right.

16 CHAIRMAN SMITH: So if somebody, after the  
17 meeting, could check to be sure what the procedure  
18 requires. And if it does say the complainant should  
19 get a copy, we should forward a copy to him.

20 Do the respondents wish to submit any  
21 additional written response at this time?

22 Since there are no respondents here, I will  
23 take as that as a "no."

24 Mr. Cortese has requested a continuance of at  
25 least two weeks so that he may prepare a thorough

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1 response. That was the message we received today by  
2 e-mail.

3 Before we proceed, I believe it's appropriate  
4 for the Commission to determine whether to honor that  
5 request. I'll open the floor to the Commission to  
6 commission discussion on this point. And I'll make my  
7 brief comment and then see what you guys have to say.

8 I'm torn on this. On the one hand, I think  
9 people should have an opportunity to present their  
10 responses. On the other hand, this complaint was filed  
11 in mid-October, almost four months ago. We had a  
12 hearing on it in mid-December. Two months ago  
13 tomorrow. Mr. Cortese did not appear at that hearing,  
14 nor did he provide a response. And now, all of a  
15 sudden, five or six hours before the hearing, he wants  
16 a two-week continuance. So I'm having a little trouble  
17 coming up with sympathy for that. So what do you guys  
18 think?

19 COMMISSIONER PIERRE-DIXON: Well, my feeling  
20 is certainly he was aware of this hearing and the  
21 investigation that was ongoing by the Commission. One  
22 of his employees or a person that worked in his office  
23 and took quite a bit of effort to locate and interview.  
24 So I'm sure Mr. Cortese was aware of that. And I would  
25 be somewhat reluctant to continue it at this time.

2 (Pages 5 to 8)

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<p>1 CHAIRMAN SMITH: Yes, Arlene. 2 MS. SILVA: I just want to direct the 3 attention of the Commission to the e-mail that was sent 4 by Mr. Cortese with regards to the request for the 5 continuance. As you can see, on his e-mail he's 6 indicated that he just received it yesterday with 7 regards to this scheduled hearing. 8 CHAIRMAN SMITH: Good point. When was it 9 sent to him? Do we know? 10 MS. KRANTZ: It was -- 11 CHAIRMAN SMITH: I suspect it got lost in his 12 office or on his desk, but... 13 MS. KRANTZ: I believe it was sent when we 14 received the hard copy. So if we received the -- 15 CHAIRMAN SMITH: Yeah, we were notified a 16 week -- a week ago today, I believe. Didn't it go -- 17 didn't the notice to us go out on Monday and the agenda 18 and everything? I mean, that's been the standard 19 practice, that we have -- 20 MS. TABER: Let me see if I can get my e-mail 21 from here. 22 CHAIRMAN SMITH: The procedure requires three 23 business days, I think. But what we generally do is a 24 week ahead, to give people time. 25 MS. KRANTZ: He received the e-mail with the</p>	<p>1 CHAIRMAN SMITH: Oh, the 6th is -- 2 MS. SILVA: The 6th is Friday. And he sent 3 it -- 4 CHAIRMAN SMITH: Oh, 7, 8, 9, yes. So he 5 sent it late Friday, so we didn't get it until today. 6 MS. SILVA: Correct. 7 CHAIRMAN SMITH: Okay. I gotcha now. So 8 that's little more time. It's not the eleventh hour. 9 It's the tenth and a half hour. 10 COMMISSIONER PEACOCK: And the board of 11 supervisors, are they meeting literally at this moment 12 now? 13 CHAIRMAN SMITH: They meet on Tuesday 14 afternoons, I believe. It's probably a committee 15 meeting, I'm guessing. 16 COMMISSIONER PIERRE-DIXON: He says he has 17 legislative duties, which includes chairing a publicly 18 noticed meeting of a quorum. 19 CHAIRMAN SMITH: So -- okay. So he sent his 20 response -- so I was wrong, what I said before. He 21 actually sent his response on February 6th. We didn't 22 receive it until the 9th because it was after business 23 hours. 24 When, again, did he receive -- when did he -- 25 when was the meeting noticed, with the complaint and</p>
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<p>1 report on the 5th. 2 CHAIRMAN SMITH: On the 5th. Which would 3 be -- 4 MS. SILVA: Thursday. 5 CHAIRMAN SMITH: Okay. 6 MS. SILVA: February 6th is the e-mail, which 7 was Friday -- this past Friday. 8 CHAIRMAN SMITH: Okay. 9 MR. MILLER: I see. I'm sorry. My confusion 10 is when I look at the paper, it says February 9th. But 11 that's the date, perhaps, it was printed out. His 12 e-mail is dated February 6th. 13 CHAIRMAN SMITH: All right. 14 MR. MILLER: Not February 9th. 15 CHAIRMAN SMITH: Whose e-mail? 16 Mr. Cortese's -- 17 MR. MILLER: Mr. Cortese's e-mail requesting 18 a continuance is dated February 6th. 19 COMMISSIONER PIERRE-DIXON: Okay. All right. 20 CHAIRMAN SMITH: That's interesting. But we 21 didn't get it until today. At least I didn't see it, 22 and I -- 23 MS. SILVA: He sent it at 5:02 on 24 February 6th, in the evening, after the business ended 25 on Friday.</p>	<p>1 notice sent to him? 2 MS. KRANTZ: The report was sent to him on -- 3 and the meeting notice was sent 9:22 a.m. on the 5th. 4 MS. TABER: That's not three days. 5 CHAIRMAN SMITH: Oh, the 5th. Okay. I'm 6 surprised, because I thought we sent -- I thought 7 everybody got everything a week ahead of time. Or is 8 it just the agenda that is posted a week ahead of time? 9 MS. SILVA: The agenda posted on Monday, 10 didn't it? 11 MS. KRANTZ: Right. The agenda was posted 12 on -- on Monday, right. 13 MS. SILVA: Because we're required by 14 Sunshine to post on subcommittees -- or -- I'm sorry -- 15 commissions seven days before, which you did do that. 16 MS. KRANTZ: Right. 17 MS. SILVA: On Monday. 18 MS. KRANTZ: Yes. 19 MS. SILVA: But why did not -- why did the 20 report not get to that, attached? 21 MS. KRANTZ: I hadn't received the hard copy 22 yet. So I was waiting on the hard copy. 23 MS. TABER: I think we have to continue it. 24 MS. KRANTZ: Which I received on the 5th. 25 CHAIRMAN SMITH: So he -- so it was -- the</p>

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1 report -- a PDF file of the report was posted on the  
2 web site on Monday the 2nd; is that right? Or Monday  
3 the -- yeah, the 2nd?

4 MS. TABER: Yes. Because I have that e-mail  
5 in front of me.

6 CHAIRMAN SMITH: And then it was Thursday,  
7 the 5th that he -- at 9:00 o'clock in the morning,  
8 whatever it is, that he was sent the -- so did he  
9 receive anything from us prior to that about this  
10 meeting? Do we know?

11 MS. TABER: I'm going through my e-mails.

12 CHAIRMAN SMITH: I'm feeling a little bit of  
13 sympathy here. Although it's still -- it's still four  
14 months, for God's sake.

15 Anyway, Commissioner Peacock, do you have any  
16 thoughts to offer while we're waiting to sort this out?

17 COMMISSIONER PEACOCK: I mean, I want to know  
18 a little bit more of the detail of this. I guess I'm  
19 sympathetic to two things. One is if he is at a board  
20 of supervisors meeting, since we know the importance of  
21 having a quorum -- I am sympathetic on that front.

22 And -- and also, if you want to give  
23 somebody -- I realize it's been several months, at the  
24 same time. There is an opportunity to -- if he did not  
25 receive it until this point. It sounds like there's a

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1 little question, that sort of thing, when it went and  
2 when it was received.

3 CHAIRMAN SMITH: Yeah, he did get the  
4 original report back in December. Before the  
5 December 10th meeting.

6 COMMISSIONER PEACOCK: Right.

7 CHAIRMAN SMITH: So he knows that. And the  
8 supplemental report adds some additional information  
9 concerning the interview with his office staff and the  
10 amount of money that was spent on the event. But the  
11 basic facts of the situation were presented, I think,  
12 back in December.

13 I don't know. I gather what he's asking  
14 for -- I mean, he does talk about his meeting. But I  
15 gather what he really wants is to send us a letter,  
16 telling us why the Evaluator -- he thinks the Evaluator  
17 is wrong. I don't know that he actually wants to  
18 appear.

19 COMMISSIONER PEACOCK: Is there -- maybe, I  
20 guess, ask you or the attorney. Is -- is there any  
21 legal pro- -- any legal reason why we should not -- why  
22 we should or should not move ahead? I mean, are we  
23 vulnerable in some way if -- despite this and given  
24 some of the dates of when things arrived?

25 MS. SILVA: Well, the question that I have

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1 right now is when did he get sent the documentation.  
2 We have a requirement to send it three -- I believe  
3 it's business days. I'm searching through --

4 CHAIRMAN SMITH: I think it is.

5 MS. SILVA: Business days. If he truly did  
6 not get it -- I made the assumption -- maybe I  
7 shouldn't have done that -- to -- that we had gotten it  
8 all on Monday. So -- because that was -- you know,  
9 that's when the Sunshine had it, seven days prior to.  
10 So I made the assumption that he also got it on that  
11 day. But, as it turns out, if he truly did not get  
12 sent the documents until February 5th, which is  
13 Thursday, that's not three business days before.

14 So I guess the legal question here is whether  
15 we complied with the Resolution requirements. And, if  
16 so, then -- if, yes, then we proceed, if the Commission  
17 does want to do that. But, if not, then that would be  
18 the technical fatal flaw here is that we can't proceed.

19 CHAIRMAN SMITH: All right. It would appear  
20 that we're vulnerable in that regard.

21 COMMISSIONER PIERRE-DIXON: Right.

22 CHAIRMAN SMITH: So I will reluctantly move  
23 that we grant a continuance of the hearing until a date  
24 to be determined.

25 COMMISSIONER PIERRE-DIXON: On our next

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1 meeting date?

2 CHAIRMAN SMITH: Well, our next -- our next  
3 meeting date is March something, when I'm going to be  
4 out of town and we all three need to be here.

5 COMMISSIONER PIERRE-DIXON: Okay.

6 CHAIRMAN SMITH: He wants two weeks. So it's  
7 something -- somewhat -- well, we can figure it out at  
8 the end of the meeting or do a poll at the end of the  
9 meeting.

10 MS. SILVA: We can just vote to continue  
11 this.

12 CHAIRMAN SMITH: But, basically, the motion  
13 is to vote to continue to a yet-to-be-determined date.  
14 Preferably -- well, I'll leave that out of the motion.  
15 Just to be continued to a date to be determined.

16 COMMISSIONER PIERRE-DIXON: And we should  
17 decide that after this meeting.

18 CHAIRMAN SMITH: And I've got to stop  
19 babbling. Because she's sitting there, trying to keep  
20 up with me.

21 COMMISSIONER PIERRE-DIXON: So we can get the  
22 proper notice to Mr. Cortese in time for the --

23 CHAIRMAN SMITH: Okay. So I need a second.

24 COMMISSIONER PIERRE-DIXON: Second.

25 CHAIRMAN SMITH: Okay. Any discussion?

4 (Pages 13 to 16)

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<p>1 MR. MILLER: Before you -- before you vote, 2 just very briefly, I would like to acknowledge the 3 presence in the room of Gregg Dietz and his associates 4 from Dietz &amp; Associates, the able private investigator 5 that we engaged on your behalf for our supplemental 6 investigation. They came this evening, not knowing 7 about this issue, in case you had questions, and to 8 make themselves known. And so I just wanted to 9 acknowledge their efforts before you end this hearing. 10 CHAIRMAN SMITH: Yeah, thank you. 11 Let me ask a question. Can we do any -- 12 could we -- we probably shouldn't. I was going to say, 13 could we do some of it and then continue before we make 14 a decision? That's probably not a good idea. Okay. 15 MS. SILVA: You could certainly do that. I 16 mean, you can ask questions and -- because we're 17 continuing the hearing. We're not closing the hearing 18 today. 19 CHAIRMAN SMITH: Right. 20 MR. MILLER: And I just want to be clear: I 21 didn't mean to imply that the Commission is paying for 22 them and so there is some efficiency that requires 23 that. They're here out of their interest and goodwill. 24 You're not -- the City is not being charged. 25 CHAIRMAN SMITH: I appreciate your coming in.</p>	<p>1 based on his -- on his campaign, and this is actually 2 not coming to him in his capacity as his supervisor's 3 office. So just -- again, I think, obviously, he's 4 aware of this. He knows it's coming. But just so we 5 can make sure that we're sending it to the proper 6 address. 7 CHAIRMAN SMITH: Good point. And I assume it 8 was his address at -- the supervisorial address that we 9 used? 10 MS. KRANTZ: I believe it was his home 11 address. 12 CHAIRMAN SMITH: His home address? 13 MS. KRANTZ: I believe so. 14 CHAIRMAN SMITH: Well, he got it. We know we 15 got it. 16 MS. TABER: Yes, it's his -- it's his home 17 address. 18 CHAIRMAN SMITH: Okay. 19 MS. TABER: She's got the full e-mail. 20 CHAIRMAN SMITH: So we have a motion before 21 us, made and seconded, to defer the hearing to a date 22 yet to be specified. Unless there's further 23 discussion, all in favor? 24 (All Commissioners responded Aye.) 25 CHAIRMAN SMITH: Opposed?</p>
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<p>1 I don't know if we would have questions or not. It 2 depends on what comes up in the course of discussing 3 the report. 4 But I think it's probably -- I don't know. 5 What do you guys think? It's probably best to just 6 defer the whole thing. 7 COMMISSIONER PEACOCK: I agree. One 8 clarification: So since we all know that e-mails can 9 come in -- sometimes they get seen or not -- are we -- 10 are we sure that the -- for instance, that the e-mail 11 that he responded to was the one that was sent to us? 12 So when information does go this time, it will -- it 13 doesn't leave any gap, that, Oh, that went to somebody 14 else in my office? 15 CHAIRMAN SMITH: Let's see. We should be 16 able to tell from -- 17 COMMISSIONER PIERRE-DIXON: It's pretty clear 18 he received it. 19 CHAIRMAN SMITH: Okay. He received it. 20 MS. SILVA: On the 5th. 21 CHAIRMAN SMITH: He responded to it. 22 MS. SILVA: He responded to it in a reply. 23 COMMISSIONER PEACOCK: And sometimes it can 24 come in -- you know, especially you can have different 25 accounts. For instance, if he had a personal account</p>	<p>1 (No response.) 2 CHAIRMAN SMITH: So it passes unanimously. 3 So we will close the books on this hearing. 4 Well, not close the books. I'm sorry. 5 MS. SILVA: You're continuing the hearing. 6 CHAIRMAN SMITH: We will -- yeah, we will -- 7 yeah. This session will -- we will close the books on, 8 but we will continue it for another date. 9 And thanks for coming. I'm sorry. If you 10 want to see what we do, we're going to do another 11 hearing right now. But it's up to you. You may have 12 better things to do. 13 Okay. So now we're going to move on to our 14 second hearing of the day. And let me get myself 15 organized here a minute. Switch one stack of paper for 16 another. 17 Okay. I'm back in business. Okay. We're 18 ready to start the second hearing. 19 It is Monday, February 9th, 2015, and this 20 hearing of the City of San Jose Ethics Commission is 21 being held in Room W-262 of San Jose City Hall. All 22 members of the Commission are present. 23 The Commission will conduct a hearing on a 24 complaint filed with the City Clerk on December 23, 25 2014, by Robert Brownstein alleging that Mayor Sam</p>

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1 Liccardo violated Section 12.21.310 of the San Jose  
2 Municipal Code. Specifically, the allegation is that  
3 Mayor Liccardo failed to disclose relevant, substantive  
4 information while considering a matter before City  
5 Council. The City Clerk notified and provided a copy  
6 of the complaint to the Independent Evaluator on  
7 December 23, 2014, and the Evaluator notified and  
8 provided a copy to the respondent on December 23, 2014.  
9 The Independent Evaluator's Report and Recommendations  
10 were submitted to the City Clerk on January 23, 2015,  
11 and copies were then provided to the complainant,  
12 respondent and commission members and posted to the  
13 city web site with the agenda for tonight's meeting.  
14 I'm going to skip over the boilerplate about  
15 the Resolution and the business with the hearing  
16 because everybody who is here now was here when I went  
17 through that before, at the previous hearing.  
18 At this time I would like to have the  
19 complainant, Robert Brownstein, and the respondent,  
20 Mayor Sam Liccardo, or their representatives identify  
21 themselves for the record. I see Mr. Brownstein is  
22 here.  
23 MR. BROWNSTEIN: I'm here.  
24 CHAIRMAN SMITH: And there's no one here  
25 representing the mayor.

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1 I don't need to have city staff and Hanson  
2 Bridgett representatives identify themselves because we  
3 just did that in the other hearing.  
4 Again, under the Commission's regulations and  
5 procedures, the respondents may submit a written  
6 response to the Report and Recommendations. The  
7 response may contain legal arguments, a summary of  
8 evidence and any mitigating or exculpatory information.  
9 As of this time, no response from the  
10 respondents has been received. That I know of, anyway.  
11 Is that correct?  
12 Okay. And there's no one here to represent  
13 the respondent, so I guess there won't be any written  
14 response.  
15 The complainant or any interested person may  
16 also submit a brief or a written argument.  
17 As of now, we have received written arguments  
18 from Robert Brownstein, dated February 20 -- I'm  
19 sorry -- February 5th, 2015. Do all the commissioners  
20 and staff have a copy?  
21 Okay. Has the complainant or other party  
22 provided a copy to the respondent? Did the mayor  
23 receive a copy of --  
24 MS. KRANTZ: Yes, he did.  
25 CHAIRMAN SMITH: Thank you.

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1 Mr. Brownstein has requested that the -- in  
2 this letter, he's requested that the Commission either,  
3 first, defer a decision and hold a study session on  
4 Open Government during the referral period or, two,  
5 permit him to withdraw his complaint. Neither the  
6 Municipal Code nor Council Resolution 76954 provide  
7 procedure for withdrawal of a complaint once it has  
8 been filed with the City Clerk. So withdrawal is not  
9 an option.  
10 Before we proceed, however, I believe it's  
11 appropriate for the Commission to consider whether to  
12 honor the request for a deferral. I'll open the floor  
13 to commission discussion on this point or we can defer  
14 the question until later in the hearing.  
15 We could wait until we hear what everybody  
16 has got to say and then decide or we can talk about it  
17 now.  
18 COMMISSIONER PIERRE-DIXON: I would prefer  
19 that.  
20 COMMISSIONER PEACOCK: That's fine.  
21 CHAIRMAN SMITH: Okay. So we will move on.  
22 Next we go to the Report and Recommendations  
23 of the Independent Evaluator. At this time I'll  
24 recognize --  
25 MR. BROWNSTEIN: Could I ask a question?

Page 24

1 CHAIRMAN SMITH: Yes, sir.  
2 MR. BROWNSTEIN: Since my request was  
3 deferred so there could be a study session, does that  
4 mean that we'll have a study session?  
5 CHAIRMAN SMITH: No, it means that -- it  
6 means that we're going to continue with the hearing.  
7 But before we make any decisions or as part of our  
8 decision-making process, after we hear from Mr. Miller  
9 and you or anybody else who wants to speak, we'll  
10 decide how to proceed then -- whether we want to make a  
11 decision tonight, whether we want to defer, whether we  
12 want to defer and have a study session.  
13 MR. BROWNSTEIN: Thank you.  
14 CHAIRMAN SMITH: We haven't done -- we  
15 haven't had this situation before, like we haven't had  
16 the situation we had in the previous hearing. So --  
17 MR. BROWNSTEIN: Right.  
18 CHAIRMAN SMITH: -- it's new ground we're  
19 plowing tonight.  
20 MR. BROWNSTEIN: Right.  
21 CHAIRMAN SMITH: At this time I will  
22 recognize Steve Miller from the Hanson Bridgett law  
23 firm to present the Independent Evaluator's Report and  
24 Recommendations.  
25 MR. MILLER: Good evening, Commissioners.

6 (Pages 21 to 24)

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<p style="text-align: center;">Page 25</p> <p>1 Adding to the newness of this evening, this 2 is the first time there has been a complaint alleging a 3 violation of Section 12.21.310, which is a recent 4 addition to Title 12 adopted in September of 2014. 5 So our first thought was to confirm with the 6 city attorney that, in fact, the Ethics Commission has 7 the jurisdiction to consider complaints of violation of 8 that particular new code section, because some of the 9 new Open Government code sections have varying remedies 10 and various enforcements mechanisms. But the city 11 attorney has advised us that, in fact, this is a new 12 addition to the Ethics Commission's duties and that the 13 determination of this complaint is very much in your 14 jurisdiction. 15 So, with that in mind, I'll just -- and 16 because it is new, the key rule to keep in mind is -- 17 in 12.21.310 is that a council member "must" -- and I'm 18 quoting now -- "must disclose relevant, substantive 19 information he or she has received from any source 20 outside the public decision-making process when that 21 matter is under consideration of the body." 22 Of particular note is the fact that 23 "relevant, substantive information," which is at the 24 heart of this complaint, is not a defined term in 25 Title 12. However, accompanying Title 12, the City</p>	<p style="text-align: center;">Page 27</p> <p>1 So our -- to make a long story, well, just a 2 little bit shorter, our focus is on whether the 3 complaint alleges material facts were not disclosed by 4 Mayor Liccardo. And in accordance with the rules 5 governing our conduct, our first task is to conduct a 6 preliminary evaluation to assess whether the complaint 7 alleges specific facts which, if proven, would be a 8 violation of the Municipal Code. 9 And as set forth in our report, we evaluated 10 the three specific factual allegations in the 11 complaint. Number one, that Mayor Liccardo did not 12 disclose the identity of specific community leaders in 13 a memo concerning the appointment of Margie Matthews to 14 the City Council; number two, that Mayor Liccardo did 15 not disclose specific information provided him by these 16 unnamed community leaders; and, number three, that 17 Mayor Liccardo did not disclose an e-mail communication 18 with Jim Canova related to the appointment of the City 19 Council manager -- member. Excuse me. City Council 20 member. 21 So, as a result of our preliminary 22 evaluation, we concluded that even if these facts were 23 true -- and with regards to the first two of those 24 three facts, they emanate from a memorandum from Mayor 25 Liccardo, and so we have no reason to doubt that they</p>
<p style="text-align: center;">Page 26</p> <p>1 Council adopted Open Government city policy that 2 suggests some guidance as to how to define -- how, for 3 you, to help determine whether a fact is substantially 4 relevant -- excuse me -- is relevant, substantive 5 information. And that is a policy definition of a 6 term, "material fact." And I understand from the city 7 attorney that the city attorney has opined that the 8 policy should be read in harmony with the provision of 9 Title 12 and that the definition of "material fact" is, 10 in fact, important guidance in determining what 11 constitutes relevant, substantive information. 12 So I'll also read to you what the definition 13 is of a "material fact," because that, in turn, will be 14 the key to deciding whether the facts at issue here are 15 relevant, substantive information. So a material fact 16 is "a fact" -- and I'm quoting again -- "a fact that is 17 relevant for a member of the City Council to make an 18 informed and knowledgeable decision and which would 19 likely influence the decision of a member of the City 20 Council on an item of business on the City Council 21 agenda. A fact is material if the failure to disclose 22 the fact will substantially mislead any member of the 23 City Council from making an informed and knowledgeable 24 decision about an item of business on the City Council 25 agenda."</p>	<p style="text-align: center;">Page 28</p> <p>1 are true. But even if they are true, the information 2 does not amount to substantive, relevant information or 3 material facts that Title 12 requires be disclosed. 4 And the details of how we reached that 5 conclusion is set forth in some detail in our report. 6 I'm happy to address specific questions about any of 7 those details. But just start by just making plain 8 that our recommendation is that no investigation is 9 warranted because of the lack of specificity and 10 sufficiency of the factual allegations. 11 We did review very carefully Mr. Brownstein's 12 supplemental memo and want to make a few comments about 13 that in regards to the detailed items in our report 14 that go to the question of whether the information at 15 issue is, in fact, relevant, substantive information. 16 CHAIRMAN SMITH: Would it be better to do 17 that after Mr. Brownstein has had an opportunity to 18 discuss his memo? 19 MR. MILLER: I defer to your pleasure. As 20 you wish. 21 CHAIRMAN SMITH: What do you guys -- 22 COMMISSIONER PIERRE-DIXON: I'd like to hear 23 from Mr. Brownstein. 24 CHAIRMAN SMITH: I think that's kind of my 25 inclination.</p>

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1 COMMISSIONER PEACOCK: That's fine.  
2 MR. MILLER: Let me just say one quick thing,  
3 which is that I have the pleasure -- for me, the  
4 pleasure of not being an advocate. I'm not defending  
5 my position. I'm not defensive in any way. I am an  
6 Independent Evaluator, so I am not intending on  
7 engaging in some kind of a tit-for-tat response with  
8 Mr. Brownstein. I will share with you my thinking.  
9 But I'm open to other ideas and am not -- you know, an  
10 advocate would be poking holes at the other side and  
11 attacking weaknesses. That is not my role here in any  
12 way at all.  
13 CHAIRMAN SMITH: Right. And we don't want a  
14 debate.  
15 But I was thinking, as I was reading things,  
16 that once Mr. Brownstein had presented his stuff, that  
17 I would want to hear what the Evaluator had to say  
18 about it. So I think --  
19 MR. MILLER: As you wish.  
20 CHAIRMAN SMITH: Is that -- that's all you  
21 have at this point, unless we have questions? Or do  
22 you want to go any deeper into what's in the report?  
23 MR. MILLER: My sense was that the -- going  
24 any deeper in the report would require consideration of  
25 the points raised by Mr. Brownstein. So if you prefer

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1 to hear from him first, I have no objection.  
2 CHAIRMAN SMITH: Okay. Do we have any  
3 questions at this point?  
4 COMMISSIONER PIERRE-DIXON: Not right now.  
5 CHAIRMAN SMITH: Okay. Let's go ahead and  
6 then we'll hear from Mr. Brownstein and then come back.  
7 Okay. So let's see. Next in the order of  
8 things, I would call upon the respondent or his  
9 representatives to come forward. There's no one here  
10 to represent Mr. Liccardo, so at this time I'll call  
11 upon the complainant, Robert Brownstein, to come  
12 forward and present any written or oral response.  
13 We'd appreciate it if you can limit your  
14 comments to five to ten minutes. If you come  
15 forward --  
16 MR. BROWNSTEIN: Do you want me to come up  
17 here?  
18 CHAIRMAN SMITH: Yes, up here would be great.  
19 And if you would please state your name for the record  
20 and raise your right hand.  
21  
22 ROBERT BROWNSTEIN,  
23 being first duly sworn by the Chairman to tell the  
24 truth, the whole truth and nothing but the truth,  
25 testified as follows:

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1  
2 MR. BROWNSTEIN: Yes, I do.  
3 CHAIRMAN SMITH: Thank you. The floor is  
4 yours.  
5 MR. BROWNSTEIN: Thank you very much for the  
6 opportunity to elaborate on my position. I've done it  
7 in writing, but I think verbally I can add something to  
8 it.  
9 Before I go into the substance of my  
10 contentions, I do want to point that the Hanson  
11 Bridgett response identified three elements of my  
12 complaint. There was a fourth element of the  
13 complaint. I thought it was stated relatively clearly  
14 in the complaint. I stated that there was evidence  
15 indicating that Council Member Liccardo interviewed  
16 Ms. Matthews and that he had an obligation to disclose  
17 information secured through that interview. And there  
18 is no analysis of that element in my complaint  
19 whatsoever in the response.  
20 CHAIRMAN SMITH: I don't remember seeing that  
21 in your letter either. Did you mention it in your  
22 letter? If you did --  
23 MR. BROWNSTEIN: I can show it to you.  
24 CHAIRMAN SMITH: I may be -- it's okay. I  
25 just -- it just slipped my mind. It was like ten

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1 pages, so I can't remember everything.  
2 MR. BROWNSTEIN: This is in the complaint  
3 itself. Not in the --  
4 CHAIRMAN SMITH: Oh, it's not in your --  
5 MR. BROWNSTEIN: No, it's in the --  
6 CHAIRMAN SMITH: Oh, it's in the complaint.  
7 MR. BROWNSTEIN: Original complaint, there  
8 was an additional point. Hanson Bridgett responds to  
9 the other ones but is simply silent on this one.  
10 CHAIRMAN SMITH: Okay.  
11 MR. BROWNSTEIN: And so I think every point  
12 is entitled to a response.  
13 CHAIRMAN SMITH: Okay. Gotcha. I'm sorry.  
14 Go ahead.  
15 MR. BROWNSTEIN: First, also let me say that  
16 I'm not interested in a tit-for-tat with Hanson  
17 Bridgett either. Although I am critical of some of the  
18 work they did, I think they were given an  
19 extraordinarily difficult task here. First, because it  
20 is the first horse out the gate in terms of this kind  
21 of analysis.  
22 And, secondly, partly because of the approach  
23 they took, they found themselves trying to determine  
24 what's relevant and influential to members of the San  
25 Jose City Council. And I think that's very difficult

8 (Pages 29 to 32)

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<p style="text-align: center;">Page 33</p> <p>1 to do unless you have a lot of experience engaging with 2 the San Jose City Council and watching the City Council 3 and understanding what they care about. And I don't 4 think that's the kind of experience they've had. It's 5 not their fault. But, absent that, they had a very 6 high hill to climb.</p> <p>7 The complaint I made, I thought, was 8 relatively straightforward. There is a legislative 9 history behind this ordinance and this Resolution, 10 which is normally an important guideline to 11 interpreting statute. And the legislative history 12 overwhelmingly indicates the importance of disclosure 13 to the public. That is, the public has a right to 14 know. Now, there is something in the history that 15 indicates there's a concern about whether one official 16 is being open to another official as opposed to being 17 open to the public. But that's clearly very secondary 18 in the legislative history. So there's a primary 19 concern about the public's right to know.</p> <p>20 Then we have the language that indicates -- 21 like the officials have to disclose relevant, 22 substantive information if it comes from a source 23 outside the public process.</p> <p>24 And then we have the actual facts of this 25 case. Mayor Liccardo took a very unusual step. He</p>	<p style="text-align: center;">Page 35</p> <p>1 Instead I found myself facing a conclusion 2 that says despite the fact that there was an entire 3 private process outside the public process, this 4 complaint doesn't even warrant an investigation.</p> <p>5 Now, when, in my experience, the legislative 6 history and the facts suggest one outcome and the 7 analysis suggests a very different outcome, there is 8 probably a problem with methodology. And that's why I 9 spent so much time in my written comments talking about 10 methodology.</p> <p>11 And here's what I think the methodological 12 problems were. First, there was a complete failure to 13 take into consideration the public's right to know. I 14 certainly agree every fact is not relevant. And I 15 would have expected an analysis that weighs the 16 public's right to know against the standard of 17 relevance and influence. But that weighing never 18 happened in this case. In fact, in the entire report 19 there's not a single word that says the public's right 20 to have information about what its government was 21 thinking about and doing.</p> <p>22 And I think the heart of this problem is the 23 interpretation of Policy 5.2.8, which is the policy 24 that deals with material facts. My reading of that 25 resolution -- that piece of the policy -- is that it</p>
<p style="text-align: center;">Page 34</p> <p>1 chose to create his own private process of securing 2 information about the District 4 vacancy. And he did 3 that not to augment the public process but, clearly, as 4 a substitute for the public process. He announced his 5 decision before the public process ever began.</p> <p>6 So I think the clear conclusion that one is 7 faced with when one understands the history of the 8 ordinance and the language requiring relevant, 9 substantive information and its disclosure is that if 10 you engage in a purely private process and ignore the 11 public process completely, you have a very unusual and 12 large burden of disclosure. And that's the heart of my 13 case.</p> <p>14 Now, considering those facts, I would have 15 expected an investigation that would have said -- that 16 would have validated the high demand that the people 17 and the ordinance have for disclosure, would have 18 credited Mr. Liccardo for making some disclosure -- he 19 did but pointing it out wasn't enough to meet the high 20 standard -- to recognize that there's no evidence of 21 bad faith and, in consequence, to come up with a 22 conclusion that says, Mayor Liccardo, you didn't meet 23 the high standard. If you simply acknowledge that and 24 state you'll fully comply in the future, the case is 25 closed. That's what I would have hoped for.</p>	<p style="text-align: center;">Page 36</p> <p>1 talks about relevance and influence on council members 2 as an effort to weed out trivial information. The 3 public isn't interested in trivial information either. 4 So the idea is, if it's not important to any 5 decision-maker, you can't ask people to disclose it. 6 That doesn't make sense.</p> <p>7 But I believe Hanson Bridgett uses a very 8 different interpretation of 5.2.8 because they're 9 arguing that facts can be dismissed as neither relevant 10 or influential because council members think something 11 else is more important. Not that the facts are trivial 12 but that something else is more important, such as the 13 fact that the mayor-elect has endorsed a specific 14 candidate. And, in fact, in their argument they say 15 that council members were more impressed by the fact 16 that the mayor-elect made a recommendation rather than 17 the facts on which that recommendation were based.</p> <p>18 Now, I think that approach, that 19 interpretation, is extremely damaging to the purposes 20 of the ordinance because it essentially allows elected 21 officials to avoid their obligation to disclose 22 relevant, substantive information simply by yielding to 23 somebody else, to say, We'll agree with whatever the 24 police chief says. We'll agree with whatever the 25 mayor-elect says. Thereby -- then they're saying</p>

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1 that's the only thing that influences us. And,  
2 therefore, no further disclosure is required unless we  
3 have an interpretation that says the primary  
4 decision-maker in that case, the mayor or the police  
5 chief or whoever, discloses what their actions is based  
6 on. And that's what I'm looking for in my complaint.

7 My second concern with the interpretation of  
8 5.2.8 is that I believe Hanson Bridgett is saying the  
9 information is not -- not only has to be influential  
10 and relevant but it also has to be misleading. All  
11 three. And I think that's an extraordinarily difficult  
12 standard. I mean, it's one thing to say, If there's a  
13 high bar, we don't want to have trivial requirements.  
14 It's another thing to ask people to climb Mount  
15 Everest.

16 And to meet the misleading standard -- if you  
17 just think about it, how do you prove that something  
18 that wasn't said is misleading to somebody else? In my  
19 mind, almost the only way you can do that is if you  
20 know what the other person was thinking. And that's  
21 rarely the case. And in a government that is governed  
22 by the Brown Act, it's very difficult for council  
23 members to know what another council member is  
24 thinking. They're not allowed to talk about a measure  
25 before they sit in public session and debate it in the

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1 agenda. So that misleads -- I agree, if it is  
2 misleading, it certainly should be disclosed. But if  
3 it's highly relevant and influential, even if it isn't  
4 misleading, it ought to be disclosed.

5 And then the third methodological issue is  
6 how do you apply the standard of influence and -- well,  
7 those terms aren't defined either. So what do we mean  
8 by that? And I'm concerned about the focus on defining  
9 those in terms of council members other than the one  
10 who has the obligation to disclose the information.  
11 Because if you're talking about what's influential and  
12 relevant to the people who haven't heard the fact, then  
13 you necessarily are dealing with hypotheticals. You're  
14 asking somebody, Would it have been relevant and  
15 influential to you if you had heard it, although we're  
16 asking you later and you haven't heard it?

17 And the way that Hanson Bridgett applies this  
18 in the case of my complaint demonstrates how slender a  
19 thread this is, to hang a complaint regarding the  
20 Municipal Code on. Because what Hanson Bridgett does  
21 is they speculate about the hypothetical. So I'm  
22 quoting now. They say "A general statement that  
23 Ms. Matthews had the support of community leaders  
24 strikes us as no less relevant than who those community  
25 leaders were." Who is "us" in that statement? It's

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1 not the public. It's not the City Council. It's  
2 Hanson Bridgett. So what they're essentially saying is  
3 they're rejecting my complaint because they're  
4 theorizing about how council members would have valued  
5 information that they never heard.

6 I think we're better off trying to focus on  
7 facts that can be ascertained. Therefore, I suggest an  
8 interpretation of 5.2.8 -- which I think is totally  
9 compatible with the wording of 5.2.8 -- which says that  
10 what we really want to target is the facts that were  
11 relevant and influential to the decision-maker who  
12 didn't disclose those facts. Because then we're asking  
13 somebody, You heard a fact. You knew a fact. Why  
14 didn't you disclose it?

15 There's a reality there that you're asking  
16 somebody about. If they communicate with somebody  
17 else, you can ask somebody else, Did this person say  
18 that the fact was relevant to them or not? That's not  
19 easy to get your hands on, but it's not a hypothetical.  
20 You're trying -- it's history. It's empirical. You  
21 can try and get an answer to those questions.

22 Now, I think, because of the methodological  
23 problems as well as probably the lack of experience  
24 with the City Council, the specific review of my  
25 individual complaint had significant failings. First,

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1 my complaint -- first, in discussing the importance of  
2 the identity of the community leaders, Hanson Bridgett  
3 comes to what I consider to be an astonishing  
4 conclusion, which is that that information wasn't  
5 relevant or influential, despite the fact that Mayor  
6 Liccardo specifically tells us that it was relevant and  
7 influential. He's the one who discloses -- I'll give  
8 him credit for it. He discloses that he vetted her  
9 candidacy to specific community leaders that he  
10 selected. How can somebody say "I vetted a candidacy  
11 with community leaders I selected" and not believe that  
12 their opinions are relevant and influential? Clearly,  
13 if they had said, "She's not a good candidate," he  
14 might have rejected her. There's no way to argue that  
15 they weren't relevant and influential to Mr. Liccardo.

16 In addition, as regards the identity, there  
17 is an entire history in the City of San Jose of San  
18 Jose council members making the disclosure that's  
19 required under this policy. It wasn't an ordinance  
20 until very recently, but it was a policy. And council  
21 members have, in public session, made disclosures based  
22 on that policy.

23 I distinctly remember on many occasions -- I  
24 go to a lot of council meetings -- council members say,  
25 I disclose on the record I met with Bob Brownstein, who

10 (Pages 37 to 40)

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1 talked to me about A, B, C and D. I can't remember a  
2 single time that one of those disclosures took place  
3 that it didn't identify who was the communicator, who  
4 was the person who provided the information. But that  
5 history is ignored in the approach that Hanson Bridgett  
6 is taking.

7 The next point regards the information that  
8 the community leader presented. Not who they were but  
9 the information that they provided. Now, as I  
10 indicated earlier, in this case, Hanson Bridgett really  
11 engages in pure speculation. They don't know, so they  
12 imagine that the information that would have been  
13 provided by these community leaders to Mr. Liccardo --  
14 they imagine that would be less influential than the  
15 fact of Mr. Liccardo's endorsement. But that's  
16 completely not based on evidence.

17 And, in addition, it denies any importance to  
18 the public's right to know. Because if the mayor-elect  
19 can say, The facts aren't important, it's my  
20 endorsement that's important, and council members agree  
21 with that, then the public learns nothing about what  
22 was the real basis of the recommendation to present  
23 Ms. Matthews, and the whole history and goal of the  
24 ordinance in terms of disclosure essentially becomes  
25 null and void.

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1 In addition, the fact that there's no mention  
2 of that hearing makes me wonder whether, in their  
3 review of my complaint, Hanson Bridgett actually  
4 reviewed the tape of the meeting. And I think, if they  
5 didn't, that's a serious problem. Because we have a  
6 complaint about an elected official's disclosure on an  
7 issue that is on the council agenda. How can you  
8 evaluate what was disclosed and what people thought was  
9 influential and relevant without at least looking at  
10 the tape of that meeting? Granted, it was a whole  
11 afternoon. But, still, somebody at that meeting could  
12 have said specifically, "I wish I knew what those  
13 community leaders had said," and no one would know that  
14 unless they review the tape.

15 Finally, I had another point that I raised  
16 regarding the possibility that Mayor Liccardo had  
17 discouraged someone from applying. I think there was  
18 ample evidence at the hearing that the small number of  
19 applicants was extremely important to the public, and  
20 there was a lot of questions about the process that was  
21 employed. I will be the first to agree, I didn't prove  
22 that. I didn't think that was my job, to prove it. I  
23 presented circumstantial evidence that I thought should  
24 lead to an investigation.

25 And, in this case, the investigation could be

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1 Furthermore, there was a whole afternoon of  
2 hearings on this appointment. And I attended those  
3 hearings. And council members again and again  
4 emphasized that they were interested in additional  
5 information. Every council member was aware of the  
6 fact that Mayor Liccardo -- Mayor-Elect Liccardo had  
7 already made an endorsement. Now, if the only thing  
8 that they cared about was his endorsement, they  
9 wouldn't have asked question after question. They  
10 wouldn't have said, You almost got my vote, if you'd  
11 only answered the question differently. Council Member  
12 Oliverio asked an hour's worth of questions to every  
13 candidate. Their behavior clearly indicates that they  
14 didn't think that the mayor's endorsement was more  
15 important than additional information. They wanted the  
16 additional information. Also, the fact --

17 COMMISSIONER PIERRE-DIXON: And they obtained  
18 it.

19 MR. BROWNSTEIN: I'm sorry.

20 COMMISSIONER PIERRE-DIXON: And they obtained  
21 it.

22 MR. BROWNSTEIN: And they got additional  
23 information. Well, you would have to ask them whether  
24 they got as much as they would have liked, but they  
25 clearly got some.

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1 done in minutes. I mean, it's one thing if I said, You  
2 got to send somebody to Chicago and interview a hundred  
3 people. One phone call would have indicated whether  
4 Mayor Liccardo had a phone call with this individual  
5 and discouraged him or didn't discourage him. And  
6 considering the public interest, I would have thought  
7 that it would be appropriate to investigate that and  
8 not simply say that there's no need to look at  
9 anything. I mean, there were dozens and dozens of  
10 people at that meeting. And there is no doubt in my  
11 mind that they would have liked to have known the  
12 answer to that question.

13 So let me conclude by reiterating the request  
14 that I made earlier. I thought that my complaint was  
15 one of the simpler kinds of applications of this  
16 provision. I still think so, because the entire  
17 fact-finding process was outside the -- all of it was  
18 outside the public process. But the points that Hanson  
19 Bridgett raises, even on this, in my mind, simpler  
20 application, suggests that this is really a challenging  
21 and conflicting kind of enforcement in order to treat  
22 defendants fairly but also to protect the goals of the  
23 ordinance, the people's right to know. And that's why  
24 I suggested it might make sense, rather than have a  
25 tit-for-tat, to try and step back and review some of

11 (Pages 41 to 44)

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1 these fundamental questions of interpretation before  
2 you make a finding in my case.  
3 And I -- well, I'm not -- you're not allowed  
4 to have me withdraw. But I would have been willing to  
5 withdraw if that would lead to making progress in terms  
6 of getting an understanding of those things. Because  
7 the outcome I sought was one that would make it clear  
8 what the standard was and get council members to say,  
9 We got it, and that's the way we'll behave in the  
10 future. And -- I mean, I think my complaint can lead  
11 to that. But a section in which the Commission  
12 achieves clarity in terms of how it's enforcing these  
13 measures and interpreting them can achieve that as  
14 well.  
15 And thank you very much for listening. It  
16 was a long presentation.  
17 CHAIRMAN SMITH: Okay. I have a couple of  
18 questions, but I'll defer to you guys if you have  
19 questions you want to make -- questions you want to  
20 ask.  
21 COMMISSIONER PIERRE-DIXON: I think I just  
22 made a comment in terms of listening to the process,  
23 and I wanted to hear everything you had to say in terms  
24 of that.  
25 I think that's -- at this point I can't say I

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1 agree with Hanson Bridgett because we haven't gotten to  
2 the end of everything he needs to present. But  
3 certainly I see that a public process did go on.  
4 Whether or not we need to do somebody additional, I  
5 think I will let that wait until we get to that point.  
6 But thank you for your argument.  
7 MR. BROWNSTEIN: Thank you.  
8 COMMISSIONER PEACOCK: I don't have anything  
9 at this point.  
10 CHAIRMAN SMITH: A couple of quick ones.  
11 MR. BROWNSTEIN: Yes.  
12 CHAIRMAN SMITH: I guess one thing is it  
13 seems to me that this if -- when we get into that  
14 definition and it's a matter of -- where are we?  
15 MR. BROWNSTEIN: 5.28.  
16 CHAIRMAN SMITH: -- 5.28, information which  
17 would likely influence the decision of a member of the  
18 council on an item of business on the City Council  
19 agenda -- I'd like your reaction to this thought.  
20 MR. BROWNSTEIN: Sure.  
21 CHAIRMAN SMITH: It seems to me that if  
22 knowing who he talked to and what they said was  
23 important to one or more council members -- they had  
24 the memo. They knew he had done this. If it was  
25 important, it seems to me they would have asked. And

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1 the fact that none of them apparently asked during that  
2 afternoon-long meeting would kind of indicate that  
3 maybe they didn't consider it important to the  
4 decision.  
5 MR. BROWNSTEIN: Well, I make two comments.  
6 First, we don't know whether they asked privately or  
7 not. They are allowed to communicate up to 5:00.  
8 CHAIRMAN SMITH: True.  
9 MR. BROWNSTEIN: And they often do. So it's  
10 possible they did ask and was answered but some of the  
11 others didn't.  
12 The other point I would make is that -- I'm  
13 disagreeing with the basic idea that you have to show  
14 that it's relevant and influential for another council  
15 member. Because, again, it's this problem of  
16 hypothetical. If you asked one of these council  
17 members -- if we brought one in now and said, "Was" --  
18 "would this information have been relevant or  
19 influential to you?" they have to make a speculation.  
20 They didn't know it at the time. And, you know, if it  
21 turned out that every single one of those people that  
22 Mr. Liccardo interviewed didn't live in District 4 but  
23 they were all -- this is totally speculative -- they  
24 were all major contributions to his campaign, that  
25 might have been something the council members would

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1 be -- have been interested in and would have found  
2 influential in terms of weighing the kind of  
3 information that they generated.  
4 The way I'm interpreting that sentence -- and  
5 I think it's completely compatible with the language of  
6 the sentence and certainly with the history of the  
7 ordinance -- is that is not supposed to show that, in  
8 fact, a council member found a certain piece of  
9 information relevant or influential. It's supposed to  
10 show that the information wasn't -- that it was a  
11 nontrivial piece of information. I mean, in a certain  
12 extent, the council is acting as the surrogate for the  
13 public and saying, This is something that is important.  
14 So that's the way I'm looking at it.  
15 And when -- if you're looking at it that way,  
16 the fact that it was important to Mr. Liccardo, who  
17 made his endorsement early, that's sufficient to show  
18 that it's influential and relevant in itself. And I  
19 think that case has overwhelmingly been made regardless  
20 of whether the other council members may have said,  
21 We'll defer to the mayor-elect. We don't need to know  
22 what he found out.  
23 CHAIRMAN SMITH: My other question gets to  
24 the public versus council members. You didn't say it  
25 so much in your verbal presentation. But in the letter

12 (Pages 45 to 48)

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1 -- repeatedly talked about the right of the public to  
2 know. And I know that's the whole business with the  
3 Sunshine Task Force.  
4 However -- I'm not an expert on 12.21, by any  
5 means. But from what I've seen, it seems to focus more  
6 on what council members need to know. And specifically  
7 this 5.2.8. It talks about influencing other council  
8 members. It doesn't mention the public. Now, maybe  
9 that's a failing in your eyes and others' eyes and the  
10 drafting of that resolution and the drafting of the  
11 ordinance, but, basically, what we got here is  
12 something that seems to focus on what other council  
13 members need to know, not what the public needs to  
14 know.  
15 MR. BROWNSTEIN: Well, I make two comments.  
16 First, so far everyone has said 5.2.8 is interpreted to  
17 provide guidance on the Code. It's not a  
18 straightjacket on the Code. And the guidance it  
19 provides should be considered in relationship to the  
20 overall purposes and goals of the ordinance. You  
21 wouldn't want guidance that takes you in a direction  
22 that's in 180 degrees, contradicts everything you're  
23 trying to do in an ordinance.  
24 Also, aside from the sentence about  
25 "misleading," the "relevant and influential" sentence

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1 doesn't say "other council members." It says "a  
2 council member." And it is as legitimate to interpret  
3 that as to mean that the council member who fails to  
4 disclose has to say what information guided his  
5 decision as it is to do the hypothetical and ask other  
6 council members whether the information they never  
7 heard would have influenced their decision.  
8 And since -- I mean, I'm speculating myself.  
9 But I think what the public really wants to know is  
10 what influence decision-makers when they're up there,  
11 doing something. It's more useful for them -- to them  
12 to know the guy who had information, I did disclose it.  
13 What influenced him in trying to figure out how people  
14 who never heard it acted? I mean, they weren't  
15 influenced on the day by that information. By  
16 definition, it was never disclosed to them. You're a  
17 member of the community. You'd like to know how these  
18 11 people made a judgment. You don't -- you're not  
19 really helped by finding out how they would have  
20 reacted to something they didn't hear. You're helped  
21 by finding out how somebody reacted to something that  
22 they did know and didn't disclose publicly because they  
23 got it from some outside source.  
24 That's the way I would answer it.  
25 CHAIRMAN SMITH: No other questions at this

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1 time?  
2 COMMISSIONER PEACOCK: Just a couple of  
3 questions.  
4 So talking about the discussions with these  
5 community leaders -- I forget the precise term --  
6 what's an example of what Mr. Liccardo should have  
7 said? What kind of detail should he provide in those  
8 conversations?  
9 MR. BROWNSTEIN: Thank you. I mean, I think  
10 he should have said, This is -- because of the process  
11 that he engaged in. He vetted Ms. Matthews' candidacy.  
12 If he just said, "I heard from a couple of community  
13 leaders," I don't think he would have had to disclose  
14 anything. But because he went through that formal  
15 process, he needed to disclose who he met with. He  
16 needed to disclose the primary information that he got  
17 from those community leaders that was influential on  
18 his decision. He --  
19 COMMISSIONER PEACOCK: For example?  
20 MR. BROWNSTEIN: Like -- I'm speculating. I  
21 don't know. But, for example, suppose he said to  
22 his -- to the community leaders, "You know, I'm going  
23 to have to go to the voters and ask for a tax increase  
24 in 2016. Do you think that's something that Margie  
25 Matthews would do?" Okay?

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1 If he asked that and they said, You can count  
2 on her -- you know, she's been somebody who has been  
3 willing to raise taxes in the past -- I think that's a  
4 piece of information the public would be entitled to  
5 know.  
6 On the other hand, if he was talking to her  
7 and she said, "You know, there really aren't enough  
8 books about San Jose's history in the public library,"  
9 I don't think he would have needed to disclose that.  
10 That's not -- that doesn't meet the standards of  
11 influential and relevant.  
12 COMMISSIONER PEACOCK: What -- I think you  
13 alluded to this a little bit. If instead of talking to  
14 people he had been listening to KLIV on the radio on  
15 the way in and three or four people, whoever they are,  
16 all said, Great person. I hope she gets nominated.  
17 That, obviously, went into his thinking. He knew about  
18 that. Is that something he should discuss at that  
19 point?  
20 MR. BROWNSTEIN: I think that's going -- no.  
21 I mean, I don't think you should disclose that. I  
22 mean, that's -- that's general information, and it's  
23 public information that everyone has. And I think  
24 it's -- it makes no sense to ask someone to disclose  
25 all the multiple inputs that they get. Hundreds of

13 (Pages 49 to 52)

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1 people may send -- may send e-mails, saying, I like  
2 her; I don't like her; here's the standards you should  
3 apply.

4 I agree with Hanson Bridgett, there should be  
5 a balancing. And the key thing to the balancing should  
6 be what's not public, what's from a source that is  
7 outside the public process and what rises to the level  
8 of it really helped somebody make a decision. And I  
9 think that's not a gigantic amount of information, but  
10 it's -- it is important information.

11 And I think that's what the goal of the --  
12 that section of the ordinance is designed to achieve.  
13 To make that kind of information available to the  
14 public.

15 COMMISSIONER PEACOCK: I think -- and your  
16 reaction to this. I think sometimes people are called  
17 sort of under the -- to say, Hey, I'm thinking about  
18 appointing thus and such. May already have his or her  
19 mind made up, but there's a little stroking of people  
20 to feel like they were part of the process or maybe  
21 lead to their support in some way. Do you have any  
22 reason to think that was the case or not the case here?

23 MR. BROWNSTEIN: I have no idea. I am going  
24 to take Mayor Liccardo at his word. I mean, he  
25 justified his decision before the public process took

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1 place by saying in a memo, I vetted Ms. Matthews with  
2 community leaders. I mean, that -- he made a strong  
3 statement. He said, essentially, I don't have to do  
4 the public process. I vetted her with community  
5 leaders.

6 And because he did that, a strong kind of  
7 information-gathering, and did -- and that was all he  
8 did and some other kinds of private  
9 information-gathering but not waiting until the public  
10 process happened -- because he did that, he's got a big  
11 burden of disclosure. If he had talked to a couple of  
12 people and then was a robust interviewer in the public  
13 process, how could anybody, including him, figure out  
14 which fact was dominant in making his decision? But we  
15 know because of the timing that all of the facts that  
16 determined his decision were the ones that were done  
17 through the private process and not through the public  
18 process.

19 And, you know, if, as a result of a judgment  
20 in this case or an interpretation in this case, council  
21 members are more inclined to do things in the public  
22 process rather than private -- they're allowed to do it  
23 privately. But if they realize that the burden of  
24 disclosure is real, I don't think that would be a bad  
25 thing.

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1 COMMISSIONER PEACOCK: Thank you. And just  
2 for -- sorry.

3 CHAIRMAN SMITH: No, go ahead. Go ahead.

4 COMMISSIONER PEACOCK: Following up on one of  
5 the other -- a question earlier. So nobody on the  
6 council said, you know, at the council meeting, Who are  
7 those people and what did they say?

8 MR. BROWNSTEIN: No. And I was there.

9 COMMISSIONER PEACOCK: All right. And so  
10 you're saying that -- but we don't know, but what if  
11 there was some private conversation where that  
12 information was relayed?

13 MR. BROWNSTEIN: It's possible. I have no  
14 way of knowing that. And it is not uncommon for the  
15 people -- they call themselves being in a Brown Act.  
16 Yeah, it's not uncommon for those kinds of  
17 conversations to take place.

18 COMMISSIONER PEACOCK: And if that  
19 happened -- speculating here, I realize -- would that  
20 be -- whose is the responsibility on that? Is that the  
21 council member who asked -- who asked informally, or is  
22 that something that reflects badly on Mr. Liccardo?

23 MR. BROWNSTEIN: You know, I'd say the  
24 primary responsibility is on Mr. Liccardo there for one  
25 reason. The other council members participated in the

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1 public process. Whatever Mr. Liccardo told them about  
2 those community leaders, they also spent the afternoon  
3 hearing hours of testimony from the candidates and  
4 dozens and dozens of citizens commenting. So they had  
5 a lot of public input. Possibly also this private  
6 input.

7 But the case of Mr. Liccardo is different.  
8 It was only private input. I mean, he put himself in a  
9 situation in which I think his burden of disclosure is  
10 higher than the burden of disclosure of someone who had  
11 gone through a robust public process. And so I would  
12 say that he had a -- he had a duty there that went  
13 beyond another council member who may have discussed  
14 who those community leaders were.

15 COMMISSIONER PEACOCK: My last question.

16 MR. BROWNSTEIN: Yeah.

17 COMMISSIONER PEACOCK: Is your impression --  
18 or maybe more than that -- that his influence is such  
19 that just by saying that, that swayed everybody despite  
20 all the other discussion?

21 COMMISSIONER PIERRE-DIXON: No.

22 MR. BROWNSTEIN: You know, the honest answer  
23 is I don't know. What I would say is there is -- you  
24 can argue -- there is information that goes both ways.  
25 On the one hand, mayors and mayor-elects are

14 (Pages 53 to 56)

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1 influential, particularly to the people who are or are  
2 going to be part of what's known as the governing  
3 coalition in San Jose.  
4 On the other hand, I'm unwilling to assume  
5 that council members were disingenuous unless I have  
6 information to suggest that they were. And a council  
7 member -- if the council member at that hearing said,  
8 I'm serious about getting information. I want  
9 information. Council Member Herrera, now Vice-Mayor  
10 Herrera, said, It was very important to me that every  
11 single person said something good about Margie  
12 Matthews. Constant said to an applicant, If you had  
13 answered one question differently, I would have voted  
14 for you. I'm taking them at their word, which is that  
15 they had not, either implicitly or explicitly, told  
16 Mayor Liccardo "You can count on my support" and that  
17 they could have voted for somebody else or asked for  
18 more time or taken a different action if the  
19 information had induced them to do so.  
20 COMMISSIONER PEACOCK: Thank you.  
21 CHAIRMAN SMITH: I have two quick questions  
22 that came up --  
23 MR. BROWNSTEIN: Sure.  
24 CHAIRMAN SMITH: -- as you were doing the  
25 others.

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1 The first one is -- you made a statement  
2 something to the effect that the mayor chose a private  
3 process -- or a public process. Isn't it more correct  
4 to say that he supplemented the public process with the  
5 private process that preceded it? I mean, he was at  
6 the meeting.  
7 MR. BROWNSTEIN: Well, if --  
8 CHAIRMAN SMITH: I mean, he participated in  
9 that meeting. It's not that he left the room and went  
10 back and had a Coke for four hours.  
11 MR. BROWNSTEIN: No, he did -- no, he did not  
12 leave the room. But he made his decision, and he did  
13 that publicly before the meeting.  
14 CHAIRMAN SMITH: Right.  
15 MR. BROWNSTEIN: So he was -- he was an  
16 observer more than a participant. Because -- I mean, I  
17 suppose you could argue that he could have repudiated  
18 his prior endorsement --  
19 CHAIRMAN SMITH: Haven't you ever seen a case  
20 where somebody made a statement and then sat through --  
21 I've done it myself in here. I've said something and  
22 we have a discussion and I change my mind.  
23 MR. BROWNSTEIN: Yeah, I have. But rarely in  
24 this kind of thing. Plus --  
25 CHAIRMAN SMITH: I understand.

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1 MR. BROWNSTEIN: Plus, the other thing is he  
2 asked virtually no questions. So -- of anybody. So --  
3 CHAIRMAN SMITH: All right.  
4 COMMISSIONER PIERRE-DIXON: He did ask some  
5 questions.  
6 MR. BROWNSTEIN: I mean, I take him at his  
7 word that he -- that he met with Matthews, was  
8 impressed with Matthews, vetted Matthews and endorsed  
9 Matthews based on that information. And he meant what  
10 he said.  
11 CHAIRMAN SMITH: And that gets to my last --  
12 MR. BROWNSTEIN: Oh, sure.  
13 CHAIRMAN SMITH: I promise, my last question.  
14 MR. BROWNSTEIN: Okay.  
15 CHAIRMAN SMITH: The word "vet."  
16 MR. BROWNSTEIN: Yeah.  
17 CHAIRMAN SMITH: Your interpretation, I  
18 believe, is that means that he did a full-blown formal  
19 process. I don't know about you, but I've heard people  
20 with a little bit of puffery, you know. What they  
21 actually did maybe wasn't that. They'll use -- they'll  
22 use words like that because it sounds impressive, and  
23 they didn't really do all that. Do you have any  
24 knowledge, one way or the other, as to what he actually  
25 did?

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1 MR. BROWNSTEIN: I don't have knowledge. But  
2 it's clear that --  
3 CHAIRMAN SMITH: I mean, he did something.  
4 MR. BROWNSTEIN: Yeah, he did something.  
5 It's also -- you know, he's an attorney. He's a former  
6 prosecutor. He's an experienced council member. He  
7 knows the importance of specific terminology.  
8 And the significance of "vet" isn't so much  
9 that it means there was an hour meeting. The  
10 importance of "vet" is that it was a test. I mean,  
11 again, I'm taking him at his word. He's saying, I  
12 tested her. And "test" means you can fail the test.  
13 And that's why I say that it was influential and  
14 relevant.  
15 CHAIRMAN SMITH: Okay.  
16 MR. BROWNSTEIN: I mean, because there was a  
17 test.  
18 And if my employer told me to vet someone, I  
19 would know that that's not casual. That means I'm  
20 testing them and I need to report back, did they pass  
21 or did they fail.  
22 CHAIRMAN SMITH: Okay. Thank you. Okay.  
23 COMMISSIONER PEACOCK: I'm sorry. One other  
24 question.  
25 MR. BROWNSTEIN: Oh.

15 (Pages 57 to 60)

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1 COMMISSIONER PEACOCK: Last one. Two  
2 related. One is -- so, obviously, he was -- he was a  
3 council member at that point.  
4 MR. BROWNSTEIN: Yes.  
5 COMMISSIONER PEACOCK: But, admittedly,  
6 mayor-elect.  
7 MR. BROWNSTEIN: He was mayor-elect, correct.  
8 COMMISSIONER PEACOCK: It was more the -- but  
9 the vote for Ms. Matthews was what?  
10 MR. BROWNSTEIN: It was -- let's see.  
11 Oliverio voted no. Three council members were absent.  
12 I think everyone else voted yes. So seven to four.  
13 COMMISSIONER PEACOCK: Okay.  
14 MR. BROWNSTEIN: Yeah.  
15 COMMISSIONER PEACOCK: So his vote -- he had  
16 one vote in that process.  
17 MR. BROWNSTEIN: You only get one.  
18 CHAIRMAN SMITH: That's it?  
19 Let's see. At this point we go to -- there's  
20 no other interested parties present, so we will go back  
21 to Mr. Miller. Again, I'll recognize Steve Miller from  
22 Hanson Bridgett law firm to make any additional  
23 comments.  
24 MR. MILLER: Thank you. I promise to honor  
25 my earlier pledge not to engage in a tit-for-tat. But

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1 I would like to point out two things.  
2 First is -- and I have been thinking about  
3 what order in which to say these. But the Commission  
4 has long -- there was a discussion of what the -- who  
5 has the burden of deciding -- of getting this passed.  
6 But the Commission has long held that Title 12 is not a  
7 fishing license for open-ended investigations but that  
8 the complainant has the burden of identifying specific  
9 facts sufficient to warrant an investigation.  
10 And as I'm listening to the conversation you  
11 just had, highly speculative about what might have  
12 happened, what could have happened, what might have  
13 been in one person's mind, I just want to say that  
14 while that is an interesting conversation, my role in  
15 evaluating this complaint preliminarily was to focus on  
16 the four corners of the complaint and on the facts that  
17 were alleged.  
18 And I believe the complainant would -- if you  
19 permit an investigation or if you authorize an  
20 investigation, I think what you're saying is that a  
21 complainant does not have to show that information was  
22 relevant. They just have to assert that there might  
23 have been something in the mind of a council member  
24 that we should investigate to find out if, in fact,  
25 that information really was relevant. And that is just

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1 not the bar that the Commission has traditionally set,  
2 to authorize a full-blown investigation, with the  
3 expense, the reputational issues. It's just not the  
4 way we have interpreted our role and interpreted your  
5 desires.  
6 So the facts that you have been discussing --  
7 you know, did -- were there other telephone  
8 conversations? Were there other private conversations?  
9 The complaint didn't mention that something happened in  
10 this hearing that required us to listen to the hearing  
11 to see whether there was some statement made in that  
12 hearing that constituted a violation. We focused  
13 purely on the facts that were presented. And, to that  
14 extent, I stand by our conclusion, based on those facts  
15 that were presented in the complaint.  
16 Second thing I want to say has to do with the  
17 intriguing and interesting theoretical, in my view,  
18 discussion as to whether the determination of what  
19 makes a fact a material fact is what was in the mind of  
20 the holder of the fact or whether what makes a fact  
21 material is whether it was material to those who did  
22 not have access to those facts. And, again, I read --  
23 that is a question, ultimately, of interpretation of  
24 city law that perhaps your city attorney is better  
25 suited to advise you on.

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1 But when I read -- I'll just tell you how  
2 I -- my thought process, when I conducted this  
3 preliminary evaluation, is that the language says --  
4 first of all, the premise of Title 12.21.310 says -- it  
5 starts by saying "in order to ensure equal, full and  
6 fair access." So the idea of equal access, to me,  
7 implies that it be shared with those who do not have  
8 the access, not -- the focus is not on the person who  
9 owns it. And then the "material fact" says -- excuse  
10 me. I've lost my place here -- "a fact that is  
11 relevant for a member of the City Council to make an  
12 informed and knowledgeable decision and which would  
13 likely influence the decision of a member of the City  
14 Council. A fact is material if the failure to disclose  
15 the fact will substantially mislead any member of the  
16 City Council." So there is, in the definition, a  
17 reference to other council members.  
18 So -- and then I will also say that I believe  
19 that anytime one has statutory language required with  
20 terms like "relevant" and "substantive" and "material,"  
21 there has to be, inevitably, a certain amount of  
22 objectivity involved in assessing whether that standard  
23 has been met. What I mean by "objectivity" is while --  
24 that's why I started by saying it's theoretical. While  
25 it's interesting to say what was in one person's mind

16 (Pages 61 to 64)

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1 and what was not in the other person's mind, I think  
2 anyone looking to enforce a law has to say, Well, what  
3 would a reasonable person find relevant under these  
4 circumstances? What would a reasonable council member  
5 need to know? Not what actually was in one person's  
6 mind or what actually was not in another person's mind.  
7 So I think there's a certain objectiveness inherent in  
8 the interpretation of any number of codes, and this is  
9 among them.

10 So I'm happy to discuss in more details how  
11 we reached our conclusion with regard to the specific  
12 facts. But we did not engage in any of the kind of  
13 speculative, hypothetical consideration that you just  
14 engaged in, for the reasons I just described.

15 CHAIRMAN SMITH: What about the fourth point  
16 from the original complaint that Mr. Brownstein  
17 mentioned?

18 COMMISSIONER PIERRE-DIXON: The discussion  
19 about Mr. Canova.

20 MR. MILLER: I'm sorry. Could you --

21 COMMISSIONER PIERRE-DIXON: My concern first  
22 and foremost was the fourth element, was there was also  
23 a full discussion on the e-mail by Mr. Canova, and we  
24 haven't heard anything from you on that as of yet. We  
25 did hear from Mr. Brownstein on that.

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1 not include that information in his memo, I suppose  
2 I'll -- two -- two aspects. One, mea culpa that  
3 perhaps I should have included that in my discussion of  
4 that in my report. Frankly, it seems to me that the  
5 memorandum from Mr. Liccardo -- which, by the way --  
6 you know, he disclosed a lot of information in this --  
7 in this memorandum.

8 COMMISSIONER PIERRE-DIXON: Right.

9 MR. MILLER: It seems -- it seemed to me  
10 almost implicit that he would not send a memo to the  
11 council endorsing Ms. Matthews if he did not think that  
12 she was interested in serving. But I repeat my mea  
13 culpa, and I agree that that's probably an omission  
14 that would have been better to have included in the  
15 report. But I don't believe it changes --

16 CHAIRMAN SMITH: Do you think it has any  
17 impact on your conclusions?

18 MR. MILLER: It does not.

19 Again, my conclusion is not what the policy  
20 is behind Open Government laws. My conclusion is  
21 purely did this complaint identify specific facts to  
22 get over the bar that the Commission has set. And I  
23 was mindful that -- if you want to speculate, I would  
24 encourage you to speculate of the types of complaints  
25 that you might have from this new provision, were you

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1 MR. MILLER: So the facts presented in the  
2 complaint are that Mayor Liccardo did not disclose that  
3 he had discouraged Jim Canova from applying for the  
4 position. And in support of that allegation, the  
5 complaint included an e-mail exchange in which Mayor  
6 Liccardo said, If you would like to apply for the  
7 position, here are the steps you need to do. But, by  
8 the way, I have decided to support another candidate.

9 I do not think that that e-mail constitutes  
10 discouraging Mr. Canova from applying. In fact, it  
11 provided him with the guidance. It may have been  
12 disappointing for Mr. Canova to hear that he was not  
13 the preferred candidate, but he did not -- the evidence  
14 in the complaint did not suggest that Mayor Liccardo  
15 actively twisted arms or discouraged him or told him  
16 not to apply. It was not -- the facts in the complaint  
17 did not suggest that there was any such conversation  
18 and did not warrant further investigation, in our view,  
19 as to whether there were some unstated conversations to  
20 the conversations -- to the contrary of those facts in  
21 the complaint.

22 COMMISSIONER PIERRE-DIXON: Thank you.

23 MR. MILLER: With regards to the point that  
24 Mayor Liccardo did not indicate that he knew that  
25 Ms. Matthews had volunteered to serve and that he did

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1 to authorize investigations anytime someone says, There  
2 must have been some other information that was not  
3 disclosed. And I'm not going to tell you what it is,  
4 but you get your investigator to go find it because  
5 there must have been somewhere.

6 CHAIRMAN SMITH: One of the things that --  
7 I'm, maybe, jumping the gun a little bit, but one of  
8 the things that strikes me after reviewing the  
9 complaint, your report, Mr. Brownstein's letter, is  
10 that 12.21 needs a little revision to clarify things  
11 and add some definitions, that that's part of our  
12 problem here, that it's not tightly enough written.

13 Do you have any observation on that or  
14 comment on that? Do you think that's an issue?

15 Did I make it more difficult -- it bothered  
16 me that you had to take an undefined term in 12.21 and  
17 tie it to a term under a different name in a  
18 resolution. And we're having all of these  
19 hypotheticals. It seems to me there might be some --  
20 for one thing, we ought to define the term in the  
21 Resolution -- I mean, in the Code. But maybe there's  
22 some other things to tighten this so that we can --  
23 because we thought -- we want to -- I think we want to  
24 investigate real issues, real -- that have some  
25 substance. But we don't want -- to your point, we

17 (Pages 65 to 68)

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1 don't want to have fishing expeditions, because we'll  
2 be here forever, hearing silliness.

3 MR. MILLER: And I don't mean to suggest  
4 that -- Mr. Brownstein is a serious man.

5 CHAIRMAN SMITH: I'm not suggesting that this  
6 is so this evening. But, to your point, if we -- if we  
7 don't have some standards, it encourages. And we've  
8 seen some of that in the past occasionally.

9 MR. MILLER: I'm not sure it's for me to say  
10 whether the ordinance needs revision.

11 CHAIRMAN SMITH: I'm just looking from the  
12 perspective of you as the investigator, trying to use  
13 the ordinance.

14 MR. MILLER: There's no question in my mind  
15 that it is a difficult task for this Commission to  
16 evaluate these types of information, and perhaps more  
17 specific guidance as to what types of information must  
18 be disclosed and what types of information must not  
19 be -- may not -- does not need to be disclosed -- I  
20 mean, perhaps that would be useful.

21 It's a tough -- it's a tough issue. In part  
22 because, you know, a City Council member could issue a  
23 vote without offering any comment at all, providing no  
24 insight into the thought process that goes into a vote.  
25 And whether that could lead to a complaint that, Well,

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1 he must have had some information that made him vote  
2 this way. What was it? He didn't speak about it. I  
3 don't know that you're ever going to -- I'm babbling.  
4 I'm not sure you're ever going to get to a point where  
5 you're going to be able to define with specificity what  
6 must be said prior to a vote.

7 CHAIRMAN SMITH: Well, you could have -- you  
8 can make that complaint about every item on the consent  
9 calendar.

10 MR. MILLER: Correct.

11 CHAIRMAN SMITH: None of them are ever  
12 discussed. Lord knows, I don't --

13 MR. MILLER: We've been doing this for you  
14 for now, I think, ten years, with quite a bit of  
15 experience with how your City Council functions.

16 CHAIRMAN SMITH: Okay. Any other questions  
17 of Mr. Miller?

18 MS. SILVA: I just want to add something.

19 CHAIRMAN SMITH: Yes.

20 MS. SILVA: If it's something that the  
21 Commission wants to explore at some point, you know, we  
22 could add this, again, to that wish list with regards  
23 to --

24 CHAIRMAN SMITH: That was going to be my  
25 suggestion.

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1 MS. SILVA: You know, to elaborate further.

2 But the Resolution -- the ordinance was --  
3 the Open Government Ordinance was passed with the idea  
4 to look at the Resolution for some guidance. It  
5 wasn't -- not that it was -- you know, it leaves --  
6 it's, yeah, as one. But certainly that's why -- you  
7 know, when we had discussed it with Steve, when  
8 Mr. Miller had contacted us as to whether, one, is this  
9 within the purview of the Commission and, two, you  
10 know, to seek the definition or to find out more  
11 guidance, what exactly is relevant, substantive facts  
12 and directed him -- you know, he raised the issue with  
13 the material fact. So it's -- you know, it's not -- we  
14 could certainly define it, you know, in future -- look  
15 at Title 12.

16 CHAIRMAN SMITH: And I gather that the  
17 attorney's office -- I believe you guys were consulted  
18 on this. You guys are in agreement with the  
19 interpretations of 5.2.8 and -- et cetera, that were  
20 used by Hanson Bridgett?

21 MS. SILVA: Well, he sought guidance from us,  
22 and this is how we interpreted it for him -- to him.

23 CHAIRMAN SMITH: Okay. Yeah, actually,  
24 personal point of view. Regardless of how this  
25 particular complaint turns out, I think that

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1 Mr. Brownstein bringing a complaint under this section  
2 at this point in time is perhaps a service to us in the  
3 long term because -- you may not know, we're about to  
4 embark on a process in a couple of months of making  
5 recommendations for revisions to Title 12. And this  
6 one looks like something we at least need to talk  
7 about. Maybe there's nothing there. Maybe it's a  
8 simple definition. Maybe the way it is is okay. Maybe  
9 some examples would help. I don't know. But it looks  
10 like a really murky area that -- without a whole lot of  
11 specifics. And that's what happens when you add new  
12 stuff. You have to feel your way and make improvements  
13 as you go.

14 Anyway, question?

15 COMMISSIONER PEACOCK: One of the things seem  
16 to be focused on the word "vet." What's the legal  
17 definition of "vet"?

18 MR. MILLER: Oh, boy. A thing I don't know.  
19 I'd be happy to -- we're, obviously, returning. I  
20 don't know that there's a legal term of art.

21 COMMISSIONER PEACOCK: The official  
22 definition. I guess what I'm asking is, you say there  
23 was not a problem regardless. I'm getting a little bit  
24 hypothetical here. But if it was -- if, instead of  
25 saying "I have vetted," he had just said "I've talked

18 (Pages 69 to 72)

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1 to some people," would that be a difference?  
2 CHAIRMAN SMITH: That's kind of like my  
3 question earlier.  
4 MR. MILLER: Yeah, I'm not sure that that  
5 would have -- I'm not sure that would have altered  
6 my -- you're talking about whether in -- whether  
7 Mr. Liccardo's memo had said "I spoke to some people"  
8 instead of "I vetted it"?  
9 COMMISSIONER PEACOCK: Yeah, I think  
10 Mr. Brownstein was saying something to the effect of  
11 vetting -- I'm using -- I'm paraphrasing. You said  
12 there is almost sort of a nefarious quality to it.  
13 MR. BROWNSTEIN: The term I used was it's a  
14 "test."  
15 CHAIRMAN SMITH: Right.  
16 MR. BROWNSTEIN: And that's what I believe it  
17 is.  
18 CHAIRMAN SMITH: Yeah, as a formality.  
19 MR. BROWNSTEIN: I would -- I would have  
20 viewed it differently if he said "I spoke to a couple  
21 of people."  
22 COMMISSIONER PEACOCK: Yeah, my -- again, my  
23 vast internet research via my iPhone says to carefully  
24 examine someone or someone carefully to make certain  
25 they're acceptable or suitable -- or suitable, which,

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1 to me, is kind of a way of saying checking out as  
2 opposed to -- it seemed like there was a little bit  
3 more of a -- "nefarious" is not the word I'm looking  
4 for. More of a quid pro quo or something kind of thing  
5 to it.  
6 MR. BROWNSTEIN: That's not what I was  
7 implying at all. Not that it was a quid pro quo but  
8 that it was a serious -- serious process in which  
9 Ms. Matthews could have failed.  
10 CHAIRMAN SMITH: And I think -- to that  
11 point, I think I read in the press about -- when  
12 they're going to appoint the new secretary of something  
13 for the United States, that the President has his folks  
14 go out and vet the candidate. And, in that case,  
15 "vetting" means looking in all the closets and under  
16 all the pillows and -- to find whatever --  
17 COMMISSIONER PEACOCK: We could also note --  
18 if I can interrupt for a second -- you'll see,  
19 typically, what will be done is the President will  
20 announce his intention to nominate. So that isn't even  
21 a nomination at that point. And so that's, again,  
22 saying, We're checking it out. So just to further  
23 supplement your point.  
24 MR. MILLER: Commissioner Peacock, if I may  
25 just, again, focus in on where my focus was, which was

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1 on the preliminary assessment for the sufficiency. Had  
2 the complaint said, Here's Mayor Liccardo's memo, which  
3 says he vetted unspecified people. Here is his  
4 calendar entries that said on date X he spoke to  
5 Persons X, Y and Z for an hour -- an hour each. And  
6 here is a newspaper article reporting that he hired a  
7 private investigator to dig into the backgrounds of  
8 Margie Matthews and three other people. You know,  
9 maybe you could put those together to be facts that  
10 would indicate that his memo did not disclose  
11 additional information.  
12 But, absent facts, there was just nothing for  
13 me to investigate.  
14 CHAIRMAN SMITH: Okay. Any other questions  
15 for Mr. Miller?  
16 Okay. At this point it's time for us to make  
17 a decision. We have -- normally we have two options,  
18 but in this case a third one has been suggested. That  
19 the two options we normally present for ourselves is  
20 the Commission may find that further investigation is  
21 necessary. If so, we direct the Evaluator to conduct  
22 further investigations and report back to the  
23 Commission.  
24 Second, the Commission may adopt the  
25 Evaluator's report, approve the recommendation against

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1 conducting an investigation and close the file on this  
2 matter without further action.  
3 And the third option that Mr. Brownstein has  
4 suggested is that we defer any decision on this and  
5 have some type of study session to better inform  
6 ourselves as to these new requirements and their  
7 implications, et cetera. And then, after having done  
8 that, we make a decision.  
9 COMMISSIONER PIERRE-DIXON: Can I suggest a  
10 fourth?  
11 CHAIRMAN SMITH: Why not?  
12 COMMISSIONER PIERRE-DIXON: Which would be to  
13 make a decision based on the information we received  
14 tonight and to close the case. But to suggest that we  
15 actually set up a study session to look at this new  
16 area of the law and do a -- I don't know if we want to  
17 do a large public forum on it, but I think that we  
18 would be well served to at least have the city  
19 attorney -- and perhaps Hanson Bridgett and others --  
20 come in and give us a study session on this area of the  
21 law.  
22 CHAIRMAN SMITH: I like the idea. The only  
23 thing I'm nervous about -- I wasn't involved -- I went  
24 to maybe one meeting. I read a lot in the paper.  
25 There was a lot of rather rancorous debates with the

19 (Pages 73 to 76)

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1 public on this.  
2 I don't -- given that it's now -- personally,  
3 given that it's now in the Code, I don't want to open  
4 all of that up again as to what should be there. What  
5 I would like to understand, if anything, is what -- you  
6 know, given what's there, what does it mean? And out  
7 of that maybe we identify some things to put on what I  
8 like to call "Cecilia's list" -- or Arlene likes to  
9 call the "wish list," but whatever -- that the stuff  
10 that we're going to make some recommendations on come  
11 summertime.

12 But that -- you know, that's kind of my  
13 inclination is to go ahead and adopt the recommendation  
14 but kind of -- kind of like Option 3 but instead of  
15 deferring, do the study session after. And I would  
16 prefer, I think, that it be something where primarily  
17 the attorneys' offices are our official legal advisor  
18 on interpretation of the Code.

19 In fact, we've gotten -- if you recall, we've  
20 gotten a little bit of introduction to this a couple of  
21 meetings ago. Nothing in the detail we're talking  
22 about here.

23 But I think we could expand that at some  
24 future meeting, to delve more deeply into particularly  
25 areas that are likely to engender complaints. There's

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1 a lot of stuff in there. But I think we -- in my mind,  
2 we would probably want to focus on areas like this one  
3 and try to understand, et cetera.

4 Anyway --

5 COMMISSIONER PEACOCK: Yeah, I'm fine on  
6 looking more into it. I'm just a little reluctant to  
7 tie it to this decision.

8 COMMISSIONER PIERRE-DIXON: Yeah. I think  
9 the decision should be closed and finished. But I  
10 would like to be able to say that we can have a study  
11 session.

12 CHAIRMAN SMITH: We can identify that under  
13 future agenda items at the end of the meeting.

14 COMMISSIONER PEACOCK: I was going to say  
15 that to make it part of the motion -- I think we just  
16 sort of -- my -- at least my gut is to say, Let's just  
17 decide one way or the other on this, and we can always  
18 say, Yeah, this type of thing should be looked at.

19 MS. SILVA: I have a question.

20 CHAIRMAN SMITH: Yes.

21 MS. SILVA: When you say "study session," are  
22 we talking about having a public forum in which there  
23 is input? Because usually that's what happens when  
24 we're trying to put in place, you know, an ordinance or  
25 a change in -- we're trying to create a product by

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1 virtue of opening it up for public, you know, input and  
2 consideration. It's the reverse here.

3 COMMISSIONER PIERRE-DIXON: Right.

4 CHAIRMAN SMITH: Yeah, that's probably --  
5 that's probably not the right term for what I'm  
6 thinking of. But, on the other hand, I can think of at  
7 least one meeting in the past where we had something on  
8 the agenda that was a little bit controversial on the  
9 community. And one side of the argument organized --  
10 and we were in the other conference room, and the room  
11 was ringed with members of the public, all of whom  
12 wanted to speak. So it basically became a study  
13 session because they all wanted to speak under public  
14 comment.

15 So, you know, anything that we would get --  
16 do with you would have to be done in a public meeting.

17 MS. SILVA: Uh-huh.

18 CHAIRMAN SMITH: And it would be agenda -- it  
19 would be agenda items. It would be put on the web  
20 site, and it would be publicized.

21 So there's always the opportunity for public  
22 input, and I don't want to discourage public input.  
23 But I guess the thing that I would -- I would like,  
24 personally, would be that we not advertise it as the  
25 intent of this is to gain public input. The intent is

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1 to educate us and anybody who wants to be educated.  
2 And, by the way, there's a public comment period. And  
3 if they want to offer comments while they're at it,  
4 that's fine too.

5 But we may -- so we would probably call it  
6 something other than a study session.

7 COMMISSIONER PEACOCK: We may decide this  
8 is -- this is far and away the most important, crucial  
9 thing to look into or maybe decide it's Number 3 on a  
10 list of ten. But I would just rather us, you know,  
11 take that separately rather than saying, Let's --

12 CHAIRMAN SMITH: I think -- I would agree  
13 with that.

14 COMMISSIONER PEACOCK: It's pretty obvious  
15 that we think it's worth exploring more. So I agree  
16 with the spirit of what you're saying.

17 CHAIRMAN SMITH: Mr. Brownstein, you had a  
18 comment?

19 MR. BROWNSTEIN: Yes. In terms of the  
20 timing, I -- well, first, I very much support the idea  
21 of looking into this and trying to get a better  
22 understanding. In terms of the timing of that, I think  
23 it should probably be sooner rather than later because  
24 at this point complainants have no idea what kind of  
25 information is the appropriate information to bring to

20 (Pages 77 to 80)

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<p>1 this committee. I mean, frankly, I was unaware of the 2 kind of standards that Hanson Bridgett has used. And 3 in this hearing today I got even additional thoughts 4 about what it takes to make a case. 5 So I don't think we want people to make 6 complaints without having useful information about what 7 kind of information proves the case or doesn't prove 8 the case. And certainly it's not helpful to have 9 people find out at the hearing meeting what proves the 10 case or doesn't prove the case. 11 So the sooner that we can get 12 clarification -- who knows? One of these may not come 13 again for a while. But one could. And it would be 14 helpful if everybody understood what the standards are. 15 I mean, I can honestly state that the chances 16 of somebody having known that prior to the report that 17 was written and the comments that were made would be 18 zero. 19 CHAIRMAN SMITH: And I think -- yes. Toni? 20 MS. TABER: I would wait until after we 21 appoint the other two people. 22 CHAIRMAN SMITH: Good point. 23 MR. BROWNSTEIN: That's a good idea. 24 COMMISSIONER PIERRE-DIXON: I would like 25 to --</p>	<p>1 And let's see. Where do we go from here? 2 Oh, then -- so we've got that. And -- okay. So -- oh, 3 adoption of the motion. I must ask each commissioner 4 to certify that they have heard or read the testimony 5 at the hearing and have reviewed all of the evidence in 6 the record by affirming "so certified." 7 Commissioner Peacock? 8 COMMISSIONER PEACOCK: So certified. 9 CHAIRMAN SMITH: Commissioner Pierre-Dixon? 10 COMMISSIONER PIERRE-DIXON: So certified. 11 CHAIRMAN SMITH: And Commissioner Smith, so 12 certified. 13 Under the Commission's regulations and 14 procedures, the Commission shall issue a resolution -- 15 a decision by resolution. At that -- at this time I 16 would entertain a motion directing the city attorney to 17 draft a resolution of the Commission's findings and 18 penalties -- well, of the Commission's findings and 19 authorizing the Chair to approve and sign the 20 resolution. 21 COMMISSIONER PIERRE-DIXON: I would so move. 22 COMMISSIONER PEACOCK: Second. 23 CHAIRMAN SMITH: Okay. Discussion? 24 All in favor? 25 (All Commissioners responded Aye.)</p>
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<p>1 CHAIRMAN SMITH: To the point, I think 2 it's -- I think it's to our advantage also to do it 3 relatively soon, because, as I mentioned a couple of 4 times, we're about to embark on our biannual process of 5 looking at our recent experiences and mulling them over 6 and making any recommendations for changes to the Code 7 or to our Resolution. So, yeah, sooner rather than 8 later I would definitely support. 9 Anyways, do we have a motion? Somebody want 10 to make a motion? You always make -- 11 COMMISSIONER PIERRE-DIXON: My recommendation 12 would be to accept the conclusions and recommendations 13 by Hanson Bridgett and recommend that the Commission 14 close the file on this matter without taking further 15 action. 16 CHAIRMAN SMITH: I'll second. 17 COMMISSIONER PEACOCK: I'll second. I was 18 going to. I'll defer to you. 19 CHAIRMAN SMITH: Okay. Discuss -- further 20 discussion? 21 All in favor? 22 (All Commissioners responded Aye.) 23 CHAIRMAN SMITH: Opposed? 24 (No response.) 25 CHAIRMAN SMITH: Okay. So it's unanimous.</p>	<p>1 CHAIRMAN SMITH: Opposed? 2 (No response.) 3 CHAIRMAN SMITH: Okay. So that passes 4 unanimously. 5 This hearing is now closed. 6 (Whereupon, hearings concluded at 7:13 p.m.) 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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I, NOELIA ESPINOLA, do hereby certify:  
That said hearing was taken down by me at the  
time and place therein named, and thereafter reduced to  
computerized transcription under my direction.

I further certify that I am not interested in  
the outcome of this hearing.

Dated: \_\_\_\_\_  
NOELIA ESPINOLA, CSR #8060

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