
MEETING MINUTES
May 13, 2015

I. Call to Order & Orders of the Day

Roll Call

PRESENT: Chair Michael Smith, Vice Chair Rolanda Pierre Dixon, and Commission Members Madhavee Vemulapalli, Adrian Gonzales and Chris Peacock

ABSENT: None

STAFF: Investigator/Evaluator Steven Miller, Deputy City Attorney Arlene Silva, City Clerk Toni Taber and Deputy City Clerk Cecilia McDaniel

OTHER: Noelia Espinola, Court Reporter with Advantage Reporting Services

Call to Order

The members of the San José Ethics Commission convened at 5:32 p.m. in Room W-262 of City Hall, 200 E. Santa Clara Street, CA 95113.

Orders of the Day

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, and seconded by Commissioner Madhavee Vemulapalli and carried unanimously, the Commission approved the adoption of the May 13, 2015 agenda. (5-0)

II. Closed Session - None

III. Hearings

- A. Continuation of hearing on Complaint filed by Karin Cogbill on March 2, 2015, alleging violation of the San José Municipal Code by Manh Nguyen for San José Council D4 2015 (Independent Investigator/Evaluator)

Document Filed: Supplemental Report from Hanson Bridgett LLP dated May 5, 2015 regarding Karin Cogbill v. Manh Nguyen for San José Council D4 2015, Complaint filed March 2, 2015.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. All members of the Commission were present. The complaint was filed with the City Clerk on March 2, 2015 by Karen Cogbill alleging that Manh Nguyen for San Jose Council D2 2015 violated section 12.06.510(A) of the San José City Municipal Code (SJMC). Specifically, the allegation is that the respondent

accepted campaign contributions before filing a statement with the City Clerk indicating whether or not the candidate would participate in the voluntary campaign expenditure limits program.

Evaluator Steven Miller received a copy of the Complaint on March 2, 2015, and he notified the Respondent the same day. The report and recommendations were received by the City Clerk on March 18, 2015, and copies were then distributed to the Respondents, Complainant, Commission Members, and posted to the City's website with the agenda for a hearing held on March 25, 2015. At the hearing, the Commission directed the Evaluator to conduct further investigation. The Evaluator's Supplemental Report is filed herewith as a result of the investigation.

Commissioner Chris Peacock was unable to attend the original hearing on March 25, 2015, and new Commissioner Adrian Gonzales, while in attendance as a member of the public, was not a member of the Commission at that time. Per procedure, both are permitted to participate in the continuation of the hearing and to vote if they have subsequently reviewed the testimony at the previous session and have reviewed all of the evidence in the record.

Commissioners Adrian Gonzales and Chris Peacock confirmed that they had reviewed the testimony and all the evidence in the record. Commissioner Chris Peacock also wanted the record to reflect that the special meeting was scheduled for a date that he was already scheduled to be out of town which was the reason for his absence.

Neither the Complainant nor the Respondent were present. The Evaluator presented the report. Evaluator Steven Miller concluded that it is more likely than not that the respondent was advised that a Form 500 was not required to be filed if the candidate intended to comply with the voluntary expenditure limit program. Therefore, although there was a violation of Title 12 because the form was not filed, Evaluator Steven Miller recommended that the Commission take no enforcement action under the circumstances. The Commission discussed the matter (see attached transcript for full discussion). Bryan Do, who worked with Manh Nguyen's campaign committee, was present at the hearing as a member of the public and not as a representative of Mr. Nguyen's committee to answer any questions that the Commission may have, of which they had none.

Action: Vice Chair Rolanda Pierre Dixon moved that the Commission find that a violation of Title 12 occurred, however, based on the information contained in the supplemental report by Hanson Bridgett and the circumstances of this case; that no penalties be assessed and that the matter be closed without further investigation. Chair Michael Smith seconded the motion. On a call for the question, the motion carried. (4-1; Opposed: Peacock.)

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

Chair Michael Smith	So certified
Vice Chair Rolanda Pierre Dixon	So certified
Commissioner Madhavee Vemulapalli	So certified
Commissioner Chris Peacock	So certified
Commissioner Adrian Gonzales	So certified

Action: Upon a motion by Chair Michael Smith, and seconded by Commissioner Madhavee Vemulapalli, the Commission moved to direct the City Attorney to draft a Resolution on the Commission's findings, and further, that the Commission authorize the Chair to approve and sign the Resolution. (5-0)

- B. Hearing on Complaint filed by Duc Lam on March 27, 2015, alleging violation of Title 12.06.040 of the San José Municipal Code by Tho Tan Nguyen, Barry H. Do and Thien L. Huynh (Independent Investigator/Evaluator)

Document Filed: 1) Report from Hanson Bridgett LLP dated April 27, 2015 regarding Duc Lam v. Tho Tan Nguyen, Barry H. Do and Thien L. Huynh, Complaint filed March 27, 2015; and 2) Response from Respondents dated May 9, 2015.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. All members of the Commission were present. Complainant Duc Lam filed a complaint with the San Jose Ethics Commission alleging a violation of section 12.06.040 of the San Jose City Municipal Code (SJMC) by Tho Tan Nguyen, Barry H. Do and Thien L. Huynh. Specifically, the allegation is that the respondents received contributions without filing any campaign committee disclosure reports. Evaluator Steven Miller received a copy of the Complaint on March 27, 2015, and he notified the Respondents by March 30, 2015. The report and recommendations were received by the City Clerk on April 27, 2015, and copies were then distributed to the Respondents, Complainant, Commission Members, and posted to the City's website. Neither the Complainant nor the Respondents were present.

The Evaluator presented the report. Evaluator Steven Miller concluded that the complaint did not contain sufficient facts to support the allegation that the Respondents received contributions, so no investigation was conducted. It was recommended that the Commission dismiss the matter without taking further action. The Commissioners discussed the matter (see attached transcript for full discussion).

Vice Chair Roland Pierre Dixon requested that Evaluator Steven Miller address the response submitted by the Respondents. Evaluator Steven Miller informed the Commission that the Respondents' response suggests that the Complaint filed by Mr. Duc Lam was frivolous and that action should be taken against him for filing such a complaint. The Evaluator explained that there is nothing in Title 12 that would allow the Commission to sanction a frivolous complainant and it is not within the jurisdiction of the Commission to act on such a request. The Commission discussed the issue (see attached transcript for full discussion). Attorney Gary Winuk, member of the public, informed the Commission that he worked for the Fair Political Practices

Commission (FFPC) for six years and indicated that they dealt with the issue one of two ways: 1) the complainants filed the complaint under penalty of perjury; and 2) the FPPC tried to expedite the investigation and resolution of the complaints as quickly as possible to take the “wind out of the sails” of people who file frivolous complaints.

Mr. Bryan Do, sworn in by Chair Michael Smith, testified before the Commission that the Complainant filed the Complaint in an attempt to inconvenience and embarrass the Respondents (see attached transcript for full discussion).

Action: Upon a motion by Chair Michael Smith, seconded by Vice Chair Rolanda Pierre Dixon and carried unanimously, the Commission voted to dismiss the complaint and close the matter without taking further action. (5-0)

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

Chair Michael Smith	So certified
Vice Chair Rolanda Pierre Dixon	So certified
Commissioner Madhavee Vemulapalli	So certified
Commissioner Chris Peacock	So certified
Commissioner Adrian Gonzales	So certified

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, seconded by Commissioner Chris Peacock and carried unanimously, the Commission voted to direct the City Attorney to draft a Resolution on the Commission’s findings, and further, that the Commission authorize the Chair to approve and sign the Resolution. (5-0)

IV. Consent Calendar

A. Approve the Minutes of March 25, 2015 – Special Meeting

Documents Filed: Draft Ethics Commission minutes for the March 25, 2015 special meeting.

Discussion: Commissioner Chris Peacock requested that the minutes reflect that he as absent from the March 25th special meeting due to a scheduling conflict.

Action: Upon a motion by Chair Michael Smith, seconded by Commissioner Rolanda Pierre Dixon and carried unanimously, the Commission approved the meeting minutes of March 25, 2015 with Commissioner Chris Peacock’s amendment. (5-0)

B. Approve the Minutes of April 8, 2015 – Regular Meeting

Documents Filed: Draft Ethics Commission minutes for the April 8, 2015 regular meetings.

Action: Upon a motion by Chair Michael Smith, seconded by Commissioner Adrian Gonzales and carried unanimously, the Commission approved the meeting minutes of April 8, 2015. (5-0)

V. Reports

- A. Chair – Welcomed new Commissioner Adrian Gonzales to the Commission.
- B. City Attorney – None
 - 1. Legislative update
- 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 reported that the list of lobbyists have been updated and posted online. Funds have been requested to allow lobbyists to post their reports electronically. The cost is estimated to be \$90,000 which would allow Netfile to program the system to accept filings online.
 - 4. Elections update – The Special Runoff election is on June 23, 2015. The winning candidate will be sworn in as the new Councilmember at the first City Council meeting in August.
- D. Investigator/Evaluator – None.

The Commission took a break from 6:31 p.m. to 6:34 p.m.

VI. Old Business

- A. Presentations, discussion, review, and action regarding submittals received in response to Request for Qualifications for Evaluator/Investigator (City Clerk)
Heard at 6:34 p.m.

Documents Filed: 1) Responses to Request for Qualifications from Renne Sloan Holtzman Sakai LLP, Hanson Bridgett and the Law Offices of Gary S. Winuk; 2) RFQ review chart; 3) Proposal Evaluator Guidelines; 4) Conflict of Interest Form; and 5) Confidentiality Agreement and Conflict of Interest Disclosure.

Discussion: City Clerk Toni Taber reiterated the Proposal Evaluator Guidelines to the Commission, summarized the RFQ review chart and confirmed that she was in possession of each Commissioner's Conflict of Interest Form and Confidentiality Agreement. City Clerk Toni Taber noted that there appeared to be no conflicts. The Commission allowed each bidder to give a 10-minute presentation on their response to the Request for Qualifications for an Evaluator/Investigator for the Ethics Commission. Each presentation was followed by a Question and Answer session and Commission discussion. The Commissioners filled out and submitted their RFQ review charts to City Clerk Toni Taber for tabulation. City Clerk Toni Taber announced the results. Out of a combined average of 100 points: Hanson Bridgett received 82.6 points; The Law Offices of Gary S. Winuk received 81.6 points; and Renne Sloan Holtzman Sakai LLP received 77.8 points.

Action: Upon a motion by Chair Michael Smith, seconded by Vice Chair Rolanda Pierre Dixon and carried unanimously, the Commission moved to recommend the retention of Hanson Bridgett as the Evaluator/Investigator of the Ethics Commission for up to four years and direct the City Attorney to draft an agreement for review and approval by the City Council. (5-0)

- B. Ethics Commission ad hoc subcommittee update (City Clerk) – Item deferred to June meeting.

VII. New Business

- A. Discussion and possible action on email from Lan Diep dated April 8, 2015. (City Clerk)

Document Filed: Email from Lan Diep dated April 8, 2015.

Discussion: Item dropped since the topic was addressed at the last meeting.

- B. Discussion and possible action on Ethics Commission's 2015 Work Plan and 2014 Annual Report. (Chair) – Deferred to the June 10, 2015 meeting.

VIII. Public Comment – None.

IX. Future Agenda Items and Adjournment

The next regular meeting is Wednesday, June 10, 2015 at 5:30 p.m. in City Hall, Tower Room 1446.

The following agenda items will be discussed at the June 10, 2015 Ethics Commission meeting:

- 2015-16 Workplan and 2014-15 Annual Report
- Identification/prioritization of concerns regarding campaign and ethics regulations and policies
- Open Government Training
- Discussion and possible action on Commission meeting time
- Election of Officers

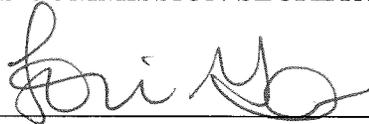
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The meeting was adjourned at approximately 8:29 p.m.



MICHAEL SMITH, CHAIR

ATTEST:
ETHICS COMMISSION SECRETARY



TONI J. TABER, CMC
CITY CLERK

Attachment: Transcript of Hearing dated May 13, 2015, Reported by Noelia Espinola, CSR, License Number 8060, Advantage Reporting Services, No. 49557, pages 1 through 48.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Taken On May 13, 2015

CITY OF SAN JOSE ETHICS COMMISSION

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CONDENSED TRANSCRIPT

Advantage Reporting

ARS

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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: Wednesday, May 13, 2015 Time: 5:32 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>#49709</p>	<p style="text-align: right;">Page 3</p> <p style="text-align: center;">PROCEEDINGS</p> <p>1</p> <p>2</p> <p>3 CHAIRMAN SMITH: So we're on to the hearings.</p> <p>4 And let me get my notes. Or my scripts, I should say,</p> <p>5 to be more accurate.</p> <p>6 Okay. First we're going to have the</p> <p>7 hearing -- continuation of the hearing of complaint</p> <p>8 filed by Karen Cogbill. So let me go through my</p> <p>9 introductory stuff here.</p> <p>10 It's Wednesday, May 13th, 2015, and this</p> <p>11 hearing of the City of San Jose Ethics Commission is</p> <p>12 being held in Room W-262 of San Jose City Hall. All</p> <p>13 members of the Commission are present.</p> <p>14 The Commission will conduct a continuation of</p> <p>15 the hearing on a complaint filed with the City Clerk on</p> <p>16 March 2nd, 2015, by Karen Cogbill alleging that Manh</p> <p>17 Nguyen for San Jose Council D42015 violated</p> <p>18 Section 12.06.510(A) of the San Jose Municipal Code.</p> <p>19 Specifically, the allegation is that the respondent</p> <p>20 accepted campaign contributions before filing a</p> <p>21 statement with the City Clerk indicating whether or not</p> <p>22 the candidate would participate in the voluntary</p> <p>23 campaign expenditure limits program. The City Clerk</p> <p>24 promptly notified and provided a copy of the complaint</p> <p>25 to the Independent Evaluator, and the Evaluator</p>
<p style="text-align: center;">Page 2</p> <p>1</p> <p>2</p> <p>3 APPEARANCES</p> <p>4 San Jose Elections Commission: MICHAEL SMITH, Chair ROLANDA PIERRE-DIXON, Vice-Chair</p> <p>5 CHRIS PEACOCK MADHAVEE VEMULAPALLI ADRIAN GONZALES</p> <p>6</p> <p>7</p> <p>8 Staff: ARLENE F. SILVA Deputy City Attorney</p> <p>9</p> <p>10 TONI TABER, City Clerk</p> <p>11 CECILIA McDANIEL, Deputy City Clerk</p> <p>12</p> <p>13 Independent Evaluator: HANSON BRIDGETT, LLP BY: STEVEN D. MILLER, Attorney at Law 425 Market Street 26th Floor San Francisco, CA 94105 (415) 777-3200</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18 The Reporter: ADVANTAGE REPORTING SERVICES BY: NOELIA ESPINOLA, CSR #8060 1083 Lincoln Avenue San Jose, CA 95125 (408) 920-0222</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23 --000--</p> <p>24</p> <p>25</p>	<p style="text-align: center;">Page 4</p> <p>1 notified and provided a copy to the respondent on</p> <p>2 March 2nd, 2015. The Independent Evaluator's Report</p> <p>3 and Recommendations were submitted to the City Clerk on</p> <p>4 March 18th, 2015, and copies were then provided to the</p> <p>5 complainant, respondents and commission members and</p> <p>6 posted to the city web site with the agenda for a</p> <p>7 hearing held on March 25th, 2015. At the hearing, the</p> <p>8 Commission directed the Evaluator to conduct further</p> <p>9 investigation. The Independent Evaluator's</p> <p>10 Supplemental Report and Recommendations were submitted</p> <p>11 to the City Clerk on March 5th, 2015, and copies were</p> <p>12 then provided to the complainant, the respondent and</p> <p>13 commission members and posted to the city web site with</p> <p>14 the agenda for tonight's hearing.</p> <p>15 Commission member Chris Peacock was unable to</p> <p>16 attend the original hearing on March 25th, 2015, and</p> <p>17 new member Adrian Gonzales, while in attendance as a</p> <p>18 member of the public, was not a member of the</p> <p>19 Commission at that time. Per procedure, both are</p> <p>20 permitted to participate in this continuation of the</p> <p>21 hearing and to vote on commission decisions because</p> <p>22 they have reviewed the testimony at the previous</p> <p>23 session and have reviewed all the evidence in the</p> <p>24 record.</p> <p>25 And that is a correct statement, correct?</p>

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<p>1 COMMISSIONER GONZALES: Yes.</p> <p>2 CHAIRMAN SMITH: Okay. Good. I'm going to</p> <p>3 skip over the boilerplate stuff describing the process</p> <p>4 because this is a continuation. We went through that</p> <p>5 on the original.</p> <p>6 So at this time I would ask to have the</p> <p>7 complainant and respondents or their representatives</p> <p>8 identify themselves for the record.</p> <p>9 And there is no one here. Note that. No one</p> <p>10 to represent the complainant or the respondent.</p> <p>11 Also have city staff and representative of</p> <p>12 Hanson Bridgett, the Commission's Independent</p> <p>13 Evaluator, please identify themselves for the record.</p> <p>14 MR. MILLER: Steven Miller from Hanson</p> <p>15 Bridgett.</p> <p>16 MS. SILVA: Arlene Silva, Deputy City</p> <p>17 Attorney.</p> <p>18 MS. TABER: Toni Taber, City Clerk.</p> <p>19 MS. McDANIEL: Cecilia McDaniel with the City</p> <p>20 Clerk's office.</p> <p>21 CHAIRMAN SMITH: Okay. Thank you.</p> <p>22 Under the Commission's regulations and</p> <p>23 procedures, the respondent may submit a written</p> <p>24 response to the Report and Recommendations. The</p> <p>25 response may contain legal arguments, a summary of</p>	<p>1 understandable.</p> <p>2 COMMISSIONER PEACOCK: If the record can</p> <p>3 reflect that.</p> <p>4 CHAIRMAN SMITH: Sure. That's entirely</p> <p>5 appropriate. Because we did schedule it when you were</p> <p>6 out of town.</p> <p>7 Okay. Steve.</p> <p>8 MR. MILLER: Thank you. Good evening,</p> <p>9 Commissioners. Welcome, Commissioner Gonzales.</p> <p>10 In our original report we told you that there</p> <p>11 was really no dispute but that Title 12 requires the</p> <p>12 filing of a Form 500 from candidates to certify whether</p> <p>13 or not they will comply with the voluntary expenditure</p> <p>14 limit. And there was really no dispute but that the</p> <p>15 Manh Nguyen for Council campaign had not filed such a</p> <p>16 Form 500. But at the hearing you asked us to conduct</p> <p>17 additional investigation into the introductions and</p> <p>18 communications between the City Clerk's office and the</p> <p>19 respondent's campaign staff regarding what was or was</p> <p>20 not told to the respondent regarding that indisputable</p> <p>21 legal requirement. And so we conducted that, and we</p> <p>22 have a report.</p> <p>23 We are faced with, as we sometimes are,</p> <p>24 essentially a he-said, she-said situation. Difficult</p> <p>25 to resolve those types of situations definitively.</p>
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<p>1 evidence and any mitigating or exculpatory information.</p> <p>2 And I believe we have not received anything</p> <p>3 from the respondent that I'm aware of, anyone, correct?</p> <p>4 MS. McDANIEL: Uh-huh.</p> <p>5 CHAIRMAN SMITH: The complainant or any</p> <p>6 interested person may also submit a brief or written</p> <p>7 argument.</p> <p>8 And again -- oh, no. We did receive -- and</p> <p>9 we saw this last time, at the original hearing. We had</p> <p>10 an e-mail dated March 24th, 2015, from Karen Cogbill,</p> <p>11 the complainant. And everybody indicated at that time</p> <p>12 that they had a copy of that.</p> <p>13 Okay. So at this time I'll recognize Steve</p> <p>14 Miller from Hanson Bridgett to present the Independent</p> <p>15 Evaluator's Supplemental Report and Recommendations.</p> <p>16 COMMISSIONER PEACOCK: Mr. Chairman, before</p> <p>17 you do that, can I just make one -- bit on that. I</p> <p>18 request -- I understand that things can all be</p> <p>19 scheduled when people are here. It was a special</p> <p>20 meeting. I had known I was not going to -- I was out</p> <p>21 of town at the scheduled meeting. Can the record</p> <p>22 reflect that it was scheduled at a time when I knew I</p> <p>23 would not be able to be here. I'm kind of a dirtbag,</p> <p>24 but at least I won't be an official dirtbag.</p> <p>25 CHAIRMAN SMITH: No, no, no. It's</p>	<p>1 It's particularly difficult under some of the</p> <p>2 particular circumstances we were faced with in this</p> <p>3 particular instance.</p> <p>4 Nonetheless, I think our report demonstrates</p> <p>5 our careful consideration, thoughtful conversations</p> <p>6 with members of the City Clerk's staff as well as with</p> <p>7 respondent's team as well as a review of the written</p> <p>8 record, the documents and such that exist, documenting</p> <p>9 the interactions between City Clerk's staff and the</p> <p>10 respondent's campaign -- Ms. Commissioner Pierre-Dixon,</p> <p>11 are you okay? Would you like a moment?</p> <p>12 COMMISSIONER PIERRE-DIXON: Oh, no. It's a</p> <p>13 terrible cough. I'm trying to have my cough drops and</p> <p>14 everything, but --</p> <p>15 MR. MILLER: All right. I'll just keep</p> <p>16 plugging along.</p> <p>17 COMMISSIONER PIERRE-DIXON: Just speak loud</p> <p>18 because I know the court reporter has to hear.</p> <p>19 (Discussion off the record.)</p> <p>20 MR. MILLER: So our conclusion is that it is</p> <p>21 more likely than not that the respondent was advised</p> <p>22 that a Form 500 was not required to be filed if the</p> <p>23 candidate intended to comply with the voluntary</p> <p>24 expenditure limit program.</p> <p>25 Our recommendation remains as it was in our</p>

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<p>1 original report, which was that Title 12 was violated 2 because the form was not filed but that we recommended 3 that the Commission take no enforcement action under 4 the circumstances. And that remains our 5 recommendation. 6 And I think, in the interest of time -- I 7 know you want me to fill up time until 6:30, but I 8 don't want to delay the point. So I'll be happy to 9 pause there and take any questions you may have. 10 CHAIRMAN SMITH: Okay. Any questions from 11 members of the Commission? 12 COMMISSIONER PEACOCK: I read and listened 13 to -- I read the whole thing and listened to it in 14 part. There was some discussion about an e-mail at the 15 last meeting, about what somebody said they had. I 16 think it was maybe from Ms. Taber. There was some 17 question about whether that e-mail would be produced. 18 MR. MILLER: So I believe the e-mail you're 19 talking about is an e-mail subsequent to the filing of 20 our report, having to do with the communications 21 between the City Clerk's office and the Register of 22 Voters as to whether or not the candidate had complied 23 with the -- was complying with the VEL program. There 24 was a separate issue as to communication with the 25 Register of Voters, who put the little diamond by the</p>	<p>1 respondent over the multitude of filing requirements 2 for campaigns to fill out. That's the time period 3 we're talking about. There is no e-mail that I have 4 been able to produce during that time period on this 5 point. The e-mail that the campaign referred to in the 6 meeting you're discussing acknowledged is the March 7 e-mail that was focused on communications with the City 8 Clerk after we had filed our report. 9 COMMISSIONER PEACOCK: Okay. So to make sure 10 I'm understanding, if -- at the hearing it made it 11 sound like he said, Oh, and I've also got this e-mail 12 that sort of proves my point. He -- 13 CHAIRMAN SMITH: He did say that, I believe. 14 MR. MILLER: He said that. 15 COMMISSIONER PEACOCK: Right. 16 MR. MILLER: I don't believe he was accurate. 17 And in my conversations with him, he's acknowledged 18 that he does not have any such e-mail. 19 COMMISSIONER PEACOCK: Okay. So it's not -- 20 it's not that there is a difference about a particular 21 e-mail. It's that there is no e-mail? 22 MR. MILLER: Correct. 23 CHAIRMAN SMITH: There's no e-mail in that 24 time frame. There is a later e-mail that is really not 25 related to this case.</p>
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<p>1 candidate's name despite his not having filed the 2 VEL -- not having filed the Form 500 indicating 3 compliance with the VEL. 4 I believe that's the e-mail you're talking 5 about. I understood that to be outside the scope of 6 our subsequent investigation, which was focused on what 7 happened before he filed the -- or didn't file the 8 Form 500. But perhaps I'm not understanding what 9 you're asking me. 10 COMMISSIONER PEACOCK: And I may be 11 misunderstanding too. I thought that there was an 12 e-mail discussed by the campaign that said if further 13 underscored work -- 14 MR. MILLER: I do remember this conversation. 15 The -- the campaign's representative did say that at 16 the meeting. And I believe I tried to clarify at the 17 meeting that I did not agree with him that it, in fact, 18 offered any clarification at all because it was related 19 to this much later discussion having to do with 20 certification to the Register of Voters. 21 CHAIRMAN SMITH: Oh, so the e-mail in 22 question -- I remember that now because -- 23 MR. MILLER: There is no e-mail. The time 24 we're talking about is December 2014, January 2015. 25 The meetings between the City Clerk's office and the</p>	<p>1 MR. MILLER: I -- 2 CHAIRMAN SMITH: I want to be sure we state 3 it correctly. 4 MR. MILLER: There was a second incident of 5 miscommunication on this issue, having to do with the 6 ballot designation with the Register of Voters. And 7 the e-mail that you're discussing has to do with that 8 interaction, not with the interactions between the City 9 Clerk's office and with the candidate. 10 COMMISSIONER PEACOCK: All right. So it was 11 a miscommunication. It was just not a miscommunication 12 that related to the case that we're discussing now. 13 MR. MILLER: That's a fair statement. 14 COMMISSIONER PEACOCK: And you have reviewed 15 that e-mail? 16 MR. MILLER: Yes. And I believe it was an 17 exhibit to -- 18 COMMISSIONER PEACOCK: Oh, it was. 19 MR. MILLER: I think everybody has a copy. 20 CHAIRMAN SMITH: We had it, but I don't think 21 it was part of the package for this hearing. I think 22 it was just -- I think it was forwarded to us 23 separately. That's my recollection. 24 Do you remember, Cecilia? Do you know the 25 e-mail we're talking about?</p>

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1 MS. McDANIEL: I don't know. And -- yeah,
2 and that was for the 25th. And --
3 CHAIRMAN SMITH: I know we saw it.
4 MS. McDANIEL: Ruth actually handled that
5 meeting on the 25th. I really am not -- I cannot say
6 for sure, but I can look it up.
7 CHAIRMAN SMITH: I'm sure we saw it. I just
8 don't remember how. But I don't think it was part of
9 the agenda package, because it really wasn't directly
10 related.
11 COMMISSIONER PEACOCK: I don't think I've
12 seen it in the package.
13 CHAIRMAN SMITH: I'm almost positive it
14 wasn't.
15 COMMISSIONER PEACOCK: The March 25th
16 hearing, though, is when this was raised.
17 CHAIRMAN SMITH: It was -- right. This came
18 up and it was a few days before that meeting that we
19 saw this e-mail relating to the ballot designation.
20 But not as part of the agenda. I think it was a
21 separate e-mail from Ruth, saying, For your
22 information, we received this e-mail. That's what I
23 remember.
24 COMMISSIONER VEMULAPALLI: I don't remember
25 any e-mail like that. At least related to --

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1 MR. DO: Is there any way we can see this
2 e-mail?
3 MR. MILLER: I don't have a copy of it with
4 me. But I can assure you that it is unrelated to the
5 task that you assigned us.
6 CHAIRMAN SMITH: Right.
7 MR. MILLER: Shortly before we -- shortly
8 after we filed our first complaint was the --
9 coincidentally, the deadline for the City Clerk's
10 office to communicate with the Register of Voters as to
11 who gets the ballot designation for compliance with the
12 VEL program. It was after both -- not only after the
13 interactions that are the subject of our supplemental
14 report but after we had submitted our original report,
15 I believe. Or perhaps the day of or the day before. I
16 may be a little bit wrong exactly on this. But it had
17 to do with the dissatisfaction of the campaign with the
18 communications with the Register of Voters.
19 COMMISSIONER PEACOCK: The part I was talking
20 about was -- and maybe this -- this will settle it.
21 Mr. Miller says "I have an e-mail --"
22 Chairman says "Would you characterize it
23 differently..."
24 Mr. Miller says whatever he says.
25 Mr. Smith says it was "a different matter."

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1 Then he says "In any event, we haven't seen" it, the
2 e-mail. So...
3 CHAIRMAN SMITH: Oh, okay. I think I
4 probably -- I think I said that because at the time I
5 didn't realize that what they were talking about was
6 this other e-mail that we had, in fact, seen.
7 COMMISSIONER PEACOCK: And then Mr. Miller
8 said "It is not included in your packet."
9 CHAIRMAN SMITH: Right. In response to the
10 question, after the meeting we can sort out. You can
11 probably contact Cecilia if you want to see a copy of
12 the e-mail. Because it's a public -- it was either --
13 I don't remember if it was sent by the Clerk's office
14 or sent to the Clerk's office. But whatever it was, it
15 should be a public record, so it should be obtainable
16 from the Clerk's office.
17 MR. MILLER: I believe it was an e-mail from
18 the candidate's campaign to the City Clerk. I'm not --
19 I would hate to say -- to speak more about it without
20 having it in front of me. It does not pertain to the
21 issue that I have --
22 CHAIRMAN SMITH: And that's the most
23 important thing. It doesn't pertain to this case.
24 COMMISSIONER PEACOCK: From the reading of
25 the transcript, it sounded like it did. So I think

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1 that's another --
2 CHAIRMAN SMITH: Right. Because it was
3 represented that way.
4 COMMISSIONER PEACOCK: Okay.
5 CHAIRMAN SMITH: But it turned out to be a
6 red herring.
7 COMMISSIONER PEACOCK: What was described as
8 a smoking gun turned out to be a red herring, if I'm --
9 CHAIRMAN SMITH: You can mix your metaphors
10 there, yeah.
11 Okay. Any other questions?
12 COMMISSIONER PIERRE-DIXON: No, thank you for
13 the follow-up work. I was very concerned in reference
14 to what had occurred and wanted to be sure at least --
15 we didn't get a full clarity on everything that
16 occurred on that date, but I think it's a lot clearer
17 to me what was told to the respondent at that time. So
18 I'm satisfied with this. Thank you.
19 CHAIRMAN SMITH: Okay. So if there's no
20 other questions -- let's see. There's no one here from
21 the respondent or the complainant. So anyone else --
22 MS. McDANIEL: Do we know --
23 MS. TABER: Sir, are you here for this
24 complaint?
25 MR. DO: Yes, I am. I'm just here to listen.

4 (Pages 13 to 16)

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<p>1 I'm Bryan Do. Also, I have an interest in this 2 particular case. 3 CHAIRMAN SMITH: Okay. But you're not -- 4 you're not representing anyone. Okay. 5 MR. MILLER: You're with the Manh Nguyen 6 campaign. 7 MR. DO: I am. But I don't represent the 8 campaign. I would just like to listen in and -- 9 hopefully an opportunity to -- 10 CHAIRMAN SMITH: Okay. I guess, then, we get 11 to the part that is relevant. Is there anyone else 12 here this evening who would like to speak to the 13 Commission and provide any additional evidence or 14 testimony in this matter? 15 And that might be you, but -- 16 MR. DO: I don't, unless you have specific 17 questions for me. Then I would give you my honest 18 answer. But I think I responded to -- 19 MR. MILLER: Mr. Do is one of the witnesses 20 whose account is reflected in your report. 21 CHAIRMAN SMITH: Okay. Good. 22 MR. MILLER: I hope accurately. 23 CHAIRMAN SMITH: Okay. So normally we would 24 go back to the Evaluator. But we just heard from you, 25 and there was nothing in between. So unless there's</p>	<p>1 action. 2 CHAIRMAN SMITH: Can we do that in one fell 3 swoop? 4 MS. SILVA: Sure. You can do it as long as I 5 itemize it into the resolution. 6 CHAIRMAN SMITH: So, basically, your motion 7 is combining the finding, saying that there is a 8 violation but that there be no penalties. And the 9 basis for no penalties is -- 10 COMMISSIONER PIERRE-DIXON: Based on the 11 facts and circumstances that I read in the newest 12 report that we received today, that it appears to lay 13 out that, in fact, this is a requirement. It was not 14 fulfilled. There is some question around what was 15 told -- 16 CHAIRMAN SMITH: Right. 17 COMMISSIONER PIERRE-DIXON: -- to the 18 respondent. But I would still say it's a violation. 19 CHAIRMAN SMITH: Okay. Do we have a second 20 for that motion? 21 I'll second it, then. 22 Any discussion? 23 COMMISSIONER VEMULAPALLI: I do have some 24 discussion. Sorry. I don't know that I past it. 25 Because it is a candidate's responsibility to actually</p>
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<p>1 another question, I think we're ready for discussion -- 2 commission discussion. 3 Okay. So now it's time for the Commission to 4 make a decision. We have four options. First we may 5 find that further investigation is necessary again. If 6 so, we direct the Evaluator to conduct that further 7 investigation and report back; second, we may find that 8 there is sufficient evidence to establish that no 9 violation has occurred; third, we may find that there 10 is insufficient evidence to establish that a violation 11 has occurred; or, fourth, we may find, based on a 12 preponderance of the evidence from the entire record of 13 the proceeding, that a violation has occurred. 14 And I'll open the floor to discussion and/or 15 if someone would like to make a motion. So any 16 discussion? 17 COMMISSIONER PIERRE-DIXON: No. 18 CHAIRMAN SMITH: If not -- 19 COMMISSIONER PIERRE-DIXON: I would make a 20 motion at this time that we find that a violation did, 21 in fact, occur; however, looking at the recommendation 22 by Mr. Miller, I feel that there shouldn't be any 23 further punishment as a result of some of the things 24 that were noted and the follow-up investigation and we 25 close the file in this matter without any further</p>	<p>1 file the forms. They have to do their own research 2 also. And I think it would be -- I mean, I agree with 3 the violation. But punishment phase, I feel there 4 should be something without -- at least that's what I 5 feel. 6 CHAIRMAN SMITH: And I would agree. I mean, 7 this is a case where it's not quite a he-said, 8 she-said. It's a he-said, I-don't-remember because of 9 the Clerk's office. The people from the Clerk's office 10 basically said, I don't remember whether they told them 11 or not. That's how I remember what the report said. 12 Be that as it may, it appears that the 13 candidate got bad advice. And so it would be highly 14 inappropriate, in my mind, to issue a penalty. Even 15 though they did violate the rules, they did it based on 16 bad advice from people from the Clerk's office. 17 So I agree -- I'm going to go for the motion. 18 Any other discussion? 19 COMMISSIONER PEACOCK: Mr. Chairman, I 20 guess -- I may be rehashing a little bit of a 21 discussion from the prior hearing when I wasn't here. 22 I guess I'm a little reluctant to say there was a 23 violation if in good faith this campaign was in and was 24 doing what they were told in -- what's the point of the 25 meeting if you can't -- if you can't go by what you're</p>

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1 told in the meeting? So I'm just reluctant here to --
2 I mean, what does that say about the credibility of the
3 meetings if we say, You're a candidate, you have to go
4 meet, but then you can't -- you can't count on anything
5 you're told? I'm exaggerating, but --
6 CHAIRMAN SMITH: That's a tough one. The
7 thing I come back to -- we had a very similar situation
8 on another case while you were gone, where a candidate
9 was told he could use a post office box on his campaign
10 signs. And apparently the Clerk's office said -- we
11 didn't know all of this at the time. Toni wasn't at
12 the meeting, so we didn't get all of the information.
13 Apparently the Clerk's office had told other candidates
14 the same thing. We found him guilty of violating it
15 even though it appears, in retrospect, that he did it
16 on bad advice.
17 So the problem I have is -- also is one of
18 consistency. Because we had two very similar cases,
19 and to find one person in violation and the other one
20 not in violation and in both cases they were given bad
21 advice, to me, would be a real problem. So that -- I
22 still think we don't need to hold people to the rules
23 even though they got bad advice, but that kind of also
24 tips the balance, in my mind. But I think we need
25 to -- in the same election in the same district, I

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1 think we need to treat people consistently.
2 And there is no penalties. I'm very clear on
3 that. I don't think there should be a penalty.
4 COMMISSIONER PEACOCK: I know it's outside
5 our purview. But people who give bad advice, are there
6 just like no --
7 CHAIRMAN SMITH: You'd have to ask the Clerk
8 about that.
9 COMMISSIONER PEACOCK: I just wondered,
10 what -- what happens when bad advice is given? Is
11 there any repercussion for that?
12 MS. TABER: Like do I get punished or does my
13 staff get punished? What do you mean by that?
14 COMMISSIONER PEACOCK: I'm just wondering,
15 what happens in a case like that?
16 MS. TABER: I don't -- I mean, I have the
17 report, and so I've already dealt with staff
18 personally. Which -- you know, I can't talk about
19 person --
20 CHAIRMAN SMITH: I assume there is some
21 training elements that --
22 MS. TABER: Yes, obviously, we train. We
23 change the manual for the next election. We usually
24 start revising that immediately after the end of one
25 election. Like, Oh, here's information. You know, we

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1 got this question a lot. We need to make sure it's
2 clear so we can do that. I wasn't sure if you meant --
3 like is there a punishment that goes on?
4 We talked with the City Attorney about the
5 other advice that I gave regarding the P.O. box. That
6 was -- a police officer was running. I told him, You
7 can go ahead and put a P.O. box on your sign, because
8 it was his personal address. They have advised me how
9 to fix that in the future, to, you know, advise them to
10 get a P.O. box -- not a P.O. box. A Mail Boxes Etc.
11 kind of thing, where it's a physical address, that they
12 could use that. So they've helped me, how to move
13 forward.
14 That was a -- like a snap judgement. Oh,
15 this is a police officer. Instead of calling the
16 attorney's office and seeing how to rectify it, I was
17 just like, Well, go ahead and put your P.O. box. And
18 since I let you, then I guess I have to let everybody
19 else. So that was sort of fixed for the future by
20 getting advice from them.
21 Normally we fix things by just fixing the
22 next -- we do a debrief at the end of every election.
23 What did we learn from this election? We add things to
24 Cecilia's list to bring forward if we feel that it was
25 a clarification issue in the Code, that maybe the Code

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1 contradicts itself. Because we've had that on
2 occasion, where one part of the Code says this and one
3 part of the Code says that. Which one do you go by?
4 So that's -- in this case, this was a
5 personnel issue. So that has been dealt with on that
6 level.
7 COMMISSIONER PEACOCK: Okay. I think also in
8 this case there was one where, in two parts of the
9 manual, it was -- you could read one part to take it
10 one way and the other part --
11 MS. TABER: Right. That was part of the --
12 let's make sure that we have that clarified. Because
13 we deal with it on a daily basis. Sometimes it's clear
14 to us when we're reading it, but it may not be clear to
15 the other person.
16 And we've had to have, what, five or six
17 people proofreading and people outside of -- because I
18 have an elections team and then I have people who don't
19 work on elections. I'll have them proofread. Is there
20 anything in there not clear to you? But, you know,
21 there is always something that maybe was clear two
22 years ago but has all of a sudden caused a question
23 this time.
24 COMMISSIONER PEACOCK: No, you answered my
25 question. Thank you.

6 (Pages 21 to 24)

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<p>1 CHAIRMAN SMITH: Anything else before we 2 vote? 3 Okay. So we have a motion to find that there 4 was a violation but that no penalty be assessed and 5 that the file be closed. 6 So all in favor? 7 (All Commissioners responded Aye.) 8 CHAIRMAN SMITH: And any opposed? 9 COMMISSIONER PEACOCK: (Raises hand.) 10 CHAIRMAN SMITH: Okay. So it's 4 to 1, with 11 Commissioner Peacock being opposed. 12 Okay. Now we get to my favorite part of 13 this, which is upon adoption of the motion, I have to 14 ask each commission member to certify that they have 15 heard or read the testimony at the hearing and have 16 reviewed all the evidence that has been presented by 17 affirming "so certified." 18 So Commissioner Vemulapalli? 19 COMMISSIONER VEMULAPALLI: I so certify. 20 CHAIRMAN SMITH: Okay. Commissioner 21 Pierre-Dixon? 22 COMMISSIONER PIERRE-DIXON: I so certify. 23 CHAIRMAN SMITH: Commissioner Peacock? 24 COMMISSIONER PEACOCK: So certify. 25 CHAIRMAN SMITH: Commissioner Gonzales?</p>	<p>1 hearing with the City of San Jose Ethics Commission is 2 being held in Room W-262 of San Jose City Hall. All 3 members of the Commission are present. 4 The Commission will conduct a hearing on a 5 complaint filed with the City Clerk on March 27, 2015, 6 by Duc Lam, alleging that Tho Tan Nguyen, Barry H. Do 7 and Thien L. Huynh violated Section 12.06.040 of the 8 San Jose Municipal Code. Specifically, the allegation 9 is that the respondents received contributions without 10 filing any campaign committee disclosure reports. The 11 City Clerk promptly notified and provided a copy of the 12 complaint to the Independent Evaluator, and the 13 Evaluator notified and provided a copy to the 14 respondents on March 30th, 2015. The Independent 15 Evaluator's Report and Recommendations were submitted 16 to the City Clerk on April 27th, 2015, and copies were 17 then provided to the complainant, respondent and 18 commission members and posted to the city web site with 19 the agenda for tonight's hearing. 20 Since we don't really have -- I think I need 21 to read the -- I don't think so. Everybody has heard 22 it. Just noting that this is open to the public. It's 23 being recorded electronically, and we have a court 24 reporter. 25 And at this time I would like have the</p>
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<p>1 COMMISSIONER GONZALES: So certify. 2 CHAIRMAN SMITH: And me, Commissioner Smith, 3 so certify. 4 Okay. I don't think there is anything we 5 want to do as far as referral to other enforcement 6 agencies. So the last thing is we need a resolution. 7 Under the Commission's regulations and 8 procedures, the Commission has to issue a decision by 9 resolution. At this time I would entertain a motion 10 directing the City Attorney to draft a resolution of 11 the Commission's findings and penalties and authorizing 12 the Chair to approve and sign the resolution. 13 COMMISSIONER VEMULAPALLI: Second. 14 CHAIRMAN SMITH: I'll move. And Vemulapalli 15 second. 16 And all in favor? 17 (All Commissioners responded Aye.) 18 CHAIRMAN SMITH: Any opposed? 19 (No response.) 20 CHAIRMAN SMITH: Okay. This hearing is now 21 closed. 22 So now we move on to the next one. This is a 23 new hearing on a new complaint, so I am going to start 24 in again here. 25 It's Wednesday, May 13, 2015, and this</p>	<p>1 complainant and Respondent or their representatives 2 identify themselves for the record. 3 I believe we have no one here. 4 MS. McDANIEL: Barry. 5 MR. DO: No, I'm Bryan. 6 MS. McDANIEL: Oh, you're Bryan. Oh, I 7 didn't -- Bryan. Okay. 8 CHAIRMAN SMITH: And we have no one here. 9 And I'm not going to have city staff identify 10 themselves because we just did that in the other 11 hearing. 12 Under the Commission's regulations and 13 procedures, the respondent may submit a written 14 response to the Report and Recommendations. 15 We do -- we did receive a response from Barry 16 Do. I assume everyone should have a copy of that. 17 And the complainant or any interested person 18 may also submit a brief or written argument. 19 And, as far as I know, we did not have 20 anything from the complainant or any other interested 21 persons. 22 At this time I'll recognize Steve Miller from 23 the Hanson Bridgett law firm to present the Independent 24 Evaluator's Report and Recommendations. 25 MR. MILLER: Thank you very much.</p>

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1 So this was -- while you described this as a
2 new complaint, I would describe it as "newish." It
3 emanates from the September 21st, 2014, capital E
4 "Event" that has been the subject of numerous
5 complaints that we have discussed together over the
6 last few months.
7 And, as you mentioned, the allegation is that
8 the group of individuals who were the promoters of this
9 event received contributions without -- received
10 contributions that put them in the category of a
11 committee -- capital C "Committee" such that they were
12 required to file certain campaign disclosure reports
13 for the City.
14 Without getting -- I wanted to try to avoid
15 rehashing all the facts of the original complaints and
16 the story of this 9-21 event. And, I think, consistent
17 with our role as Evaluator, our first job under
18 Title 12 is to determine whether a complaint meets the
19 sufficiency standard set forth in Title 12, which the
20 Commission has traditionally set a high bar for. And
21 that sufficiency standard is that before we conduct an
22 investigation, we have to make a determination that the
23 complaint identifies sufficient facts which, if proven
24 true, would be a violation of Title 12. And the only
25 facts identified in the complaint are facts contained

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1 in our additional earlier reports. They just reference
2 our reports.
3 And I believe they don't necessarily
4 characterize the facts in our report accurately because
5 our earlier report suggests that the group spent
6 between \$10,760 and \$14,760, not that this group
7 received contributions in that amount. The complaint
8 does not contain any evidence that Respondents received
9 contributions in any amount and -- nor do they
10 present -- does the complaint present evidence that any
11 expenditures that were made were independent
12 expenditures, as that term is defined. Rather, as our
13 earlier reports have concluded, any expenditures made
14 by this group of people in the furtherance of a
15 campaign event, not the "Get Out the Vote" event,
16 should have been treated as contributions made at the
17 behest of the candidates because they were made in
18 coordination with the candidates.
19 And so, therefore, we do not find in the
20 complaint sufficient facts to support the allegation
21 that the respondents received contributions, and we did
22 not conduct a further investigation. And our
23 recommendation is that the Commission dismiss this
24 matter without taking any action.
25 And I can address -- If you'd like -- I know

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1 after we submitted our report there was this e-mail
2 comment from one of the respondents, which I am happy
3 to address at the pleasure of the Commission.
4 CHAIRMAN SMITH: I think Commissioner
5 Pierre-Dixon is asking can you to do that.
6 MR. MILLER: So the e-mail from Mr. Do
7 suggests that this was a frivolous complaint and that
8 you should, in fact, take action against the
9 complainants accordingly. And I would just make two
10 observations. And I'll try not to editorialize but
11 just to report on our earlier reports, which is -- I
12 think our earlier reports have made clear that Mr. Do
13 and his group -- while we did not find that they had
14 violated Title 12, that was because of the coordination
15 that took place with the candidates, which coordination
16 was almost accidental. And through no fault of the
17 candidates, the nature of the event was blurred between
18 a "Get Out the Vote" event and an actual campaign
19 event, promoting the candidacy of this group-selected
20 candidate. So I do think it's perhaps ironic that
21 Mr. Do is suggesting that his group of pro- -- event
22 promoters are without any responsibility for the time
23 this Commission has spent investigating this
24 September 21st event.
25 I also think there is nothing in Title 12

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1 that would allow you to sanction a frivolous
2 complainant and don't see -- and perhaps I should defer
3 to City Attorney. But from my perspective of Title 12,
4 there is not -- it's not within your jurisdiction to
5 act on that request.
6 MS. SILVA: And, actually, I just pulled it
7 out. I knew you were going that route. And there
8 isn't an authority or power from Title 12 by this
9 Commission to sanction people who come to file a
10 complaint.
11 CHAIRMAN SMITH: I guess if we felt that
12 there were frivolous complaints or, in particular,
13 repeated frivolous complaints, which is what the e-mail
14 from Mr. Do was alleging -- he was saying the whole
15 stream of complaints was frivolous, as I read it. The
16 only thing one can do, I think, if they wanted to, is
17 city staff could perhaps contact that person or the
18 next time they came in with a complaint and try to
19 counsel them a little bit before they proceed. I mean,
20 obviously, there's nothing -- that I'm aware of,
21 anyway -- that allows anybody to do anything to prevent
22 it. If somebody brings in a complaint and it's signed,
23 it goes into the system. And the only thing you can do
24 is -- I think, is maybe try to counsel someone that,
25 you know, maybe this isn't such a good idea. You want

8 (Pages 29 to 32)

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<p style="text-align: center;">Page 33</p> <p>1 to think twice about it. 2 MS. SILVA: I think the protection that we 3 have in Title 12 is basically -- the threshold 4 investigation that the Evaluator conducts prior to 5 actually embarking in an actual investigation is to see 6 the sufficiency -- to hit the sufficiency standard. 7 And if it doesn't hit that, then we -- 8 CHAIRMAN SMITH: Right. 9 MS. SILVA: -- then we close the file. 10 CHAIRMAN SMITH: But even that takes time and 11 money. 12 MS. SILVA: Correct. 13 CHAIRMAN SMITH: So that's -- 14 COMMISSIONER PIERRE-DIXON: It does, but -- 15 CHAIRMAN SMITH: Not nearly as much as an 16 investigation. 17 COMMISSIONER PIERRE-DIXON: No, but I think 18 the intent is that we want -- anyone who feels they 19 have a complaint, they have a right to file it. But we 20 also must follow the rules and decide whether or not it 21 goes further. I would hate to see us do anything that 22 would chill someone from making a complaint. 23 CHAIRMAN SMITH: Absolutely. Yeah. 24 COMMISSIONER VEMULAPALLI: My actual question 25 is actually more toward the e-mail. They mention like</p>	<p style="text-align: center;">Page 35</p> <p>1 so-and-so has been accused of such and such, and the 2 Commission is investigating. And, unfortunately, that 3 happens, which is why we did add the statement. But I 4 don't think the statement has any teeth. 5 MS. TABER: Yeah. Because persons filing the 6 complaint are requested not to release said complaint. 7 But we can't make them not release it. 8 MS. SILVA: In that, when we made the 9 changes -- I don't know what the date was under the 10 form that we made the changes to. 11 MS. TABER: April 2014. 12 MS. SILVA: So when we made the changes on 13 April 2014, we wanted to have that statement there. 14 And we wanted to have a little bit more teeth to 15 enforce it. But, unfortunately, I think this was 16 accompanied by a memo that I did regarding the fact 17 that there is actually a case -- and I'm not sure if 18 it's within this circuit, but there is a Supreme Court 19 case -- you know, there was a case that is on point on 20 another elections commission wanting to have something, 21 you know, kept confidential. And there isn't really 22 any teeth into it if the person -- you know, we just 23 told them to, you know, honor -- 24 CHAIRMAN SMITH: We ask them nicely. 25 MS. SILVA: Exactly. And if they want to</p>
<p style="text-align: center;">Page 34</p> <p>1 they are getting the media attention when the 2 investigation is in the process. How is it possible? 3 Because they sign the forms saying, okay, they're not 4 going to talk, right? 5 MR. MILLER: So -- and stop if me if you 6 would prefer to answer. But the rules that we follow 7 are we do not communicate publicly the existence of a 8 complaint beyond notifying the respondents, for due 9 process purposes, that they are the subject of a 10 complaint. Title 12 both restricts city staff from 11 commenting as well as instructing the City Clerk as to 12 what to say if asked about a complaint. 13 But I -- it is a reality that there is not 14 really anything that one can do to prevent a 15 complainant from exercising his or her First Amendment 16 right to announce that he has filed a complaint. And 17 that is just a reality that the City has dealt with for 18 as long as I've been here. 19 CHAIRMAN SMITH: And we've had this 20 discussion, unfortunately, numerous times, where it 21 appears very strongly that people have submitted what 22 you might characterize as bogus or overblown complaints 23 for the purpose of generating media attention. And 24 then the next thing you know, there's an article in the 25 Metro or in the Mercury News that says, you know,</p>	<p style="text-align: center;">Page 36</p> <p>1 release it, you know, they're doing it against, you 2 know, basically a signature that they said they 3 wouldn't do it. 4 CHAIRMAN SMITH: They do sign a statement 5 that says they -- 6 MS. TABER: They sign a statement, but all it 7 says: I have read and understood the above policy. 8 But it clearly says they're requested not to release. 9 We're hoping the signature makes them think they can't, 10 but -- 11 CHAIRMAN SMITH: Basically, we've done as 12 much as we think we legally can to short-circuit that. 13 But it's, unfortunately, going to continue to happen. 14 MR. MILLER: I can assure you that it doesn't 15 interfere -- it doesn't influence my reporting and my 16 evaluation of the complaints. I pay no attention to 17 that news. 18 CHAIRMAN SMITH: And this is one of many 19 reasons why we try to process complaints expeditiously. 20 There's a requirement in Title -- it's either Title 12 21 or the Resolution -- 22 MS. SILVA: It's the Resolution. 23 CHAIRMAN SMITH: -- that complaints -- the 24 evaluation be completed within 30 days of submittal. 25 And -- I don't think it's specific but even quicker</p>

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1 during the last two weeks before an election -- because
2 that's when the ugliness really can rear its head --
3 that we try to get these things completed. But if the
4 word does get out that there is something going on,
5 then we can get -- you know, get the thing resolved in
6 a timely manner.
7 Any other questions or comments?
8 Yes?
9 COMMISSIONER GONZALES: So I understand that
10 currently the Commission does not have any power to
11 penalize those maybe perceived to be abusing the
12 system. But if the Commission, in cooperation with the
13 City Attorney and Clerk, were to propose criteria that
14 would classify potential abusers as potential abusers
15 of the system with a proposed find and recommend that
16 to the Council for consideration for adoption, would
17 that be something --
18 CHAIRMAN SMITH: Is that like a vexatious
19 litigant, or whatever the term is?
20 MS. TABER: Add to Cecilia's list.
21 MS. SILVA: We could do that. I have to do
22 some research on whether we can actually do that. It
23 has that sort of chilling effect on, you know, First
24 Amendment rights of individuals. That's why the
25 language is so soft. Because we don't want to get to

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1 that fine line between -- you know, we're basically
2 silencing them as opposed to having -- you know, and
3 that's --
4 CHAIRMAN SMITH: There are things -- there is
5 one thing that we did do that is within the law and
6 appears to be effective. At one time you could submit
7 anonymous complaints on that form, not identify the
8 complainant. And there was one case in particular that
9 just tied everybody in knots for quite some time, and
10 we spent a whole bunch of money investigating the
11 complaint and ended up finding that it was -- there was
12 no violation. And there was a lot of uproar about
13 abuse of the system with anonymous complaints.
14 Basically, anybody could put something and not identify
15 themselves and sling whatever crap they want to.
16 So I don't remember how long ago it was.
17 Four or five years ago probably.
18 MS. TABER: It was before I started. It was
19 while Lee was still City Clerk because her name --
20 CHAIRMAN SMITH: That's right. We put in
21 place a system for handling anonymous complaints. You
22 can't submit -- if you submit the form, it has to be --
23 you have to sign the thing. If -- otherwise we have a
24 phone number which you can call and give the
25 circumstances, and there's a process to go through

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1 that -- an anonymous complaint -- the reason for
2 requesting anonymity has to be given, and there's only
3 a couple of fairly narrow circumstances under which you
4 can do it. And the whole thing has to be reviewed by
5 the Chair before it's even filed.
6 That's the one circumstance where somebody on
7 the Commission gets in the loop before it goes to the
8 Evaluator. And it has to be looked at, and the Chair
9 can stop the thing right then and there if it doesn't
10 meet the criteria.
11 So that was one thing we did, because people
12 were taking advantage and putting things in without
13 putting their name on it. In that we could do
14 something if you're willing to step forward and give
15 your name. That's a tough one.
16 Anyway, enough of that. Any other questions?
17 MS. SILVA: We could put that in the wish
18 list for something that we can --
19 CHAIRMAN SMITH: Yeah, we could. Sure. Look
20 at it.
21 I don't want to -- I don't -- in doing it, I
22 don't want to imply that I in any way -- I can't speak
23 for the rest of the Commission -- feel that that was
24 the case with regard to this complaint. But it is a
25 valid concern, that it might happen. And maybe we want

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1 to talk about it. So we can put that on the list.
2 MR. WINUK: Is there public comment?
3 CHAIRMAN SMITH: Sure.
4 MR. WINUK: All right. My name is Gary
5 Winuk. I worked for the FPPC for six years, and this
6 is one of the issues that we dealt with all the time.
7 We were used as a tool a lot. File the complaint.
8 Press release would come out before the complaint.
9 We kind of addressed it two different ways.
10 One, one of our complaint forms was under penalty of
11 perjury. So had to sign a sworn complaint form. We
12 would accept them if they were not on the sworn form.
13 But the sworn form discouraged, I think, a lot of
14 people from doing that.
15 The other thing we did that I felt was
16 effective was really just turn things around, the
17 frivolous ones, as quickly as possible. Once that
18 happened and you get your news cycle out of it, that
19 really took a lot of wind out of the sails for people
20 to do that.
21 That's my perspective.
22 CHAIRMAN SMITH: Great. Thank you.
23 Okay. Any other -- let's see. We were on --
24 MS. TABER: Do you want to have a public
25 comment?

10 (Pages 37 to 40)

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<p>1 MR. DO: If I may.</p> <p>2 CHAIRMAN SMITH: Hang on a second. Let me</p> <p>3 get my -- let me get back to where we are.</p> <p>4 Yeah, we're ready for public comment. Sure.</p> <p>5 You want to introduce yourself.</p> <p>6 MR. DO: If I may, in this particular case,</p> <p>7 the complaint --</p> <p>8 MS. TABER: You need to state your name for</p> <p>9 the record.</p> <p>10 CHAIRMAN SMITH: And, actually, since you're</p> <p>11 offering testimony, I need to do the business. Give us</p> <p>12 your name and raise your right hand.</p> <p>13 MR. DO: I'm Bryan Do.</p> <p>14</p> <p>15 BRYAN DO,</p> <p>16 being first duly sworn by the Chairman to tell the</p> <p>17 truth, the whole truth and nothing but the truth,</p> <p>18 testified as follows:</p> <p>19</p> <p>20 THE WITNESS: I would call this more like</p> <p>21 additional information that you probably should be</p> <p>22 aware of, this particular case. Why it came back in</p> <p>23 your view again after you already make your review</p> <p>24 previously.</p> <p>25 Mr. -- because the people who complain, they</p>	<p>1 But the issue is still the same. If we have someone</p> <p>2 simply file a complaint; the very next day or very same</p> <p>3 day, leak it out to the media to embarrass those</p> <p>4 involved. Particularly in a growing -- the Vietnamese</p> <p>5 community are growing in population. It's also growing</p> <p>6 in voting -- you know, demographic of voting, but this</p> <p>7 has a chilling effect also on the voter and have a</p> <p>8 chilling effect on those who participate in politics.</p> <p>9 They afraid, the moment they get involved in</p> <p>10 politics, they choose the wrong side. Someone files a</p> <p>11 frivolous complaint, it get aired on the radio. They</p> <p>12 don't have a -- not everyone has a way to defend</p> <p>13 themselves. Not everybody has a radio program or</p> <p>14 station they can counter this accusation. And that</p> <p>15 does have the reverse chilling effect as well as those</p> <p>16 that -- you know, we have to protect First Amendment</p> <p>17 rights.</p> <p>18 But those who consistently filing these</p> <p>19 complaints, not providing evidence and simply just</p> <p>20 complain for the sake of complaining and then airing on</p> <p>21 the media instantly -- we can see the strategy here.</p> <p>22 The tactic is quite obvious. And that's my concern.</p> <p>23 You can also reverse chilling effect on the other side,</p> <p>24 of voter -- of political participation by the member of</p> <p>25 the community.</p>
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<p>1 recognize that some of those who are in this complaint</p> <p>2 don't live in San Jose. They live very far away. San</p> <p>3 Francisco and other places. And by making the</p> <p>4 complaint, they have to -- they would want to travel</p> <p>5 down to San Jose or -- become very inconvenient.</p> <p>6 And second thing is, as soon as the complaint</p> <p>7 was made, they air on the radio and on the media to</p> <p>8 basically embarrass these folks. Most people listen to</p> <p>9 the radio. They don't know that just because an</p> <p>10 accusation is made is the same -- is not the same as</p> <p>11 you actually committed those crimes. So, by</p> <p>12 embarrassing these folks, it reduced their credibility</p> <p>13 and reduced the effect on the candidate supporting for</p> <p>14 this particular race. Mr. Thien Huynh, Mr. Do and</p> <p>15 Mr. Tho Nguyen, they are not supporting the choice of</p> <p>16 candidate for City Council District 4 that the</p> <p>17 complainant is making -- Mr. Duc Lam is making. And so</p> <p>18 that is their way of punishing. Send a second message</p> <p>19 that you didn't choose my choice of candidate the first</p> <p>20 time. I file a complaint. They've asked for support</p> <p>21 from Mr. Nguyen to fundraise for their candidate.</p> <p>22 Mr. Nguyen refused to do so. This is their way of</p> <p>23 sending another complaint to punish.</p> <p>24 I don't know the nature of the letter from</p> <p>25 Mr. Do sent to you, the e-mail or letter sent to you.</p>	<p>1 CHAIRMAN SMITH: Okay. You said you hadn't</p> <p>2 seen the e-mail, but very similar points to what you</p> <p>3 just made.</p> <p>4 And -- yeah, I guess the thing that concerns</p> <p>5 me about this one is not so much the complaint itself</p> <p>6 but, rather, the use of the media, which -- I assume</p> <p>7 it's gone through the Vietnamese media, which --</p> <p>8 MR. DO: Totally. Totally. This gentleman</p> <p>9 sent me through the mud because of that position. I'm</p> <p>10 not -- I'm not here to talk about the complaint,</p> <p>11 because Mr. Miller has done that. I'm just talking</p> <p>12 about the process of using this Commission as a weapon</p> <p>13 rather than as a shield.</p> <p>14 CHAIRMAN SMITH: Right. Okay. Thank you.</p> <p>15 Any other questions?</p> <p>16 Mr. Miller, do you have anything else before</p> <p>17 we go into --</p> <p>18 MR. MILLER: I do not.</p> <p>19 CHAIRMAN SMITH: So your recommendation is</p> <p>20 that we -- restate the recommendation.</p> <p>21 MR. MILLER: My recommendation, dismiss this</p> <p>22 matter without taking any further action.</p> <p>23 CHAIRMAN SMITH: And close the file.</p> <p>24 MR. MILLER: And close the file.</p> <p>25 CHAIRMAN SMITH: Okay. So would someone like</p>

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1 to make a motion or any discussion? Either/or.	1 (No response.)
2 COMMISSIONER PIERRE-DIXON: No further	2 CHAIRMAN SMITH: Okay. That passes
3 questions.	3 unanimously.
4 CHAIRMAN SMITH: Okay. I've move that we	4 And this hearing is closed.
5 close this -- close the file on this case -- let me	5 (Whereupon, Item III Hearings concluded at
6 see. We find that no -- no, we do not -- let me look	6 6:21 p.m.)
7 at my example here.	7
8 MR. MILLER: Dismiss the matter without	8
9 taking further action and close the matter on the file	9
10 is my recommendation.	10
11 CHAIRMAN SMITH: Yes. Thank you. I'm	11
12 getting confused today. Okay.	12
13 COMMISSIONER PIERRE-DIXON: I would second	13
14 that.	14
15 CHAIRMAN SMITH: Second from Commissioner	15
16 Pierre-Dixon.	16
17 Okay. Now discussion on the motion.	17
18 Okay. If not, all in favor?	18
19 (All Commissioners responded Aye.)	19
20 CHAIRMAN SMITH: Any opposed?	20
21 (No response.)	21
22 CHAIRMAN SMITH: Okay. It's unanimous.	22
23 Okay. And again we go through -- we need to	23
24 certify. Upon adoption of the motion, the Chair must	24
25 ask each commission member to certify that they have	25
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1 heard or read the testimony at the hearing and have	1
2 reviewed all the evidence in the record by affirming	2 I, NOELIA ESPINOLA, do hereby certify:
3 "so certified."	3 That said hearing was taken down by me at the
4 Commissioner Vemulapalli?	4 time and place therein named, and thereafter reduced to
5 COMMISSIONER VEMULAPALLI: So certified.	5 computerized transcription under my direction.
6 CHAIRMAN SMITH: Commissioner Pierre-Dixon?	6 I further certify that I am not interested in
7 COMMISSIONER PIERRE-DIXON: So certified.	7 the outcome of this hearing.
8 CHAIRMAN SMITH: Commissioner Peacock?	8
9 COMMISSIONER PEACOCK: So certified.	9
10 CHAIRMAN SMITH: Commissioner Gonzales?	10
11 COMMISSIONER GONZALES: So certified.	11 Dated: _____
12 CHAIRMAN SMITH: And me, Commissioner Smith,	11 NOELIA ESPINOLA, CSR #8060
13 so certified.	12
14 Okay. Under the Commission's regulations and	13
15 procedures, we shall issue a decision by resolution.	14
16 At this time I would entertain a motion directing the	15
17 City Attorney to draft a resolution of the Commission's	16
18 findings and penalties and authorizing the Chair to	17
19 approve and sign the resolution.	18
20 COMMISSIONER PIERRE-DIXON: I would so move.	19
21 COMMISSIONER PEACOCK: Second.	20
22 CHAIRMAN SMITH: Okay. Discussion?	21
23 If not, all in favor?	22
24 (All Commissioners responded Aye.)	23
25 CHAIRMAN SMITH: Any opposed?	24
	25

A				
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