

Item 8 - Police Commission Procedural Changes

CITY OF OAKLAND

Public Ethics Commission

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February 1, 2024

Councilmember Dan Kalb
Councilmember Kevin Jenkins
City Hall
1 Frank H. Ogawa Plaza
Oakland, CA 94612

RE: Public Ethics Commission’s Review & Comment on an Ordinance Modifying the Enabling Ordinances for the Police Commission, the Community Police Review Agency and the Office of the Inspector General

Dear Councilmembers Kalb and Jenkins,

Under City Charter Section 603(h), the Commission is required to review and comment on any amendments to laws that the Commission has the power to enforce before these amendments can become law.¹ Pursuant to this responsibility, the Public Ethics Commission (Commission or PEC) met on January 17, 2024, to review and provide comment on your proposed ordinance modifying the enabling ordinances for the Police Commission, the Community Police Review Agency, and the Office of the Inspector General (OIG), which was passed by the Public Safety Committee on December 12, 2023 (Item 3).

The Commission voted to recommend the adoption of those sections in the Proposed Ordinance affecting the PEC with the addition of suggested amendments, as specified below. The PEC takes no position on the merits of the proposal overall or other sections in the proposal not relating to the PEC.

A. Proposed OMC Section 2.45.190(D) - Adopt As-Written

This Section would require the Police Commission to provide an annual report to the PEC regarding Police Commissioners’ completion of workplace retaliation training. **The PEC recommends the adoption of proposed OMC Section 2.45.190(D) as-written.**

¹ That section provides, in full:

Amendment of Laws. Prior to enacting any amendments to laws that the Commission has the power to enforce, the City Council shall make a finding that the proposed changes further the goals and purposes of the ordinance or program in question and provide specifics substantiating the finding. Absent an urgency finding akin to suspending compliance with the Sunshine Ordinance, amendments to laws that the Commission has the power to enforce and proposed ballot measures that would amend such laws shall be submitted to the Commission for review and comment, prior to passage of the amendments or approval of the proposed measures for the ballot by the City Council.

Item 8 - Police Commission Procedural Changes

B. Proposed OMC Sections 2.45.210 and 2.47.060 - Adopt As-Written

These sections provide that the PEC has the authority to investigate and prosecute the alleged failure of City departments (e.g. the Police Department) to provide files or records requested by the Police Commission and OIG in order to carry out their legal functions. These sections restate existing law and do not add or detract from the PEC's existing authority in any substantive way. **The PEC recommends the adoption of proposed OMC Sections 2.45.210 and 2.47.060 as-written.**

C. Proposed OMC Sections 2.45.040(D) - Adopt with Amendments

This Section gives concurrent jurisdiction over allegations of Police Commissioner misconduct to other independent investigators besides the PEC. **The PEC recommends the adoption of proposed OMC section 2.45.040(D) with the following amendments (either directly incorporating the underlined language in red font, or substantially similar language).**

1. To avoid forum shopping or allegations of forum shopping, specify who will receive and refer complaints to the appropriate investigator and specify the criteria that will be used to select that investigator.

Complaints that a Commissioner has failed to abide any of the same will be initially processed by the City Administrator for purposes of selecting an appropriate independent investigator, and assessed and investigated as appropriate by an independent investigator who shall be selected based upon their subject matter jurisdiction and expertise over the alleged type of violation, such as the City's office of Employment Investigations and Civil Rights Compliance (EICRC) or the Public Ethics Commission.

2. Allow the independent investigator to request that a complaint be re-assigned to another investigator if they lack capacity to expedite a time-sensitive matter or if they lack subject matter expertise to investigate the complaint.

The independent investigator may request that the City Administrator reassign the complaint to another independent investigator if either:

the allegations made in a complaint are deemed to be serious, the investigation and resolution of that complaint is deemed to be time-sensitive, and the independent investigator is unable to expedite the matter due to reasons of caseload, staffing, or similar constraints; or

the independent investigator lacks expertise in the subject matter of the complaint.

Item 8 - Police Commission Procedural Changes

The request for reassignment shall be made in writing by the independent investigator, and shall include the reasoning for making the request. A copy of the request shall also be provided to both the complainant and the respondent at the time the request is made, unless the independent investigator determines that doing so would negatively impact the integrity of any subsequent investigation.

Should the complaint be referred to an outside contractor for assessment and investigation, the costs incurred in hiring that outside contractor shall be borne by the Police Commission.

3. Specify that the independent investigator shall follow its normal procedures for making its determination of facts. For the PEC, this would include the full Commission voting to adopt findings of fact.

The procedure for assessing and investigating a finding of a violation under this section shall be the same as that normally followed by the independent investigator in the course of assessing and investigating other complaints under their jurisdiction, including the determination of final findings of fact and whether any violation of this section occurred. Any sustained findings of a violation of this section shall be referred to the City Council for determination of an appropriate resolution in lieu of the independent investigator making such a determination. A finding that a Commissioner has violated an applicable law, rule, or policy may result in reprimand, suspension or removal by the City Council.

4. Specify that any person may file a complaint against a Police Commissioner. This follows the PEC's existing practice for other complaints alleging violations of the laws the PEC enforces.

Anyone may make a complaint against a Commissioner under this section, including any public servant or member of the public.

D. Legal Opinion

Because of potential legal ambiguity, the PEC urges that you request that the City Attorney produce a written opinion regarding whether City Charter section 604(c)(10) precludes any agency besides the PEC from investigating allegations that could result in the City Council removing a Police Commissioner for cause.

E. Other

The PEC takes no position on the rest of the legislation because it does not affect the PEC's enforcement authority.

Item 8 - Police Commission Procedural Changes

The video for the January 17, 2024, meeting where the PEC adopted this recommendation may be accessed from the PEC's website at <https://www.oaklandca.gov/boards-commissions/public-ethics-commission/meetings>. I have also attached to this letter a copy of the staff report which was prepared for the PEC's discussion of this item and includes a more detailed explanation of the amendments requested in Section 2.45.040.

Thank you for the opportunity to provide the Commission's perspective on this proposal. If you have any questions or would like further information, please contact me at nheidorn@oaklandca.gov or 510.604.1002.

Sincerely,

Nicolas Heidorn

Nicolas Heidorn
Executive Director
Oakland Public Ethics Commission

CC:
Members of the City Council
City Administrator Jestin Johnson



Item 8 - Police Commission Proposed PEC Changes

Ryan Micik, Chair
Charlotte Hill, Vice Chair
Alea Gage
Arvon Perteet
Vincent Steele
Francis Upton IV

Nicolas Heidorn, Executive Director

TO: Public Ethics Commission
FROM: Simon Russell, Enforcement Chief
DATE: January 2, 2024
RE: Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

OVERVIEW

Legislation is currently pending before the City Council that would amend the enabling ordinances of the City's civilian bodies responsible for police oversight. These bodies are the Police Commission, the Community Police Review Agency (CPRA), and the Office of the Inspector General (OIG). Most of the proposed amendments do not affect the Public Ethics Commission (PEC) and will not be considered here. However, there are some proposed amendments that affect the PEC's enforcement authority. Therefore the proposed amendments are being submitted to the PEC for review and comment prior to any City Council vote on them.¹

This report provides the following, for purposes of soliciting the PEC's comment on the proposed amendments:

1. A review of the laws that currently exist re: PEC enforcement authority over police oversight matters;

¹ This is a requirement of Oakland City Charter section 603(h), which says that prior to enacting any amendments to laws that the PEC has the power to enforce, such amendments shall be submitted to the PEC for review and comment prior to passage of those amendments by the City Council.

PEC staff notes with concern that we were not notified of this pending legislation by the City Attorney's office or any other agency. PEC staff learned of the legislation through our own coincidental review of pending City Council agendas. We urge the City Attorney's office to institute a formal practice of notifying the PEC of any proposed legislation affecting our enforcement authority in conformity with the requirements of Charter section 603(h).

Item 8. Police Commission ~~Proposed~~ BEC ~~Matters~~

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

2. A summary of the proposed amendments to those laws, and PEC's staff analysis of them;
3. A summary of some miscellaneous issues flagged by PEC staff; and
4. PEC staff's recommendation that the PEC vote to support the proposed legislation with some clarifying amendments.

Any comments submitted by the PEC in regard to the proposed legislation are not binding on the City Council.

PEC'S CURRENT ENFORCEMENT AUTHORITY OVER POLICE COMMISSION MATTERS

In addition to its general jurisdiction over City officials under the Government Ethics Act (which applies to the Police Commission, CPRA, and OIG officials), the PEC has enforcement authority over certain matters specific to the Police Commission. These are the following:

1. The PEC can investigate and prosecute the alleged failure of City departments (e.g. OPD) to provide files or records requested by the Police Commission or the OIG in order to carry out their legal functions (Oakland Municipal Code section 2.45.210); and
2. The PEC can investigate alleged misconduct by a Police Commissioner and refer its findings to the City Council for their decision as to an appropriate resolution, up to and including dismissal of that Commissioner (Oakland City Charter section 604(c)(10)).

Regarding allegations of Police Commissioner misconduct which the PEC is empowered to investigate (#2 above), the only definition of misconduct currently given is that Police Commissioners may be removed "for cause" (Oakland City Charter section 601(a)).²

² The same Charter section also states that a majority of members of the Police Commission may vote to remove a Police Commissioner for "conviction of a felony, conviction of a misdemeanor involving moral turpitude, a material act of dishonesty, fraud, or other act of moral turpitude, substantial neglect of duty, gross misconduct in office, inability to discharge the powers and duties of office, absence from three consecutive regular Commission meetings or five regular meetings in a calendar year except on account of illness or when absent by permission." It is unclear whether the PEC would have the ability to investigate allegations of those sorts, because the same Charter section only says that the PEC has jurisdiction to investigate "allegations which, if true, could be cause for removal of a Commissioner under Section 601 of the Charter" – which merely refers to the removal of a Commissioner "for cause" by the City Council (and not by the Police Commission itself).

Item 8. Police Commission Procedure BECHMegas

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

PEC staff had concerns about the current version of this law, even before it became aware of the pending amendments. For example, staff was unsure what type of conduct could be grounds for removing a Police Commissioner “for cause,” given that this is not more specifically defined in the relevant Charter section. And in terms of procedure, it was unclear whether staff could refer investigative findings directly to the City Council, or if those findings needed to be approved first by the PEC (potentially following an administrative hearing).

PROPOSED AMENDMENTS AFFECTING THE PEC’S ENFORCEMENT AUTHORITY

The proposed amendments to the Oakland Municipal Code would affect the PEC’s jurisdiction over police oversight matters in the following ways:

1. Because the proposed amendments create an entirely new chapter of the Oakland Municipal Code pertaining to the OIG (instead of the current law which incorporates the OIG’s enabling ordinances into the same chapter as the Police Commission’s enabling ordinances), the new chapter contains a provision stating that the PEC has the authority to investigate and prosecute the alleged failure of City departments (e.g. OPD) to provide files or records requested by the OIG in order to carry its legal functions. (Proposed OMC sections 2.45.210, 2.47.060) This is essentially copying the current provision regarding the PEC’s authority in these matters into the new chapter being created specifically for the OIG, and does not add or detract from the PEC’s existing authority in any substantive way.
2. It would require the Police Commission to provide an annual report to the PEC regarding Police Commissioners’ completion of workplace retaliation training. (Proposed OMC section 2.45.190(D)).
3. It gives concurrent jurisdiction over allegations of Police Commissioner misconduct to other independent investigators besides the PEC. (Proposed OMC section 2.45.040(D)).

PEC staff is supportive of the first two changes, and broadly supportive of the third, albeit with suggestions for important clarifications.

Regarding the third change (giving other agencies besides the PEC the authority to investigate alleged Police Commissioner misconduct), it is worth quoting the relevant portion of the proposed legislation:

Item 8. Police Commission Procedure BECHMegas

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

Commissioners shall act in accordance with all applicable laws and policies, including the Commission’s policies and all rules of procedure. Complaints that a Commissioner has failed to abide any of the same will be assessed and investigated as appropriate by an independent investigator such as the City’s Office of Employment Investigations and Civil Rights Compliance (EICRC) or the Public Ethics Commission. A finding that a Commissioner has violated an applicable law, rule, or policy may result in reprimand, suspension or removal by the City Council. (Proposed OMC section 2.45.040(D))

PEC staff supports this amendment to the extent that it clarifies the grounds upon which a Police Commissioner may be removed. We do note that this clarification also appears to expand the types of allegations that the PEC could be charged with investigating, which could expand our caseload.

Staff also believes it is desirable for allegations to be investigated by the agency with subject-matter expertise over the particular type of allegation being made. For example, it is entirely appropriate for EICRC to investigate alleged civil rights violations such as sexual or racial harassment (and it is already the PEC’s current practice to refer allegations of this sort to EICRC).

PEC staff has concerns with the legislation as-written, however, on the following grounds:

1. It does not provide any criteria for determining which type of allegations should be investigated by the PEC, by EICRC, or by any other “independent investigator”;
2. As under existing law, it still does not specify the procedure by which investigative findings will be referred to the City Council for resolution; and
3. It is unclear who can initiate complaints under this section.

All of these deficiencies may impact the fair and efficient investigation and resolution of allegations against Police Commissioners.

The need for criteria to select an investigative agency

The proposed legislation does not specify what types of allegations should be referred to the PEC versus the EICRC. More worryingly, PEC staff notes that the proposed legislation says allegations can be investigated by agencies “such as” the PEC or EICRC, which potentially opens the door to referring allegations to any agency, absent some criteria for making a referral.

Item 8. Police Commission Procedure BEC/Megas

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

This creates the possibility that complainants (or City officials referring a complaint) could “forum shop” for an investigative agency based upon criteria that are irrelevant or even prejudicial to the fair investigation and resolution of an allegation. For example, complainants or referring officials might be tempted to steer a complaint toward an agency or office that they believe is already sympathetic to the claim being made, sympathetic to the complainant, or hostile to the respondent. And even if complainants do not seek to “forum shop” in this way, the legislation potentially exposes investigators to accusations of this sort by respondents, because it does not contain any objective criteria by which an appropriate investigative agency will be selected.

PEC staff suggests amending the proposed language to something like the following (our added language is in red):

Complaints that a Commissioner has failed to abide any of the same will be assessed and investigated as appropriate by an independent investigator **who shall be selected based upon their subject matter jurisdiction and expertise over the alleged type of violation**, such as the City’s office of Employment Investigations and Civil Rights Compliance (EICRC) or the Public Ethics Commission.

The need to clarify the procedure by which findings will be referred to Council

It would be advisable to clarify the procedure by which investigative findings shall be submitted to the City Council, as well as who can make such findings. Failure to do so could impact respondents’ due process rights and expose investigative findings to costly procedural attacks.

For example, under the PEC’s Complaint Procedures (which govern how we handle all cases or complaints), all of our investigative findings must be submitted to the PEC for a vote before they become conclusive. If we were to investigate an allegation under the proposed legislation, it is unclear if we would first need to submit our findings to the PEC for their approval (per our Complaint Procedures) before we could submit them to the City Council. Furthermore, if the respondent requests a hearing before the PEC instead of stipulating to our findings, this would essentially result in two hearings on the allegations – one before the PEC, and one before the City Council. (Similar issues might arise with other investigative agencies that are required to submit their findings to a hearing officer or board for approval.)

The current version of the legislation also does not specify the respondent’s procedural rights. For example, it is unclear if respondents need to be informed of the allegations or

Item 8. Police Commission Procedure BEC/Megas

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

given a chance to respond before they are referred to the City Council. It is also unclear whether respondents would be compelled to cooperate with an investigation, including by producing relevant documents or testimony; or if a state of limitations exists.

Clarifying the procedure to be followed would minimize the chances of a respondent raising procedural objections that can't be easily resolved by looking to the ordinance language. PEC staff recommends adding the following language (or something similar) if the intent of the legislation is for investigative findings to be referred directly to the City Council without being reviewed by the Commission (our proposed additions are in red):

The procedure for assessing and investigating a complaint under this section shall be the same as that normally followed by the independent investigator in the course of assessing and investigating similar complaints under their jurisdiction, except that the City Council shall be the only body empowered to make final findings of fact and determine an appropriate resolution. A finding that a Commissioner has violated an applicable law, rule, or policy may result in reprimand, suspension or removal by the City Council.

Alternatively, if the intent of the legislation is that the PEC should first adopt any findings made by PEC investigators, with the City Council merely determining an appropriate resolution based upon those factual findings, then PEC staff recommends adding the following language (or something similar) (our proposed additions are in red):

The procedure for assessing and investigating a complaint under this section shall be the same as that normally followed by the independent investigator in the course of assessing and investigating similar complaints under their jurisdiction, including the procedure for making final findings of fact and determining whether any violation of this section occurred. All findings and conclusions made under this section shall be referred to the City Council for determination of an appropriate resolution. A finding that a Commissioner has violated an applicable law, rule, or policy may result in reprimand, suspension or removal by the City Council.

Clarifying who can initiate a complaint

It would be helpful to clarify who can make a complaint alleging Police Commissioner misconduct for purposes of this section. For example, it is currently unclear if members of the public can submit complaints alleging Police Commissioner misconduct, or if this is limited to City staff or even just fellow Commissioners. It is also unclear if investigative agencies can initiate proactive complaints.

Item 8. Police Commission Procedures

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

PEC staff recommends adding the following language (or something similar) to proposed legislation (our suggested additions are in red):

Anyone may make a complaint against a Commissioner under this section, including any public servant or member of the public.

SPECIAL CONSIDERATIONS

PEC staff makes the following miscellaneous observations:

1. It may be helpful to have a fast-track procedure for urgent matters, with the decision to fast-track a complaint being made by an independent agency with subject-matter expertise.
2. The City Attorney should confirm whether the current language of the City Charter (which cannot be amended without a ballot measure) precludes any other agency besides the PEC from investigating alleged Police Commissioner misconduct.

The need for a neutral fast-track procedure

In discussions between the PEC and the legislation's authors, it was noted that under current conditions, PEC investigations can sometimes take a year or longer. It was also noted that the PEC does have the ability to fast-track investigations if they are deemed to be urgent and time-sensitive, but that this depends upon the PEC's available staffing and its competing case priorities.

PEC staff shares this concern about the current length of many PEC investigations. We would note that this is primarily due to lack of adequate staff support, as well as to the complexity and sensitivity of many of the allegations we investigate (for which care must be taken not to arrive at unfounded conclusions).

Nevertheless, given the great public importance of the Police Commission's work, it is crucial that serious allegations of Police Commissioner misconduct be resolved quickly as well as thoroughly. For this reason, staff recommends including language in the proposed ordinance that would allow for an outside contractor to be hired to conduct urgent investigations, if the PEC or other appropriate city agency (e.g. EICRC) is unable to fast-track the investigation on its own.

However, we believe it is important that the determination as to what constitutes an urgent complaint, and the decision to refer it to an outside contractor for fast-tracking purposes, should be made by the agency initially handling the complaint (e.g. PEC or EICRC). This will

Item 8. Police Commission Procedures BECHMegas

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

minimize the potential for this fast-track procedure to be used or perceived as a loophole for forum-shopping or vexatious investigations.

We recommend adding the following language (or something similar) to the proposed legislation (our proposed additions are in red):

Where the allegations made in a complaint are deemed to be serious, and the investigation and resolution of that complaint is deemed to be time-sensitive, the independent investigator may refer the investigation of the complaint to an outside contractor if the independent investigator is unable to expedite the matter due to reasons of caseload, staffing, or similar constraints. The determination to make such a referral shall be made by the independent investigator, and its reasoning for making the referral shall be provided in writing to both the complainant and the respondent at the time the referral is made, unless the independent investigator determines that doing so would negatively impact the integrity of the investigation. The costs incurred in hiring an outside contractor shall be borne by the Police Commission.

Legal question as to whether the Charter precludes the legislation

PEC staff notes that the current language of the City Charter (to which any pending legislation must comport) may preclude the possibility of any agency besides the PEC investigating allegations of Police Commissioner misconduct that could result in the City Council removing that commissioner for cause. The relevant Charter section (604(c)(10)) reads as follows:

The Public Ethics Commission shall have the authority to investigate all allegations which, if true, could be cause for removal of a Commissioner under Section 601 of the Charter and to refer the findings to the City Council.

This section makes no reference to any agency besides the PEC being empowered to investigate allegations of Police Commissioner misconduct, and could therefore be read as giving the PEC sole authority over such matters. The City Attorney may want to assess whether the proposed amendment to OMC section 2.45.040(D) is consistent with this section of the Charter, specifically whether the investigations and remedies contemplated under proposed OMC section 2.45.040(D) are of the same type as those contemplated under City Charter 604(c)(10).

Item 8. Police Commission Procedures BECHMegas

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

STAFF RECOMMENDATION

PEC staff recommends that the PEC vote to do all of the following:

1. Submit a written comment to the City Council that expresses the following, pursuant to City Charter section 603(h):
 - a. PEC recommends the adoption of proposed OMC sections 2.45.190(D), 2.45.210 and 2.47.060 as-written.
 - b. PEC recommends the adoption of proposed OMC section 2.45.040(D) with the following suggested amendments:

Complaints that a Commissioner has failed to abide any of the same will be assessed and investigated as appropriate by an independent investigator who shall be selected based upon their subject matter jurisdiction and expertise over the alleged type of violation, such as the City's office of Employment Investigations and Civil Rights Compliance (EICRC) or the Public Ethics Commission.

The procedure for assessing and investigating a violation under this section shall be the same as that normally followed by the independent investigator in the course of assessing and investigating similar complaints under their jurisdiction, except that the City Council shall be the only body empowered to make final findings of fact and determine an appropriate resolution. A finding that a Commissioner has violated an applicable law, rule, or policy may result in reprimand, suspension or removal by the City Council.

Where the allegations made in a complaint are deemed to be serious, and the investigation and resolution of that complaint is deemed to be time-sensitive, the independent investigator may refer the investigation of the complaint to an outside contractor if the independent investigator is unable to expedite the matter due to reasons of caseload, staffing, or similar constraints. The determination to make such a referral shall be made by the independent investigator, and its reasoning for making the referral shall be provided in writing to both the complainant and the respondent at the time the referral is made, unless the independent investigator determines that doing so would negatively impact the

Item 8. Police Commission Proposed PECHMegas

Proposed amendments to Oakland Municipal Code chapters 2.45, 2.46 and 2.47 (regarding the Police Commission, the Community Police Review Agency, and the Office of the Inspector General, respectively) as they pertain to the enforcement authority of the Public Ethics Commission

integrity of the investigation. The costs incurred in hiring an outside contractor shall be borne by the Police Commission.

Anyone may make a complaint against a Commissioner under this section, including any public servant or member of the public.

- c. PEC takes no position on the rest of the legislation because it does not affect the PEC's enforcement authority.
2. Attach this memo as background information to the comment recommended in #1 above.
3. Urge the City Attorney to produce a written opinion regarding whether City Charter section 604(c)(10) precludes any agency besides the PEC from investigating allegations that could result in the City Council removing a Police Commissioner for cause.

Attachments: Proposed Legislation; Public Safety Committee staff report.

Item 8 - Police Commission Procedural Changes

Proposed Revision to OMC section 2.45.040(D):

Complaints that a Commissioner has failed to abide any of the same will be investigated by an independent investigator with the City's Office of Employment Investigations and Civil Rights Compliance (EICRC) or the Public Ethics Commission (PEC) based upon subject matter jurisdiction over the alleged type of violation. The PEC will conduct an initial complaint assessment and determine whether EICRC or PEC should have subject matter jurisdiction to investigate the complaint. EICRC or PEC may elect to engage an outside contractor to complete the investigation after considering factors, including but not limited to, investigative timing or urgency, availability of resources, and subject matter expertise.

Should the complaint be referred to an outside contractor for assessment and investigation, the costs incurred in hiring that outside contractor shall be borne by the Police Commission.

The procedure for assessing and investigating a finding of a violation under this section shall be the same as that normally followed by the independent investigator in the course of assessing and investigating other complaints under their jurisdiction, including the determination of final findings of fact and whether any violation of this section occurred. Any sustained findings of a violation of this section shall be referred to the City Council for determination of an appropriate resolution. A finding that a Commissioner has violated an applicable law, rule, or policy may result in reprimand, suspension or removal by the City Council.

Anyone may make a complaint against a Commissioner under this section, including any public servant or member of the public.