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TO: Public Ethics Commission  
FROM: Simon Russell, Enforcement Chief  
DATE: May 31, 2023  
RE: Overview of Confidentiality Rules for Enforcement Complaints and Investigations; and Proposed Practices for Handling of Election-Related Matters, for discussion at the June 14, 2023, meeting of the Public Ethics Commission

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This report invites Commissioner and public discussion on two related issues:

1. What changes, if any, should the Enforcement Unit make to its rules concerning confidentiality of complaints and investigations? What is the proper balance between protecting the integrity of an investigation and avoiding potentially unfair publicity, while also assuring the Commission and the public that we have received complaints and are actively investigating them?
2. Should the Enforcement Unit have any special procedures in place for handling complaints and investigations relating to an ongoing election? How do we avoid potentially unfair pre-election publicity, while also investigating and enforcing campaign laws at the time when they matter the most: before an election, while the alleged harm is ongoing?

These questions do not have easy answers. The purpose of this report is to provide an overview of the Enforcement Unit's current approaches to these questions, both as required by law and in our informal practices. It will also compare how other state and local enforcement agencies address these questions. Finally, it will provide a range of possible new approaches. The goal is to get feedback from the Commission and the public, so that Enforcement staff can return at a later meeting with new draft procedures (if requested) for the Commission's analysis and vote.

### **Background and Brief Summary of Current Procedures**

At its meeting of January 11, 2023, the Public Ethics Commission (PEC) asked Enforcement staff to prepare a briefing on Enforcement's practices for the processing of complaints relating to an ongoing election. The request was made in the wake of an incident during the lead-up to the November 2022 election, in which the media learned of, and reported on, Enforcement's then-recent decision to open an investigation into a candidate for City office.

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In brief, Enforcement does not have unique procedures for the handling of election-related complaints (as compared to non-election-related complaints). Informally, Enforcement may try to prioritize the preliminary review of election-related complaints (staff resources permitting) given the time-sensitive nature of the alleged public harm. But in making the final decision as to whether and when to open a full investigation, Enforcement consciously avoids taking the timing of an impending election into account. This is to avoid the possibility or appearance of bias, either in favor of the respondent-candidate (by deliberately shielding the respondent-candidate from scrutiny until after the election) or against the respondent-candidate (by deliberately exposing the respondent-candidate to scrutiny before the election). Put simply, Enforcement ignores the election when it comes time to decide whether move a case from “preliminary review” to “investigation.”

Enforcement’s confidentiality rules should, in theory, avoid undue publicity of complaints or investigations until our findings are ready to be made public at the end of an investigation. The City Charter requires that investigations be kept confidential until our findings are presented to the Commission.

However, Enforcement is also legally required under its Complaint Procedures to notify complainants and respondents of its decision to open an investigation, and it lacks the ability to restrain those persons from making disclosures to third parties (such as the media). Witnesses and other persons contacted by Enforcement might also notify third parties of the existence of the complaint or investigation, and Enforcement similarly lacks the ability to restrain such disclosures. Enforcement must also disclose the existence of a complaint or investigation in response to a public records request for that information, with limited exceptions.

These limited disclosure requirements are meant to provide a measure of public accountability for the Enforcement Unit. Their aim is to prevent Enforcement from unduly delaying or “burying” the investigation of complaints. However, the potential for unfair publicity is also apparent. While Enforcement stresses to complainants and respondents that the mere existence of an investigation does not necessarily mean that wrongdoing occurred, there is an unavoidable stigma associated with the investigation process. This problem is compounded by Enforcement’s understaffing challenge, which can greatly extend the length of time needed to complete an investigation and resolve the ambiguity over the validity and seriousness of the allegations.

The key issue is how to balance the desire for transparency and strong enforcement of Oakland’s ethics and campaign laws, with the equally compelling desire to avoid unfair publicity and/or compromising the integrity of Enforcement’s work.

### **In Detail: Enforcement's Rules of Confidentiality for Complaints and Investigations**

The fundamental requirement for Enforcement to keep most of its work confidential can be found in the City Charter, which states:

Investigations. Preliminary review by Commission staff of allegations shall be confidential, to the extent permitted by law, until any of the following occurs:

- (i) Placement of the item on a Public Ethics Commission meeting agenda;
- (ii) Passage of one year since the complaint was filed;
- (iii) Action by the Executive Director closing the file without placing it on the agenda, pursuant to the Commission's complaint procedures or policies; or
- (iv) Expiration of the Statute of Limitations.<sup>1</sup>

This language is somewhat confusing, in that it refers interchangeably to both “investigations” and “preliminary review of complaints.” In practice, Enforcement treats these as two discrete phases in a single matter. Specifically, Enforcement classifies incoming complaints as being under a formal process of “Preliminary Review,” during which Enforcement determines whether there are sufficient legal and evidentiary grounds to open an investigation. If the answer to that question is “yes,” then Enforcement formally changes the status of that matter to “Investigation.” This is important not only for administrative purposes, but also because (as described in detail below) there are certain public disclosures that we are legally required to make at each stage in the process. But as far as the general confidentiality requirement of the City Charter goes, we interpret it as applying equally to both the “Preliminary Review” and “Investigation” phases of a single matter, given that the Charter refers to both stages.

Note that the Charter does not impose a penalty for a violation of the confidentiality requirement. The requirement appears not to be a punitive law, but rather an exemption from disclosure of an open Enforcement file under a public records request. We have also interpreted this language to mean that a complaint itself is generally disclosable as a public record, while the subsequent review and investigation of a complaint is not.<sup>2</sup>

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<sup>1</sup> City Charter, section 603(f)(1).

<sup>2</sup> We do retain the direction under California Government Code section 6255 to withhold a complaint from a public records request if necessary in the public interest. This is rare, and is usually done for evidence preservation concerns (i.e., the respondent named in the complaint is currently unaware of the complaint and might destroy/tamper with evidence if they learn of it before being contacted by Enforcement).

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In addition to the general confidentiality requirement imposed by the City Charter, the Enforcement Unit is also legally bound by the public notification requirements found in our formal Complaint Procedures (which are regulations adopted by the Commission itself, most recently in 2020). According to the Complaint Procedures, the first required notification occurs upon the initial receipt of a formal complaint:

- i. Upon receipt of a formal complaint, Commission staff will make a reasonable effort to acknowledge receipt of the complaint.
- ii. Commission staff shall process and review all formal complaints.<sup>3</sup>

In practice, this usually takes the form of an email to the complainant (or a letter or phone call if they lack a valid email address), confirming that the complaint was received and providing them with a complaint number.

Note that these rules state that Enforcement “shall” review every formal complaint it receives; we do not have the ability to reject formal complaints (e.g. for being clearly outside of our jurisdiction, or for making allegations that are clearly not a violation of the law, etc.) and thereby avoid confirming its receipt.<sup>4</sup> The intent behind these requirements is to limit the potential for Enforcement to abuse its discretion in order to arbitrarily reject or “bury” any formal complaints (e.g. for political or personal motives).<sup>5</sup>

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<sup>3</sup> PEC Complaint Procedures, section III(A)(1)(b).

<sup>4</sup> See also section III(B): “**Preliminary Review of Complaints.** Upon receipt of a formal complaint, Commission staff shall conduct a preliminary review of the complaint to determine whether to open an investigation.” (Emphasis in original)

<sup>5</sup> This section of our Complaint Procedures refers to “formal” complaints, which are complaints made under penalty of perjury on our official complaint form. There is a separate section of our Complaint Procedures (III(A)(2)) dealing with the receipt of “informal” complaints, which are complaints that are not made on our official complaint form (e.g. via email or phone call), and are not usually made under penalty of perjury. Our Complaint Procedures are silent as to whether we are required to acknowledge receipt of an informal complaint; and we are expressly given the discretion to reject informal complaints without processing them any further, for whatever reason we determine. Later sections of our Complaint Procedures (including certain notification requirements) refer to “complaints” in general, without specifying whether they are formal or informal. In practice, Enforcement has begun to address this ambiguity by processing informal complaints in the same way as formal complaints *after we have determined whether or not to reject the informal complaint upon initial receipt* (e.g. for obvious lack of jurisdiction, etc.). This means that we provide a meritorious informal complainant with an acknowledgment and a complaint number – just as we do with formal complainants – and follow all procedures governing formal complaints from that point onward (including notification requirements). But given the ambiguous language of our Complaint Procedures, it is ultimately unclear

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One issue that arises here is the possibility that a complainant might share the complaint acknowledgment (as well as the complaint itself) with third parties, thereby violating the spirit of the confidentiality requirement of the City Charter. There are a number of reasons that a complainant might do this, e.g. as part of a separate lawsuit or outside investigation; to deter an ongoing violation; or for publicity. Enforcement does not have the legal authority to restrain such disclosures, e.g. through a non-disclosure agreement (NDA) or as a violation of any of the laws we enforce.

The next required disclosure under our Complaint Procedures comes at the end of the preliminary review stage:

**Intake Resolution.** After conducting a preliminary review of a complaint, Commission staff shall decide whether to open a case for investigation, resolve the complaint by way of dismissal, or recommend closure. Commission staff shall notify the complainant of the result of the preliminary review in writing...

**Notification to Respondent.** After the preliminary review of the complaint, if Commission staff dismisses the complaint, then Commission staff may notify the respondent of the receipt and dismissal of the complaint. If Commission staff recommends closure or the opening of an investigation, then Commission staff shall notify the respondent of the complaint and the issue(s) to be investigated in writing...

**Notification to Complainant.** After the preliminary review of the complaint, Commission staff shall notify the complainant of its decision to dismiss, close, make a referral, or open an investigation. If Commission staff opens an investigation, Commission staff shall also provide to the complainant a copy of the notice to the respondent...<sup>6</sup>

(Emphasis in original; underlining added). Again, the intent behind these required disclosures is to provide a measure of accountability for Enforcement staff to investigate matters it is charged with enforcing, and avoid the possibility of “burying” allegations that need to be investigated. And again, there is a possibility that complainants or respondents could share these disclosures with third parties, despite the confidentiality requirement of the City Charter. While we typically discourage respondents and complainants from doing so, we lack any legal means to restrain their free speech rights in this area.

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whether we are required to do that, and it was not our consistent practice with informal complaints until recently.

<sup>6</sup> PEC Complaint Procedures, section IV(A), (C)-(D).

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No further notifications are required to the complainant or the respondent until the matter is ready to be heard at a public Commission meeting. However, it is not uncommon for complainants, members of the public, and/or the media to make a public records request concerning the existence and/or current status of a complaint or investigation. In light of the above laws, Enforcement releases only the following information in response to such requests:

- the complaint or case number
- the current status, e.g. “Preliminary Review” or “Investigation”
- the name(s) of the respondent(s) as listed on the Enforcement Database (our internal case tracking system)
- a copy of the initial complaint, if requested (personal information redacted, other than the name(s) of the complainant(s), respondent(s), and witnesses).

Enforcement sometimes withholds some or all of the above information if necessary to preserve the integrity of an investigation (e.g. to avoid destruction of evidence or witness tampering) or the confidentiality of settlement negotiations.

Under no circumstances does Enforcement issue press releases or similar public announcements concerning the receipt of a complaint or the opening of an investigation.

### **Confidentiality Rules at Other Commissions**

Other ethics commissions vary widely in their confidentiality rules. Some of them make open complaint and case information searchable on their public website, while others do not even confirm the receipt or existence of a complaint or case until they are ready to prosecute or settle.

The state Fair Political Practices Commission (FPPC), for example, has a “Case and Complaint Information Portal” on its website, allowing the public to search for open and closed complaints or cases by name, jurisdiction, or case number. The information provided includes the status of a matter (i.e., whether a complaint has been received and/or an investigation opened), the name(s) of the person(s) who are alleged to have violated the law, the name(s) of the person(s) making the allegations, and the type of allegations being made or investigated, among other information.

The FPPC’s online case portal, for example, appears as follows (this was after conducting a search for “cases” in the jurisdiction “Oakland”):

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Case No.	Type	Status	Jurisdiction	External Parties
2023-00349	Staff/Filing Officer Referral	Case Opened and Pending	<u>State</u> Oakland, Alameda County	<u>Respondents</u> : Kandis Session; Kenneth Session; Kenny Session; Kenny Session for District 6 2022 <u>Complainants</u> : Ana Lara-Franco; Suzanne Doran
<b>Date Opened:</b>		05/10/2023		
<b>Date Closed:</b>		N/A		
<b>Violation Type:</b>		2022 Pre-Election		
<b>Disposition:</b>		N/A		
<b>Disposition Details:</b>		N/A		
2023-00329	Sworn Complaint	Case Opened and Pending	<u>Local</u> Oakland, Alameda County	<u>Respondents</u> : Caltrans; Dorothy Moore <u>Complainants</u> : Adina Flores
2023-00132	Staff/Filing Officer Referral	Closed	<u>Local</u> Oakland, Alameda County	<u>Respondents</u> : Thomas Quinn <u>Complainants</u> : Andrea Carey

And the FPPC's online complaint portal appears as follows (this was after conducting a search for "complaints" in the jurisdiction "Oakland"):

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Complaint No.	Type	Status	Jurisdiction	External Parties
▼ COM-05252023-01479	Staff/Filing Officer Referral	Complaint added to Existing Case	<u>Local</u> Oakland, Alameda County	<u>Respondents</u> : Sahar Shirazi <u>Complainants</u> : William Cameron
<b>Date Received:</b>		05/25/2023		
➡ COM-05252023-01477	Staff/Filing Officer Referral	Complaint added to Existing Case	<u>Local</u> Oakland, Alameda County	<u>Respondents</u> : Sahar Shirazi <u>Complainants</u> : William Cameron
➡ COM-04262023-01166	Sworn Complaint	Case Opened	<u>Local</u> Oakland, Alameda County	<u>Respondents</u> : Caltrans; Dorothy Moore <u>Complainants</u> : Adina Flores
➡ COM-03222023-00795	Staff/Filing Officer Referral	Complaint added to Existing Case	<u>Local</u> Oakland, Alameda County	<u>Respondents</u> : Yakpasua Zazaboi; Yakpasua Zazaboi; ZAZABOI FOR OAKLAND CITY COUNCIL DISTRICT 6 2022; YAKPASUA <u>Complainants</u> : Ana Lara-Franco

The PEC does not provide this information on our website. We do provide some of this information in response to public records requests, but we only provide the case number, the case status, and the name(s) of the respondent(s). We may also withhold some or all of this information if we determine that doing so is necessary for an investigation (usually to avoid evidence destruction or witness tampering).

At the other end of the spectrum, the Los Angeles City Ethics Commission does not provide any information about its complaints or cases until they are ready to present their probable cause report or settlement agreement at a Commission meeting. Complainants are not given a notification that their complaint was received, nor are they informed whether an investigation was opened or the complaint dismissed. Respondents are not notified of complaints either, though they may be contacted for evidence-gathering purposes in the course of a preliminary review or investigation. Individual cases that are dismissed or closed by staff without charges being filed are not reported to the public or the Commission, though



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they do provide general statistics.<sup>7</sup> L.A. City Ethics also does not release any information about specific open complaints or cases in response to public records requests, though once again they do provide general statistics.

The San Francisco Ethics Commission (SFEC) follows similar practices to Los Angeles. SFEC does notify complainants when an investigation is opened, but they do not notify respondents of a complaint or investigation unless necessary for evidence-gathering purposes. And similar to Los Angeles, SFEC does not confirm the existence of a complaint or investigation to members of the public or the media. It is official misconduct under the SFEC's procedures to reveal anything about a complaint or case until either a finding of probable cause or a settlement agreement is presented to their Commission at one of its public meetings.

### **Approaches to Election-Related Cases**

Enforcement does not have special laws or procedures concerning complainants or cases relating to a current election. This is in line with most other ethics commissions consulted by Enforcement when preparing this report (including San Francisco, Los Angeles, and the FPPC). A partial exception is the San Diego Ethics Commission, which requires preliminary review of any formal election-related complaint<sup>8</sup> to be completed within fifteen days instead of the usual thirty days mandated under its laws.<sup>9</sup>

Informally, Enforcement staff at the PEC may try to prioritize the preliminary review of complaints relating to an ongoing election, staff resources permitting. However, this may not always be possible given competing priorities, nor is the length of a preliminary review or investigation solely within Enforcement's control. (The complexity of a case, the lack of timely cooperation from witnesses or respondents, and/or a large caseload-to-staff ratio can significantly extend the length of time needed for a preliminary review or investigation).

When it comes to deciding whether to open a full investigation into an election-related complaint, all of the other ethics commissions consulted when writing this report (including San Francisco, Los Angeles, San Diego, and the FPPC) all take the same approach as the PEC.

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<sup>7</sup> This is in contrast to the PEC, where Enforcement reports all dismissed complaints to the Commission following preliminary review, and presents all of its investigation findings to the Commission even when it is recommending that the Commission close a case without charges.

<sup>8</sup> The San Diego Ethics Commission defines an election-related complaint as any formal complaint that is "received by the Commission within ninety calendar days of a municipal election and alleging violations by a candidate seeking office at that election." San Diego Municipal Code section 26.0422(c).

<sup>9</sup> By contract, the PEC does not have a deadline for completion of preliminary review of incoming complaints, whether election-related or otherwise.

The timing of the election is simply not factored into the decision of whether or when to open an investigation. Instead, the decision is made at the point in time when staff has been able to conduct sufficient preliminary evidence-gathering and legal research to determine that an investigation is warranted. Taking the timing of an election into account runs the risk of injecting an improper political motivation into this process, either in favor of the affected candidate (by delaying an investigation until after the election is over) or against them (by arbitrarily accelerating an investigation to begin before the election is over).

### Questions For Discussion

In light of the above background, Enforcement reiterates the questions posed at the beginning of this report, to foster Commissioner and public discussion:

1. What changes, if any, should the Enforcement Unit make to its rules concerning confidentiality of complaints and investigations? What is the proper balance between protecting the integrity of an investigation and avoiding potentially unfair publicity, while also assuring the Commission and the public that we have received complaints and are actively investigating them? As a reminder, the preliminary review and investigation of complaints is strictly confidential except at the following points:
  - when Enforcement sends the complainant an acknowledgment that it has received their complaint, and gives them a complaint number;
  - when Enforcement notifies the respondent that a complaint has been made against them;
  - when Enforcement notifies the respondent that an investigation has been opened and what allegations are being investigated, or that the complaint has been dismissed;
  - when Enforcement notifies the complainant that an investigation has been opened, or that the complaint has been dismissed (and includes a copy of the notification that was sent to the respondent);
  - when Enforcement presents its investigation findings to the Commission at one of its public meetings (either as a settlement agreement, a probable cause report, or a closure request); and
  - in response to a public records request (giving the case number, status, name of the respondent(s), and a copy of the complaint).

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2. Should the Enforcement Unit have any special procedures in place for handling complaints and investigations relating to an ongoing election? How do we avoid potentially unfair pre-election publicity, while also investigating and enforcing campaign laws at the time when they matter the most: before an election, while the alleged harm is ongoing?

If any changes are desired, then Enforcement offers the following possibilities. This list is not exhaustive and we welcome other ideas; nor are these possibilities mutually exclusive. As described below, each of these suggestions offer benefits as well as significant drawbacks:

1. Amending the PEC's Complaint Procedures to state that complainants will not receive a notification that an investigation into an election-related complaint has been opened until after the election is over, nor will election-related complaints or investigations be confirmed in a public records request until after the election is over.

*Pros:* Reduces the possibility of unfair publicity while an election is ongoing.

*Cons:* With no accountability to complainants or the public until after the election, this allows for the possibility that Enforcement could improperly “bury” an election-related complaint into a favored candidate until after an election has taken place. To the extent that the allegations in the complaint might already be public (e.g. if the allegations originated from a media report), the public also has no assurance that Enforcement is looking into the matter. Finally, complainants would still have the ability to publicize their own complaints.

2. Amending the PEC's Complaint Procedures to require that preliminary review of election-related complaints be prioritized and completed within a short period of time (e.g. ten business days). To the extent that Enforcement cannot meet the deadline due to lack of timely cooperation by respondents, an investigation will automatically be opened.

*Pros:* Diminishes the possibility of unfair pre-election publicity by quickly winnowing out non-meritorious complaints.

*Cons:* This may not be feasible without more Enforcement staff. Even with more Enforcement staff and full cooperation by respondents, it is not always possible to guarantee completion of a preliminary review within a set time frame if necessary third parties (witnesses, custodians of records, etc.) do not give timely cooperation, and it might be unfair to automatically open an investigation for reasons outside of the control of respondents (or conversely, to dismiss an otherwise meritorious complaint because third parties have been slow in responding). This approach also significantly reduces Enforcement's ability to set its own priorities among its caseload; it assumes

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that all election-related complaints are meritorious and/or serious, when this is not always the case.

3. Create a permanent Enforcement subcommittee of 1-3 Commissioners, to which Enforcement must report the receipt of all election-related complaints, and which must vote to approve the investigation or dismissal of any election-related complaint.

*Pros:* Provides another layer of review to insulate Enforcement decision-making from the actuality or appearance of political bias.

*Cons:* Any commissioner taking part in the subcommittee would be barred from later voting on the final resolution of these cases, placing those consequential decisions in the hands of a smaller number of commissioners. Moreover, some commissioners are appointed by elected officials, which may lead to public mistrust of their neutrality.