

RESOLUTION NO. 79187

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AMENDING REGULATIONS AND PROCEDURES FOR THE SAN JOSE BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES INVESTIGATIONS AND HEARINGS, AND REPEALING RESOLUTION 78390

WHEREAS, the San Jose Board of Fair Campaign and Political Practices ("Board") is charged, under Chapter 12.04 of the San Jose Municipal Code, to investigate complaints alleging violations of Title 12 of the San Jose Municipal Code and take enforcement action where appropriate; and

WHEREAS, formal regulations ensure that all interested parties are apprised of and understand the procedures by which a fair hearing will be conducted; and

WHEREAS, the City Council desires to amend the current regulations and procedures for Board investigations and to reflect the Board's current practice;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

SECTION 1. The following Regulations and Procedures govern all proceedings before the San Jose Board of Fair Campaign and Political Practices (Board).

REGULATIONS AND PROCEDURES FOR SAN JOSE BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES INVESTIGATIONS AND HEARINGS

A. PREAMBLE

Regulations and Procedures of the San Jose Board of Fair Campaign and Political Practices are promulgated to ensure the fair, just, and timely resolution of complaints presented to the Board that allege violations of City campaign finance, lobbying, conflicts of interest and certain governmental ethics ordinances under Title 12 of the San Jose Municipal Code, by:

1. Setting and maintaining objective standards for investigating and determining matters brought before the Board;
2. Eliminating improper influence in the investigation of and determinations relating to persons alleged to have violated Title 12 of the San Jose Municipal Code; and
3. Assuring reasonable time frames for completing enforcement proceedings.

B. DEFINITION OF TERMS

For purposes of these Regulations and Procedures, the following definitions apply:

1. "Alternate Evaluator" means a person who is neutral and impartial, meets the qualifications in Section C, and has been retained for the limited purpose as provided herein because the Evaluator cannot maintain the appearance of neutrality or impartiality in evaluating or investigating a particular Complaint.
2. "Board" means the San Jose Board of Fair Campaign and Political Practices.
3. "Candidate" means a person who is running for City Office or is a City elected officeholder.
4. "Chair" means the elected Chair of the San Jose Board of Fair Campaign and Political Practices. If the Chair is not available, the elected Vice-Chair may temporarily assume the duties and responsibilities of the Chair.
5. "Code Enforcement" means the Code Enforcement Division of the Planning, Building, and Code Enforcement Department which provides citywide enforcement service for all reported concerns and violations relating to neighborhood residential properties as well as commercially and industrially zoned properties.
6. "Complainant" means a person or entity that files a complaint.
7. "Complaint" means a complaint alleging a possible violation of Title 12 of the San Jose Municipal Code that is filed with the Office of the City Clerk on the Board of Fair Campaign and Political Practices Complaint Form, which the Complainant has completed and signed.
8. "Day" means calendar day, unless otherwise stated.
9. "Evaluator" means a person who is neutral and impartial, meets the qualifications in Section C and has been retained as provided herein.
10. "Exculpatory information" means information tending to show that the Respondent has not committed the alleged violations.
11. "Hearing" means a formal meeting of the San Jose Board of Fair Campaign and Political Practices convened for the purpose of making determinations regarding a Complaint and conducted in accordance with Section G.

12. "Investigator" means a person who is neutral and impartial, meets the qualifications in Section D, and has been retained as provided herein.
13. "Mitigating information or circumstances" means information or circumstances tending to excuse or reduce the significance of the Respondent's conduct.
14. "Preliminary Evaluation" is the initial review of a complaint conducted by the Evaluator to determine whether sufficient cause exists to conduct a full investigation prior to any presentation to the Board.
15. "Respondent" means a person or entity that is alleged in a complaint to have violated a provision of Title 12 of the San Jose Municipal Code.
16. "Sufficient Cause" means that a complaint identifies specific facts, which if proven, would be a violation of Title 12 of the San Jose Municipal Code.
17. "Title 12" means the campaign, lobbying, conflicts of interest and ethics ordinances under Title 12 of the San Jose Municipal Code.

C. HIRING OF THE EVALUATOR

1. The Board will prepare and issue a Request for Proposals for an Evaluator at least six (6) months before the existing contract with the Evaluator expires.
2. The Evaluator must have a legal background and experience with ethics, election, or political law.
3. The Evaluator must be neutral and impartial and may not have or appear to have any bias or favoritism toward any person or entity involved with any complaint or investigation.
4. The Board will select the Evaluator and present the contract with the selected candidate to the Council for approval of the contract on a public agenda.
5. The contract may have up to a four (4) year term and should not end in an even numbered year.
6. The Board may terminate the contract with the Evaluator at its pleasure.
7. The Board may terminate the contract with the Evaluator if circumstances arise which, in the Board's judgment, would compromise the Evaluator's appearance of neutrality.

8. If circumstances arise where the Evaluator cannot be neutral or impartial, or maintain the appearance of being neutral or impartial, when evaluating or investigating a particular Complaint, the City Attorney, in consultation with the Chair, may enter into an agreement with an Alternate Evaluator for the limited purpose of conducting a Preliminary Evaluation or Investigation of that Complaint. All Regulations and Procedures applicable to the Evaluator are applicable to the Alternative Evaluator.

D. HIRING OF AN INVESTIGATOR

1. When necessary, the Board may hire an Investigator by contract executed by the City Clerk.
2. The Board will prepare and issue a Request for Proposals for the Investigator to conduct or assist with investigations of complaints assigned by the Board, and to monitor compliance with Title 12 as requested by the Board.
3. The Investigator must have experience in conducting investigations such as law enforcement, ethics, or employment related investigations. Familiarity with conflict of interest, campaign finance, and lobbying laws is desirable.
4. The Investigator must be neutral and impartial and may not have or appear to have any bias or favoritism towards any person or entity involved with any complaint or investigation.
5. The Board may terminate the contract with the Investigator at its pleasure.
6. The Board may terminate the contract with the Investigator if any circumstances arise which, in the Board's judgment, would compromise the Investigator's appearance of neutrality.
7. The City Clerk will administer the contract with the Investigator.
8. The Regulations and Procedures applicable to the Evaluator are applicable to the Investigator.

E. COMPLAINTS OF ALLEGED VIOLATIONS

1. Any person may file a complaint alleging possible violations of the campaign finance, lobbying, conflicts of interest and certain governmental ethics ordinances set forth in Title 12.
2. Complaints must be filed with the City Clerk, who serves as the Secretary to the Board. Complaints may be filed with the Office of the City Clerk in person during normal business hours, by mail, by electronic mail, or by facsimile.

3. Complaints must be filed on the complaint form that is approved by the Board, and is available in the Office of the City Clerk or the City Clerk's website. The City Clerk may also accept complaints filed by letter or electronic mail if the complaint provides the specificity and detail, including the identity of the Complainant, as required under this Section.
5. A complaint must provide as much specificity and detail as possible, including facts constituting the alleged violations, the name and address of the person who is alleged to have violated an ordinance, the names and addresses of potential witnesses, and the identity of the Complainant unless there is good cause for anonymity as established in this Section.
6. The City Clerk will forward any written complaint that satisfies the requirements of this Section to the Evaluator.
7. The City Clerk is authorized to dismiss a written complaint, without prejudice, that does not satisfy the requirements of this Section. Following such a dismissal, the City Clerk will inform the Complainant, in writing, of the specific deficiencies of the complaint.
8. The following matters are outside the Board's jurisdiction, and the Board may not take any action on:
 - a. Complaints against the Board or its members;
 - b. Complaints against the City Clerk;
 - c. Complaints regarding the placement or size of political signs. The City Clerk will forward complaints of this nature to Code Enforcement; or
 - d. Complaints alleging violations that are not under Title 12.
 - e. Complaints alleging nepotism and consensual personal relationships as governed by Chapter 12.20, as may be amended.
9. A complaint may be submitted anonymously by calling the "Board of Fair Campaign and Political Practices Anonymous Complaint Hotline" at 408-975-ANON (2666). The Complainant must state good cause for anonymity, which is limited to:
 - a. an employee of the City or the Successor Agency to the Redevelopment Agency who is not protected by the Civil Service system making a complaint about a supervisor in his or her chain of command; or

- b. a private sector employee making a complaint about his or her employer.

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10. The Chair will assess whether there is good cause for anonymity. The Complainant may provide a telephone number or other contact information for the Chair to contact the Complainant to gather additional information about the cause for anonymity. If the Chair determines there is good cause for anonymity, the City Clerk will forward the complaint to the Evaluator. If the Chair determines that the Complainant does not have good cause for anonymity, the complaint may not be forwarded to the Evaluator.
11. The City Clerk will promptly notify the Board members that a complaint has been filed, the date the complaint was filed, and the general nature of the complaint.
12. If a Board member files a complaint, that member's right to participate in the complaint process is the same as any other complaining party. However, that member may not participate in deliberations or vote on a matter concerning such complaint.
13. Under the circumstances described in Subsection F.8, the Evaluator may file a complaint with the City Clerk alleging possible violations of Title 12 as provided in this Section.

F. REVIEW OF COMPLAINTS BY EVALUATOR

1. Upon receipt of the complaint, the Evaluator must notify the Respondent of the allegations and provide the Respondent with a complete copy of the complaint and the Regulations and Procedures of the Board, unless the Evaluator determines that it is necessary to delay the notification to avoid compromising the investigation.
2. The Evaluator must conduct a preliminary evaluation of every complaint to determine whether sufficient cause exists to conduct a full investigation. The Evaluator may not conduct an investigation if:
 - a. the complaint does not identify specific facts demonstrating a potential violation;
 - b. the facts would not amount to a violation of law; or
 - c. identical allegations have already been addressed in a prior complaint.
3. The Board may not consider Complaints filed more than four (4) years after the alleged violations occurred.
4. Any City employee who is a Candidate for City office must be treated like any other Candidate for the purposes of San Jose Municipal Code Chapter 12.06.

However, the Evaluator must refer any complaint where the Respondent is a classified or unclassified employee appointed by a City Council Appointee to the appointing authority for investigation and action. The Board may not take further action on the complaint with regard to the employee.

5. If the Complaint, on its face, does not warrant an investigation, the Evaluator will advise the Chair and schedule a Hearing for the Board to consider the Evaluator's Report and Recommendations.
6. If the Board determines, upon reviewing the Evaluator's determination of lack of sufficient cause, that the complaint identifies specific facts that if proven would be a violation of Title 12, the Board may direct the Evaluator to commence an investigation.
7. When there is sufficient cause, the Evaluator will conduct an investigation, which must include an interview with the Respondent unless the Respondent refuses to cooperate. The Evaluator may also interview the Complainant and any witnesses, as well as review documents and other evidence.
8. In the event the Evaluator uncovers facts and information during an investigation that may implicate possible violations of Title 12 by one or more persons or entities who are not identified as Respondents, the Evaluator will notify the Chair of this discovery and the Chair will schedule a Hearing to consider the Evaluator's Report and Recommendations.
9. If the Board determines that the Evaluator has identified specific facts that if proven would be a violation of Title 12, the Board may direct the Evaluator to investigate. The City Clerk will file an amended complaint against the new Respondent(s) using the complaint form established for such purpose. To the extent the information giving rise to the complaint relates to the circumstances of another complaint under investigation, the City Clerk may reference this in the complaint and indicate that the complaint should be treated as an amendment of the existing complaint. In this event, the Evaluator must notify the new Respondent(s), as well as the Complainant and Respondent(s) of the existing complaint, of the new allegations. The Evaluator must also provide copies of the subject complaints to all parties and the Board's Regulations and Procedures.
10. If the information giving rise to the new complaint is not related to another complaint and deserves a separate and independent investigation, the Evaluator will notify the Respondent(s) of the allegations and provide a complete copy of the complaint and the Board's Regulations and Procedures, unless the Evaluator determines that it is necessary to delay the notification to not compromise the investigation.

11. When the Evaluator concludes an investigation, the Evaluator will prepare a written Report and Recommendation. The Report must contain a summary of law and evidence gathered through the investigation, including any exculpatory and mitigating information. The Evaluator may consider all relevant facts and evidence, including hearsay evidence, and must include in the Report all facts bearing on the weight given to the evidence considered. The Report must also state whether the Evaluator concludes that Respondent(s) did or did not violate Title 12. Recommendations may include actions to be taken by the Board or further investigation to be conducted by the Evaluator.
12. No complaint, investigative file, or information contained therein, may be disclosed to any person other than a Respondent or Respondent's representative, the City Attorney, District Attorney, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation, prior to the presentation of the Report and Recommendations to the Board. The Evaluator, however, may communicate with the Chair during the investigation of a pending complaint in the following circumstances:
 - a. On procedural matters; or
 - b. As required for a determination that a subpoena is essential under the provisions of Section G.
13. When a complaint, investigative file, or information contained therein has been released to the public by any person or entity prior to presentation of the Report and Recommendations to the Board, the City Clerk may acknowledge receipt of the complaint and issue a statement noting that:
 - a. Any given complaint may or may not fall within the purview of the Board;
 - b. A complaint represents unsubstantiated allegations pending the results of an investigation and Hearing; and
 - c. Early release of a complaint to the public is a violation of the San Jose Municipal Code.
14. After presentation of the Report and Recommendations, complaints, related documents, and investigative files may not be disclosed except as required by the California Public Records Act, as amended (Government Code §§ 6250 et seq.).

G. BOARD HEARING

1. The Evaluator must advise the Chair to set a Hearing at the earliest practicable date based on the projected schedule for submittal and distribution of the Evaluator's Report and Recommendations.
2. The City Clerk must notify the Complainant and the Respondent of the date and time of the Hearing at which the Complaint will be reviewed by the Board.
3. The Evaluator will deliver the Report and Recommendations to the Board, the Complainant, the Respondent and all interested parties who request the Report, three (3) business days in advance of the Board Hearing.
4. The Board will consider the Report and Recommendation of the Evaluator as well as any other evidence presented at the Hearing.
5. The Respondent may submit a written response to the Report and Recommendations. The response may contain legal arguments, a summary of evidence, and any mitigating or exculpatory information.
6. The Respondent who chooses to submit a response must deliver the response at least 24 hours in advance of the Board Hearing, if possible. The Respondent must deliver a total of eight copies of the response to the City Clerk for distribution to the Board and the Evaluator.
7. The Respondent may personally appear before the Board or be represented by counsel or any other person.
8. The formal Rules of Evidence do not apply to the Hearing.
9. All testimony presented to the Board must be under oath or affirmation.
10. Board members may ask questions of the Complainant, Respondent, witnesses or the Evaluator when recognized by the Chair.
11. The Board, if necessary, may compel the testimony of witnesses and may compel the production of relevant documents to the Evaluator by subpoena, but this power may be used only as a last resort after good faith efforts to acquire the relevant information have failed and upon a finding that the information or testimony is essential for a determination in the matter.
 - a. The Chair, after consultation with the Evaluator, may subpoena witnesses and compel their attendance and testimony, and may require by

subpoena the production of any books, papers, records or other items at a scheduled Board Hearing.

- b. Use of the subpoena power by the Chair may only be used after a written determination that the information or testimony is essential for a determination in the matter and material to the duties or exercise of the Board's powers and that good faith efforts to acquire the relevant information have failed.
 - c. The City Clerk must promptly notify the Board members that subpoena power has been used and must describe the general basis for the written determination without reference to specific details of the complaint, investigative file or information contained therein.
12. Except as otherwise provided above, individual Board members may not investigate complaints or discuss pending complaints with anyone except during the course of a Hearing.
 13. The Complainant is to be treated like any other witness in providing evidence. Any interested person can submit a brief or any written argument to the Board at least 24 hours before the Board Hearing, if possible. The brief or written argument must be simultaneously provided to the Respondent.
 14. The Hearing is to be recorded by the City Clerk.
 15. The Hearing must be open to the public except that witnesses may be excluded at the Board's discretion.
 16. Prior to a final determination on the merits of a complaint, there may be no oral or written communications regarding the merits of a complaint with any person or entity unless the communication is necessary for the conduct of the investigation or except as otherwise provided in these Regulations. After the final determination, the Chair will be the sole contact with the public and media.

H. SCHEDULING

1. This process is to be completed at the earliest possible time. While timeliness cannot be precise because of the nature of an investigation, timeliness is paramount, particularly when an elections-related complaint is filed within two (2) weeks of an election. In all cases, the Evaluator's Report and Recommendations must be submitted to the City Clerk within thirty (30) calendar days after the Evaluator receives the complaint unless an extension has been requested and granted as provided in this section.

2. Whenever an action is required to be completed by a particular time pursuant to these Regulations or an order of the Board, the Evaluator or Respondent may request an extension of time by filing a written request with the City Clerk. The Clerk will promptly forward the request for an extension to the Chair and the City Attorney's Office. In consultation with the City Clerk and the City Attorney's Office, the Chair may grant the request only upon a showing of good cause. The extension granted by the Chair must be in writing and must specify the amount of additional time that has been granted.
3. If the Chair grants an extension to the Evaluator, the Evaluator must submit a progress report on the status of the Evaluator's Report and Recommendations at each regularly scheduled meeting of the Board until the Report has been delivered. The progress report should explain the status of the Report and Recommendations without divulging details about the Complaint or the investigation.
4. If the Chair has denied the Evaluator's request for an extension, the Evaluator must deliver, within three (3) business days, a Report that summarizes the law and evidence gathered through the investigation up to that point, including any exculpatory and mitigating information.

I. ROLE OF THE CHAIR

1. The Chair will make procedural determinations including but not limited to the scheduling of Hearings, time extensions, and order of witnesses.
2. The Chair may consult with the Evaluator and the City Attorney on procedural matters. The Chair may also discuss procedural matters *ex parte* with the Respondent.
3. The Chair is the only contact or spokesperson for interactions with the public, the City Council, and the media. Except for routine administrative matters within their individual areas of responsibility, the City Clerk, City Attorney, Evaluator, and Investigator will refer all inquiries to the Chair.

J. BOARD FINDINGS

1. If the Board concludes that further investigation is necessary, it will direct the Evaluator to conduct further investigation and to report back to the Board.
2. Upon conclusion of the Hearing, the Board must issue a decision by Resolution.
3. If the Board decides that there is sufficient evidence to establish that a violation occurred, the Board must publicly announce this decision.
4. If the Board decides that there is insufficient evidence to establish that a violation occurred, the Board must publicly announce this decision.
5. A decision that a violation has occurred is based on a preponderance of the evidence from the entire record of the proceedings.
6. The votes of at least three (3) members of the Board are required to decide that a violation of Title 12 occurred. Each Board member voting on the decision must certify on the record that he or she heard (either in person or by listening to a recording) or read the transcript of the testimony at the Hearing on the complaint and reviewed all the evidence in the record.
7. The Board may not impose a penalty if it is presented with clear and convincing evidence that prior to the alleged violation:
 - a. The Respondent requested and obtained a written opinion from the City Attorney or the California Fair Political Practices Commission (FPPC); and
 - b. The Respondent, in requesting the opinion, truthfully disclosed all the material facts pertinent to the case; and

- c. The Respondent committed the acts or violations alleged in the complaint in good faith reliance upon the formal, written opinion of the City Attorney or the FPPC.
8. The City Clerk must provide a copy of the Resolution of the Board's decision to the Respondent and Complainant. A copy of the Resolution must be posted on the Board's website.
9. The decision of the Board is a final administrative determination of the City, unless the Board makes another decision by Resolution to impose penalties under Section K, in which case that decision is the final administrative determination of the City.

K. ADMINISTRATIVE ORDERS AND PENALTIES

1. If the Board finds a violation, the Board may:
 - a. Find mitigating circumstances and take no further action;
 - b. Issue a public statement or reprimand;
 - c. Require corrective action by a particular deadline; or
 - d. Impose a penalty *in* accordance with Chapter 12.04 of the San Jose Municipal Code.
2. The votes of at least three (3) Board members are required to impose any order, penalty, or both for a violation of Title 12. Each Board member voting to impose any order, penalty, or both for a violation must certify on the record that he or she has heard (either in person or by listening to a recording) or read the transcript of the testimony at the Hearing on the complaint and reviewed all the evidence in the record.
3. In determining if penalties should be imposed for violations of Title 12 and the amount of any such penalties, the Board may consider all the relevant circumstances surrounding the case including:
 - a. The severity of the violation;
 - b. The presence or absence of any intention to conceal, deceive, or mislead;
 - c. Whether the violation was deliberate, negligent or inadvertent;

- d. Whether the violation was an isolated incident or pervasive enough to indicate a pattern of disregard for Chapter 12.04 of the San Jose Municipal Code;
 - e. Whether the Respondent has a prior record of violations of City law relating to campaign finance, lobbying, conflicts of interest, or governmental ethics;
 - f. The degree to which the Respondent cooperated with the investigation;
 - g. Whether or not corrective actions were taken, if appropriate, in accordance with the provisions of Chapter 12.04 of the San Jose Municipal Code.
4. Civil penalties are imposed by Resolution of the Board. The City Clerk must provide a copy of the Resolution imposing a penalty to the Respondent and Complainant, and post a copy of the Resolution on the Board's website.

L. REFERRALS TO OTHER ENFORCEMENT AGENCIES OR OFFICIALS

At any time, the Evaluator or the Board may refer a complaint and, if applicable, any information gathered in investigating the complaint, to another government agency or official if the Board determines that the agency or official may more appropriately resolve the allegations in the complaint or enforce the applicable provisions of law. A copy of all information gathered must be sent by the City Clerk's Office or City Attorney's Office to the agency or official together with the referral.

M. JUDICIAL REVIEW

1. The Resolution must advise the Respondent that he or she can seek judicial review of the Board's decision in accordance with Chapter 1.16 of the San Jose Municipal Code.
2. Upon receipt of any complaint filed in Superior Court challenging any decision of the Board, the City Attorney will decide if there is a conflict of interest which precludes the City Attorney's Office from representing the Board in the action.
3. If the City Attorney determines that a conflict exists, the City Attorney will retain conflicts counsel to defend the lawsuit.

N. COLLECTION OF CIVIL PENALTIES

1. Civil penalties imposed by the Board must be remitted to the City Clerk within 100 days of the date of the Resolution by cashier's check for the specified amount.
2. If the civil penalties are not paid within the time specified, the Clerk will refer the debt to the Director of Finance for submission to the City's collection agency.

O. ROLE OF THE CITY ATTORNEY

1. The City Attorney may provide legal advice to the Board on matters unrelated to complaints or on general interpretations of the San Jose Municipal Code or relevant state or federal law. The City Attorney may not participate in investigations or reviews of complaints. (SJMC § 12.04.080.H)
2. The Chair or the Evaluator may consult with the City Attorney at any time about procedure or an interpretation of the San Jose Municipal Code, in general, and not as it applies to facts that are the subject of a pending complaint.

SECTION 2. Resolution No. 78390 is hereby repealed.

ADOPTED this 25th day of June, 2019, by the following vote:

AYES: ARENAS, CARRASCO, DAVIS, DIEP, ESPARZA,
FOLEY, JONES, JIMENEZ, KHAMIS, PERALEZ,
LICCARDO.

NOES: NONE.

ABSENT: NONE.

DISQUALIFIED: NONE.



SAM LICCARDO
Mayor

ATTEST:



TONI J. TABER, CMC
City Clerk

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