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MEMORANDUM

TO: Members of the Police Commission
 CC: Chief of Police, William Scott
 FROM: Alicia Cabrera
 Deputy City Attorney
 DATE: May 28, 2024
 RE: Recusal and Disclosure Requirements for Commissioners

In response to questions raised by Police Commissioners, in this memorandum, we provide an overview of recusal and disclosure requirements that apply to members of the Police Commission and other City commissions. This memorandum summarizes several State and local laws. Briefly, they provide:

- Commissioners who are present at a meeting must vote on every item—unless the commissioner has a legal conflict of interest, the commissioner has an impermissible bias in an adjudicatory proceeding, or the commission votes to allow the commissioner to recuse.
- If a commissioner has a legal conflict of interest, the commissioner must describe the facts giving rise to the conflict, leave the room for the discussion and vote on the item, and file a notice of recusal with the Ethics Commission within 15 days. A commissioner must file a notice of recusal with the Ethics Commission even if the commissioner was absent from the meeting where they would have had a conflict of interest.
- Even if a commissioner does not recuse, they still must make a public disclosure if they have a personal, professional, or business relationship with any individual who is, or has an ownership or financial interest in, the subject of the commission's decision where the public could reasonably question the commissioner's ability to act for the benefit of the public.

The laws governing conflicts of interest and due process can be complicated, and we strongly encourage commissioners to contact our Office in advance to discuss whether they must recuse or make a disclosure in a particular matter. Seeking our legal advice before a meeting protects the individual commissioner and the commission as a whole against potential liability and challenges to the validity of the commission decisions.

I. Voting and Recusal

Under Charter Section 4.104(b) and Administrative Code Section 1.29, each member of a commission who is present at a meeting must vote on each action item put before the body. This rule is subject to two exceptions: (1) a commissioner must abstain from participating when the commissioner has a legal conflict of interest, (2) a commissioner must abstain from participating when their participation would violate a person's due process rights, and (3) the commission by a

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majority vote of members present at the meeting may adopt a motion excusing a member from voting on an item for any reason. Charter § 4.104(b); Admin. Code § 1.29.

A. Legal Conflicts of Interest

A commissioner may not participate in a discussion or vote on an item if the commissioner has a legal conflict of interest. The conflict-of-interest laws that most commonly require City commissioners to recuse from participating include:

- The California Political Reform Act prohibits a commissioner from participating in a governmental decision that may impact their financial interests, such as a source of income, an interest in real property, a source of gifts, or a business investment. Cal. Gov't Code § 87100 et seq.
- California Government Code Section 1090 prohibits a commissioner from participating in any part of a contracting process in which the commissioner has a financial interest.
- Government Code Section 84308 may require a commissioner to recuse from an item involving a contract, permit, or entitlement where the commissioner has received a campaign contribution from someone involved.
- San Francisco Campaign and Governmental Conduct Code (“C&GCC”) Section 3.207 contains additional rules requiring recusal, including where a decision before the commission would result in personal or professional gain for the commissioner, their immediate family, or an organization with which the commissioner is associated.

This is not an exhaustive list of all legal bases that may require a commissioner to recuse, and determining whether the commissioner has a conflict of interest is frequently a fact-intensive inquiry. We strongly urge commissioners to seek advice from their Deputy City Attorney or the Ethics Commission in advance of participating in any item on which they may have a conflict. We discuss these rules in more detail in our [Good Government Guide](#), pages 32-55.

Recusal Procedures. When a commissioner has a legal conflict of interest under any of the laws listed above (the Political Reform Act, Government Code Section 1090, Government Code Section 84308, or C&GCC Section 3.207), local law requires the commissioner immediately prior to consideration of the item to: (1) publicly identify the circumstances that give rise to the conflict of interest in detail sufficient to be understood by the public; and (2) leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter is on the commission’s consent calendar. C&GCC § 3.209(a). If the matter is in closed session, the commissioner may not participate in the discussion and vote in deciding whether to go into closed session. The recusal procedures must be completed in open session prior to the commission’s vote to go into closed session. The commissioner must provide information to describe the conflict that does not improperly disclose any confidential information about the closed session.

Police Commissioners and other commissioners required to file a Form 700 Statement of Economic Interests must also file a notice with the Ethics Commission each time the

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commissioner recuses from a matter because of a conflict of interest under the Political Reform Act, Government Code Section 1090, Government Code Section 84308, or C&GCC Section 3.207. *See* C&GCC Section 3.209(b). The commissioner must file the recusal notification within 15 days after the meeting at which the recusal occurred, even if the commissioner was not present at the meeting that would have involved the conflict of interest. *Id.*

B. Due Process Conflicts

For certain types of adjudicatory matters where a commission is acting in a quasi-judicial capacity, such as employee discipline matters before the Police Commission, the person who is the subject of the proceeding has a due process right to a fair hearing. In some circumstances, a commissioner must recuse from such a matter in order to ensure these due process rights—even if the commissioner does not have the type of financial conflict of interest described above. An example of a situation requiring recusal is when a commissioner has already made up their mind about the merits of the matter before hearing any evidence or arguments, particularly where the commissioner has made pre-hearing public statements about the matter indicating their views or where a commissioner has written up talking points indicating their position on the matter before hearing the evidence. *Nasha v. City of Los Angeles*, 125 Cal.App.4th 470, 780-81 (2004); *Petrovich Development Co., LLC v. City of Sacramento*, 48 Cal.App.5th 963, 973-76 (2020).

City law does not describe the steps a commissioner must take to recuse if they have a conflict based on due process grounds. But we recommend that a commissioner follow the process identified above for a legal conflict: state the basis for the recusal at the outset and leave the room for the duration of the item. The commissioner is not required to file a form with the Ethics Commission after recusing on due process grounds.

C. Other Recusals With Commission Approval

Where a commissioner does not have a legal conflict of interest and their participation does not violate the due process rights of someone involved in the matter, local law requires the commissioner to vote on every item before the commission. *See* Charter § 4.104; Admin. Code § 1.29. If a commissioner wishes to not participate in an item because there may be an appearance of conflict, including when a commissioner decides to recuse themselves out of an abundance of caution or for another reason, they may ask their colleagues to excuse them from the item. The commission may by majority vote of commissioners present at the meeting excuse a commissioner even if the commissioner does not have a legal conflict. The commissioner is not required to file a disclosure with the Ethics Commission in this situation.

As mentioned above, commissioners should consult their assigned Deputy City Attorney or the Ethics Commission in advance of any meeting where the commissioner believes they have a conflict or wishes to recuse. If a commissioner participates in a matter where they have a legal conflict of interest, the commissioner may be subject to administrative, civil, or criminal penalties in their personal capacity, and the commissioner's unlawful participation may give rise to a lawsuit to invalidate the commission's action. *See* Cal. Gov't Code §§ 1097, 83116, 91000, 91003, 91005.5; C&GCC § 3.242.

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II. Required Disclosures Under Campaign and Governmental Conduct Code Section 3.214

In situations where a commissioner does not have a conflict of interest, C&GCC Section 3.214 still requires the commissioner to disclose on the public record any personal, professional, or business relationship with any individual who is, or has an ownership or financial interest in, the subject of the commission's decision on an item. This disclosure requirement applies only if, as a result of the relationship, the public could reasonably question the commissioner's ability to act for the benefit of the public. A commissioner should make the disclosure during the meeting in advance of the commission's consideration of the item.

The Ethics Commission has adopted regulations detailing the types of personal, professional, and business relationships that this section requires to be disclosed. *See* Ethics Commission Regulations 3.214-1 to 3.214-6. The regulations define personal, professional, or business relationships as follows:

- Personal relationship. A personal relationship is a relationship involving a family member or a personal friend, but does not include a mere acquaintance.
- Professional relationship. A professional relationship is a relationship with a person based on regular contact in a professional capacity, including regular contact in conducting volunteer and charitable activities.
- Business relationship. An officer has a business relationship with a person if, within the two years before the decision, the person was a client, business partner, colleague, or did business with the officer or employee's business. A business relationship does not include a person with whom the officer or employee does business in a personal capacity, such as a grocery store owner.

A court may invalidate any decision made by a commissioner who willfully fails to make the disclosure in some circumstances. And under Proposition D, a measure the voters approved at the March 5, 2024 election, a commissioner who fails to make the disclosure may be subject to administrative, civil, and criminal penalties as well. These new penalties will become operative on October 12, 2024.

III. Conclusion

Our Office and the Ethics Commission are available to assist commissioners navigate these issues and we welcome any questions commissioner have.

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