

## City of San José Board of Fair Campaign and Political Practices

Chair—Adrian Gonzales  
Vice Chair – Isabella Nyakundi  
Member—Joe Lopez  
Member—Louis Silver  
Member – Vacant

Mark Vanni, Senior Deputy City Attorney—Staff  
Toni Taber, City Clerk—Staff  
Joy Rodriguez, Assistant City Clerk—Staff

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### **DRAFT MEETING MINUTES**

**December 8, 2021**

**5:30 p.m.**

#### **I. Call to Order & Orders of the Day**

Roll Call

PRESENT: Chair Adrian Gonzales, Vice Chair Isabella Nyakundi, Board Member Joe Lopez

STAFF: Sr. Deputy City Attorney Mark Vanni, Assistant City Clerk Joy Rodriguez

OTHER: Ramona Giwargis from San José Spotlight; Steven Miller and Jessilyn Ho from HansonBridgett (Independent Evaluator); Members of the Public: Tran Nguyen, Lloyd Alaban; Scott Largent

The members of the San José Board of Fair Campaign and Political Practices convened virtually via remote teleconferencing at 5:33 p.m.

Action: Upon motion by Board Member Joe Lopez, seconded by Louis Silver, and carried unanimously, the Board approved the adoption of the December 8, 2021 agenda (4-0).

#### **II. Closed Session – None**

#### **III. Hearings**

Continuation of San José Spotlight Public Records Appeal

Discussion: Chair Adrian Gonzales opened the public hearing on a complaint filed with the Office of the City Clerk on July 26, 2021, appealing a decision of the Council's Rules and Open Government Committee denying a Public Records Act request from San José Spotlight. The request included all email, texts, and Slack or other messaging system communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other Mayor's staff, consultants, lobbyists or associates related to Solutions San José over the past six months. He recapped the appeal process San José Spotlight presented to the Rules and Open Government Committee on June 23, 2021 which was denied, and subsequently to the Board of Fair Campaign and Political Practices which was first heard on October 13, 2021. At this meeting, the City Attorney's Office reiterated their position that the responsive documents were privileged, and the Board would not be able to review the documents in any manner since the City Council has not waived privilege on the responsive documents. The Board subsequently voted and referred the matter to the independent evaluator to help clarify whether the Board may review responsive

documents that are attorney-client privileged as part of the records appeal process as outlined in Title 12 of the Municipal Code or if the Board's laws should be amended to allow such involvement. He then proceeded to explain the process for the continuation of the hearing.

Independent Evaluator Steven Miller from HansonBridgett law firm summarized their findings for which they also agreed to the City Attorney's Office's conclusion on the issue---that the attorney-client privilege rests with the client (City) and the City Council is the holder of the privilege. He noted that the Evidence Code does not provide the Board authority to review privileged documents and that the Board does not have explicit authority to review privileged documents without requiring the City Council to waive the privilege. He also explained the condition of extending the attorney-client privilege to third parties for which they have not found any authority for treating the Board like a consultant for purposes of expanding the privilege; nor have they found any reason why the Board might not be within the scope of the privilege if, like a consultant, its involvement were necessary and essential to obtaining legal advice from the City Attorney. He stated that the City might consider amending section 12.21.430 to clarify the Board's role in reviewing appeals in PRA requests and to assert that the Board's authority includes reviewing privileged records without waiving the privilege; however, they do not think that a court would find the Board's involvement necessary or essential for purposes of the privilege just because the Municipal Code states. He opined that the court would conduct a fact-specific inquiry into the specific circumstances and it would be impossible to predict whether the Municipal Code amendment would have the desired effect.

Board Member Joe Lopez asked if the Commission (Board) has the authority to review the facts as they've been presented and make an independent decision. Sr. Deputy City Attorney Mark Vanni stated that the Board is conducting an appeal and in a regular public records request, is part of the appeal process and has the ability to issue a decision. He noted though that without having the ability to review the records, he posited on what would entail that decision. Board Member Louis Silver inquired if having an independent person look at the communication and confirm whether they are attorney-client privileged communication. Independent Evaluator Steven Miller explained that an independent review would entail waiving the privilege unless the independent review was conducted by a judge who was authorized in the evidence code to conduct in camera review of records, without waiving the privilege.

Chair Adrian Gonzales asked what changes to policies and procedures might be recommended if City Council agrees and if privilege can be extended to an independent evaluator to conduct these types of appeals. Sr. Deputy City Attorney explained that they are obligated as a counsel for the City to maintain attorney-client privilege for the client which is also an ethical duty all attorneys have and cannot be breached once the determination is made. He also noted that it may be potentially possible but has to be looked at closer.

Ramona Giwargis from San José Spotlight recapped the process they've already gone through and questioned why the Municipal Code allow a request or to appeal to the

Board when it cannot review or release said records. She requested for the Board to do the right thing and stop the stonewalling of public records.

Action: Upon motion by Chair Adrian Gonzales, seconded by Board Member Louis Silver, it was decided that the Board would not to take a stance on this appeal but refer it to City City Council and issue a statement urging the City Council to work with the Board to remedy and clarify the Board's responsibilities in participating in public records appeal process for the biennial review. (4-0).

#### **IV. Public Record – None**

#### **V. Consent Calendar**

Action: Upon motion by Board Member Louis Silver, seconded by Joe Lopez, and carried unanimously, the Board approved the Minutes of the October 13, 2021 Regular Meeting. (4-0).

#### **VI. Reports**

- A. Chair - Chair Adrian Gonzales noted one vacancy on the Board.
- B. City Attorney – Sr. Deputy City Attorney Mark Vanni stated that his office received questions from employees and how they can engage in political activities while employed by the City.
- C. City Clerk – Assistant City Clerk Joy Rodriguez stated that the Office of the City Clerk has started receiving lobbyist registration forms and that flyers and announcements for the various boards and commissions vacancies would be circulated.
- D. Investigator/Evaluator – None.

#### **VII. Old Business**

- A. Discussion and possible action on biennial review of [San Jose Municipal Code Title 12](#), City Council [Resolution 78390](#) and other administrative policies, including Complaint Intake Process. Suggested Revisions to the SJMC Title 12 and Resolution 78390 (Chair Adrian Gonzales/City Attorney)

Discussion: Chair Adrian Gonzales noted that the Board does not have a resolution specific to handling public hearings for public records appeals and also raised the question about the Board's authority to review having gone through the San José Spotlight public records appeal. Board Member Louis Silver recommended to ask for specific authority for the Board to hire outside counsel to review documents for an appeal before the Board makes a decision. Independent Evaluator Steven Miller clarified that when he is advising the Board, he is not acting in the capacity of an attorney and communications are not subject to attorney-client privilege. Sr. Deputy City Attorney Mark Vanni noted that with respect to Public Records Act, there are a number of exemptions.

Action: Upon motion by Chair Adrian Gonzales, seconded by Louis Silver, the City Attorney's Office is directed to conduct an analysis to define the Board's responsibilities when participating in public records appeal process.

- B. Discussion of City Council Referral from July 28, 2020: proposed campaign finance and conflict of interest reforms, board and commission reforms, and lobbyist and contractor restrictions (Ad Hoc Status Update Report; Status update on the [audit](#) being conducted by [Hanson Bridgett](#)). (Chair Adrian Gonzales/City Attorney)

Discussion: Chair Adrian Gonzales gave a status update of the the findings on the Proposed Campaign Finance and Ethics Reforms. He noted that there are no incumbent Board Members/Commissioners that are also lobbyists. He stated that the last information he would like to look at is a judgmental sample of developers that had big permits pending before the City Council and to verify if any of them made contributions during the last election cycle.

- C. Status update on ongoing work from the Campaign Finance Study Session from April 20, 2021. (City Clerk/City Attorney)

Discussion: Sr. Deputy City Attorney Mark Vanni stated that he gave a presentation to the City Council on November 16, 2021 which discussed campaign disclosure and major committee funding ordinance. He noted that the Council approved the ordinance which would be effective December 31, 2021 and this would align the City's disclosure requirements with the state law. Assistant City Clerk Joy Rodriguez noted that the immediate request from Council was to have a repository of campaign advertisements which is currently in the works.

- D. Status update on collaboration with Charter Review Commission. (Chair Adrian Gonzales)

Discussion: Assistant City Clerk Joy Rodriguez shared that the Charter Review Commission recommended for the Board of Fair Campaign and Political Practices to be elevated as a charter commission. Sr. Deputy City Attorney Mark Vanni noted that the issue was expanding the scope of the Board. The item is agendaized for the January 11, 2022 City Council meeting and the deadline for a ballot measure is March 11, 2022.

- E. Status update on collaboration with [Code for San José: Open Disclosure](#).

No discussion.

- F. Scheduling of Special Board meeting if needed. (City Clerk)

No discussion.

## **VIII. New Business - None**

**IX. Public Comment**

Scott Largent requested for the Board meeting to be more accessible to the public.

**X. Meeting Schedule and Agenda Items**

The next regular meeting is scheduled for January 12, 2022 at 5:30 p.m. via remote teleconferencing.

**XI. Adjournment**

Upon motion by Board Member Joe Lopez, seconded by Louis Silver and carried unanimously, the Board approved to adjourn at 7:15 p.m. (3-0-1. Absent: Nyakundi).

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ADRIAN GONZALES, CHAIR

ATTEST:

BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES SECRETARY

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TONI J. TABER, CMC  
CITY CLERK