CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

PUBLIC LEGAL OPINION

TO: WHITNEY BARAZOTO, EXECUTIVE DIRECTOR
PUBLIC ETHICS COMMISSIONERS

FROM: BARBARA J. PARKER
CITY ATTORNEY

DATE: January 11, 2018

RE: **Ethics Complaints Against Public Ethics Commission**

I. INTRODUCTION

The Oakland Public Ethics Commission (the "PEC" or "Commission") seeks advice regarding whether the PEC may investigate and adjudicate complaints lodged against the Commission, individual members of the Commission, or Commission staff. The Commission also seeks advice on the scope of representation of the Commission by the City Attorney's Office, including who determines when the City Attorney's Office has a conflict in representation, and how the Commission may request a second legal opinion. This is a public opinion as it addresses the relative powers, roles and responsibilities of different Charter-created entities. Like other public opinions, this opinion will be posted on our website.

II. QUESTIONS AND BRIEF ANSWERS

Question No. 1:

May the Commission, its members or its staff investigate and adjudicate complaints made against the Commission, its members or its staff involving allegations of non-compliance with procedural, ethics and other laws within the jurisdiction of the Commission?

Brief Answer:

No. The PEC is a quasi-judicial body; it has authority to conduct investigations and hearings, issue rulings and impose fines. Accordingly, the PEC has a legal duty to provide all respondents and parties that appear before it a fair, neutral and impartial

body, free from bias for or against any party. This includes when there is evidence of bias or even the appearance of bias. The participation of the Commission, Commission members, and/or Commission staff in investigating and hearing complaints against the Commission, Commission members or Commission staff could raise procedural due process issues and undercut the legal validity of the Commission's final determinations; there also would be issues regarding an appearance of bias and potential challenges to the decisions.

Question No. 2:

Who may investigate complaints against the Commission, its members or its staff involving allegations of non-compliance with ethics and other laws within the Commission's jurisdiction?

Brief Answer:

The City and the Commission have several options: (1) enter into agreements with other local Ethics Commissions to conduct investigations in these circumstances; (2) contract with an outside entity to investigate, conduct hearings, and make formal determinations; or (3) decline jurisdiction altogether. When the Commission declines jurisdiction, aggrieved parties may file a civil suit seeking injunctive relief[1] or file a complaint with the state's ethics watchdog, the Fair Political Practices Commission.

Question No. 3:

Who determines when the Office of the City Attorney has a legal conflict of interest that would preclude the Office's representation of the Commission on a particular matter?

Brief Answer:

City Charter section 401(6) provides that the City Attorney shall administer the Office of the City Attorney and mandates that the City Attorney serve as counsel to City boards and commissions, unless otherwise specified in the Charter. The City Attorney serves as legal counsel to the PEC and is responsible for advising the PEC on investigations and matters that come before the Commission. In addition, the City Attorney represents City boards and commissions, including the PEC, when they are named as defendants in a lawsuit.

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[1] *See*, Oakland's Municipal Code (OMC) §2.25.080(C)(4).

As the charter-designated legal counsel for City boards and commissions, the City Attorney is responsible for determining when the Office has a conflict of interest [2] in representation and conflict counsel is needed. A conflict in representation would occur only if the City Attorney's Office is required to simultaneously or successively advise or represent two or more City elected or appointed officials or employees in their official capacities or City entities (e.g., the municipal corporation and a board) who have adverse interests.[3] In the foregoing circumstances, the City Attorney, would select and retain conflict counsel. Practically speaking, we can see no circumstance in which a conflict in representation would occur for the City Attorney in connection with a complaint against the PEC.

Question No. 4:

Under what circumstances is the Commission entitled to a second opinion; and how does the Commission request a second opinion?

Brief Answer:

The Commission may request a second opinion from the City Attorney; however, the Commission is not entitled to a second opinion. Pursuant to City Charter Section 401(6), the City Attorney is legal counsel to the Mayor, City Council, City departments,[4] City officers, boards and commissions and other agencies of the City. As legal counsel

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[2] Attorney conflict in representation is not the same as bias under procedural due process requirements. Cal. Professional Conduct Rule 3-310 prohibits an attorney from simultaneously representing more than one client in any matter in which the interests of the clients actually or potentially conflict, without disclosure to the clients of the actual foreseeable adverse consequences of continued joint representation and the clients' written consent to the representation. In contrast, due process applies to adjudicatory or quasi-adjudicatory bodies and requires that all such bodies be fair and impartial.

[3] Oakland City Charter §§401(6), 700 *et seq.*, Cal. Rules of Prof. Conduct Rules 3-310, 3-600 Cal. There are other instances that would operate to prevent individual members of the City Attorney's Office from representing a City Department. These conflicts are different from adverse client representation in that they are *personal* to a member of the City Attorney's Office, such as conflicts of interest involving the financial interests of a particular attorney, unfairly pursuing prosecution, seeking outside counsel in a discriminatory manner, or failing to account for gifts from outside counsel. These personal conflicts of interest are not discussed in this Opinion, however, as they would never necessitate the City Attorney's Office as a whole to recuse itself based upon a legal conflict, nor are these personal financial conflicts governed by the Rules of Professional Conduct for attorneys. See Cal. Gov. Code sections 1090, 89503-89505.5 and 87100 *et seq.*

[4] Except for those City departments that the City Charter mandates have their own counsel, such as the Port Department. *See*, Charter Section 706(20).

for the foregoing parties, the City Attorney has discretion to determine whether to provide a second opinion.

III. ANALYSIS

A. Due process principles prohibit the PEC from adjudicating its own complaints.

At its core, due process requires reasonable notice and opportunity to be heard before governmental deprivation of a significant interest.[5] Procedural due process principles apply to administrative bodies that perform quasi-judicial functions.[6] Embedded within the opportunity to be heard is the requirement that all quasi-judicial bodies be fair and impartial.[7] In a quasi-judicial action, a court will determine whether, after considering the totality of the circumstances, the due process requirements of a hearing before a "reasonably impartial, noninvolved reviewer" have been met.[8] Specific requirements for procedural due process vary depending upon the situation under consideration and the interests involved.[9] Biased decision makers are constitutionally impermissible.[10]

In *Cohen v. City of Thousand Oaks*, the California Court of Appeal, Second District, found that the City had violated the plaintiffs' procedural due process rights when its Council acted as both a party (appellant) and a neutral adjudicator when the Council heard an appeal to a planning commission decision.[11] The *Cohen* plaintiffs spent 15 years obtaining planning commission approval of a mixed residential and commercial development project that was highly unpopular with adjacent residents. During a Council meeting, several residents spoke against the commission's decision during the public comment portion of the agenda, prompting the Council to hear an

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[5] *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975).
[6] Merriam Webster's online dictionary defines "quasi-judicial body" as a body that is authorized "to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the general manner of courts." Merriam Webster, https://www.merriam-webster.com/dictionary/quasi-judicial. *Nasha v. L.L.C. v. City of Los Angeles*, 125 Cal.App.4th 470 (2004); *Drakes Bay Oyster Company v. California Coastal Commission*, 4 Cal.App.5th 1165 (2016).
[7] *Cohen v. City of Thousand Oaks*, 30 Cal.App.4th 547, 559 (1994).
[8] *Quintero v. City of Santa Ana*, 114 Cal.App.4th 810, 812 (2003); *Haas v. County of San Bernardino*, 27 Cal.4th 1017, 1025 (2002).
[9] *Mathews v. Eldridge*, 424 U.S. 319, 325 (1926).
[10] *Applebaum v. Board of Directors*, 104 Cal.App.3d 648, 657 (1980), citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).
[11] *Cohen v. City of Thousand Oaks*, 30 Cal.App.4th 547 (1994).

appeal immediately, relying on an emergency exception to the Brown Act.[12] The Council overturned the planning commission's approval and plaintiffs sued. The Court held that the "cumulative effect" of the Council's actions resulted in a violation of the plaintiffs' due process rights; the Court's ruling was based in part on the Council's self-initiated appeal in the middle of a meeting in progress, when its own rules did not permit such an action.

As noted in *Cohen,* courts will accept evidence of either actual bias or the occurrence of a particular combination of circumstances that create an unacceptable risk of bias.[13] Impartiality also requires that adjudicators must be free from financial or personal interest.[14] It is important to note, though, that courts do not demand a showing of actual bias; for example, a state appellate court found an "unacceptable *probability* of bias" was enough to find that a planning commissioner should have recused himself because he authored a newsletter in his private capacity that disparaged a proposed development project and misrepresented having had direct contact with the party opposing the project.[15] In *Nasha v. L.L.C. v. City of Los Angeles*, Commissioner Lucente authored an opinion piece about a multiunit development project, where he clearly advocated a position against the project, which he characterized as a "threat to wildlife corridor."[16]

Under the Charter, the PEC is responsible for enforcing ethical laws in City government with respect to City employees, City officials and City boards and commissions.[17] The Commission's Charter sections, enabling legislation, operating policies or complaint procedures do not prohibit the PEC from hearing complaints against the Commission, nor do they require that the PEC hear such complaints. However, the PEC must exercise its enforcement authority within the bounds of the law. At the very least, the PEC's investigation, hearing and/or adjudication of complaints against the Commission would raise the specter of an appearance of bias in violation of due process principles, since the PEC would not be a neutral or impartial adjudicator in those situations.

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[12] *Ibid.* (Council relied on Government Code §54954.2, which reads in part, ". . .there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted as specified in subdivision (a).").
[13] *Drakes Bay, supra*, 4 Cal.App.5th at 1175(citing *Morongo Bay*, 45 Cal.4th at 741.).
[14] *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal.4th 731, 741 (2009).
[15] *Nasha v. L.L.C. v. City of Los Angeles*, 125 Cal.App.4th 470, 484 (2004).
[16] *Id.*
[17] Oakland City Charter, Section 603(a) and (b).

B. The PEC should establish alternative methods of handling complaints against the PEC

To comport with due process principles, the PEC should establish procedures to formally recuse itself from hearing complaints against the Commission and, in accord with PEC regulations, designate another forum(s) to conduct hearings and make determinations. The PEC has authority to retain outside administrative hearing officers to investigate and adjudicate matters that involve the Commission itself.[18] The PEC also could consider entering into an agreement with another ethics commission to handle each other's matters when a complaint involves their commission. The San Francisco Ethics Commission has such arrangements with ethics commissions in nearby jurisdictions. Alternatively, depending on the allegations, the PEC could decline jurisdiction and refer matters to the District Attorney or the California Fair Political Practices Commission (FPPC), the state administrative agency that administers and oversees compliance with the California Political Reform Act which regulates campaign financing, conflicts of interest, lobbying and governmental ethics.[19]

C. The City Charter authorizes the City Attorney, within her sole discretion, to determine when a legal conflict exists and whether to retain outside counsel.

Oakland is a Charter city; this means that the City Charter is the City's constitution and is the supreme law of the City, subject only to conflicting provisions in the state or federal constitutions and preemptive state or federal law.[20] A charter city may not act in conflict with its charter.[21] And only the voters have the power to amend the Charter.

City Charter section 401(6) provides in pertinent part that the City Attorney shall administer the Office of the City Attorney and mandates that the City Attorney serve as counsel to City boards and commissions:

> The City Attorney shall serve as counsel to the Mayor, City Council, and each and every department of the City, except departments specifically enumerated by this Charter as an independent department of the City, in their official

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[18] PEC Complaint Procedures, Sections II(C)(3) and IV(A): PEC may refer a complaint to an outside administrative investigator, pp. 3 and 5 respectively
[19] *Id.*, Section II(C)(3).
[20] See Cal. Const. Art. XI sections 3(a), 5(a), 6; *Harman v. City and County of San Francisco*, 7 Cal.3d 150, 161 (1972); *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994); *San Francisco Fire Fighters v. City and County of San Francisco*, 68 Cal.App.3d 896 (1977).
[21] *Domar Electric, Inc.*, 9 Cal.4th at 171.

> capacities pursuant to state law and the Charter, and as counsel, shall assert and maintain the attorney-client privilege pursuant to state law. He or she shall advise all officers, boards, commissions, and other agencies of the City on legal matters referred to him or her *and shall render written legal opinions when the same are requested in writing by* the Mayor or a member of the Council or the City Administrator or *any* other officer, *board or commission of the City*. . . . (Emphasis added.)

Neither Section 401(6) nor any other provision of the Charter authorizes any attorney, except the City Attorney, to provide legal representation to boards and commissions, with the exception of the Board of the Port of Oakland.[22]

Accordingly, the City Attorney has sole discretion to determine when the services of outside counsel are warranted, including determining when to provide a second opinion. This also includes legal analyses of any conflicts that would necessitate conflict counsel.

We also note that at a minimum, all attorneys in California, including public lawyers, must comply with the California Rules of Professional Conduct. Specifically, Rule 3-600 addresses when an organization is the client, and in such cases provides that the client is the organization itself, acting through its highest authorized officer, employee, body or constituent.[23] Rule 3-310 prohibits the simultaneous or successive representation of adverse interests. Based upon the nature of their work, public lawyers are held to a higher ethical standard than private lawyers.[24] This Rule is independent of the City Attorney's other legal and ethical obligations.

Specifically, Rule 3-310 prohibits an attorney from simultaneously representing more than one client in any matter in which the interests of the clients actually or potentially conflict without (1) disclosing to the clients the actual foreseeable adverse consequences of continued joint representation and (2) the clients' written consent to the representation.[25] This type of conflict also can occur when an attorney is asked to represent successive clients with potential adverse interests, e.g., representing an environmental group suing a former client oil company.

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[22] Charter section 706(20); In addition, the Charter provides the successor agency to the Citizen's Police Review Board, the Community Police Review Agency, with one non-City Attorney legal counselor who is selected by the City Attorney. *See*, Charter section 604(e)(1).
[23] Cal. State Bar Formal Opinion 2001-156 applies Rule 3-600 to City Attorneys.
[24] *See People ex. Rel Clancy v. Superior Court*, 39 Cal. 3d 740, 745 (1985).
[25] Cal. Rules of Prof. Conduct, Rule 3-310.

Similarly, an attorney may not accept or continue representation of a client whose interests are adverse to another of the attorney's clients *unless* the attorney receives the client's informed written consent, and in some instances written disclosures by the attorney.[26] It is important to note that conflicts may be imputed to an entire firm or entity, and not just the individual attorney. Accordingly, it is within the province of the City Attorney under the Charter to determine when there is the potential for a legal conflict in a litigation matter.

IV. CONCLUSION

The PEC's investigation and adjudication of complaints against the Commission would violate due process requirements. The PEC may develop reciprocity agreements with other local ethics commissions to investigate and hear complaints against the Commission. Alternatively, the PEC could either decline jurisdiction and refer the matter to the District Attorney or FPPC, or retain an administrative hearing officer to investigate and adjudicate the matter.

The City Attorney's duty to act as PEC counsel would not change with respect to representing the PEC if a lawsuit is filed against the Commission. The City Attorney would defend the PEC against complaints challenging PEC actions or determinations.

Very truly yours,

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[26] Rules of Professional Conduct Rule 3-310.