

1 **Ethics Review Commission Transcript, January 27, 2015: Item 3D**

2
3 **In Attendance:**

4 Austin Kaplan

5 Peter Einhorn

6 Sylvia Hardman-Dingle

7 Jolene Kiolbassa

8 Donna Beth McCormick

9 James Sassin

10 Dennis Speight

11 Cynthia Tom

12
13 **Kaplan:** Moving on to item 3D. This is the powers, duties, and functions of the Commission
14 and the City Auditor, including City Council Resolution 20141016-033, report from the
15 Commission working group, and possible recommendation to City Council regarding proposed
16 Chapter 2-3 – City Auditor – and Chapter 2-7 – Ethics and Financial Disclosure – City Code
17 amendments – Kaplan, Einhorn, Sassin, and Staff. You’ll remember that myself, Commissioner
18 Einhorn and Commissioner Sassin are your working group on this. We’ve been working hard on
19 this – harder than I’m going to waste my breath explaining to y’all maybe – on this.

20
21 **Tom:** There’s – just FYI – there’s back-up on this as well. It’s also toward the end I think there
22 is a draft recommendation which this Commission may choose to adopt tonight. From the
23 working group which relates specifically to just one provision of this whole giant super
24 complicated stuff only relates to the ERC and it’s on the Council agenda on Thursday. I don’t
25 know if anyone is able to come on Thursday to Council, but let me know if you are. Council
26 looked at this in work session today and it sounds like it may go forward on Thursday without
27 being postponed – without opposition – so we’ll see but definitely look at the draft
28 recommendation.

29
30 **Kaplan:** Alright and we have Michael Whellan here on behalf of TDS. Michael, do you want to
31 speak first on this thing and I’m sure we’ll get some thoughts from the Auditor. So – can I give
32 my 30 seconds first and then y’all can tell me why I’m wrong? I appreciate it. So here’s my 30
33 seconds to update you on the world as I see it. We’ve been working on this for quite a while.
34 We have a bigger package of proposed changes. That package is not ready. Some stakeholders
35 have concerns about some of the language, most of which is not – it’s between the Auditor and
36 the Auditor’s process and other union members and folks that are represented by civil service so
37 it’s not directly related to Ethics Commission complaint process stuff, but we’re sort of involved
38 in the whole bigger picture. In any event, that part of the process is – the concept is that it’s
39 going to take 60 to 90 more days for those issues to be worked out. That’s what’s been
40 communicated to me by the Assistant City Manager and lots of other folks in meetings and so in
41 order to try to get something done as a stopgap measure to keep this Commission from having to
42 hear three or four complaints from the Auditor that we wouldn’t otherwise hear because those
43 folks will be covered by municipal civil service. We’ve put together – Deborah Thomas drafted
44 the 2-7-2-7 Ordinance that’s in your packet and after I was done drafting the annual report –
45 drafted this Board and Commission recommendation which basically just says that we are going

46 to adopt this thing to attempt to keep the status quo as we see it. And those are my thoughts. I'll
47 turn it over to y'all.

48
49 **Michael Whellan:** I'm Michael Whellan on behalf of TDS. First I want to thank Chair Kaplan
50 and everybody that's been working on this. I know some are new, but this has been a fantastic
51 effort. We had a great group of people that showed up to then go over everything and then divide
52 into working groups and it's been a real example of good government and a good process. So
53 thank you for leading and for everybody participating. And thanks for the volunteer time that
54 you spend as you're doing tonight. The one thing that obviously has been an issue for us and
55 will continue to be an issue for us – and we had a good conversation outside and we've had
56 plenty of time to do that. The Auditor and – what's your official title? Acting Deputy Auditor?
57 Excuse me. I want to get the right titles rather than by calling them by first name, which is
58 delightful out in the hall. The one thing that has always been our issue – I think I've made it
59 clear, I've tried to be articulate if not annoying on it, is making sure that third parties who are
60 identified in any report are ultimately given notice so that they can show up at the preliminary
61 hearing. We had a great working group that Mr. Kaplan led and Ms. Thomas, Ms. Tom, Acting
62 City Auditor Stokes was there and myself and we – excuse me – and our City Clerk, Jeannette,
63 was there. We had a great conversation. We came up with some solutions. There is one area
64 that I do want to just explain as an important area for us. We want to be sure that it's still
65 covered and we can continue to have discussions and that's specifically on sworn complaints that
66 are filed with the Clerk. I still haven't got a solution to this, but the issue that I'd like to see
67 somehow accomplished, and we were trying to brainstorm it a little bit earlier this morning, is
68 that any person who files a sworn complain with the City Clerk should be required to provide
69 valid contact information for, and this is a quote that we've been using and the Auditor has
70 accepted it in terms of other language. "Any person or entity mentioned or referenced as being
71 involved in the alleged inappropriate conduct should be identified in the complaint and the
72 complainant should be required to provide valid information." It's fairly easy to get valid
73 information from the Secretary of State or the County records. You have to do it when you file a
74 lawsuit and you're suing defendants you get that from the Secretary of State's office, but I think
75 there should be something which either invalidates the complaint if they're not willing to provide
76 that information or we need to have something that puts the onus on the complainant, not on the
77 Clerk. One of the issues was we didn't want to put the onus on the Clerk to have to find the
78 identifying information, but this way the Clerk then has the information and can report it to the
79 Ethics Review Commission. The Clerk could give notice and know whether that was valid
80 information because they could always follow up and make sure that it was valid information
81 with a phone call, but I think this eliminates the need for the Clerk to make the determination as
82 to whether or not the person or entity was involved in the alleged inappropriate conduct. That's
83 something we decided the Auditor and the Auditor has accepted is something they are
84 responsible for. So the Auditor, if it's not going to be the sworn complaint route, it's going the
85 Auditor reporting route, the Auditor will be giving notice to, quote, "any person or entity
86 mentioned or referenced as being involved in the alleged inappropriate conduct" and that we've
87 kind of agreed to so this is now turning to the other route which is the sworn complaints. If they
88 start mentioning third parties and making sure that any third party has a chance to participate.
89 That's the issue. We're still struggling obviously because I think like a plaintiff filing a petition
90 we need to put the onus – we need to figure out a way to put the onus on the complainant to
91 provide valid identifying information. I understand the concern that the Clerk has in not having

92 to chase down that information, but I want you to know that we have some concern on figuring
93 out a way to accomplish that and we're looking to Legal – Ms. Tom and Ms. Thomas – to help us
94 do that as well and obviously all the other great minds that are here and know about the
95 situations that occurred because it's good to talk to the Auditor and Assistant Deputy Auditor to
96 help with identifying scenarios so we can work through them and make sure that they're
97 captured. Anyway, big thank you, but again, a big note of caution that this issue is still out there
98 and we need to figure out a way to tackle it. Thanks.
99

100 **Kaplan:** Thank you, Mr. Whellan. Acting Deputy Auditor, Acting City Auditor Stokes.
101

102 **Stokes:** I think you summed it up pretty well. We're still working on some things with various
103 parties. I think that from a context perspective the most interesting thing we've run into, or the
104 biggest challenge right now is that we're trying to codify some things that have always been our
105 practice and are authorized by the charter, but once you start trying to write them into Code a lot
106 of people come out and say, "wait, you can't do that" or "what if we word it this way?" or "what
107 if you do this differently?" So have this kind of piece of what we're saying. That's something
108 that we've always done and have always had the authority to do. But, for example, the police
109 union and the fire union are saying, "we're not sure we want you to be able to do this" and we're
110 saying we still can do this, but it's the trying to put it in this piece of Code to make it really clear
111 how each kind of complaint is going to be handled. It basically just calls for more time and so
112 we've gone back and it's actually at this point, I think, between our lawyers and the union's
113 lawyers so it's not even really the Auditor involved in this anymore, but I'm sure once we get
114 that information we'll be back making sure that we've worked everything out, but I think we've
115 made a lot of progress since our first meeting with you guys on this topic, even since April or
116 July all of the times we've been here to talk to y'all or that y'all have talked about it. And so I'm
117 really impressed with the progress we've made. I think we've heard positive comments from
118 most of the stakeholders who have been involved in the process, but we still have a little more to
119 iron out. I'm happy to answer questions if y'all have them.
120

121 **Kaplan:** Any other Commissioner want to trade for me and get on the speed-dial of everybody
122 up and down the City Hall and the unions? I didn't think so.
123

124 **Whellan:** Just so you know, it did come up at work session today – your paragraph – and City
125 Auditor Stokes did a nice job of explaining the paragraph and there were follow-up questions
126 from several Councilmembers about the process. There is going to be interest in this. I know
127 Councilmember Pool especially was asking a little bit more in terms of some detail about it and
128 so I expect there's going to be interest.
129

130 **Kaplan:** And I think that's right. I spoke to a staff member in Councilmember Pool's office
131 about it – just trying to explain the history of what the Ethics Commission sought to do and
132 where we are and what's going on and who I am in the first place and what the heck I have to do
133 with any of this. That was the hardest part, but in any event I did want to make sure that they
134 understood that our intent here – and I haven't heard any push back or opposition from this – and
135 I did send it to the bigger stakeholder group. Our intent here is to just keep the status quo as we
136 understand it, as we would like it to be, as the Ethics Commission has expressed it wants it to be
137 and not start ruling on folks covered by municipal civil service real soon and so that's what we're

138 doing here. So I am looking for a motion if y'all had a chance to take a look and it would be to
139 adopt this recommendation.

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141 **Einhorn:** So moved.

142
143 **Speight:** Second.

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145 **Kaplan:** Okay, motion by Vice-Chair Einhorn, second by Speight. Discussion on either the
146 recommendation or the resolution itself?

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148 **McCormick:** (whispers) Let's get this over with.

149
150 **Kaplan:** Commissioner McCormick, you have to turn your mic on when you say that.

151
152 **Hardman Dingle:** I just want to repeat what you said to make sure I'm clear on it. So, we're
153 recommending the status quo, but I thought I heard some words to say, "no, we're not."

154
155 **Kaplan:** Well, yeah. Let me take a stab and then I'll let you take a stab at cleaning up what I've
156 gotten wrong. We've already adopted a resolution – this Commission has already adopted a
157 resolution that says that we are not interested in ruling on sworn complaints alleging violations
158 of Code of Ethics against members of the City's classified municipal city service system or
159 members of the state civil service system because those people already have their due process
160 rights covered by a different system and so when I say the status quo I mean the status quo as of
161 when we adopted that resolution.

162
163 **Einhorn:** And so in the absence of the broader changes we're asking for a change just on this to
164 sort of kick the can down the road, was it 90 days, to try to get a resolution on the rest of this.
165 I'm beginning to refer to this as the "just when you thought it was safe to go back in the water."
166 When we show up for an Ethics Review Commission and Michael Whellan is not here, I'm
167 gonna feel awful lonely. It won't be the same.

168
169 [Laughter]

170
171 **Einhorn:** I just wanna say for the record, for my first four Ethics Review Commission meetings
172 I don't think anybody showed up. You could walk down the hallway to the meetings and hear
173 crickets chirping.

174
175 **Kaplan:** We're really doing our job then. Acting City Auditor Stokes, any feedback?

176
177 **Stokes:** No, I think you got it. Basically what we're saying here is, and we're all in a room last
178 week, we had several subgroup and working groups and we've been moving through this as fast
179 as possible to be ready for it to be heard on the January 29th Council agenda and we got in a
180 room and said we're not quite there and it was one the Assistant City Managers who said, "why
181 do we have to do this now? Why are we rushing? We have some stakeholders who aren't
182 satisfied – why are we trying to push it through?" and we went back to the whole reason that
183 we've been pushing the timing on this since September is because we have cases right now that

184 need to be finalized and they either need to be finalized and issued to management and go
185 through the civil service process or they need to be finalized as a sworn complaint or as some
186 sort of way to get them to y'all and so we're kind of in limbo and so this fixes the limbo,
187 meaning that we'll move forward with those cases and the only exception would be if we have
188 an investigation that's substantiated or that we have reasonable basis to believe that a violation
189 has occurred then of somebody who's not in those protected classes, so all the City executives or
190 a City official then under our current interpretation those would come to this Commission, but at
191 this point we don't have those. We aren't ready to bring anything of that type to y'all so this just
192 carves out the ones y'all said you didn't want and that we would prefer not to handle differently
193 than we're going to be handling them in three months. So it's kind of an administrative fix to get
194 us more time to get to a longer term solution.

195
196 **McCormick:** Bottom line – more to come later.

197
198 **Kaplan:** That couldn't be more true. Hearing no further discussion, we'll put this to a vote. We
199 have the motion pending. All those in favor?

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201 **Everyone:** Aye.

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203 **Kaplan:** No one opposed, that passes unanimously. Thank you. And we may ultimately see
204 this go on consent and get passed in the first historic meeting of the 10-1.

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