

1 **Ethics Review Commission Transcript, October 28, 2014: Items 2d and 4a**

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3 Austin Kaplan: Chair
4 Peter Einhorn: Commissioner
5 Sylvia Hardman-Dingle: Commissioner
6 Donna Beth McCormick: Commissioner
7 James Ruiz: Commissioner
8 James Sassin: Commissioner (absent)
9 Dennis Speight: Commissioner
10 Cynthia Tom: City Attorney

11
12 **Austin Kaplan:** So the next item on the agenda is 2d. Request from Texas Disposal Systems to pass
13 resolution regarding jurisdiction of the Ethics Review Commission and invalidating actions of the City
14 Auditor. I know we have Michael Whellan on 2d and 4a. Would you like to kick us off with a comment?
15 And actually just limit it to the same 3 minutes.

16 **Michael Whellan:** We're going to be quicker than that. I don't want Jim Cousar to leave, though, he's our
17 historian on these rules. I'm serious, I think he would...

18 **Cynthia Tom:** He's off the clock. If he wants to hang out for fun...

19 **Michael Whellan:** I certainly think he offers a great deal of introspective. Can you shut the door please?
20 Michael Whellan on behalf of Texas Disposal Systems. We, first and foremost I want to thank y'all for
21 being here; for taking this up; for putting it on the agenda; for the late hour; and for all of your volunteer
22 work. I think it is significant and important; and I think you give this City a great honor in the way that
23 you conduct yourself; and I want to emphasize that because you are the sole decider of violations of
24 Conflict of Interest rules and rules under the election code. And I think it's significant that we're here
25 today and we're asking you to reject the City Auditor's report. And you might ask yourself, why are we
26 asking you to do that. And it is because you are the sole authority to make that decision. In addition, if
27 you look at the Auditor's report, frankly the Auditor invited this resolution. When they distributed the
28 report prior to sending it, I might add, to Daniela Ochoa-Gonzalez, they distributed it to the Ethics
29 Review Commission prior to Ms. Ochoa-Gonzalez ever getting it; prior to TDS ever getting it; they
30 themselves invited you to review it first, put it on your Agenda, which you did. You took their bait,
31 frankly, and now I think it is time for you to pass a Resolution rejecting it. I also believe strongly that this
32 provides the place for checks and balances. The Auditor is not the judge and jury. The Auditor may
33 gather facts and may present those facts, but you might ask yourself, and I would encourage you to ask
34 the Auditor yourself, why is it that they have never done this before. They cannot point to another
35 example where they have written a report on a commissioner or board member and have found
36 somebody guilty as charged without any due process. We, we have this due process in place; it should
37 apply to everyone. When we get to the ordinance that's being proposed, you've already pointed this out
38 Commissioner Einhorn, it is scary to see the extent to which salaried city officials and salaried employees
39 will be investigated. They have specifically not stated that they cannot investigate commissioners and
40 board members in the language that was proposed by Spellman. It is not prohibited; they'll still be able
41 to do exactly what they did to Ochoa-Gonzalez. And frankly, as you pointed out Commissioner Einhorn

42 last time, it is surprising that they passed both of these on the same day. The failures are articulated in
43 the Resolution. There are three main failures. One, they exceeded their jurisdiction by taking away your
44 authority and deciding themselves somebody's guilt. They failed to follow the process, completely
45 ignoring the Charter and City Code, and they failed to apply the, one of the two required standard
46 elements, factors, in finding a conflict of interest. There was no direct economic benefit. And what's
47 worse, is there's no analysis, they simply mischaracterized the three agenda items as quote "TDS agenda
48 items" without any disclosure to you when they directed in their distribution list, this report to you; no
49 disclosure to you that those were items of a generic interest, two of them especially. Universal Recycling
50 Ordinance, and Special Events Ordinance, and the third one was an Austin Energy contract for which
51 Republic Disposal was the only, was the sole remaining bidder. Why do we... I must say also, what's been
52 most striking when you read the Statesman comments from Jason Hadavi, who is here and can speak for
53 himself, is how completely unapologetic, completely unapologetic the Auditor is about their failure to
54 follow the process, their exceeding their authority and their failure to properly apply the standard.
55 Completely unapologetic. We need a message from you that is clear. You're the decision maker. And
56 again, I think that when you get into the discussion later of 4d, of 4a, excuse me, you'll see that that is
57 completely, a completely unnecessary reaction to a mistake. A mistake made by the Auditor, and it
58 should not be remedied by pointing to new language that needs to be added, which takes away the
59 Ethics Review Commission's power and instead what should happen is a Resolution tonight rejecting this
60 report. I don't know if there's anybody else who has any comments.

61 **Bob Gregory:** May I continue? I'm Bob Gregory with Texas Disposal Systems. You've heard from me two
62 times already, this is the third time. Thank you very much for taking the time to hear these comments
63 and hear our request. Thank you for putting this item on the Agenda; it was at our request and I very,
64 very much appreciate it. It's important for TDS to have a determination from this Commission. This
65 Commission has sole determining jurisdiction on this issue. You know that. It had it when the Auditor's
66 report came out. It has it now. Please settle this issue now and not require me to go to a higher court on
67 it. Michael has touched on several things that I was wanting to touch on, but one of the things that I do
68 want to mention is much has been said about the rights and the need to protect the anonymous
69 complainant, yet almost no consideration has been given to the other party that is almost always
70 mentioned or condemned in a conflict of interest complaint or determination. In this case it's TDS. But in
71 other cases it could be any non-profit group, any environmental group, any company or any individual.
72 These entities have reputations too, and they deserve due process right protections just like Boards and
73 Commission members do, and just like salaried public officials do, that you'll be considering later. The
74 City Auditor should not be the investigator, the prosecutor, the judge, and the jury. Please approve the
75 Resolution rejecting this Auditor's report and please attach the Commission's Resolution to the Auditor's
76 report until such time that it is withdrawn by the City Auditor. You have received our comments and the
77 basis for our comments and I thank you for your consideration. And just like last time, I'm happy to
78 answer any questions that y'all have for us.

79 **Austin Kaplan:** You have two minutes of the total time left.

80 **Gary Newton:** Well actually, Gary Newton, Texas Disposal Systems. I really don't have anything new to
81 add to what they've covered. I just wanted to second it, and was here to donate time.

82 **Michael Whellan:** I do want to say one thing because I am very appreciative of your patience on this
83 matter. We have spent a significant amount of time and money focused on this because we do believe in
84 this cause and we believe strongly in protecting citizens' rights to have a full and fair process, and for the
85 Auditor not to exceed the bounds of their authority and to be held in check. And so we're going to pay
86 special attention when we get to it, on the Resolution, the other language, the Code amendments, and
87 that's where I think it will be handy for Jim Kowser to speak up. But I do feel, and we feel, very strongly
88 as you can tell about rejecting this Auditor's report once and for all. Thank y'all very much for your
89 attention and your time.

90 **Austin Kaplan:** Commissioner Einhorn.

91 **Commissioner Einhorn:** No, I'm not ready yet.

92 **Austin Kaplan:** Okay. Commissioner McCormick.

93 **Commissioner McCormick:** The Council has already passed the Resolution. The Council is above us, and
94 we're down here.

95 **Michael Whellan:** You're not. You're above Council on this issue. You have sole jurisdiction to decide
96 Conflict of Interest rules. I knew that you were going to ask that. You're absolutely; I wrote down, "Why
97 you?" would be the question you would ask. And the answer is the sole, the Council doesn't even get to
98 decide whether somebody has violated Conflict of Interest rules. Under the Code and the Charter as it's
99 written this body is the sole decision maker of violations of the Conflict of Interest rules.

100 **Commissioner McCormick:** But if they can put us in, and take us out...

101 **Michael Whellan:** They can.

102 **Bob Gregory:** That's true. But while you're here...

103 **Michael Whellan:** That is true, but while you're here...

104 **Bob Gregory:** ... you have sole jurisdiction.

105 **Michael Whellan:** ...you have sole jurisdiction. And this body, whoever is made up of this body, even if
106 you're told to leave, Commissioner McCormick, God forbid, even if you're told to leave, this body still
107 exists. Somebody will be on this body as the sole decision maker.

108 **Commissioner McCormick:** But it won't be the same people and they may not have the same ideas we
109 have.

110 **Michael Whellan:** I understand.

111 **Commissioner McCormick:** Now what are we... I'm not the lawyer on this group.

112 **Austin Kaplan:** Well our lawyer is Cindy Tom.

113 **Cynthia Tom:** Is there a legal question?

114 **Commissioner McCormick:** Do we have the authority? After the Council has already passed a resolution,
115 do we have the authority to pass a resolution that might contradict that?

116 **Michael Whellan:** It doesn't.

117 **Cynthia Tom:** Council action is going to supersede, you know. If you have a sworn complaint before you,
118 and you have a hearing, and you make findings of fact or conclusions of law, like we were doing earlier,
119 you are the ultimate authority on those decisions. You don't have a sworn complaint before you...

120 **A Commissioner:** But we don't have that.

121 **Cynthia Tom:** ... and you're not having a hearing so, you know, I think some of these issues, maybe, are
122 almost asking to make findings of fact or conclusions of law without those processes. But I don't know if
123 that's answering your question.

124 **Austin Kaplan:** Commissioner McCormick. Commissioner Einhorn, or Hardman-Dingle.

125 **Commissioner Hardman-Dingle:** I was going to say, my problem is, I understand your complaints and I
126 sympathize, and again without knowing if they're right or wrong, I understand, but it looks like the City
127 Council has spoken and given you everything that you're asking us for, so the point is moot.

128 **Bob Gregory:** That's not correct.

129 **Michael Whellan:** So the reason that's not completely accurate is the Council does not have the
130 jurisdiction to make determinations of guilt under the Conflict of Interest rules. The only body that has
131 that authority is you. And we have not heard a resounding rejection; we have not heard a resounding
132 rejection from this body of this report. And I might add, they invited it when they distributed their report
133 to you.

134 **Commissioner Einhorn:** But Cindy, is it not true that we don't have that jurisdiction unless we have a
135 complaint in front of us.

136 **Cynthia Tom:** Right, and as I stated before, if you had a sworn complaint before you on the Daniela
137 Ochoa-Gonzalez conflict of interest facts, and you had a preliminary and/or final hearing on the matter,
138 you would have the authority to make findings of fact, you know, "this happened" or "this didn't happen,
139 in conclusion, blah, blah." "This is a violation, this is not a violation." You don't have that before you and
140 you never have. So it is true that if you did have a complaint before you and you did have hearings you
141 would be the entity under City Code that would make the final determination as to whether, you know,
142 obviously our standards are whether there's a preponderance of credible evidence on record to show
143 that a violation had occurred. So you would make that determination. And you would have the ability to
144 make that determination and Council would not, that is very true. If you were following your hearing
145 procedures, complaint, notice, hearings. Without following those procedures, you know, I can't really say
146 that you have the authority to make those same determinations. As we discussed before, you don't have

147 a complaint currently before you. That's not to say that you could not get a complaint. Any person can
148 file a complaint with the Commission. It doesn't need to be sworn, but the person would need to be
149 fairly sure that a violation occurred to file it, but there is that two year statute of limitations on conflicts
150 of interest, and so I think we're still within, within that statute of limitations. You could get a complaint in
151 the future on these facts, but you don't have one in front of you today.

152 **Commissioner Einhorn:** Cindy, is it true to say that we've never had a sworn complaint on this issue. We
153 had an Agenda item...

154 **Cynthia Tom:** You've never had a sworn complaint. That's correct.

155 **Commissioner Einhorn:** ...in July, in response to the Auditor's report. I'll say this, Mr. Whellan, I think
156 you've heard me say enough on this issue to know that I am sympathetic to a lot of the points that are
157 made in this, but this resolution makes me very uncomfortable because of some of the Whereas-es are, I
158 really do feel they are findings of fact, you know, outside of the very two-step process that this
159 resolution talks about. In addition, you know, I have real concerns about what our jurisdiction is, you
160 know, the last Be It Further Resolved talks about directing the Auditor to withdraw the report. This
161 Commission has absolutely no authority over the Auditor's office; has absolutely no authority to direct
162 them to do anything. We can't direct them to go and buy me a soda downstairs even though I'm really
163 thirsty right now.

164 **Michael Whellan:** But you can make a recommendation. Just so you know, the Resolution was simply a
165 template for the discussion. And I would say this, I hear what everybody is saying about a sworn
166 complaint and findings of fact; I get it. Your silence also has significance. And there's nothing that doesn't
167 say that the Auditor's themselves can, they can file a sworn complaint if they believed that they had a
168 case, and they've just never done that. It's okay to pass a Resolution, even if it's simple, and it's just a
169 simple rejection of the report, and require them then to follow the process. What you allow them to do
170 with your silence is, prepare a report of guilt, distribute it broadly to the Mayor, Council, City Manager,
171 Assistant City Manager, Ethics Review Commission, City Clerk, Director of ARR, Director of
172 Communication, Public Information, and get away with it without this body just simply saying, "We
173 reject this report." And make them file a sworn complaint.

174 **Austin Kaplan:** Mr. Whellan, I certainly hope that I haven't come across as being silent on this issue. And
175 I think that when we take up the next agenda item, or the agenda item with regards to Code
176 amendments, I think that's really the most effective way for us to be involved in this process. I don't have
177 a huge amount of interest in passing a resolution. I'm more interested in getting in front of the City
178 Council, and protecting the jurisdiction of this commission, where it really matters.

179 **Michael Whellan:** We concur with you on that.

180 **Austin Kaplan:** This is a citizen commission that needs to have jurisdiction over very vital areas of the
181 Code of Ethics. I would argue that we are, as you have said, the decision making authority on violations
182 of the Code of Ethics. I would be very interested in protecting that jurisdiction going forward. To me, this

183 isn't necessarily the most interesting way to do that as much as taking up that conversation and, you
184 know, going before the Council and making that case to them.

185 **Michael Whellan:** I think both go hand in hand. But that's here and there.

186 **Austin Kaplan:** Do we have a motion on the table to adopt this, or, is there any motion on the table from
187 the commissioners to take any action?

188 **Commissioner Hardman-Dingle:** I move that the Commission take no action on the resolution. I won't
189 state all the reasons why; the discussion has already been given here. That would be the resolution, the
190 motion, I'm sorry.

191 **Austin Kaplan:** Okay, motion to take no action on this resolution. Do we have a second?

192 **Commissioner Einhorn:** On a motion to take no action?

193 **Commissioner Speight:** I don't under... I just say we stay silent and don't do a motion at all. That's just,
194 that's part of my discussion.

195 **Austin Kaplan:** Discussion? Do we have a second on the motion?

196 **Commissioner Einhorn:** If there was a motion to take no action, could we, would we have to do a
197 motion to reconsider at another time if we wanted to take the resolution up at a later time?

198 **Cynthia Tom:** Yeah, maybe.

199 **Commissioner Einhorn:** Such as after the Council had taken action on Code amendments.

200 **Cynthia Tom:** On this particular resolution, if you might want to take it up at a later time it might be best
201 not to take, have any motions on action or otherwise today. But I can't say for sure that you couldn't take
202 it up again.

203 **Austin Kaplan:** All right. We've received something like legal advice on, unforeseen in Robert's Rules for
204 this, but we have a motion to take no action. Do we have a second? Is there a second?

205 **Cynthia Tom:** You could postpone to a future specific date. Tabling would, just table it for this meeting,
206 without, are you going to come back to it again later in this meeting?

207 **Austin Kaplan:** I'm not suggesting we do that. So we have our motion, do we have a second? Hearing no
208 second; that motion dies. Is there further discussion that y'all want on this Agenda item 2d? With the
209 understanding of course that we're going to come right back to this when we talk about 4a; in some
210 shape or form if not directly on this Resolution, but on this general issue. Any further discussion? Okay.
211 Thank y'all. Why don't we just skip ahead. We do need to do e. and f. but why don't we go ahead and
212 just move ahead. But if I could ask y'all to make room because I think the Auditor is going to come up
213 and join us for this discussion. Of course you're invited to stay.

214 **Michael Whellan:** Oh we will.

215 **Cynthia Tom:** We do need to do...

216 **Austin Kaplan:** No, let's do e. and f. later. We're going to move ahead to 4.a. unless there is an objection.
217 4.a. Old Business. Powers. Tabling e. and f., we'll come back and do them before we're done tonight. And
218 noting that it's 9:33 and that the goal is to be out of here at 10 or before. 4.a. The powers, duties, and
219 functions of the Commission and the City Auditor, including City Council Resolution numbers, you can
220 read, and report and possible recommendation from working group Kaplan, Einhorn, Sassin, Staff. And I
221 invite the Auditor to come up here. I want to give you guys just a really quick overview of what Peter was
222 good enough to draw in kind of a Visio format for everyone. Jason's seen this before because I drew it on
223 the white board while we were sitting in a room working. We'll get it up on the screen so everybody can
224 follow it. I'm just going to stand if y'all will... oh man that feels funny. All right. Here's the story. So the
225 working group met with the Auditor to try to figure out how to solve this, you know, solve the problem
226 of jurisdiction with thoughts to the Ochoa matter and also thoughts to the matter moving forward;
227 thoughts to what things are going to look like in 10-1, etcetera, etcetera. It's a bigger issue than we even
228 have time to discuss today, or we had time there. But first we talked about complaints in City executives.
229 And I want to draw a distinction between City executives and City rank and file. Those aren't technical
230 terms but we're using them as sort of malleable terms to give you an idea of who we're targeting. City
231 Executive would include all the high up folks: Assistant department directors, department directors,
232 Mayor, Council, Council Staff, etcetera. For those folks we envisioned a process that looks something like
233 this. It's up on the board there. We envisioned a process that looks something like this. A complaint can
234 be filed against any of those folks by, in four different places. The City Auditor, that's an anonymous
235 complaint. City Management, people may be filing against their supervisor, HR, that may be something,
236 and the Ethics Review Commission; that probably shouldn't have a question mark, that probably should
237 just be Ethics Review Commission. That's, if someone files a complaint against an executive with the
238 Ethics Review Commission, we go ahead through our process that we did three times tonight. That's the
239 bottom line. Here's the problem. People are filing lots of complaints with these other entities that we
240 haven't heard of and we were not even aware of until the Ochoa matter came before us. So what do we
241 do about that? Do we wrest jurisdiction from all of those folks and put them through our process tonight
242 and hear thirty complaints? We heard three tonight and it's almost 10:00. So, you know, it would require
243 an entire re-envisioning of the Ethics Commission to do that, even with respect to City executives. So
244 what we thought was this, it goes through the processes that currently exist with the Auditor, City
245 Management, and HR; goes through an investigation, they come to a conclusion. This is something that
246 we can hash out in a little bit more detail, but perhaps the Ethics Commission gets a report; and there's
247 not really currently a system in the City in any of these instances as I understand it, to create a canned
248 report to give to the Ethics Commission, with respect to complaints that are within our jurisdiction, so
249 Code of Ethics complaints against these folks. And I'm sorry, it's not in this form, but we're just talking
250 about stuff that's in our jurisdiction, so it would be Code of Ethics stuff. But, if they come to a conclusion,
251 some kind of a finding, there would be something like an appeal process to the ERC to make a final
252 determination of the Code of Ethics violation. So we don't run into a situation where there's been sort of
253 a determination by the Auditor that somebody feels like they can't bring before us and to have us shine
254 light on it and bring it to public. That's a process that doesn't really exist yet, as we've learned tonight,
255 and as we've learned throughout this process. But it's certainly something that we can suggest in

256 recommendation to Council, that Council writes into the Code amendment that's currently being
257 envisioned. So that's kind of how we see complaints against City officials. What y'all don't have in front
258 of you is what to do about complaints about rank and file. And here's the problem and I'm just going to
259 give it to you really briefly. The problem with complaints about rank and file is there are many, many,
260 many, many, many, many more of those complaints. Way too many for us to even envision here. Like
261 hundreds, I don't know, possibly thousands. We really don't know. They're going to HR, they're going to
262 Management, they're going to Auditor. They're things we really wouldn't consider. Somebody's using
263 their work computer here at the City to send personal emails. I mean, if we start hearing that stuff we're
264 going to be here every day. And so it's simply just not something that we're constituted in our current
265 form to do. So we had the idea, and unfortunately we don't have a Visio on this, or whatever, but it
266 would be, complaints about rank and file would go to those same three bodies. The Auditor, City
267 Manager, you know, whoever they are complaining to in their management, HR. And if somebody were
268 to file it with the ERC, it would be filed with the Clerk. The Clerk would have instructions, we can write
269 that into Code, to refer it to the Auditor. Now everyone's, you know, I would like for you to let it go out
270 from your head, "What do we do about due process for these alleged violations, and conflicts of interest
271 just for rank and file folks?" And here's what we think the solution is. Those bodies investigate, it goes to
272 the City Manager who decides what to do about discipline, and then after the City Manager makes a
273 determination of discipline, there's actually a separate process, that's a brand new process, the M triple
274 C. What's the technical term? Municipal Civil Service Commission. A new commission that's been
275 constituted, that has its own set of due process, you know, stringent requirements, and that we would
276 say would be sufficient for City Staff, rank and file, not Board and Commissioners, not Council, Council
277 Staff, Directors, etcetera, but just, you know, City employees. And they would be, as long as they're
278 handled under Municipal Civil Service, they wouldn't come to us for final appeal. So the distinction, if I
279 can take you out of this magical world, would simply be this. If you're covered by Municipal Civil Service,
280 so you have a due process backstop, and you have these investigations, The Ethics Review Commission
281 would not assume jurisdiction over those folks. We currently, I think my understanding is, that we
282 currently have it, but those complaints haven't been coming to us, but they can, and there are thousands
283 of them.

284 **Cynthia Tom:** I don't know if there are thousands.

285 **Austin Kaplan:** Well, hundreds. Let's say hundreds. We really don't know. So if I can draw the distinction
286 for you, it'd be as simple as this. Rank and file, municipal civil service, those folks go through the
287 Municipal Civil Service process and that's where they get their due process with respect to these
288 violations. Anyone who is not covered by Municipal Civil Service would then go through a different
289 process where we would then have a potential appeal to the Ethics Review Commission for anything
290 within our jurisdiction. And I think we'd like to see a report from these three entities just so we have an
291 idea what's going on. It's not something that currently exists, but it's something we can kind of ask for. Is
292 that about correct?

293 **Jason Hadavi:** Close. If I could just make a couple of clarifications. Sure. Jason Hadavi, Chief of
294 Investigations with the Auditor's office. So one, at the beginning when the Chair was talking about City
295 executives, City executives doesn't go intend elected officials. It's the City Manager, assistant managers,

296 department directors, and many assistant department directors. This flow chart is an outline of a process
297 we envisioned for City executives for, if I can just go over here and point so that everyone can see what
298 I'm talking about, for elected officials, the Mayor and Council, and for non-salaried officials, which is all
299 Board Members and Commissioners; we would envision them only going through this process to the
300 ERC. And that was actually reflected in the language that Spellman proposed. There was lots of back and
301 forth on the exact terminology but in, oh gosh, 235 Powers and Duties m, and this is the proposed
302 language, it's not the existing Code, it says "The City Auditor shall refer any complainant who alleges that
303 a non-salaried City official has violated Article 4 Code of Ethics, or Article 5 Financial Disclosure 2-7, to
304 the Ethics Review Commission complaint and hearing procedures as set out in Article 3 of Chapter 2-7.

305 **Cynthia Tom:** Jason, can I just ask for clarification. So my prior understanding of the intent behind that
306 section was that it would really only apply to Board Commission members and not Council. But are you
307 saying that you understood that it would, that Council would also fall into that non...

308 **Jason Havadi:** So my point about that subsection was to address the Board member and Commissioner
309 complaints. That we would not be investigating Board members, Commissioners. If anything comes in
310 regarding a Board member or Commissioner we immediately sending it to the ERC. Through discussion
311 with the working group, we added to that complaints against the Mayor and Council, which are the
312 elected officials, and the Council appointees, which are the City Manager, City Clerk, City Auditor, and
313 municipal court judges, I believe. Clerk. Thank you. Clerk of the Court, as well as the judges. And so all of
314 those parties, allegations against any of those parties would follow the same treatment, where it would
315 be referred directly to the ERC. We wouldn't do any investigation; we would refer it to your attention.
316 For City executives it's the process that you see up here. And then for non-City executives, that is all
317 those employees that are compensated, salaried, or salaried City officials or City employees, they would
318 follow the process that the Chair outlined which goes through the Municipal Civil Service Commission
319 because they're all covered by that.

320 **Corrie Stokes:** Although there are other Civil Service...

321 **Cynthia Tom:** Right.

322 **Jason Havadi:** Public Safety is an exception but they have their own processes that are already
323 established. Correct. I don't know if I made that more complex, or if I cleared anything up.

324 **Austin Kaplan:** No that helps. So, so just to restate it. We've got three different groups: Execs,
325 elected/appointed/ and then regular employees which we are calling rank and files. Execs go through
326 this pipeline. Elected/appointed/ would come straight to us. That's actually going to increase our
327 workload a little bit, just so you know what we're getting ourselves into. And then employees would not
328 so theoretically if they had come before us it would decrease our workload, it decreases our jurisdiction,
329 certainly, because we're punting those folks, but we've never, as far as we can recall, had a complaint
330 about Code of Ethics against the rank and file City employee, that we can remember, come before this
331 commission so...

332 **Commissioner Einhorn:** Appointed officials are the Clerk, the Auditor, the City Manager, Municipal Court
333 judges...

334 **Jason Havadi:** And the Clerk of the Court, who's the administrator for....

335 **Commissioner Einhorn:** ... and then Boards and Commissions.

336 **Cynthia Tom:** But those would not be... I mean, I'm just referring back to the language, those would not
337 be non-salaried City officials, those would be salaried City officials, you know; the Auditor, the Clerk...

338 **Jason Havadi:** They would all follow the same treatment though.

339 **Cynthia Tom:**appointed and salaried.

340 **Commissioner Speight:** They would all come straight to the ERC.

341 **Jason Havadi:** Yes. Well, I can't prevent someone from making the allegation to us. What we do in
342 response to that allegation is...

343 **Commissioner Speight:** Is refer them.

344 **Jason Havadi:** Yes.

345 **Austin Kaplan:** And there is already, in the resolution, there is already language the Auditor does not
346 need to make a sworn complaint... (noise) refer the complaint...

347 **Jason Havadi:** And that was the clarification of the language. We went back and forth on referring the
348 complainant, referring an allegation. And the reason I wanted to refer an allegation, or complaint for
349 consistency purposes, is because we often don't have someone on the phone or someone in front of us
350 to speak with, but I still want to be able to refer that information.

351 **Corrie Stokes:** So if we receive an anonymous allegation, we would still refer the allegation. We don't
352 know who the complainant is, but we do have an allegation, perhaps with sufficient detail...

353 **Jason Havadi:** ... that you might want to take up the complaint yourselves.

354 **Cynthia Tom:** Which brings up a question for the commission. What would you do with that? And how
355 could you envision the process to ...

356 **Commissioner Einhorn:** Is this Commission going to need to ask the Council to set aside some money
357 for investigation because, you know, a lot of the times, from my understanding, these complaints are
358 kind of, rather vague, and you guys are professional investigators, so with something vague you could
359 probably find something, if there's something there...

360 **Austin Kaplan:** But, help me think this through while we're all here. I mean, we have complainants come
361 before us, we had three of them tonight, they have allegations, you know, they have some information
362 that's publicly available, maybe a tweet or two, what have you, but, you know, they don't have subpoena

363 power either, necessarily, but they certainly are not able to go and like fish out, you know, any
364 information that we couldn't necessarily ask the respondent for if we thought that we were moving to a
365 final hearing and having it in two hearings. So, I don't know that we're necessarily all that handicapped.
366 Am I forgetting something?

367 **Cynthia Tom:** So there wouldn't be, just for clarification, there would be no respondent unless you had,
368 the Commission had filed a complaint on some initiative, under Code as it is currently written.

369 **Austin Kaplan:** Yeah. We need a way so that we can, and maybe it's constituting a working group or
370 maybe it's something else; we need a way to like, not have to have three meetings to handle each of
371 these because we're going to get, we're going to get them. They're going to come. So we need to find a
372 way to set the preliminary hearing once we get the complaint, even though it's not a sworn complaint.
373 So that's...

374 **Cynthia Tom:** You might need to use a committee versus a working group just because...

375 **Austin Kaplan:** That's fine.

376 **Cynthia Tom:** ...a working group is less permanent. It's supposed to have one kind of function when the
377 function is done the working group ceases to exist. However, committees are subject to...

378 **Commissioner Einhorn:** So a committee's going to be permanent, or...

379 **Cynthia Tom:** No.

380 **Commissioner Einhorn:** Do we need a bylaw amendment or something like that? Don't we have the
381 ability to have subcommittees?

382 **Cynthia Tom:** It would be bylaws, and committees, I think, have to abide by TOMA. [Texas Open
383 Meetings act] So, FYI.

384 **Commissioner Einhorn:** So it'd be, it would have to be an open meeting, as a committee?

385 **Cynthia Tom:** I think so. I can double check.

386 **Commissioner Einhorn:** Even though it's not a quorum of the full...

387 **Cynthia Tom:** I think that 2. 1 says all committees are subject to TOMA, and I don't... but I can double
388 check.

389 **Austin Kaplan:** So, just for information, so just for background information, if it feels like this is moving
390 too fast, and it is moving too fast, the working group has expressed that repeatedly in different levels of
391 volume. And unfortunately Council has already moved on this so we're sort of playing catch up. And so,
392 you know, if we don't want what is currently being proposed to Council we need to get in front of
393 Council with something different, and hopefully better, that we all agree on that reflects the process that
394 we want to have happen. Obviously, you know, as we've seen here, trying to work it out is difficult, it's

395 easier said than done to get it right. But, I think this is a step in the right direction in term of sort of
396 trying to figure out how to handle these problems.

397 **Commissioner Einhorn:** I think the proposal addresses my major concern which is the due process. I
398 think for folks who are covered by Municipal Civil Service that there is a due process procedure in place
399 for them. And so, you know, for the Boards and Commission members, for Mayor and Council, for the
400 appointed officials it's important to maintain that due process, and I think that's something that we offer.

401 **Commissioner Speight:** But the way we deal with anonymous complaints that may show up in their
402 world, we would end up having to be the ones that basically follow the complaint.

403 **Cynthia Tom:** Under current Code that's your only option unless you want to propose some Code
404 amendments to give you some other options.

405 **Commissioner Einhorn:** And there isn't Code procedure for us to hire investigation, investigators, right?
406 Or to have someone come in and help us with...

407 **Cynthia Tom:** There's no mention of investigators or the Commission hiring. There are certain
408 circumstances that are set out in your existing Code where it might be, the City might pay for (inaudible)
409 bill and at certain times... I'm sorry... The City attorney also has certain procedures where is she believed
410 there might be a conflict for City Council and City Staff attorneys to represent the Commission, then she
411 will hire outside counsel. There isn't anything right now, specific in Code about hiring investigators.
412 There's general language about Law Department providing staff. And I think there's also some general
413 language in the Duties section about City Manager providing assistance; City Manager and Council
414 providing assistance to a Commission as needed. So there's not anything specific but that doesn't
415 necessarily mean that if Council wanted to provide money to hire some type of investigator or somebody
416 be on contract, that they couldn't authorize that. I don't know if a Code amendment would be
417 necessary. It may be more of something that would need to go in the budget.

418 **Austin Kaplan:** Okay. So, you know, so we have a couple of, I mean, there are going to be a lot of details
419 that we would, with more time be able to do a better job suggesting. But we just don't have it, I think, is
420 what we're understanding, and so, you know, I'd like to have us have some sort of an idea from the
421 Commission tonight, if we're heading in the right direction and then how to get this in front of Council,
422 since it seems like we're all, with the exception of the details, more or less on the same page.

423 **Corrie Stokes (Deputy City Auditor):** I just had a couple of comments about the Executives, I guess, and
424 some of the direct appointees, and Jason may have said this in the meeting that y'all had.

425 **Commissioner Hardman-Dingle:** Excuse me, what's your name, please?

426 **Corrie Stokes:** Oh sorry, Corrie Stokes, Deputy City Auditor. I apologize. So under the current process,
427 pre- Municipal Civil Service, which took effect, which officially took effect I think two days ago, so, 27th,
428 yesterday, but essentially pre-Municipal Civil Service we had our personnel policies which would apply to
429 every employee of the City and there's a process and an appeals process laid out in there. So currently,
430 or until, actually until July which is when the appeals portion of the Municipal Civil Service took effect, if

431 you were an employee covered by those personnel policies, not covered by Civil Service or Public Safety,
432 in Public Safety, you, that would go through an appeal process through the, through management
433 basically, through the City, the final decision maker was the City Manager for all of those folks. And that's
434 currently the process for those executives so I understand that there may be a desire for more due
435 process or more of a public process for those executives; at the same time for most executives, they are
436 covered under those personnel policies and therefore do have a process in place to appeal any decisions
437 made as the result of an investigation. So, I wanted to clarify that. And that would also be true, that's not
438 necessarily true, I think it gets a little, I guess, for us, we have some independence concerns when it
439 comes to investigating or auditing our bosses. So we stay away from, to the best of our ability, from
440 auditing, for example, let's say the Auditor conducting an investigation involving the City Auditor;
441 conducting an investigation involving City Council members, although we have not had a process spelled
442 out in Code for that so we've had to develop that kind of ad hoc as those concerns have come up. So, for
443 me, at least from my perspective, and the Auditor's office, I think that it's key to have the, this
444 Commission looking at those involving the City Auditor and the Mayor and Council, the City Manager, I
445 could also see a case for that. I think some of the other executives we could continue to handle and
446 those would go through the same appeal process we have. I'm not making a case to do that one way or
447 another. We certainly, I think, we've talked about it extensively in house, and if that's something the
448 Commission wants to do we'll definitely support that. I wanted y'all to have all that information.

449 **Austin Kaplan:** Any thoughts from the Commissioners on that? Right. The problem is the clock is ticking.
450 This is the problem with the process, unfortunately. So, okay, we need to get in front of Council on this,
451 so, we can either adopt some kind of a resolution or we can empower the working group to adopt some
452 kind of a resolution, thank you, recommendation, sorry, recommendation to Council to do something
453 along these lines but we don't have the final language tonight; it's just not going to be here tonight. Are
454 y'all comfortable with doing that? I'll leave it to y'all to figure out what we should do as well.

455 **Commissioner McCormick:** I was not here for the last meeting. Who's on the committee?

456 **Austin Kaplan:** Oh, this working group is Commissioner Einhorn, myself, and Commissioner Sassin, who's
457 not here tonight. Sure, do y'all want to offer a thought? Can you limit it to just a few minutes? Y'all are
458 over your 9 minutes, I'm relatively certain.

459 **Cynthia Tom:** When you hit 10 you can keep going we just need to take a vote by the Commission to
460 extend the meeting past 10:00.

461 **Gary Newton:** How much time do we have?

462 **Austin Kaplan:** As quickly as y'all can.

463 **Michael Whellan:** We do have a few comments. We think this is pretty amazing.

464 **Cynthia Tom:** And I'll probably stop you in the middle of a comment when you do hit 10, so...

465 **Michael Whellan:** I understand. Thank you again, Michael Whellan on behalf of TDS. Again, I'm going to
466 start kind of where I began. I would encourage you to talk to your counsel, Jim Kowser, who worked on

467 and wrote these rules. I feel like there hasn't been a problem until the Auditor wrote a report that
468 exceeded the Auditor's jurisdiction and what we have here is a reaction to that that has cast a net by the
469 definitions that have been used that is extraordinarily wide. Your net was never as wide as it has now
470 become as the result of the definition of abuse and fraud that has been put in here. I'd also point out,
471 page 7, under 2-3-5-i; the City Auditor, says that they're responsible for investigating fraud, waste, and
472 abuse matters involving salaried officials. It does not explicitly exclude their investigatory powers over
473 non-salaried City officials, and I would encourage you to be sure to have that explicitly added so that we
474 don't find ourselves again faced with the situation we did with Daniela Ochoa-Gonzalez. Also, looking at
475 page 11, under H, we have the Auditor filing the investigative report. You'll see under G that they will
476 notify the respondent of the findings but they won't give the report before they circulate it broadly just
477 as they did, and just as they ruined Daniela's reputation and livelihood. Hereto, they don't have to
478 provide a copy until they have the final copy, and they don't even give an advance opportunity to the
479 respondent to see the report. So I would encourage some thought there as well. So those are the two,
480 three items that I would say again, I don't think this is necessary. The processes work. You haven't been
481 flooded by hundreds or thousands of people coming before you in the past.

482 **Gary Newton:** Gary Newton, Texas Disposal Systems. Yeah, when I first saw the Resolution it struck me
483 that this was a solution looking for a problem. In my mind there was no problem. There was already a
484 process in the Ordinance. The City Auditor has all the authority to investigate but when they come to a
485 position that they think there may have been a violation of the Conflict of Interest laws, under the
486 Ordinance, the current Ordinance, they are to report the suspected violation to the appropriate
487 authority. For Conflicts of Interest that would have been the Ethics Review Commission by means of a
488 sworn complaint. They didn't do that. They should have. That's in the current Ordinance; it doesn't need
489 to be changed. Now, I see a lot of these Whereas-es where they talk about there's issues with the
490 current process, and that Daniela Ochoa-Gonzalez was a victim of the current process. No, she was a
491 victim of the City Auditor's office not following the current process in the Ordinance. So, I think, when I
492 read this it seemed like for the salaried employees and officials, that they were going to be now subject
493 to the same investigation by the Auditor, and the Auditor makes the determination of guilt. That is not a
494 fair process. So I urge you not to go that direction. Wherever, whatever direction you go, that you
495 provide a process that somebody who has a complaint filed against them, can come to either you, or
496 some other body and present their case, and hear the complaints against them out in the open and not
497 be kept in secret. So.

498 **Austin Kaplan:** Mr. Newton, I hate to cut you off but I have to because it's about to strike 10. So, do we
499 want to continue this? Do we have a motion to continue past 10?

500 **Cynthia Tom:** We have to do officer elections anyway.

501 **Commissioner Einhorn:** I have a motion to continue.

502 **Austin Kaplan:** All right. All those in favor? It passes almost unanimously. In favor, Einhorn, Speight,
503 McCormick. Mr. Gregory, anything to conclude?

504 **Gary Newton:** No. I'm good. I think you understand our position.

505 **Austin Kaplan:** Thank you, I do. Do y'all have any questions for Mr. Whellan or Mr. Gregory on this?

506 **Michael Whellan:** Newton. Gary Newton.

507 **Cynthia Tom:** And Mr. Gregory doesn't have any time remaining.

508 **Commissioner Einhorn:** I agree. And I think the working group talked about the fact that the speed at
509 which this was going seems to be more politically motivated than policy motivated and I would love to
510 slow down. I have a feeling though if we slow down the Council is just going to do something whether
511 we chime in or not. So, I think that we kind of, we can bemoan the fact that it's moving too fast, and we
512 can bemoan the fact that, you know, it was a solution looking for a problem; I don't think that's entirely
513 the case. And I do think that some of the things that have come to light since then with regards to the
514 jurisdiction of the ERC over rank and file employees, that seems to me to be unnecessary. One of the
515 things that I guess I have some concern about is expanding our jurisdiction over higher level executives. I
516 think when you, I think if I understood you correctly, that they actually in the personnel policies have a
517 due process so...

518 **Corrie Stokes:** Right. It's through the chain of command...

519 **Commissioner Einhorn:** ...assistant City managers, they have some due process, or, I mean, how far
520 down does that go?

521 **Corrie Stokes:** I would say it goes, well, if you go two levels from City Manager then you don't really have
522 an appeal process; if that makes sense. So if you're a department director you report to an assistant City
523 Manager, who reports to the City Manager, then your appeal process is shortened. You can appeal once
524 to your direct supervisor, the Assistant City Manager; and once to the City Manager, but...

525 **Commissioner Einhorn:** So there's no appeal to a separate body after appealing to your boss.

526 **Corrie Stokes:** Correct. Or your boss's boss. Now depending...

527 **Austin Kaplan:** We're only talking about complaints, Code of Ethics, we're not talking about everything.

528 **Jason Havadi:** One qualifier to that. Prior to the establishment of the Municipal Civil Service
529 Commission, the grievance process included a hearing officer, a contracted hearing officer that was
530 separate. I don't know how that's changed for those employees who are not covered by the Municipal
531 Civil Service, if that still... I don't know what the treatment is there.

532 **Austin Kaplan:** Right, okay. So we're agenda-ized for possible recommendation, or rather, I'm sorry,
533 we're agenda-ized for a possible action, on a Recommendation.

534 **Commissioner Einhorn:** I'd like to make a motion but I'm still trying to formulate in my head how I make
535 that motion, that isn't two paragraphs.

536 **Austin Kaplan:** I don't know that I can help.

537 **Commissioner Hardman-Dingle:** Did you guys actually have a recommendation for us?

538 **Commissioner Einhorn:** Well the recommendation was, I guess, the flow chart that's up there; the one
539 that the Chair laid out for rank and file employees. Do we need to separate out...

540 **Austin Kaplan:** We need a third flow chart for...

541 **Commissioner Einhorn:** We need a third flow chart for like elected and appointed officials; 'cause I kind
542 of saw that line on the right as the elected and appointed officials.

543 **Jason Havadi:** Exactly. The line on the right is elected and appointed officials.

544 **Commissioner Einhorn:** And maybe a more concise way to do it is to take that and separate it out onto
545 a...

546 **Jason Havadi:** That's what I was trying to describe, very poorly.

547 **Commissioner Einhorn:** And I think that we can do that.

548 **Commissioner Hardman-Dingle:** Without a motion, is there kind of a consensus that we do not want to
549 be involved with the rank and file employees, at all?

550 **Commissioner Speight:** Yes.

551 **Commissioner Einhorn:** All right. Let's start there. I'll make a motion that we, that we, that we draft up
552 the recommendations to Council in the flow chart along the lines of what you explained, essentially
553 relinquishing our jurisdiction over Code of Ethics complaints for rank and file employees, and inserting
554 the Municipal Civil Service appeal process, due process, as it was described.

555 **Cynthia Tom:** Okay, and just obviously the Commission cannot relinquish its own jurisdiction but it would
556 recommend that Council make that ...

557 **Commissioner Einhorn:** Yes, that was all prefaced with: that was a recommendation.

558 **Austin Kaplan:** Is there a second?

559 **Commissioner Speight:** Second.

560 **Austin Kaplan:** Motion by Einhorn, second by Speight. Discussion on that motion?

561 **Cynthia Tom:** And the working... who was going to draft the Recommendation?

562 **Austin Kaplan:** That's definitely the working group.

563 **Commissioner Einhorn:** Somehow it's going to fall to me...

564 **Austin Kaplan:** He's working after 10 on... anyway.

565 **Cynthia Tom:** And everyone feels comfortable by what's meant by "rank and file"...

566 **Austin Kaplan:** No. but it's the best we can do. I don't think we have a better, you know, a better way...

567 **Commissioner Einhorn:** Maybe we just amend that motion so that it's "people covered by Municipal
568 Civil Service."

569 **Corrie Stokes:** I think it's by Civil Service, period.

570 **Cynthia Tom:** Right. There's also a different coverage for EMS, Fire...

571 **Commissioner Einhorn:** Yes, and I think that's what they were saying. They were just saying Civil Service
572 generally, not Municipal Service.

573 **Cynthia Tom:** I don't know if Civil Service is the right term...

574 **Corrie Stokes:** Police, Fire, EMS, all have now...

575 Don't they have their own?

576 What does Civil Service cover?

577 **Austin Kaplan:** Let me roll this back. This is part of the problem. Once we get into the details it becomes,
578 as you can see, a disaster. So, what we broken up to rank and file...

579 **Commissioner Einhorn:** But I think we can make a recommendation to Council just general enough so
580 they understand. My guess is that there's a good chance that the Chair and Vice Chair are going to end
581 up with Council talking...

582 **Austin Kaplan:** Trying to explain what we mean. But I think that we... I don't want to use an offensive
583 term. I don't want to offend a City employee by calling them rank and file. But that's who I'm talking
584 about; non-assistant/department head level employees.

585 **Commissioner Hardman-Dingle:** We can approach it from either way, then, and just identify the ones
586 that it does cover. I think they did that when they were talking to us, as opposed to saying "rank and
587 file".

588 **Austin Kaplan:** Everyone else.

589 **Commissioner Einhorn:** Yes, and that's what I was saying is amending it to cover, for folks covered by
590 Civil Service.

591 **Commissioner Speight:** Well, she's saying, go the other direction. I think. Weren't you? Just start at the
592 top. Not covered.

593 **Cynthia Tom:** There are some people not exempted from the Municipal Civil Service, which we were
594 discussing, who are covered by say labor agreements, under Chapter 143. So, and who would still maybe
595 be considered to be rank and file, over whom you would now, probably, have jurisdiction.

596 **Commissioner Einhorn:** But we already do have jurisdiction. Right? Is that what you're saying? And what
597 you're saying is we're not, we wouldn't be relinquishing, or wouldn't be recommending the relinquishing
598 of our jurisdiction for those?

599 **Austin Kaplan:** All right. So I think we can... why don't we let the working group...

600 **Cynthia Tom:** It sounded like you were recommending...

601 **Austin Kaplan:** Okay, so this is a restated motion, and the motion is...

602 **Commissioner Hardman-Dingle:** How about the motion is let the working group...

603 **Austin Kaplan:** ...make the recommendation to Council.

604 **Commissioner Einhorn:** My motion is that we allow the working group to find the proper language to
605 describe a recommendation to, that the ERC relinquish, or have jurisdiction over rank and file
606 employees, which means employees that have some form of Civil Service protection.

607 **Austin Kaplan:** Do we have a friendly amendment to just allow the working group to make a
608 recommendation for Council on behalf of the Ethics Commission along the lines of what we've discussed
609 tonight?

610 **Commissioner Einhorn:** I'm okay with that as long as everyone else is okay with that.

611 **Commissioner McCormick:** So be it amended.

612 **Commissioner Hardman-Dingle:** I'm okay with what you guys outlined. That sounds like what we need
613 to do.

614 **Cynthia Tom:** Generally a recommendation from the Commission is going to have like the date of
615 approval, the vote, normally, and I know we've got, we're pressed for time here...

616 **Commissioner Hardman-Dingle:** What's kind of time limit are we working on?

617 **Cynthia Tom:** This is going to Council on November 20th. Right now, this is the last regular Commission
618 meeting scheduled for the year. There are no special called meetings scheduled right now. There could
619 be one...

620 **Commissioner Einhorn:** Are there any outstanding complaints?

621 **Cynthia Tom:** No, not that I'm aware of now. But you know tomorrow I'll go to my office and there'll be a
622 new complaint, I mean, you never know. But right now, were the commission to receive additional
623 complaints, they would need to be heard, you know, within 20 working days, is normally what we do,
624 and we would schedule one. But there's no guarantee that, unless the Commission specifically wants to
625 schedule a special called meeting for the most part to deal with this issue. And then if a complaint came
626 in in the meantime, you could add that. The Commission has the flexibility to have an additional special
627 called meeting. I know that we've had a lot this quarter. If you wanted; if the Commission wanted to

628 revisit it. I mean, you can go forward with what you're doing, I just don't know if it's gonna raise any red
629 flags with Council or other folks if the actual Recommendation, like this is an example of a past
630 Recommendation that goes, doesn't have a vote, or approval date.

631 **Austin Kaplan:** It will instead be a Recommendation from the working group because we won't have
632 time to evolve...

633 **Cynthia Tom:** Yeah, I kind of, I kind of think that's what it would be. And you can do that. It's just that it's
634 up to the Commission...

635 **Commissioner Einhorn:** We can call it a Recommendation of the Ethics Review Commission, if the Ethics
636 Review Commission has delegated that responsibility. Is there any provision in our bylaws for the
637 Commission to delegate that responsibility to a working group?

638 **Cynthia Tom:** The, a working group, I mean, can't necessarily act for the Commission. I have to have at
639 least four for the Commission to take action. I realize y'all are really pressed for time.

640 **Austin Kaplan:** It can't be a working group.

641 **Cynthia Tom:** This is not your normal procedure for doing a Recommendation.

642 **Commissioner Speight:** But we concede our authority to make that...

643 **Commissioner Einhorn:** That's why I was trying in my motion to kind of...

644 **Austin Kaplan:** At the end of the day we're gonna have to stand up in front of Council and explain what
645 we're talking about anyways.

646 **Cynthia Tom:** I think it's a question for the Commission. Are you comfortable not having a
647 Recommendation language like this, like Whereas-es, and you know, in front of you?

648 **Commissioner Einhorn:** Do we have to follow that format?

649 **Cynthia Tom:** This is the format for any Board and Commission to communicate with Council.

650 **Commissioner Einhorn:** Okay. But do we have to follow that format?

651 **Austin Kaplan:** That's just the official format. I mean, you know, if we were to send an email to our
652 Council member with thoughts, it's not like they're going to reject it because it's not on this official form.
653 But it's now the will of the Ethics Commission. But we are each Ethics Commissioners.

654 **Cynthia Tom:** I mean Council has asked specifically in that Resolution for the Commission to look at this.
655 They haven't asked specifically for a recommendation from the whole Commission.

656 **Austin Kaplan:** Would it be better to have a recommendation from the whole Commission, with the
657 correct language and changes to the specific, every specific provision? Yes. Are we going to get there?
658 No. We don't have enough time. So my suggestion would be to everybody to delegate to the extent we

659 can, the power to the working group; let the working group make the recommendation to Council; and
660 the each of us is invited to go in front of Council when the issue comes up, it certainly won't be on the
661 Consent Agenda, and discuss the issue.

662 **Cynthia Tom:** So the motion we're trying to get specific enough, at least with regard to what the
663 Commission wants jurisdiction over, or not.

664 **Commissioner Speight:** We did that a while ago. I think what I would like, you know, I think what I would
665 like is that once y'all do put something sort of together, then maybe y'all can draft it up for us, and send
666 it to us in an email, and then we as individual Board members can communicate with Council on our
667 own, from that.

668 **Austin Kaplan:** Oh, "no walk requirements" there in Council in public, or don't communicate with the
669 other Commission members. Is this correct? Is that not a TOMA problem?

670 **Commissioner Speight:** I'm saying send it to Cindy...

671 **Austin Kaplan:** Send it to Cindy. Cindy circulates our draft. The Commissioners can then go on their own
672 and do what they want as long as they don't quorum with each other. Is that not a TOMA problem?

673 **Cynthia Tom:** The working group is made up of three Commissioners. The quorum of the Commission is
674 four commissioners. If only those three, let me think about it. If only those three commissioners are
675 talking to each other about the Recommendation, and you send it to me... this might be a slippery slope
676 when it comes to TOMA. And I send it to each of you, not so that you can talk to each other about it, but
677 so that you can talk to Council about it...

678 **Commissioner Speight:** So we know what the recommendation was.

679 **Austin Kaplan:** Or if it posts as backup for Council. It's a public document and the Commissioners can.

680 **Cynthia Tom:** I don't know if it will be posted as backup for Council.

681 **Commissioner Einhorn:** It should be. Shouldn't it?

682 **Cynthia Tom:** I mean, I'll have to, it's late. I don't want to tell you I can do something that maybe I
683 shouldn't be doing. Maybe, maybe that would be okay, um, I want to say probably. But I would definitely
684 want to talk it over with my colleagues to be sure.

685 **Commissioner Hardman-Dingle:** And as a restate, I think what I'm hearing is if the working group drafts
686 up something, sends it to you; you can send it to us, at the same time send it to the Council, and then all
687 of the committee, we're free to go down and talk about it if we want to. I understand there could be no
688 discussion amongst us, the Quorum, but we will just have the draft at the same time that City Council
689 gets it.

690 **Austin Kaplan:** And it would be public discussion that you would be having in front of Council...

691 **Cynthia Tom:** I think that would probably be okay, but like I said, it's late, TOMA's tricky, I want to double
692 check with my colleagues before I give you a definite...

693 You're in a public hall

694 But it's not a called meeting

695 **Austin Kaplan:** (inaudible), that's a TOMA problem

696 **Cynthia Tom:** Yeah. So the issue with regard to the Council meeting itself, if a quorum of ERC members
697 wanted to attend the Council meeting and talk about this, y'all need to let me know. Probably anyone
698 who wants to, plans to attend a Council meeting will need to let me know, because if that number rises
699 to four or more then I think I will need to post that also as a meeting of the Ethics Review Commission.
700 So it's no biggie, we can do it. I don't know how likely it is that four of you will actually want to show up
701 in person to a Council meeting. That won't matter if you're just calling, or meeting with, or emailing
702 certain Council members individually, you know, your appointing member, or whoever, but if you're all in
703 one place at the Council meeting, and you're planning on speaking about it, we'd want to post that just
704 to be safe. But that is something you would individually inform me of, not inform each other of.

705 **Austin Kaplan:** So how do we get out of this box again? We have a pending motion on the table, right?
706 Do you want to withdraw that and try a new motion?

707 **Commissioner Einhorn:** I'm not happy about saying this, but I don't see a way for this Commission can
708 move forward without convening again. And so I guess, the motion that I'm gonna make is that we call a
709 special meeting before Council takes this up again so that the working group can come back with a
710 recommendation and supporting documentation, with an actual resolution with a recommendation for
711 Council.

712 **Cynthia Tom:** So Commissioner Einhorn, or, excuse me, Vice Chair Einhorn. Are you withdrawing your
713 previous motion?

714 **Commissioner Einhorn:** Yes.

715 **Austin Kaplan:** Previous motion withdrawn. Motion by Einhorn to call a Special Called to deal with this
716 sometime between now and Council...

717 **Cynthia Tom:** November 20th is the date that Council directed the City Manager, Law Department, come
718 back to Council with the Ordinance. At that time Council can vote on it. If it passes by a vote of 5 or more
719 it will waive the requirement to be heard on, read on three separate days and so it can become effective
720 10 business days after that date. I don't know, but I don't expect it would come back to Council before
721 November 20th. That's what they asked for in the Resolution, for it to come back on that date.

722 **Austin Kaplan:** Okay. We have a motion, is there a second?

723 **Commissioner McCormick:** I'll second.

724 **Austin Kaplan:** Motion by Einhorn, second by McCormick. Any discussion? All those in favor of Special
725 Called?

726 **Cynthia Tom:** Uh, do we have four?

727 **Austin Kaplan:** I think that's four, slowly, five. Five to one. The Chair votes vehemently no.

728 **Cynthia Tom:** Let the record show Kaplan votes no. Okay so then, unless you guys want to pick a date
729 right now we'll, my assistant twill get back to y'all.