

1 **Special Called Ethics Review Commission Meeting, November 12, 2014: Item 3E**

2  
3 Roll Call:

4  
5 Austin Kaplan

6 Peter Einhorn

7 Dennis Speight

8 Donna Beth McCormick

9 James Ruiz (not present)

10 James Sassin

11 Sylvia Hardman-Dingle (not present)

12  
13 **Kaplan:** So moving on to 3E. Powers, duties and functions of the Commission and City  
14 Auditor through City Council Resolution 20141016-033. Report from working group, possible  
15 recommendation of Council regarding proposed Chapter 2-3 City Auditor, 2-7 Financial  
16 Disclosure, City Code amendments – Kaplan, Einhorn and Sassin and Staff. I'm gonna turn it  
17 over to Commissioner Einhorn who's taken the lead on this.

18  
19 **Cindy Tom:** And we do have staff here who I think is available to speak with you all about the  
20 Ordinance. Deborah, is that right? If you like.

21  
22 **Deborah Thomas:** I'm gonna keep – whatever they want. I'm taking notes so I know what to  
23 draft.

24  
25 **Cindy Tom:** Deborah Thomas is here from the Law Department and she is working on drafting  
26 the Ordinance that will come up to Council on the 20<sup>th</sup> if y'all have any questions...

27  
28 **Einhorn:** Alright, well I guess the way to start this is y'all got a copy of the draft resolution and  
29 the three flow charts. I think y'all saw one flow chart at the last meeting; it's now become three.  
30 As we've tried to wrestle with the changes needed...

31  
32 **Cindy Tom:** There should be a few extra copies floating around.

33  
34 **Einhorn:** We talked at our last meeting about the statement of principles that the working group  
35 had been working off of and since then a couple members of the working group met with folks  
36 from the Auditor's office to talk about how to work towards some consensus around the changes.  
37 I wasn't in that meeting and so I would defer to my working group compatriots to speak to that.  
38 Essentially these three flow charts came out of that meeting, more or less. They have since been  
39 changed a little bit based on some conversations with the Law Department and more internal  
40 conversations with the working group. I guess we'll just start with the first flow chart which is  
41 the one on complaints filed against Council, persons appointed by Council, Council direct Staff,  
42 City executives or assistant City attorneys. This is just simply a flow chart of our process as it  
43 currently is without any suggested changes so I don't know what more I need to say about that  
44 one. The next one is the Code of Ethics complaints filed against rank and file employees so  
45 that's defined as people covered by Municipal Civil Service or other labor agreements.  
46 Currently, we have found out that the Commission does have jurisdiction over these. Essentially

47 what we're talking about is relinquishing our jurisdiction because there is due process in other  
48 forums so if you look at the flow chart complaints would come into the City Clerk's office.  
49 Those would have come to the Commission. The Clerk's office will now direct those complaints  
50 to the City Auditor. Complaints can also come in directly to the Auditor, City Management, or  
51 Human Resources and then there's an investigation process: no finding – process ends. Finding  
52 – it goes to City Management for discipline. There's a Civil Service process and a secondary  
53 appeal before there's a final determination of a Code of Ethics violation. Maybe we should bring  
54 the Auditor's office up to the table so that they can talk a little bit about that if they want to. In  
55 essence there is no ERC involvement anymore in rank and file employee ethics complaints.

56

57 **Kaplan:** And our understanding of that was we have jurisdiction over that, but we haven't seen  
58 any complaints ever as far as we know, but if we were to see the complaints that were out there  
59 we would see lots and lots and lots and lots.

60

61 **Einhorn:** Right. Exactly.

62

63 **Kaplan:** And then – why don't we just go through the last flow chart and then we'll open it up.

64

65 **Einhorn:** So complaints filed against City executives or assistant City attorneys – these are  
66 folks who are not covered by Municipal Civil Service or any kind of labor agreement. The  
67 process like on the first chart, people who file complaints with them can file directly with the  
68 Ethics Review Commission, but there is now what we would propose to be a process where  
69 people could file complaints with the City Auditor, City Management or HR. There's an  
70 investigation report issued and then we inserted this evening - Commission Sassin and I met and  
71 inserted a response between the investigation and the report being issued. In talking with folks  
72 in the Law Department we kind of decided that the main issue is the lack of due process and so,  
73 you know, one of the things that was discussed was whether the respondent could have an  
74 opportunity to review the draft report, draft a written response to that and then have that be  
75 published as part of – or as an addendum – to the final report being issued. One of the questions  
76 we had was whether the ERC wanted to relinquish determination authority and I think what we  
77 felt was – correct me if I'm wrong, Commissioner Sassin – but we felt like the ultimate  
78 determination should go through the ERC so it would really be a report being issued and then it  
79 would come to the ERC for a final determination. One of the things that we talked about was  
80 how the Auditor's office is their reluctance to do any kind of sworn complaint and so we need to  
81 urge Council to find a different way so that they don't have to swear the complaint.

82

83 **Deborah Thomas:** Commissioner Einhorn, can I ask you a question? I was looking at these  
84 and I saw that attorneys look like their appearing twice.

85

86 **Einhorn:** They're on twice.

87

88 **Deborah Thomas:** You meant for them to be.

89

90 **Einhorn:** We meant for them to be on there twice because – we added them to this one so they  
91 could still continue to go through the old process. People could come directly to us with a

92 complaint against the assistant City attorney or a City executive or they could go through this  
93 process.

94  
95 **Deborah Thomas:** Oh, okay. Gotcha.

96  
97 **Einhorn:** Dual tract.

98  
99 **Deborah Thomas:** Gotcha. So that was not an error; that was intentional.

100  
101 **Einhorn:** That was intentional. Did I capture that?

102  
103 **Kaplan:** I think you captured it very well. And the investigation piece done by each of these  
104 entities on their own - is that correct?

105  
106 **Einhorn:** Well, if the complaint comes into HR, HR does the investigation. If it comes into the  
107 Auditor's office, the Auditor does the investigation. I don't know what process City  
108 management would have. They would probably go through HR wouldn't they, if somebody  
109 complained to a manager?

110  
111 **Jason Hadavi:** Not necessarily. The City's fraud, waste and abuse bulletin authorizes any  
112 manager or department director to conduct their own investigation. That was part of the  
113 discussion early on was trying to – you know, we have no expertise. Let me step back a few  
114 moments. I'm Jason Hadavi, Chief of Investigations in the Auditor's office. Our intent was not  
115 to get involved in personnel matters such as harassment, hostile work environment or any of  
116 those issues because that's not our area of expertise, but our desire was to have one track of  
117 investigations for fraud, waste, and abuse matters which we do feel we have the expertise in so  
118 that there is a varied investigative experience. As it is right now, as you can see on this flow  
119 chart, we have certain investigative procedures and ways that we conduct things. Management  
120 handles them differently. HR handles them differently and then even within different  
121 departments within management it's handled differently and so we're trying to create a single  
122 expectation of the process for our employees.

123  
124 **Cindy Tom:** So are you saying that in this flow chart under the process you're envisioning the  
125 City management and HR bits would be gone and it would just be the City Auditor doing the  
126 investigation?

127  
128 **Einhorn:** Now that it's explained to me that City managers have the ability to conduct  
129 investigations of their own, I'm not wild about that. It seems to me the Auditor and HR would  
130 have an investigation procedure that they would follow and it would make sense to me to have  
131 someone who had a little bit more expertise in actually doing the investigation, *doing* the  
132 investigation.

133  
134 **Cindy Tom:** So is the working group proposing to amend it?

135  
136 **Einhorn:** I don't know if that's beyond our scope to weigh in on whether City managers –  
137

138 **Kaplan:** You're saying you'll put the Auditor below or change the location of it?  
139  
140 **Einhorn:** I don't know. Do you guys have a response to that?  
141  
142 **Hadavi:** I haven't looked at this long enough to formally respond.  
143  
144 **Einhorn:** In an ideal world would you – would complaints that are coming in to managers,  
145 would you like those managers to be bringing those fraud, waste, and abuse complaints to you?  
146  
147 **Hadavi:** If it was fraud, waste and abuse I think it should come to us just the same way -  
148  
149 **Cindy Tom:** Are you guys talking about fraud, waste and abuse or just Code of Ethics?  
150  
151 **Einhorn:** We're just talking about Code of Ethics, of which fraud, waste and abuse can be part  
152 of it. Is that right?  
153  
154 **Hadavi:** Everything that's currently in our standards of conduct that's in our Code of Ethics  
155 could be considered potential fraud, waste and abuse.  
156  
157 **Deborah Thomas:** And my issue, I'm only trying to draft what I hear is an agreement. To the  
158 extent that something is called a Code of Ethics violation and it's pursued as a Code of Ethics  
159 violation, we need to understand exactly what that clear line is to the extent that he's calling it  
160 fraud, waste, and abuse and he's handling it as fraud, waste and abuse. Okay, fine. It's over  
161 there as fraud, waste and abuse, but if it's a Code of Ethics, it's being handled as a Code of  
162 Ethics issue then we need to understand it separately so that everybody knows how a Code of  
163 Ethics issue is handled. I don't want them mixed.  
164  
165 **Cindy Tom:** I don't think the working group is intending to make any recommendations or  
166 comments regarding treatment of fraud, waste, or abuse.  
167  
168 **Einhorn:** Only to the extent that they overlap.  
169  
170 **Hadavi:** And that's what I've done a poor job of articulating. They do completely overlap. The  
171 easiest example I can give, and to those of you who have heard it already I apologize for  
172 repeating it, but the misuse of city resources. That is something that HR currently investigates as  
173 a personnel matter. It's something that we investigate as fraud and abuse and it's something that  
174 is a potential Code of Ethics violation also, per our City Code. And it's something that  
175 management can look at from an operational perspective. As a result of that being classified in  
176 so many different areas, there's multiple investigative authorities looking at it and just depending  
177 on what department you're in or where someone makes a complaint you're subjected to very  
178 different treatment even though you may have done the exact same thing as the person next to  
179 you. So what we're trying to do is streamline that so that there's consistency for our employees  
180 so if I misuse the City vehicle by moving furniture on the weekends using a City truck, it doesn't  
181 matter if I'm in Austin Energy, doesn't matter if I'm in Code Compliance; whatever department I  
182 might be there's a single place to report that and for that to get handled so that all those  
183 employees in the different departments can be treated equally.

184 **Cindy Tom:** And everybody's looking at the colored copies of the flow chart, right? Not the  
185 black and white. The color copies are the ones to look at.

186  
187 **McCormick:** This was my question. Are the questions that you would ask about the same?  
188 Like would the City Auditor ask about the same questions? Like you use the City truck - what  
189 time or what day, and this kind of stuff. City Management, would they be asking the same  
190 questions and HR the same or is everybody kind of here, there and yon?

191  
192 **Hadavi:** I would say that a lot of the same questions would be asked, but in more complex  
193 matters I think there would be varied investigative techniques. We have a working arrangement,  
194 a process with our IT department where we can pull forensic copies of computers. If someone  
195 was misusing a computer or doing something inappropriate on the computer we can view that  
196 information. I can't say that management or HR would necessarily do that or not do that. I'm not  
197 fully aware of every one of their investigative procedures, but I have seen variance across. When  
198 you look at that HR box, that's not one department. There's a Human Resources department.  
199 Austin Energy has HR. Water Utility has HR. Multiple departments have HR. There's going to  
200 be different practices, different backgrounds, different expertise.

201  
202 **Cindy Tom:** And I would say the same under this City management box. We work closely with  
203 internal audit groups and a couple of the departments, three or four departments, where we know  
204 the techniques that they use because we have conversations with them as they conduct their  
205 investigations, but that's four out of thirty departments.

206  
207 **Hadavi:** So just as an example - I know you're asking about specific questions - but we've seen  
208 some departments and, I don't want to call anyone out specifically, but we've seen some  
209 departments where it is very clear that a violation may be criminal and they involve the Austin  
210 Police Department early and frequently and consistently because of the nature of the violation or  
211 the potential violation. Whereas other departments say "I don't have time for this to go through  
212 the criminal prosecution process. I need to deal with this employee." I'm not saying one  
213 approach is more right than the other. What I'm saying is that maybe it's not the best idea to  
214 have varied approaches so that our employees or all employees of the City of Austin first, have  
215 those different experiences.

216  
217 **McCormick:** I guess my concern is that each person or entity is doing their separate little thing  
218 and never the tween shall meet. I don't know if it's coming to another investigation.

219  
220 **Sassin:** Really that investigation is housed here, not in a box by itself. That's why I asked the  
221 question because really the flow charts suggest there's one investigative body.

222  
223 **Hadavi:** You could say up to 30 because there are 30 different departments. Some have HR  
224 departments, some of them don't.

225  
226 **McCormick:** Okay, so HR will have - I mean there's not just one - I'm from the old days when  
227 it was "personnel" and we just had one office for the whole institution, but now each department  
228 has their own little person that does it?

229

230 **Hadavi:** Some departments, not every department. So it depends on the size.

231

232 **McCormick:** And we go through the main one?

233

234 **Hadavi:** Some do, some don't.

235

236 **McCormick:** That's what I meant. Never the tween shall meet.

237

238 **Kaplan:** Are there further questions for the Auditor's office for the moment? Why don't we put  
239 y'all on pause for a minute and let's hear from Michael who's here to give us some thoughts. We  
240 may call you back up to chat a little more. Does that sound alright? Let's do that. Today is  
241 definitely less formal than the last ten meetings we've had. Mr. Whellan.

242

243 **Michael Whellan:** I'm Michael Whellan on behalf of Texas Disposal Systems and I'm  
244 interested in this topic as you well know. Very interested in this topic, so thank you very much.  
245 I'm not – maybe I should urge reconsideration of my last motion but I'm not going to do that.  
246 Paragraph seven on your document – I wanted to ask if you would please consider after the  
247 second sentence - you talk about anonymous complaints and you talk about the Commission as  
248 currently established does not have the staff. You then urge careful consideration and I would  
249 ask that you add a sentence. I don't know what the words are, but something like "anonymous  
250 complaints against City officials" quote, unquote, which as defined would not be considered  
251 without a complaint process through the ERC. You already have identified that there's certain  
252 things that will remain a sole jurisdiction. I think you have defined that in here. I think some  
253 clarity on how important it is anonymous complaints against City officials will not be considered  
254 without a complaint process. I understand they don't want to do a sworn complaint. Query:  
255 why not? But putting that aside at least to have a declarative statement is your position that's  
256 such things against City officials will go through the ERC. Also with regard to that paragraph  
257 seven, I would add to make it clear that the Auditor will not make determinations about ethics  
258 violations if it's been done by an anonymous complainant; that those determinations after the  
259 complaint process will be done by the ERC. And finally you have some questions here about, or  
260 some discussion about investigating. You said inadequately investigated anonymous complaints  
261 – I would urge also that you have something in here that if the Auditor is going to investigate  
262 such anonymous complaints maybe you can say the facts related to the complaint need to be  
263 shared with the ERC, just not the identity of the person. So those would be the three things I  
264 would ask. One, that anonymous complaints will not be considered without a complaint process  
265 through the ERC. Two, that again, emphasizing the Auditor will not make determinations of  
266 whether an ethics violation has occurred, that that will remain for those City officials quote,  
267 unquote, with the ERC and then finally any investigation whether it be work papers or facts that  
268 are gathered will be shared with the ERC, just not the identity of the person. Otherwise, we end  
269 up exactly where we were with Daniela Ochoa Gonzalez and I would encourage you to at least  
270 not just rely on Council to do whatever, but put something in here to identify and really elevate  
271 how important this particular issue is. I think anonymous complaints are your most vulnerable  
272 area and it's the area that there is the most opportunity for abuse from our Auditor's office, in my  
273 opinion. Abuse that we've seen, by the way.

274

275 **Einhorn:** And I guess the response to that that I would have to that, you know, with regards to  
276 the Council and persons appointed by the Council, which would be Boards and Commission  
277 members would be included in that, there is no process that includes the Auditor's office and I  
278 think that we're all on the same page that Boards and Commission members, they're okay with  
279 getting out of that business. And for us, as a Commission, we really have no provision for  
280 accepting an anonymous complaint because the complaint has to be sworn. So with this  
281 proposed change there would be no anonymous complaints against Board and Commission  
282 members anymore. They would refer – you can come back to the table – my understanding from  
283 the conversation we've had with you is that you guys would be referring us calls that come into  
284 the fraud, waste, and abuse hotline when they're anonymous. Usually it's just a voicemail, right?  
285 Where we don't have any phone number or an email to email them back. You would essentially  
286 just forward us the complaint without the investigation, correct? So that's what's being  
287 envisioned.

288  
289 **Whellan:** So they'll be no more – so you're eliminating the anonymous complaints for Boards  
290 and Commissions.

291  
292 **Einhorn:** And I'm not sure...I mean I can see some value to having anonymous complaints, but  
293 not with a lack of due process. Due process is paramount and I think that we tried to capture that  
294 as we went through this is that every step, every time there's an investigation against somebody,  
295 the person who, you know, the respondent must have the opportunity to respond to a complaint  
296 and be able to defend themselves.

297  
298 **Whellan:** If that's the case, shame on me. I only read this very quickly. Maybe right there –  
299 and this is something that we do in drafting contracts and pleadings and such – maybe put a  
300 sentence right before the “we urge Council” for clarity, there will be no anonymous complaints  
301 against quote City officials or however you want to identify it. Boards and Commissioners.  
302 Because I did not pick up on that when I read this originally.

303  
304 **Einhorn:** The anonymous complaint process is really for executives, right. We talked about  
305 situations where an employee wants to complain against their boss, but they don't want to go on  
306 the record doing that because they fear retaliation. Even though they're protected they'd never  
307 make the complaint if they couldn't do in anonymously.

308  
309 **Whellan:** I'm fine with that. I'm just saying that when I read this I didn't catch that. I'm just  
310 adding – I think you owe it to yourselves to be sure that Council doesn't miss it as well in their  
311 even quicker review of this document.

312  
313 **Cindy Tom:** Vice-Chair, I'm assuming that when you say anonymous complaints are no more,  
314 you are not intending to remove the Commission's authority to initiate complaints on its own  
315 initiative? It may be within the realm of possibility that an anonymous person could bring  
316 something.

317  
318 **Einhorn:** We'd have to swear it.

319  
320 **Cindy Tom:** I think so, yeah.

321 **Einhorn:** To anyone's memory, has anyone ever sworn its own complaint.  
322  
323 **Kaplan:** No. We have no recollection of that as a Commission.  
324  
325 **Whellan:** Wait a minute. You can't sua sponte on your own.  
326  
327 **Everybody:** Yes we can.  
328  
329 **Cindy Tom:** So I mean I think it's possible that an anonymous complaint could be brought to  
330 you. That person wouldn't be in a position to swear the complaint, but if you felt like you had  
331 enough information you were able to do a little investigation on your own or something you felt  
332 like you wanted to do one you could.  
333  
334 **Kaplan:** But then we'd have all the due process.  
335  
336 **Cindy Tom:** So at that point the complainant wouldn't be anonymous. The complaint would be  
337 the Commission itself.  
338  
339 **Kaplan:** And the respondent would have all the due process.  
340  
341 **Cindy Tom:** Yes. All those still have to be followed.  
342  
343 **Kaplan:** And I guess from that perspective an anonymous complaint could still be filed with the  
344 Commission, it would just land on us to swear it.  
345  
346 **Cindy Tom:** It could be forwarded to you.  
347  
348 **Kaplan:** So the Auditor could receive something over email and they could forward it to us. We  
349 could choose to proceed or not because we have to have a sworn complaint, right, to proceed  
350 still? If my understanding is correct. Someone help.  
351  
352 **Cindy Tom:** The question of whether – if the Commission filed a complaint on its own initiative  
353 it also has to be sworn is a little vague –  
354  
355 **Whellan:** Murky. It's not explicit. If I recall.  
356  
357 **Cindy Tom:** It's a little vague, but –  
358  
359 **Kaplan:** That's another problem we were trying to fix in this process.  
360  
361 **Cindy Tom:** I don't know if we fixed that one, but there is a lot of discussion in current Code  
362 about hearings on sworn complaints. It never explicitly says you can have a hearing on a sworn  
363 complaint if it's filed by the Commission. It's a little bit of a grey area. I think if you wanted to  
364 cross all your t's and dot all your I's under our current code it probably would be good if a  
365 member of the Commission on behalf of the full Commission actually you know, got it notarized  
366 and swore it to a complaint.

367 **Whellan:** It's in 2-7-41D: on a sworn complaint any person filed with the City Clerk's office,  
368 quote, or on the Commission's own initiative the Commission shall consider possible violations  
369 of a provision within jurisdiction of the Commission by City officials or employees, former City  
370 officials or employees.

371  
372 **Kaplan:** That is still unclear.

373  
374 **Cindy Tom:** It's a little murky. If it comes up, in fact, it could possibly come up under 4A. We  
375 will figure it out.

376  
377 **Whellan:** So that was all I had. I don't know, Peter, whether that - I mean Commissioner  
378 Einhorn - if there's any way to clarify that...that sure would be...that would be my request and  
379 the last thing is, thank y'all very much. This has been a long, arduous process. You've seen a lot  
380 of me and the reason you have and the reason while y'all have taken it so seriously and for which  
381 we, Mr. Gregory on behalf of TDS, and Mr. Newton, are very appreciative of what you've done  
382 here and how seriously you've taken it and how seriously you take this job. So thank y'all very  
383 much for doing so. I really appreciate it.

384  
385 **Kaplan:** So before us is this draft recommendation we can make some changes to or not or do  
386 something with.

387  
388 **Einhorn:** So the Law Department did raise one issue for us to think about with regards to Code  
389 of Ethics complaints filed against rank and file employees covered by Municipal Civil Service  
390 and/or labor agreements. So the process has been that folks can complain to the fraud, waste and  
391 abuse bulletin hotline at the Auditor's office. They can conduct investigations or they can  
392 complain directly to the ERC through the City Clerk's office. One thing that we were talking  
393 about was whether City Management and HR really ought to be in the business of investigating  
394 Code of Ethics violations. Not any HR violations, but Code of Ethics violations. Should that  
395 strictly go through - is that what you're saying?

396  
397 **Deborah Thomas:** As of right now it's with the ERC. My understanding is it was moving to  
398 the Auditor's office, but not all these other places. Is that what the understanding was?

399  
400 **Hadavi:** Right. That's what the - I don't know which draft, but the draft that we were working  
401 off of -

402  
403 **Deborah Thomas:** The Council draft.

404  
405 **Hadavi:** The Code provisions are correct. We had just the Auditor's office over the  
406 investigation part.

407  
408 **Deborah Thomas:** Yes.

409  
410 **Hadavi:** Now Management and HR would still investigate hostile work environment,  
411 discrimination, other personnel matters; but if it's fraud, waste or abuse, or those code of ethics  
412 violations then it's...

413 **Kaplan:** The question from me, if we're speaking we have to zero in on the definition of Code of  
414 Ethics violation and complaint and then the question we have to ask and maybe the  
415 recommendation we need to make to Council is should those all go through the Auditor's office?  
416 Or should there be a provision for Code of Ethics complaint to go through City Management and  
417 HR. I could actually see...I can see the case for having them go through one entity –  
418

419 **Einhorn:** Which is what happens now. We are the official entity determining...what's being  
420 envisioned and in my conversations with you we have talked about the fact that these complaints  
421 come in through lots of different avenues. A lot of them get investigated and get handled, but we  
422 don't have real sense of how many Code of Ethics violations are there because they're not going  
423 through a single entity so that we can be tracking them.  
424

425 **Hadavi:** What I was referring to was looming out there was several complaints and  
426 investigations and even violations of things involving misuse of city resources, misuse of position  
427 or information - conflict of interests that are never called a Code of Ethics complaint so it doesn't  
428 come through this process. It just gets handled administratively and I'd like to clear that up.  
429

430 **Kaplan:** And I think. I mean for a Code of Ethics violation allegation, to me that's something  
431 we want to be tracking. Through the ERC process we're tracking it. A complaint is sworn to the  
432 ERC, the ERC has a preliminary hearing, we have a procedure. I think it's important for us to  
433 be able to track that and of course there's nobody here from HR or from the City Management to  
434 sort of state why we shouldn't, but I'm not quickly coming up in my head with a reason why  
435 there should be multiple processes for these Code of Ethics investigations.  
436

437 **Sassin:** I'm sitting here looking at what Lavonia passed out. Employees Guide to Ethics. It has  
438 exactly what we have on our flow chart. It has a part for reporting wrongdoing. It has  
439 immediate supervisor, department division director, which is management. It has Human  
440 Resources, department, division, corporate HR and then it also has the Auditor's office. But  
441 we're consistent with the way it's being investigated now with this alignment.  
442

443 **Einhorn:** Though there's a disconnect between that and really the ERC is the one that has sole  
444 determining jurisdiction under Code right now.  
445

446 **Kaplan:** Not investigative authority, but –  
447

448 **Cindy Tom:** The solution to that is whoever does the investigation brings it to the ERC in the  
449 end after it's over for final determination.  
450

451 **Einhorn:** Right, but I think what we're talking about is relinquishing our jurisdiction with  
452 regard to rank and file employees.  
453

454 **Kaplan:** That's what everyone thinks is happening. That's what we thought was happening.  
455 But now we've come to find out that wasn't necessarily –  
456

457 **Cindy Tom:** It may not have been happening, but it's the place of the Legal Department –  
458

459 **Deborah Thomas:** Wait, I'm not clear.

460

461 **Kaplan:** One of the things that we've been discussing is, you know, the most important thing  
462 that I think has come up for us, is the lack of due process, in certain processes, and to insure that  
463 because there's a Civil Service, Municipal Civil Service process, there's a Municipal Civil  
464 Service Commission, and/or labor agreements that give rank and file employees due process,  
465 because that due process exists the ERC may be unnecessary, and we don't really have the  
466 bandwidth to investigate every ethics complaint against every rank and file employee. And I  
467 don't think, I don't want to speak for my fellow Commissioners, I don't have the will to take up  
468 every single ethics complaint against every rank and file employee.

469

470 **Deborah Thomas:** And just to be clear, for rank and file employees, if there's an ethics  
471 complaint, and if there is discipline, suspension, probation, demotion or termination, then they  
472 can appeal to...

473

474 **Kaplan:** The Civil Service.

475

476 **Deborah Thomas:** The Civil Service. If there is a written reprimand, there is no appeal.

477

478 **Cindy Tom:** Or if there is no discipline.

479

480 **Deborah Thomas:** Or if there's no discipline; there is no appeal. So, just to be clear, just  
481 because you get, just because there's a determination of ethics violation, that doesn't always...

482

483 **Kaplan:** We have some folks from AFSCME here. Do you guys want to come to the table and  
484 talk about this a little bit? Welcome.

485

486 **Carol Guthrie:** I haven't had an opportunity to read all of the back-up.

487

488 **Kaplan:** No, that's all right.

489

490 **Guthrie:** Carol Guthrie with AFSCME Local 1624. I did not know that the Ethics Commission,  
491 that anyone who violates, or is accused of violating, or has an ethics complaint, that that  
492 complaint comes to the Commission.

493

494 **Kaplan:** Yeah. Well neither did we.

495

496 **Cindy Tom:** It doesn't... it hasn't...

497

498 **Einhorn:** We haven't gotten them, but our understanding from our advice from the Law  
499 Department is that we do in fact have jurisdiction.

500

501 **Guthrie:** Okay. So right now they go to, um, all of the different departments and they do an  
502 investigation and then they make a determination whether or not they believe that it was an  
503 ethics violation, I guess based on evidence that they have. But I had no idea that this was...

504

505 **Einhorn:** Neither did we.

506

507 **Kaplan:** We were told.

508

509 **Einhorn:** And that's been the standard practice that the complaints have gone through HR, City  
510 Management, and the Auditor's office, and the rest is kind of, is newer, but there's been an  
511 investigation, and a finding, and so...

512

513 **Guthrie:** And so...

514

515 **Einhorn:** ... and so what we're just simply saying is we didn't know we had the jurisdiction, and  
516 as long as there is due process, as long as the person who has a complaint filed against them has  
517 an opportunity to respond to that complaint in a fair way, then we don't feel like we need  
518 jurisdiction over those issues.

519

520 **Guthrie:** Well I think that you could have an issue with consistency because it is true,  
521 depending on what department you're in, if you are charged with some kind of ethics violation,  
522 and there's some sort of discipline against you, it can be one department might not measure it as  
523 anything, and you can have the exact same situation and that department may measure it as, you  
524 know, this is grounds for, you know, suspension.

525

526 **Peter Einhorn:** I think that's why the Auditor talked about the inconsistencies with regards to  
527 that. And that's one of the reasons in our conversations they had been talking about trying to  
528 focus them through a single process. Is that correct?

529

530 **Kaplan:** Right.

531

532 **Cindy Tom:** I don't think that on the discipline... you're talking about inconsistencies on  
533 discipline?

534

535 **Guthrie:** Yes, for an ethics violation.

536

537 **Cindy Tom:** I don't think the Auditor's office would issue any, or recommend any discipline,  
538 they just do the investigation.

539

540 **Kaplan:** No. They just do the investigation.

541

542 **Cindy Tom:** So the discipline, on the discipline end, like Deborah was saying, if it reaches the  
543 level, if the discipline reaches the level of discharge, suspension, demotion, or denial of  
544 promotion, or being put on disciplinary probation, that can go to Municipal Civil Service  
545 Commission now for the folks that are covered by that. And I think that hopefully that process  
546 will provide a little more consistency in discipline because you'll have somebody looking at, for  
547 the folks who appeal...

548

549 **Kaplan:** There's one Municipal Civil Service, right? That's going to look over all...

550

551 **Einhorn:** What would be discipline short of that?

552

553 **Cindy Tom:** A written reprimand.

554

555 **Deborah Thomas:** Or oral reprimand. Counseling.

556

557 **Cindy Tom:** Oral, counseling. Could you get days off without pay?

558

559 **Deborah Thomas:** Yeah, that would be a suspension. Or a letter in your file

560

561 **Carol Guthrie:** This is going to sound like a very strange question, but, who, did y'all just find  
562 out that this was your jurisdiction? Or, we all should have known to refer things to you guys?

563

564 **Kaplan:** I don't think anybody knew.

565

566 **Carol Guthrie:** Okay.

567

568 **Caitlyn Brown:** And I, if I can make a comment. Caitlyn Brown with AFSME. I just, Carol and  
569 I were involved on the Municipal Civil Service Commission quite a bit and there were several  
570 months of thoughtful discussion about due process in terms of types of representation when you  
571 are being accused, or you're a complainant, or you're a witness. And the City Auditor's office  
572 was exempted from the rights given to employees, but we didn't have this type of a discussion  
573 about expanding their scope or having a single process. I'm a little concerned that when we went  
574 through that months of thoughtful discussion and made rules with the Commission that they were  
575 under the understanding that typically these types of investigations go to the Auditor's office. I'm  
576 not weighing in one way or another yet, because this is very new to us and we haven't looked. I  
577 just wanted to make a point of that cuz this is all kind of new and they developed and crafted  
578 those rules and rights to representation and that's in consideration when they go forward with an  
579 appeal were they given proper representation because in terms of the Auditor's office, our role is  
580 very different versus us going to HR, in terms of how involved we can be, in terms of  
581 notification, the ability to reschedule, whether witnesses can have representation. So I just  
582 wanted to make that point.

583

584 **Hadavi:** I need to comment on that. The exemption is not from all of Municipal Service. It's  
585 from the investigative interviews portion. Our processes have always been that we - it hinges on  
586 representation; which is if you're coming in for an investigative interview, can you bring  
587 someone whether it be a union rep, an attorney; we've had people bring their colleagues, family  
588 members, friends, whomever. And what we've done to protect the integrity of the investigations,  
589 we've said, if you're a respondent, if you're the one accused of wrongdoing, you're permitted to  
590 bring a representative and we'll schedule around that, but we don't allow witnesses and  
591 informants who are not accused of wrongdoing to bring such representatives in because we have  
592 no grounds to keep that information confidential as it relates to the representative. So if a  
593 representative represented a witness, and also represented a respondent they could provide all the  
594 information and undermine the investigation. So we still provide, or provide for representation  
595 during all of our respondent interviews and go through that same process. Municipal Civil

596 Service has it in their rules that their witnesses can also, or will also have the right to  
597 representatives; which is not part of our process.

598  
599 **Caitlyn Brown:** And if could clarify, complainants, and we have our members that we go  
600 forward with complaints and have in the past through the Auditor's office because some people,  
601 even though it's supposed to have protections, they don't want to come forward without  
602 representation, so we, you know, we were on all sides of that, so if you're now cutting out  
603 complainants from having that, I'm just concerned because I know from us, that people don't  
604 want to come forward and make a complaint because of concerns of repercussions, all of that, so  
605 you may be losing some of people reporting. And we report, we refer people to the Auditor's  
606 office, we call the Auditor's office sometimes and ask them, "Can we refer them?" Because we  
607 have, you know, we represent, we do represent on all sides, but we have a lot of employees who  
608 do want to come forward and make sure that the rules are being followed. So we are involved in  
609 all aspects.

610  
611 **Sassin:** My perspective is that I think the issue of representation to the Municipal Civil Service  
612 process for rank and file employees is a little bit beyond our scope to weigh in on. I do, I hear  
613 what you're saying and I think there's a lot of validity in it, but I think, you know, that's  
614 something that Council's gonna have to wade through and make a determination on it. And  
615 really, I think what's before us, is what is the jurisdiction of the Ethics Review Commission in  
616 regard to Code of Ethics violations and how do we, how do we separate the process for the  
617 various, you know, classifications of folks who would have a complaint filed against them.

618  
619 **Kaplan:** Anything else for us? Any other questions for Ms. Guthrie or Ms. Brown? At the  
620 moment?

621  
622 **Caitlyn Brown:** It's all new.

623  
624 **Kaplan:** All right. So what are we doing? We are agendized for possible action. We have in  
625 front of us this recommendation to be signed by the Ethics Review Commission, that's us. And  
626 Mr. Whellan gave us some very snappy language to add to number seven, which we may want to  
627 add in there and adopt, which sort of summarized his comments. We've heard from the AFSME  
628 representatives about Municipal Civil Service. I'll leave it to y'all. Is there a motion out here?

629  
630 **Sassin:** Do you have some refinement you want to do on 7 with regards to anonymous  
631 complaints?

632  
633 **Kaplan:** I wrote down the snappy comments, and what I had written down is that before; I  
634 thought they were very succinct, is the word I'm looking for; before we urge, it says for clarity,  
635 oh gosh, I thought I had written them down now I can't read my own handwriting. No  
636 anonymous complaint against City officials, including Board and Commission members, shall be  
637 made.

638  
639 **Sassin:** But the question is, the question is, in our conversation, did we determined that there  
640 really, there is an anonymous complaint procedure through the ERC, so they bring us an

641 anonymous complaint and then we can decide whether to, whether it's a sworn complaint or not,  
642 take some sort of action of our own.

643  
644 **Kaplan:** Uh, yeah, so maybe we need some more...

645  
646 **Sassin:** And I guess, in that context, there still is the due process of the preliminary and the final  
647 hearing of the ERC. Is that something that y'all would find acceptable? If we received an  
648 anonymous complaint that came in to the Auditor's office, they referred it to us without an  
649 investigation, just, "Here's what the email said", or "Here's what the voicemail message said."

650  
651 **Einhorn:** We'll have to go through a preliminary ...

652  
653 **Kaplan:** We'd have to go through a preliminary and final hearing anyway.

654  
655 **Michael Whellan:** So long as you identify who, you would follow the process, identify the  
656 respondent...

657  
658 **Kaplan:** Yes, it would be through the ERC process.

659  
660 **Whellan:** Absolutely.

661  
662 **Kaplan:** Okay, alright.

663  
664 **McCormick:** Did somebody get the language down?

665  
666 **Kaplan:** Do we have some language that'll... yeah.

667  
668 **Cindy Tom:** Well, I think what Vice Chair Einhorn was saying is that maybe...

669  
670 **Einhorn:** I think there is an anonymous complaint process.

671  
672 **Cindy Tom:** Maybe he's saying there are no anonymous complaints, maybe a little bit inaccurate  
673 since...

674  
675 **Einhorn:** There really are, it's just...

676  
677 **Cindy Tom:** The complaint itself wouldn't be anonymous, it would be filed by the Commission,  
678 but someone could send an anonymous RFP into the Commission, and the Commission has a  
679 process where it could, potentially file a complaint on its own, related to that allegation.

680  
681 **Einhorn:** And so it really is that there is a need for an anonymous complaint process but that no,  
682 there should never be an anonymous complaint process that doesn't have an... and I think that  
683 this governs everything that we've been talking about, is that there needs to be due process no  
684 matter what.

685  
686 **Cindy Tom:** No matter where the complaint comes from.

687 **Sassin:** Would it be possible for us to start inserting these into the document so that we could  
688 have something that could be close to being adopted?

689  
690 **Cindy Tom:** Well, does anyone want to make changes to 7? Do you want to go through, have  
691 y'all gone through the actual ...

692  
693 **Einhorn:** Is there any changes needed? I don't think there's any changes needed.

694  
695 **Kaplan:** Maybe, let's just go through the "therefore's", and

696  
697 **Cindy Tom:** We've gone through the flowchart, why don't y'all go through the actual language  
698 of the recommendation?

699  
700 **Einhorn:** So, I'll just say...

701  
702 **Sassin:** Add the parts that were recommended, or...

703  
704 **Einhorn:** What was the other? Austin?

705  
706 **Kaplan:** Yeah, do we have one that works?

707  
708 **Einhorn:** The other ones were, no determinations of, no final determination being made by the  
709 Auditor's office, right?

710  
711 **Cindy Tom:** Uh, with regard to City officials? I mean, the definition of City officials is very  
712 broad, and would include quote, in 2-7, and would include folks to be considered to be  
713 executives.

714  
715 **Einhorn:** And I think really what we're talking about is City executives or assistant City  
716 attorneys. It's that third flowchart, right? Michael?

717  
718 **Kaplan:** Mike, would you join us here at the table and help us out as we... I appreciate that.

719  
720 **Whellan:** I'm on your staff. You didn't know that?

721  
722 **Kaplan:** Michael Whellan, with Deborah Thomas.

723  
724 **Deborah Thomas:** Are you even making a comment on anything other than Boards and  
725 Commission members?

726  
727 **Cindy Tom:** Yeah, when you say City officials, are you just talking about Boards and  
728 Commission members?

729  
730 **Whellan:** What I meant, when I said "Auditor", I meant; my first sentence was, "to be  
731 affirmative of anonymous complaints against City officials." And what I meant was however you  
732 defined your jurisdiction, which I was trying to follow, which I think is "City executives, or

733 assistant City attorneys.” And then I think you, is that within your jurisdiction? Yeah, there it is.  
734 It’s against “Council, persons appointed by Council, Council direct staff, City executives, or  
735 assistant City attorneys.” That’s what I meant by City officials, although I acknowledge that  
736 there is a definition of City Official which is broader.

737  
738 **McCormick:** That’s why we don’t use that.  
739

740 **Whellan:** I understand. I understand. So we’ll use these words. That’s what I meant.

741  
742 **Cindy Tom:** So for any respondent that might be under ERC jurisdiction, is that what you’re  
743 saying?  
744

745 **Whellan:** If we want to use, I would say, “anonymous complaints against” this list on the first  
746 page, against “Council, persons appointed by Council, Council direct staff, City executives, or  
747 assistant City attorneys, will not be considered without a complaint process through the Ethics  
748 Review Commission.” And then another sentence, “The Auditor shall not”, just to make it clear,  
749 “the Auditor shall not make any determinations concerning Conflict of Interest”, you know, 2-7-  
750 63, 2-7-64, “concerning Council, persons appointed...”

751  
752 **Deborah Thomas:** Not just Conflict, but the Code of, the whole thing, Article 4.  
753

754 **Whellan:** Article 4, “shall not make determinations regarding Article 4 against these: Council,  
755 persons appointed by Council, Council direct staff, City executives, or assistant City attorneys.”  
756 And then I had one other one...  
757

758 **Cindy Tom:** So, on this last flowchart which allows a Code of Ethics complaint to be filed with  
759 the Auditor, or maybe management, or maybe HR, I think we talked about maybe striking those,  
760 I’m not sure... against City executives, assistant City attorneys, and then the investigation  
761 happens; it looks like the proposal - as the flowchart has it - is for that eventually go to the ERC  
762 for final determination? Is that right, Working Group? Even though it might start out at the  
763 Auditor?  
764

765 **Sassin:** Yes  
766

767 **Einhorn:** Correct  
768

769 **Cindy Tom:** So is that in line with what you’re saying, that you don’t want the Auditor to be  
770 able to make a final determination, theoretically this would have to go to the ERC for the final  
771 determination?  
772

773 **Deborah Thomas:** Those people are in two different...  
774

775 **Einhorn:** So Michael, this is something that we changed tonight. In this process we added City  
776 executives, or assistant City attorneys here; this is the traditional ERC process.  
777

778 **Whellan:** Right. I like that process.

779 **Einhorn:** There's also this process for complaints to be filed against City executives, or  
780 assistant City attorneys through this process. But this process also goes here...

781  
782 **Kaplan:** Also ultimately comes to us.

783  
784 **Einhorn:** Which then leads right back into the old ERC process.

785  
786 **Whellan:** And, so on behalf of any, so with regard to Boards and Commissions, just, stay right  
787 here, which is great...

788  
789 **Einhorn:** Only there, this is just an additional process for City executives, or assistant City  
790 attorneys, who don't have that Civil Service protection or are protected by some sort of labor  
791 union.

792  
793 **Whellan:** And if Deborah is comfortable with that, as an assistant City attorney, then I'm fine  
794 with that, but I would point out just that you're going to end up in a very similar situation, there's  
795 an investigation - I love the fact that at least you're requiring a response and the response be  
796 attached, and at least you're recommending that, but then that report is issued and circulated ...

797  
798 **Kaplan:** To us.

799  
800 **Whellan:** To anybody.

801  
802 **Einhorn:** But it's a report, it's not a determination. You're not making a determination in that  
803 report. It is based on the evidence found in our investigation, we believe that there are, there is  
804 reason to believe...

805  
806 **Speight:** It's almost like they've done the preliminary hearing for us.

807  
808 **Whellan:** I think it's fine, so long as it's clear that the report shall not have any findings of  
809 guilt." And I'm not sure - I missed that one, shame on me.

810  
811 **Kaplan:** Help us with the language if it's not in there. I think that's everyone's intent.

812  
813 **Speight:** It's basically like they're performing the preliminary hearing. Right? And the  
814 investigation process.

815  
816 **Cindy Tom:** Well I think maybe what he's saying is that let's take the one report from the  
817 Auditor, you guys have ever seen; there might have been language in there that kind of sounded  
818 like a final determination...

819  
820 **Whellan:** Number 9?

821  
822 **Einhorn:** Yeah. "For all complaints alleging violations to the City's Code of Ethics that are  
823 within the jurisdiction of both the Commission and the City Auditor, the Council should be clear  
824 that while the Auditor may conduct an investigation, if evidence supports a suspected violation

825 has occurred, the Auditor should refer the matter to the Commission, and they should be  
826 empowered to determine if an Ethics violation has occurred.”

827  
828 **Whellan:** That’s good.

829  
830 **Speight:** I think what was confusing about this flowchart, Peter, is that the investigation looks  
831 like it’s a separate deal, and really the investigation’s happening here.

832  
833 **Einhorn:** The complaint comes in to them, they do an investigation.

834  
835 **Speight:** But each of these entities

836  
837 **Einhorn:** Each of those entities does an investigation.

838  
839 **Speight:** The response goes to...

840  
841 **Einhorn:** Well, and that might be a question for the Auditor’s office. Do you want Code of  
842 Ethics violations in this flowchart all coming into the Auditor’s office as well? Speaking, I mean,  
843 this is for City executives and assistant City attorneys; talking about Code of Ethics violations.  
844 We were talking about that for the rank and file employees. We wanted to do away with HR and  
845 City management and just have the Auditor doing those investigations. Should we do the same  
846 with the other one?

847  
848 **Hadavi:** So Code of Ethics, and the language we had originally talked about was “fraud, waste  
849 and abuse and the Code of Ethics”.

850  
851 **Cindy Tom:** I don’t think the ERC... do you guys want to make recommendations on fraud,  
852 waste and abuse, or do you want to stick with your...

853  
854 **Deborah Thomas:** Article 4.

855  
856 **Cindy Tom:** I think probably the ERC is going to have no opinion on - no comment on fraud,  
857 waste and abuse.

858  
859 **Einhorn:** That’s fine. And with regards to Code of Ethics violations against, you know, I’m fine  
860 with recommending that they all go through the Auditor’s office, and the Auditor’s office can  
861 track them. I think that there should be a single process so there’s some clarity around that. I  
862 don’t know what the rest of the Commission thinks about that.

863  
864 **Speight:** I like the tracking system.

865  
866 **Deborah Thomas:** I have a couple of comments.

867  
868 **Whellan:** Are you looking at the anonymous? Because I had one other comment on the  
869 anonymous that we didn’t include, which was if we’re going to do anonymous, and the Auditor  
870 is going to be taking those, and then, and you’ve now clarified won’t be making a determination,

871 that if there is an investigation that all facts that are gathered be shared with the ERC. If they are  
872 going to retain and keep the witnesses name anonymous, then at least they can share all the facts.  
873 There was some frustration related to that, as you well remember.

874  
875 **Cindy Tom:** I think that speaks to this flowchart where it assumes there could be an  
876 investigation that would eventually come to the ERC.

877  
878 **Einhorn:** Well it does, it would come to the ERC, but I think what he's talking about is the  
879 details of the report which is of course what came out of the Daniela Ochoa-Gonzalez cases.  
880 They didn't comment on the details of the investigation. I don't disagree with that. I think that  
881 would probably be a deal-breaker for y'all talking about the details of your investigation.

882  
883 **Hadavi:** Not completely so. It was the nature of the details. It was the working papers versus  
884 the report so what we talked about in light of that moving forward all this changes is having  
885 much more detailed reports with a lot of that information built in there so those questions  
886 don't...

887  
888 **Einhorn:** That's what it needs to be because it felt like there were a lot of determinations being  
889 made and we couldn't do anything with that because we couldn't look under the hood and see –

890  
891 **Whellan:** It was conclusory expert witness testimony without any of the back-up.

892  
893 **Einhorn:** So it sounds like we'll have a solution to that problem.

894  
895 **Whellan:** And where will that be? Will that be in Rules or where is that going to be? Is that in  
896 this recommendation? Is that in these?

897  
898 **Einhorn:** It's not. A more detailed report - that might be something we want put in is urging the  
899 Council to – and I don't even know if the Council needs to require the Auditor's office to do it or  
900 whether the Auditor just needs to set it as policy to do a more detailed report.

901  
902 **Deborah Thomas:** It actually was in the Resolution from Council that precipitated this  
903 discussion actually does specify in one of the "whereas" or a "therefore be it resolved" that we  
904 do need to modify our investigative report practices to include more details and those were in the  
905 report. So not that it shouldn't be part of you recommendation, but it was actually explicit in  
906 there and it's something we are working on.

907  
908 **Einhorn:** I think we should add something.

909  
910 **Cindy Tom:** Specifically to help you at least with regard to this one where they do an  
911 investigation.

912  
913 **Einhorn:** And we're talking just about anonymous complaints.

914  
915 **Kaplan:** Correct.

916

917 **Whellan:** Philosophically when you think about it there really shouldn't be anything that isn't  
918 revealed. Everything should be revealed except for the identity, right? That's really the way it  
919 should be written if they're going to withhold the identity then everything should be revealed in  
920 terms of the facts that have been gathered, just the basic underlying facts.

921  
922 **Kaplan:** I guess there are some personal facts that they might want to withhold. Medical  
923 information or I don't know.

924  
925 **Whellan:** We're only talking about Article 4, though. We're only talking about ethics.

926  
927 **Kaplan:** Oh, I don't know. We ended up with medical information during one of our hearings  
928 about City Council candidate forums. You never know. I'm trying to think back to last year. I  
929 won't get into it. It was already on the dang record. Where was I? Anything we have to do with  
930 receiving gifts and the Auditor looks to somebody's – I don't know how – but looks into  
931 somebody's bank account we don't need to necessarily make people's bank account information  
932 public. I'm just thinking of reasonable things that y'all might withhold, but I agree that the  
933 report needs to be fleshed out so we can see facts.

934  
935 **Whellan:** The challenge I have – I hear what you're saying – but if you were to add in there a  
936 provision that said something like “and the Auditor shall use its discretion to withhold whatever  
937 might be identifying information” well you and I know from our work with privilege everything  
938 has the possibility of being identifying or identifiable.

939  
940 **Cindy Tom:** The other thing is that the Auditor is a City official, the ERC members are City  
941 officials. You know, it might be possible to share information between the two without it  
942 necessarily being public for everyone in the world to see.

943  
944 **Kaplan:** Yeah, and I think once we set the process in motion if we don't see enough detail to,  
945 yeah, we can revisit it and maybe work on solutions between ourselves.

946  
947 **Cindy Tom:** Personal, financial information or something that could be...Peter, we're fixing it  
948 on here?

949  
950 **Einhorn:** Yes. It's just easier. That keyboard kind of freaks me out.

951  
952 **Deborah Thomas:** So the Ordinance, if you'll recall, the Resolution came from Council with an  
953 ordinance framework so to the extent – so basically I'm following that if there are, if the Council  
954 did give the Auditor and the Law department the Manager and the ERC some flexibility, so to the  
955 extent that there are any agreements with regard to those items, the Ordinance will reflect that.  
956 There's no sense in making the Council deal with something that everybody already agrees to,  
957 but if there's not an agreement on something then I'm leaving it as the Council sent it out. So for  
958 instance, I understand that the Auditor and the Ethics Review Commission agree that the Council  
959 and Council appointees stay with the ERC so the Ordinance will say it stays with the ERC, but to  
960 the extent that you guys don't agree about what's going to happen with the executives I'm gonna  
961 leave it as it was when the Council sent it out with the Auditor, just because I don't have a way to  
962 move it. So when you're doing your recommendations, of course, I just want you to know that if

963 there's not an agreement I'm leaving it the way it was, the way it came out of Council. I won't  
964 make those changes.

965  
966 **Cindy Tom:** And the way it came out of Council was that ERC only retains jurisdiction with  
967 regard to Code of Ethics over Board and Commission members. Just to remind everybody.

968  
969 **Deborah Thomas:** So the Ordinance will say Council and Council appointees because you guys  
970 all agree on that.

971  
972 **Cindy Tom:** There seems to be agreement that ERC will also retain jurisdiction over Council,  
973 Council appointees, which would of course include Board and Commission members and also  
974 other folks like direct staff, City manager. Are you in agreement about Council staff?

975  
976 **Deborah Thomas:** Okay, so put the Council staff in there? Okay.

977  
978 **Cindy Tom:** But on executives, where are we falling on that?

979  
980 **Corrie Stokes:** I would say – one thing that we haven't done is have a discussion with City  
981 management about that piece and that's something that obviously, I don't want it to be the City  
982 Auditor and the ERC agree to this without discussion with the Manager on that. So I would want  
983 to have that discussion. I don't think we're opposed to it so – I don't know if that makes sense  
984 so we're at this point neutral on it but I would want to make sure that we've run that by the HR  
985 and the Manager before –

986  
987 **Deborah Thomas:** So right now you're neutral on the way it's set out in here?

988  
989 **Corrie Stokes:** I think that the process works. I just think that whether or not City executives  
990 and assistant City attorneys who are not covered by Municipal Civil Service, whether they go the  
991 Ethics Review Commission, I would say we'd be okay with that but I wouldn't want to commit  
992 to that without having that discussion with the Manager.

993  
994 **Cindy Tom:** So there's two slides that contain executives and assistant City attorneys on this.  
995 There's the first one where you could have sworn complaints straight to the ERC and then there's  
996 the last one where a complainant comes to the Auditor. The Auditor could investigate, could  
997 issue hopefully a detailed report and then it could still come to the ERC for final determination.  
998 Are ya'll neutral on this slide or?

999  
1000 **Corrie Stokes:** I think that, I mean the word neutral isn't maybe the correct characterization.  
1001 What I'm saying is I think the process works as laid out.

1002  
1003 **Kaplan:** You guys will confirm with City management and then get back with Law if that's the  
1004 case.

1005  
1006 **Deborah Thomas:** Or vice-verse. As soon as I have something I will send it to you guys.

1007  
1008 **Kaplan:** Great.

1009 **Cindy Tom:** Because it will be finalized  
1010  
1011 **Deborah Thomas:** It will definitely come out on Friday, but as soon as the minute that I have it  
1012 I will send it to you.  
1013  
1014 **Cindy Tom:** So the ERC has of course called this special meeting to talk about this tonight. I  
1015 think the intent of the Commission is to make a recommendation tonight, vote on it, sort of  
1016 where they are tonight so they won't have an opportunity to come back as a group after you guys  
1017 have had a chance to talk with management. Unless y'all want another meeting.  
1018  
1019 **Deborah Thomas:** But if I understand what your position is on the executives and they tell me  
1020 they're in agreement on the position with executives then I will put that in the order.  
1021  
1022 **Cindy Tom:** And obviously the Commission members, after tonight, are more than welcome to  
1023 contact Council directly or attend the Council meeting on the 20<sup>th</sup> just let me know if you are  
1024 attending the Council meeting on the 20<sup>th</sup> so I can make sure to have an appointment set. So it's  
1025 not that you don't get to have any more feedback after tonight. Tonight is just the night y'all  
1026 have set aside to adopt a recommendation as a group, or individual advocacy if you choose, and  
1027 can continue past tonight directly as individuals.  
1028  
1029 **Einhorn:** So I made a couple of changes on these. It's going to take a lot more work to actually  
1030 remove them, but I struck thorough City management and HR so from that slide and from this  
1031 slide. So that reflects the Auditor's office is the sole entity to be investigating Code of Ethics  
1032 complaints and we should define that in our Resolution. It goes to Council and I guess we define  
1033 that as Article...  
1034  
1035 **Cindy Tom:** Article 4, Chapter 2-7.  
1036  
1037 **Einhorn:** So here's what I put in. I added another number paragraph after paragraph 7; it talks  
1038 about anonymous complaints. It says, "The Commission urges Council to require that the  
1039 Auditor's office" and requires might not be the right word "requires that the Auditor's office  
1040 expand the amount of detail and whenever possible use plain language in investigative reports to  
1041 ensure clarity to third parties. This is to ensure that the Commission can reasonably use the  
1042 report as the basis for a preliminary hearing." I'm not completely married to that language.  
1043  
1044 **Kaplan:** I think it's snappy.  
1045  
1046 **Einhorn:** Part of that was drawn directly from Council's resolution.  
1047  
1048 **Corrie Stokes:** We've actually already been directed to do it and are already in the process of  
1049 implementing it. We are very comfortable with that language.  
1050  
1051 **Kaplan:** So Cindy's retyping this in her version. This is what we are thinking about maybe  
1052 taking some action on?  
1053  
1054 **Einhorn:** Yes. Did we change anything in seven? We left seven alone, right?

1055 **Kaplan:** I left seven alone instead of clarifying it in eight. Does that address your concerns with  
1056 regards to that?  
1057

1058 **Whellan:** I still think for clarity purposes because if there is going to be an anonymous  
1059 complaint against Council, persons appointed by Council, Council direct staff, City executives or  
1060 assistant City attorneys we should say it will not be considered without a complaint process with  
1061 the ERC.  
1062

1063 **Einhorn:** But this process doesn't involve the Auditor's office at all so there would be no  
1064 Auditor's report.  
1065

1066 **Corrie Stokes:** Well, you gotta carve out these guys for a second.  
1067

1068 **Einhorn:** I guess that's true.  
1069

1070 **Cindy Tom:** What about – does number two help with that? Where it says sole jurisdiction?  
1071 And also one is Mayor and Council and two is about officials appointed by Council.  
1072

1073 **Whellan:** So there still can be anonymous complaints, though, is what you're presuming with  
1074 regard to people covered by the Commission in one and two.  
1075

1076 **Einhorn:** There can technically still be anonymous complaints under this, but the anonymous  
1077 complaints would never be investigated by the Auditor's office under this procedure that's being  
1078 envisioned. They would forward the anonymous complaint or I guess someone could  
1079 theoretically anonymously complain to Cindy.  
1080

1081 **Cindy Tom:** Your email addresses are online, but I don't know if anyone would know how they  
1082 could do that anonymously. I guess they could do an anonymous voicemail.  
1083

1084 **Einhorn:** They could theoretically anonymously leave a voicemail with our staff.  
1085

1086 **Cindy Tom:** But there's no anonymous reporting hotline that the ERC maintains.  
1087

1088 **Einhorn:** But your number's on the ERC website. Right? Your phone number?  
1089

1090 **Cindy Tom:** Yes. Sadly, yes.  
1091

1092 **Einhorn:** Somebody could call Cindy's phone in the middle of the night, leave a voicemail. No  
1093 name, no return phone number.  
1094

1095 **McCormick:** No caller ID?  
1096

1097 **Cindy Tom:** I think my voicemail tells me where it came from, but if they had a blocked  
1098 number or something it wouldn't –  
1099

1100 **Einhorn:** But then that wouldn't go through the Auditor's office. There'd be no Auditor's office  
1101 report. It would come to us and we would have to decide how to handle that.

1102  
1103 **Cindy Tom:** And there would be a hearing on an anonymous complaint. It would be a hearing  
1104 on a complaint initiated by –

1105  
1106 **Kaplan:** Before it was ever a preliminary hearing it would be an agenda item on a special called  
1107 meeting where we discuss that we received this.

1108  
1109 **Whellan:** The process would – yes.

1110  
1111 **Einhorn:** If the process is public in that case.

1112  
1113 **Cindy Tom:** Am I not addressing your concerns with one or two?

1114  
1115 **Whellan:** Yes, it's there, one and two. I'm telling you if somebody just picks this up and reads  
1116 this it's unclear in my opinion. Maybe there's a way to emphasize that one and two, that there  
1117 can be anonymous complaints for one and two, but that process will still be done through the  
1118 ERC without any Auditor involvement. Because you're asking - anonymous complaints are  
1119 important and you're urging the Council to give consideration - I think you can still provide a  
1120 little bit of direction by saying anonymous complaints will not be handled by – anonymous  
1121 complaints against this group: Council, persons appointed by Council, Council direct staff, City  
1122 executives or City attorneys will not be handled by the Auditor.

1123  
1124 **Corrie Stokes:** The report would still come to the ERC, but the anonymous complaint would be  
1125 investigated by us for executives and assistant City attorneys.

1126  
1127 **Einhorn:** The only time an anonymous report from an anonymous complaint would come to the  
1128 ERC would be for City executives and assistant City attorneys.

1129  
1130 **Whellan:** And, again, for clarity purposes I would, and it's a simple sentence because you're  
1131 asking them to give careful consideration to clarify that anonymous complaints against Council,  
1132 persons appointed by Council, Council direct staff shall not go to the Auditor and will be  
1133 considered to be ERC process.

1134  
1135 **Einhorn:** In number two we do say for the same reasons the Commission should retain sole  
1136 jurisdiction over all officials appointed directly by the City Council, including but not limited to  
1137 City manager, City Auditor, Municipal Court judges, City Clerk, Boards and Commissions  
1138 appointees and direct Council staff.

1139  
1140 **Whellan:** The Auditor will have no input with regard to two.

1141  
1142 **Cindy Tom:** Right. The sole jurisdiction – do you think they need to say something affirmative  
1143 about the Auditor not – you know they have sole and the Auditor has no jurisdiction over –

1144  
1145 **Einhorn:** I think we would say that if there was a disagreement -

1146 **Cindy Tom:** And I think the Ordinance is going to explicitly state that the Auditor may not  
1147 investigate Code of Ethics violations by those people.  
1148

1149 **Einhorn:** If there was disagreement about that I would think we should make that more explicit,  
1150 but since there seems to be pretty clear agreement on that I don't feel the need to add words for  
1151 that. I don't know, what does everyone else think?  
1152

1153 **Cindy Tom:** I agree.  
1154

1155 **Kaplan:** I think number two is clear. So, where are we?  
1156

1157 **Cindy Tom:** I added language. Did I type that correctly? Can anybody read this? Does it need  
1158 to be bigger?  
1159

1160 **Einhorn:** So get rid of Human Resources and Management in number five and then on number  
1161 six take Human Resources out of there. And then I think, Cindy, I've actually found a use for  
1162 our "whereas'."  
1163

1164 **Cindy Tom:** Exciting. What are you going to do?  
1165

1166 **Einhorn:** I'm going to say whereas the issue of jurisdiction for determination of violation of the  
1167 City of Austin's Code of Ethics and then in parentheses we say "defined as."  
1168

1169 **Cindy Tom:** Do you want to say "defined as" or do you just want a parenthetical?  
1170

1171 **Einhorn:** Do we know what the convention for our recommendation number is? Is it just the  
1172 date?  
1173

1174 **Cindy Tom:** It should be 2014 and then 11 and then whatever today's date is.  
1175

1176 **Einhorn:** Are there dashes or anything like that?  
1177

1178 **Cindy Tom:** Dash 001. Is the intent for the recommendation to include the enclosures?  
1179

1180 **Einhorn:** Yes, please. The corrected flow charts please.  
1181

1182 **Cindy Tom:** Does the recommendation textual language reference the flowcharts in any way?  
1183 Should it? No? No.  
1184

1185 **Einhorn:** If the Chair is ready for a motion?  
1186

1187 **Kaplan:** I'm not sure I am, but I guess we'll speed things up. So we have motion for approval  
1188 of resolution with the attachments and all the changes by Einhorn, second by Speight. Further  
1189 discussion? Hearing none, we'll have a vote. All those in favor?  
1190

1191 **Everyone:** Aye.

1192 **Kaplan:** Passes unanimously. Thank you to everyone for all your hard work.

###