

STOP KICKING THE CAN DOWN THE ROAD SAN DIEGO'S 1992 TRANSPARENCY LAW MUST BE ENFORCED

SUMMARY

The City of San Diego (City) voters passed a ballot measure in 1992 amending the San Diego City Charter to add section 225 titled, "Mandatory Disclosure of Business Interests." The new law—also called the "transparency law"—required every company doing business with the City to disclose information about the principals involved in the transaction.

In response to a citizen complaint that the law was not being enforced, the 2016/2017 San Diego County Grand Jury (Grand Jury) investigated to see if companies contracting with the City were providing the required information. In many instances, they were not. The main reason is that charter section 225 contains language that is overly broad, rendering it difficult to enforce and easy to circumvent.

Since 1992, three successive City Attorneys have provided to the City Council formal opinions known as Memoranda of Law (MOL), as well as a charter-review report addressing the deficiencies in charter section 225. All have made specific recommendations, but none have been acted on. In October 2016, at the request of the City Council, the City Attorney's office provided yet another MOL analyzing charter section 225 as well as proposing an ordinance to clarify the law's intent and to empower the City to enforce it. However, the proposed ordinance had several components that needed input from the City Council Rules Committee in order to finalize it.

At the October 2016 meeting, the Council Rules Committee formally requested input from the Mayor's office, asking the Mayor and his staff to work in conjunction with the Independent Budget Analyst and other appropriate City departments to recommend the necessary language. Also under consideration was whether to enact an ordinance, as the City Attorney suggested, or to place a measure on the 2018 ballot to amend the language of charter section 225. The Grand Jury encourages this effort—whichever path is chosen—and recommends that the Mayor's office move forward with haste. The citizens of San Diego deserve to have the transparency in City contracts that was the law's intent 24 years ago. The Grand Jury further recommends that the City Council heed the counsel of the City Attorney's office, especially when it issues multiple MOLs on the same subject.

INTRODUCTION

The Grand Jury became interested in assessing how well the City of San Diego is implementing charter section 225, the so-called transparency law. A citizen complaint suggested that the law was essentially being ignored, and the Grand Jury found information required of participants in city contracts is not being provided as the law intended.

PROCEDURE

The Grand Jury reviewed the following documents:

- City Attorney’s Memorandum of Law and proposed ordinance (October 12, 2016)
- San Diego City Council’s request for City Attorney analysis regarding charter section 225 (July 28, 2016)
- City Attorney’s Report to the City Council: 2014 San Diego Charter Legal Review (February 5, 2014)
- City Attorney’s report on Enforcement of Charter Section 225 (June 20, 2005)
- City Attorney’s Memorandum of Law: Section 225 of the City Charter (July 16, 1992)
- Various news articles

The Grand Jury also attended meetings of the Council Rules Committee and interviewed officials from the Mayor’s office, the City Council, and the City Attorney’s office.

DISCUSSION

After the City of San Diego’s real estate department nearly made a \$47 million deal voters approved Proposition E in 1992. The measure amended the City Charter to require disclosure of the names, identities, and business interests of anyone doing business with the City. Since that time, charter section 225—the transparency law—has rarely been enforced, mainly because, according to the City Attorney’s Office, its language is vague and overly broad. Three San Diego City Attorneys have issued memoranda of law (1992,¹ 2005,² 2016³) pointing out the deficiencies in the law and making recommendations to fix it. The City Attorney’s office also issued a report to the City Council in 2014, advising revision of charter section 225.⁴ The City Council did not respond to the 1992 or 2005 MOL, nor did it respond to the 2014 request for revision.

The transparency law has received recent attention in the media, especially when a review of a number of contracts revealed that none fully complied with the law requiring disclosure.⁵ The flurry of news reports spurred the City Council to request the 2016 MOL, in other words, simply asking for yet another analysis of the law and guidance on its enforcement.

The 2016 MOL highlights the problems with the law’s original language. Chief among them: It places the burden of compliance on the applying entity, not on the City. The law requires “disclosure of the name and identity of any and all persons directly or indirectly involved in the application or proposed transaction and the precise nature of all interests of all persons therein.”⁶ The City Attorney’s MOL concluded that this provision is vague and overly broad. The example

¹ John Witt, City Attorney’s Memorandum of Law: Section 225 of the City Charter, July 16, 1992.

² City Attorney’s report on Enforcement of Charter Section 225, <http://docs.sandiego.gov/cityattorneyreports/RC-2005-15.pdf> (accessed 11/14/2016).

³ City Attorney’s Memorandum of Law and proposed ordinance, <https://assets.documentcloud.org/documents/3149127/Section-225-Memo-of-Law-Goldsmith-Oct-2016.pdf> (accessed 11/22/2016).

⁴ City Attorney’s Report to the City Council: 2014 San Diego Charter Legal Review, <https://assets.documentcloud.org/documents/3001576/2014-San-Diego-Charter-Review-City-Attorney-Jan.pdf> (accessed 12/6/2016).

⁵ Brad Racino, “Long-ignored transparency law would reveal who’s doing billions in business with San Diego,” *inewsourc.org*, August 2, 2016, <http://inewsourc.org/2016/08/02/san-diego-business-transparency-section-225/> (accessed August 3, 2016).

⁶ San Diego City Charter, Section 225: Mandatory Disclosure of Business Interests.

given is of a hypothetical contract with General Motors, which, according to a literal interpretation of the law, would require disclosure by every stockholder in the company. The City Attorney's MOL recommended a proposed ordinance that refined the language of section 225 in keeping with the intent of the original initiative, but more precisely described its requirements.

Memoranda of law issued by previous City Attorneys suggested implementation of a new council policy to refine the law's reporting requirements and would also include limitations on the types of contracts to which the law would apply. For example, one suggestion was to limit the law's scope to only contracts needing City Council approval. Another would limit disclosure requirements to only those individuals who held a 5 percent ownership and with a value of \$10,000 or more. The current MOL points out that such a council policy could not legally implement these requirements. Doing so would require a voter-approved amendment to charter section 225, something that could not be accomplished until 2018.

As an alternative, the City Attorney's MOL-proposed ordinance was careful not to "amend" charter section 225, as this can be done only by voter approval. Instead, it clarified the language and proposed amending San Diego's municipal code. However, the City Attorney's office requested input from the Council Rules Committee to fill in some gaps in the language of the proposed ordinance. Because it would be an "implementing ordinance," the City Attorney's office needed to know how it should be carried out and enforced.

The Council Rules Committee referred that request to the Mayor's office because that office must decide on the mechanics of implementing an ordinance. Costs of implementation, such as staffing, also should be considered. The committee asked the Mayor's office to "work with the appropriate city departments, the Office of the Independent Budget Analyst, the City Attorney's Office, and the Committee Consultant to:

- Review this charter section and proposed ordinance, and
- Report back to the Rules Committee with recommendations on how to best implement its provisions."⁷

City officials have also stated that enforcement of charter section 225 might be hampered by staff or budget limitations. The Grand Jury does not believe that enforcement of this law is optional, nor should it be postponed or sidelined by lack of staffing or budget.

At the time of this report, the Grand Jury has been assured that the Mayor's office is diligently working on the process of putting the pieces of the puzzle together, whether the result is an ordinance to amend the Municipal Code or a ballot measure to amend the City Charter. The Grand Jury favors whichever solution will best enable the City to enforce charter section 225. Whatever the final choice, the Grand Jury encourages the Mayor's office to complete the task with great urgency. Voters decided this issue more than 24 years ago, and enforcement is long overdue.

⁷ Rules Committee of the City of San Diego, Actions for the Committee Meeting of October 26, 2016, http://docs.sandiego.gov/ccaction_rules_ogir/r161026_actions.pdf (accessed 12/6/2016)/

An additional concern is that three successive City Attorneys recommended addressing problems with the enforceability of charter section 225 via MOLs and charter review suggestions. All were summarily ignored. It was only when news stories revealed that the law has been essentially ignored since its passage in 1992 that the City Council took action. The Grand Jury believes that the City Council should heed the advice the City Attorney provides. Otherwise, why have one?

FACTS AND FINDINGS

Fact: Voters approved Proposition E, the transparency law, in 1992, adding section 225 to the San Diego City Charter.

Fact: Language in San Diego City Charter section 225 is vague.

Finding 01: Because of its overly broad language, the transparency law is largely unenforceable.

Fact: Three City Attorneys issued memoranda of law—in 1992, 2005, and 2016—addressing the deficiencies in San Diego City Charter section 225.

Fact: The City Attorney recommended in a 2014 report that San Diego City Charter section 225 be revised.

Fact: The San Diego City Council has not yet revised San Diego City Charter section 225.

Finding 02: The San Diego City Council has been remiss in not following the advice of successive City Attorneys and correcting the identified deficiencies in San Diego City Charter section 225.

RECOMMENDATIONS

The 2016/2017 San Diego County Grand Jury recommends that the San Diego City Council:

17-20: Collaborate with the Mayor, the Independent Budget Analyst, and other appropriate City departments to either amend the municipal code to enforce the transparency law or place a measure on the 2018 ballot to amend charter section 225.

17-21: Correct identified deficiencies in San Diego City Charter Section 225 by not ignoring advice and counsel from the Office of the City Attorney.

The 2016/2017 San Diego County Grand Jury recommends that the Mayor of the City of San Diego:

17-22: Provide the information requested by the City Attorney in his October 12, 2016, MOL to enact an ordinance enabling enforceability of the transparency law. Alternatively, work in collaboration with the City Council and other appropriate departments to craft ballot language for the 2018 election to amend the City Charter.

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

- (a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
 - (1) The respondent agrees with the finding
 - (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
 - (1) The recommendation has been implemented, with a summary regarding the implemented action.
 - (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
 - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
 - (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

| Responding Agency | Recommendations | Date |
|-------------------------------|----------------------------|----------------|
| San Diego City Council | 17-20 through 17-21 | 7/12/17 |
| San Diego Mayor | 17-22 | 7/12/17 |