Ralph Kanz
[Address redacted]

August 29, 2012

Mr. Richard Unger, Chair
Oakland Public Ethics Commission
One Frank Ogawa Plaza, 11th Floor
Oakland, CA 94612

Re: Complaint 12-06

Dear Chair Unger and Members of the Commission:

As you know, the Oakland Public Ethics Commission ("PEC") met on May 16, 2012 and selected two new members for the Commission. Both the staff report and the City Attorney's opinion on this complaint are too narrowly focused to answer the real question: Could three members, enough to elect a new member to the PEC, meet in secret to decide on the selection of two new members to the Commission. I believe if the question had been framed more broadly, and not so narrowly focused the PEC would clearly see that a "cure and correct" of the May 16 meeting is mandatory.

The portion of the one opinion cited by the City Attorney revolves around the issue of how many members are needed to have a quorum. In this case that is not the issue. Here we are concerned with the deliberative process and the need to publicly notice any meeting where a decision affecting the public takes place. The issue here is that the sub-committee that met on May 16 selected two new members for the PEC without opportunity for public participation.

Article I, section 3(b) of the California Constitution provides the overriding guidance in this case:

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41 at page 48 provides significant clarification on the roles of deliberation and action in whether a meeting is subject to the noticing requirements of the Brown Act:

> "The act supplies additional internal evidence that deliberative gatherings are 'meetings,' however confined to investigation and discussion. Section 54952.6 defines the phrase 'action taken.' (Fn. 3, supra.) This definition leads to two other provisions where this phrase, or an approximation of it, appears: the declaration of legislative intent in section 54950 and the misdemeanor declaration in section 54959 (fns. 2 and 3, supra). In section 54950 the notion of action-taking is juxtaposed to that of deliberation, indicating that deliberation and action, however they may coalesce, are functionally discernible steps, both of which must be taken in public view."

While the *Sacramento* case dates to 1968, Article I, section 3(b) of the state Constitution which further strengthen the Brown Act was not passed by the voter until 2004. Clearly, if the Court were to revisit this 1968 decision it would be even stronger given the new constitutional mandates.

As both staff and the City Attorney have conflicts in this matter, it is critical that the PEC consult outside authorities for a fully objective analysis of this case.

If the PEC is to set an example for the City, and as this was an unintentional error, it is imperative that a "cure and correct" meeting be scheduled.

Sincerely yours,

Ralph Kanz