

CITY OF OAKLAND
PUBLIC ETHICS COMMISSION
REGULAR MEETING
One Frank Ogawa Plaza (City Hall)
Monday, April 4, 2011
Sgt. Mark Dunakin Hearing Room (No. 1)
6:30 p.m.
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Commission Membership: Richard Unger (Chair), Ai Mori (Vice-Chair), Alex Paul, Amy Dunning, Lloyd Farnham, Christopher Young, Aspen Baker

Staff Members: Commission Staff:
Daniel Purnell, Executive Director
Tamika Thomas, Executive Assistant
City Attorney Representative:
Alix Rosenthal, Deputy City Attorney

MEETING AGENDA

- A. Roll Call And Determination Of Quorum
- B. Approval Of Draft Minutes Of The Regular Meeting Of March 7, 2011
- C. Executive Director And Commission Announcements
- D. Open Forum
- E. Complaints
 - 1. A Staff Report And Action To Be Taken On Complaint No. 10-09 (Handa) **(Supplemental)**
 - 2. A Staff Report And Action To Be Taken On Complaint No. 10-22 (Cash) **(Supplemental)**
 - 3. A Staff Report And Action To Be Taken On Complaint No. 10-26 (Kanz) **(Supplemental)**
 - 4. A Staff Report And Action To Be Taken On Complaint No. 10-27 (Kanz)
 - 5. A Referral From The Office Of The City Auditor Regarding Potential Violations Of OCRA Section 3.12.140; Action To Be Taken Whether To Initiate A Complaint

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- F. A Staff Report And Action To Be Taken Regarding 1) A Required Review And Adjustment Of City Council Salaries; And 2) Proposals To Modify Commission Authority To Adjust City Council Salaries Pursuant To City Charter §202(c)
- G. A Staff Report And Action To Be Taken Regarding A Request For Commission Review And Development Of A Proposal To Amend OCRA §3.12.220 (How And When Voluntary Expenditure Ceilings Are Lifted)
- H. A Staff Report And Action To Be Taken Regarding Commission Participation In The Recruitment And Selection Of A New Executive Director

The meeting will adjourn upon the completion of the Commission's business.

You may speak on any item appearing on the agenda; however, you must fill out a Speaker's Card and give it to a representative of the Public Ethics Commission. All speakers will be allotted three minutes or less unless the Chairperson allots additional time.

In compliance with the Americans with Disabilities Act, if you need special assistance to participate in the meetings of the Public Ethics Commission or its Committees, please contact the Office of the City Clerk (510) 238-7370. Notification two full business days prior to the meeting will enable the City of Oakland to make reasonable arrangements to ensure accessibility.

Should you have questions or concerns regarding this agenda, or wish to review any agenda-related materials, please contact the Public Ethics Commission at (510) 238-3593 or visit our webpage at www.oaklandnet.com.

Approved for Distribution

Date



PUBLIC ETHICS COMMISSION TIMELINE FOR FUTURE AGENDA ITEMS (TENTATIVE)

ITEM	MAY	JUNE
Complaint No. 09-15 (Supplemental)		X
Complaint No. 10-05 (Hearing)	X	
Complaint No. 10-07 (Supplemental)	X	
Complaint No. 10-16		X
Complaint No. 10-20	X	
Complaint No. 10-21	X	
Complaint No. 10-24 (Supplemental)	X	
Complaint No. 10-25	X	
Complaint No. 10-28	X	
Complaint No. 10-30		X
Review Of Commission's General Complaint Procedures (Committee)		X
Sunshine Ordinance Hearings RE Public Accessibility To Records	X	X
Mandatory Review And Adjustment Of City Council Salaries	X	X
Commission Goal Setting Meeting	X	

Public Ethics Commission Pending Complaints

Date Received	Complaint Number	Name of Complainant	Respondents	Date of Occurrence	Issues	Status
12-7-10	10-30	Sanjiv Handa	Oakland Parking Division	Ongoing	Oakland Sunshine Ordinance -- Alleged failure to timely produce records	Staff is investigating
11-1-10	10-28	Ralph Kanz	Ala. Demo. Central Comm.; OakPAC	October 29, 2010	OCRA; §3.12.230	Staff is investigating
11-1-10	10-27	Ralph Kanz	Coalition For A Safer California	October 29, 2010	OCRA; §3.12.230	Staff is investigating
10-13-10	10-26	Ralph Kanz	Jean Quan Floyd Huen	June 30, 2010 and ongoing	OCRA; §3.12.050; 3.12.090	Staff is investigating
10-13-10	10-25	Ralph Kanz	Don Perata	June 30, 2010 and ongoing	OCRA; §3.12.090(A)(D)	Staff is investigating
10-13-10	10-24	Ralph Kanz	Jean Quan	September 2010	OCRA; §3.12.140(P)	Staff is directed to explore settlement in lieu of hearing.
9/13/10	10-22	Jeffery Cash	Desley Brooks	Ongoing	Sunshine Ordinance; public records	Staff is investigating

9/14/10	10-21	Jean Quan	Don Perata, Paul Kinney; California Correctional Peace Officers Association; Ronald T. Dreisback; T. Gary Rogers; Ed DeSilva; Richard Lee	Ongoing	OCRA violations	Staff is investigating
8/2/10	10-20	Sanjiv Handa	Various Business Improvement Districts & Community Benefit Districts	Various between June 3 and August 2, 2010	Sunshine Ordinance; public meetings	Staff is investigating
7/2/10	10-16	Gwilym Martin	Joseph Yew, Finance	June 18, 2010	Sunshine Ordinance; production of records	Staff is investigating
3/29/10	10-09	Sanjiv Handa	Port of Oakland Board Of Commissioners	1/26/10	Oakland Sunshine Ordinance	Staff is directed to explore settlement in lieu of hearing.
3/23/10	10-07	Sanjiv Handa	Victor Uno, Joseph Haraburda, Scott Peterson, Sharon Cornu, Barry Luboviski, Phil Tagami	January 1, 2007 to present	Lobbyist Registration Act	Staff is investigating
3/3/10	10-05	David Mix	Oakland City Council	3/2/10	Oakland Sunshine Ordinance	Staff is directed to explore settlement in lieu of hearing.
11/17/09	09-15	Anthony Moglia	Jean Quan	Ongoing	Alleged misuse of City resources	Staff is investigating.
09/16/09	09-12	Marleen Sacks	Office of the City Attorney (Mark Morodomi)	ongoing	Sunshine Ordinance; Public Records Act	Staff is directed to explore settlement in lieu of hearing.

2/7/09	09-03	John Klein	City Council President Jane Brunner	February 3, 2009	Sunshine Ordinance -- Allocation of speaker time.	Awaiting report from City Attorney.
11/6/08	08-18	David Mix	Raul Godinez	August 2008	Allegations involving Sunshine Ordinance -- Public Records Request	Commission jurisdiction reserved
11/6/08	08-13	David Mix	Leroy Griffin	August 2008	Allegations involving Sunshine Ordinance -- Public Records Request	Commission jurisdiction reserved
3/28/08	08-04	Daniel Vanderpriem	Bill Noland, Deborah Edgerly	Ongoing since 12/07	Allegations involving production of City records	Commission jurisdiction reserved.
2/26/08	08-02	Sanjiv Handa	Various members of the Oakland City Council	February 26, 2008	Allegations involving the Oakland Sunshine Ordinance and Brown Act	Commission jurisdiction reserved.
2/20/07	07-03	Sanjiv Handa	Ignacio De La Fuente, Larry Reid, Jane Brunner and Jean Quan	December 19, 2006	Speaker cards not accepted because they were submitted after the 8 p.m. deadline for turning in cards.	Commission jurisdiction reserved.
3/18/03	03-02	David Mix	Oakland Museum Dept.	3/11/03	Allegation of Sunshine Ordinance and Public Records Act violation.	Commission jurisdiction reserved.



Commission Membership: Richard Unger (Chair), Ai Mori (Vice-Chair), Alex Paul, Amy Dunning, Lloyd Farnham, Christopher Young, Aspen Baker

Staff Members: Commission Staff:
Daniel Purnell, Executive Director
Tamika Thomas, Executive Assistant
City Attorney Representative:
Alix Rosenthal, Deputy City Attorney

MINUTES OF MEETING

A. Roll Call And Determination Of Quorum

The meeting was called to order at 6:30 p.m.

Members present: Unger, Mori, Paul, Dunning, Farnham, Young, Baker

B. Approval Of Draft Minutes Of The Special Meeting Of January 19, 2011, The Special Meeting Of February 2, 2011, And The Regular Meeting Of February 7, 2011

The Commission approved by unanimous consent the minutes of January 19, 2011, February 2, 2011, and February 7, 2011.

C. Executive Director And Commission Announcements

The executive director reported that the City Council's Rules and Legislation Committee considered the Commission's proposed amendments to the Lobbyist Registration Act at a meeting on March 3, 2011. Councilmember Jane Brunner submitted a proposal that the City Council adopt the California Political Reform Act's definition of lobbyist: An individual who receives \$2,000 or more per month to lobby or who spends one-third of his or her time directly lobbying public officials. The Rules Committee postponed further deliberations on the item to study additional alternatives to the two proposals.

Commissioners are reminded to file their annual Statements Of Economic Interests (Form 700) with the Office of the City Clerk before the April 1, 2011 deadline.

MINUTES OF MEETING -- DRAFT
PUBLIC ETHICS COMMISSION
REGULAR MEETING
One Frank Ogawa Plaza (City Hall)
Monday, March 7, 2011
Sgt. Mark Dunakin Hearing Room (No. 1)
6:30 p.m.



Commission staff is attempting to schedule a second hearing on public access to City records for Thursday, March 24, 2011. Formal notice will follow.

Commissioner Baker proposed that the Commission schedule a meeting to discuss Commission goals and strategies. The Commission directed staff to agendaize the subject for further discussion and scheduling. The Commission would like to invite a representative from the Office of the City Auditor to attend.

D. Open Forum

There was one speaker: Sanjiv Handa

E. Complaints

1. A Staff Report And Action To Be Taken On Complaint No. 10-05 (Mix)

The Commission moved, seconded and failed to adopt a motion to pursue settlement of Complaint No. 10-05 by way of training for City Council chairpersons and staff on relevant provisions of the Sunshine Ordinance. (Ayes: Farnham, Young; Noes: Unger, Mori, Dunning, Paul, Baker)

The Commission moved, seconded and adopted a motion to schedule an evidentiary hearing before the full Commission to determine whether the City Council Rules and Legislation Committee violated Section 2.20.080(B) and (E) of the Oakland Sunshine Ordinance by supplementing the City Council's March 2, 2010 regular meeting without making a proper "urgency" finding. The Commission directed staff to attempt reaching a settlement of the allegations by means of a voluntary "cure and correction" before scheduling any hearing. (Ayes: Unger, Mori, Dunning, Paul, Baker; Noes: Farnham, Young)

There was one speaker: Sanjiv Handa

2. A Staff Report And Action To Be Taken On Complaint No. 10-08 (Klein)

The Commission moved, seconded and adopted a motion to dismiss Complaint No. 10-08 on grounds that the complainant is believed to have left the area and there appears to be no records existing that are responsive to his request. (Ayes: All)

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There were two speakers: Ralph Kanz; Sanjiv Handa

3. A Staff Report And Action To Be Taken On Complaint No. 10-26 (Kanz)

The Commission directed staff to prepare a supplemental report addressing the issues raised in Mr. Kanz's March 2 email and in the original complaint with respect to payments made by an agent or independent contractor.

There were no speakers.

4. A Staff Report And Action To Be Taken On A Proposed Settlement Of Complaint No. 10-29 (PEC)

The Commission moved, seconded and approved a motion to approve the proposed settlement of Complaint No. 10-29. (Ayes: All)

There were no speakers.

F. A Presentation From The Office Of The City Auditor Regarding Its "Ethical Climate Survey -- 2010"

The Commission received an informational report from the Office of the City Auditor on its first "Ethical Climate Survey -- 2010".

There were three speakers: Sharon Ball (Office of the City Auditor); Ralph Kanz, Sanjiv Handa

G. A Staff Report And Action To Be Taken On Regarding The Administration Of The Limited Public Financing Program During The November 2010 Municipal Election

The Commission received an informational report from the executive director and referred the report to its Committee on Campaign Finance and Lobbyist Registration for further review and development of recommended amendments.

There was one speaker: Sanjiv Handa

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H. A Staff Report And Action To Be Taken Regarding Approval Of The Commission's Annual Report For 2010

The Commission approved the release of the Commission's Annual Report For 2010 on April 1, 2011.

There was one speaker: Sanjiv Handa

The meeting adjourned at 8:50 p.m.

City Attorney

City of Oakland
Public Ethics Commission
April 4, 2011

In the Matter of)
) Complaint No. 10-09
) **SUPPLEMENTAL**

I. SUMMARY OF COMPLAINT

Sanjiv Handa filed Complaint No. 10-09 on March 29, 2010, initially alleging that a standing committee of the Oakland Board of Port Commissioners (Port Board) and the Port Board's secretary, John Betterton, failed to timely file and post an agenda for a January 26, 2010, committee meeting.

Mr. Handa amended his complaint on May 14, 2010, to allege that another Port Board standing committee improperly continued a meeting from Wednesday, May 5, 2010, to Tuesday May 11, 2010.

Mr. Handa amended his complaint on June 1, 2010, to allege that the Port Board failed to provide timely agenda related materials for a meeting held on June 1, 2010.

The Commission considered a preliminary staff report on November 1, 2010. **Attachment 1.** At the November 1, meeting, the Commission approved motions to:

1) dismiss allegations pertaining to improper notice of the Port Board meeting of January 26, 2010; and

2) set for hearing the following issues: (a) whether the Port Board violated Sunshine Ordinance Section 2.20.070(B) by failing to post an electronic copy of the agenda for a special meeting of the Port Board's Real Estate Committee for May 11, 2010, on the Port Board's website; and (b) whether the Port Board timely filed and distributed agenda-related material for a June 1, 2010, meeting of the Port Board pursuant to Sunshine Ordinance Section 2.20.070 (as alleged by Mr. Handa), or pursuant to Section 2.20.080 (as alleged by the Port Board).

The Commission directed staff to discuss settlement of the allegations with Port Board representatives before setting the issues for hearing.

II. FURTHER COMMUNICATIONS WITH PORT STAFF

A. Issues Regarding Notice Of The Port Board's Real Estate Committee Meeting Of May 11, 2010

In its preliminary report, Commission staff described how a May 5 meeting of a now non-existent Port Board sub-committee was cancelled due to lack of a quorum. The meeting was re-scheduled for May 11, 2010. Port Board staff revised the May 5 agenda by placing the words, "THIS MEETING HAS BEEN CONTINUED UNTIL MAY 11TH AT 12 P.M." across the front of the agenda. Port Board staff sent this revised agenda to its agenda subscribers and re-posted the revised agenda to its website. In re-posting the revised agenda to its website, the revised agenda was placed behind a link to the previously noticed May 5 meeting date, instead of creating a new link indicating a May 11 meeting date. The Commission decided to conduct a hearing whether this mis-labeling of the revised May 11 meeting agenda violated Sunshine Ordinance Section 2.20.070(B), which requires the Port Board to post a copy of its special meeting agendas on its website.

In subsequent communications with Commission staff, Port Board staff attorney Joshua Safran noted: 1) the Port Board immediately corrected the mis-labeled link as soon as Mr. Handa brought it to staff's attention on the morning of May 11; 2) there is no evidence that any person was misled by the mis-labeled link; 3) the only action taken at the May 11 committee meeting was to forward a proposed lease agreement to the full Port Board for consideration on May 18, a meeting which the minutes demonstrate Mr. Handa's attendance and participation; and 4) the Port Board's Real Estate committee no longer exists and is therefore incapable of repeating any similar alleged violations or of curing or correcting any past allegations. **Attachment 2.**

Based on the response from Port Board staff, it is difficult to recommend that the Commission proceed with an evidentiary hearing as to the Real Estate committee meeting of May 11 for the above reasons. There appears to be no information that any member of the public was prejudiced from the mis-labeled link. Furthermore the possibility of a similar situation occurring in the future is greatly diminished by the Port Board's dissolution of all its standing committees.

B. Issues Regarding Timely Filing And Distribution Of Agenda-Related Material For A June 1, 2010, Port Board Meeting

In its preliminary report, Commission staff described how Port Board staff electronically filed, posted and distributed additional ("supplemental") agenda-related materials in the evening hours of Friday, May 28, 2010, for a Tuesday morning, June 1, 2010, meeting of the full Port Board. (The intervening Monday was the City-wide Memorial Day holiday.) Sunshine Ordinance Section 2.20.070 requires the Port Board to file, post and deliver copies of the agenda and materials for **special** meetings at least 48 hours (not including weekends or holidays) before the time of the meeting. Mr. Handa alleges that the 48-hour deadline was not met, arguing that the June 1 meeting was a special meeting because of its 9 a.m. (vs. the usual 2 p.m.) starting time. The Port Board argues instead that

the June 1 meeting was a regular meeting despite the 9 a.m. starting time. Sunshine Ordinance Section 2.20.080 requires the Port Board to post and file a copy of the agenda and materials for **regular** meetings at least ten days before the meeting (which it did.) However, the Sunshine Ordinance permits the Port Board to supplement its agenda and agenda material up to 72 hours before the start of a regular meeting -- but that 72-hour period can **include** weekends and holidays. Thus whether the Port Board timely supplemented its agenda materials depends on whether the June 1 meeting constituted a regular or a special meeting.

Sunshine Ordinance Section 2.20.060(A) states that every local body "shall establish by formal action the time and place for holding regular meetings and shall conduct such regular meetings in accordance with such resolution or formal action." Section V of the Port's "Rules For Public Participation" states: "The Board and Standing Committees . . . shall hold regularly scheduled meetings ("Regular Meetings") at an established time and place suitable for their purposes. **Other meetings scheduled for a time or place other than for Regular Meetings shall be designated "Special Meetings."** (Emphasis added.) Commission staff noted in its preliminary report that since the June 1 meeting began at 9 a.m. as opposed to its usual 2 p.m. starting time, the meeting arguably constituted a "special meeting" under its own rules. The Commission decided to adjudicate whether the supplemental agenda materials for the June 1 meeting were timely provided.

Since the Commission considered the preliminary staff report, Mr. Safran told Commission staff that the Port Board modified its regular meeting schedule at its meeting of April 20, 2010, when the Port Board decided to hold an all-day meeting on June 1 to consider a proposed Strategic Plan for the Port of Oakland. He said that the Port Board made this change "by unanimous consent" although there is nothing in the formal minutes from the April 20 meeting reflecting this action. The minutes do however reference a summary of the April 20 meeting written by the Port's private consultant indicating that there would be a second "all-day meeting on June 1, 2010." **Attachment 3.** Mr. Safran also states that the agenda for the Port Board's May 18 meeting contained an announcement stating "The next **Regular Meeting** of the Board will be held on June 1, 2010 from 9:00 a.m. until 5 p.m." (Emphasis added.) **Attachment 4.** He states that the Port Board's chairperson also announced at the conclusion of the May 18 meeting (at which Mr. Handa was present): "Okay, please join us at our next regularly scheduled meeting on June 1st. It's an all-day marathon." Mr. Safran argues that these subsequent meeting notices and announcements demonstrate the Port Board's intent and action to maintain the character of the June 1 meeting as a regular meeting well before it filed, posted and distributed the supplemental agenda material for the June 1 meeting.

One of the practices Commission staff thought would assist the Port Board (as well as other local bodies) to ensure timely filings for all meetings would be to submit "hard copies" of its agenda packets to the City Clerk and Main Library rather than electronic files which can be submitted after the close of business hours. Mr. Safran advises that the City Clerk continues to receive electronic copies of the Port agenda and materials. According to Diedre Scott, the records manager for the Office of the City Clerk, The Clerk's Office makes available a computer terminal available for anyone who wishes to review and/or print those

filings. In addition, the Port now has a similar arrangement with the Main Library as well as all the City's branch libraries.

Based on the additional information Port Board staff has provided regarding its meeting of June 1 meeting, it appears more likely that the Port Board intended the meeting as a regular meeting for which its supplemental material could be found to have been timely filed. Commission staff notes the efforts made by Port Board staff to make its agenda filings more accessible to members of the public at the City Clerk's office and City libraries. Commission staff finally questions the benefit in conducting an evidentiary hearing to determine whether the materials were timely filed with the City Clerk and Main Library in the absence of any demonstration that any member of the public was prejudiced and in light of the fact that all electronic agenda subscribers received a link to the agenda materials in question on the Friday before the meeting.

III. STAFF RECOMMENDATION

In light of the responses from Port Board staff, the Commission may wish to determine that 1) the issues arising from the Port Board's Real Estate Committee meeting of May 11 have been rendered moot by the dissolution of the Real Estate Committee itself, 2) additional information demonstrates that the Port Board noticed its meeting of June 1 as a regular meeting, and 3) the Port Board has made arrangements to ensure that its agenda materials are available to members of the public at the Office of the City Clerk and Oakland main and branch libraries. In the absence of such determinations and a dismissal of the complaint, Commission staff seeks the Commission's direction whether to set the previously identified issues for hearing and whether to delegate the authority for conducting such a hearing to a member or members of the Commission.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*

City Attorney

City of Oakland
Public Ethics Commission
November 1, 2010

In the Matter of)
) Complaint No. 10-09
)

Sanjiv Handa filed Complaint No. 10-09 on March 29, 2010.

I. SUMMARY OF COMPLAINT

Mr. Handa filed Complaint No. 10-09 initially alleging that a standing committee of the Oakland Board of Port Commissioners (Port Board) and the Port Board's secretary, John Betterton, failed to timely file and post an agenda for a January 26, 2010, committee meeting.

Mr. Handa amended his complaint on May 14, 2010, to allege that another Port Board standing committee improperly continued a meeting from Wednesday, May 5, 2010, to Tuesday May 11, 2010.

Mr. Handa amended his complaint on June 1, 2010, to allege that the Port Board failed to provide timely notice of a special meeting held on June 1, 2010. **Attachment 1.**

II. BACKGROUND

The Port Board is the governing, multi-member public body established under the Oakland City Charter to control and manage the Port of Oakland. Its seven members are nominated by the Mayor and appointed by the City Council.

III. FACTUAL SUMMARY AND ANALYSIS

The Port Board filed a lengthy and extensive written response to Mr. Handa's complaint dated July 16, 2010. **Attachment 2.** Deputy Port Attorney Joshua Safran told Commission staff that the report constitutes the Port Board's formal response to the specific allegations and that the facts stated in the written report are true and accurate.

A. January 26, 2010, Meeting Of The Port Board's Administration Committee

1. Issues Relating To Timely Notice

Port staff states that it emailed a copy of the agenda and agenda-related materials for a January 26, 2010, regular meeting of the Port Board's "Administration

Committee" to the Office of the City Clerk and to the Oakland Main Library on Friday, January 15, 2010. **Attachment 3.** Staff states a copy was also posted that day to the lobby bulletin board at Port headquarters. Mr. Betterton states that the lobby bulletin board is the usual and customary location for meeting notices and can be viewed by the public 24 hours a day. Because Friday, January 15 was a "mandatory business shut-down day" for the City, Mr. Betterton's assistant also drove to City Hall where she reportedly taped a copy of the agendas to the outside bulletin boards of City Hall. Port staff also contends it posted a copy of the agenda and agenda-related materials to the Port Board's website and emailed the Port Board's agenda subscribers a link to the agenda and agenda-related materials contained on the Port Board's website.

Mr. Handa alleges that the Administration Committee meeting of January 26 was improperly noticed because the Port failed to 1) post a copy of the meeting agenda in a public location at least ten days before the meeting; and, 2) timely file a copy of the agenda and agenda-related materials with the Office of the City Clerk ten-days before the meeting (on account of the fact that the City Clerk's Office was closed on January 15, the day the email containing the agenda and agenda-related materials was sent). As a related contention, Mr. Handa alleges that he did not receive a timely copy of the agenda-related materials in his capacity as an "agenda subscriber" because his email notice of the January 26 meeting did not contain electronic copies of the materials but instead contained a "link" to the materials contained on the Port's website.

a/ Mr. Handa is barred from complaining about defective notice regarding the January 26 meeting

Mr. Handa acknowledges in his complaint that he attended the January 26 meeting. Sunshine Ordinance Section 2.20.270(F) provides in relevant part:

"No person may file a complaint with the Public Ethics Commission alleging violation of the notice provisions of Section 2.20.080 if he or she attended the meeting or had actual notice of the item of business at least 72 hours prior to the meeting at which the action was taken."

By the terms of Section 2.20.270(F), Mr. Handa may not contest the above noticing issues. Commission staff requested Mr. Handa to explain his objection to receiving his agenda materials in the form of a **link** to the materials posted to the Port's website rather than receiving the documents in the form of electronic **attachments**. At the time of this writing Mr. Handa has not yet provided a rationale for his objection. In any case, Sunshine Ordinance Section 2.20.090(D) provides:

"Notwithstanding any other provision of this ordinance, the failure of an agenda subscriber to timely receive the agenda or agenda related materials pursuant to this section shall not constitute grounds for invalidation of the actions of the local body taken at the meeting for which the agenda or the agenda related material was not timely received."

Thus it does not appear that Mr. Handa has grounds for objecting to any alleged noticing issues regarding the January 26 meeting.

2. Issues Relating To The Conduct Of The January 26 Meeting

Mr. Handa states that he attended the January 26 meeting and filled out speaker cards for each of the eight items on the agenda, including Open Forum. **Attachment 4.** Mr. Handa states that he typically agrees to consolidate his time until the end of committee meetings and that at the January 26 meeting he requested eight minutes' of speaking time. He alleges that Mr. Betterton "interrupted" his comments by advising the committee chairperson: "It is Port policy to limit speakers to a maximum of six minutes of speaking time per meeting." Mr. Handa claims that such a policy did not exist at the time of the meeting. He also states he "manage[d] to get more than six minutes, but was not able to finish making my comments at the Jan[uary] 26 meeting."

Port staff provided Commission staff a transcript of Mr. Handa's comments at the January 26 meeting. **Attachment 5.** The transcript and audio recording demonstrates: 1) Mr. Handa received a total of 11 (eleven) minutes of speaking time at the January 26 meeting, including approximately 2.5 minutes to address Agenda Item 5 and approximately 8.5 minutes of consolidated time to address the other items and Open Forum; 2) Mr. Handa had finished his comments on Item 5 before Mr. Betterton spoke (no indication that Mr. Handa was "interrupted"); and 3) Mr. Handa appears to have voluntarily concluded his final comments and was not prevented from making them. The Port transcript further demonstrates that Mr. Betterton did not object to Mr. Handa speaking for the eight minutes Mr. Handa requested ("I'm not suggesting that Mr. Handa not have eight minutes. . .") Based on the above, Commission staff cannot discern a factual basis for Mr. Handa's allegations.¹

¹ In addition to his allegation pertaining to timely notice of the January 26 meeting, Mr. Handa further requests the Commission to consider ten "issues" he identifies in his complaint. Commission staff responds to each question briefly (**in bold**):

1. Was the Jan. 26 meeting notice defective because it was not timely filed with the City Clerk and also not posted on the official bulletin board? **Mr. Handa is precluded from obtaining a Commission determination on this issue. There is no provision in the Brown Act or the Sunshine Ordinance defining what constitutes an "official bulletin board."**
2. Is it sufficient compliance for any board or commission to do its own posting without filing with the City Clerk? **The Sunshine Ordinance requires a copy of the agenda and agenda related material to be "filed" with the City Clerk. There is no prohibition on a local body posting a copy of its own agenda even though the Clerk's Office typically performs this function for many local bodies.**
3. Is an e-mail link to agenda-related materials sufficient compliance with Brown Act and Sunshine edicts to provide any subscriber who so requests the "agenda and related materials" for legislative bodies? **The Brown Act provides that upon written request, local agencies must mail agendas and/or agenda packages to so-called "agenda subscribers." Local agencies may charge a fee to cover the cost of this service. Persons may voluntarily agree to receive an electronic copy of an agenda or agenda package but there are no rules or regulations governing the format in which this material must be provided.**

B. May 5th - May 11th Meeting Of The Commercial Real Estate Committee

On April 23, 2010, Port Board staff states it emailed to the Clerk's Office, Main Library and to agenda subscribers an agenda and agenda-related materials for a regular meeting of the Port's Commercial Real Estate Committee ("Real Estate Committee") scheduled for May 5, 2010. **Attachment 6.** Port staff states it also posted a copy of the agenda to the Port bulletin board the same day. The agenda contains several matters for closed session, one item for open session (approval of a lease agreement) and Open Forum.

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4. *Can the Port unilaterally contravene the Sunshine Ordinance on speaker time, which states that City policy shall be speaking time of a minimum of two minutes? The Port's arbitrary and capricious reduction of speaker time to one minute per person directly violates that policy. **The Sunshine Ordinance provides that it is "City policy" that all speakers are entitled to a minimum of two minutes of speaking time per item, subject to the discretion of the presiding officer. The presiding officer shall state the reasons justifying any reduction in speaking time and must take into account several express factors: a consideration of the time allocated or anticipated for a meeting; the number and complexity of agenda items; and the number of persons wishing to address the local body.***
 5. *Can the Port make changes to, or impose new rules on, public comment without any public discussion? **A local body may adopt rules regulating the conduct of its meetings. To the extent these rules are subject to approval by the local body, such a decision would have to be publicly noticed before the local body takes action to adopt them.***
 6. *Can consolidation of speaker time be made contingent on imposed reductions in time for each item? **Brown Act Section 54954.3 authorizes a local agency to adopt "reasonable regulations" regarding speaker time. It permits regulations limiting the total amount of time "on particular issues and for each individual speaker." Any rules requiring a "consolidation of speaker time" must also be consistent with the provisions of the Sunshine Ordinance described in No. 4, above.***
 7. *What is a reasonable standard for imposing reductions of speaker time to less than two minutes per item, especially when there are just one or two speakers for an entire meeting? **See answer to No. 4, above.***
 8. *What training have Port Commissioners been provided for conducting meetings in compliance with the Brown Act and Sunshine Ordinance? When and where did these trainings take place? Were there serial and/or unnoticed meetings held for such purposes? **While Mr. Handa makes no allegations regarding serial meetings of Port Commissioners, Port staff advises that new Port Commissioners receive "individual Brown Act and Sunshine Ordinance briefings and trainings from the Port Attorney's Office."***
 9. *What writings were sent by either staff and/or Commission President Uno to the Port Commissioners within the past nine months related to changes in policies for speaker time? Do these writings constitute "meetings" under the provisions of the Brown Act insofar as the use of intermediaries and/or technological devices? **Mr. Handa makes a request for factual information to which the Port responds on page 14 of its July 16 letter to Commission staff.***
 10. *What is the remedy for violations of speaker time when it is reduced to a level less than mandated by law? **The Brown Act permits a district attorney or an interested party to bring a civil action in a court of competent jurisdiction but only after the local agency has had an opportunity to cure the violation. The Sunshine Ordinance contains no express remedies or penalties for violation of its speaker time provisions.***

The Real Estate Committee failed to achieve a quorum on May 5. Mr. Betterton states that no members appeared and no meeting took place. That same day, Mr. Betterton states he sent an electronic copy of the existing May 5 agenda to agenda subscribers and the City Clerk with additional language across the front of the agenda stating: "THIS MEETING HAS BEEN CONTINUED UNTIL MAY 11TH AT 12 P.M." **Attachment 7.** A copy of the Port's website made on May 10 references only meetings of the Real Estate Committee for May 5 and for June 2. According to Mr. Handa, the link to the May 5 meeting would have revealed the "revised version" of the May 5 agenda indicating the meeting had been "continued" to May 11. **Attachment 8.**

On May 11, 2010, Mr. Handa sent an email to members of the Port Board, the Alameda District Attorney, Oakland City Attorney and Commission staff advising them that the notice for the Real Estate Committee meeting was "substantially defective" and must be rescheduled. He alleges that the meeting notice did not comply with the Brown Act provisions pertaining to the "continuation" of an item. **Attachment 9.**

Under Government Code (Brown Act) Section 54955, a legislative body may "adjourn" any regular or special meeting to a "time and place specified in the order of adjournment." If, as in this situation, all members are absent from a regular meeting, the clerk or board secretary "may declare the meeting adjourned to a stated time and place. . .and shall cause a written notice of adjournment to be given in the same manner" as notice for a special meeting. A copy of the "order or notice of adjournment" shall be conspicuously posted on or near the door where the regular meeting was held within 24 hours after the time of adjournment. When a regular meeting is adjourned pursuant to Section 54955, the resulting adjourned meeting is a "regular meeting for all purposes."

Other Brown Act sections deal specifically with the "continuance" of "hearings" and of "items" from prior meetings. Specifically, a "hearing" may be continued to a subsequent meeting "by order or notice of continuance. . ." [Government Code Section 54955.1] Another Brown Act section deals with the ability of a legislative body to take action on items not appearing on an agenda. Government Code Section 94954.2 permits a legislative body to do so only if an item was properly posted on a regular meeting agenda for a prior meeting that occurs "not more than five calendar days prior to the date action is taken on the item and at the prior meeting the item was continued to the meeting at which action is being taken."

The May 5 meeting of the Real Estate Committee never occurred due to lack of a quorum. Notice for the May 11 meeting is not supported under Section 54955.1 because there was no "hearing" being continued. Notice for the May 11 meeting is also not supported under Section 94954.2 because that section deals with the ability of a legislative body to take action on items that do not appear on a meeting agenda, which is inapplicable here. The only remaining basis for proper notice of the May 11 meeting is if: 1) the "revised" May 5 meeting agenda constitutes an "order or notice of adjournment" under Section 54955, thus making the May 11 meeting a "regular meeting" requiring another 10-days' notice under the Sunshine Ordinance, or 2) the "revised" May 5 agenda constitutes notice for a "special meeting" of the Real Estate Committee requiring at least 48 hours' notice under the Sunshine Ordinance.

Commission staff believes that deeming the "revised" May 5 agenda as an "order or notice of adjournment" would unreasonably stretch the intent and plain meaning of that term. Consequently, it appears that the meeting of May 11 constituted a "special meeting" of the Real Estate Committee for which 48 hours' notice must be provided. While Port staff argues that this is the correct interpretation, it is not clear to Commission staff that notice was properly given for the May 11 special meeting. Sunshine Ordinance Section 2.20.070(B) requires the Port Board to post a copy of its special meeting agendas on the Port's website. Looking at the website as it existed on May 10, there is no indication that a meeting of the Real Estate Committee will occur the following day. It is only by clicking the link to the May 5 meeting that a viewer would know that the May 5 meeting had been "continued" to May 11. Commission staff thus concludes that an issue exists whether the May 11 meeting was properly noticed as a "special meeting" pursuant to Sunshine Ordinance Section 2.20.070(B).²

C. June 1, 2010, Special Meeting Of The Port Board

On May 21, 2010, Port Board staff submitted to the Office of the City Clerk an agenda for a meeting of the Port Board scheduled for June 1, 2010. **Attachment 10.** The agenda specified a starting time of 9 a.m. and indicated a planned adjournment of 5 p.m. The agenda listed a "morning session" and an "afternoon session" for the Port Board's consideration of a "Five Year Strategic Plan". Under each morning and afternoon session, the agenda states: "supplemental information to follow." The City Clerk's copy of the agenda demonstrates that it was received and posted on May 21, 2010. Port staff states that a copy was also posted on May 21, 2010, to its bulletin board and to the Port's website.

On May 28, 2010, Port Board staff sent an email at approximately 7:28 p.m. to its agenda subscribers that contained five attachments. **Attachment 11.** One of the attachments to the email was a detailed "breakdown" of the planned morning and afternoon sessions for the June 1 meeting. The email and accompanying document slightly revised the anticipated times for commencement and adjournment of the meeting. **Attachment 12.** Another attachment contained a very extensive "Strategic Plan Reference Guide." Port staff states that it did not receive this material from its consultant until after the agenda was initially posted.

Mr. Handa alleges that the "revised" agenda and agenda-related materials distributed on May 28, 2010: 1) was not filed, posted or distributed at least 48 hours (excluding weekends and holidays) before the commencement of the meeting; 2) failed to provide an opportunity for members of the public to speak on agenda items or under "Open Forum"; and, 3) was insufficiently clear regarding a planned mid-afternoon break and anticipated time for adjournment.

1. Issues Relating To Timely Notice

² While not a technical requirement, Commission staff believes some of the confusion could have been avoided had there been an indication on both the agenda and Port website that the May 5 meeting was being re-scheduled as a "special meeting" on May 11. Port staff's use of the term "continued" seemed to imply that specific provisions of the Brown Act were being relied upon to notice the May 11 meeting when they were not.

Sunshine Ordinance Section 2.20.070 requires the Port Board to provide notice of a **special** meeting at least 48 hours (not including weekends or holidays) before the time of the meeting by 1) posting a copy of the agenda in a public location and on its website; 2) filing a copy of the agenda and copies of all agenda-related material in the Office of the City Clerk; and 3) delivering a copy of the agenda to board members, local newspapers of general circulation, agenda subscribers, and to media organizations that have previously requested notice in writing.³

Sunshine Ordinance Section 2.20.080 requires the Port Board to provide notice of a **regular** meeting by 1) posting a copy of the agenda publicly and on its website at least ten days before the meeting; and 2) filing a copy of the agenda and agenda materials with the City Clerk and Main Library ten days before the meeting. The Port Board may "supplement" a copy of the agenda or agenda related materials no later than 72 hours before a regular meeting and only for one of several specified reasons, which include adding agenda material not known to staff or considered to be relevant at the time the agenda materials were initially filed.

Port staff contends that the June 1 meeting was a "regular Board meeting that started at an earlier time than usual." Thus it contends that the additional material distributed by email in the evening hours of Friday, May 28 constituted "supplemental" agenda material that was not available at the time the initial agenda was posted. Port staff claims that the additional material was therefore timely filed and distributed more than 72 hours before the meeting on Tuesday, June 1.

Mr. Handa contends that the June 1 meeting constituted a "special meeting" of the Port Board due to its unique starting time of 9:00 a.m. (A review of the Port Board's meeting calendar demonstrates the Port Board typically convenes its regular meetings on the first and third Tuesdays at 2 p.m.) As a special meeting, all agenda material must be filed and distributed at least 48 hours before the time of the special meeting excluding weekends or holidays. Since the additional material was filed and distributed on a Friday evening before the three-day Memorial Day weekend, Mr. Handa claims the revised agenda and additional agenda material did not comply with the 48-hour deadline for filing, posting and distributing.

Whether the material was timely submitted depends on how the June 1 meeting is characterized, either as a special or regular meeting. The Sunshine Ordinance Section 2.20.060(A) states that every local body "shall establish by formal action the time and place for holding regular meetings and shall conduct such regular meetings in accordance with such resolution or formal action." Section V of the Port's "Rules For Public Participation" states: "The Board and Standing Committees. . . shall hold regularly scheduled meetings ("Regular Meetings") at an established time and place suitable for their purposes. **Other meetings scheduled for a time or place other than for Regular Meetings shall be designated "Special Meetings."** (Emphasis added.)

³ This provision and Section 2.20.080 also applies to the City Council and Ethics Commission.

While Port staff clearly considered the June 1 meeting as a "regular" meeting (as indicated by its initial filings ten days in advance of the meeting), the 9 a.m. start time appears to diverge significantly from its 2 p.m. usual starting time and therefore, by its own rule, arguably constitutes a "special meeting" for which the 48-hour deadline (excluding the three-day weekend) would apply. Commission staff thus concludes there is an issue whether the supplemental material submitted by email on Friday evening May 28 was timely filed and distributed under Section 2.20.070 of the Sunshine Ordinance. Commission staff does not believe that the additional "breakdown" of the planned morning and afternoon sessions for the June 1 meeting constitutes a new or amended agenda but rather further elaboration how the June 1 meeting would be organized, including its mid-afternoon break and anticipated time for adjournment. Agendas are not required to specify such information.

IV. STAFF RECOMMENDATION

Commission staff recommends the Commission to:

- 1) Dismiss allegations pertaining to the timely notice of the January 26 meeting be dismissed on grounds that Mr. Handa attended the meeting pursuant to Sunshine Ordinance Section 2.20.270(F);
- 2) Dismiss allegations pertaining to the conduct of the January 26 meeting on grounds that there is no factual information that Mr. Handa was deprived of a reasonable amount of speaking time, especially when he agreed to consolidate his speaking time at that meeting;
- 3) Consider whether to hold a hearing to determine whether the May 11 meeting of the Real Estate Committee was properly noticed as a "special meeting" pursuant to Sunshine Ordinance Section 2.20.070(B), specifically, whether a copy of the agenda was timely and properly posted to the Port's website;
- 4) Consider whether to hold a hearing to determine whether the June 1 meeting of the Port Board was a special or regular meeting for purposes of providing timely public notice under the relevant provisions of the Sunshine Ordinance.

In deciding whether to conduct a formal hearing, the Commission may wish to consider the magnitude of harm or prejudice to the public, the chance that the alleged conduct is likely to continue, the amount of time and resources the Commission wishes to devote to conducting a formal hearing on this subject, and/or the availability or suitability of other remedies.

Commission staff notes that Port staff has raised questions regarding the Commission's jurisdiction under the City Charter to determine matters involving the Port Board's operations. (See pages 5 - 8; Attachment 1.) Port staff contends that Mr. Handa must first exhaust all his administrative remedies directly with the Port Board before he may obtain relief from the Commission or from a court, as he has reportedly threatened.

In light of the above, the Commission may wish to first direct staff to discuss with Port representatives whether the Port Board would be willing to voluntarily 1) cure and correct any alleged violation; 2) always provide the Clerk's Office and Main Library with "hard copies" of all agendas and agenda related material; and/or 3) establish a specific "time and place for holding regular meetings" so that material deviations in the time and place for regular meetings can be designated as "special meetings" so as to avoid doubt in the future what agenda deadlines must be observed.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*



PORT OF OAKLAND

JOSHUA SAFRAN

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January 21, 2011

Via U.S. Mail & Email

Daniel D. Purnell
Executive Director
Public Ethics Commission
One Frank H. Ogawa Plaza, Fourth Floor
Oakland, CA 94612-2031

RE: Sanjiv Handa Complaint No. 10-09

Dear Mr. Purnell:

We are in receipt of your letter, dated December 1, 2010, concerning the above-referenced three-part, 19-claim complaint filed by Mr. Handa against Secretary of the Board of Port Commissioners John Betterton. The Port of Oakland filed an 18-page Preliminary Response to this complaint, dated July 16, 2010, supported by 14 separate exhibits. In response to additional requests from the Public Ethics Commission ("PEC") staff, the Port subsequently submitted a four-page Supplement to Preliminary Response with one exhibit. The Port's Preliminary Response raised a number of significant threshold legal issues that warranted dismissal of Mr. Handa's claims on their face (including fundamental issues of jurisdiction and mootness) in addition to providing specific responses to each claim.¹

Your letter indicates that 17 of Mr. Handa's 19 claims were dismissed by the PEC at its meeting of November 1, 2010. Based on your letter and staff report of November 1, 2010, we understand the two outstanding issues to be, and provide responses thereto, as follows:

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¹ It appears that the Public Ethics Commission has not considered or evaluated these threshold legal issues.

I. WHETHER THE PORT'S POSTING OF THE AGENDA FOR ITS SPECIAL REAL ESTATE COMMITTEE MEETING OF MAY 11, 2010 ON ITS WEBSITE CONSTITUTED "POSTING A COPY OF THE AGENDA FOR ANY SPECIAL MEETING ON-LINE" UNDER SECTION 2.20.070(B) OF THE CITY OF OAKLAND'S SUNSHINE ORDINANCE.

A. Facts

The Port's website contained the full agenda for the meeting in question, listing it as follows:

**"Wednesday, May 5, 2010 – 12:00 p.m.
530 Water Street - Board Room**

THIS MEETING HAS BEEN CONTINUED UNTIL MAY 11TH AT 12:00 P.M."

Upon being contacted by Mr. Handa on May 11, 2010 (who characterized the issue as "such a blatant violation of state and local meetings laws that the Port Commissioners ought to be concerned about the poor legal advice they seem to accept regularly"), the Secretary of the Board concluded (1) that his longstanding instructions regarding the wording/configuration of agenda postings had not been effectuated as intended (whether through human or IT error); and (2) that the configuration of the posting, while providing the required language, could be confusing. At the direction of the Secretary of the Board on the morning of May 11, 2010, the language of the posting was set forth in a "May 11, 2010" link and changed to read:

**"Wednesday, May 11, 2010 - 12:00 P.M.
530 Water Street - Board Room**

THIS MEETING HAS BEEN RESCHEDULED FROM MAY 5TH."

Such language remains posted as such in the on-line archive of 2010 meetings.

B. Mr. Handa's Claim & Port's Response

The specific claim made by Mr. Handa was: "Anyone logging on to the Port's website and to the CRE page is not made aware of the May 11 meeting."

First, there is no requirement that anyone "log on" to the Port's website to view agendas. Second, there is no objective criteria for evaluating a website user's "awareness" of the content of the website, nor is there any "awareness" legal requirement. Third, Mr. Handa's claim specifically concedes that he was, in fact, made "aware" of the agenda on the website for the meeting in question since he makes reference to it in his complaint.

C. PEC Staff's Interpretation of Mr. Handa's Claim & Port's Response

The staff report on this matter states that because initially no specific link labeled "May 11" was provided on the Port website, an issue exists pursuant to Section 2.20.070(B) of the

City's Sunshine Ordinance. As quoted above, the City's Sunshine Ordinance requires posting of the agenda "on-line." As there is no contention that the Port did not post the subject agenda "on-line," it is unclear what legal issue may exist. Even if a legal issue did exist, the City's Sunshine Ordinance specifically provides for software or hardware failures.

Whatever the case, PEC staff proposes to "settle" the issue by having the Port "cure and correct" the violation and by a commitment that in the future the Port will provide the Clerk's Office and Main Library with hard copies of all agendas and agenda-related materials. As to "cure and correction," absent a violation of law it is unclear what could be "corrected." As discussed above, upon the Secretary of the Board's discovery of the potentially confusing listing of the agenda on the Port's website, the Secretary directed that a specific "May 11, 2010" link be listed and that the agenda language be clarified. It is unclear what further action could have been taken for that agenda. This is the first and only instance of someone complaining about the configuration of agenda postings on the Port's website. Because of the volume and frequency of Board Committee meetings, it was inevitable that some website content would be created at variance with the standing instructions of the Secretary of the Board. For these reasons, and because of the inefficiencies and difficulties posed by a 10-day notice requirement in the fast paced business environment of the Port, the Board disbanded its committees shortly after filing of the subject complaint.

In this context, it is unclear why or how delivering hardcopies, increasing costs for the Port, to the City Clerk or Main Library would have avoided confusion over use of the Port's website. There is no allegation or facts to suggest that the City Clerk or Main Library did not receive the subject agenda electronically. On January 19, 2011, the Secretary of the Board confirmed that it is not the City Clerk's preference to receive hardcopies of agendas or agenda related materials. *See* attached correspondence.

It is unclear how further discussion of a one-time website configuration issue for a meeting of a now-disbanded advisory body that took no action eight months ago would be in the public interest or would justify further cost or human resources.

II. WHETHER THE PORT'S BOARD MEETING OF JUNE 1, 2010 WAS A "REGULAR" MEETING, AS MAINTAINED BY THE PORT (REQUIRING THE LONGER 10-DAY NOTICE), OR A "SPECIAL" MEETING (REQUIRING THE SHORTER 2-DAY NOTICE).

A. Facts

From time to time the Board of Port Commissioners adopts a "regular" meeting schedule. The regular meeting schedule adopted on July 7, 2009 by the Board's then-extant Executive Committee, covered the period of June 1, 2010, and established "regular" meetings on the first and third Tuesdays of every month (except for August) with a start time of 2:00 p.m. Absent further Board action, a regular meeting would have been calendared for June 1, 2010 at 2:00 p.m. However, during discussion of outreach to the public during the Port's Strategic Plan process at its meeting of April 20, 2010, the Board decided to hold an "all-day meeting" on June 1, 2010. *See* BTW Board Meeting Minutes attached, at page 9. The agenda for the May 18, 2010 Board meeting, accordingly stated: "The next Regular Meeting of the Board will be held on June 1,

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2010 from 9:00 a.m. until 5:00 p.m.” See agenda of May 18, 2010 attached. At the conclusion of the May 18, 2010 meeting, the President of the Board announced at minute 1:38:25: “Okay, please join us at our next regularly scheduled meeting on June 1st. It’s an all-day marathon.”

The agenda for the June 1, 2010 meeting stated: “Tuesday, June 1, 2010 – 9:00 A.M. – 5:00 P.M. NOTE SPECIAL START TIME.” See agenda of June 1, 2010, attached.

B. Mr. Handa’s Claim

Mr. Handa is apparently claiming that the Board meeting of June 1, 2010 should have been noticed as a “special meeting” because it began at 9:00 a.m. instead of 2:00 p.m. PEC staff suggests that the Port “establish a specific ‘time and place for holding regular meetings’ so that material deviations in the time and place for regular meetings can be designated as ‘special meetings’ so as to avoid doubt in the future what agenda deadlines must be observed.”

C. Port’s Response

The subject adjustment by the Board of its regular meeting schedule is in keeping with the Port’s practice to amend its regular meeting schedule from time to time over the course of the year, as deemed appropriate by the Board or its Presiding Officer. It has been the Port’s policy and practice that if an earlier start time is deemed appropriate and desirable for an upcoming regular meeting to accommodate anticipated additional public speakers or to provide for longer deliberation on the public record, the Board will amend the regular meeting schedule in advance to include such earlier start time, subject to ten-day public notice, rather than to declare a “special meeting” subject only to two-day public notice, to maximize public notice and public participation. See Resolution Adopting a Schedule for Regular Meetings of the Board of Port Commissioners for Calendar Year 2011, attached.

Mr. Handa seems to be alleging that once a regular meeting schedule is adopted, no single-meeting deviations may be permitted from such schedule unless such meeting is characterized as a “special meeting,” requiring eight days less notice. This is at variance with the Port’s articulated policy and practice. This understanding is also at variance with California’s Ralph M. Brown Act which authorizes legislative bodies such as the Board to set the “time and place for holding regular meetings” by “ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body.” Government Code section 54954(a). Here, the establishing of the 9:00 a.m. start time for the subject regular meeting was made by unanimous consent, a method employed by the Board to adopt a routine or non-controversial motion without the formal step of introducing, seconding, and calling the question on the motion. Such practice is endorsed by Robert’s Rules of Order which refers to “Adoption of a Motion or Action Without a Motion, by Unanimous (or General) Consent” in cases “where there seems to be no opposition in routine business or on questions of little importance.” RONR (10th ed.), p. 51.

Should the Port adopt Mr. Handa’s view, it would have to begin providing significantly less public notice and would set a precedent among California public agencies to the detriment of public participation.

In response to PEC staff's suggestion that the Board establish a specific time and place for meetings, it is unclear what further action could be taken by the Board. In keeping with past schedules, the Board's adopted schedule of meetings for 2011 already sets a regular date, time, and place for regular Board meetings. The Board will reserve the right to amend such schedule for early meeting start times, in keeping with its longstanding policy and practice of maximizing public notice where feasible.

• • •

We look forward to working with you to resolve Mr. Handa's few remaining claims. In understanding the PEC's reluctance to consider and evaluate the threshold legal issues presented by the Port, we request and would appreciate receiving data illustrating the number of PEC complaints brought by Mr. Handa over the past five years, including the date of his complaints, the named respondents thereto, the outcome of such complaints, and the percentage of total PEC complaints represented by Mr. Handa's complaints. This public information will assist the Port and the PEC in evaluating Mr. Handa's potential status as a "repetitive unmeritorious complainant" under the PEC's General Complaint Procedures.

Very truly yours,

DAVID L. ALEXANDER
Port Attorney

By



JOSHUA SAFRAN
Deputy Port Attorney

cc: John Betterton, Secretary of the Board of Port Commissioners
Alix Rosenthal, Deputy City Attorney
Mark T. Morodomi, Deputy City Attorney
Michelle Abney, Open Government Coordinator
Nancy E. O'Malley, District Attorney

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Port of Oakland April 20, 2010 Board Meeting Notes

On April 20, 2010 BTW facilitated the third in a series of Board meetings as part of the Port's strategic planning process. The all-day meeting had two main components: 1) a morning conversation about the role and identity of the Port; and 2) an afternoon discussion to determine the guiding principles that will be used by the Commission to make decisions over the next five years and by the staff to develop the strategic plan. The notes below capture the key themes from the meeting, a detailed list of the guiding principles that were agreed upon and a summary of related issues for further discussion.

MORNING SESSION: ROLE & IDENTITY OF THE PORT

Commissioners began the day by addressing questions regarding the role and identity of the Port. This issue was examined through three lenses. First, Commissioners participated in an exercise of writing slogans for what they hope the Port will be known for in five years that would fit on a t-shirt.¹ The intention of the exercise was to encourage Commissioners to think creatively and be aspirational as they approached the work to be accomplished over the course of the day.

Commissioners were then asked to define and discuss three "identities" of the Port that surfaced during BTW's conversations with Commissioners and senior staff in January. Was the Port an international gateway, a regional jewel or an intermodal connector to middle America? Commissioners considered the following questions:

- What would it mean for the Port to be an "international gateway," "regional jewel" or "intermodal connector to middle America"? Are these roles mutually exclusive or mutually reinforcing?
- Does the Port need to have one overriding identity or can there be distinct identities within each revenue line? Must they complement each other or can they be in conflict? Which takes priority?
- Is being an international gateway out of our control or is it a necessary condition of success for some business lines?
- To what extent should the Port be focused on regional growth and job development in the next five years?
- To what extent should the Port be focused on "the fundamentals" of price, value and services for its customers?
- How can the Port balance its dual role as both a business and a public institution? Is one or the other more of a priority?

¹ See Appendix B for a summary of slogans created by Commissioners and senior staff.

NEXT STEPS IN THE STRATEGIC PLANNING PROCESS

Below is a summary of BTW's understanding of the next steps in the strategic planning process.

- **Following the April 20 meeting the Executive Director and Strategic Planning Task Force (SPTF) develop strategies and scenarios for the Board to consider.**

Following the April day-long meeting, it is the responsibility of the Executive Director and SPTF to apply the Board's guiding principles to the work the SPTF is already doing outlining strategies to bring to the Board to evaluate. BTW will be available to Port staff as needed to talk through how to best collate and communicate these strategies, but we do not see that we have any role in writing or shaping content.

- **The Executive Director and SPTF present the Board with strategies and scenarios to evaluate for inclusion in the strategic plan.**

In a second all-day meeting, on June 1, 2010, the Executive Director, SPTF and Port staff will bring to the Commission a series of strategies and scenarios for discussion on decision making within and across business lines. It is BTW's understanding that the Executive Director and SPTF will present this work as they are content experts in these areas and that the ideas they share will represent their best thinking to date. BTW's role would be to keep the meeting well organized and timely. To the extent that it would be helpful to have a facilitator when it is time for the Board's discussion and decision making, we would be happy to facilitate this portion of the conversation.

- **BTW concludes its role as facilitator and writes a short white paper.**

At this point, BTW's role as facilitator of the process ends. We will summarize some of our key insights in a short white paper so that the Board and staff have a record of the major issues that emerged from this part of the process. We anticipate our work to be completed by June 1, 2010.

- **The Executive Director and SPTF complete the strategic plan and submit it to the Commission for approval.**

The Executive Director and his team lead strategic planning work from this point on, finalizing the plan and presenting it to the Commission for final approval.

OMAR BENJAMIN
Executive Director

DAVID L. ALEXANDER
Port Attorney

ARNEL ATIENZA
Port Auditor

JOHN T. BETTERTON
Secretary of the Board

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Second Vice-President

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Commissioner

GILDA GONZALES
Commissioner

KENNETH KATZOFF
Commissioner

MICHAEL LIGHTY
Commissioner

AGENDA

Meeting of the Board of Port Commissioners

Tuesday May 18, 2010 – 2:00 p. m.

Board Room – 2nd Floor

ROLL CALL

Commissioner **Calloway**, Commissioner, **Gonzales**, 2nd Vice-President **Gordon**, 1st Vice President **Head**, Commissioner **Katzoff**, Commissioner **Lighty**, and President **Uno**.

CLOSED SESSION (approximately 1:00 hour)

1. **CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION. Significant exposure to litigation pursuant to subdivision (b) of Section 54956.9: 7 matters**
2. **CONFERENCE WITH LABOR NEGOTIATOR**
Agency Negotiator: Marsha Peterson
Employee Organization: Western Council of Engineers

ROLL CALL (approximately 2:00 p.m.)

Commissioner **Calloway**, Commissioner, **Gonzales**, 2nd Vice-President **Gordon**, 1st Vice-President **Head**, Commissioner **Katzoff**, Commissioner **Lighty**, and President **Uno**.

CLOSED SESSION REPORT

The Port Attorney or Board Secretary will report on any final actions taken in Closed Session.

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PRESIDENT'S REPORT

The President will report on noteworthy events occurring since the last Board Meeting.

ATTACHMENT 4

EXECUTIVE DIRECTOR'S REPORT

The Executive Director will report on noteworthy events occurring since the last Board Meeting.

AVIATION

- A-1 Airport Rescue and Fire Fighting Vehicles: Approval to Advertise for Bids.

COMMERCIAL REAL ESTATE

May 11th Commercial Real Estate Committee Report

- C-1 Approval of a Lease with Dealey, Renton & Associates Inc. for the Premises Located at 530 Water Street, 7th Floor.

MARITIME

- M-1 Adoption of the Negative Declaration/Initial Study for the Maritime Utilities Upgrade Project.
- M-2 Authorizing Disposal of Obsolete or Surplus Port Vehicles.

OPERATIONS

EXECUTIVE COMMITTEE

May 4th Executive Committee Report

ADMINISTRATION

- O-1 Approval and Adoption Of Port Of Oakland Sewer System Management Plan As Required By The State Water Resources Control Board Order.

AUDIT BUDGET & FINANCE

May 13th Audit, Budget, & Finance Committee Report

- O-2 Authority to Renew Port of Oakland Insurance Policies and Port Insurance Program in an amount Not to Exceed \$3,650,000.
- O-3 Waiver of Standard Bidding and Authorization for the Executive Director to Enter into an ERP Support and Maintenance Agreement for \$189,100
- O-4 Approval of the First Supplemental Agreement to the Audit Contract with Macias Gini & O'Connell LLP to Perform Audit Services

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ATTACHMENT 4

APPROVAL OF THE MINUTES

Regular Meetings of April 6th, April 20th and May 10th.

SUMMARY ITEMS

Action by the Board under "Summary Items" means that all matters listed below have been summarized, and are considered to be perfunctory in nature, and will be adopted by one motion and appropriate vote. Summary Items may be removed from the summary for discussion at the pleasure of the Board.

ORDINANCES FOR SECOND AND FINAL READING

- S-1 Second Reading of an Approval to Amend Port Ordinance 4091 (Airport Rules and Regulations) Schedule A and Schedule B to Revise Alternative Fuel and Maximum Vehicle Age Requirements for Taxicabs and All Other Ground Transportation Operators.
- S-2 Second Reading of Ordinance Establishing Minimum Standards for Providers of Aeronautical Services and Self Fueling at the North Field (Oakland International Airport).

INFORMATIONAL REPORTS

- S-3 State and Federal Legislative and Advocacy Summary and Outlook.

OPEN FORUM

The Board will receive public comment on non-agenda items during this time. Please fill out a speaker card and present it to the Secretary of the Board.

SECOND CLOSED SESSION (approximately 2.5 Hours)

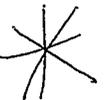
EMPLOYEE PERFORMANCE EVALUATIONS

Titles: Executive Director, Port Attorney, Port Auditor & Board Secretary

ADJOURNMENT



The next Regular Meeting of the Board will be held on June 1, 2010 from 9:00 a.m. until 5:00 p.m.



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City Attorney

City of Oakland
Public Ethics Commission
April 4, 2011

In the Matter of

)
) Complaint No. 10-22
) **SUPPLEMENTAL**

Jeffrey Cash filed Complaint No. 10-22 on September 13, 2010, alleging that Oakland Councilmember Desley Brooks failed to produce copies of various records he requested, including a copy of her "public calendar."

The Commission considered a preliminary staff report at its meeting of January 19, 2011. **Attachment 1.** The Commission directed staff to request the Office of the City Attorney develop a written response to Mr. Cash regarding his request for a copy of Councilmember Brooks' public calendar.

On February 3, 2011, the Office of the City Attorney sent Mr. Cash a letter stating, "Consistent with the City Attorney's February 8, 2005, Memorandum, current City policy and current case law, Councilmember Brooks is not providing her calendar." Attached to the letter was a copy of the City Attorney's February 8, 2005, memorandum to members of the Oakland City Council. **Attachment 2.** The memorandum explained that Proposition 59, adopted by California voters in November 2004, might someday be used by open government advocates to obtain access to appointment calendars maintained by public officials.¹ The City Attorney recommended that the City produce office calendars in response to a request. However the City Attorney also acknowledged that "personal, private entries" in such calendars could be redacted and, "[i]n the alternative, you could maintain separate office and personal calendars" that would not have to be produced.

Based on the February 3 response from the City Attorney's Office, as well as Ms. Brooks' earlier assertion that she does not maintain a "public calendar," it appears that the City finally determined that it did not possess discloseable public records responsive to Mr. Cash's request. Commission staff notes this determination and communication to Mr. Cash fell considerably beyond the Public Records Act's ten-day period in which to respond. Much of the delay resulted from a disagreement over which office would be responsible for communicating the City's position. Commission staff agrees with the

¹ The City Attorney's February 8, 2005, memorandum references an analysis of Proposition 59 that Commission staff prepared for the Commission in December 2004. A copy of that analysis is included. **Attachment 3.**

apparent conclusion that the Office of the City Attorney shall continue to perform this function on behalf of the City.

Commission staff recommends that the Commission dismiss Complaint No. 10-22 on grounds that the City has finally provided a response to Mr. Cash's request.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*

City Attorney

City of Oakland
Public Ethics Commission
January 19, 2011

In the Matter of)
) Complaint No. 10-22
)

Jeffery Cash filed Complaint No. 10-22 on September 13, 2010.

I. SUMMARY OF COMPLAINT

Mr. Cash filed Complaint No. 10-22 alleging that Oakland Councilmember Desley Brooks failed to produce copies of various records he requested, including a copy of her "public calendar." **Attachment 1.**

II. FACTUAL SUMMARY

On July 18, 2010, Mr. Cash made a request through the City's Online Record Request System for the following categories of records pertaining to "District Six Council Member":

- "All staff resumes from 1/1/06 to present
- All staff payroll records from 1/1/06 to present
- All expenditure reports from 1/1/06 to present
- All job announcements and applications from 1/1/06 to present
- All statements of economic interest for Miss Brooks from 1/1/06 to present
- All campaign disclosures for Miss Brooks from 1/1/06 to present
- All documents relating to Miss Brooks recent parking space dispute
- Miss Brooks public calendar from 1/1/06 to present
- All recommendations to any of the cities [sic] boards and commissions from 1/1/06 to present
- All performance and financial audits relating to District 6/Miss Brooks from 1/1/06 to present" **Attachment 2.**

On July 25, 2010, Mr. Cash made a second request for "all documents for Miss Brooks and her staff relating to any travel done for official city business from 1/1/06 to present." **Attachment 3.**

Former Open Government Coordinator Michelle Abney helped to coordinate a response to Mr. Cash's requests among the various City departments that possess the requested records. Ms. Abney said that copies were timely provided for all the requested categories, except that there were no records available for "staff resumes" or "performance and financial audits." The only category of records for which Ms. Abney said there were no records produced nor a response provided was for the requested copy of Ms. Brooks' "public calendar." Ms. Abney said that she contacted Ms. Brooks regarding Mr. Cash's request and said she was unable to obtain a copy of any calendar from her office.

On September 22, 2010, Deputy City Attorney Mark Morodomi apparently sent an email to Mr. Cash stating: "This office has been in communication with Ms. Brooks regarding producing copies of her calendar pursuant to your request. At this point, however, we have advised Ms. Brooks that this office cannot represent her in this matter, and that she will need to inform you herself [of] her reasons for not producing the calendars." **Attachment 4.**

Mr. Cash states that he has not received any response from Ms. Brooks or the City regarding his request for a copy of her public calendar.

Ms. Brooks told Commission staff that she does not maintain a public calendar other than the "community calendar" she maintains on her City website which she notes is accessible to any online viewer. Ms. Brooks refused to tell Commission staff whether she maintained any other type of calendar and contends that such an inquiry is beyond the Commission's jurisdiction to consider or to determine. She acknowledges that Mr. Cash is entitled to a written response from the City regarding this component of his record request. She contends however, that it is up to the Office of the City Attorney to provide Mr. Cash a written response to his record request.

III. ANALYSIS

The Sunshine Ordinance provides that the "[r]elease of public records by a local body, or by any agency or department, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act ("CPRA") [citations] in any particulars not addressed by this Article." [O.M.C. §2.20.190] The Sunshine Ordinance requires the Commission to "develop and maintain an administrative process for review and enforcement of the ordinance, among which may include the use of mediation to resolve disputes. No such administrative review process shall preclude, deny or in any way limit a person's remedies under the Brown Act or Public Records Act." [O.M.C. Section 2.20.270(A)(3)]

The Commission has developed and maintained an administrative process for review and enforcement of the Sunshine Ordinance in the form of the Commission's General Complaint Procedures ("GCPs"). Neither the Sunshine Ordinance nor the GCPs provide express remedies for the failure to comply with the public records provisions of the Sunshine Ordinance. Despite the absence of any express remedies regarding public records matters, the Commission has historically received complaints under its GCPs to at least review whether

the City's local bodies, agencies and departments have complied with the CPRA and particular provisions of the Sunshine Ordinance.

The CPRA governs all local agencies in California and provides that members of the public shall have the right to inspect and obtain copies of public records. [Government Code Section 6263] A public record includes any writing "containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." [Government Code Section 6252(d)] There are a large number of exceptions to this definition. [See generally Government Code Section 6254.]

When a copy of a record is requested, the local agency has ten days to determine whether the request "seeks copies of disclosable public records in the possession of the agency" and must "promptly notify the person making the request of the determination and the reasons therefor." [Government Code Section 6253(c)] If the records or the personnel that need to be consulted regarding the records are not readily available, the ten-day period to make the determination may be extended for up to 14 additional days provided the requestor is notified in writing by the head of the agency or his or her designee. If immediate production of disclosable public records is not possible, the agency must provide an estimate of the date and time that the records will be available.¹

In the absence of 1) a determination by the "local agency" (i.e., the City of Oakland) whether Mr. Cash's request seeks "copies of disclosable public records in the possession of the [City]" and 2) notification to Mr. Cash of its "determination and the reasons therefor," there is nothing for staff or the Commission to review as part of the complaint process. Since Councilmember Brooks, in her individual capacity, does not constitute a "local agency" as defined by the CPRA, the responsibility for making the appropriate determination and communicating it to Mr. Cash appears likely to lie with the Office of the City Attorney, which frequently responds on behalf of the City to public record requests.

IV. STAFF RECOMMENDATION

Commission staff recommends at this time that the Commission request the Office of the City Attorney to promptly develop, in cooperation with Councilmember Brooks, a response to Mr. Cash's request for copies of the requested public calendars and to

¹ Government Code 6253(c): "Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available."

direct staff to report back to the Commission regarding the status of Mr. Cash's request.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
John A. Russo
City Attorney
Mark T. Morodomi

February 3, 2011

(510) 238-3601
FAX: (510) 238-6500
TTY/TDD: (510) 238-3254
(510) 238-6101

Jeffrey Cash
2351 80th Avenue
Oakland, CA 94605

Re: Public Records Request, File No. 1923

Dear Mr. Cash:

Consistent with the City Attorney's February 8, 2005, Memorandum, current City policy and current case law, Councilmember Brooks is not providing her calendar.

Very truly yours,

John A. Russo
City Attorney

By: 
Mark T. Morodomi
Supervising Deputy City Attorney

MTM:cr

cc: Council Member Desley Brooks
Executive Director, Public Ethics Commission

/encl.

752262

ATTACHMENT 2

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CITY OF OAKLAND
CITY ATTORNEY'S OFFICE
MEMORANDUM

TO: President De La Fuente; Vice Mayor Brunner; and
Members of the City Council

FROM: John Russo, City Attorney

DATE: February 8, 2005

RE: Impacts of Proposition 59 on Oakland's Obligations to Provide Records to the
Public and Personal Liability for Violations of Open Government/Meeting Laws

The City of Oakland's Ethics Commission's analysis of Proposition 59 is attached. The City Attorney's Office has reviewed and approved the analysis. This memorandum provides additional advice based on events that occurred after the PEC issued its analysis. Proposition 59 amended the California Constitution to provide a constitutional right of access to government meetings and the writings of public officials and agencies. Proposition 59 also requires that laws related to the public's right of access be interpreted "broadly" and that legal exceptions to those laws be interpreted "narrowly."

Because the City Attorney's Office has interpreted the open government laws broadly and because the City Council adopted the Oakland Sunshine Ordinance, the passage of Proposition 59 should have little impact on Oakland's practices.

Appointment Calendars Should be Produced in Response to a Public Records Request

For the reasons we discuss in this memorandum, we strongly recommend that the City change its practice concerning office calendars. Based on the law prior to the passage of Proposition 59, this Office had advised that appointment and other calendars were exempt from disclosure under the Public Records Act.

Immediately after Proposition 59's passage, the media made a public records request for Governor Schwarzenegger's calendars. The media argued that Proposition 59 overturned an earlier court ruling that exempted calendars

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from disclosure. The Governor chose not to litigate this issue and turned over his calendars.

Media advocates are likely to use Proposition 59 to overturn the California Supreme Court's 1991 decision in *Times Mirror v. Superior Court*, 53 Cal. 3d 1325. In *Times Mirror* the California Supreme Court relied upon the Public Records Act's balancing test to deny access to the Governor's daily appointment calendars. (Gov. Code Section 6255.) The Public Records Act balancing test requires that the City determine whether the public's interest in disclosure outweighs the City's interest in maintaining the confidentiality of the records in question. The media's argues that Proposition 59 changes the weighting in the balancing test and therefore calendars are now disclosable.

The media's argument is very tenable and certainly would ignite litigation all the way to the California Supreme Court if the City or any other jurisdiction denies access to calendars because the media is looking for a test case. The City Attorney's Office strongly recommends that the City produce office calendars in response to a request.

Please note that the Governor did not produce personal aspects of his calendars or other items for which there was a specific and justifiable legal exemption. Withholding of personal, private entries as well as personnel related entries is consistent with current law. Accordingly, if you receive a request for your office calendar, the City Attorney's Office strongly advises that you produce the calendar, and specifically justify in writing any redactions. We are available to assist you in preparing your responses. In the alternative, you could maintain separate office and personal calendars.

The Governor also did not produce some calendar entries involving private political or campaign related meetings. His argument was that those entries were not "official state business" and therefore were not public information. Since the City Councilmembers are not full time employees, that same argument may have merit for political meetings during the work day outside City Hall. That same argument has much less merit for calendars of full time hourly (non-salaried) city employees if those political or campaign meetings are during working hours.

Proposition 59 Does Not Create New Personal Liability for Violations of Open Government/Meeting Laws

Please note that despite the arguments by a member of the public, Proposition 59 does not create new personal liability for public officials who violate open government laws.

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There is no personal liability for violation of the public records laws, although the City is liable for attorney's fees in any subsequent successful civil suit against the City. There is pre-Proposition 59 misdemeanor criminal liability in the public meetings law "where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled"(Brown Act, Gov't Code §54959.)

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CITY OF OAKLAND
Public Ethics Commission

Alden Mudge, *Chair*
Peter Reinke, *Vice-Chair*
Lily Kimura
Kathryn Kasch
Ralph Kanz
Andrew Wiener
Caryn Bortnick



Daniel D. Purnell, Executive Director

One Frank Ogawa Plaza, 4th Floor, Oakland, CA 94612 (510) 238-3593 Fax: (510) 238-3315

TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: December 6, 2004

RE: An Informational Report On Proposition 59: Implications For Open Government Laws

I. INTRODUCTION

On November 2, 2004, California voters approved Proposition 59 by a vote margin of 83 to 17 percent. This legislatively backed initiative amended the California Constitution as it pertains to public meetings and public records. This memorandum provides a summary of the new constitutional provisions and their likely implications for existing open government laws.

II. SUMMARY OF PROVISIONS

Proposition 59 amends Article I, Section 3 of the California Constitution to:

- 1) provide a constitutional right of access to government meetings and the writings of public officials and agencies;
- 2) require that the laws relating to the public's right of access be interpreted "broadly" and the legal exceptions to those laws be interpreted "narrowly;" and,
- 3) preserve a number of existing exceptions to public access.

Proposition 59 also requires that any new law which provides an exception from public access to meetings or writings must contain "findings" that demonstrate the public interest being protected by the exemption and the need for protecting that interest.

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Proposition 59 does not directly require any specific information to be made available to the public. It also expressly states that it does not "repeal or nullify" any existing constitutional or statutory exception to the right of access to public records or meetings.

The complete text of Proposition 59 is attached to this memorandum. **Attachment 1.**

III. WHAT IS THE LIKELY EFFECT OF PROPOSITION 59?

A. Constitutional Right Of Access To Governmental Meetings And Writings

Article 1, Section 3(b)(1) states:

"The people have a 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."

Commission staff notes that similar language currently exists in at least two existing state statutes -- the Ralph M. Brown Act and the California Public Records Act. [See Government Code §54950 and Government Code §6250, respectively.] The proponents of the measure argue that Proposition 59 will "create a new civil right" by adding the above language into the California Constitution. According to the Office of the Legislative Analyst, placing this language into the Constitution will result in governmental agencies "[having] to demonstrate **to a somewhat greater extent than under current law** why information requested by the public should be kept private." (Emphasis added.) Neither Proposition 59 nor the Legislative Analyst specifies what a public agency must do or consider in order to limit public access beyond that which is currently provided under existing law.

B. Interpretation Of Open Government Laws

Article I, Section 3(b)(2) states in relevant part:

"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."

The above language specifies how a "statute, court rule, or other authority" shall be interpreted. While much of the commentary surrounding Proposition 59 focused on future **judicial** interpretation of open government laws, nothing in Proposition 59 appears to limit this interpretive process to the courts. Governmental agencies are frequently faced with questions involving the interpretation of open government laws. An example is Public Records Act Section 6255, which permits public agencies to withhold any record if they can demonstrate that the record fits into one of the many express exemptions contained in the Public Records Act, or that the public interest is better served by nondisclosure than disclosure. Must a governmental agency, in responding to a request for records, also interpret open government laws broadly and exemptions narrowly? Or is this a standard that applies only to judicial review of public records requests? The proponents of Proposition 59 argued that the new

language applies to "public agencies, officials and courts." The opponents did not address this issue. See Official Ballot Arguments, **Attachment 2**.

As to the issue of judicial interpretation, the proponents of Proposition 59 have argued that the courts have, in some cases, limited the public's right of access through their interpretation of existing law. A particular exemption which they state will be addressed by Proposition 59 is the so-called "deliberative process" exemption that was articulated by the California Supreme court in the case of Times-Mirror Company v. Superior Court. In Times-Mirror, the court held that a request for Governor George Deukmejian's appointment calendars could be denied under the Public Records Act's balancing test because public scrutiny of those records would interfere with the governor's "deliberative process" and inhibit members of the public from meeting with him by making their names subject to disclosure. Lower California courts have subsequently applied this ruling to deny other public requests for records.

As an initial test of Proposition 59's application, the California First Amendment Coalition recently announced that it had requested Governor Arnold Schwarzenegger to publicly release his meeting calendars. The Governor has announced that his office will comply with the request although it is unknown at this point how extensively he will do so. However, unless and until the courts decide to reconsider the "deliberative process" exception it still exists as a basis for public agencies to withhold certain types of records, although reliance on this exception alone may not be sufficient to withstand a future legal challenge.

C. Requirement For Legislative Findings

Article I, Section 3(b)(2) states in relevant part:

"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."

The above language requires that any newly enacted law that limits the public's right of access be adopted with "findings" demonstrating the interest protected by the limitation and the need for protecting that interest. Proposition 59 does not define the term "findings" nor give any clue how extensive the findings must be to justify any new limitation on the public's right of access.

It seems fairly clear that one of the intended purposes of the above language is to provide a basis for judicial review of any new legal exception to test whether the findings supporting the new law are adequate.

D. Exemptions To the Right Of Public Access

Most of the language contained in Proposition 59 is devoted to "locking in" existing exceptions that currently limit the public's right of access to meetings and records. Subdivisions 3 through 6 expressly recognize exceptions based on:

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- 1) "the right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer" [Article I, Section (b)(3)];
- 2) "the guarantees that a person may not be deprived of life, liberty or property without due process of law, or denied equal protection of the laws" [Article I, Section (b)(4)];
- 3) "any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records" [Article I, Section (b)(5)]; and,
- 4) constitutional provisions, state law and legislative rules relating to the confidentiality of proceedings and records of the "Legislature, members of the Legislature, and its employees, committees, and caucuses..." [Article I, Section (b)(6)].

It appears that every existing constitutional and statutory exception to open meeting and public record laws has been constitutionally protected by Proposition 59. In the area of public records law, this is significant because the California Public Records Act provides only two ways for a record to be withheld from public inspection. The first is if a record falls into one of the express exceptions under the Act (of which there are many). The second is if the public interest is better served by keeping the record confidential than by making it public (aka "the balancing test"). [See Government Code §6255]. Proposition 59 does nothing to affect the operation of these express exceptions, although it is possible that, over time, the courts will more closely scrutinize decisions to withhold a record on grounds that it fits within a particular exception. Proposition 59 certainly intends for courts to weigh in favor of public disclosure when reviewing government decisions to withhold any record based on the "balancing test."

Finally, Proposition 59 contains no express recourse or remedy for violation of its provisions. The California First Amendment Coalition, one of Proposition 59's supporters, has stated that "responsible officials" of a public agency would not face fines or criminal charges for violating the new constitutional provisions.

IV. CONCLUSION

Because Proposition 59 did not expressly repeal any existing statute or judicial decision, its effects are likely to emerge over time as public agencies and the courts begin to interpret and apply the broad principles contained in Sections (b)(1) and (b)(2).

With regard to public records, a public agency will likely stand a better chance of basing its decision not to release a record on one of the constitutionally recognized exceptions rather than on balancing the interests of non-disclosure against disclosure. But even a decision to withhold a record based on a recognized exception is likely to be more carefully scrutinized if

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challenged in court. Decisions to withhold records based solely on the "deliberative process" exception now appear to be especially vulnerable to judicial challenge under Proposition 59. One of the unintended consequences of Proposition 59 could be fewer records being made and retained by public agencies and officials to the extent such records reflect their decision-making (i.e., "deliberative") process, such as records containing preliminary thoughts, recommendations or the names of people with whom they consulted.

It is not as clear how Proposition 59 will apply to open meeting laws such as the Brown Act. Commission staff anticipates that some of the anticipated litigation in this area will address the propriety of closed session meetings of public agencies, such as whether a closed session was properly convened. However judicial inquiry into those areas is likely to be complicated, as it currently is, by questions of proof and sufficiency of evidence. The courts have historically been reluctant to permit parties to discover what occurred in closed legislative sessions. Some people have argued that Proposition 59 will make it easier to pierce the veil of closed session hearings but this remains to be seen.

Commission staff will continue to apprise the Commission on important developments under this new set of laws.

Respectfully submitted,



Daniel D. Purnell
Executive Director

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ATTACHMENT 3

City Attorney

City of Oakland
Public Ethics Commission
April 4, 2011

In the Matter of

)
) Complaint No. 10-26
) **(SUPPLEMENTAL)**

Ralph Kanz filed Complaint No. 10-26 on October 13, 2010. The Commission postponed its consideration of a preliminary staff report on March 7, 2010, to permit staff to address issues raised by Mr. Kanz in an email dated March 2, 2011.

Attachment 1.

I. SUMMARY OF COMPLAINT AND PRELIMINARY STAFF REPORT

Mr. Kanz filed Complaint No. 10-26 alleging that then-mayoral candidate Jean Quan violated the Oakland Campaign Reform Act (OCRA) by receiving a loan to her campaign in excess of OCRA's contribution limits. Commission staff determined that Ms. Quan and her husband made a total of three payments to her campaign during the course of the election: A payment of \$5,000 made on June 30, 2010, drawn from a joint bank account held by Ms. Quan and her husband, Floyd Huen; A payment of \$75,000 also made on June 30, 2010, drawn from a line of credit issued by First United Credit Union to Ms. Quan and Mr. Huen; and a second payment of \$75,000 made on September 30, 2010, also drawn on the First United line of credit.

Commission staff determined that the above payments did not violate OCRA's contribution limits because 1) OCRA does not expressly restrict the amount candidates may give to their own campaigns and that judicial decisions generally forbid such restrictions where they do exist, and 2) OCRA expressly exempts from its contribution limitations "[t]he proceeds of a loan made to a candidate by a commercial lending institution in the regular course of business on the same terms available to members of the public and which is secured or guaranteed. . ." [OCRA Section 3.12.090(C)]

In an email dated March 2, 2011, Mr. Kanz raised the following questions in connection with the staff report: 1) whether the loans Ms. Quan and her husband were properly reported on Ms. Quan's campaign statements; and 2) whether payments made by the campaign to campaign workers and/or family members of the candidate should have been reported on a so-called "Schedule G." **Attachment 2.**

II. ANALYSIS

A. Commission Jurisdiction

OCRA authorizes the Commission to "oversee compliance" with OCRA's provisions and to serve as the "sole body for civil enforcement." [OCRA Section 3.12.260] With few exceptions (see Section II.B.1 below), OCRA contains no provisions regulating the filing of campaign statements. Campaign filings are regulated under the California Political Reform Act ("PRA") and enforced by the Fair Political Practices Commission (FPPC), the district attorney and, in certain cases, by the elected city attorney of a charter city. The Commission's General Complaint Procedures ("GCPs") permit the Commission to refer matters outside its direct jurisdiction to other "governmental or law enforcement agenc[ies]" for review. [GCP Section III.B.1.] Thus any Commission action regarding campaign filings that are not otherwise regulated by OCRA would be limited to referring allegations to these other governmental agencies.

B. Reporting Personal Loans

1. OCRA Section 3.12.090(B)

As cited in the preliminary staff report, OCRA Section 3.12.090(B) provides: "Every loan to a candidate or the candidate's controlled committee shall be by written agreement and shall be filed with the candidate's or committee campaign statement on which the loan is first reported." While not expressly stated, there are logical reasons to conclude that this provision does not apply to loans made by candidates with their own funds to their own campaigns: People do not typically make loan agreements with themselves. In addition, the PRA already requires such personal loans to be reported [Section 84216], and candidates are prohibited from charging interest on any loan he or she makes to his or her own campaign [Section 85307(b)]. There is however reason to support a conclusion that loans to a candidate or a candidate-controlled committee from a third party (such as a commercial lender or an individual), is subject to OCRA Section 3.12.090(B). Commission staff thus concludes there is an issue whether a copy of the loan agreement between First United and Ms. Quan and her husband should have been attached to the campaign filing for the period in which the loan was first reported (1-1-10 through 6-30-10.)

2. Reporting Loans On FPPC Form 460 (Schedule B)

Candidates are required to report loans, including amounts drawn on lines of credit, on Schedule B of FPPC Form 460. Here, there were three reportable loan events: The \$5,000 payment drawn on a jointly held bank account, and the two separate \$75,000 payments drawn from the First United line of credit. Ms. Quan reported the first two payments as a single \$80,000 loan from Mr. Huen. In its instructions for filing out Schedule B, the FPPC advises candidates to:

"Report the original source of all loans received. E.g., for a loan from a commercial lending institution for which a candidate is personally liable, report the lending institution as the lender." Attachment 3.

Candidates are also advised that they may report the deposit of their own funds into their campaigns as a loan reportable on Schedule B. Each loan must be reported separately, "even if the committee has received more than one loan from a single source." **Attachment 4.**

According to the above instructions, it appears the loan of \$5,000 should be separately identified from the June 30 loan of \$75,000 from First United. First United should also arguably be identified as the "original source" for the two \$75,000 payments, according to FPPC instructions. The applicable interest rate and the amounts paid from campaign funds for principal and for interest should also be reported. (The Schedule B currently on file with the City Clerk reports a "zero" interest rate for all loans and a "zero" amount of interest paid.) In the absence of a filed copy of the loan agreement, Commission staff cannot assess whether these reported amounts are accurate. Ms. Quan's campaign treasurer, Alan Yee, told Commission staff that he was advised by the FPPC that the loan was properly reported as coming from Ms. Quan and her husband. This advice appears to be at variance with FPPC instructions.

C. Reporting Sub-vendor Payments

The PRA prohibits agents and independent contractors from making payments on behalf of a candidate or committee in excess of \$500 unless the payments are reported by the candidate or committee in the same manner as if the expenditures were made directly by the candidate or committee. [PRA Section 84303] Such payments, commonly known as "subvendor payments," typically occur when a campaign worker, volunteer or family member of the candidate makes a payment on behalf of the campaign and then receives reimbursement for the payment from campaign funds. If the amount of the payment or payments total more than \$500, the campaign must disclose the name and address of the payee, the amount of the expenditure and a brief description of what was purchased. These disclosures are usually reported on Schedule G of FPPC Form 460 but can also be made on Schedule E or F. Mr. Kanz claims there are a number of payments reported on Schedule E that suggest the campaign should have made additional disclosures regarding the ultimate payee of the funds.

Commission staff reviewed the Schedule E's (Payments Made) currently on file with the City Clerk and noted the following payments:

Name of Payee	Description Of Payment	Amount Paid
Susan Piper	Campaign lit and printing; office supplies	\$3,626

Lailan Huen	Printing, campaign lit, info technology costs, campaign paraphernalia	\$2,636
Susan Piper	Campaign lit and printing; office supplies	\$1,337
Floyd Huen	Lawn signs	\$7,559
Floyd Huen	Printing, campaign paraphernalia/misc.	\$3,167
Holly Lim	Supplies	\$643
Michael Tigges	Supplies	\$1,363

Commission staff cannot conclude from the filings themselves that all the above payees made payments on behalf of the campaign to other vendors for the listed items and services. But unless the named individuals are in the business of providing lawns signs, campaign literature, printing services, office supplies, etc., there is a likelihood that additional sub-vendor information may be required.

III. STAFF RECOMMENDATION

Commission staff previously recommended that the Commission dismiss Complaint No. 10-26 as to allegations that the three payments violated OCRA's contribution limits. Commission staff affirms its recommendation as to this allegation.

Commission staff concludes there is an issue whether the campaign should have filed a copy of the written loan agreement between Ms. Quan and First United together with the campaign statement on which the loan was first reported pursuant to OCRA Section 3.12.090(B). This is an issue which the Commission is authorized to determine pursuant to OCRA and its General Complaint Procedures. In deciding whether to conduct a hearing on this issue, the Commission may wish to consider the magnitude of harm or prejudice to the public, the chance that the alleged conduct is likely to continue, the amount of time and resources the Commission wishes to devote to conducting a formal hearing on this subject, and/or the availability or suitability of other remedies. Should the Commission decide to schedule a hearing, the Commission's General Complaint Procedures require the Commission to decide whether to sit as a hearing panel or to delegate its authority to hear evidence to one or more Commission members or to an independent hearing examiner.

Commission staff concludes there are additional issues arising under the PRA regarding how the loans were disclosed on Schedule B, and the possible absence of subvendor information. As stated above, the Commission does not have the ability to determine these issues but may refer them to another governmental agency for review.

Commission staff recommends that the Commission direct staff to attempt to resolve all reporting issues with Ms. Quan's representatives before setting any issue for hearing or referring any matter to another agency.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*

City Attorney

City of Oakland
Public Ethics Commission
March 7, 2011

In the Matter of)
) Complaint No. 10-26
)

Ralph Kanz filed Complaint No. 10-26 on October 13, 2010.

I. SUMMARY OF COMPLAINT

Mr. Kanz filed Complaint No. 10-26 alleging that then-mayoral candidate Jean Quan violated the Oakland Campaign Reform Act (OCRA) by receiving a loan to her campaign in excess of OCRA's contribution limits. **Attachment 1.**

II. FACTUAL SUMMARY

On a campaign financial statement (Form 460) filed for the reporting period ending on June 30, 2010, Ms. Quan reported the receipt of a loan in the amount of \$80,000. The name of the lender is listed as Lloyd Huen, Ms. Quan's husband. **Attachment 2.** On a Form 460 filed for the reporting period ending on September 30, 2010, Ms. Quan reported the receipt of a second loan in the amount of \$75,000. The names of the lenders are listed as "Lloyd Huen & Jean Quan." **Attachment 3.**

Commission staff requested and received from Ms. Quan's campaign treasurer, Alan Yee, copies of the checks used to make the loan payments. The first loan of \$80,000 was made using two separate instruments -- A check written in the amount of \$75,000 and drawn from an account at First United Services Credit Union ("First United"); and a check written in the amount of \$5,000 and drawn from an account at Citibank. The First United account shows Mr. Huen as the account holder; the Citibank account shows both Mr. Huen and Ms. Quan as the account holders. **Attachment 4.** The second loan of \$75,000 was drawn from the First United account. **Attachment 5.** All checks were signed by Mr. Huen.

Mr. Yee told Commission staff that all funds loaned to the campaign constituted Ms. Quan's and Mr. Huen's community property. He said that the funds were drawn from a line of credit ("Equity Entree" as printed on the two checks) issued by First United and secured by Mr. Huen's and Ms. Quan's home in Oakland. Even though the account is maintained in Mr. Huen's name, he said both Mr. Huen and Ms. Quan are co-borrowers under the line of credit. He said Mr. Huen had been handling the couple's

finances during the campaign period and that Ms. Quan consented to and directed that the loan be made.

Commission staff performed a search of county assessor records to confirm Mr. Yee's statements. There exists in county records a 2007 deed of trust on Ms. Quan's and Mr. Huen's Oakland residence which secures an "Open-End Line Of Credit" from First United and authorized for an amount in excess of the \$155,000 campaign loan. The deed of trust lists both Ms. Quan and Mr. Huen, in their capacities as trustees of a family trust, as "co-borrowers" under the loan instrument secured by the deed.

III. ANALYSIS

OCRA limits the amount a person may contribute, and a candidate can receive, in an election for local office. [OCRA §3.12.050] The amount depends on whether the candidate has accepted voluntary expenditure ceilings for his or her campaign. For the election of November 2010, the contribution limit totaled \$700 for candidates accepting voluntary expenditure ceilings and \$100 for candidates who did not accept the ceilings. Ms. Quan filed OCRA Form 301 accepting voluntary expenditure ceilings for the November 2010 election. **Attachment 6.**

OCRA also contains a related provision relevant to this complaint:

3.12.090 Loans

A. A loan shall be considered a contribution from the maker and the guarantor of the loan and shall be subject to the contribution limitations of this Act.

B. Every loan to a candidate or the candidate's controlled committee shall be by written agreement and shall be filed with the candidate's or committee campaign statement on which the loan is first reported.

C. The proceeds of a loan made to a candidate by a commercial lending institution in the regular course of business on the same terms available to members of the public and which is secured or guaranteed shall not be subject to the contribution limitations of this Act.

Thus the issue presented is whether a loan reportedly made by a candidate's spouse that is actually drawn on a line of credit secured by a community property asset constitutes a loan subject to OCRA's \$700 contribution limit.

While OCRA restricts the amount of direct contributions to candidates and, pursuant to Section 3.12.090, applies those limits to the "maker and guarantor" of a loan to a candidate, OCRA does not include any express limit on the amount a local candidate may contribute or loan to his or her campaign. In Buckley v. Valeo (1976)

424 U.S. 1, the U.S. Supreme Court ruled that laws limiting a candidate's use of personal funds in his or her campaign burden a candidate's free speech rights and thus subject to "strict scrutiny" by the courts. Subsequent court decisions have indicated such laws would not survive a demanding strict scrutiny from the courts. Thus a reading or interpretation of OCRA Section 3.12.050 (contribution limits) and Section 3.12.090 (loans to candidates) that would include a candidate's personal funds would not likely be consistent with U.S. court decisions.

Commission staff further notes that Section 3.12.090(C) expressly excludes from its limitations "[t]he proceeds of a loan made to a candidate by a commercial lending institution in the regular course of business on the same terms available to members of the public and which is secured or guaranteed. . ." Here, the proceeds of the home equity line from First United were "made" to Ms. Quan in her capacity as a co-borrower under the deed of trust and loan instrument. The loan is "secured" by her community property home asset. There is nothing to suggest the terms of the loan were not available to other credit union members. The fact that it was Mr. Huen who signed the checks does not change the character of their community property asset nor appear to affect the exception provided in Section 3.12.090(C).¹

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 10-26 on grounds that the reported loans from Floyd Huen were actually loans by a commercial lending institution to Mr. Huen and Ms. Quan and secured by Mr. Quan's community property interest in real property.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*

¹ *The above conclusion does not imply that a person could never trigger the provisions of Section 3.12.090 by making a loan to his or her spouse-candidate; the use of **separate** property in making such a loan would present a different analysis under OCRA but such facts are not currently before the Commission.*

Purnell, Daniel

From: Ralph Kanz [rkanz@sonic.net]
Sent: Wednesday, March 02, 2011 3:50 PM
To: Purnell, Daniel
Subject: Complaint No. 10-26

Dan,

I have some concerns about the staff report for Complaint No. 10-26.

The analysis does not take into consideration OCRA Section 3.12.100 A. that "contributions by a husband and wife shall be treated as separate contributions and shall not be aggregated." If the loans are from Ms. Quan then they were not properly reported. Beyond that the staff report indicates that the loans are in fact from two different sources, and there are three loans not two. The first loan is from Floyd Huen from the joint checking account with Jean Quan. The other two loans are from Floyd Huen. If all or some of the loans are in fact from First United, as the staff report assumes, then there must be some documentation in the campaign filings to support this assertion. If the loan is from First United, then a copy of the loan agreement should have been attached to the campaign filing. Many candidates "loan" money to their campaigns, and we all understand that when it is an amount someone might take from savings we do not question the source and terms of the loan. In this case it has been confirmed that the source of the money is not the personal savings of the candidate, but instead a loan from a commercial lending institution. If this is a loan, then one would expect for monthly payments to be made. Have the monthly payments been accounted for on campaign filings?

The second part of my complaint is not addressed by the staff report, that being the failure to attach Schedule G to any of the campaign filings of Ms. Quans mayoral committee. My review of her filings show that she still has not filed Schedule G's with any of her reports. This relates directly to the problem with the loan reporting. We as the public are not allowed the information as to the ultimate destination of the funds. When a member of Ms. Quan's family is reported to have been paid for a mailer on the Schedule E, but there is nothing on the Schedule G to indicate the ultimate payee of the money (printers, mail houses, etc), this defeats the entire intent of campaign laws.

Finally this complaint has similarities to Complaint 02-07 where Ms. Quan and her treasurer Mr. Yee did not properly account for campaign contributions. In that case the problem related to the accounting of contributions from husbands and wives. In both cases it would have been possible to amend filings and clean up the discrepancies, but nothing was or has been done.

Please let me know if you need any additional information

Ralph Kanz

ATTACHMENT 2

Item E-3
Date 4/4/11
Page 9 of 12

3/21/2011

**Instructions for
Schedule B – Part 1
Loans Received**

All loans received or outstanding are reported on Schedule B. Loans include monetary loans and amounts drawn on lines of credit.

Report loan guarantors on Schedule B – Part 2. A “guarantor” is a third party that co-signs, endorses, or provides security for a loan, or establishes or provides security for a line of credit. A guarantor is also making a contribution.

When a state candidate guarantees a loan from a commercial lending institution in connection with his or her election, both the lending institution and the candidate are required to be disclosed as the lender.

For each loan of \$100 or more that was received or was outstanding during the reporting period, disclose the lender’s name and address. Report the original source of all loans received. E.g., for a loan from a commercial lending institution for which a candidate is personally liable, report the lending institution as the lender.

Column (a) – Enter the outstanding loan balance at the beginning of this period (Column (d) of last report). If the loan was received this period, this column will be blank.

Column (b) – Enter the amount received from the lender during this reporting period. If this loan was received in a previous reporting period, leave blank.

Column (c) – Enter the amount of any reduction of the loan during this reporting period. Check whether the loan was paid or forgiven. When the lender forgives a loan or a third party makes a payment on a loan, also report the lender or third party on Schedule A.

Column (d) – Enter the outstanding balance of the loan at the close of this reporting period. Enter the due date, if any.

Column (e) – Enter the interest rate and the amount of interest paid on the loan(s) during this reporting period. Interest paid is reported separately from payments made on the loan principal. Interest payments are also transferred to the Schedule E Summary.

Column (f) – Enter the original amount of the loan and date received. If this is the first time you are reporting the loan, this will be the same amount reported in Column (b).

Column (g) – Enter the cumulative amount of contributions (loans, monetary and nonmonetary contributions) received from the lender during the calendar year covered by this statement. Candidates subject to state contribution limits (or if required by local ordinance) must disclose the cumulative amount received from each contributor during the limitation cycle in addition to the calendar year cumulative amount. (Candidates for elective state office should refer to FPPC Campaign Disclosure Manual 1.)

Schedule B Summary:

The Schedule B Summary reflects the “net change” in your loan activity. That is, loan payments made during the period are subtracted from new loans received. When the loan payments number is larger than the amount of new loans received, Line 3 will be a negative figure. For example, if \$200 is paid during the period and only \$100 is received in new

loans, report the net change on Line 3 as “-\$100” or “(\$100).” Be sure to carry this figure to the Summary Page as a negative figure to be subtracted from Summary Page totals.

Additional Important Information:

Refer to the Instructions for Schedule A for important information about:

- Contributor Codes
- Contributions from Individuals
- Contributions from Committees
- Intermediaries

A loan received from a commercial lending institution in the normal course of business is reportable on Schedule B but is not considered a contribution. Contributor codes and cumulative amounts (Column (g)) are required only for loans that are contributions. Refer to the FPPC Campaign Disclosure Manual for your type of committee for important information about recordkeeping, prohibitions on cash contributions, returning contributions, and more.

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Date 4/4/11
Page 10 of 12

ATTACHMENT 3

Chapter 6 — Committee Report - Form 460

Form 460
Schedule B
Part 1

Type or print in ink.
Amounts may be rounded
to whole dollars.

Statement covers period
from 7/1/20XX
through 9/30/20XX

SCHEDULE B - PART 1
CALIFORNIA FORM **460**
Page 5 of 13

SEE INSTRUCTIONS ON REVERSE

NAME OF FILER
Committee to Elect Waters Mayor

ID. NUMBER
1001234

FULL NAME, STREET ADDRESS AND ZIP CODE OF LENDER (IF COMMITTEE, ALSO ENTER ID. NUMBER)	IF AN INDIVIDUAL, ENTER OCCUPATION AND EMPLOYER (IF SELF-EMPLOYED, ENTER NAME OF BUSINESS)	(a) OUTSTANDING BALANCE BEGINNING THIS PERIOD	(b) AMOUNT RECEIVED THIS PERIOD	(c) AMOUNT PAID OR FORGIVEN THIS PERIOD		(d) OUTSTANDING BALANCE AT CLOSE OF THIS PERIOD	(e) INTEREST PAID THIS PERIOD	(f) ORIGINAL AMOUNT OF LOAN	(g) CUMULATIVE CONTRIBUTIONS TO DATE
				PAID	FORGIVEN				
Beach City Bank 300 10th Street Beach City, CA 95823		\$ - 0 -	\$ 7,000	<input type="checkbox"/> PAID \$ - 0 -	<input type="checkbox"/> FORGIVEN \$ - 0 -	\$ 7,000	\$ 5 FISC	\$ 7,000	CALIFORNIA YEAR PER ELECTION** \$ N/A
<input type="checkbox"/> IND <input type="checkbox"/> COM <input type="checkbox"/> OTH <input type="checkbox"/> PTY <input type="checkbox"/> SCC		\$ - 0 -	\$ 7,000			\$ 7,000	\$ 100 DATE DATE	\$ 7,000	
Megan Waters 100 Sandburg Street Playa del Sol, CA 95888	Realtor, Waters Realty	\$ 2,000	\$ - 0 -	<input checked="" type="checkbox"/> PAID \$ 1,000	<input type="checkbox"/> FORGIVEN \$ - 0 -	\$ 1,000	\$ - 0 - FISC	\$ 2,000	CALIFORNIA YEAR PER ELECTION** \$ 2,000
<input checked="" type="checkbox"/> IND <input type="checkbox"/> COM <input type="checkbox"/> OTH <input type="checkbox"/> PTY <input type="checkbox"/> SCC		\$ 2,000	\$ - 0 -			\$ 1,000	\$ - 0 - DATE DATE	\$ 2,000	
SUBTOTALS		\$ 7,000	\$ 1,000	\$ 8,000	\$ 100				

Schedule B Summary

1. Loans received this period \$ 7,000
(Total Column (b) plus unitemized loans of less than \$100.)

2. Loans paid or forgiven this period \$ 1,000
(Total Column (c) plus loans under \$100 paid or forgiven.)
(Include loans paid by a third party that are also itemized on Schedule A.)

3. Net change this period. (Subtract Line 2 from Line 1.) NET \$ 6,000
Enter the net here and on the Summary Page, Column A, Line 2.

*Amounts forgiven or paid by another party also must be reported on Schedule A.
** If required.

Contributor Codes

IND - Individual
COM - Recipient Committee
(other than PTY or SCC)
OTH - Other (e.g., business entity)
PTY - Political Party
SCC - Small Contributor Committee

**How to Complete Schedule B – Part 1
Loans Received**

Lender Information

Provide the name, street address, city, state, and zip code of each lender of \$100 or more.

Financial Institution

If a financial institution, such as a bank, has loaned the committee money or the committee has drawn on a line of credit, report the institution as the lender by listing its name and address, including zip code. Even if the candidate has established the line of credit, report the institution as the lender.

Individual

If the lender is an individual, also provide the individual's occupation and employer. Do not leave this column blank. If the contributor is self-employed, provide the name of the business. If this information has not been obtained, put "requested" or similar language in this column and amend Schedule B, Part 1 later. (See Chapter 1 for

restrictions on contributions received when the name, address, occupation, or employer information is missing.)

Officeholder/Candidate

Officeholders and candidates depositing their personal funds in the campaign account to assist in their own elections may report the funds as a loan on Schedule B.

Contributor Codes

For each itemized lender, check the box indicating whether the lender is an individual, committee, other (such as a business entity), or a political party. (SCC is applicable only to state candidates and committees.)

Quick TIP Report each loan separately, even if the committee has received more than one loan from a single source.

(a) Outstanding Balance Beginning This Period

Enter the outstanding loan balance at the beginning of this reporting period (Column

(d) of the last report filed). If the loan was received this period, enter zero or leave Column (a) blank.

(b) Amount Received This Period

Enter the amount received from the lender during this reporting period. If this loan was received in a previous reporting period, enter zero or leave Column (b) blank.

(c) Amount Paid or Forgiven This Period

Enter the amount of any reduction of the loan during this reporting period. Check whether the reduction was a payment or forgiveness. When the lender forgives all or part of a loan, or a third party makes a payment on a loan, also report the lender or third party on Schedule A. Enter zero or leave this column blank if no payments were made this reporting period.

(d) Outstanding Balance at Close of This Period

Enter the outstanding balance of the loan at the close of this reporting period. Enter the due date, if any.

(e) Interest Paid This Period

Enter the interest rate and the amount of interest paid on the loan(s) during this reporting period. If the lender is not charging interest, indicate "none" on the "interest rate" line. Interest paid is reported separately from payments made on the loan principal. Interest payments are also transferred to the Schedule E Summary.

(f) Original Amount of Loan

Enter the original amount of the loan and the date it was received. If this is the first time the loan is being reported, this is the same amount as reported in Column (b).

(g) Cumulative Contributions to Date

Enter the cumulative amount of contributions (including loans, loan guarantees, monetary and nonmonetary contributions) received

from the lender during the calendar year covered by this statement.

Candidates subject to local contribution limits may be required to disclose the cumulative amount received from each contributor during a specific period. Check with the local filing officer to see what reporting obligations are required under local law. Primarily formed committees do not complete this part.

When a loan is repaid, the cumulative amount may be reduced by the amount repaid.

A loan is a contribution unless it is received from a commercial lending institution in the ordinary course of business. It is not necessary to disclose cumulative amounts for loans that are not contributions.

Schedule B Summary

As loans are paid, Line 3 of the summary section of Schedule B will eventually be a negative amount. When transferring a negative figure from Line 3 to the Summary Page, Column A, Line 2, be sure to subtract the amount from the previous report, Column B, Line 2, to determine the figure for this report's Column B, Line 2.

City Attorney

City of Oakland
Public Ethics Commission
April 4, 2011

In the Matter of)
) Complaint No. 10-27
)

Ralph Kanz filed Complaint No. 10-27 on November 1, 2010.

I. SUMMARY OF COMPLAINT

Mr. Kanz filed Complaint No. 10-27 alleging that the committee known as the "Coalition For A Safer California" ("Committee") violated the Oakland Campaign Reform Act ("OCRA") by failing to include a required disclosure on an independent expenditure during the November 2010 election. **Attachment 1.**

II. FACTUAL SUMMARY

Mr. Kanz submits with his complaint a mailing he says he received from the Committee on or about October 29, 2010. The mailer encourages recipients to vote for mayoral candidate Don Perata and criticizes candidate Jean Quan. **Attachment 2.** The address side of the mailer contains the following notice:

*NOTICE TO VOTERS (Required by City and County of San Francisco)
This mailing is not authorized or approved by any candidate for City and County office, by any election official, or by a committee controlled by a candidate. It is paid for by Coalition for a Safer California, 1020 12th Street, Suite 408, Sacramento, CA 95814.*

Mr. Kanz contends the above language does not comply with OCRA's disclosure requirements for independent expenditures.¹

III. ANALYSIS

OCRA Section 3.12.230 provides:

¹ State law defines an "independent expenditure" as an expenditure made in connection with a communication "which expressly advocates the election or defeat of a clearly identified candidate [or ballot measure]. . .or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." [Government Code Section 82031]

"Any person who makes independent expenditures for a mass mailing, slate mailing or other campaign materials which support or oppose any candidate for city office shall place the following statement on the mailing in typeface of no smaller than fourteen points:

Notice to Voters

(Required by the City of Oakland)

***This mailing is not authorized or approved by any City candidate or election official.
It is paid for***

***by (name) _____
_____ (address, city, state)***

Total cost of this mailing is: (amount)"

OCRA also provides that any person who "intentionally or negligently" violates Articles III, IV or V of the Act (which include Section 3.12.230) is subject to enforcement proceedings before the Commission. If the Commission determines a violation has occurred, the Commission is authorized to administer appropriate penalties and fines "not to exceed three times the amount of the unlawful contribution or expenditure." (Section 3.12.280)

According to Richard Rios, an attorney representing the Committee in connection with this complaint, the Committee sent approximately 53,000 copies of the mailer to recipients throughout Oakland. He said the cost of the mailing was \$41,600. Mr. Rios said that the Committee was active in a number of local elections throughout the state and that its consultant inadvertently used the disclosure required by San Francisco's campaign finance laws instead of Oakland's. He claimed that the use of the San Francisco disclosure language instead of the Oakland disclosure language was inadvertent, and the fact that the Committee placed disclosure language (albeit the wrong one), on the mailing demonstrates an intent to comply with the law.

Commission staff notes that the Committee sent at least one other mailer that did contain OCRA's disclosure language. **Attachment 3.** Commission staff therefore concludes that the Committee's use of the San Francisco disclosure language instead of the Oakland language was likely inadvertent and not intentional. However, Commission staff cannot conclude that a reasonable inspection of the final proof before printing and mailing would not have discovered the omission. Furthermore, the Oakland disclosure language requires the sender to disclose the cost of the independent expenditure while the San Francisco language apparently does not. Such an omission is arguably material and would controvert an argument that the San Francisco disclosure language substantially complies with OCRA's requirements. Because of this arguably substantive omission, Commission staff concludes that there is an issue in law and fact of whether the Committee violated provisions of Section 3.12.230.

IV. STAFF RECOMMENDATION

The Commission has discretion whether to schedule and conduct an evidentiary hearing on the issue of whether the Committee intentionally or negligently violated OCRA Section 3.12.230. In deciding whether to conduct a hearing in this matter, the Commission may wish to consider the magnitude of harm or prejudice to the public, the chance that the alleged conduct is likely to continue, the amount of time and resources the Commission wishes to devote to conducting a formal hearing on this subject, and/or the availability or suitability of other remedies.

Should the Commission decide to schedule a hearing, the Commission's General Complaint Procedures require the Commission to decide whether to sit as a hearing panel or to delegate its authority to hear evidence to one or more Commission members or to an independent hearing examiner. Commission staff recommends that the Commission direct staff to discuss a settlement with the Committee's representative before any hearing is scheduled.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*

City of Oakland

For Official Use Only

Public Ethics Commission

Stamp Date/Time Received:

COMPLAINT FORM

Complaint Number: 10-27

Please Type or Print in Ink and Complete this Form.

This complaint concerns a possible violation of: (please check all that apply)

The Oakland Sunshine Ordinance, California Public Records Act or Brown Act. (Access to public meetings or documents.)

Oakland Campaign Reform Act

Oakland City Council's Rules of Procedure/Code of Ethics

Oakland Limited Public Financing Act

Oakland Conflict of Interest regulations

ATTACHMENT 1

Item E-4

Date 4/4/11

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Oakland Lobbyist Registration Act

Oakland False Endorsement In Campaign Literature Act

I am/We are not sure which specific law, ordinance or regulations apply. However, I am/We are requesting that the Ethics Commission determine if my/our complaint is within its jurisdiction.

The alleged violation occurred on or about the following date(s)

October 29, 2010

The alleged violation occurred at the following place:

Oakland, California

Please provide specific facts describing your complaint. (Or attach additional pages as necessary.)

The Coalition for a Safer California mailer opposing Jean Quan does not have the disclosure required by OCRA Section 3.12.230.

The persons you allege to be responsible for the violation(s) are:

Coalition for a Safer California

Any witnesses who were involved and/or who can provide additional information are: (Please indicate names and phone numbers, if available.)

ATTACHMENT 1

Item E-4

Date 4/4/11

Page 5 of 8



NOTICE TO VOTERS (REQUIRED BY CITY AND COUNTY OF SAN FRANCISCO)
This mailing is not authorized or approved by any candidate for City and County office,
by any election official, or by a committee controlled by a candidate. It is paid for by
Coalition for a Safer California, 1020 12th Street, Suite 408, Sacramento, CA 95814.

Jean Quan...

Always leaves taxpayers holding the bag.

Every time

Jean Quan leaves

**a job unfinished
to run for a higher
office, she leaves
taxpayers holding
the bag.**

In 2002, Jean Quan left the Oakland School Board to run for City Council.

Taxpayers were left with a \$35 Million deficit and the District was taken over by the State.

Now, she's leaving her position as Chair of the Oakland City Council's Finance Committee to run for Mayor.

Taxpayers are left with police layoffs and an estimated \$59 Million budget deficit.

Quan's explanation:

"Could we have been more conservative in our revenue estimates last spring? Absolutely. But I don't think a lot of this is due to mismanagement or being top heavy."

— Jean Quan
The San Francisco Chronicle, December 24, 2008.

Item E-4
Date of Mail
Page 6 of 8

ATTACHMENT 2

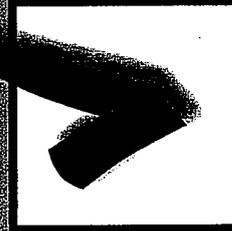
Only Don Perata knows how to stay at work until the job is done.

San Francisco Chronicle **Perata is best choice for Oakland Mayor**

"Perata spent 12 years pushing against assault weapons until his bill to establish the nation's strongest restrictions was signed into law."

The San Francisco Chronicle
October 18, 2010

Don Perata



- The only candidate who will re-hire 80 police officers
- The only candidate who will not lay off any more cops
- The only candidate who will cut bureaucratic waste to keep Oakland safe

Notice to Voters This mailing is not authorized or approved by any City candidate, election official, or a committee controlled by a City candidate.

It is paid for by Coalition for a Safer California, 1020 12th Street, Suite 408, Sacramento, CA 95814.

Total Cost of this mailing is: \$28,024.01



*****ECRLOT**C-007

109 26

109 26

Date

Page 8 of 8

PRSR STD
U.S. POSTAGE
PAID
OAKLAND, CA
PERMIT # 2565

ATTACHMENT 3

OAKLAND POLICE AND FIREFIGHTERS URGE YOUR SUPPORT OF DON PERATA

CITY OF OAKLAND
Public Ethics Commission

Richard Unger, *Chair*
Ai Mori, *Vice-Chair*
Alex Paul
Amy Dunning
Lloyd Farnham
Christopher Young
Aspen Baker



Daniel D. Purnell, Executive Director

One Frank Ogawa Plaza, 4th Floor, Oakland, CA 94612 (510) 238-3593 Fax: (510) 238-3315

TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: April 4, 2011

RE: A Referral From The Office Of The City Auditor Regarding Potential Violations Of OCRA Section 3.12.140; Action To Be Taken Whether To Initiate A Complaint

On March 21, 2011, the City Auditor's Office delivered a letter to Commission staff indicating that it had "developed evidence of potential violations of the Oakland Campaign Reform Act (OCRA)." **Attachment 1.** The "evidence" appears to constitute reported campaign contributions that were allegedly made by representatives from two companies, ABC Security and Marina Security. The City Auditor reports that the representatives made contributions to Oakland candidates and officeholders at various times during 2010.

Commission staff understands that ABC Security and Marina Security are both seeking the award of a two-year contract to provide security services at City facilities. A January 25, 2011, City Council staff report states that the City issued Requests For Proposals (RFPs) for the contract as recently as early 2010. The value of the contract is reported at up to \$2 million annually. According to the minutes of the City Council's Finance and Management Committee meeting on March 8, 2011, the Committee adopted a motion to recommend that the full City Council award the contract to ABC Security. At the time of this writing, the City Council is expected to consider the Committee's recommendation at its meeting of April 5, 2011.

II. APPLICABLE LAW

OCRA Section 3.12.140 provides in relevant part:

"No person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the city for the rendition of services...whenever the

value of such transaction would require approval by the City Council shall make any contribution to the Mayor, a candidate for Mayor, a City Councilmember, a candidate for City Council...at any time between commencement of negotiations and either one hundred eighty (180) days after the completion of, or the termination of, negotiations for such contract.

"Commencement of negotiations" for city contracts occurs when a contractor or contractor's agent formally submits a bid, proposal, qualifications or contract amendment to any elected or appointed city officer or employee or when any elected or appointed city officer or employee formally proposes submission of a bid, proposal, qualifications or contract amendment from a contractor or contractor's agent.

"Commencement of negotiations" does not include unsolicited receipt of proposal or contract information or documents related to them, requests to be placed on mailing lists or routine inquiries for information about a particular contract, request for proposal or any information or documents relating to them or attendance at an informational meeting.

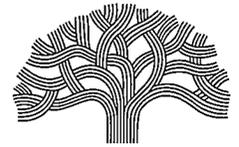
"Services" means and includes labor, professional services, consulting services, or a combination of services and materials, supplies, commodities and equipment which shall include public works projects."

The City Auditor's letter raises the issues of whether ABC Security or Marina Security made a contribution to a local candidate or officeholder during a period of negotiation on a contract regulated by Section 3.12.140. Based on the information provided by the Office of the City Auditor, Commission staff's review of the City Council staff reports, and the above-cited law, Commission staff recommends that the Commission initiate a complaint to examine and determine whether any applicable provisions of OCRA were violated. If the Commission takes this action, Commission staff will conduct an investigation and prepare a preliminary staff report for subsequent consideration pursuant to the Commission's General Complaint Procedures.

Respectfully submitted,

Daniel D. Purnell
Executive Director

CITY OF OAKLAND



CITY HALL • ONE FRANK H. OGAWA PLAZA, 4TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Auditor
Courtney A. Ruby, CPA
City Auditor

(510) 238-3378
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TDD (510) 238-3254
www.oaklandauditor.com

March 21, 2011

Mr. Daniel Purnell, Executive Director
Public Ethics Commission
1 Frank Ogawa Plaza, 4th floor
Oakland, CA 94612

SUBJECT: POTENTIAL VIOLATIONS OF OAKLAND CAMPAIGN REFORM ACT

Dear Mr. Purnell:

The Office of the City Auditor has developed evidence of potential violations of the Oakland Campaign Reform Act (OCRA). In accordance with OMC 3.12.260, we are providing this information to the commission that has jurisdiction as the enforcing body, the Public Ethics Commission.

We found that two of the ten bidders for the pending Security Services contract contributed a total of \$2,300 in 2010 to three current councilmembers and three November 2010 candidates for city council seats. These contributions appear to constitute violations of OMC 3.12.140, which precludes contractors from making political contributions during the period they are negotiating for a contract with the City.

Our review of the Form 460's filed with the City Clerk for the 2010 calendar year disclosed that Ana Chretien, CEO of ABC Security, made contributions totaling \$1,800 to councilmembers and city council candidates; Sam Tadesse, Managing Partner of Marina Security, made a \$500 contribution to one councilmember. We did not find any contribution from the other eight contractors who submitted proposals for the contract. Contribution details are provided in this letter's Enclosure.

As required by the City of Oakland's procurement procedures, both of these individuals signed and submitted a "Schedule O" (Contractor Acknowledgement of City of Oakland Contribution Limits for Construction, Professional Service & Procurement Contracts) on behalf of their respective firm.

Item E-5

Date 4/4/11

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Public Ethics Commission, Daniel Purnell
Potential Violations of Oakland Campaign Reform Act
March 21, 2011
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My staff has more information on the specific contributions found as well as copies of the Schedule O's for all ten bidders. Please contact Sharon Ball, FW+A Program Manager at (510) 238-4975 on this matter.

Sincerely,



COURTNEY A. RUBY, CPA, CFE
City Auditor

Enclosure (as stated above)

cc: Mayor Jean Quan
President Larry Reid
Councilmember Jane Brunner
Councilmember Pat Kernighan
Councilmember Nancy Nadel
Councilmember Libby Schaaf
Councilmember Ignacio Del La Fuente (President ProTem)
Councilmember Desley Brooks (Vice Mayor)
Councilmember Rebecca Kaplan
City Attorney John Russo

Item E-5
Date 4/4/11
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Summary of Contributions Identified

Recipient	460 Filing Period	Contributor	Date	Amount
Brunner, Jane	July-Dec 2010	ABC Security	7/27/2010	\$ 350.00
Schaaf, Libby	Jan-Jun 2010	ABC Security	6/28/2010	\$ 100.00
Schaaf, Libby	Jan-Jun 2010	ABC Security	3/1/2010	\$ 600.00
Broadhurst, Jill	Jan-Jun 2010	Ana Chretien	6/28/2010	\$ 250.00
Brooks, Desley	Jan-Jun 2010	Ana Chretien	not on form	\$ 300.00
Dorado, Jose	Jan-Jun 2010	Ana Chretien	5/30/2010	\$ 100.00
Killian, Clinton	Jan-Jun 2010	Ana Chretien	6/10/2010	\$ 100.00
Brooks, Desley	Jan-Jun 2010	Sam Tadesse	not on form	\$ 500.00
		Total by contractors bidding on RFP		\$2,300.00
		ABC Security / CEO		\$1,800.00
		Marina / Managing Director		\$ 500.00

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Daniel D. Purnell, Executive Director

One Frank Ogawa Plaza, 4th Floor, Oakland, CA 94612 (510) 238-3593 Fax: (510) 238-3315

TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: April 4, 2011

RE: A Report And Action To Be Taken Regarding Required Review And Adjustment Of City Council Salaries For Fiscal Year 2011-2012 And A Discussion Of Options For Amending The Commission's Authority To Annually Adjust City Council Salaries In The Future

In March, 2004, Oakland voters adopted ballot Measure P. Among other things, Measure P amended the Commission's authority for adjusting City Council salaries. This memorandum reviews Commission options for determining City Council salaries for Fiscal Year (FY) 2011-2012, and provides several options for amending the Commission's authority under City Charter Section 202(c) to adjust City Council salaries in the future.

I. BACKGROUND AND HISTORY OF SALARY ADJUSTMENTS

When Oakland voters created the Public Ethics Commission in 1996, they authorized the Commission to establish a base salary for City Councilmembers and to adjust it in every odd-numbered year in an amount not to exceed ten percent. The Commission established a base level City Council salary in November 1997 in the annual amount of \$60,000. The previous annual salary amount was \$36,900.

In November 1998, Oakland voters adopted Measure X, which amended the Commission's salary-setting authority by providing that any future salary increase must be approved by a public vote. The Commission did not make a salary adjustment in 1999.

In March, 2004, Oakland voters adopted Measure P by a vote margin of 70 to 30 percent. Oakland City Charter Section 202(c) now authorizes the Public Ethics Commission to annually adjust City Council salaries "by the increase in the consumer price index over the preceding

year." The Commission may also adjust salaries beyond the increase in the consumer price index (CPI) up to an aggregate total of five percent. Any annual increase beyond five percent must be approved by the voters. [See full text of amended Section 202(c) in paragraph II.C., below.]

The following is a summary of Commission-approved salary increases since 2004:

June 2004	5 percent
June 2005	2.1 percent (CPI)
June 2006	4 percent
June 2007	5 percent
June 2008	2.9 percent (CPI)
June 2009	0.8 percent (CPI)
June 2010	1.7 percent (CPI)

II. COMMISSION OPTIONS FOR DETERMINING CITY COUNCIL SALARIES FOR FISCAL YEAR (FY) 2011-2012

A. Current Salary

Members of the Oakland City Council are currently authorized to receive a salary of \$6,175 per month or \$74,098 per year (inclusive of the Commission's June 2010 salary adjustment.) This amount is funded in approximately equal shares from the general fund and redevelopment agency. The City's Budget Office also reports that City Councilmembers voluntarily declined to accept the June 2010 salary adjustment.

According to a survey updated recently by Commission staff, the current authorized salary for Oakland City Councilmembers is almost identical to the average salaries provided to councilmembers of the eight largest cities in California (excluding Oakland). The chart shown on **Attachment 1** compares city council salaries and benefits of the reviewed jurisdictions. As Attachment 1 indicates, the mean (average) salary for councilmembers of these eight cities totals \$6,163 per month. Oakland councilmembers are currently authorized to receive \$6,175 per month. However when compared to the average salary of the eleven largest cities in California (excluding Oakland), Oakland councilmembers receive \$1,204 per month more than the \$4,971 average monthly salary. Only one jurisdiction, the City of Los Angeles, expressly excludes its councilmembers from receiving outside income.

B. Other Benefits

Although the Commission only has authority to set City Council salaries, questions frequently arise over the total compensation package which Oakland City Councilmembers receive. City Councilmembers essentially receive the same benefit package as other permanent management employees. The benefit package includes City-paid contributions to the Public Employees' Retirement System (PERS), health, dental and vision coverage, and life and disability insurance. According to the City Budget Office, City Councilmembers now contribute a portion of their salary to PERS. The total City-paid benefit package amounts to an additional

\$42,739 per City Councilmember per year. The final element of compensation is an available car allowance in the amount of \$550 per month.

C. Adjusting City Council Salaries Under Charter Section 202(c)

City Charter Section 202(c) provides:

"Beginning with Fiscal Year 2003-2004, the Public Ethics Commission shall annually adjust the salary for the office of Councilmember by the increase in the consumer price index over the preceding year. The Commission may adjust salaries beyond the increase in the consumer price index up to a total of five percent. Any portion of an increase in compensation for the office of Councilmember that would result in an overall increase for that year in excess of five percent must be approved by the voters."

The above language presents the Commission with the following required actions and options:

1. Mandatory CPI Adjustment

Section 202(c) requires the Commission to make annual CPI adjustments in City Council salaries "over the preceding year." According to the Office of Personnel, most payroll adjustments in the City of Oakland are made annually and take effect on the first payroll period after the beginning of the new fiscal year, which will begin on July 1, 2011.

The federal Bureau of Labor Statistics publishes a CPI for the San Francisco-Oakland-San Jose region. The Bureau of Labor Statistics calculates this index every other month. Based on its most recent CPI calculation through and including February 2011, the CPI has increased 1.0 percent (rounded to the nearest tenth) since April 2010. (The next scheduled CPI calculation through and including April 2011, will be published in May 2011.) Thus Section 202(c) requires the Commission to adjust City Council salaries by at least 1.0 percent by the end of the current fiscal year, **subject to the May 2011 revise**. A 1.0 percent increase would raise existing City Council salaries by an amount of \$61.75 monthly to a new annual total of \$74,839.00.

2. Discretionary Authority To Adjust Salaries Up To Five Percent

Section 202(c) states that the Commission **may** adjust salaries beyond the increase in the CPI up to a total of 5 percent. If the CPI increased 1.0 percent since April, 2010, the Commission has the discretion to further increase City Council salaries an additional 4.0 percent (subject to the May, 2011 revise) without voter approval.

The following table shows the total dollar cost for every one percent increase in City Council salaries up to a total of five percent:

%age Increase To Existing Base Salary	Annual Salary Increase Per Councilmember	Annual Cost To Fund City Council Salary Increases
1 percent	\$ 741	\$5,928.00
2 percent	\$1482	\$11,856.00
3 percent	\$2223	\$17,784.00
4 percent	\$2964	\$23,720.00
5 percent	\$3705	\$29,640.00

3. Public Ratification For Salary Increases Beyond Five Percent

Section 202(c) states that any annual adjustment of greater than five percent must be approved by Oakland voters. The City Attorney's Office has previously advised the Commission that only the City Council may place items directly before the voters. Thus if the Commission were to make a salary adjustment of greater than five percent, it must request the City Council to place that portion of the increase exceeding five percent before the voters for approval. The City Council has the discretion whether to place any matter before the voters.

There are several factors that the Commission may wish to consider in deciding the amount by which to increase City Council salaries. One is the current salary amount relative to other California cities. As Attachment 1 demonstrates, Oakland City Council salaries are almost identical to the mean salaries of the eight largest cities in California but greater than the mean salaries of the eleven largest cities. The other factor is whether the Commission, as a matter of policy, should increase salaries above the mandatory CPI adjustment to make progress towards restoring City Council salaries to a level comparable to the \$60,000 level established in 1997. The CPI has increased approximately 41 percent since November 1997. Had City Council salaries kept pace with adjustments in the CPI since 1997, annual City Council salaries currently would total approximately \$84,600 compared with the \$74,098 they are currently authorized to receive. Commission staff notes that the current financial environment will likely make it difficult to obtain City Council and/or voter approval for any adjustment in excess of the 5 percent the City Charter authorizes the Commission to adopt.

III. PROPOSALS TO AMEND THE COMMISSION'S AUTHORITY TO ADJUST CITY COUNCIL SALARIES IN THE FUTURE

At its regular meeting of September 8, 2010, the Commission considered a staff report describing how other local California jurisdictions have delegated the authority to set and/or adjust the compensation of city councilmembers to a subsidiary legislative body. **Attachment 2.** This inquiry arose from the Commission's actions last June to adjust City Council salaries by the change in the CPI. As part of its deliberations, the Commission considered sending a letter to the City Council requesting that it form a task force to review and propose revisions to the manner by which City Council salaries are currently adjusted. At its meeting of September 8 however, the Commission declined to send the letter on grounds that the Commission needed first to review and determine whether it should express a policy preference in retaining some or all of its current salary-adjusting authority or, whether the duty to adjust City Council salaries was fundamentally inconsistent with the Commission's purpose and mission. Commission staff was directed to develop policy options which the Commission could consider to assist in making this

determination. There was also discussion and general consensus that this matter be further discussed and determined by the 2011 Commission.

As previously discussed, Section 202(c) **requires** the Commission to annually adjust City Council salaries by the increase in the CPI over the preceding year. The Commission has the **discretion** to adjust salaries up to 5 percent if the CPI increase totals less than 5 percent. Voter approval must be obtained to affirm any increase greater than 5 percent.

One of the frequent criticisms expressed by previous Commissions is that Section 202(c) requires the Commission to "rubber stamp" a CPI increase every year. Section 202(c) provides no discretion for the Commission to consider other factors such as the City's relative financial status, other City-provided benefits, adjustments provided or denied to other City employees, or comparable salaries in other similar jurisdictions. This lack of discretion raises the question whether City Council salaries could not easily be adjusted through a codified formula that removes the Commission from the salary-setting process altogether. On the other hand, adjusting City Council salaries by a pre-determined formula could occasionally result in undesirable outcomes, for example, an inflationary environment could dramatically increase a CPI adjustment in any given year.

Most California cities vest the city council with the authority to set and adjust their compensation levels. Larger cities tend to compensate councilmembers as full or part-time employees with levels of salary and benefits comparable to other city employees. Smaller cities tend to provide councilmembers either with a small monthly stipend or "per diem" payments. Oakland has been in the first category at least since salary levels were established at \$60,000 annually in 1997. Like Oakland, a number of local jurisdictions have chosen to delegate the authority to review, set and adjust compensation levels for elected officials. Among the reasons for delegating this authority are to ensure that the decision can be conducted with some degree of expertise and impartiality, and to avoid the appearance of self-dealing and personal enrichment by the decision-maker.

If the Commission wishes to retain at least some authority to adjust salaries, there are several options the Commission could pursue:

- 1) Retain the current authority under Section 202(c).
- 2) Amend Section 202(c) to grant the Commission the discretion whether to make a CPI adjustment in any given year up to the current 5 percent (or other) limit.
- 3) Amend Section 202(c) to grant the Commission the discretion not only to adjust salaries but to review and adjust the entire level of compensation City Councilmembers receive, including benefits. For example, the San Francisco Civil Service Commission is authorized to annually set the level of benefits for all elected officials at a level equaling but not exceeding that provided to "any classification of miscellaneous officers and employees."
- 4) Amend Section 202(c) to authorize the Commission to adjust the salary and/or compensation of all Oakland elected officials, including the Office of Mayor, City Attorney and

City Auditor. Currently, the City Charter authorizes the City Council to set and adjust salary levels for these Citywide offices according to a specified formula.¹ The same policy reasons that supported the delegation of authority to the Commission for City Council salaries arguably could be extended for these other offices.

If the Commission decides that it does not wish to continue its current duties to annually adjust City council salaries, then Commission staff would recommend that the Commission review and direct staff to send some version of the previously considered letter to the City Council. **Attachment 3.**

IV. STAFF RECOMMENDATION:

With regard to this year's annual salary adjustment, Commission staff recommends that the Commission receive this report and take public comment. Since the mandatory CPI adjustment will be based on the May 2011 revise, there is sufficient time for the Commission to raise and consider any additional questions in time for the May meeting. At the May meeting, Commission staff will seek direction from the Commission to prepare the necessary resolutions for final consideration at the June 6, 2011, regular meeting.

With regard to proposals pertaining to the Commission's authority to adjust City Council salaries in the future, the Commission may wish to discuss and receive additional public comments before making a final decision on which option to pursue.

Respectfully submitted,

Daniel D. Purnell
Executive Director

¹ **For the Office of Mayor**, City Charter Section 300 authorizes the City Council to set the salary "which shall be not less than 70% nor more than 90% of the average salaries of City Managers/Chief Executive Officers of California cities within the three immediate higher and the three immediate lower cities in population to Oakland," reviewable and adjusted in odd-numbered years.

For the Office of City Attorney, City Charter Section 401 authorizes the City Council to set the salary "which shall be not less than 70% nor more than 90% of the average salaries of City Attorneys of California cities within the three immediate higher and the three immediate lower cities in population to Oakland, and may not be reduced during the City Attorney's term of office, except as part of a general reduction of salaries of all officers and employees in the same amount or proportion."

For the Office of City Auditor, City Charter Section 403 authorizes the City Council to set the salary "which shall be not less than 70% nor more than 90% of the average salaries of City Auditors of California cities within the three immediate higher and the three immediate lower cities in population to Oakland, and may not be reduced during the City Auditor's term of office, except as part of a general reduction of salaries for all officers and employees in the same amount or proportion."

CITY OF OAKLAND
Public Ethics Commission

Jonathan Stanley, *Chair*
Barbara Green-Ajufo, *Vice-Chair*
Alaric Degrafinried
Alex Paul
Ai Mori
Richard Unger
Vacancy (Mayoral)



Daniel D. Purnell, Executive Director

One Frank Ogawa Plaza, 4th Floor, Oakland, CA 94612 (510) 238-3593 Fax: (510) 238-3315

TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: September 8, 2010

RE: A Staff Report And Action To Be Taken Regarding A Proposal From The Public Ethics Commission For The City Council To Appoint A Task Force To Review City Charter Section 202 Pertaining To City Council Salaries

I. BACKGROUND

At its regular meeting of July 7, 2010, the Commission considered a draft letter to the City Council regarding the Commission's authority to adjust City Council salaries. The purpose of the letter was to express the Commission's desire for the City Council to form a special task force to review and propose revisions in the manner by which City Council salaries are adjusted. The Commission suggested in the draft letter that "the job of adjusting City Council salaries might be more appropriately delegated to a board or panel with more expertise in setting levels of compensation. To Commission staff's knowledge, no other ethics commission in the country exercises this type of authority with respect to elected officials."

During its consideration of the draft letter, the Commission debated whether the authority to adjust City Council salaries should be delegated to another City board, or retained by the Commission with additional discretion regarding future compensation adjustments. The Commission requested staff to research and return at a later meeting with information from other jurisdictions that have delegated the authority to adjust compensation of elected officials to a subsidiary body.

II. FINDINGS FROM OTHER JURISDICTIONS

Commission staff was able to identify five California jurisdictions that utilize a board separate from the city council for the purpose of recommending or making adjustments to the compensation of elected officials. The following describes the composition and powers of each

board. The findings are further summarized for comparison purposes on the attached chart.
Attachment 1.

A. San Jose

The San Jose City Charter creates a "Council Salary Setting Commission." It consists of five members appointed by the city's Civil Service Commission.² Each member serves a four-year term. The Salary Setting Commission is authorized to make recommendations every two years regarding the monthly salary level for members of the city council and the office of mayor. Proposed salary adjustments must be "in an amount which takes into account the full time nature of the office and which is commensurate with salaries then being paid for other public or private positions having similar full time duties, responsibilities and obligations." The Salary Setting Commission must pass the recommendation by three affirmative votes and the failure to make a recommendation shall be deemed to mean that no adjustment be made for the forthcoming two-year period. The City Council **must** adopt the recommendation, or a lesser amount, by ordinance.

The Council Salary Setting Commission is also required to establish a sum that shall be deducted from the salary of city council members for each city council meeting that they fail to attend in each calendar month, except for reasons of city business, illness or a family death. The mayor is not subject to this requirement.

B. San Diego

The San Diego City Charter creates a "Salary Setting Commission." It consists of seven members appointed by the city's Civil Service Commission. Each member serves a four-year term.

On or before February of every even year, the Salary Setting Commission "shall recommend to the Council the enactment of an ordinance establishing the salary of members of the Council" for a two-year period. The Council **may** adopt the salaries by ordinance as recommended, or in some lesser amount, but in no event in a greater amount. Any ordinance adopted shall be subject to city referendum and that upon the filing of the referendum petition, the ordinance shall not become effective and shall be repealed by the Council or shall be submitted to a vote of the people.

C. Sacramento

The Sacramento City Charter establishes a "Compensation Commission." It consists of five members appointed by the mayor and approved by the city council. Each member serves a four-year term. The chairperson of the Compensation Commission "shall be a retired judicial officer."

² The City of Oakland maintains a comparable Civil Service Board.

The Commission is required to meet at least once per year to "set the compensation for the mayor and members of the city council. Compensation shall be reasonable and consistent with other cities similar in size and structure."

D. San Francisco

The San Francisco City Charter establishes a Civil Service Commission consisting of five members appointed by the mayor. Each member serves a six-year term.

The Civil Service Commission is authorized to set the "wages and benefits of all elected officials" and the "salaries" of members of the board of supervisors. As to elected officials other than members of the board of supervisors, the Civil Service Commission set an initial base salary in 2007 based on an average of comparable offices in five Bay Area counties. The base salary applies for a five-year period subject to mandatory CPI adjustments of up to five percent annually. Subsequent base five-year salary determinations may not result in a reduction of the respective salary for any office. The Commission is also authorized to annually set the benefits of elected officials. Benefits "may equal but may not exceed those benefits provided to any classification of miscellaneous officers and employees as of July 1 of each year."

As to members of the Board of Supervisors, the City Charter provides that such office "is a full time position." In 2002, the Commission established a base salary based on a survey "of other full time California City Councils and County Boards of Supervisors. . ." Thereafter the Commission adjusts supervisor salaries every five years. The Commission is required to convey its determination to the Controller so that funds can be set aside for that purpose. There is no authority for periodic cost of living adjustments.

The Commission may subsequently amend the compensation levels of all elected officials, including members of the board of supervisors, "to achieve comparable cost savings" if the City and employee organizations agree to amend compensation levels to reduce costs.

E. Stockton

The Stockton City Charter establishes a "Council Salary Setting Commission." It consists of five members appointed by the Stockton Civil Service Commission. Each member serves a four-year term.

In every odd-numbered year, the Council Salary Setting Commission "shall recommend to the Council the amount of monthly salary and the benefits which it deems appropriate for the members of the Council, including the Mayor, for the two-year period" beginning on July 1. The amount recommended for the mayor may exceed the amount for councilmembers except that the mayor's salary "shall not be less than the amount received by the Chairman of the Board of Supervisors of the County of San Joaquin." The monthly salaries and benefits shall take into account "the time devoted to the office of Councilmember, the full time nature of the office of Mayor and shall be commensurate with salaries and benefits then

being paid for other public and private positions having similar part time and/or full time duties, responsibilities and obligations."

The city council *may* adopt the salaries by ordinance as recommended, or in some lesser amount, but in no event in a greater amount. Salaries adopted by ordinance remain in effect until the ordinance is amended. There is no provision for annual cost of living adjustments.

III. DISCUSSION AND RECOMMENDATION

Commission staff believes there is a threshold issue for the Commission to determine in deciding whether to recommend a different manner for adjusting City Council salaries: Whether the authority should remain with the Commission or be transferred to some other Oakland local body. If the Commission believes that it should retain salary-adjusting authority, then staff recommends that the Commission should develop a specific proposal to submit to the City Council as to how its current authority should be modified (e.g., whether to allow discretion in future cost of living adjustments, whether to include other elected City offices, whether to include other forms of compensation within its authority, etc.)

If, on the other hand, the Commission determines that it would be better policy for some other City board to make decisions regarding compensation, then staff recommends that the Commission proceed with some version of the proposed July 7 letter to the City Council for the creation of a task force to examine alternative models for setting and adjusting compensation levels. In either scenario, any change will ultimately require a City Council action to place the matter before the voters for approval.

Respectfully submitted,

Daniel D. Purnell
Executive Director

DRAFT -- FOR DISCUSSION ONLY

Honorable Members of the
Oakland City Council

Dear Councilmembers:

As you know, City Charter Section 202(c) authorizes and directs the Public Ethics Commission "to annually adjust the salary for the office of Councilmember by the increase in the consumer price index [CPI] over the preceding year." The Commission may, in its discretion, adjust salaries beyond the increase in the CPI up to a maximum of five percent annually, but any increase beyond five percent must be approved by public vote.

Since 1994 (when the current Charter language took effect), the Commission has made the following adjustments to City Council salaries:

June 2005	2.1 percent (CPI)
June 2006	4 percent
June 2007	5 percent
June 2008	2.9 percent (CPI)
June 2009	0.8 percent (CPI)
June 2010	1.7 percent (CPI)

In recent years, the Commission has become acutely aware of the financial difficulties facing the City. The City Charter's requirement for the Commission to pass through a mandatory CPI adjustment frequently places the Commission, as well as the City Council, in a position that is arguably contrary to public perceptions of what is fair and what should constitute "shared sacrifice" during these difficult times.

This letter respectfully requests that the City Council take action to create and appoint a special task force for the purpose of reviewing Charter Section 202(c) and developing policy alternatives regarding future adjustments to City Council salaries. While the Commission has dutifully executed its obligations under current law, the Commission suggests that the job of adjusting City Council salaries might be more appropriately delegated to a board or panel with more expertise in setting levels of compensation. To Commission staff's knowledge, no other ethics commission in the country exercises this type of authority with respect to elected officials.

The Commission also notes that the City Charter provides different procedures for setting and adjusting compensation levels for the City's other elected officials. The task force authorization may wish to address whether to consolidate the authority for determining and adjusting compensation for all of Oakland's elected officials. While selection of the task force is wholly within the City Council's discretion, the Commission suggests that it could include former and current elected officials, a member of the Commission, interested community stakeholders and be staffed by employees from the Office of Personnel and City Attorney.

The Commission wishes to thank the City Council for its consideration of this proposal and to express its willingness to assist in any reasonable way.

Very truly yours,

City & population	Salary (per month)	Health benefits	Dental/ Vision	Retirement plan	Life Insurance	Automobile Allowance (Monthly)
Los Angeles <i>3,849,378</i>	\$ 14,833.00	Yes	Yes	Yes	Yes	\$ 500.00
San Diego <i>1,307,402</i>	\$ 6,282.00	Yes	Yes	Yes	Yes	\$ 800.00
San Jose <i>1,023,083</i>	\$ 6,875.83	Yes	Yes	Yes	Yes	\$ 600.00
San Francisco <i>815,358</i>	\$ 8,045.75	Yes	Yes	Yes	Yes	\$ 400.00
Long Beach <i>492,682</i>	\$ 2,659.00	Yes	Yes	Yes	Yes	\$ 450.00
Fresno <i>505,479</i>	\$ 5,416.00	Yes	Yes	No	No	\$ 260.00
Sacramento <i>466,488</i>	\$ 5,068.00	Yes	Yes	Yes	Yes	\$ 400.00
Santa Ana <i>357,754</i>	\$ 125.00	Yes	Yes	Yes	Yes	\$ 500.00
Bakersfield <i>338,952</i>	\$ 100.00	Yes	Yes	Yes	Yes	\$ 560.00
Riverside <i>300,430</i>	\$ 3,284.00	Yes	Yes	Yes	Yes	\$ 350.00
Stockton <i>322,462</i>	\$ 1,993.96	No	No	No	No	\$ -
Oakland	\$ 6,175.00	Yes	Yes	Yes	Yes	\$ 550.00
Mean of Top 8 Cities (excluding Oakland)	\$ 6,163.00					
Mean of Top 11 Cities (excluding Oakland)	\$ 4,971.00					

City Council Member Salary and Benefit Comparison 2011

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CITY OF OAKLAND
Public Ethics Commission

Richard Unger, *Chair*
Ai Mori, *Vice-Chair*
Alex Paul
Amy Dunning
Lloyd Farnham
Christopher Young
Aspen Baker



Daniel D. Purnell, Executive Director

One Frank Ogawa Plaza, 4th Floor, Oakland, CA 94612

(510) 238-3593

Fax: (510) 238-3315

TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: April 4, 2011

RE: A Supplemental Staff Report And Action To Be Taken Regarding Commission Review And Development Of A Proposal To Amend OCRA Section 3.12.220 Regarding How and When Expenditure Ceilings Are Lifted

I. INTRODUCTION

At its meeting of February 7, 2011, the Commission considered a City Council request for the Commission to review and propose specific recommendations pertaining to when and how local voluntary expenditure ceilings could be lifted during an election for local office. The Commission reviewed a staff proposal to amend OCRA Section 3.12.220 that currently regulates this area of law. The Commission directed staff to make several revisions to the proposal (pertaining to the timing, form and how candidates would be advised of filed information) and to submit the revised proposal to the City Council for consideration.

During its preparation of the February 7 staff report, Commission staff reviewed several local ordinances that contained similar local filing requirements. While preparing the Commission's revised proposal for City Council consideration, Commission staff further researched the extent to which local jurisdictions could impose filing requirements on candidates and committees that are additional to those required under state law. Commission staff has concluded that additional modifications must be made to the Commission's February 7 proposal to keep it consistent with state law.

II. ANALYSIS

Commission staff previously advised the Commission that under current law, once candidates for Oakland office have accepted voluntary expenditure ceilings, OCRA permits the expenditure ceilings to become inapplicable or "lifted" in two situations: One, if a candidate who

has not accepted voluntary expenditure ceilings receives contributions or makes campaign expenditures equal to fifty (50) percent or more of the expenditure ceiling for the office being sought; or Two, if an "independent expenditure committee" spends more than \$20,000 on a District City Council or School Board election, or \$95,000 in a City-wide election.¹ Once the expenditure ceilings are lifted in a given race, the ceilings are no longer binding on any candidate for the same office and candidates who previously agreed to the voluntary ceilings may continue receiving contributions at the higher amounts:

3.12.220 Expenditure Ceilings Lifted

If a candidate declines to accept expenditure ceilings and receives contributions or make qualified campaign expenditures equal to fifty (50) percent or more of the expenditure ceiling, or if an independent expenditure committee in the aggregate spends more than fifteen thousand dollars (\$15,000.00) [NOW \$20,000] on a District City Council or School Board election or seventy thousand dollars (\$70,000.00) [NOW \$95,000] in a City Attorney, Auditor, Councilmember-at-Large or Mayoral election, the applicable expenditure ceiling shall no longer be binding on any candidate running for the same office, and any candidate running for the same office who accepted expenditure ceilings shall be permitted to continue receiving contributions at the amounts set for such candidates in Sections 3.12.050C and 3.12.060C of this Act. The independent expenditure committee amounts of fifteen thousand dollars (\$15,000.00) and seventy thousand dollars (\$70,000.00) respectively, shall be increased in proportion to any increase of the voluntary expenditure ceiling amounts resulting from an increase in the CPI as provided by Section 3.12.180 of this chapter.²

Commission staff observed that one of the main problems with existing Section 3.12.220 is that it does not specify a timely way for a candidate or the City to learn when another candidate or an independent expenditure committee has exceeded the specified spending thresholds. Since committees making independent expenditures are generally required to file disclosures only during specified periods before an election, a significant amount of time could elapse between the date a committee exceeds a threshold and the date that it is required to disclose that fact. The proposal approved by the Commission on February 7 addressed this timing issue by requiring candidates and committees reaching the specified thresholds to provide the City with written notice within 72 hours of doing so:

3.12.220 Voluntary Expenditure Ceilings Lifted

A. The voluntary expenditure ceiling accepted by a candidate pursuant to this Article shall not be binding on said candidate if:

¹ State law defines an "independent expenditure" as an expenditure made in connection with a communication "which expressly advocates the election or defeat of a clearly identified candidate [or ballot measure]. . . or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." [Government Code Section 82031]

² In August 2010, the Office of the City Clerk revised the threshold amounts based on a change in the CPI, so that the new limits are \$95,000 for a City-wide race and \$20,000 for a district race.

1) *another candidate seeking election to the same office declines to accept voluntary expenditure ceilings and receives contributions or makes qualified campaign expenditures equal to fifty (50) percent or more of the voluntary expenditure ceiling; or*

2) *a committee makes independent expenditures of more than twenty thousand dollars (\$20,000.00) in an election involving said candidate for the office of District City Council or School Board Director, or more than ninety-five thousand dollars (\$95,000.00) in an election involving the candidate for the office of City Attorney, City Auditor, Councilmember-at-Large or Mayor.*

B. *Any candidate who declines to accept voluntary expenditure ceilings and who receives contributions or makes qualified campaign expenditures equal to fifty (50) percent or more of the applicable expenditure ceiling shall, within 72 hours of equaling or exceeding that amount, provide written notice to the Office of the City Clerk and to the Public Ethics Commission of (a) the name and identification number of the candidate and his or her controlled committee, (b) the date the fifty (50) percent threshold was first equaled or exceeded, and (c) the amount the candidate has received or expended as of the date the written notice is provided. The written notice shall be executed under penalty of perjury by the candidate and his or her campaign treasurer on a form previously developed and approved by the Public Ethics Commission.*

C. *Any committee that makes independent expenditures of more than twenty thousand dollars (\$20,000.00) in an election for the office of District City Council or School Board Director, or more than ninety-five thousand dollars (\$95,000.00) in an election for the office of City Attorney, City Auditor, Councilmember-at-Large or Mayor shall, within 72 hours of equaling or exceeding that amount, provide written notice to the Office of the City Clerk and the Public Ethics Commission of (a) the name and identification number of the committee, (b) the date the relevant \$20,000 or \$95,000 threshold was first equaled or exceeded, (c) the election or elections in which said independent expenditures were made, and (d) the amount the committee has made in independent expenditures in each of the applicable races as of the date the written notice is provided. The written notice shall be executed under penalty of perjury by the treasurer and a principal officer of the committee on a form previously developed and approved by the Public Ethics Commission.*

D. *Before any candidate may exceed the voluntary expenditure ceilings based on the amount of independent expenditures specified in subsection (C), said candidate shall execute and file with the Office of the City Clerk and Public Ethics Commission a declaration stating that (a) none of the independent expenditures were made at the behest of the candidate or his or her representatives, and (b) neither the candidate nor any person acting at the behest of the candidate made or solicited contributions to the committee whose independent expenditures would result in a lifting of the voluntary expenditure ceilings pursuant to this section. The declaration shall be executed under penalty of perjury by the candidate on a form previously developed and approved by the Public Ethics Commission.*

E. Upon receipt of a written notice submitted pursuant to subsection (B) or (C), the Public Ethics Commission shall immediately provide a copy of the notice to all candidates in the relevant election and advise such candidates of their right to submit a declaration pursuant to subsection (D).

F. Any candidate whose voluntary expenditure ceilings are no longer binding pursuant to this section shall be permitted to continue receiving contributions at the amounts set for such candidates in Sections 3.12.050(B) and 3.12.060(B) of this Act.

G. The amounts of twenty thousand dollars (\$20,000.00) and ninety-five thousand dollars (\$95,000.00) respectively, shall be increased in proportion to any increase of the voluntary expenditure ceiling amounts resulting from an increase in the CPI as provided by Section 3.12.200 of this chapter.

H. Any candidate or committee that fails to timely file or accurately report campaign contributions or expenditures pursuant to state law, or who fails to provide timely and accurate notice to the Office of the City Clerk and Public Ethics Commission pursuant to this section, and such failure results in a material delay in another candidate's ability to seek relief from his or her voluntary expenditure ceiling pursuant to this section, shall be subject to enforcement proceedings by the Public Ethics Commission pursuant to Article VII of this Chapter.

A. Need For Further Modification

Section 81013 of the California Political Reform Act ("CPA") permits local agencies to impose additional requirements on any person so long as "the requirements do not prevent the person from complying with [the CPA's existing requirements]." This authority has allowed many local agencies to adopt a variety of local campaign laws. This authority is limited however by Section 81009.5(b), which provides that a local agency shall not enact any ordinance imposing filing requirements "additional to or different from" those set forth in the CPA for elections held in its jurisdiction. The only relevant exceptions are for 1) candidates seeking election in that local jurisdiction, 2) committees formed or existing primarily to support or oppose the local candidate, and 3) city or county general purpose committees active only in that city or county, respectively.

The Fair Political Practices Commission (FPPC) has issued several advice letters concluding that additional or different local filing requirements would not be applicable to statewide general purpose committees or committees active in other jurisdictions [See Donovan Advice Letter, No.A-05-207; Herrick Advice Letter, No. I-10-103]. Based on this advice, Commission staff concludes that the mandatory filing requirement imposed on committees pursuant to proposed Section 3.12.220(C) would likely be inapplicable to committees that are also active in jurisdictions outside of Oakland. (The Commission will recall that the situation which initiated the City Council's requested review of Section 3.12.220 in the first place was a state committee that made significant expenditures in the November 2010 mayoral race.)

The above conclusion creates a significant problem with the Commission's current proposal. One alternative approach would be to leave existing Section 3.12.220 alone but for minor modifications to clarify what types of expenditures will trigger the thresholds, adjusting cross-references, and adding a version of sub-paragraph (H) providing for Commission enforcement authority. The problem with this approach is that it fails to address the ongoing problem of how candidates are supposed to know, in a timely way, when any of the threshold triggers have been reached. A second approach would be to keep the Commission's current proposal intact, and add a final sub-paragraph that essentially states: "The obligations imposed pursuant to sub-paragraph (C) shall not apply to any non-candidate committee active in jurisdictions outside of Oakland." This approach acknowledges the limitations imposed by Section 81009.5 but would render the proposal inapplicable to a potentially significant source of independent expenditures in a local election.

A third approach would be to change the manner by which "non-local" committees must notify the City when they reach the prescribed thresholds. Instead of requiring non-local committees to "provide written notice" (arguably a "filing requirement" limited by Section 81009.5), the proposed amendment could instead require non-local committees simply to "notify" the Office of the City Clerk when they have reached the prescribed threshold. The manner of notifying the City Clerk could be left up to the committee and may not necessarily constitute an additional "filing requirement." The notification could still be required within 72 hours of reaching a threshold level. The downside to this approach is that there would be no way to verify the accuracy of such a notification by requiring a committee to submit its information on a special form and signed under penalty of perjury as currently proposed. However candidates would still be alerted that information was received and the burden would be upon the candidate seeking relief from his or her previous promise to comply with the voluntary expenditure ceilings to verify that the committee did indeed exceed its threshold.

A revised version of Section 3.12.220 is hereby proposed consistent with the third alternative. Commission attention is called to new subsection (D):

3.12.220 *Voluntary Expenditure Ceilings Lifted*

A. The voluntary expenditure ceiling accepted by a candidate pursuant to this Article shall not be binding on said candidate if and only when:

1) another candidate seeking election to the same office declines to accept voluntary expenditure ceilings and receives contributions or makes qualified campaign expenditures equal to or more than fifty (50) percent of the voluntary expenditure ceiling;
or

2) a committee makes independent expenditures equal to or more than twenty thousand dollars (\$20,000.00) in an election involving said candidate for the office of District City Council or School Board Director, or equal to or more than ninety-five thousand dollars (\$95,000.00) in an election involving the candidate for the office of City Attorney, City Auditor, Councilmember-at-Large or Mayor.

B. Any candidate who declines to accept voluntary expenditure ceilings and who receives contributions or makes qualified campaign expenditures equal to or more than fifty (50) percent of the applicable expenditure ceiling shall, within 72 hours of equaling or exceeding that amount, provide written notice to the Office of the City Clerk of (a) the name and identification number of the candidate and his or her controlled committee, (b) the date the fifty (50) percent threshold was first equaled or exceeded, and (c) the amount the candidate has received or expended as of the date the written notice is provided. The written notice shall be executed under penalty of perjury by the candidate and his or her campaign treasurer on a form previously developed and approved by the Public Ethics Commission.

C. Any committee whose primary filing officer is the City Clerk and which makes independent expenditures equal to or more than twenty thousand dollars (\$20,000.00) in an election for the office of District City Council or School Board Director, or equal to more than ninety-five thousand dollars (\$95,000.00) in an election for the office of City Attorney, City Auditor, Councilmember-at-Large or Mayor shall, within 72 hours of equaling or exceeding the respective amounts, provide written notice to the Office of the City Clerk of (a) the name and identification number of the committee, (b) the date the relevant \$20,000 or \$95,000 threshold was first equaled or exceeded, (c) the election or elections in which said independent expenditures were made, and (d) the amount the committee has made in independent expenditures in each of the applicable races as of the date the written notice is provided. The written notice shall be executed under penalty of perjury by the treasurer and a principal officer of the committee on a form previously developed and approved by the Public Ethics Commission.

D. Any committee whose primary filing officer is not the City Clerk and which makes independent expenditures equal to or more than twenty thousand dollars (\$20,000.00) in an election for the office of District City Council or School Board Director, or equal to or more than ninety-five thousand dollars (\$95,000.00) in an election for the office of City Attorney, City Auditor, Councilmember-at-Large or Mayor shall, within 72 hours of equaling or exceeding the respective amounts, notify the Office of the City Clerk of (a) the name and identification number of the committee, (b) the date the relevant \$20,000 or \$95,000 threshold was first equaled or exceeded, (c) the election or elections in which said independent expenditures were made, and (d) the amount the committee has made in independent expenditures in each of the applicable races as of the date of notification.

E. Before any candidate may exceed the voluntary expenditure ceilings based on filings submitted pursuant to subsection (C) or the notification provided in subsection (D), said candidate shall execute and file with the Office of the City Clerk a declaration stating that (a) none of the independent expenditures were made at the behest of the candidate or his or her representatives, and (b) neither the candidate nor any person acting at the behest of the candidate made or solicited contributions to the committee whose independent expenditures would result in a lifting of the voluntary expenditure ceilings pursuant to this section. The declaration shall be executed under penalty of perjury by the candidate on a form previously developed and approved by the Public Ethics Commission.

F. Upon receipt of the filings submitted pursuant to subsections (B) or (C), or upon receipt of the notice pursuant to subsection (D), the City Clerk shall advise within 24 hours all candidates in the relevant election of the information submitted and of their right to submit a declaration pursuant to subsection (E), as applicable.

G. Any candidate whose voluntary expenditure ceilings are no longer binding pursuant to this section shall be permitted to continue receiving contributions at the amounts set for such candidates in Sections 3.12.050(B) and 3.12.060(B) of this Act.

H. The amounts of twenty thousand dollars (\$20,000.00) and ninety-five thousand dollars (\$95,000.00) respectively, shall be increased in proportion to any increase of the voluntary expenditure ceiling amounts resulting from an increase in the CPI as provided by Section 3.12.200 of this chapter.

I. Notwithstanding any other provision of this Chapter, any candidate or committee that fails to timely or accurately provide the information to the City Clerk pursuant to subsections (B), (C) or (D), and such failure results in a material delay in another candidate's ability to seek relief from his or her voluntary expenditure ceiling pursuant to this section, shall be subject to enforcement proceedings before the Public Ethics Commission pursuant to its General Complaint Procedures. The Public Ethics Commission is hereby authorized to impose penalties and fines of up to \$1,000 per day for every day information required by this section is not provided.

In addition to the new language contained in subsection (D), Commission staff proposes that 1) all filings and notices be submitted to the Office of the City Clerk, and 2) a specific penalty and fine of up to \$1,000 per day for every day that a candidate or committee fails to provide the information required under this section.

Commission staff recommends that the Commission adopt the revised amendment to Section 3.12.220 and to direct staff to forward it to the City Council for approval.

Respectfully submitted,

Daniel D. Purnell
Executive Director

CITY OF OAKLAND
Public Ethics Commission

Richard Unger, *Chair*
Ai Mori, *Vice-Chair*
Alex Paul
Amy Dunning
Lloyd Farnham
Christopher Young
Aspen Baker



Daniel D. Purnell, Executive Director

One Frank Ogawa Plaza, 4th Floor, Oakland, CA 94612 (510) 238-3593 Fax: (510) 238-3315

TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: April 4, 2011

RE: A Report And Action To Be Taken Regarding Commission Participation In The Selection Of A New Executive Director

This memo is to formally apprise the Commission of the announced resignation of its current executive director, effective June 30, 2011, and to discuss options for Commission participation in the recruitment and selection of his successor.

During the last opening for this position in 2000, the City's Personnel Office conducted an open recruitment for a position that continues to be classified as a civil service position. The Personnel Office developed recruitment materials with input from the Commission, including a widely circulated brochure describing the duties of the position, requirements for application and qualifications. **Attachment 1.** Upon submission of the required application materials, a number of candidates were invited to participate in a panel interview and written test. Based on the interview and test results, four candidates were rated and ranked. The full Commission then conducted a closed session interview of each of the four candidates. The Commission's recommendations were submitted to the City Manager (now City Administrator), who conducted separate individual interviews and ultimately made the final decision.

Commission staff recommends that the Commission determine whether it wishes to follow some version of the above-described process during the recruitment and selection of the next executive director. It is not within the Commission's authority to appoint the executive director directly. The Commission may wish to appoint a temporary ad hoc committee to work with the current executive director and City's Department of Human Resources to develop a recruitment and selection process that maximizes Commission participation.

Respectfully submitted,
Daniel D. Purnell
Executive Director

QUALIFICATIONS

The successful candidate will possess a track record of demonstrated leadership, proven accomplishments, and excellent performance.

Candidates should possess knowledge of: laws, ordinances, and acts pertaining to the conduct of public agencies; documentation procedures for public agency meetings; California Code of Civil Procedure; Robert's Rules of Parliamentary Procedure; related municipal, state, and federal codes and the City Charter; principles, practices and techniques of conducting an investigation, including conduct of interviews, research and data investigation, analysis of information and preparing thorough and objective recommendations. Considerable knowledge of effective management, budgetary, and supervisory practices; public and community relations and the development and implementation of public relations and educational programs; organizational and management practices as applied to the analysis and evaluation of programs, policies, and operational needs.

Candidates will have the ability to: interpret rules, laws and regulations and terminology pertaining to Public Ethics Commission mission; analyze and compile information, facts and data; communicate effectively orally and in writing; make superior presentations to both large and small groups; prepare excellent written documents; establish and maintain professional working relationships with employees, elected officials, boards and commissions, and the general public; exercise judgment, initiative, thoroughness, tact, courtesy and discretion; serve with integrity, avoiding the appearance of bias or favoritism; ability and willingness to clearly identify conflicts of interest that might affect the fair performance of one's duties; work independently and set priorities; supervise, train, and evaluate assigned professional, clerical and volunteer staff; establish and maintain effective work relationships with those contacted in the performance of duties.

BENEFITS

The City of Oakland offers an attractive salary and benefits package which currently includes:

- ◆ Fully paid PERS retirement.
- ◆ Health, dental, orthodontic and vision plans for employees and dependents.
- ◆ Vacation leave, sick leave, holidays and management leave.
- ◆ Deferred compensation and credit union services.
- ◆ Life insurance and an employee assistance program.

THE SELECTION PROCESS

Interested persons must submit a completed City of Oakland employment application form, supplemental questionnaire, a letter of interest, and current resume with salary history. The application materials will be evaluated and only the most suitably qualified candidates will be selected to continue in the process. Candidates selected as finalists will be required to submit professional references.

APPLICATION PROCESS

Candidates for this position must submit the required application materials listed above to:

Daryl Look
City of Oakland
Office of Personnel Resource Management
150 Frank H. Ogawa Plaza, 2nd Floor
Oakland, CA 94612-2019

Closing Date for Filing Application Materials is:
Friday, January 7, 2000

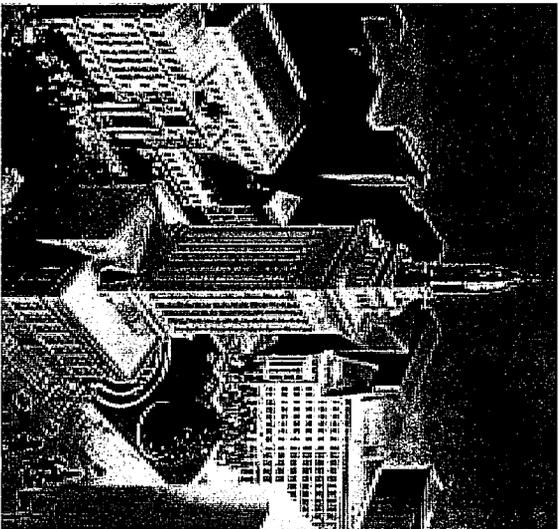
99-0237-118

For additional information visit our website
at www.oaklandnet.com
OR
Contact: Daryl Look
Phone: (510) 238-4479
Email: dlook@oaklandnet.com

*The City of Oakland is an Affirmative Action/
Equal Opportunity/ADA Employer*

City of Oakland Career Opportunity

*Executive Director
to the
Public Ethics
Commission*



**\$70,104 - \$86,076
Annually**

THE CITY OF OAKLAND

The City of Oakland, the eighth largest city in California, is the metropolitan focal point of the exciting East Bay Area. The City boasts a rich tapestry of many races and cultures, and has many active community and neighborhood organizations. With a population of 386,000, Oakland is the most integrated city in the United States.

Oakland is a city on the rise and has enormous economic growth potential. It is one of the major gateway cities to the Pacific Rim and is recognized as the center of the East Bay Trade Area.

The Bay Area climate is sunny with moderate temperatures, and Oakland's citizens pursue outdoor activities throughout the year. The City maintains 106 parks, 21 recreation centers, Jack London Square, Knowland Park Zoo, and several marinas. Sports enthusiasts enjoy professional sports and many college events taking place at the eight four-year colleges.

THE COMMISSION

In 1996, the citizens of Oakland established the Oakland Public Ethics Commission by amendment to the City Charter. The Commission was established to help assure fairness, openness, honesty and integrity in City government by setting policy and monitoring and responding to issues within its jurisdiction. Primary areas of responsibility include: the Oakland Sunshine Ordinance, Campaign Reform Ordinance, conflict of interest regulations, and ethics code for the City Council. It will also have jurisdiction over partial public financing of campaigns and a lobbyist registration if proposed ordinances are adopted by the City Council.

THE POSITION

The Executive Director to the Public Ethics Commission plans, directs and coordinates administrative and managerial services to the Public Ethics Commission and represents the Commission in meetings before elected officials, City staff, the public, and other city

and state bodies. The incumbent will receive general supervision from the City Manager or the City Manager's designee and functional supervision directly from the Commission. He/she will be responsible for providing highly complex, responsible, and confidential administrative services to the Public Ethics Commission. The incumbent receives assignments directly from the Chairperson or members of the Ethics Commission and provides supervision to clerical support staff. This position is an executive position, exempt from the Fair Labor Standards Act. It is currently classified as a civil service position. The position may change, however, and be placed under the direct supervision of the Commission should a future ballot measure be approved by the voters making the Public Ethics Commission independent from the City Manager's Office (parallel to the City Attorney and independent City Auditor).

This is an opportunity for the new Executive Director to the PEC to build the new office up from the ground floor and administer the possible expanded jurisdiction of the Commission in the areas of partial public financing and lobbyist registration.

DUTIES AND RESPONSIBILITIES

The responsibilities of this position include, but are not limited to the following:

- ◆ Receives and investigates complaints filed with the Public Ethics Commission as to their appropriateness for hearing or dismissal; analyzes and compiles facts and data for complaint cases including information provided by other City agencies; formulates objective recommendations based on detailed analysis; and interprets rules, laws and regulations pertinent to the investigation.
- ◆ Identifies and researches specific questions of law for precedence, related complaints; summarizes research in correspondence and memoranda for the Commission; writes a variety of complex staff reports to the Commission; prepares and maintains case reports; drafts opinions for review; and works cooperatively with the Office of the City Attorney which generally serves as counsel for the Commission.

- ◆ Coordinates and manages public hearings and, when directed, represents the Commission in hearings before other City, State, public boards, and community organizations.
- ◆ Develops media strategies in conjunction with Commission and other appropriate City entities including arranging press conferences; pursues new grant funding opportunities and prepares proposals.
- ◆ Develops and supervises an active citizen volunteer program; develops and maintains an effective and legally accurate public education program.
- ◆ Supervises, trains, and evaluates staff.

- ◆ Develops program and service proposals for Commission consideration, and makes recommendations to the Commission regarding amendments to relevant ordinances.
- ◆ Responds to inquiries from the general public; acts as a liaison between the Commission and City.
- ◆ Directs the development and implementation of record maintenance systems.

THE IDEAL CANDIDATE

- ◆ Is an experienced, dynamic leader who enjoys working with people and who demonstrates strong participatory management and administration skills.
- ◆ Has a background in public policy, law, or public administration.
- ◆ Inspires teamwork, builds positive working relationships, and places an emphasis on the effective delivery of program services and excellent customer service.

REQUIREMENTS FOR APPLICATION

Equivalent to five years of increasingly responsible professional experience in public administration, including two years in complaint investigation, litigation, legal advisory support, or related area AND a Bachelor's Degree from an accredited college or university in public or business administration, law or a related field. A Master's or Juris Doctor degree is preferred.