Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
May 3, 2010

In the Matter of)
) Complaint No. 10-04
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David Mix filed Complaint No. 10-04 on March 3, 2010.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 10-04 alleging that the Oakland City Council conducted an extended discussion of an item at its March 2, 2010, regular meeting without first providing public notice. ***Attachment 1.***

II. FACTUAL SUMMARY

At its regular meeting of March 2, 2010, the Oakland City Council considered Agenda Item 3 -- Open Forum/Citizens' Comments. The meeting minutes indicate that 11 people were recognized to speak under this item. After the speakers had finished, City Councilmember Desley Brooks asked Council President Jane Brunner if the City Administrator could address the "parking situation" raised by one of the speakers. Ms. Brunner explained to City Administrator Dan Lindheim that one of the speakers had objected to a parking ticket. She asked Mr. Lindheim if he could address two questions: First, whether there were people who had parking tickets rescinded; and, Second, whether the City's parking director ever communicated to his staff that some areas of the City could be ticketed and not others.

Mr. Lindheim then began a verbal response to the questions that lasted for approximately eight-and-a-half minutes. Mr. Lindheim yielded to questions and comments from Ms. Brooks that lasted approximately two-and-a-half minutes. Mr. Lindheim then spoke for another three-and-a-half minutes. Ms. Brunner then recognized comments from Councilmembers Brooks, herself, Ignacio De La Fuente and Rebecca Kaplan. These Councilmember comments continued for another four minutes before Chief Deputy City Attorney Barbara Parker interjected by stating that the topic of discussion had not been placed on the agenda, there had not been adequate public notice for such a discussion, and that the law permitted only "brief remarks" for an item not appearing on a meeting agenda.

Ms. Brunner then recognized Councilmembers Jean Quan and Mr. De La Fuente, who stated that the subject should be agendized for further discussion. Ms. Brunner then recognized Councilmembers Pat Kernighan and Ms. Kaplan before turning to the next item on the agenda. The total amount of time the City Council spent discussing and receiving

information on this subject totaled 26 minutes. At the time of this writing, the subject of parking ticket enforcement has not been agendized for a subsequent City Council meeting.

Mr. Mix alleges that the City Council violated both the Brown Act and Sunshine Ordinance for considering an item that was not on the agenda.

III. ANALYSIS

The Ralph M. Brown Act requires local agencies to post a copy of an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting at least 72 hours before the meeting. [Government Code Section 54954.2] The Brown Act further provides in relevant part:

> *"No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3. In addition, on their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities. Furthermore, a member of a legislative body, or the body itself, subject to rules or procedures of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda."* [Government Code Section 54954.2(a)(2)]

Sunshine Ordinance Section 2.20.150(b) provides:

> *"Every agenda for every regular or special meeting shall provide an opportunity for members of the public to directly address a local body on item of interest to the public that are within the local body's subject matter jurisdiction,* ***provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by Government Code Section 54954.2(b).***[1] [Emphasis added.]

Sunshine Ordinance Section 2.20.050 provides:

> *"All meetings of local bodies specified in Sections 2.20.030(E) and Section 2.20.040(A) shall be open and public to the same extent as if that body were governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et seq.) unless greater public access is required by this ordinance, in which case this ordinance shall be applicable."*

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[1] *Government Code Section 54954.2(b) pertains to "emergency" items and other items requiring a two-thirds vote not applicable here.*

At the City Council meeting of March 2, 2010, members of the City Council received public testimony from a speaker under Open Forum. At the request of Councilmember Desley Brooks, City Administrator Dan Lindheim responded to the issue raised by the speaker and began a series of comments that, taken together, continued for approximately 12 minutes. City Councilmember comments ran from one-to-two minutes per councilmember for an additional 14 minutes. After approximately 20 minutes of City Council and staff comment, Ms. Parker cited the relevant law that the matter under discussion was not itemized on the agenda and therefore the public did not have sufficient notice. Ms. Brunner then recognized several additional councilmembers who wished to complete their comments on the subject.

The issue Mr. Mix presents is whether the approximately 26 minutes of staff and councilmember comment falls within the exemption for "brief responses" to statements made or questions posed by persons exercising their public testimony rights. Commission staff could find no legal authority defining or discussing what constitutes a "brief response" for purposes of the Brown Act. However, even if each councilmember and the City Administrator were provided a full minute to make a "brief response", the total would not constitute even half of the time the City Council expended on this item. Thus Commission staff concludes there is an issue in law and fact whether the City Council 1) violated Section 54954.2(a)(2) as it applies to Oakland's "local bodies" pursuant to O.M.C. Section 2.20.050; and/or 2) violated O.M.C. 2.20.150(b) by discussing the issue of parking ticket enforcement when that issue did not appear on the March 2, 2010, agenda.

IV. STAFF RECOMMENDATION

The Commission has the discretion whether to schedule and conduct an evidentiary hearing on the issue of whether the City Council violated Government Code Section 54954.2(a)(2) as it applies to Oakland's "local bodies" pursuant to O.M.C. Section 2.20.050 and/or Sunshine Ordinance Section 2.20.150(b).

If the Commission determines a violation occurred, the Sunshine Ordinance would require the City Council to agendize whether to cure and correct the violation. If the City Council chose to cure and correct the item, it would then decide whether to affirm or supersede its previous action after taking any new public testimony on the item. [O.M.C. §2.20.270(D)]

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.

Should the Commission decide to schedule a formal hearing in this matter, 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 mediated settlement or stipulated judgment with the

City Council before a hearing, if any, 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.*