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. 10-03
	)	

David Mix filed Complaint No. 10-03 on February 22, 2010.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 10-03 alleging that the Office of the City Attorney, Alix Rosenthal and Jocelyn Combs violated the Oakland Sunshine Ordinance and the California Public Records Act (CPRA) by refusing to provide him with an unredacted copy of what he asserts to be a public record.

II. BACKGROUND

On August 20, 2008, Mr. Mix submitted a request for public records to Raul Godinez, director of the Oakland Public Works Agency (PWA). The request set forth a demand to produce copies of records contained in thirteen (13) separate categories relating to City efforts to adopt a landscaping and lighting assessment district (LLAD). A large number (reportedly 700 to 800 pages) of documents were assembled by PWA staff and submitted to the Office of the City Attorney for review before making them available to Mr. Mix.[1]

One of the records produced was a copy of an email dated April 22, 2008, from Jocelyn Combs, a special assistant in the PWA, to Joseph Francisco, a private consultant retained by the City to assist in the effort to adopt the LLAD. Ms. Combs asked Mr. Francisco in the email how to count the LLAD votes. Mr. Mix alleged in a previous complaint to the Commission (No. 08-18) that a portion of the email (i.e., the answer to Ms. Combs' question) had been removed and not provided to him. In the preliminary staff report for Complaint No. 08-18, Commission staff reported that Ms. Combs had said that she did not delete any emails in response to Mr. Mix's request and that the answer to the question posed in her email to Mr. Francisco may have been verbally communicated to her. The Commission directed staff to follow-up with PWA staff to determine whether additional records existed that had not been provided to Mr. Mix.

[1] Mr. Mix filed Complaint Nos. 08-13, 08-14, 08-15, 08-16, 08-17 and 08-18 in connection with record requests he made pertaining to the LLAD.

In April 2009, Commission staff sent a "hard" copy of the email to Ms. Combs to determine if she could recall specifically whether she received a written response to her question. Ms. Combs told Commission staff that upon seeing a copy of the email (as it was provided to Mr. Mix) that there was in fact a response to her email which she claims she forwarded to the City Attorney's Office. Ms. Combs speculated that the response was apparently removed or redacted during the City Attorney's Office review of the PWA records before they were provided to Mr. Mix. Commission staff advised Ms. Combs that she should consult with the City Attorney's Office directly to determine whether the response to her email should have been disclosed.

In July 2009, Commission staff met with Mr. Mix and Michelle Abney of the City Attorney's Office to review the status of his various records requests. Staff advised Mr. Mix of the conversation that he had with Ms. Combs regarding the email and that Ms. Combs had submitted the missing portion of the email to the City Attorney's Office for another review. In January 2010, Mr. Mix told Commission staff that he never received any communication from either Ms. Combs or the City Attorney's Office regarding the status of the missing email information. Commission staff contacted Ms. Rosenthal and again requested that her office provide Mr. Mix with a response.

On February 11, 2010, Ms. Rosenthal sent an email to Mr. Mix to which she attached an electronic copy of the "missing" email. The substantive text of the email however, was redacted. Ms. Rosenthal apologized for the delay in providing a copy of the email to him, and cited the "attorney-client privilege" as the basis for redacting the information.

Mr. Mix alleges that 1) the City failed to provide him with a timely response to his public record request and 2) the attorney-client privilege is not an appropriate basis for redacting the information.

III. ANALYSIS

A. Timely Response To The Public Record Request

The Sunshine Ordinance provides that the release of public records by any local body, agency or department of the City shall be governed by the CPRA unless the ordinance provides otherwise. [O.M.C. §2.20.190] The CPRA provides that members of the public shall have the right to inspect and obtain copies of public records. [Government Code Section 5263] 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)] E-mails are expressly defined as a "writing" under the CPRA. [Government Code Section 6252(g)]

When a copy of a record is requested, the local agency has ten days to determine whether to comply with the request and must "promptly" inform the requestor of its decision. 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 disclosure is not possible, the agency must provide the records within a "reasonable period of time, along with an estimate of the date that the records will be available."

As previously reported, Mr. Mix made his initial request for records pertaining to the LLAD in August 2008. He filed Complaint No. 08-18 in November 2008 alleging that the City had not fully responded to all his public records requests. (The Commission has retained jurisdiction over Complaint No. 08-18 to consider whether further records exist which have not been produced.) Among his allegations in Complaint No. 08-18 was that the City had not completely responded with respect to Ms. Combs April 22, 2008, email -- He contended the City should have provided a copy of the response to the question that Ms. Combs raised. The Office of the City Attorney became aware of the "missing" email as early as April 2009. Commission staff requested that it provide a response to Mr. Mix in July 2009. It was not until February 11, 2010, that Ms. Rosenthal provided the City's response. Ms. Rosenthal told Commission staff that she delayed her response to Mr. Mix in favor of "urgent matters" she was handling for other departments. She claims that City budget cuts increased her job responsibilities and the demands on her time.

Based on the foregoing, Commission staff concludes there is an issue in fact and in law whether the City made a timely response to Mr. Mix's request for a copy of the email.

B. Justification For Redacting The Information

With respect to whether the City was justified in redacting portions of the information contained in the records, Sunshine Ordinance Sections 2.20.240 and 2.20.250 provide in their entirety:

> ***SECTION 2.20.240 <u>Minimum Withholding</u>.***
>
> *No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure by law. Any redacted, deleted or segregated information shall be keyed by footnote or other clear reference to the appropriate justification for withholding. Such redaction, deletion or segregation shall be done personally by the attorney or other staff member conducting the exemption review.*
>
> ***SECTION 2.20.250 <u>Justification For Withholding</u>.***
>
> *Any withholding of information shall be justified, in writing, as follows:*
>
> *(A) A withholding under a permissive exemption in the California Public Records Act or this ordinance shall cite the legal authority and, where the exemption is based on the public interest in favor of not disclosing, explain in practical terms how the public interest would be harmed by disclosure.*
>
> *(B) A withholding on the basis that disclosure is prohibited by law shall cite the applicable legal authority.*

> *(C) A withholding on the basis that disclosure would incur civil or criminal liability shall cite any statutory or case law supporting that position.*

Ms. Rosenthal's email to Mr. Mix dated February 11, 2010, states that the redacted portion of the email "contains legal advice given by Mr. Morodomi" and that this advice "is protected by the attorney-client privilege." While not citing a specific code section or case authority, Mr. Rosenthal further explains in her email:

> *"[T]he communication is privileged because Mr. Francisco was acting as an agent of the City for the purpose of counting the LLAD votes, and so he is treated as a City employee for these purposes. It was necessary for Mr. Francisco to be apprised of this advice in order to do his work on behalf of the City."*

Commission staff concludes that even in the absence of a specific code section or case authority, Ms. Rosenthal provided the "legal authority" (i.e., the attorney-client privilege) that justified the redaction.

Mr. Mix argues that the attorney-client privilege does not justify the redaction because the Oakland City Attorney's Office does not represent the consultant, Joseph Francisco, or his firm, Francisco and Associates. He suggests that the City Attorney's Office was trying to "direct and dictate" a way to count the votes in a "fashion or manner contrary to the requirements of the statute."

The CPRA provides an exemption from producing records that are "exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." [Government Code §6254(k)] One of the privileges recognized in the Evidence Code is the "attorney-client privilege."

California Evidence Code Section 954 provides that a client has a privilege to disclose, and to prevent another from disclosing, a "confidential communication" between the client and lawyer. Evidence Code Section 951 defines "client" as a person "who, directly ***or through an authorized representative***, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." [Emphasis added.]

Evidence Code Section 952 defines a "confidential communication" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interests of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." California case law provides that an attorney must assert the claim of privilege unless instructed otherwise by the client. [See People v. Vargas (1975) 53 Cal.App.3d 516, 527.]

The City Attorney's position appears to be that Mr. Francisco was acting as the "authorized representative" for Ms. Combs when she sought advice over how to count the LLAD votes. The confidential nature of the communication between Mr. Morodomi and Ms. Combs would not appear to be waived by providing advice to or through Mr. Francisco since Mr. Francisco, as a previously retained consultant on matters pertaining to the LLAD, was present to either further the interests of the City or to accomplish the purpose for which Mr. Morodomi was consulted, i.e., how to tally the LLAD votes. Commission staff concludes that the City Attorney's justification for the redaction of the April 22, 2008, email could be consistent with provisions of the attorney-client privilege.[2]

Commission staff makes no comment or conclusions regarding Mr. Mix's allegations of "vote rigging" in the LLAD election.

IV. STAFF RECOMMENDATION

Commission staff concludes there is an issue whether the Office of the City Attorney failed to provide a timely response to Mr. Mix's request for a copy of Mr. Francisco's April 22, 2008, email to Ms. Combs. The Sunshine Ordinance however does not provide a penalty or remedy in the event the Commission were to determine that a violation occurred.

In determining whether to conduct a formal hearing on the above 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 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 still direct staff to discuss a mediated settlement or stipulated judgment with the parties even if it chooses to pursue a formal hearing on any of the allegations.

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.*

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[2] Since the Commission does not have the authority to review the content of the redacted text the Commission would not be able to make a conclusive determination on this issue. Mr. Mix is not precluded from seeking an "in camera" [private] review of the text by a Superior Court judge.