From: Marleen Sacks ([redacted])
To: Morodomi, Mark; JRusso@oaklandcityattorney.org
Date: Saturday, August 29, 2009 1:50:12 PM
Cc: David@donahue.com; krayburn@bayareanewsgroup.com
Subject: Re: Meet and Confer on Public Records Request

Mark:

In enacting the California Public Records Act, the Legislature stated that access to information concerning the conduct of the public's business is fundamental and necessary right for every person in the state. Cases interpreting the CPRA also have emphasized that its primary purpose is to give the public an opportunity to monitor the functioning of their government. See e.g. U.S. Department of Justice v. Reporters Committee for Freedom of Press (1989) 489 U.S. 749. As you know, that is precisely what I'm trying to do here.

There is nothing in the law that precludes me from describing records pursuant to a Public Records Act request any differently than a discovery request, nor have you cited any law that states this. Section 6257 compels an agency to provide a copy of nonexempt records upon a request "which reasonably describes an identifiable record, or information produced therefrom ...."

"However, the requirement of clarity must be tempered by the reality that a requester, having no access to agency files, may be unable to precisely identify the documents sought. Thus, writings may be described by their content. The agency must then determine whether it has such writings under its control and the applicability of any exemption. An agency is thus obliged to search for records based on criteria set forth in the search request." California First Amendment Coalition v. Superior Court (Wilson) (1998) 67 Cal.App.4th 159, 166-167. Records requests inevitably impose some burden on government agencies. An agency is obliged to comply so long as the record can be located with reasonable effort. Id., citing *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1186.

My initial request describing the documents was more than sufficient. When taken together with my "meet and confer" letter, the City is on adequate notice regarding the documents I am seeking, that were not produced (e.g. documents from City Council members, all attachments etc.)

I understand that the audits are not complete, and that I will be entitled to see a copy when they are complete. However, given the lack of compliance so far, I am entitled to see responsive documents even before the audits are complete, and you have cited to no law to the contrary. Your citation to Government Code Section 6254(a) was inaccurate and misleading, because, as you well know, in order to shield documents under the "draft" exception, the "drafts" may be withheld only "where the public interest in nondisclosure clearly outweighs the public interest in disclosure." You have cited to no facts relating to this prong of the inquiry. Clearly, given the City's blatant violation of the audit requirements for the past five years, there is clearly a public interest in disclosure of the audit

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information as they are being prepared.

You state in your correspondence that "to the extent that drafts are being created at the direction of the lawyers and sent to lawyers for their review in light of your lawsuit and to be used in the litigation, the communications are covered by the attorney-client and the pending litigation exemptions of 6254(k) and (b)." There is no law supporting such a broad interpretation of the attorney-client privilege, particularly as weighed against a CPRA request. The audits are being created because they are required by law, and by the Court, not because your office is requiring them. I also completely fail to see why so much lawyer intervention is necessary in the preparation of the audits. Certainly, an initial communication between your office and the person(s) responsible for preparing the audits on the results of the lawsuit, and what must legally be included in the audits, is understandable. Also, after the audits are complete, a subsequent e-mail with your advice on how to improve or revise the audits would also be understandable. But the level of supposed intervention by your office seems entirely unnecessary, and copying a lawyer on all the communication for the purpose of shielding the e-mails from disclosure is completely inappropriate.

The entire purpose of the audits is to ensure that public monies are being spent appropriately, and that the projects that were supposed to be funded are getting done. The idea that all of these activities are being cloaked in secrecy is entirely contrary to the purpose of the audits, and appallingly in conflict with Oakland's particular claims of a commitment to open government.

Please let me know when I can expect a supplemental response that includes all of the documents previously requested.

Marleen L. Sacks

From: "Morodomi, Mark" <MMorodomi@oaklandcityattorney.org>
To: Marleen Sacks <[redacted]>; "Siegel, Kevin D." <KSiegel@oaklandcityattorney.org>
Cc: David@donahue.com
Sent: Friday, August 28, 2009 5:47:39 PM
Subject: RE: Meet and Confer on Public Records Request

Marleen,

This is in response to the points raised in your email. Your original public records request was written in form of a request for production of documents (e.g., "all records that refer or relate to"). A public records request is not a discovery request, but rather a request for identifiable records. The City has undertaken reasonable efforts to provide to you records in response to the broad "refer or relate to" query, and it is happy to work on following up on identifiable records you want. If you can identify the documents that you request, the City can more easily find what you are seeking. Also, the litigation is not yet over. Appeals may still occur. The return on the writ is still pending. So that the City is not put in an unfair position in the

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lawsuit, the pending litigation exemption must apply.

The annual report provided by Government Code section 50075.3 et seq. is not yet complete. When it is complete it will be made freely available to anyone who wants it.

1. We are in the process of collecting the attachments and reviewing them to make sure they are not exempt under the Public Records Act. To the extent you can identify those attachments you want, rather than stating you want all of them will assist us in speeding up the production.

2 and 3. We will review the matrix. Drafts not normally kept in the ordinary course of business are exempt from disclosure (Gov't Code section 6254(a).) Also to the extent that drafts are being created at the direction of the lawyers and sent to lawyers for their review in light of your lawsuit and to be used in the litigation, the communications are covered by the attorney-client and the pending litigation exemptions of 6254(k) and (b). These exemptions are necessary under the law so that the City get full and frank legal advice from its lawyers.

4. The City will provide the contract with Patel & Associates and related documents.

5. I do not see in your original request a request for records correspondence from the police department regarding issues raised by the lawsuit regarding the "status" of projects that were supposed to be funded by Measure Y." We can look for correspondence in this area.

6. We will confirm your inquiry regarding documents held by City Council. It is unlikely that the City Councilmembers have responsive documents. If there is an identifiable document you think the City Council has, please inform us and we will review and produce it to you if it is not exempt.

7, 8 and 9. See responses to 2 and 3.

Sincerely,

Mark Morodomi

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f: 510-238-6500

From: Marleen Sacks [mailto:[redacted]]
Sent: Monday, August 24, 2009 9:15 PM
To: Morodomi, Mark; Siegel, Kevin D.
Cc: David@donahue.com
Subject: Meet and Confer on Public Records Request

Mark and Kevin:

I have reviewed the documents produced in response to my public records request, PRR 090173. It appears that not all responsive documents have been produced. In addition, there have been numerous redactions, without explanation. Footnoted annotations outlining the reasons for the redactions are

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required by Oakland's Sunshine Ordinance.

As the litigation is now over, I fail to see why the preparation of the annual reports needs to be conducted with such secrecy. There are over 20 e-mails that have been entirely withheld. The entire purpose of the auditing function is to ensure that public monies are being spent appropriately. Indeed, there is even an Oversight Committee, whose function it is to ensure compliance with applicable laws, and that the monies are spent in accordance with the Measure. The auditing process should be completed in the light of day.

I want to also note that the fact that the acting Controller, Osborn Solitei, appears to have little or no understanding of the lawsuit and its implications is quite alarming. Specifically, in his August 3, 2009 e-mail, he states that the "Measure Y financial audits have been done timely and reported to council and in accordance with Government Codes. Attached are the financial audits…." Needless to say, those are the same documents that the Superior Court found completely inadequate and not in compliance with the Government Code. I would have hoped that the Controller would be more informed about the defects identified by this litigation, particularly since that e-mail was written approximately four months after the City lost the lawsuit.

The specific references to apparently missing documents are detailed below:

1. Numerous e-mails refer to attachments. None of the attachments were included. See e.g. August 4, 2009 e-mail from Kevin Siegel to Osborn Solitei that reads: "I don't see data on this form." However, no form was attached to the e-mail, which is obviously a responsive document. Also, see e.g. June 16, 2009 e-mail from Monica Singhai (from Patel CPA firm) to Sara Bedford reading "Please find attached list of contracts….." Again, no attachments were included. See also e.g. June 17, 2009 e-mail from Ms. Singhai to Mr. Solitei reading: "Please find attached my file for the disbursement questions…." No file was attached. I can't list all of the missing attachments, because there are so many, but all of the attachments need to be produced.

2. Numerous e-mails (e.g. July 29, 2009 from Priya Jagannathan; July 7, 2009 from Osborn Solitel; July 29, 2009 from Felicia Silva) refer to the "Measure Y reporting matrix." However, none of those attachments, with various versions of and/or data for the matrix, were included.

3. The e-mail dated July 7, 2009 from Osborn Solitei refers to numerous responses from OPD, Fire and DHS for the "reporting matrix" that Deanna Andrews was supposed to compile. However, no data or correspondence from OPD (or the other departments) was provided for the "matrix."

4. It appears that a CPA firm named Patel & Associates has been retained to do "FY 2009 audit work." However, there is no documentation provided regarding how Patel was retained to do the work or what the scope of work is supposed to be. Presumably there is a contract designating the scope of work, correspondence confirming the scope of work, indication of approval of the contract etc. None of this documentation was provided.

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5. The letter dated June 2, 2009 from Mr. Patel indicates that this firm was retained to perform a financial audit only. As you are aware, the Government Code requires a performance audit as well as just a financial audit (including a description of the status of each project funded by the measure). Notably, there was no correspondence included from the police department regarding issues raised by the lawsuit regarding the "status" of projects that were supposed to be funded by Measure Y, e.g. hiring of Crime Reduction Team officers, hiring of PSOs, hiring of truancy officers etc. Please ensure that all responsive documents have been produced with respect to this category.

6. It does not appear that any of the City Council members were surveyed regarding their possession of relevant documents. Please ensure that I receive all responsive documents from them as well.

7. An August 4, 2009 e-mail from Osborn Solitei refers to "more correspondence with department staff (OPD, Fire, DHS and Jeff Baker) regarding Measure Y project status matrix." However, no attachments were provided.

8. A June 25, 2009 e-mail from Jeff Baker indicates: "We are preparing the Annual Status Report of the Measure Y fund. It requires contributions from both OPD and DHS. I have forwarded the attached matrix for your review. I plan to submit the Rules Request on July 27th..." However, no attachment was included, and no final version submitted to "Rules" was provided either.

9. Notably, the following e-mail is a "template" for the Measure Y matrix/report. However, the text is redacted. I fail to see how a "template" would be considered protected under the attorney-client privilege. Please provide an unredacted copy of this e-mail (dated June 25, 2009 from Marianna Marysheva-Martinez).

I look forward to receiving a supplemental response from your office promptly.

Sincerely

Marleen L. Sacks

[redacted]

Oakland CA 94602

Attachment 6D