Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
April 7, 2010

In the Matter of	)	
	)	Complaint No. 09-12
	)	

Marleen Sacks filed Complaint No. 09-12 on September 16, 2009.

I. SUMMARY OF COMPLAINT

Ms. Sacks filed Complaint No. 09-12 alleging that various City staff including Mark Morodomi, Michelle Abney and Kevin Siegel of the City Attorney's Office, Jeff Baker of the Office of the City Administrator, and Renee Sykes of the Oakland Police Department violated the Oakland Sunshine Ordinance and the California Public Records Act ("CPRA") by failing to produce or failing to timely produce copies of public records. ***Attachment 1.*** She filed an amendment to her complaint dated September 14, 2009. ***Attachment 2.***

Since her amended complaint on September 14, and as recently as February 5, 2010, Ms. Sacks has made other requests for records in which she alleges the City has not responded in accordance with the Public Records Act or Sunshine Ordinance. She requests that these additional allegations also be considered by the Commission in connection with this complaint. (See below).

After Ms. Sacks filed her complaint, Commission staff proposed a mediation session to resolve any issues pertaining to the non-production of records. The mediation took place on November 6, 2009. In addition to Commission staff, City participants included Mark Morodomi and Michele Abney from the Office of the City Attorney, Jeff Baker from the City Administrator's Office, Gilbert Garcia from the Oakland Police Department (OPD), and Sara Bedford from the Oakland Fire Department (OFD). As a result of the mediation, Ms. Sacks received either responses or records pertaining to her outstanding requests, although some of these responses or records were not produced within the time specified in the mediation.

II. BACKGROUND

Most of the record requests at issue pertain to the City's implementation of Measure Y. Adopted by Oakland voters in November 2004, Measure Y (the "Violence Prevention and Public Safety Act of 2004"), imposed a new parcel tax and a parking surcharge to support additional fire suppression services, new police officers for community policing, and various violence prevention efforts. Measure Y sunsets in January 2015.

Among Measure Y's various provisions was the addition of 63 sworn police officers for community policing, crime reduction, and a focus on truancy, school safety, domestic violence and child abuse. The new officers were to be deployed to community policing beats, so-called "crime reduction teams," and various other assignments. Measure Y provides after-school and in-school programs and outreach for at-risk youth, offender and parolee employment training and incentives, and counselors for victims of domestic violence and child abuse. It provides for the restoration of two fire engine companies, additional paramedic services and using firefighters as "youth mentors."

In April 2008, Ms. Sacks sued the City over the alleged misuse of Measure Y funds and the failure to implement some of Measure Y's provisions. An April 2009 court ruling determined that the use of Measure Y funds for training and academy expenses for officers not placed in Measure Y positions was an impermissible use of Measure Y funds. The court also ruled that an independent auditor's report pertaining to Measure Y did not satisfy requirements of state law. The City has since appealed the court's decision.

On March 18, 2010, Ms. Sacks filed a second lawsuit alleging the City failed to hire and maintain a requisite number of "problem solving officers" and provide adequate deployment to crime reduction teams, and to budget for police academies sufficient to keep OPD at minimum staffing levels under Measure Y. Among her allegations were that the City has repeatedly violated the CPRA in connection with public records requests she has made. She states in her lawsuit that throughout 2009 and 2010, she has submitted "over a dozen public records requests, and the City has practically never complied" with the requirement of the CPRA. She also alleges that the Public Ethics Commission has "failed to comply" with its own complaint procedures for having her complaint heard in a timely manner "and has failed to provide any valid excuse for failing to adhere to its own timelines." Ms. Sacks is requesting the court, among other things, to "make a finding that the City violated the CPRA and related provisions in the past. . .[and] order the City to comply with the CPRA and related provisions in the future, and for court monitoring to ensure compliance." ***Attachment 3A.***

III. FACTUAL SUMMARY AND ANALYSIS

Ms. Sacks submits with her initial complaint a detailed summary of eight public records requests she made between November 25, 2008, and September 4, 2009, and the responses she received. (Ms. Sacks has withdrawn her May 26, 2009, request for records related to a proposal to eliminate park rangers as part of this complaint.) In addition, Ms. Sacks made five more requests since filing this complaint for which she has alleged non-compliance with the CPRA and/or the Sunshine Ordinance. For reference purposes Commission staff has prepared a chart summarizing 1) the records requested, 2) the status of the City's response, and 3) Ms. Sacks' pending contentions and allegations. ***Attachment 3B.***

A. Overview Of Applicable Law And Commission Jurisdiction

Most of Ms. Sacks' requests and the issues presented in this complaint involve basic public records law. 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)]

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."[1]

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[1] 6253. *(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.*

"(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

"(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. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
(4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

"(d) Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial."

Under the Sunshine Ordinance, the Commission is required to "develop and maintain an administrative process for review and enforcement of this ordinance, among which may include the use of mediation to resolve disputes under this ordinance. 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.

B. Specific Allegations

1. Request for records dated March 31, 2009

On March 31, 2009, Ms. Sacks sent an email to Michelle Abney, the City Attorney's Open Government Coordinator, for four categories of public records related to the funding for 14 so-called "problem solving officer" (PSO) positions within OPD. ***Attachment 4A.*** Ms. Abney sent a confirming email the same day, stating that she had forwarded the request to the "appropriate departments for review and processing." Ms. Sacks was advised to contact Ms. Abney if she did not receive a response. Ms. Sacks amended her request the following day on April 1, 2009. ***Attachment 4B.*** By letter dated April 8, 2009, Felicia Silva of the City's Budget Office notified Ms. Sacks that additional time was needed to respond to her two requests because of "[t]he need to compile data or construct a computer report to extract data." The letter stated "We will answer your request on April 24, 2009." On April 24, 2009, Ms. Silva sent an email to Ms. Sacks that the requested records had been submitted to the City Attorney's Office for review with the goal of providing her the information by May 4, 2009. ***Attachment 4C.***

On or about May 6, 2009, Ms. Sacks received in the mail copies of records in response to her request. By email of May 6th, Ms. Sacks again amended her request for certain records and objected to the redaction of information contained in some of the records that had been produced. (See also Section III.B.3, below.) ***Attachment 4D.*** Emails indicate that Mr. Morodomi had a telephone conversation on May 14, 2009, with Ms. Sacks in which he told her that the redacted information "was pursuant to the attorney-client privilege." By email of May 20, 2009, Ms. Sacks cited legal authority in support of her demand for the redacted information. On May 28, 2009, Deputy City Attorney Mark Morodomi agreed to release some of the redacted information but not all, also citing legal authority to justify his position. ***Attachment 4E.***

Ms. Sacks alleges that the City Attorney's Office failed to provide a timely determination when the records would be produced. She also contends that copies of several emails she received contained information that had been redacted without providing sufficient justification.

Ms. Sacks' requests of March 31 and April 1 for copies of public records should have resulted either in the "prompt" production of discloseable (i.e., non-exempt) records, or notification within ten days whether the City would comply with the request. [Government Code Section 6253] While it appears that Ms. Silva sent a letter dated April 8, 2009, to Ms. Sacks within the ten-day period, it does not appear that the City notified Ms. Sacks whether it would produce "discloseable records" within either the ten-day period or the additional 14-day period: Ms. Silva wrote to Ms. Sacks on April 24th that the records were still pending the City Attorney's review.

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. Sacks contends Mr. Morodomi said in a telephone conversation that the redacted information was being withheld on grounds of attorney-client privilege. After sending Mr. Morodomi an email on May 20 citing legal authority why the information should be disclosed, Mr. Morodomi's email of May 28 does provide a "clear reference" to justification for redacting the information that Ms. Sacks contends

should have been provided when the three emails were initially produced.[2] Commission staff believes an issue exists whether the City provided a sufficient ten-day response to her requests of March 31 and April 1 and whether the redacted emails were "keyed by footnote or other clear reference to the appropriate justification for withholding."

2. Request for records dated May 26, 2009

Ms. Sacks withdraws her contentions regarding this request.

3. Request for records dated May 6, 2009

As described in subsection III(B)(1) above, Ms. Sacks amended her March 31, 2009, request on May 6, 2009. The amended request sought records specifying job descriptions of Measure Y-funded positions and included a demand for unredacted copies of emails that the City's had previously provided. She contacted Mr. Morodomi on June 23, 2009, claiming that she had not received any records responsive to Measure Y-funded positions and acknowledged that she did receive an unredacted version of a previously-provided copy of an email. Ms. Abney sent Ms. Sacks an email two days later stating she would forward the amended request to staff for a response. ***Attachment 5A.***

Ms. Sacks claims she had not received a response to her May 6, 2009, request at the time she filed her complaint. She later acknowledged that she had received records pertaining to Measure Y-funded positions only after the November 6, 2009, mediation.

There is no information that the City provided Ms. Sacks with either the records pertaining to Measure Y-funded positions prior to the November 6, 2009, mediation or any writing stating within ten days of the request when a determination would be made. The issue regarding the confidentiality of the emails is addressed in Section III.B.1 above.

4. Request for records dated July 29, 2009

On July 29, 2009, Ms. Sacks sent an email to Ms. Abney and Mr. Morodomi requesting four categories of records relating generally to 1) audits of Measure Y funding, 2) a $2.1 million set-aside for reimbursing the Measure Y fund, 3) the deployment of six officers to a "crime reduction team", and 4) implementation and communication of certain provisions of the Statement of Decision in Sacks v. City of Oakland. ***Attachment 6A.*** Ms. Abney responded by email the same day stating she would "forward as appropriate." On August 6, 2009, Deputy City Attorney Kevin Siegel sent Ms. Sacks an email advising that the City was in the process of gathering

[2] *The Sunshine Ordinance does not authorize the Commission to conduct a private "in camera" review of information withheld due to any of the exclusions provided in the CPRA. Thus Commission staff does not analyze, nor should the Commission opine, on whether the redactions were justified.*

documents responsive to her request but because of the amount of documents and the need to coordinate with other City agencies he expected to provide responsive documents by August 21, 2009." ***Attachment 6B.***

In a letter dated August 21, 2009, Mr. Siegel advised Ms. Sacks that records responsive to her July 29 request were available and that she could arrange a review or request copies by contacting Ms. Abney. He stated the City "has not produced documents that are exempt under the law from disclosure because of legal privileges (Gov. Code § 6254(k) e.g., attorney-client privilege and/or attorney work product doctrine) or documents pertaining to pending litigation (Gov. Code §6254(b)). Please note we did not locate any responsive documents for request nos. 3 and 4." ***Attachment 6C.***

On August 24, 2009, Ms. Sacks sent an email to Mr. Siegel and Mr. Morodomi contending that not all responsive documents had been produced and that the records contained "numerous redactions" without containing the footnoted annotations required under the Sunshine Ordinance. Mr. Morodomi responded to her contentions by email of August 28, 2009, stating that his office was in the process of reviewing the "attachments" to some of the email that had been produced and providing legal justification for withholding certain emails and other writings. Ms. Sacks responded by email of August 29, 2009. ***Attachment 6D.*** It appears through a series of email correspondence that the City Attorney's Office continued transmitting records in connection with the July 29, 2009, request during September, 2009. A final production of responsive records was not made until after the November 6, 2009, mediation.

Procedurally it appears that Mr. Siegel made a timely response to Ms. Sacks via his email dated August 6, 2009. In his letter dated August 21, 2009, Mr. Siegel advised Ms. Sacks that the City was asserting statutory exemptions for emails and other writings that were not produced. Other emails were produced containing redactions that were not "keyed by footnote or other clear reference." Mr. Morodomi has told Commission staff his office will perform this task if necessary but contends his office provided the appropriate justification for the redactions in its correspondence with Ms. Sacks.

5. Request for records dated August 10, 2009

During the week of August 3, 2009, Neighborhood Services Coordinator Renee Sykes sent a mass email to Oakland residents advising them of several residential burglaries that occurred in two Oakland neighborhoods. As a recipient of the email, Ms. Sacks states that she made an August 10, 2009, email request to Ms. Sykes to provide records detailing the locations of where the burglaries occurred. Ms. Sykes apparently responded within a few minutes advising Ms. Sacks to contact the Criminal Investigation Division for the information and provided her with a telephone number. Ms. Sacks sent an email to Ms. Abney on August 18 stating that she had received no response from Ms. Sykes. Ms. Abney was apparently on vacation and responded on August 31, 2009, saying that she would follow-up with Ms. Sykes.

Ms. Sacks sent an email to Mr. Morodomi the same day complaining that she never received a response to her initial request within a ten-day period. Mr. Morodomi responded by email on September 3, 2009, saying he would inquire. ***Attachment 7A.***

On September 10, 2009, Mr. Morodomi sent an email to Ms. Sacks stating that public records requests for police department records should be sent to OPD's Records Division. He advised her that Ms. Sykes does not handle public records requests and that if she provided more information he could help expedite a response. ***Attachment 7B.*** Ms. Sacks states she ultimately received the records on September 21, 2009. She contends that she never received a formal response from Ms. Sykes and that the City's production was not timely.

Ms. Sykes told Commission staff that she told Ms. Sacks to contact OPD for the information shortly after Ms. Sykes made her request. Ms. Sykes said she told Ms. Sacks that she did not have the information and that she (Ms. Sacks) should contact either burglary investigator Edwin Somarriba or OPD record coordinator Millie Crossland for the requested information. Ms. Sacks contends that Ms. Sykes, as a City employee, should have taken responsibility for responding to the request or communicating the request to someone in her department who could make a timely response. On the other hand, it can be argued that Ms. Sykes properly discharged her duties under the CPRA if she told Ms. Sacks how to obtain the records she sought. This is an issue of both law and fact that the Commission may wish to determine.

6. Request for records dated August 18, 2009

On August 18, 2009, Ms. Sacks sent an email to Ms. Abney, Sharon Orgain and Mr. Morodomi requesting records relating to the amount of money transferred from the Measure Y fund pursuant to a $7.7 million "augmented recruiting program" in 2008. The first indication that Ms. Sacks received a response appears to be an email dated September 12, 2009, from Mr. Morodomi stating that Measure Y money was not transferred to the general fund but charged directly for certain services. Based on that information, Ms. Sacks revised her request by email dated September 17, 2009. ***Attachment 8A.***

Mr. Morodomi acknowledged in another email dated September 12, 2009, that vacations, City furloughs and holidays caused the delay in providing a response and promised to send the requested records under cover of a separate letter. ***Attachment 8B.***

On September 25, 2009, Mr. Morodomi sent an email stating that there was no "hard copy document" that specifies the expenditures of the $7.7 million augmented recruiting program. He claimed an exemption under the CPRA to maintain confidentiality for records "created at the direction of attorneys for specific use in litigation" pursuant to Government Code Section 6254(b). He referred her to a "declaration" by Peter Fitzsimmons produced in the course of Ms. Sacks' litigation with the City stating that $3.3 million had already been expended. He stated he would

confirm whether that figure was still "up to date." He also stated that two of her requests would require a special program request within the City's "Oracle" payroll system requiring four hours of time to extract the data and possibly an additional eight hours of time to confirm that the data are "actually responsive to [the] request." He asserted the City's right to request or waive the "cost to construct a record" pursuant to Government Code Section 6253.9(b). Mr. Morodomi did not provide a date by which he expected to produce updated records pertaining to expenditures for the augmented recruitment program. ***Attachment 8C.*** Ms. Sacks responded by email the same day refuting his claimed exemption under the "litigation exemption." ***Attachment 8D.*** Ms. Sacks stated that she ultimately received responsive records following the November 6, 2009, mediation.

The record of communications between Ms. Sacks and representatives of the City Attorney's office indicates that more than ten days elapsed between the time Ms. Sacks made her request on August 18 and the first response by Mr. Morodomi on September 12, 2009. Mr. Morodomi responded to the revised request of September 17 within the ten-day period but did not provide an estimated date by which the records would be provided. In fact, all responsive records were not completely provided until after the November 6 mediation.

7. Request for records dated August 28, 2009

Ms. Sacks claims that on or about August 28, 2009, she sent an email to Jeff Baker, an assistant to the City Administrator and staff member to the Measure Y Committee, for the email addresses of the Measure Y Committee members. She said she followed-up her request on September 2, 2009. Mr. Baker responded by email stating that "[t]he e-mail addresses, telephone numbers, mailing addresses and business addresses of the Oversight Committee members is not public information." He wrote that if she had correspondence for the committee members that she should send it to him and he would forward it to them. ***Attachment 9A.*** Ms. Sacks emailed Mr. Morodomi on September 4, 2009, requesting the email addresses pursuant to the CPRA. Mr. Morodomi responded on September 10, 2009, stating that the City would produce them "[t]o the extent that the committee members do not have an expectation of privacy with regard to their email addresses." He stated he hoped to provide a response by September 17, 2009. ***Attachment 9B.***

On September 23, 2009, Mr. Baker sent an email to Ms. Sacks providing email addresses for most of the Measure Y Committee members. He stated several of the members objected to having their personal email addresses disclosed and were advised to obtain an alternative email address to provide to members of the public. Two days later, he provided email addresses for the remaining members. All but one were the email addresses "filed with the City." The other, that of committee member Richard Carter, was apparently created in order to provide one to Ms. Sacks. ***Attachment 9C.*** Ms. Sacks contends that she is entitled to Mr. Carter's "original" email address and not one created to respond to Ms. Sacks' request.

With regard to the August 28/September 2 request for email addresses, it appears Mr. Baker initially denied the request without providing a "clear reference to the appropriate justification for withholding" pursuant to O.M.C. Section 2.20.240. Commission staff questions whether stating that the addresses are not "public information" satisfies this requirement. Mr. Morodomi responded within ten days to the September 4 request and anticipated a production by September 17. The actual response occurred on September 23 and on September 24, seven days later than Ms. Sacks was anticipating. Ms. Sacks contends there was an "unacceptable delay" over the production of the email addresses and that she was entitled to the "original" email addresses the City possessed and not merely emails created for the purpose of responding to her request.

Commission staff could locate no case law determining whether the email addresses of members of a public advisory committee constitutes a discloseable public record. Government Code Section 6254(c) provides an exception from disclosure for records that are "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." The requested email addresses do not appear to constitute "personnel, medical or similar files," especially since California law requires exemptions to be "narrowly construed." Thus to determine whether the "original" email must be disclosed, the proponent of non-disclosure must demonstrate that the public interest in disclosure is "clearly outweighed" by the public interest in non-disclosure.

While the law, on its face, clearly tilts the balance in favor of disclosure, there are court cases falling on both sides of the issue, each heavily dependent on the facts of each particular case. Furthermore, Commission staff notes that Sunshine Ordinance Section 2.20.250(B) requires that any withholding of information that is "based on the public interest in favor of not disclosing" shall explain in "practical terms how the public interest would be harmed by disclosure." It does not appear that such an explanation was ever provided.

The Commission would have to consider in a formal proceeding whether the City's arguments in favor of non-disclosure "clearly outweigh" the public interest in disclosing the email address. However, Mr. Morodomi has recently advised Commission staff that his office is advising staff to City boards and commissions to provide "original" email addresses when specifically requested.

8. Request for records dated November 25, 2008

On November 25, 2008, Ms. Sacks sent an email to Ms. Abney requesting five categories of records generally relating to the transfer of Measure Y funds for what she described as "police overstaffing." By letter of December 4, 2008, Mr. Morodomi responded to each of the written categories of documents, stating in essence that 1) her request was unspecific, 2) responsive records did not exist or, 3) to the extent that they did exist, they "have been or are being produced through the

discovery process" in connection with the litigation Ms. Sacks initiated against the City. ***Attachment 10A.***

Ms. Sacks sent an email dated December 9, 2008, to Ms. Abney in which she attempted to clarify her record request. She requested any and all documents that indicate whether Measure Y funds have been used to fund the number of officers in excess of OPD's "authorized" strength of 803, and, if Measure Y money has been used for that purpose, "how much money was spent and whether it was refunded to Measure Y." Ms. Sacks objected on January 5, 2009, that she had not received any records responsive to her November 25 request and her December 9 clarification. ***Attachment 10B.*** By letter of January 12, 2009, Mr. Morodomi reiterated that there were no documents responsive to her requests. ***Attachment 10C.*** Ms. Sacks contends she did not receive a timely response to her November 25 or December 9 requests.

As to the November 25, request, Mr. Morodomi did provide a response within the ten-day period. Based on the objections, Ms. Sacks submitted a revised request on December 9, for which there appears to have been no response until January 12, 2009, considerably beyond the ten-day period.

9. Request for records dated September 22, 2009

On September 22, 2009, Ms. Sacks sent an email to Ms. Abney requesting six categories of records pertaining to the use of Measure Y funding for fire, paramedic and violence prevention services. On October 6, 2009, Sara Bedford from the City's Human Services Agency responded by email to category Nos. 4 and 5. Ms. Sacks emailed Ms. Bedford claiming that the records produced were not responsive. Ms. Bedford responded to Ms. Sacks on October 16, 2009, describing how the records were responsive to her initial request and also included additional attachments. Ms. Sacks claimed on October 22, 2009, that there had to be additional records available. ***Attachment 11A.*** Additional records were apparently sent to Ms. Sacks by email on October 22, 2009. The City's final set of records were produced following the mediation session on November 6, 2009. ***Attachment 11B.***

Ms. Sacks contends in an email to Commission staff on October 6, 2009, that she received a response to item No. 6 of her September 22, 2009 request "but received no response with respect to my other requests." Commission staff forwarded this email to Ms. Abney who responded that Ms. Sacks' request was considered completed based on responses to item Nos. 1 through 3 between September 23 and September 30 from Donna Hom, item Nos. 4 and 5 on October 6 from Sara Bedford, and item No. 6 on September 30 from former Officer David Kozicki. ***Attachment 11C.*** It appears the City made an initial production of records within 10 days with the apparent exception of Ms. Bedford's records response on October 6, 2009. Ms. Sacks continued to prod the City into producing more records pursuant to her original request up to and following the November 6 mediation. Thus there appears

to be an issue whether the City failed to provide a timely and adequate response to the September 22, 2009, request.

10. Request for records dated October 1, 2009

On October 1, 2009, Ms. Sacks sent an email to Ms. Abney and Mr. Morodomi requesting five broad categories of records pertaining to police academies and budget appropriations for payment of police officers and benefits during the 2009/2010 fiscal year. Ms. Sacks sent Commission staff an email dated October 13, 2009, claiming she received an acknowledgment of the request and was informed that the OPD employee who typically handles such requests was "out of town" and would begin working on the request when he returned. Ms. Sacks complained that this was "not a sufficient response." ***Attachment 12A.***

It is unclear whether any documents were forwarded to Ms. Sacks prior to the mediation session of November 6, 2009. At the mediation, Jeff Baker and OPD representative Gilbert Garcia agreed to perform a search for the records and respond within ten days. By email dated November 17 and November 24, 2009, Ms. Sacks told Commission staff that she still had not received any responsive documents following mediation and "no acknowledgement or apology or request for additional time." ***Attachment 12B.*** However Mr. Garcia apparently sent Ms. Sacks an email dated November 18 that included a responsive document and the message that another employee, budget director Cheryl Taylor, would respond to questions regarding police budget appropriations. ***Attachment 12C.*** Ms. Sacks later indicated she had received responsive records but well beyond the agreed upon date of production.

There does not appear to have been a formal ten-day response to Ms. Sacks' October 1 request although there was some acknowledgment that the person able to best address her inquiries was out-of-town. Ultimately production of records did not occur until after the agreed upon date following mediation. Thus there appears to be an issue whether the statutory deadlines for response and production were met.

11. Request for records dated October 18, 2009

On October 18, 2009, Ms. Sacks sent an email to Ms. Abney and Mr. Morodomi requesting five categories of records pertaining to the funding sources of PSO positions and the assignment or deployment of three specific OPD officers. Mr. Morodomi responded by email dated October 28, 2009, stating that he required approximately 3 to 4 weeks to provide the requested records. He also cited a cost of $1,040 to extract requested data from existing electronic timecards, based on his conversations with City staff familiar with the "Oracle" payroll system. Ms. Sacks responded the same day that she did not wish to pay for the extracted information and modified her previous request regarding the three specific OPD officers. ***Attachment 13A.***

Ms. Sacks told Commission staff recently that she ultimately received information stating the OPD officers referenced in her request were not assigned to desk duty. She said she found it "shocking" that the City's computer payroll system is so antiquated that it would require a special program, at significant cost to the public, to extract what should otherwise be basic payroll data. While the nature of the City's payroll system may raise issue of governmental transparency that the Commission may wish to address, Commission staff does not perceive a violation of the CPRA or Sunshine Ordinance on the facts of this allegation.

12. Request for records dated December 4, 2009

On December 4, 2009, Ms. Sacks sent an email to Mr. Baker, Ms. Abney and Mr. Morodomi requesting records relating to 1) the City's use of outside experts to select Measure Y evaluators, 2) records relating to the effect of Measure Y violence prevention programs on crime reduction, and 3) records relating to Mr. Baker's responsibilities in addition to staffing the Measure Y committee. Mr. Baker responded by email dated December 14, 2009, stating his office was "gathering the records" for which he anticipated completion and delivery "on or before December 23, 2009." Ms. Sacks responded on January 1, 2010, that she received a package of information that was apparently responsive to her second category of requested documents but nothing as to categories one and three. Five days later she sent another email to Mr. Baker stating she never received a reply. ***Attachment 14A.***

On January 11, 2010, Ms. Sacks requested Commission staff to inquire why she never received a complete response to her request. Commission staff contacted Mr. Baker who sent Ms. Sacks an email the same day with two electronic documents attached. ***Attachment 14B.*** Ms. Sacks complains over the failure to provide copies of the records she requested until weeks after the promised date.

It appears from the correspondence that Mr. Baker notified Ms. Sacks within ten days of her December 4, 2009, request and apprised her that the requested records would be delivered "on or before December 23, 2009." There was nothing suggesting that only some of the requested records would be produced. It was not until January 11, 2010, that Mr. Baker submitted records responsive to request Nos. 1 and 3. Mr. Baker advised Commission staff that Ms. Sacks' request required locating and searching through files maintained by his predecessor and by budget director Cheryl Taylor. He also attributes some of the delay to the end-of-the-year combination of City business shut-downs and holidays. Nevertheless there appears to be an issue why the actual production of documents did not occur on or about December 23 or notification provided as to a new date of production.

13. Request for records dated February 5, 2010

On February 5, 2010, Ms. Sacks made an email request to Mr. Morodomi and Ms. Abney for records pertaining to a "public employee salary survey" performed for the City by a private consultant in 2003. Ms. Abney responded the same

day stating that her office had no responsive records but would forward the request to the Office of the City Clerk for a response. A few hours later she also sent Ms. Sacks an electronic copy of the City Council resolution authorizing the survey. Three days later, Ms. Abney emailed some records in response to the request. Ms. Sacks responded by amending her request on February 8 to include additional records relating to the total cost of the survey and how the survey consultant was selected. ***Attachment 15A.***

On February 8 and 9, 2010, Ms. Abney emailed more electronic records responding to Ms. Sacks' requests. On February 17, 2010, Ms. Abney sent Ms. Sacks a summary of the records that had been sent to her together with the statement: "These are the only documents that have been located in response to your request except for the survey." Ms. Abney acknowledged that City departments still had not located a copy of the survey itself. ***Attachment 15B.*** Ms. Sacks complains that she never received records demonstrating that the survey had been presented to the City Council, how the outside consultant was selected, or a copy of the survey itself. According to Ms. Abney, the City could not locate a copy of the outside consultant report although background data from the survey was located and provided to Ms. Sacks.

Under the CPRA, a local agency must produce copies of non-exempt public records "promptly." Here, the City produced the majority of the requested records within three to four days of Ms. Sack's request. No "ten day" letter is necessary when all non-exempt records can be produced promptly. What Ms. Sacks argues however is that she should have received a written notice within ten days indicating that more time would be necessary to locate a copy of the salary survey and an estimated date by which it would be produced. Thus an issue exists whether the City made a timely response to Ms. Sacks' request for a copy of the salary survey.

IV. DISCUSSION AND STAFF RECOMMENDATION

Taken individually, most of Ms. Sacks' allegations can be viewed as minor, procedural infractions of the CPRA and/or the Sunshine Ordinance. Ms. Sacks argues however that these allegations document the City's "abysmal" track record for complying with public records requests. She cites the City Attorney's Office for doing a poor job coordinating the deadlines and responses from the various City agencies.

The Commission has long been aware of the difficulty the City has in managing City records and responding to public requests to produce them. On the other hand, the allegations of this complaint should also be viewed in light of Ms. Sacks' litigation with the City. Ms. Sacks has made multiple demands for records in an amount and at a level of detail that is fairly uncommon and unquestionably taxed the City's ability to produce and monitor the production of records. Thus Commission staff encourages the Commission to consider thoughtfully the best use of Commission time and resources in determining a response to Ms. Sacks' complaint.

There are several options available to the Commission. The Commission may: 1) set for hearing those allegations in which Commission staff has identified an issue exists (Allegation Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13) for the purpose of making a formal determination of whether the City violated the Oakland Sunshine Ordinance and/or the CPRA; 2) direct staff to provide more information before considering a final decision; 3) dismiss those portions of the complaint pertaining to alleged violations of the CPRA on grounds that Ms. Sacks has chosen a judicial forum in which to pursue her remedies under the CPRA; and/or 4) direct staff to attempt to negotiate a settlement or stipulated judgment between Ms. Sacks and the City.

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 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.*