Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
March 1, 2010

In the Matter of)
) Complaint No. 09-16
)

Marleen Sacks filed Complaint No. 09-16 on November 18, 2009.

I. SUMMARY OF COMPLAINT

Ms. Sacks filed Complaint No. 09-16 alleging that 1) members of Oakland's Violence Prevention and Public Safety Oversight Committee (Measure Y Committee) failed to file Statements of Economic Interests (Form 700) in connection with their service on the Committee, and 2) two members of the Committee appear to have "actual conflicts of interest." ***Attachment 1.***

II. BACKGROUND

Oakland voters adopted Measure Y in November 2004. Entitled the "Violence Prevention and Public Safety Act of 2004", Measure Y 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 automatically expires in January 2015.

Measure Y also established an eleven-member committee to review and evaluate Measure Y programs.[1]

III. ANALYSIS

Ms. Sacks contends that since its inception, members of the Measure Y Committee have never filed a Statement of Economic Interests (Form 700). She also alleges that two members have an "actual conflict of interest." Specifically she states that one member works for the Oakland Unified School District and another member works for the Alameda County

[1] The full text creating the Measure Y Committee reads: "To ensure proper administration of the revenue collection and spending, and the implementation of the programs mandated by this Ordinance, the Mayor shall appoint three members of a "Violence Prevention and Public Safety Oversight Committee" and each councilmember shall appoint one member. The committee shall review the annual audit, evaluate, inquire and review the administration, coordination and evaluations of the programs and make recommendations to the Mayor and the City Council for any new regulations, resolutions or ordinances for the administration of the programs to comply with the requirements and intent of this Ordinance."

Probation Department. Both public agencies receive Measure Y funds, according to Measure Y Committee staff director Jeff Baker.

In January 2010, the City Attorney's Office submitted to the City Council amendments to the City's financial conflict of interest code. ***Attachment 2.*** As described in greater detail below, cities must review and, if necessary update, their conflict of interest codes every two years. Among the proposed changes adopted by the City Council was the inclusion of members of the Measure Y Committee into the category of public officials that must annually file a Form 700 and avoid making decisions affecting those interests. The City Council last reviewed and amended the City's conflict of interest code in February, 2007, and in March, 2005.

A. Applicable Law And Commission Jurisdiction

1. Local Conflict Of Interest Codes

Every local agency is required to adopt a conflict of interest code pursuant to the provisions of the California Political Reform Act ("PRA"). Like Oakland, the overwhelming majority of California cities simply incorporate the conflict of interest provisions of the PRA into their local codes. A city council is the "code reviewing body" for any city agency other than the city council itself. [Section 82011] [2] Every conflict of interest code must specify the positions within the agency that "involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest and for each such enumerated position, the specific types of investments, business positions, interests in real property, and sources of income which are reportable." [Section 87302]

The PRA generally prohibits any "public official" from making, participating in making, or otherwise using his or her official position to influence governmental decisions in which the official has a financial interest, unless an exception applies. [Section 81001(b)]

A "public official" includes "every member, officer, employee or consultant of a state or local governmental agency. . ." [Section 82048] Regulations adopted by the Fair Political Practices Commission ("FPPC") further define "member" as including "salaried or unsalaried members of committees, boards or commissions with decision-making authority." [2 Cal. Code Regs. 18701(a)(1)] The same regulation also provides that a board or commission possesses "decisionmaking authority" whenever:

"(i) It may make a final governmental decision;

(ii) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

[2] All citations are to the California Government Code unless otherwise stated.

(iii) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency."

The PRA requires the code reviewing body (in this case, the Oakland City Council) to review the City's conflict of interest code no later than July 1 in each even-numbered year and amend it if a change is "necessitated by changed circumstances." If no change in the code is required, the "local agency head" shall submit a written statement to that effect to the code reviewing body no later than October 1 of the same year. [Section 87306.5]

2. Commission Jurisdiction And Authority

City Charter Section 202(b)(5) provides:

*"The City Council shall **by ordinance** prescribe the function, duties, powers, jurisdiction and terms of the members of the Commission, in accordance with this Article."* (Emphasis added.)

The Commission's enabling ordinance, Chapter 2.24, provides that it shall be the "function and duty" of the Commission to ". . .oversee compliance with conflict of interest regulations as they pertain to City elected officials, officers, employees, boards and commissions." [O.M.C. Section 2.24.020(C)] In furtherance of its enumerated functions and duties, the Commission is authorized to 1) conduct investigations, audits and public hearings; 2) issue subpoenas; and 3) impose penalties and fines "as provided for by ordinance." [O.M.C. Section 2.24.030] There is no ordinance that authorizes the Commission to impose penalties and fines in connection with the City's financial conflict of interest code. Such authority lies administratively with the FPPC and judicially through civil and criminal proceedings.[3] [Section 8311 et seq; Section 91001]

Finally, pursuant to the Commission's General Complaint Procedures, the Executive Director may recommend that a complaint be referred to "another governmental or law enforcement agency better suited to address the issues." [GCP Section III(B)(1)(e)]

B. Does The Measure Y Committee Possess "Decisionmaking Authority" For Purposes Of The PRA?

Based on its implementing legislation, the Measure Y Committee appears to serve solely as an advisory body whose powers are expressly limited to 1) "review[ing] the annual audit", 2) "evaluat[ing], inquir[ing] and review[ing]" Measure Y programs, and 3) "mak[ing] recommendations to the Mayor and the City Council for any new regulations, resolutions or ordinances for the administration of [Measure Y] programs. . ." Mr. Baker confirmed the advisory nature of the Measure Y Committee by stating that the Measure Y Committee does not make decisions where or how Measure Y funds are spent. He said the Committee does not hire or authorize payment for the outside consultant who evaluates

[3] The PRA also authorizes the "elected city attorney of any charter city" to act as the civil or criminal prosecutor for alleged PRA violations occurring within his or her city. [Section 91001.5]

Measure Y programs. He said that the Committee's actions are limited to "requesting information, reviewing programs and making recommendations."

Mr. Baker said the Committee has in the past made recommendations to the City Council. Most recently, the Committee recommended adoption of the outside evaluator's findings with regard to community policing programs. Prior to that, the Measure Y Committee has only "very rarely" made recommendations over the past five years to the City Council. Even with respect to those recommendations, Mr. Baker stated that the City Council and its committees have not always followed the Measure Y Committee's recommendations.

Even though the Measure Y Committee was established and operates as an advisory body, Regulation 18701(a)(1)(A) requires an assessment of the extent to which an advisory body's recommendations have been followed in the past. The FPPC has advised that for advisory bodies that are "newly formed" and have no history of its recommendations being regularly approved over an extended period of time, that such a body is not a decisionmaking entity under the PRA [See Wiener Advice Letter, No. A-06-118]. However the FPPC also advises:

> *"Once there is a history of a particular advisory body's recommendations being routinely accepted without amendment or modification, the body converts from a solely advisory function to one of making or participating in the making of a governmental decision and its members are considered public officials subject to the conflict-of-interest provisions under the Act."* [Wiener, pg. 4]

According to Mark Morodomi, the Deputy City Attorney who performs the periodic review of the City's conflict of interest code, he recommended inclusion of the Measure Y Committee because of its "ongoing debate and discussion of Measure Y issues." While acknowledging the advisory nature of the Measure Y Committee, he decided to "err on the side of greater transparency" by proposing its members conform to conflict of interest laws. As a consequence of the City Council's action last January to require the Measure Y Committee members to comply with the city's conflict of interest code, Committee members soon will be receiving information on filing Form 700 and the rules pertaining to financial conflicts of interest.

C. Did Two Members Of The Measure Y Committee Participate In A Governmental Decision Involving Their Economic Interests?

Ms. Sacks alleges that two Measure Y Committee members work for governmental agencies (the Oakland Unified School District and the County of Alameda, respectively) that receive Measure Y funds. As employees of these agencies, she questions whether they are engaged in an ongoing conflict of interest by participating in discussions of Measure Y programs while their respective employers receive Measure Y funds. The short answer is that prior to January 19, 2010, members of the Measure Y Committee were not "public officials" for purposes of the City's conflict of interest code and therefore exempt from its provisions. That is, until the City Council amended the financial conflict of interest code to include members of the Measure Y Committee such members were not bound by the code's

provisions. Furthermore, the PRA expressly ***excludes*** income received from a local governmental agency as a discloseable or disqualifying economic interest. [Section 82030(b)(2)] Thus even if they were public officials, their income from a local governmental agency would not be considered a disqualifying economic interest.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 09-16 on grounds that the provisions of the City's financial conflict of interest code did not apply to members of the Measure Y Committee prior to January, 2010.

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.*