Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
January 4, 2010

In the Matter of

) Complaint No. 09-08
) Complaint No. 09-09
) Complaint No. 09-10
) Complaint No. 09-11
CONSOLIDATED

(SUPPLEMENTAL)

I. SUMMARY OF COMPLAINT AND PROCEDURAL HISTORY

David Mix filed Complaint Nos. 09-08, 09-09, 09-10 and 09-11 on July 13, 2009. In them, he alleges that the Oakland Convention and Visitors Bureau, Oakland Museum of California, Chabot Space and Science Center Foundation, and the East Bay Zoological Society impermissibly made contributions of alleged "public funds" to a campaign committee in support of Measure "C" during the July, 2009, special election.

Commission staff prepared a preliminary report that was agendized for Commission consideration at the Commission's December 7, 2009 meeting. On Friday afternoon, December 4, 2009, Mr. Mix delivered a ten-page letter that contests some of the findings and analysis contained in the staff report. ***Attachment 1.*** Due to concerns over whether the respondents received appropriate notice that the Commission would be considering the staff report at the December 7, 2009, meeting, the Commission postponed the matter to the January 4, 2010, meeting.

At the December 7, 2009, meeting, Mr. Mix gave Commission staff an additional document which he requested the Commission to consider. ***Attachment 2.*** On December 12, 2009, Mr. Mix sent a letter to Commission staff entitled "Jurisdiction And Authority", arguing the Commission should "forward the complaint to the proper authority" or, in the alternative, "pursue a resolution through or by a civil action as provided for by law." ***Attachment 3.*** Mr. Mix also sent Commission staff several emails dated December 1, 7 and 9, respectively, which he requested to be forwarded to the Commission. ***Attachment 4.***

II. DISCUSSION

As described in greater detail in the preliminary staff report, Mr. Mix asserts that the four non-profit entities violated provisions of state law which generally prohibit the

use of public funds for personal or political purposes. Staff cited Government Code Sections 8314 and 54964, and Penal Code Section 424, as the statutes potentially implicated by his complaints. In its preliminary report, Commission staff cited provisions in written agreements between the City of Oakland and three of the respondent entities that appear to restrict use of "moneys paid" or "funds received" pursuant to those agreements for "political purposes." Commission staff reported that the Commission does not have the authority to determine matters of state law or to determine whether a contractual obligation has been violated. Commission staff recommended that the Commission refer to the Office of the City Attorney the issue of whether the non-profit entities breached their respective agreements with the City not to use contractual funds or moneys for political purposes, and to refer to the Fair Political Practices Commission the issue of whether the Chabot Space and Science Center Foundation or any other person violated provisions of the California Political Reform Act by making two contributions in excess of $100 by cashiers check.

In his complaints and communications, Mr. Mix requests that the Commission determine whether the four non-profit entities constitute public agencies and whether the moneys paid to or received by the entities constitute "public money" for purposes of the relevant statutes. The applicable law does not grant the Commission the authority to make those determinations, as shown below:

City Charter Section 202(a) provides:

> *"There is hereby established a Public Ethics Commission which shall be responsible for responding to issues with regard to compliance by the City of Oakland, its elected officials, officers, employees, boards and commissions with regard to compliance with* ***City regulations and policies*** *intended to assure fairness, openness, honesty and integrity in City government including, Oakland's Campaign Finance Reform Ordinance, conflict of interest code, code of ethics and any ordinance intended to supplement the Brown Act, and to make recommendations to the City Council on matters relating thereto, and it shall set City Councilmember compensation, as set forth herein."* (Emphasis added.)

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.)

There is nothing in the City Charter, the Commission's own enabling ordinance (O.M.C. Chapter 2.24) or any of the ordinances which the Commission is authorized to enforce that authorizes the Commission to determine alleged violations of the Government and Penal Code Sections cited or any contractual matter. Neither is Commission staff comfortable recommending that the Commission request the District Attorney to investigate and/or prosecute the non-profit entities based on Mr. Mix's

research and argument, particularly in the absence of the City Attorney's prior review of the contracts and any other research that office deems appropriate.

Thus Commission staff reiterates its previous recommendations to the Commission in connection with these complaints.

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.*