Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
January 4, 2009

In the Matter of)
) Complaint No. 09-14
)

John Klein filed Complaint No. 09-14 on November 13, 2009.

I. SUMMARY OF COMPLAINT

Mr. Klein filed Complaint No. 09-14 alleging that Commission Executive Director Dan Purnell failed to include, in a preliminary staff report, exhibits Mr. Klein provided to the Executive Director's Office in connection with Complaint No. 08-20. ***Attachment 1.***

II. FACTUAL SUMMARY

On December 11, 2009, Mr. Klein filed Complaint No. 08-20 alleging that local developers Carlos Plazola, Kathy Kuhner, Joe DeCredico and Jay Dodson violated the Lobbyist Registration Act ("LRA") by failing to register and disclose lobbying activities on behalf of the Oakland Builders' Alliance ("OBA"). The Commission considered a preliminary staff report in connection with Complaint 08-20 on May 4, 2009.

During the preparation of preliminary staff report, Mr. Klein submitted to Commission staff a five-page letter dated March 11, 2009. In it, Mr. Klein argued in support of his allegations and refuted assertions made by the complaint respondents. Mr. Klein's letter also included approximately 36 additional pages of attachments. These attachments generally consisted of 1) pages from Internal Revenue Service (IRS) manuals pertaining to non-profit corporations; 2) printed downloads from the websites of OBA, the Sierra Club, Friends of the Oakland Library and the various companies owned by, or associated with, the respondents; and 3) Secretary of State filings for each of the respondents' companies demonstrating the office or title each respondent held within his or her company. ***Attachment 2.***

Commission staff included a copy of Mr. Klein's March 11 letter as an attachment to the preliminary staff report. Commission staff did not include copies of the attachments to the March 11 letter based on the belief that 1) Mr. Klein generally described the contents of the attachments in the body of his letter, 2) there was no dispute regarding the corporate status of the respondents and/or their respective companies that the attachments purported to prove, and 3) some of the attachments appeared incidental or redundant to Mr. Klein's allegations or arguments.

At the Commission's May 4, 2009, hearing, Mr. Klein reiterated the allegations made in his complaint and the arguments contained in his March 11 letter. One of his points was that the Commission should consider whether the respondents were representing the interests of OBA or the interests of their respective companies. Following public comment and debate, the Commission voted not to proceed with an evidentiary hearing on Complaint No. 08-20, and instead directed staff to dismiss the complaint and prepare alternative policy proposals for amending Section 3.20.030(D) to effect both a "narrow" and "broad" definition of local governmental lobbyist.

Mr. Klein alleges that the Executive Director failed to 1) provide the attachments to the Commission, 2) post the attachments to the Commission's website, and 3) file the attachments with the Office of the City Clerk. He alleges the Executive Director failed to "properly account for, or provide the full Commission with, documents and evidence I submitted related to Complaint No. 08-20" and failed to "properly summarize or to present his conclusions regarding the exhibits attached to the March 11 letter in his report to the Commission."

Mr. Klein does not state in his complaint how the absence of the attachments could have affected the outcome of the Commission's decision.

III. APPLICABLE LAW

Section III of the Commission's General Complaint Procedures (GPCs) provides in relevant part:

> ***III. PRELIMINARY REVIEW OF COMPLAINTS.***
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> *A. The Executive Director shall process, review and make recommendations on all complaints expeditiously, and in any event no more than thirty (30) business days of receipt, unless additional time not to exceed fifteen (15) business days is provided by the Chairperson of the Commission ("Chair"). No further extensions shall be permitted except upon approval of the Commission as a whole.*
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> *B. After review by the City Attorney for form and legality, the Executive Director may recommend in writing, after an investigation, that:*
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> *(1) The complaint be dismissed for any or all of the following reasons:*
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> *(a) The Commission has no jurisdiction;*
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> *(b) The complaint fails to state a basis for relief;*
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> *(c) The complaint restates other complaints containing substantially similar or identical allegations which have already been determined and the evidence does not warrant reopening the previous case;*

(d) The allegations contained in the complaint are already under investigation by the Commission;

(e) The complaint should be referred to another governmental or law enforcement agency better suited to address the issue;

(f) The complaint is time-barred;

(g) The facts fail to support a finding that a violation occurred following an investigation described in subsection C herein; or

(h) The complaint has been resolved pursuant to the procedures set forth in Section IV.

(2) The complaint be referred to the Commission for hearing pursuant to Section VI below.

C. In order for the Executive Director to make his or her recommendation under Section III.B.(1)(g) above, the Executive Director shall first conduct an investigation. Such an investigation shall include, but not necessarily be limited to, an interview of the parties and any witnesses, and the review of documentary and other evidence. The Executive Director may consider statements including hearsay, declarations of investigators or others relating to the statements of witnesses, or the examination of physical evidence. When the investigation is concluded, the Executive Director shall include in his or her written recommendations a summary of evidence gathered and any conclusions. The written recommendation shall conclude whether to dismiss the complaint pursuant to Section III.B.(1)(g) or set the complaint for hearing pursuant to Section VI, below. The written recommendation shall generally not exceed ten (10) pages excluding attachments.

IV. DISCUSSION

Due to concerns about the propriety of Commission staff analyzing allegations filed against it, Commission staff respectfully declines to evaluate the merits of Mr. Klein's complaint or to provide the Commission with any recommendations as to the complaint's ultimate disposition. Should the Commission wish to have this analysis performed, the City Attorney's Office can inquire into the possible referral of this matter to another similar office, such as the Executive Director's Office of the San Francisco Public Ethics Commission, perform the analysis itself or refer the matter to another

appropriate person or agency.

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.*