Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
July 7, 2010

In the Matter of)
) Complaint No. 10-07
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Sanjiv Handa filed Complaint No. 10-07 on March 23, 2010, alleging that six individuals violated provisions of the Oakland Lobbyist Registration Act ("LRA") by failing to register as lobbyists and/or by failing to file quarterly disclosures regarding their respective efforts to influence local governmental decisions. ***Attachment 1.***

I. SUMMARY OF COMPLAINT

Mr. Handa alleges that the following individuals have not registered and/or not filed quarterly disclosures regarding their alleged lobbying activities on behalf of their respective "clients":

1. **Joseph Haraburda** on behalf of the Oakland Metropolitan Chamber of Commerce (Oakland Chamber).

2. **Scott Peterson** on behalf of the Oakland Chamber.

3. **Sharon Cornu** on behalf of the Alameda Labor Council (Labor Council).

4. **Barry Luboviski** on behalf of the Alameda County Building Trades Council (Building Trades Council).

5. **Victor Uno** on behalf of the International Brotherhood Of Electrical Workers (IBEW) Local 595.

6. **Phil Tagami** on behalf of "California Commercial Group" [actually "California Capital Group"] (CCG).

II. SCOPE OF ANALYSIS

In his complaint, Mr. Handa alleges that the above individuals meet the definition of a local governmental lobbyist under the PRA. For each individual, Mr. Handa alleges he or she communicated on behalf of his or her respective client to influence a variety of governmental actions, particularly (but not exclusively) City and Redevelopment Agency actions regarding commercial development at the Oakland Army Base. Because of the potentially large number of governmental actions all six persons may have sought to influence during the past two years, Commission staff analyzes in this report only

whether there is an issue regarding their respective status as lobbyists. Depending on the Commission's resolution of that issue, there may or may not be a registration and reporting obligation with which the "lobbyist" would be required to comply.

III. RELEVANT LAW

Under the provisions of LRA Section 3.20.030(D), a “local governmental lobbyist” means any individual who:

> *"1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or*
>
> *2) whose duties as a salaried employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee, for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency.*
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> *No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of 'local governmental lobbyist' shall be interpreted broadly."*

The LRA prohibits local governmental lobbyists from "engag[ing] in any activity on behalf of a client as a local governmental lobbyist unless such lobbyist is registered and has listed such client with the City Clerk." [LRA §3.20.120(A)] Once registered, lobbyists are required to file quarterly disclosures of their lobbying activities that include 1) the item of pending or proposed governmental action sought to be influenced, 2) the name of the City official, officer or designated employee with whom the lobbyist communicated, and 3) a description of the client's position with respect to the item. [LRA §3.20.110]

IV. ANALYSIS

A. Joseph Haraburda and Scott Peterson On Behalf Of The Oakland Chamber

The Oakland Chamber exists as a California non-profit corporation. According to its website, Mr. Haraburda holds the position of President and Chief Executive Officer (CEO). Mr. Peterson is described as the Oakland Chamber's "Director of Public Policy." Commission staff received a letter dated May 11, 2010, from R. Zachary Wasserman, Esq. stating his office has been retained to represent the Oakland Chamber, Mr. Haraburda and Mr. Peterson in connection with Mr. Handa's complaint. ***Attachment 2.***

The first inquiry is whether Mr. Haraburda and/or Mr. Peterson meet the definition of a "local governmental lobbyist" under Section 3.20.030(D). To do so, an individual 1) must be a "salaried employee, officer or director of any corporation, organization or association"; 2) his or her job duties must include communication with any public official, officer or designated employee for the

purpose of influencing any proposed or pending governmental action of the City; and 3) his or her activities are not limited to those described in Section 3.20.030(A).

With regard to the first two criteria, Mr. Wasserman does not dispute that his clients are "salaried employee(s), officer(s) or director(s)" of the Oakland Chamber. He also does not dispute that Mr. Haraburda and Mr. Peterson have, in the past, made communications with City officials for the purpose of influencing City actions. To illustrate the number and breadth of issues on which Mr. Haraburda and Mr. Peterson have addressed, the attached chart summarizes the appearances each have made at public meetings of the City Council and its subcommittees over the past two years. ***Attachment 3.***

It is the third criteria to which Mr. Wasserman takes issue. Current law ***excludes*** persons from the definition of lobbyist ". . .by reason of activities described in Section 3.20.030(A)." Those "activities" refer to who or what qualifies as a "client" of the lobbyist. Section 3.20.030(A) defines "client" as:

> *". . .the real party in interest for whose benefit the services of a local governmental lobbyist are actually performed. An individual member of an organization shall not be deemed to be a 'client' solely by reason of the fact that such member is individually represented by an employee or agent of the organization as a regular part of such employee's or agent's duties with the organization as long as such member does not pay an amount of money or other consideration in addition to the usual membership fees for such representation."*

Mr. Wasserman contends that Mr. Haraburda's and Mr. Peterson's activities "are on behalf of the members of the Chamber and not of any individual 'Client.'" Since no part of the dues or contributions made by members of the Chamber are made for "individual representation," he argues that "no employee of the Chamber is a Local Governmental Lobbyist." He contends that if Mr. Haraburda and Mr. Peterson were required to register under the Act, "then [they] would be required to list every member of the Chamber on [their] quarterly report," thus defeating any "reasonable intent of the Act."

Commission staff believes Sections 3.20.030(D) and (A) are subject to an alternative interpretation. The primary, relevant definition of local governmental lobbyist is an individual whose "duties as a salaried employee, officer or director ***of any corporation, organization or association***" include influencing City officials. Thus an argument can be made that it is the Oakland Chamber itself (as a corporate entity) that constitutes the "client" in this case. Support for this interpretation can be found in the January 29, 2010, letter to which Mr. Handa refers in his complaint, as well as an electronic version of a letter dated September 21, 2009, from Mr. Haraburda to City officials. ***Attachment 4.*** Both letters frequently refer to "the Chamber's position", the "Board of Directors" and "the Chamber and its members", implying that it is the Oakland Chamber, and not every one of its individual members, whose position is being represented.

The current exclusion for "activities described in Section 3.20.030(A)" arguably exists to avoid the problems that Mr. Wasserman describes -- that no person is a lobbyist on behalf of the individual members of an organization, nor must he or she list each individual member of the

organization as a "client", unless that individual member pays above and beyond the "usual membership fees" for such representation. Mr. Wasserman's interpretation would effectively prohibit any application of the LRA to the salaried representatives of organizations or associations that consist of members (such as unions, professional associations, public interest groups) because, under his reasoning, only members paying additionally for lobbyist representation can be a client and, if they do not, then there is no "client" and thus no "lobbyist." Commission staff therefore questions whether such a potentially narrow interpretation is correct.

B. Sharon Cornu On Behalf Of The Labor Council; Barry Luboviski On Behalf Of The Building Trades Council; Victor Uno On Behalf Of IBEW

The Labor Council exists as a labor association (a "union of unions") that collectively represents thousands of Bay Area workers. According to its posted mission statement, one of its stated goals is to "strengthen the voice of working families at all levels of government." ***Attachment 5.*** Until May 2010, Mr. Cornu served the Labor Council as its executive Secretary-Treasurer. She made numerous appearances before the City Council on a wide variety of issues (Attachment 2).

The Building Trades Council exists as a California non-profit corporation. According to its website and public tax filings, Mr. Luboviski served as its Secretary-Treasurer until his reported retirement in April 2010. Attachment 2 demonstrates the appearances Mr. Luboviski has made before the City Council. Mr. Handa submits in support of his allegation that Mr. Luboviski met the definition of a local governmental lobbyist a copy of a letter dated May 6, 2008, in support of the proposal by AMB/CCG for the commercial development of the Oakland Army Base. The letter was written by Mr. Luboviski "on behalf of the Building and Construction Trades Council." ***Attachment 6.***

IBEW is a labor union for which Victor Uno serves as business manager and financial secretary. Mr. Uno also as serves as a member of the Board of Port Commissioners, the governing entity for the Port of Oakland. Mr. Handa submits in support of his allegation that Mr. Uno met the definition of a local governmental lobbyist a copy of a letter dated May 5, 2008, from Mr. Uno expressing IBEW's support for the selection of AMB/CCG as developer for the Oakland Army Base. ***Attachment 7.*** He also submits a resume for Mr. Uno upon his nomination for a seat on the Port Board. In it, Mr. Uno states that as business manager for IBEW, he "build(s) relationships with political representatives and work(s) with the union's Executive Board and Officers to promote policies and goals for union organizing and representative duties." ***Attachment 8.***

Commission staff received a letter dated April 10, 2010, from William Sokol, Esq. stating that his office has been retained to represent Ms. Cornu, Mr. Luboviski and Mr. Uno in connection with Mr. Handa's complaint. ***Attachment 9.*** In his letter and in a telephone conversation with Commission staff, Mr. Sokol acknowledges that each individual worked as a "salaried employee" of their respective organizations and communicated with City officials to influence the decision on the selection of a master developer for the Oakland Army Base. Mr. Sokol presents three arguments why, in light of these facts, each individual does not meet the definition of a local governmental lobbyist or is otherwise exempted from registering.

The first argument is identical to the one previously discussed -- that the three individuals do not qualify as local governmental lobbyists because members of their respective

organizations do not pay any amounts other than their respective membership fees. As discussed above, this argument does not address the alternative interpretation that the "client" can be the organization itself, (i.e., the Labor Council, the Building Trades Council and/or IBEW), as the "real parties in interest" whose benefit their respective employees represented.

The second argument is that the three individuals are exempted from the LRA's registration and reporting requirements under Section 3.20.060(F), which provides:

> *"The provisions of this Act shall not apply. . .*
>
> *F. To designated representatives of a recognized employee organization whose activities are limited to communicating with city officials or their representatives regarding (1) wages, hours and other terms and conditions of employment pursuant to the procedures set forth in Government Code Section 3500-3510, or (2) the administration, implementation or interpretation of an existing employment agreement."*

Mr. Sokol asserts that the three individuals are paid a salary to represent their respective members with respect to "wages, hours and other terms and conditions of employment" and thus are exempt pursuant to Section 3.12.060(F). He asserts that:

> "each of these three organizations is a recognized employee organization (Local 595) and/or is made up of recognized employee organizations (the Building Trades Council and the Labor Council), and that the exclusive interest of their designated representatives in meeting with and petitioning their elected officials, is to talk about and protect the wages, hours and terms and conditions of employment of the employees they represent, in part by encouraging the City to deal with employers who are known to meet and bargain with recognized employee organizations pursuant to Government Code Section 3500 et seq. . .[T]his Section 3.20.060(F) is applicable to the efforts of these Union Representatives to meet and confer with City officials about securing an agreement with a developer at the Oakland Army Base who is known to meet and confer with recognized employee organizations concerning wages, hours, and other terms and conditions of employment."

Commission staff has a difficult time accepting this argument because Government Code Section 3500 *et seq* (aka the "Myers-Milias-Brown Act") deals exclusively with employment relationships between public agencies and their public employees. Section 3501(b) defines a "recognized employee organization" as "an employee organization which has been formally acknowledged by the public agency as an employee organization ***that represents employees of the public agency***." [Emphasis added.]

The City of Oakland has recognized a number of employee organizations that represent City workers in labor negotiations but the Labor Council, the Building Trades Council and IBEW are not among them. Commission staff also cannot appreciate how communications made in support of the selection of a commercial real estate developer relates to the "wages, hours and other terms and conditions of employment" of ***City*** employees. Furthermore, Section 3504 expressly places outside the scope of the MMBA "the merits, necessity or organization of any service or

activity provided by law. . ." This exception was established to prevent the scope of regulated representation from "[expanding] beyond reasonable boundaries to deprive an employer of his legitimate management prerogatives." [Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616] Thus it is arguable that Section 3.20.060(F) applies only to exempt individuals communicating to City officials regarding the wages, hours and other terms and conditions of employment of City employees, and not the employees of a private developer or contractor.

The third argument is that state law preempts local regulation in the area of public employer-employee relations. When generally a true statement of law, there is nothing in the communications pertaining to the Oakland Army Base developer that refers to City employees. With respect to Mr. Sokol's contention that the LRA may violate First Amendment rights, the Office of the City Attorney has previously advised the Commission that case law has generally upheld reasonable registration and reporting requirements for compensated lobbyists.

Mr. Sokol's final argument seeks to exempt any registration or reporting obligation for Mr. Uno on grounds that as a member of the Board of Port Commissioners "he speaks with and writes to City Council members about issues which directly affect the Port." LRA Section 3.20.060(A) provides:

> *"The provisions of this Act shall not apply. . .[t]o a public official acting in his or her official capacity."*

There is no indication that Mr. Uno was acting in his official capacity as a Port Commissioner when he wrote his letter of May 5, 2008, on behalf of IBEW and on IBEW letterhead.

C. Phil Tagami On Behalf Of CCG

According to Mr. Tagami, CCG exists as a general partnership in which he and his co-partner, Len Epstein, own and control the assets and income. Neither Mr. Tagami nor Mr. Epstein receive a salary for their activities but instead receive periodic distributions ("draws") from the income. Mr. Handa alleges that Mr. Tagami failed to register as a local governmental lobbyist in connection with CCG's application to be named as the "master developer" of the Oakland Army Base and in connection with restoration efforts at the Fox Theatre. With respect to the Oakland Army Base, CCG made its proposal in concert with AMB, a publicly traded real estate investment trust. The CCG/AMB "team" was ultimately granted the right to negotiate exclusively with the City to develop the Army Base property. According to City redevelopment staff, CCG and AMB will likely form a new legal entity to execute the agreement but, at the time of this writing, no entity has been established.

In June, 2009, Mr. Tagami contacted Commission staff to inquire, based on the facts stated above, whether he should register as a local governmental lobbyist on behalf of CCG's efforts to secure the Army Base agreement. Commission staff reviewed the definition of "local governmental lobbyist" with Mr. Tagami and told him he must register if he served as a "salaried employee, officer or director" of CCG and none of the express exemptions applied. Mr. Tagami told Commission staff that he did not believe the definition applied to him but said he would register anyway due to the high level of public attention associated with the project.

On June 16, 2009, Mr. Tagami filed an initial registration listing: "self, dba California Capital Group, a California General Partnership" and "AMB-CCG JV (TBF -- this entity has not been formed)" as his "client". ***Attachment 10.*** Mr. Tagami subsequently filed two quarterly reports for the same period (10-1-09 through 12-31-09) in which he reported no lobbying activity. Commission staff has advised Mr. Tagami on several occasions to either file his annual registration and quarterly reports or to file a Notice of Termination of his status as a local governmental lobbyist. As of the date of this writing, Mr. Tagami has not complied with either request.

The main question presented is whether Mr. Tagami is a "salaried employee, officer or director" of CCG. In a similar analysis involving a limited liability company, (Complaint No. 09-05), Commission staff concluded that a "member" of a limited liability company who received periodic distributions from LLC income was not a "salaried employee, officer or director" for purposes of the LRA. Here, Mr. Tagami purports to be a general "partner" of his enterprise who does not receive a salary. A general partnership does not have "officers" or "directors" comparable to a corporation whose basic duties and responsibilities are specified by law. The "partners" in a partnership agree among themselves how to allocate the various duties of management and control. On this basis, Commission staff concludes that as an non-salaried "partner" of CCG, Mr. Tagami does not meet the test of a local governmental lobbyist with respect to influencing any governmental action of the City on behalf of CCG.[1]

V. STAFF RECOMMENDATION

Commission staff concludes there is an issue in law and fact as to whether Mr. Haraburda, Mr. Peterson, Ms. Cornu, Mr. Luboviski and Mr. Uno meet the definition of a "local governmental lobbyist" pursuant to Section 3.20.030(D) in connection with communications made on behalf of their respective employers and that none of the express exceptions contained in Section 3.20.060 apply.

If the Commission agrees with this assessment, Commission staff recommends that the Commission direct staff to attempt a settlement or stipulated judgment with the respondents subject to approval by the Commission. In the event a settlement or stipulated judgment is not possible, Commission staff will obtain any additional information that will be submitted in the form of a supplemental staff report. At that time, the Commission can decide whether to schedule an evidentiary hearing in this matter.

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[1] *Commission staff received a letter dated April 29, 2010, from Mr. Wasserman representing Mr. Tagami in this complaint.* ***Attachment 11.*** *In it, Mr. Wasserman argues that Mr. Tagami does not meet the definition of "local governmental lobbyist" because he was representing "his own interests as an owner and manager of the enterprises interested in and which have contracted with the City regarding the Fox theatre and Oakland Army Base." In effect, Mr. Wasserman argues that an individual cannot be a lobbyist merely for representing one's own interests. While Commission staff generally agrees with this principle and has proposed language to amend the LRA to that effect, Commission staff does not reach that issue here.*

Commission staff further recommends that allegations as to Mr. Tagami be dismissed on ground that Mr. Tagami is not a "salaried employee, officer or director" of CCG.

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.*