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. 09-16
) **SUPPLEMENTAL**

Marleen Sacks filed Complaint No. 09-16 on November 18, 2009. The Commission considered a preliminary staff report at its meeting of March 1, 2010.

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.***

The Commission considered a preliminary staff report at its meeting of March 1, 2010. ***Attachment 2.*** Commission staff concluded 1) members of the Measure Y Committee were not required to file Form 700s because the City Council had never included members of the Committee into the City's conflict of interest code prior to January 2010; and 2) two Measure Y Committee members who work for governmental agencies receiving Measure Y funds (the Oakland Unified School District and the County of Alameda, respectively) did not have a financial interest in decisions affecting their respective agencies because income from a local governmental agency is not considered a discloseable or disqualifying economic interest.

The Commission directed staff to prepare a supplemental report addressing 1) a more detailed history of recommendations made by the Measure Y Committee to determine whether it possesses "decision-making authority" so that its members should have been required to file statements of economic interests prior to January 2010; 2) the criteria the City uses to include advisory boards and commissions in the City's conflict of interest code; and 3) whether members of the Measure Y Committee who work for entities that receive Measure Y funds are precluded from participating in decisions under Government Code Section 1090.[1]

II. DID THE MEASURE Y COMMITTEE POSSESS "DECISION-MAKING AUTHORITY" THAT SHOULD HAVE REQUIRED ITS INCLUSION IN THE CITY'S CONFLICT OF INTEREST CODE PRIOR TO JANUARY 2010?

[1] *Unless otherwise specified, all statutory references pertain to the California Government Code.*

As previously stated in the March 1, 2010, preliminary staff report, members of advisory committees, boards or commissions that possess "decision-making authority" are considered "public officials" for purposes of California's Political Reform Act (CPRA). The CPRA regulates in great detail whether and to what extent such public officials are required to 1) publicly disclose their financial interests, and 2) avoid making governmental decisions affecting those interests. As reported, an advisory board or commission possesses "decision-making authority" whenever:

> *"(i) It may make a final governmental decision;*
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> *(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*
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> *(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."* [2 Cal. Code Regs. 18701(a)(1)]

Commission staff previously reported that the Measure Y Committee's authorizing legislation limits its authority 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. . ." Commission staff also reported that Jeff Baker, staff director for the Measure Y Committee, stated that the Committee does not make decisions where or how Measure Y funds are spent. He told Commission staff that the Committee has in the past made only a few recommendations to other City agencies and, even then, the Committee's recommendations have not always been followed.

At the Commission's request, staff reviewed past Measure Y Committee actions to determine whether the Committee had made "substantive" recommendations that, over an "extended" period of time, had been "regularly approved without significant amendment or modification by another public official or governmental agency."

As the attached chart demonstrates, there is a very limited record of the Measure Y Committee making "substantive recommendations" to any public official or governmental agency over its four and a half-year history. ***Attachment 3.*** For those substantive recommendations the Committee did make, there is even less of a record that such recommendations were "regularly approved without significant amendment or modification." The Committee's most "substantive" recommendations -- primarily its opposition to proposed uses of Measure Y funds -- have resulted in contrary final decisions.

Commission staff previously reported that there is no formula that determines how many recommendations over a particular period of time will convert an advisory body into a "decisionmaking body" for purposes of triggering financial conflict of interest laws. The argument whether the Measure Y Committee should have been included in the City's financial

conflict of interest code is, at this point, also moot because of its inclusion last January and the lack of any administrative remedy for the failure to do so. However, based on the review of the Committee's past actions, there appears to be little information to support a conclusion that the Measure Y Committee met the criteria as a "decision-making body" that would have warranted earlier inclusion into the City's conflict of interest code.

III. CRITERIA USED TO INCLUDE ADVISORY BOARDS AND COMMISSIONS IN THE CITY'S CONFLICT OF INTEREST CODE

Commission staff previously reported that the Measure Y Committee's enabling legislation expressly limits the Measure Y committee's authority 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. . ." Mark Morodomi, the Deputy City Attorney who performs the periodic review of the City's conflict of interest code, told Commission staff his office recommended inclusion of the Measure Y Committee into the City's conflict of interest code last January to promote greater governmental transparency.

In further conversation with Mr. Morodomi, he said that the court's decision in August, 2009, ordering the City to reimburse the Measure Y fund for recruitment and training expenses was a significant factor in his office's recommendation to include the Measure Y Committee in the City's conflict of interest code. He stated that the additional scrutiny placed on the City's use of Measure Y funds, combined with any future recommendations the Committee might chose to make with respect to those funds, influenced his office to recommend the inclusion of the Measure Y Committee in the City's conflict of interest code.

Regarding the criteria his office uses to determine which advisory boards and commissions are recommended for inclusion, Mr. Morodomi said a primary factor is whether an appointed member makes any decision "that could conceivably have an effect on his or her own pocketbook." He said his analysis includes whether an advisory board has the power to award or spend City money, to award a contract or grant, to employ or discipline a City employee, or to exert a significant influence in such decisions. He said the recommendation is also "balanced carefully by the possible invasion of privacy that occurs when an individual falls under the conflict of interest code's disclosure provisions." Mr. Morodomi believes that any decision to include an advisory body in the City's conflict of interest code is best made on a case-by-case assessment rather than a pre-determined formula.

IV. ARE SOME MEMBERS OF THE MEASURE Y COMMITTEE PRECLUDED FROM PARTICIPATING IN DECISIONS PERTAINING TO MEASURE Y FUNDING IF THEIR EMPLOYERS RECEIVE MEASURE Y FUNDS?

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

Probation Department. She also alleged that a member of the Measure Y Committee may be an employee of a non-profit entity that receives Measure Y funding.

As reported in the preliminary staff report, members of the Measure Y Committee did not have to file their Statements of Economic Interests (Form 700) until the Committee was included in the City's conflict of interest code last January. Thus none of the provisions of the CPRA's financial conflict of interests code applied until the City Council acted to include the Measure Y Committee within the City's conflict of interest code.

At Ms. Sacks' request and upon the Commission's direction, Commission staff has reviewed whether these members may have been precluded from taking part in any decision or action under Government Code Section 1090.[2] The Commission is without authority to determine violations under Section 1090 but may refer information to "another governmental or law enforcement agency better suited to address the issue." [General Complaint Procedures Section III(B)(1)(e)]

The relevant provisions of Section 1090 provides that City officers or employees "shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Participation by an officer or an employee in the process by which a prohibited contract is made can constitute a violation of Section 1090. Such participation can include preliminary discussions, negotiations, compromises, reasoning, planning, and solicitation of bids, as well as voting on the contract itself. Court decisions have extended the application of Section 1090 in some cases to members of advisory boards and commissions. [See generally Schaefer v. Berinstein (1956) 140 CA2d 278.]

The "1090 prohibition" thus focuses on whether a public official or employee has a financial interest in a contract which he or she has participated in making. That is why this body of law is often referred to as the prohibition against "self dealing" in contracts. Related statutes have furthered narrowed and divided the range of financial interests into so-called "remote" interests and "non-interests" by members of public, multi-member bodies. Of particular relevance to Ms. Sacks' allegations are the following "remote" interests and "non-interests":

1. An officer or an employee of a non-profit corporation has a remote interest in the contracts of that corporation. The California Attorney General advises that such a contract can include governmental "grants" to the non-profit corporation. [Section 1091(b)(1); 85 Ops.Cal.Atty.Gen. 176]

2. An officer or employee who receives a salary, per diem or reimbursement from a governmental agency shall be deemed ***not*** to have an interest in

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[2] *As described more fully below, many present members of the Measure Y Committee have still not filed a Statement Of Economic Interests (Form 700) in connection with their service on the Committee. Thus it was impossible to rule out conclusively whether any other member may have had a potential financial interest in any Committee decision. Where possible, Commission staff reviewed the resumes that accompanied their appointment and did not discover any employment or position that would, on its face, trigger an 1090 analysis. See Section IV(E) below for additional comment on this issue.*

a contract unless the contract directly involves the department of the governmental entity that employs the officer or employee, as long as the interest is disclosed to the body or board at the time of consideration and the interest is noted in the body or board's official records. [Section 1091.5(a)(9)]

If a "remote" interest is present, the contract or grant may be made if the officer or employee: 1) discloses his or her interest to the public agency; the interest is noted in the body's official record; and 3) the office or employee completely abstains from any participation in the making of the contract. If a "non-interest" exists, the contract may be made without the abstention and without the need for disclosure unless otherwise required.

One of the purposes of Measure Y is to provide funding for violence prevention programs and services. These services are administered by and through the City's Department of Human Services (DHS). Every year, DHS prepares a report and recommendations that includes a request for City Council authorization for the City Administrator to enter into various grant and service agreements with community program and service providers. DHS has historically submitted a copy of this report and recommendation each year to the Measure Y Committee consistent with the Committee's authority to "evaluate, inquire and review" Measure Y programs.

As the attached chart demonstrates, DHS has submitted a copy of the Measure Y report and recommendations to the Measure Y Committee at the Committee's meetings of June 21, 2006; June 6, 2007; July 21, 2008 (no quorum); June 15, 2009; and May 17, 2010. The Committee's disposition of the report have ranged from voting to "accept" the report (June 6, 2007); taking no action on the report (June 21, 2006; July 21, 2008 and June 15, 2009); and "tabling" consideration of the report (May 17, 2010). The question presented is whether any of the alleged Measure Y Committee members took part in "making" a Measure Y "contract" by virtue of the Committee's consideration of the DHS' annual report and recommendations.

A. Donald Blevins/Chief Probation Officer For Alameda County

Measure Y Committee meeting minutes indicate that Mr. Blevins was a member of the Committee since its inception in October, 2005. He resigned his position in February, 2010. The minutes also indicate that Mr. Blevins attended the meetings of June 6, 2007, July 21, 2008, and June 15, 2009, at which the Committee considered DHS' annual report and recommendations. In each of the annual reports, Measure Y funding was proposed and ultimately approved for Alameda County's Health Services Agency, a separate agency from the county's probation department which Mr. Blevins headed. As an officer/employee of Alameda County, Mr. Blevins would have had a "non-interest" in any contract "made" by the Measure Y Committee provided he stated the nature of his interest on the record and abstained from participating. There is nothing the Committee's minutes indicating that such a disclosure or abstention ever occurred.

B. Qa'id Aqeel/"Safe Passages" Director For Oakland Unified School District

Measure Y Committee meeting minutes demonstrate that Mr. Aqeel has been a member of the Committee since November 2009 and was present at the meeting of May 17, 2010. Mr. Aqeel works for OUSD as an on-site counselor who conducts a program funded by Measure Y, the "Safe Passages" program. Mr. Aqeel told Commission staff that his position is funded directly from the general budget of the school where he is currently assigned and not from any Measure Y-funded project account. As an employee of OUSD, Mr. Aqeel, like Mr. Blevins, would have had a "non-interest" in any contract "made" by the Measure Y Committee provided he stated the nature of his interest on the record and abstained from participating. There is also nothing the Committee's minutes indicating that he did so.

C. Michael Brown, Jr./Part-time Employee At Attitudinal Healing Connection

Mr. Brown is a high school student who was appointed to the Measure Y Committee in March 2009. He told Commission staff that until recently he worked as a part-time drumming instructor and office assistant at Attitudinal Healing Associates (AHA), a non-profit corporation. AHA provides and sponsors programs that address "the educational, emotional and social needs of individuals, groups, and communities," according to its website. Since 2006, AHA has served as the fiscal agent for a program known as "Restorative Justice for Oakland Youth" (RJOY). This program trains people who deal with youth manifesting chronic truancy and violence. According to Sara Bedford, DHS manager of policy and planning, AHA stopped serving as the fiscal agent for RJOY programming in 2009.

As a part-time employee of a non-profit corporation, Mr. Brown would have had a "remote" interest in any contract made with AHA, requiring both a disclosure of his interest and an abstention from any participation. However a review of the Committee's records indicate that Mr. Brown was absent during the meeting of June 15, 2009, at which the annual report and recommendation involving AHA was considered. The report and recommendation considered at the Committee's May 17, 2010, meeting (which Mr. Brown attended) did not contain any proposal or reference involving AHA.

D. Did The Measure Y Committee "Make" A Contract/Grant With Any Recipient?

The above facts demonstrate that Mr. Blevins and Mr. Aqeel were officers or employees of a governmental entity that received Measure Y funds. However, for the prohibitions of Section 1090 to apply, the members of the Measure Y Committee must have participated in the "making" of the grant or contract. What activities constitute the "making" of a contract regulated under Section 1090 is not specified by statute and has been determined by case law and opinion over the years. In People v. Sobel (1974) 40 Cal.App. 3d 1046, 1052, the court held that a public official or employee can violate Section 1090 "if it is established that he had the opportunity, and did, influence execution directly or indirectly to promote his personal interests." In Millbrae Association for Residential Survival v. City of Millbrae (1968) 262 Cal.App.2d 222, 237, the court stated that the "making" of a contract also includes such

activities as "preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids."

The question presented here is whether the consideration of DHS' proposed annual report and recommendation by the Measure Y Committee can be construed as "making" a contract to justify a referral to a "governmental or law enforcement agency." Section 1090 provides for criminal prosecution for willful violations, forfeiture of office, and the voiding of any improperly made contract. While courts have consistently upheld a broad interpretation of what it means to "make" a contract, there still must exist some activity by which the Measure Y Committee had to influence, directly or indirectly, the making of the annual grant agreements. With respect to its legal authority, Commission staff notes a written opinion from the City Attorney prepared in January 2008 addressing the Committee's authority:

> *". . .the Oversight Committee has the power to 'review the annual audit, evaluate, inquire and review. . .' The Committee has the authority, therefore, to conduct evaluations, inquiries and reviews of the Measure Y programs. The Committee also can make recommendations to the Mayor and City Council for new 'regulations, resolutions, ordinances. . .' The Oversight Committee may advise the Council of its evaluations and assessments, and it may make recommendations to the Mayor and the Council. But the Oversight Committee's power is limited to apprising the Council and Mayor of its concern, findings and making recommendations regarding the administration of the programs and other matters based on its review, evaluations and audits.*
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> *"The language of Measure Y imposes no requirement that any proposal that involves Measure Y money be reviewed or approved by the Oversight Committee. However the Oversight Committee has the option to place on its agenda discussion and "review" of any proposal. Under Measure Y, such review is not a precondition for any action by any other entity. Measure Y does not give the Oversight Committee the authority to enter into contracts, draft contracts, allocate money, or direct the assignment of police officers. The City Administrator and City Council maintain their powers under the City Charter and City ordinances to make contracts and allocate money under established City procedures."* ***Attachment 4.***

Even if the Measure Y Committee is without the legal authority to make a Measure Y contract, there was also no information that any of the above members individually, or the Measure Y Committee collectively, took any part in the process to nominate, review, select or approve Measure Y funds for the County of Alameda or the OUSD. Mr. Blevins, Mr. Aqeel and Mr. Brown all deny they took any action whatsoever to influence proposed grant agreements to their respective employers. An argument could be made that the mere consideration of DHS' proposed report and recommendations constitutes a form of indirect involvement in the overall process by which the grant agreements were approved. However case law and commentary suggest that something more is necessary than the Committee's passive receipt of a staff presentation. As the Sobel court ruled, there must be an opportunity and action to influence, directly or indirectly, the execution of a contract that promotes a

personal interest. Clearly a stronger case could be made if the Committee was asked for or gave a recommendation on the proposed grants to Alameda County or OUSD, but there is nothing to demonstrate that it did. Thus based on the available law and facts, Commission staff questions whether a referral to any governmental or law enforcement agency by the Commission is warranted at this time.

E. Failure To File Required Statements Of Economic Interests

Of the 12 people who were members of the Measure Y Committee at the time the City Council required their compliance with the CPRA or who were appointed since that time, only ***four*** have filed a required Statement of Economic Interests. Committee staff director Jeff Baker told Commission staff that Measure Y Committee members have been advised to file the statement. Diedre Scott of the City Clerk's Office told Commission staff that warning letters are being prepared advising City employees as well as City board and commission members of their obligation to file if they have not already done so. The CPRA provides late penalties of up to $100 as well as further administrative sanctions for those who fail to timely file.

V. STAFF RECOMMENDATION

Based on the above, Commission staff recommends:

1) The Commission direct staff to send a letter to the Office of the City Clerk expressing its concern over the substantial lack of compliance by members of the Measure Y committee to file required Statements of Economic Interests and to request the City Clerk to provide the Commission with a status report on Form 700 compliance at the Commission's September and/or October regular meetings; and

2) The Commission postpone any final decision on whether to refer allegations pertaining to financial conflict of interest violations pending the receipt of outstanding Form 700 disclosures and any additional facts, comment or legal justification as to why any Commission referral is necessary; and,

3) The Commission request the Office of the City Attorney to provide conflict of interest training to the Measure Y Committee at its earliest opportunity.

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.*