Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
January 5, 2009

In the Matter of)
) Complaint No. 08-10
)

John Klein filed Complaint No. 08-10 on October 22, 2008.

I. SUMMARY OF COMPLAINT

John Klein filed Complaint No. 08-10 alleging that various City offices had not responded to his written requests for copies of public records in violation of the Public Records Act and the Oakland Sunshine Ordinance. ***Attachment 1.***

II. FACTUAL SUMMARY

This complaint arises from three separate requests for records Mr. Klein made in September, 2008:

1) An email dated September 13, 2008, requesting the Office of the City Clerk to provide records of "all communications with the Mayor's Office regarding the nomination of Ada Chan" to the City Planning Commission during the period January 1, 2008, to the present. ***Attachment 2A***

2) An email dated September 15, 2008, requesting the Office of the City Clerk to provide records from the Offices of City Councilmembers Ignacio De La Fuente, Jane Brunner, Henry Chang and Larry Reid pertaining to a proposal for so-called "entitlement extensions" during the period January 1, 2008, to the present.[1] ***Attachment 2B***

3) An email dated September 23, 2008, requesting the Office of the City Clerk to provide records of "all communications to or from all City Councilmembers regarding the nomination of Ada Chan as a commissioner on the Oakland Planning Commission." ***Attachment 2C***

Ms. Simmons forwarded the email requests to representatives of the Office of the Mayor, Office of the City Attorney, and various offices of the City Council. According to

[1] The proposal for "entitlement extensions" would grant a one-year extension for all planning approvals that are due to expire before January 1, 2010.

Michelle Abney, Open Government Coordinator for the Office of the City Attorney, requests for records of City Councilmembers are coordinated through her office.

On September 26, 2008, Mr. Klein sent an email to Ms. Simmons inquiring about the status of his record requests. Ms. Simmons responded the same day to advise him that his initial request was forwarded to members of the City Council and was still in the process of being handled. Mr. Klein filed his complaint more than three weeks later alleging that he had not received any records pursuant to his requests.

Commission staff contacted Ms. Abney shortly after receipt of the complaint. She said she was still coordinating a response from various City Council offices. She said some records had already been produced from some of the City Council members while others were still outstanding. Commission staff contacted Mr. Klein by telephone in mid-November who confirmed the receipt of some of the requested records, noting in particular that he had not received a response from the offices of City Councilmembers Quan, Reid and Brooks. Based on assurances from Ms. Abney and the fact that records were being produced, he agreed to wait a while longer before seeking Commission assistance in demanding a response.

On December 10, 2008, Ms. Abney was able to forward the final, outstanding records to Mr. Klein. Apparently some of the records were mis-handled in the City's interoffice mail but were ultimately recovered and provided to Mr. Klein. Other email records were apparently deleted upon receipt and were unable to be recovered. Mr. Klein notified Commission staff on December 12, 2008, that the City had made its final response and that his complaint could be closed.

III. ANALYSIS

The Oakland Sunshine Ordinance provides that the release of public records by any local body, agency or department of the City shall be governed by the California Public Records Act unless the ordinance provides otherwise. [O.M.C. §2.20.190] The Public Records Act provides that members of the public shall have the right to inspect and obtain copies of public records. [Government Code Section 5263] A public record includes any writing "containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." [Government Code Section 6252(d)] E-mails are expressly defined as a "writing" under the Public Records Act. [Government Code Section 6252(g)] Upon any request for public records, a local agency shall make the records available "promptly," subject to a number of legal exemptions that justify withholding the records from public disclosure. [Government Code Section 6257]

While Mr. Klein ultimately received the existing records he requested, it is not clear that all the records were produced "promptly" as the law requires. Part of the problem appears to be the lack of record retention procedures for elected officials, particularly regarding emails. Some Councilmembers reportedly leave them in their computer's "inbox"; others delete them after various periods of time. Once deleted, the

City has only a limited capacity to retrieve them. This situation is currently being addressed by the City Clerk's Office which is currently developing a Citywide records retention program. A draft proposal is expected by April, 2009; the Commission will review and conduct public hearings on the proposal at that time.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 08-10 at Mr. Klein's request.

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.*

Attachment E-1