Approved as to Form and Legality**

_____
City Attorney

City of Oakland
Public Ethics Commission
April 6, 2009

In the Matter of)
) Complaint No. 08-17
)

David Mix filed Complaint No. 08-17 on November 6, 2008.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 08-17 alleging that the City Councilmembers Brunner, Kernighan, Quan, De La Fuente, Brooks, Reid and Chang failed to respond to a public records request made in July, 2008. ***Attachment 1.***

II. BACKGROUND

Oakland's Landscaping and Lighting Assessment District (LLAD) was established in 1989 to help pay for street lighting and maintenance for City parks, fields, street medians and trees. According to City staff reports the current assessment has not kept up with increasing development and service levels. Early in 2008, the City Council considered a proposal to ask certain Oakland property owners to increase the assessment. The proposed assessment was put to certain Oakland property owners in April, 2008. In June, 2008, City staff reported a weighted vote tally of 53 percent in favor and 47 percent opposed to the proposed assessment increase. Later in 2008, the City Council rescinded its action to approve the vote based in part upon an intervening California Supreme Court ruling that invalidated a similar assessment process in Santa Clara County.

III. FACTUAL SUMMARY

On July 29, 2008, Mr. Mix sent an email to all eight City Councilmembers requesting copies of the following records:

> *". . .any and all correspondence, written, e-mails, phone calls, messages, etc.,* ***regarding the recent LLAD election and the proposed increase,*** *that you or members of your staff had or may have had with individual members of the public, city staff, city officials, other city employees, news groups, individual news reporters, etc.* (Emphasis in original.)
>
> *This request is to also encompass all utility companies, PG&E, EBMUD, etc. all public properties, all business entities, Brandywine Realty Trust Group, etc.,*

foundations, non-profit groups, hospitals, churches, developers etc., but not limited thereto.

Please provide the above-requested information and records for the period commencing with June 1, 2007, of last year, to the present (July 29, 2008). ***Attachment 2.***

On August 29, 2008, Mr. Mix reported to Open Government Coordinator Michelle Abney that he had only received responses from Councilmembers Quan and Nadel. Ms. Abney advised him that City Councilmember Chang reported that he did not have any records responsive to his request. ***Attachment 3.***

On September 18, 2008, Mr. Mix sent another email to all City Council offices renewing his original request and stating that he had still not received records from Councilmembers Reid, Brunner, Brooks or Chang. He also stated that he believed that "a great deal more exists which has not been made available by your office as was requested." ***Attachment 4.*** Of the records received from Councilmembers De La Fuente, Kernighan, Nadel and Quan, Mr. Mix acknowledges receiving approximately three dozen records from Councilmember Kernighan and approximately 95 pages from Councilmember De La Fuente.

At the time Mr. Mix filed this complaint, he alleges he had still not received any response from Councilmembers Brunner, Brooks and Reid. Commission staff contacted the three City Councilmembers to follow-up Mr. Mix's original request. Councilmember Brooks told Commission staff that she thought she sent records to the City Attorney's Office as her response to Mr. Mix, but Ms. Abney has no record or recollection that she did. Councilmember Reid told Commission staff that he searched his emails and deleted email folders and found nothing responsive to the request. Mr. Reid also denies that he met or spoke with anyone as it related to the LLAD proposal. Councilmember Brunner told Commission staff that she recalled assembling her office records for Mr. Mix and was surprised that the City Attorney's Office had not produced them. Ms. Abney told Commission staff that there was no record of receiving anything from Councilmember Brunner's office. In early March, 2009, Ms. Brunner produced the records to the City Attorney's Office, which then forwarded approximately 30 pages of records to Mr. Mix.

IV. 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]

With the exception of Councilmembers Quan, Nadel and Chang, five of the eight City Council offices had not responded to Mr. Mix's record request within one month of his sending it. At the time this complaint was filed, three offices still had not responded although there was apparently some confusion over whether the records were supplied to the City Attorney's Office or not. As stated before in Mr. Mix's other complaints, it is not possible for Commission staff to determine or evaluate Mr. Mix's claim whether in fact the City Attorney's Office properly screened for attorney-client privilege, or whether the City Council offices fully complied with the original request.

V. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 08-17 on grounds that there is no information to support a conclusion that members of the City Council possesses any further non-privileged records responsive to Mr. Mix's request. The Commission may wish to direct staff to prepare and deliver a letter, together with the Office of the City Attorney, reminding City Councilmembers of the need to respond promptly to public records requests.

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.*