Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
April 6, 2009

In the Matter of)
) Complaint No. 08-18
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David Mix filed Complaint No. 08-18 on November 6, 2008.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 08-18 alleging that the Public Works Agency ("PWA") failed to produce records he requested pertaining to the Landscaping and Lighting Assessment District ("LLAD"). ***Attachment 1.***

[NOTE: At its special meeting of February 9, 2009, the Commission directed staff to re-agendize Complaint No. 08-16, which also deals with a public records request by Mr. Mix to the PWA. A copy of the staff report for Complaint No. 08-16 is enclosed. The Commission expressed its desire to consider both complaints concurrently.]

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 Later in 2008, the City Council rescinded its action to approve the vote based in part upon an intervening California Supreme Court ruling that invalidated a similar assessment process in Santa Clara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 August 20, 2008, Mr. Mix submitted a request for public records to Raul Godinez, director of the PWA. The request set forth a demand to produce copies of records contained in thirteen (13) separate categories. ***Attachment 2.*** According to Jocelyn Combs, a special assistant in the PWA who provided primary staff support for the LLAD proposal, everyone who had worked on the LLAD proposal within the PWA was notified and told to forward any responsive documents to the City Attorney's Office for review and coordination. She said PWA

assistant director Brooke Levin and PWA director Raul Godinez were actively involved in the search for records. Ms. Combs told Commission staff that she reviewed both her paper and electronic files to assemble a large number of documents within weeks of Mr. Mix's request. She said she spent at least "2 to 3 days" reviewing and assembling the files she submitted to the Office of the City Attorney. Brooke Levin said she also spent a considerable number of hours gathering records. Mr. Godinez said he personally reviewed Mr. Mix's requests and directed his executive assistant to forward his electronic and written records to the City Attorney's Office. Deputy City Attorney Mark Morodomi and Howard Starks, a paralegal working under Mr. Morodomi's supervision, reviewed the submitted material and ultimately made between 700 and 800 separate pages of documents available to Mr. Mix.[1]

The following table summarizes the specific original request Mr. Mix made, his particular objection to what the City actually provided or failed to provide, and City staff's response to the objection or explanation for what was provided.

Original Request	Mr. Mix's Objection To City's Production	Specific Response To Objection
No. 2: "All correspondence (letters, e-mails, faxes, memos, etc.) between Francisco and Associates and the City of Oakland (its Officers, Council members, and any other agent or employees thereof) pertaining to the 2008/09 LLAD."	There are "gaps" in communications between Francisco and the City.	All correspondence pertaining to the LLAD was collected and forwarded to the Office of the City Attorney. In addition, Mr. Mix made a concurrent demand for LLAD-related correspondence directly to City Councilmembers and to the Mayor's Office. [2]
No. 3: "All correspondence (letters, e-mails, faxes, memos, etc.) between the City of Oakland and any third party whereby a copy was directed to Francisco and Associates. Or conversely, where a correspondence was directed to a third party by Francisco and a copy was directed to the City of Oakland."	No correspondence under this category was provided.	Correspondence was not organized in the manner Mr. Mix describes. As stated above, copies of all correspondence was collected and forwarded to the Office of the City Attorney for review.

[1] Mr. Mix has filed a separate complaint against Mr. Morodomi and the Office of the City Attorney (Complaint No. 08-14) for the alleged improper withholding of public records.
[2] Mr. Mix has filed a separate complaint against members of the City Council (Complaint No. 08-17) and against the Mayor's Office (Complaint No. 08-15) for the alleged failure to produce requested records.

No. 5: "All correspondence (as described above) between Manross (SRI) and the City of Oakland (Officers and/or employees as described above) and all third party correspondence whereby copies were provided to the City or Francisco by Manross or any of the parties copied in any other party. (sic)"	There are "gaps" in the correspondence between Manross (SRI) and the City.	Copies of all correspondence between Manross and PWA staff was collected and forwarded to the Office of the City Attorney for review.
No. 7: "All correspondence from or to Jocelyn Combs regarding the LLAD and/or third party correspondence where a copy was directed to Combs."	There are large gaps in the correspondence to or from Ms. Combs.	Ms. Combs states that she provided copies of all her electronic and written correspondence to the Office of the City Attorney.
No. 9: "All correspondence to or from **"Neighbors for a Safe and Green Oakland"** of 333 Market Street, Oakland, CA 94607 directed to or from the City of Oakland and/or directed to particular parcel owners from or by the City of Oakland and in particular, Councilwoman Quan's aide, Susan Piper."	Did not receive any records from PWA staff regarding "Neighbors for a Safe and Green Oakland." Mr. Mix contends that "Neighbors" was formed by the City, comprised "predominately by City employees who met regularly on City time, and that the materials used and produced by "Neighbors" was funded by the City.	PWA staff responds that "Neighbors for a Safe and Green Oakland" was a private committee formed in support of the LLAD proposal and that PWA had no records pertaining to it. Susan Piper, aide to Councilmember Jean Quan, told Commission staff that she provided all written and electronic correspondence pertaining to the LLAD to Mr. Mix in connection with another records request. She said any of her involvement with "Neighbors" was performed strictly on her own time and on her own home computer. Mr. Godinez and Ms. Combs deny the use of employee time and funding for any political activity pertaining to the LLAD.

No. 10: "All correspondence with any and all outside agents or organizations, companies, etc., other than Francisco or Gary Manross, engaged or contracted to provide any type of service, polling, research, evaluations, etc. regarding the mail ballot and LLAD election."	There were no records provided pursuant to this request.	According to Ms. Combs, the City retained Gary Manross of Strategy Research Institute (SRI) to conduct polling and research on the viability of a LLAD increase. No other "outside agents or organizations" were engaged by the City for this purpose. There were no records responsive to this request.
No. 11: "All correspondence or communications with any private parcel owner, public parcel owner, utility company, or other, regarding the election or their vote (other than the mailed ballot and required notice) engaged in by the City of Oakland, its officers, agents or employees, directly, or by a party or agent acting on behalf of the City."	No records were provided. Mr. Mix contends that his own review of meeting minutes and news accounts demonstrates that City officials, including the Mayor and City Administrator, tried to persuade parcel owners to vote affirmatively on the LLAD increase or to abstain from voting.	According to Ms. Combs, Brooke Levin, Raul Godinez, David Chai (Mayor's chief-of-staff), Marisol Lopez (Mayor's executive assistant), Dan Lindheim (City administrator) there are no records responsive to this request.
No. 12: "'Call sheets' provided by Francisco or others to facilitate the LLAD vote phone polling."	No records were provided. Mr. Mix contends Francisco provided "call sheets" of public and private parcel owners to Manross (SRI) and the City to facilitate polling and persuading voters to vote in a particular way.	Ms. Combs said that Francisco may have provided parcel information to Manross so that Manross could conduct the polling and research it was retained to do by the City. She said any such "call sheets" were not provided to the City.

No. 13: "List of the LLAD 'Oversight Committee' members, (city employees and non-city employees) the times, dates, and places the committee met regarding the LLAD (schedules and calendars, announcements, notices, etc.) and copies of all correspondence between any and all members of the committee during the time of its duration."	No records were provided. Mr. Mix contends that there was an "oversight committee" appointed concerning the LLAD proposal.	Both Ms. Combs and Mr. Godinez deny that there was a LLAD "oversight committee" as Mr. Mix describes. Mr. Godinez said there were meetings among City staff, including City legal counsel, and that all records arising from any such meetings were forwarded to the City Attorney's Office.
Specific request: Mr. Mix requested a copy of the reply sent to Ms. Combs from Francisco in response to her question concerning the tally of parcel ballots. ***Attachment 3.***	Mr. Mix contends that Francisco's response to the email question was deleted from what the PWA produced.	Ms. Combs told Commission staff that she did not delete any emails in response to Mr. Mix's request. She further believes the answer from Francisco may have been made verbally to her.

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]

Mr. Mix contends that despite the large number of records that were produced in response to his request, there are additional records which he believes were not produced. Commission staff contacted those persons having the most knowledge of records pertaining to the LLAD proposal. They claim they have provided Mr. Mix all the records they have in response to the particular categories he was seeking.

It is difficult for Commission staff to assess and analyze a contention that a City office or agency failed to produce records on grounds that the records do not exist. Even if

Commission staff had the resources to conduct an independent assessment of the materials produced against the PWA files from which they were taken, it seems unlikely that the result would be any different. Should Mr. Mix wish to provide Commission staff with any more definitive information that records are being improperly withheld, Commission staff can always assist in trying to obtain them or to evaluate the stated reasons for their confidentiality. At this point, there does not appear to be any further information, other than Mr. Mix's contentions, that public records exist which have not been produced.

V. STAFF RECOMMENDATION

In the absence of any additional information, Commission staff recommends that the Commission dismiss Complaint No. 08-18 on grounds there is no information to support a conclusion that the Public Works Agency possesses any further non-privileged records responsive to Mr. Mix'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.*