Approved as to Form and Legality**

_____
City Attorney

City of Oakland
Public Ethics Commission
April 6, 2009

In the Matter of)
) Complaint No. 08-14
)

David Mix filed Complaint No. 08-14 on November 6, 2008.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 08-14 alleging that the Office of the City Attorney violated the Oakland Sunshine Ordinance and California Public Records Act by improperly withholding records from public inspection and copying. ***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 Later in 2008, the City Council rescinded its action to approve the vote based in part upon an intervening California Supreme Court ruling that invalidated a similar assessment process in Santa Clara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.

II. FACTUAL SUMMARY

On July 29, 2008, Mr. Mix submitted to the eight members of the City Council the following public records request:

> *"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." for the period June 1, 2007 through July 29, 2008. (Emphasis in the original.)*

Mr. Mix also submitted a rather extensive request to the Public Works Agency ("PWA") that included 13 separate categories of records he was seeking in connection with the LLAD election. [1]

In August, 2008, the Office of the City Attorney helped to coordinate the response from the various City Council offices and the PWA. On August 14, 2008, the City Attorney's Office produced copies of emails from Councilmember Quan's and Councilmember Kernighan's offices. In a cover letter transmitting some of the records, Michelle Abney, the City Attorney's Open Government Coordinator, stated: "We have withheld emails in which we assert the attorney-client privilege." ***Attachment 2.*** On August 29, 2008, Howard Starks, a paralegal in the City Attorney's Office, sent a letter to Mr. Mix stating he would send certain records from the PWA and "[t]o the extent that your request asks for attorney-client communication or attorney-work product, we object and will not produce such documents. (Govt. Code §6254.)" According to Mr. Morodomi, both Ms. Abney and Mr. Starks were working under his direction in responding to Mr. Mix's record request.

Mr. Mix filed this complaint in November, 2008, alleging that the Office of the City Attorney and, in particular, former Commission attorney Mark Morodomi and legal assistant Howard Starks, improperly removed and withheld from inspection and copying records that were in the custody and possession of the City Council and/or the Public Works Agency and that were responsive to his request. He demanded that the withheld records be produced and alleges in his complaint that the City "demonstrate how or why they (the withheld records) are exempt" under the Public Records Act.

On February 10, 2009, the City Attorney's Office provided a written response to Mr. Mix's allegations. ***Attachment 3.*** In it, Chief Deputy City Attorney Barbara Parker states that the attorney-client privilege was the "only ground that the City Attorney's Office asserted for withholding documents covered by Mr. Mix's public records request."

III. ANALYSIS

A. Applicable Law

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 6253] 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

[1] Mr. Mix has filed separate complaints (Complaint No. 08-17 and 08-18, respectively) pertaining to the actual production of records from the City Council and the PWA.

the records available "promptly," subject to a number of legal exemptions that justify withholding the records from public disclosure. [Government Code Section 6257]

The Public Records Act also contains a number of express exemptions from the above-cited disclosure requirements. One of the exemptions is for "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." [Government Code Section 6254(k)] California courts have recognized that among the privileges exempt from disclosure under Section 6254(k) is the attorney-client privilege as set forth in Evidence Code Section 950 et seq. [Roberts v. The City of Palmdale (1993) 5 Cal. 4th 363, 371] In Roberts v. City of Palmdale, the California Supreme Court ruled that a local governing body is the holder of the attorney-client privilege with regard to legal opinions by its attorney and may assert the attorney-client privilege on matters involving confidential communications. [Id. at 373] A "confidential communication" is information transmitted between a client and attorney in the course of their relationship that is intended to be confidential and which is disclosed to no third party. [Evidence Code §952.] An attorney must assert the claim of privilege unless instructed otherwise by the client. [People v. Vargas (1975) 53 Cal.App.3d 516, 527.]

The Oakland Sunshine Ordinance contains two provisions relating to the withholding of City records. Section 2.20.240 provides:

> *"No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure by law. Any redacted, deleted or segregated information shall be keyed by footnote or other clear reference to the appropriate justification for withholding. Such redaction, deletion or segregation shall be done personally by the attorney or other staff member conducting the exemption review."*

Section 2.20.250 provides:

> *Any withholding of information shall be justified, in writing, as follows:*
>
> *(A) A withholding under a permissive exemption in the California Public Records Act or this ordinance shall cite the legal authority and, where the exemption is based on the public interest in favor of not disclosing, explain in practical terms how the public interest would be harmed by disclosure.*
>
> *(B) A withholding on the basis that disclosure is prohibited by law shall cite the applicable legal authority.*
>
> *(C) A withholding on the basis that disclosure would incur civil or criminal liability shall cite any statutory or case law supporting that position.*

B. Application

Mr. Mix provides no factual or legal support for his contention that the withheld documents constitute a "clear violation of the California Public Records Act." Pursuant to the Sunshine Ordinance, the City Attorney's Office advised him that the records were being withheld subject to attorney-client privilege, citing in one instance the Government Code Section (6254) authorizing the withholding. Should Mr. Mix wish to challenge the City Attorney's determination that the records were improperly withheld, his remedy would appear to lie in a court of competent jurisdiction authorized to inspect the disputed records privately. The Sunshine Ordinance provides no similar remedy for an "in camera" review of the disputed records.

In lieu of providing the withheld records, Mr. Mix also demands that the City abide by Government Code Section 6255(a) which provides:

> *"The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of. . .(the Public Records Act) or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."*

The City Attorney did not base its claim of exemption on the so-called "public interest" balancing test, but on the express provisions of Government Code Section 6254. Thus no further justification appears necessary.

IV. STAFF RECOMMENDATION

Commission staff recommends that Complaint No. 08-14 be dismissed on grounds that the City Attorney properly cited the attorney-client privilege as the reason why specific records were being withheld.

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.*