City of Oakland
Public Ethics Commission

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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: June 1, 2009

RE: **A Staff Report And Action To Be Taken Regarding Proposed Amendments To The Lobbyist Registration Ordinance And A Proposed Moratorium On Commission Enforcement Actions Pertaining To The Registration Of Certain Officers And Directors Of Corporations, Organizations And Associations**

I. INTRODUCTION

At is regular meeting of May 4, 2009, the Commission directed staff to provide a series of options for amending Section 3.20.030(D) of the Lobbyist Registration Act ("LRA") relating to the definition of "local governmental lobbyist." It also directed staff to prepare a proposed "moratorium" policy addressing the enforcement of future complaints alleging violation of certain provisions of Section 3.20.030(D). Finally, the Commission requested staff to prepare proposed amendments for Section 3.20.160, the current prohibition on the creation of "false appearances of public favor or disfavor" regarding a proposed governmental decision.

II. BACKGROUND

At its May 4, 2009, meeting, the Commission considered a complaint alleging various violations of the LRA by representatives of the Oakland Builders Alliance. A central issue in the complaint was the interpretation and application of a portion of Section 3.20.030(D) that addresses so-called "in-house" lobbyists. [1] The full text of Section 3.20.030(D) provides:

[1] In general, most jurisdictions make a distinction between so-called "contract" lobbyists (those retained as an independent contractor), and so-called "in-house" lobbyists (persons whose job duties for their employer or organization entail lobbying).

"Local governmental lobbyist" means any individual who:

(1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or

(2) ***whose duties as a salaried employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee***

for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency.

No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly. [Emphasis added.]

In declining to exercise its discretion to proceed with an administrative hearing to determine the allegations, the Commission noted that the highlighted language above was ambiguous (i.e., subject to more than one meaning) and therefore did not provide sufficient notice that a person may have to register before attempting to lobby. Specifically, the Commission noted that the current language is unclear whether the phrase "salaried employee, officer or director" required such people to receive a salary to be considered a lobbyist, or whether "salaried" only modifies "employee", and that any officer or director, even if serving in a voluntary capacity, could potentially be subject to the LRA if they attempted to lobby. Commission staff noted the former interpretation would necessarily result in fewer people being subject to the definition (because many officers and directors are not "salaried"), while the latter interpretation would result in greater application of the ordinance.

III. ANALYSIS

A. Proposed Amendments To The Definition Of "Local Governmental Lobbyist"

The Commission directed staff to develop alternative proposals to create both a "narrow" and a "broad" definition of lobbyist. What follows are three proposed definitions. The first would likely involve fewer people subject to the LRA's requirements, the second and third likely to result in more people subject to the definition of "lobbyist." Commission staff also proposes language for possible exceptions that should be considered in regard to any of the proposed definitions.

Option 1: Clarify Existing Language To Require Employees, Officers And Directors Be "Salaried" Or "Compensated"

Perhaps the easiest way to achieve a "narrow" definition of local governmental lobbyist is to clarify that the modifier "salaried" applies to all three nouns:

“Local governmental lobbyist” means any individual who:

(1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or

(2) whose duties as a salaried employee, salaried officer or salaried director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee

for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency.

No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly.

Commission staff notes that the modifier "salaried" may not be the most appropriate term to convey the concept that a person must be compensated in some manner as a condition of being a registered lobbyist. Since not all employees are "salaried", and directors may be compensated on a per diem or stipend basis if and when they are compensated at all, the existing language could also be modified to read:

“Local governmental lobbyist” means any individual who:

(1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or

(2) whose compensated duties as an employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee

for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency.

No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly.

Option 2: Institute Minimum Thresholds With Or Without Compensation Modifiers

As stated in Commission staff's January 5, 2009, memorandum, many local jurisdictions impose certain threshold requirements that an "in-house" lobbyist must meet before becoming subject to a registration requirement. ***Attachment 1.*** Among the most common threshold requirements are a minimum "contacts" threshold (e.g., 10 lobbying contacts per month), or a minimum "hours" threshold (e.g., 5 hours spent lobbying per month), or a "significant" or "substantial" job-duties threshold (e.g., an employee, officer or director for whom a "significant" or "substantial" amount of time is spent lobbying).

Of the above thresholds, a "contacts" threshold appears the most objective and easiest to verify administratively. A version applying a "contacts" threshold to ***any*** employee, officer or director of a corporation, organization or association could read as follows:

"Local governmental lobbyist" means any individual who:

(1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or

(2) whose duties as an employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee and who communicates 10 or more times during a calendar quarter with one or more public officials, officers or designated employees

for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency.

No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly.

A version applying a "contacts" threshold to a ***compensated*** employee, officer or director could read:

"Local governmental lobbyist" means any individual who:

(1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or

(2) whose <u>compensated</u> duties as an employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee and who communicates

10 or more times during a calendar quarter with one or more public officials, officers or designated employees

for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency.

No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly.

The number of contacts per calendar quarter is, of course, subject to the Commission's discretion. The higher the number, the more lobbying a person may do without triggering a registration requirement.

Option 3: Clarify Existing Language To Eliminate Requirement That Employees, Officers And Directors Be "Salaried"; No Minimum Thresholds

A third option resulting in an even broader application of existing law would be to eliminate the modifier "salaried" so that any "employee, officer or director" -- even if the officer or director is acting in a voluntary capacity -- could potentially be subject to the definition of "lobbyist":

"Local governmental lobbyist" means any individual who:

(1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or

(2) whose duties as an employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee

for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency.

No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly.

B. Proposed Exceptions To Lobbyist Registration Requirements

Almost all local lobbyist registration ordinances contain exceptions which, because of policy, political or practical reasons, exclude certain persons or particular activities from triggering a registration requirement. In general, the exceptions help a local ordinance strike an appropriate balance between the public's interest in knowing who is influencing

governmental decisions, and the need to avoid excessive burdens on First Amendment rights and excessive reporting obligations, especially for those whose advocacy is required, occasional or of relatively minor importance.

The LRA currently contains seven express exceptions to its requirements. The full text of Section 3.20.060 provides:

The provisions of this Act shall not apply:

A. To a public official acting in his or her official capacity.

B. To the publication or broadcasting of news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge governmental action.

C. To a person specifically invited by the city council or redevelopment agency or any committee thereof, or by any board or commission, or any committee of a board or commission, or by any officer or employee of the city or agency charged by law with the duty of conducting a hearing or making a decision, for the purpose of giving testimony or information in aid of the body or person extending the invitation.

D. To a person who, without extra compensation and not as part of, or in the ordinary course of, his or her regular employment, presents the position of his or her organization when that organization has one or more of its officers, directors, employees or representatives already registered under the provisions of this Act.

E. Any attorney, architect or civil engineer whose attempts to influence governmental action are limited to: (1) Publicly appearing at a public meeting, public hearing, or other official proceeding open to the public; (2) Preparing or submitting documents or writings in connection with the governmental action for use at a public meeting, public hearing, or other official proceeding open to the public; and (3) Contacting city or redevelopment agency employees or agents working under the direction of the city manager or executive director directly relating to 1. and 2. above.

F. To designated representatives of a recognized employee organization whose activities are limited to communicating with city officials or their representatives regarding 1) wages, hours and other terms and conditions of employment pursuant to the procedures set forth in Government Code Sections 3500 -- 3510, or 2) the administration, implementation or interpretation of an existing employment agreement.

G. To persons whose only activity is to 1) submit a bid on a competitively bid contract, 2) respond to a request for proposal or qualifications, or 3) negotiate the terms of a written contract if selected pursuant to such bid or request for proposal or qualifications. This exception shall not apply to persons who attempt to

influence the award of terms of a contract with any elected official or member of any City board or commission.

Commission staff has often noted a rough correlation between how broadly "lobbyist" is defined and the number of exceptions local jurisdictions provide from the definition. Thus depending on which of the above definitions the Commission chooses to recommend for adoption, the following additional exceptions may be appropriate:

1. Exemptions For Representatives Of Non-Profit Organizations

The question of whether representatives of non-profit organizations should be subject to lobbyist registration requirements occasionally confronts policy-makers. Advocates for such an exception claim that non-profit organizations are generally less organized than "for profit" companies, are not permitted to spend money supporting or opposing candidates, and are typically organized for some public benefit. Others can argue however, that some non-profits can marshal their influence quite effectively and, while generally prohibited from spending money to support or oppose candidates as an organization, their members are not. Furthermore, in many jurisdictions including Oakland, a considerable amount of public money is awarded annually to a variety of non-profit organizations. While these awarded funds arguably serve a public good, any allocation of public dollars inevitably comes at the expense of other worthwhile priorities. How these priorities are influenced and determined is one of the public interests served by a local lobbying ordinance.

As previously discussed in the January 5, 2009, staff memorandum, the Commission initially proposed in 2000 an exception for certain communications from representatives of non-profit organizations. The full text of the proposed exception provided:

The provisions of this Act shall not apply to. . .

"The officers or employees of a not-for-profit organization, who do not otherwise qualify as contract or expenditure lobbyists, and who communicate with City officials to promote the general interests of the organization or of its members. No exemption is created by this section if the communication relates to: (1) future City or Redevelopment Agency funding for the organization or its programs; (2) any [collective bargaining] contract or agreement. . .or, (3) any formally proposed legislative or administrative action that would directly regulate the activities of the organization or its members. For purposes of this subsection, a "not-for-profit" organization generally includes corporations registered under 26 U.S.C. 501(c)(3), 501(c)(4), or 501(c)(6), labor unions, business and merchant associations, and other similar entities."

The intent of this proposed exception was to permit non-profit representatives to advocate for general actions or policies on behalf of the organization and its members. This exception was ultimately not adopted in favor of a completely different lobbyist registration proposal. Commission staff notes that the perceived need for an exception for "general" advocacy by non-profit organizations has since been mitigated by a subsequently adopted

amendment that lobbyists must be attempting to influence a "proposed or pending" governmental action thus exempting, by implication, "general" advocacy.

In 2008, the Commission developed and voted to recommend a second exception for certain representatives of non-profit organizations:

> *The provisions of this Act shall not apply. . .*
>
> *"To a salaried employee, officer or director of any non-profit corporation that operates or manages property in which the City or Redevelopment Agency has an ownership or possessory interest and on which property the non-profit corporation performs a public function or service on behalf of the City, Redevelopment Agency, or a multi-governmental agency in which the City or Redevelopment Agency is a member."*

The above-proposed exception was developed in response to the situation in which the City works in close cooperation with a non-profit entity such that the interests of the non-profit are closely aligned with the City or a service the City would otherwise provide.[2] Examples of communications to which the above exception could apply include those from the Oakland Zoological Society, the Oakland Museum Foundation, Chabot Space and Science JPA, and several others.

2. Exception For Public Communications

Another Commission-developed exception addresses whether a person advocating the interests of another should be subject to formal registration and reporting requirements if his or her only lobbying activity is to speak at a public meeting:

> *The provisions of this Act shall not apply. . .*
>
> *"To any person whose communications regarding a governmental action are limited to speaking at a publicly noticed meeting of the City Council, Redevelopment Agency, City board or commission, or any standing committee of the City Council, Redevelopment Agency or City board or commission, so long as the person publicly identifies himself or herself and the name of the client on whose behalf the communication is made."*

The rationale for the above-proposed exception is that any such advocacy automatically becomes a matter of public record and arguably does not require additional disclosure. Commission staff notes that additional provisions could be made for persons who submit writings in advance or in lieu of testimony at public meetings, similar to the letters the Commission receives in connection with complaints and/or its policy deliberations. As long as these written communications are made public at the meeting or concurrently filed with the City Clerk, such written advocacy could also be exempt.

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[2] Commission staff notes that the same ambiguity exists with respect to "salaried employee, officer or director" that should be corrected in light of the pending policy decision pertaining to the definition of "local governmental lobbyist," discussed above.

C. Other Proposals

At the Commission meeting of May 4, 2009, several speakers requested the Commission to consider additional amendments to the LRA, among them the public posting of personal calendars and office sign-in sheets. Other ideas discussed include the permanent retention of emails and mandatory disclosure of so-called "ex parte" (i.e., one-sided) communications by public officials. While outside the scope of the Commission's direction for this memorandum, such ideas could be developed into specific amendments but it is unclear whether such proposals properly belong within a lobbyist registration ordinance or within a body of law such as the Oakland Sunshine Ordinance, whose purpose is to promote governmental transparency. While there is undoubtedly overlap in the objectives of the LRA and the Sunshine Ordinance (e.g., transparency in governmental decision-making), Commission staff believes that the Sunshine Ordinance is the appropriate body of law to mandate certain disclosures by public officials, while the LRA is the appropriate mechanism for requiring registration and disclosure by lobbyists.

The Commission may wish to request its Sunshine Committee to take up these proposals in greater detail as part of its ongoing review of the Sunshine Ordinance.

D. Staff Assessment Of Proposed Definitions And Exceptions

Crafting an acceptable definition of "lobbyist" is a challenging exercise in policy making in most jurisdictions. Commission staff is occasionally consulted about Oakland's LRA; inevitably questions arise about how to define "lobbyist" and the rationale for the various exceptions thereto. The short answer is that there is no perfect definition; every legislative approach risks creating too broad or too narrow a definition that has resulting consequences -- Too broad a definition risks imposing unreasonable burdens on free speech and association, too narrow a definition risks sacrificing a comprehensive picture of how influence is wielded and public decisions are made. That does not necessarily mean that lobbyist registration ordinances are fatally flawed. Rather, they can and do help achieve a greater degree of governmental transparency than would otherwise be attainable.

One of the fundamental decisions facing the Commission is whether the LRA should attempt to regulate paid, professional lobbyists, or a wider category of persons, regardless of compensation, who attempt to influence City decisions on behalf of another. In the latter approach, it appears prudent to build in a "minimum contacts" threshold beneath which a certain amount of lobbying may occur before it reaches a point where registration becomes desirable. Accordingly, the first definition contained in Option 2 and the definition contained in Option 3 might serve as acceptable definitions. The problem with establishing a "minimum contacts" threshold however, is that it is inherently arbitrary, and can lend itself to gamesmanship, constant interpretation and daily recordkeeping. A broader definition of lobbyist also brings within government regulation a class of people who might never reasonably realize they are subject to the provisions of a lobbyist registration ordinance.

The alternative approach is to regulate those persons whose job it is to lobby, and who can better be expected to understand and conform to a regulatory system.

Commission staff acknowledges that such an approach would not apply to a number of local volunteer organizations and their members. These organizations can exert substantial influence over City decisions, as the Klein complaint recently demonstrated. Yet public comments made during the Klein complaint indicate there may be a number of persons to whom even a narrow definition of lobbyist applies and who are not yet registered. The Commission may wish to choose one of the "narrow" definitions of lobbyist contained in Option 1 and make a dedicated outreach to this class of potential lobbyists before seeking to expand the scope and reach of the LRA.

As to the issue of exceptions, Commission staff believes that some version of the Commission-proposed exceptions for City-related non-profits and for speakers at public meetings are appropriate no matter which definition of lobbyist is recommended for adoption.

IV. CREATION OF FALSE APPEARANCES

At its May 4, 2009, meeting, the Commission considered for the first time an allegation involving the existing prohibition on certain persons from creating a "false appearance" of public support or disfavor in connection with a governmental action. Article V of the LRA contains a series of prohibitions for lobbyists, clients, contractors and/or "persons doing business with the city or redevelopment agency."[3] The prohibition contained in Section 3.20.160 provides:

> *"No local governmental lobbyist, client, contractor, or person doing business with the city or the redevelopment agency shall attempt in any way to create a fictitious appearance of public favor or disfavor of any governmental action or to cause any communication to be sent to a city or agency officer or designated employee in the name of any fictitious person or in the name of any real person, except with the consent of such real person."*

As noted in the May 5, 2009, staff report, the language that lobbyists and their clients are prohibited from attempting "in any way to create a fictitious appearance of public favor or disfavor of any governmental action. . ." appears to be a vague and overbroad restriction on otherwise permitted communications. Also, the prohibition on sending "any communication . . .in the name of any real person, except with the consent of such real person" also appears to be an undue and overbroad burden on speech: This language could be read to prohibit lobbyists and their clients from communicating the opinions of other people "except with the consent of such real person(s)." Such a restriction appears to be as impractical as it is unenforceable.

Commission staff notes that there also exists a related section in Article V, Section 3.20.140, that prohibits the "deception' of City officers and employees:

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[3] Commission staff notes that in addition to Section 3.20.160, other prohibitions contained in Article V, including those contained in §§3.20.130, 3.20.140 and 3.20.170, apply to "contractors" and "persons doing business with the City", as defined. The definitions for these respective terms have nothing to do with lobbyists or lobbying and raise a question why these persons are regulated under the LRA.

"No local governmental lobbyist, client, contractor or person doing business with the city or the redevelopment agency shall deceive or attempt to deceive a city or agency officer or designated employee as to any material fact pertinent to any pending or proposed governmental action."

Since the apparent intent of Section 3.20.160 is to prohibit lobbyists and their clients from misrepresenting material facts by creating "false appearances", Commission staff proposes amending Section 3.20.140 and merging it with those provisions of Section 3.20.160 that are sufficiently clear and enforceable:

No local governmental lobbyist or client shall deceive or attempt to deceive a City public official, officer or designated employee as to any material fact pertinent to any pending or proposed governmental action including, without limitation, sending a written communication in the name of a fictitious person.

V. MORATORIUM ON FURTHER ENFORCEMENT ACTIONS PERTAINING TO CERTAIN PERSONS AFFECTED BY SECTION 3.20.030

At its meeting of May 4, 2009, the Commission directed staff to prepare for further consideration a Commission moratorium on further enforcement actions with respect to certain persons affected by Section 3.20.030. The purpose and factors influencing the adoption of this memoriam were discussed at the May 4, 2009, meeting and are set forth in the attached Resolution. ***Attachment 2.*** Commission staff proposes in the Resolution that its provisions only affect "individuals who serve as officers and directors of any corporation, organization or association pursuant to Section 3.20.030" so that the administration and enforcement of the LRA as to "contract" lobbyists and "salaried employees" shall not be affected by the proposed moratorium.[4]

VI. STAFF RECOMMENDATION

Commission staff recommends that the Commission 1) take public input on the proposed amendments to the definition of "local governmental lobbyist" and Section 3.20.160, 2) give direction to staff for any additional amendments for consideration at the July 6, 2009, meeting, 3) request the Sunshine Committee to consider any additional amendments to the Sunshine Ordinance pertaining to disclosure of calendars, sign-in sheets and email retention;

[4] On May 5, 2009, John Klein filed Complaint No. 09-05 alleging violation of the LRA by Matthew Novak, a purported members of the Oakland Builders Alliance and employee of a local developer. The Commission staff report for this complaint will likely appear on the Commission's July 6, 2009, agenda.

and 4) adopt the proposed Resolution.

Respectfully submitted,

Daniel D. Purnell
Executive Director

CITY OF OAKLAND
Public Ethics Commission
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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: January 5, 2009

RE: Analysis Of Key Terms In The Oakland Lobbyist Registration Act

I. PROCEDURAL HISTORY AND BACKGROUND

At its regular meeting of December 1, 2008, the Commission considered a staff report pertaining to allegations that a majority of the City Council's Community and Economic Development Committee ("CED Committee") gathered to hear a presentation on September 12, 2008. The allegations focused on whether the gathering constituted a meeting under the Brown Act and Sunshine Ordinance for which public notice should have been provided. ***Attachment 1.***

The presentation was conducted by representatives of the Oakland Builders Alliance ("OBA"), a non-profit corporation founded in 2007. According to people in attendance, the OBA representatives were Carlos Plazola, Kathy Kuhner and Joe DeCredico. All three are listed as current members of OBA's Board of Directors. The presentation consisted of a PowerPoint that discussed the status of affordable housing in Oakland and made specific recommendations to encourage the development and purchase of housing. Among the recommendations was a specific proposal to modify an existing City program known as the Mortgage Assistance Program ("MAP"). The MAP was established in 1993 to assist lower-income, first-time homebuyers. In 2005, the CED Committee considered a resolution to modify the MAP program and passed its recommendations to the full City Council for approval.

The PowerPoint presentation appears to be consistent with OBA's self-described mission. The OBA website contains the following greeting to visitors:

> *"The Oakland Builders Alliance (OBA) was formed in late 2007 as a non-profit organization focused on the economic growth and revitalization of Oakland, and to advocate for the needs of the building trades people and professionals of Oakland. The*

OBA is committed to promoting and advocating for innovative policies and practices that support smart-growth and urban infill; that lead to livable communities; and that create mixed-income, mixed-use communities that reduce dependency on automobiles, and encourage safe, walkable streets. Our members are small and medium sized builders and affiliated trades and professions who live or do considerable work in Oakland."

At the Commission's request, staff prepared a report investigating and analyzing allegations arising under the Sunshine Ordinance in connection with the September 12, 2008, gathering. As part of that investigation, Commission staff contacted Mr. Plazola to ask him questions about the presentation. Commission staff also asked why, as a previously registered lobbyist under the City's Lobbyist Registration Act (LRA), he had not listed OBA as a client or disclosed the presentation on his Quarterly Disclosure of lobbying activities. Mr. Plazola told Commission staff he did not believe he was required to registered OBA as a client and objected to Commission staff even raising the question in the context of a Sunshine Ordinance investigation. In subsequent communications, Mr. Plazola, his spouse Monica Plazola, business associate Laura Blair, and local attorney Jenny Kassan have argued that provisions of the LRA are vague and that any effort to enforce the LRA against OBA representatives would "open a can of worms" as to other non-profit entities which may engage in non-reported lobbying.

At its meeting of December 1, 2008, the Commission considered whether to initiate a formal complaint against Mr. Plazola, Ms. Kuhner and/or Mr. DeCredico for failing to register and disclose lobbying activities under the LRA. Several members of the public addressed the Commission to assert that Mr. Plazola has lobbied on other items before the City Council that have not been previously disclosed.

The Commission directed staff to prepare this memorandum describing and analyzing relevant provisions of the LRA -- in particular the definition of "local governmental lobbyist" -- to assist it in considering future action with respect to OBA and/or future policy changes.

II. CURRENT LANGUAGE

The relevant provisions of the LRA for purposes of this memorandum are as follows:

Definition Of "Lobbyist":

"Local governmental lobbyist" means any individual who: 1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or 2) whose duties as a salaried employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee, for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency. No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly. [3.20.030(D)]

Definition of "Client":

"Client" means the real party in interest for whose benefit the services of a local governmental lobbyist are actually performed. An individual member of an organization shall not be deemed to be a "client" solely by reason of the fact that such member is individually represented by an employee or agent of the organization as a regular part of such employee's or agent's duties with the organization as long as such member does not pay an amount of money or other consideration in addition to the usual membership fees for such representation. [3.20.030(A)]

If a person qualifies as a "local governmental lobbyist," then he or she must first register with the Office of the City Clerk before attempting to lobby. [LRA §3.20.040(A)] The LRA also prohibits local governmental lobbyists from "engag[ing] in any activity on behalf of a client as a local governmental lobbyist unless such lobbyist is registered and has listed such client with the City Clerk." [LRA §3.20.120(A)]

III. LEGISLATIVE HISTORY OF THE LRA

An initial proposal for a lobbying ordinance originated in the late 1990's from a "Lobbyist Registration Task Force" formed by the Commission. The Commission submitted several versions of a proposed ordinance to the City Council's Rules and Legislation Committee between 1999 and 2001 without success. The proposed drafts contained substantially similar versions of the following definition of "lobbyist" and "lobbying":

'"Lobbyist'" means. . . (1) "any individual who, during a consecutive three month period, (a) has received or is entitled to receive $3,200 to lobby City officials on behalf of one or more clients ("contract lobbyist"), or (2) is a salaried employee who has lobbied City officials on behalf of his or her employer 25 or more times or whose written job duties include lobbying ("in-house lobbyist"). . .

(2) Any person that makes payment or incurs expenditures of $5,000 or more during any calendar year in connection with carrying out public relations, advertising or similar activities with the intent of soliciting or urging employees or other persons to communicate directly with any City officials in order to attempt to influence legislative or administrative action ("expenditure lobbyist")."

*'"Lobbying'" means **influencing** or attempting to influence **legislative or administrative action."** (Terms in **bold** were further defined in the proposed ordinance.)*

In January, 2002, the Rules Committee considered a draft lobbyist registration proposal that also contained an exception made at the request of the Rules Committee for representatives of non-profit organizations:

"The officers or employees of a not-for-profit organization, who do not otherwise qualify as contract or expenditure lobbyists, and who communicate with City officials to promote the general interests of the organization or of its members. No exemption is created by this section if the communication relates to: (1) future City or Redevelopment Agency funding for the organization or its programs; (2) any [collective bargaining] contract or agreement. . .or, (3) any formally proposed legislative or administrative action that would directly regulate the activities of the organization or its members. For purposes of this subsection, a "not-for-profit" organization generally includes corporations registered under 26 U.S.C. 501(c)(3), 501(c)(4), or 501(c)(6), labor unions, business and merchant associations, and other similar entities."

At its meeting of February 28, 2002, the Rules Committee expressed its preference for a lobbyist registration ordinance then in effect in the City of San Jose. It directed staff to make minimal changes to the "San Jose" ordinance to conform its language for use in Oakland. Former Councilmember Danny Wan proposed an additional series of amendments to the "San Jose" ordinance, many of which were adopted at the Rules Committee meeting of April 9, 2002, and at the full City Council meeting of May 14, 2002. The various Committee and City Council amendments resulted in the current definitions of "local governmental lobbyist", "client" and the removal of a number of the originally proposed exceptions, including the exception for non-profit representatives set forth above. Since 2002, there has been only a slight change to the definition of "local governmental lobbyist"[5] and no change to the definition of "client."

IV. ANALYSIS AND ASSESSMENT

The Commission requested staff to examine and analyze the definitions of "lobbyist" and "client" for policy and legal ramifications.

A. Examination Of The Term "Lobbyist"

As part of its membership in COGEL [The Council On Governmental Ethics Laws], Commission staff was part of a study group formed to research and develop a "model" lobbyist registration ordinance. As part of that effort, Commission staff reviewed numerous state and local laws currently regulating lobbying activities.

In general, most of the surveyed laws make a distinction between so-called "contract" lobbyists (those retained as an independent contractor), and so-called "in-house" lobbyists (employees whose job duties entail lobbying for their employer). Oakland's current definition of a "contract" lobbyist is fairly typical: It uses a dollar threshold ($1,000) over a period of time (one month) as a threshold criteria for those who are retained to lobby for

[5] "Local governmental lobbyist" means any individual who: 1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or 2) whose duties as a salaried employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee, for the purpose of influencing any proposed or pending governmental, legislative or administrative action of the city or the redevelopment agency. No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly.

others. On the other hand, Oakland's current definition of "in-house" lobbyist is somewhat rare in the sense that most definitions of "in-house" lobbyist contains a minimum "contacts" threshold (e.g., 10 lobbying contacts per month) or a minimum "hours" threshold (e.g., 5 hours spent lobbying per month) or a "significant" or "substantial" job-duties threshold (e.g., an employee for whom a "significant/substantial" amount of time is spent lobbying).

Oakland's definition of "in-house" lobbyist has none of the above threshold triggers, stating that a "local governmental lobbyist" is a "***salaried*** employee, officer or director of any corporation, organization or association [whose duties] include. . . [lobbying]." While rare, Oakland's absence of threshold triggers is not unique -- The COGEL research noted that the federal statutes of Canada, the state code of North Carolina, and the ordinances of Miami-Dade County in Florida also provide a "zero threshold" definition of lobbyist.

The primary objection and argument pertaining to Oakland's definition of "in-house" lobbyists is that it is too vague to know whether the law applies to an individual or not. One issue is whether the modifier "salaried" applies only to "employee" or to "officer" or "director" as well. If so, the applicable scope of the ordinance would be narrowed since few directors in a company are "salaried" -- in the case of a non-profit corporation, it is even rarer to see salaried "officers" or "directors". If, on the other hand, "salaried" modifies only "employee", then the LRA could apply to any organization's "officers" or "directors" if their job duties "include influencing any proposed or pending governmental action. . ." Another issue is the phrase "whose duties. . .include [lobbying]." Are these the ***written*** duties of a salaried employee, officer or director? Does the mere fact that a salaried employee, officer or director attempted to influence an Oakland official mean, ipso facto, that his or her job duties include lobbying? Or can salaried employees, officers or directors engage in an occasional or incidental amount of lobbying if it is not part of their "job duties?"

Further guiding the Commission's interpretation in determining who qualifies as a local governmental lobbyist is the last sentence of Section 3.20.030(D) which states: "In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly." As used in this context and giving the word its common meaning, the term "ambiguity" means "doubtfulness or uncertainty as regards interpretation" (American Heritage Dictionary, 3d Ed.) Thus the LRA intends for the term "lobbyist" to be broadly applied in situations where there may exist doubt or uncertainty as to whether an individual meets the definition of "lobbyist."

B. Examination Of The Term "Client"

The COGEL research did not survey definitions of who or what a "client" is. Commission staff cannot appreciate any vagueness or ambiguity over the current definition of ***client:*** "The real party in interest for whose benefit the services of a local governmental lobbyist are actually performed." Ms. Plazola and Ms. Kassan make a policy argument that the current definition of "client" and/or "lobbyist" be amended so that a registration requirement is triggered only if a salaried employee, officer or director seeks to influence a decision-maker on an issue that results in a "direct or indirect benefit" to a client. Thus they argue that there should be no "lobbyist-client" relationship established if a representative seeks to influence specific City policies or decisions on matters of general concern to the organization or the City.

This argument is similar to the rationale supporting the 2002 proposed exception for representatives of non-profit entities (see above).

C. Legal Sufficiency Of The Ordinance

Commission staff could find no controlling legal authority that would indicate the LRA would be subject to judicial invalidation on First Amendment grounds. Courts have generally upheld lobbyist registration and disclosure provisions as serving important governmental interests, such as providing the electorate with useful information. In United States v. Harriss (1954) 347 U.S. 612, 625-626, the U.S. Supreme Court upheld the Federal Regulation of Lobbying Act which required lobbyists to report lobbying receipts and expenditures against challenges that it violated the guarantees of freedom to speak, publish, and petition. The court concluded that Congress has a valid interest in determining the source of voices seeking to influence legislation and could reasonably require the professional lobbyist to identify himself and disclose his lobbying activities.

V. DISCUSSION

Based on the foregoing, there appears to be no significant defect in the current language defining "lobbyist" or "client" that would preclude its enforcement by the Commission. There are some opportunities to clarify the definition of "in-house" lobbyist as it pertains to "salaried employee, officer or director" and the reference to whether the individual's "job duties" include lobbying. The Commission could also consider adding a minimum threshold requirement to the definition of "in-house" lobbyist as many other jurisdictions provide (e.g., a "minimum contacts per month" test or an "hours spent lobbying per month" test). The problem with such minimum threshold tests however is that they may fail to capture significant communications that pass "below the radar" of the minimum thresholds. Commission staff has historically recommended retaining a broad definition of "lobbyist" and then create whatever exceptions are necessary for those whom, for policy or practical reasons, arguably should stand outside the LRA's registration and disclosure requirements.

Earlier this year, the Commission approved for City Council consideration two additional exemptions from the LRA's registration requirements: One would exempt representatives of non-profit organizations that perform a public function or service on City-owned property; and the other would exempt individuals whose only communication is speaking at a noticed public meeting. ***Attachment 2.*** Commission staff has postponed the submission of these two exceptions to the City Council in the event the Commission desires to make any further recommendation as a result of the issues presented in this memorandum.

VI. FURTHER ACTION

The following is a non-exclusive list of options the Commission may wish to consider as a result of the December 1, 2008, staff memorandum, the public testimony taken at that meeting, and this memorandum:

1) Whether to direct staff to collect more information, initiate a formal complaint or issue an order to show cause pertaining to whether representatives of the OBA violated the registration and disclosure provisions of the LRA in connection with its September 12, 2008, presentation to the CED Committee.

2) Whether to direct staff to explore any additional instances of lobbying by Mr. Plazola as alleged by members of the public at the Commission's December 1, 2008, meeting. (***Note:*** On December 11, 2008, Oakland resident John Klein filed a complaint against Mr. Plazola, Ms. Kuhner, Mr. DeCredico and Jay Dodson for acting as local governmental lobbyists on behalf of OBA without first registering or disclosing their lobbying activities. The complaint essentially incorporates the allegations Mr. Klein presented at the December 1, 2008, meeting. Since there is now a formal complaint before the Commission regarding an alleged lobbying relationship between Mr. Plazola and others on behalf of OBA, Commission staff recommends that the Commission makes no further comment on the merits of these allegations until Commission staff completes its written report pursuant to the Commission's General Complaint Procedures.)

3) Whether to consider any additional amendments to the LRA pertaining to the definition of "lobbyist" or "client", as well as consider any additional exceptions for representatives of non-profit corporations such as the 2002 proposal. Such a legislative approach can be pursued concurrently with, or in lieu of, any enforcement proceedings the Commission may wish to pursue.

Respectfully submitted,

Daniel D. Purnell
Executive Director

CITY OF OAKLAND
PUBLIC ETHICS COMMISSION
RESOLUTION NO. 09-02
(PROPOSED)

BY ACTION OF THE OAKLAND PUBLIC ETHICS COMMISSION:

WHEREAS, Oakland Municipal Code Chapter 2.24 establishes the functions and duties of the Public Ethics Commission, and

WHEREAS, Section 2.24.020 expressly provides that "[i]t shall be the function and duty of the Public Ethics Commission" to "[o]versee the registration of lobbyists in the City should the City Council adopt legislation requiring the registration of lobbyists"; and

WHEREAS, Oakland Municipal Code Chapter 3.20 provides for the registration and regulation of local governmental lobbyists, as defined; and

WHEREAS, Oakland Municipal Code Section 3.20.030 defines "local governmental lobbyist" in relevant part as ". . . any individual who: 1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or 2) whose duties as a salaried employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee, for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency. . ."; and,

WHEREAS, at its meeting of May 4, 2009, the Commission determined in connection with a complaint alleging violations of specific provisions of Chapter 3.20 that Section 3.20.030 was ambiguous with respect to whether non-salaried, volunteer officers and directors of a corporation met the definition of "local governmental lobbyist"; and

WHEREAS, the Commission directed staff to prepare a series of proposed legislative options for the purpose of recommending to the City Council specific amendments to address the ambiguity of Section 3.20.030 and to return to the Commission promptly for a discussion of those options; and

WHEREAS, the Commission intends to continue the administration and enforcement of Chapter 3.20 as it applies to any individual who 1) receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, and 2)

whose duties as a salaried employee of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee, for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency; and

WHEREAS, time is needed to permit the Commission to research, develop and adopt proposed amendments to address the above-described ambiguity and to permit the City Council to take action upon said proposed amendments;

NOW, THEREFORE BE IT

RESOLVED, that the Commission hereby imposes a moratorium on enforcement of Oakland Municipal Code Chapter 3.20 as that Chapter pertains to the registration of, and quarterly reporting by, individuals who serve as officers and directors of any corporation, organization or association pursuant to Section 3.20.030; and

RESOLVED, the moratorium shall remain in effect from the date of adoption of this Resolution through the earlier of the effective date of any ordinance adopted by the City Council to address the above-described ambiguity of Section 3.20.030 or December 31, 2009.

RESOLVED, that the Commission authorizes the Executive Director to make any changes to draft versions of this Resolution as directed by the Commission and to certify and issue a final version of this Resolution without further approval by the Commission.

CERTIFICATION RE: APPROVAL OF RESOLUTION

The foregoing Resolution was presented for approval at a duly noticed meeting of the City of Oakland Public Ethics Commission ("Commission") held on June 1, 2009. A quorum of the membership of the Commission was present at the meeting. A motion approving the Resolution was made and seconded, and the motion was adopted by a majority of said quorum.

I hereby certify that the foregoing is true and correct.

Dated: June ___, 2009

_____

Daniel D. Purnell
Executive Director
Oakland Public Ethics Commission