Approved as to Form and Legality**

_____
City Attorney

City of Oakland
Public Ethics Commission
June 1, 2009

In the Matter of)
) Complaint No. 09-02
)

David Mix filed Complaint No. 09-02 on February 9, 2009.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 09-02 alleging that the City Council's Rules and Legislation Committee ("Rules Committee") violated the Oakland Sunshine Ordinance and the Ralph M. Brown Act by failing to agendize three scheduling items for the Rules Committee meeting of February 5, 2009. ***Attachment 1.***

II. FACTUAL SUMMARY

On Thursday, February 5, 2009, the City Council Rules Committee conducted one of its regular weekly meetings for the purpose of agendizing various matters for consideration by the City Council's policy committees and to review and approve the agenda for the full City Council meeting of February 17, 2009.

Shortly before the meeting convened, Councilmember Quan's staff submitted three scheduling requests to the three present Rules Committee members (Councilmembers Quan, Brunner and De La Fuente). The requests sought consideration at a February 24, 2009, regular meeting of the Finance and Management Committee for three items. The first item was a proposed submission to Oakland voters for a two percent surcharge to Oakland's Transient Occupancy ("hotel") Tax. The second was a proposed submission to Oakland voters for the repeal of Measure OO (Oakland Fund For Children and Youth). The third was a proposed submission to Oakland voters for a parcel tax supporting lighting, parks and trees. ***Attachment 2.*** During the meeting, the Rules Committee voted to place these three items before the Finance and Management Committee on February 24, 2009.

The "ten-day" agenda for the February 5, 2009, regular meeting of the Rules Committee was posted and filed on January 23, 2009. ***Attachment 3.*** The ten-day agenda typically contains five standing items (in addition to Open Forum), as well as any item which the Rules Committee considers as part of its policy-reviewing function (e.g., most of the Commission's legislative proposals are initially heard before the Rules Committee.) The five standing items (other than Open Forum) are:

1 Closed Session

2 Approval Of Draft Minutes From Prior Meetings

3 Determination Of Schedule Of Outstanding Committee Items

4 Scheduling Of Agenda Items And Revisions To The Agendas For Council Committee Meetings

5 Review Of The Agenda For The Next Council Meeting And Rules Committee Meeting

Under Item 3 ("Determination Of Schedule Of Outstanding Committee Items"), the Rules Committee directs the various items to the appropriate policy committees before the item is considered by the full City Council. In order to have an item submitted to the Rules Committee for scheduling, City officials and staff complete a "scheduling request form" (like the ones at Attachment 2), and submit it to Rules Committee staff no later than 6 p.m. on the Tuesday preceding the weekly Thursday Rules Committee meeting.

On the Wednesday afternoon before the meeting, Rules Committee staff distributes a supplemental copy of the Rules Committee agenda that contains a listing of all the items submitted for scheduling, as well as attached copies of the scheduling requests themselves. This "supplemental" Rules Committee agenda is the first public notice of the specific items submitted for scheduling. In addition, the Rules Committee will consider scheduling requests submitted just before or during the meeting (so-called "dais" requests). These requests are not listed in or on the supplemental agenda and are usually considered by the Rules Committee after it has reviewed the requests listed in the supplemental agenda.

Mr. Mix objects to the Rules Committee's action to place Ms. Quan's three proposed tax and assessment items before the Finance and Management Committee on February 24, 2009, without a minimum ten-days' notice.

III. ANALYSIS

Government Code [Brown Act] Section 54954.2 is the general notice requirement for regular meetings of local legislative bodies. It requires that a local legislative body post its agenda for a regular meeting at least 72 hours before the meeting begins. The agenda must provide a "brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session." The Sunshine Ordinance greatly expands this notice requirement for City Council regular meetings, requiring that notice be posted and agenda-related material be filed at least ten days before the meeting. [O.M.C. 2.20.080]

In addition to its regular meeting notice requirements, Government Code Section 54954.2 also contains the following relevant provisions:

> *No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3 [i.e., "Open Forum"]. In addition, on their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities. Furthermore, a member of a legislative body, or the body itself, subject to the rules or procedures of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter,* ***or take action to direct staff to place a matter of business on a future agenda.*** [Emphasis added.]

Sunshine Ordinance 2.20.080, which establishes the ten-day notice requirements for regular meetings of the City Council, Port Board, Public Ethics Commission, and their standing committees, affirms Government Code Section 54954.2 as it applies to scheduling items for future meetings:

> *"Nothing in this section shall prohibit a local body from taking action to schedule items for a future meeting to which regular or special meeting notice requirements will apply. . ."* [2.20.080(F)]

Thus it appears that the City Council, Port Board, Public Ethics Commission and their standing committees, are not restricted by the notice and agenda-filing requirements of Sunshine Ordinance Section 2.20.080, or the agenda requirements of Government Code Section 54954.2, with respect to scheduling items for future meetings "to which regular and special meeting notice requirements will apply."

Commission staff notes that there is are several policy reasons supporting the above conclusion. The Sunshine Ordinance's ten-day agenda requirement undoubtedly provides a public benefit by advanced notice of the items and materials to be considered at regular meetings of the City Council, Port Board and Ethics Commission. However this benefit comes at the cost of restricting the ability that other California cities enjoy to adjust their agendas in light of changing circumstances. Requiring the City Council to add an additional ten-day period for the mere act of scheduling a future agenda item would, in Commission staff's opinion, significantly affect the City Council's ability to manage the City's business. Furthermore, the current exception from the ten-day rule for scheduling future agenda items is mitigated by the fact that whatever item the Rules Committee places on a future meeting agenda will ultimately be subject to Sunshine's advanced notice requirements.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 09-02 on grounds that the facts do not support an issue that the City Council violated Sunshine Ordinance Section 2.20.080.

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.*