

CITY OF OAKLAND
PUBLIC ETHICS COMMISSION
REGULAR MEETING
One Frank Ogawa Plaza (City Hall)
Monday, October 4, 2010
Hearing Room One
6:30 p.m.
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Commission Membership: Jonathan Stanley (Chair), Barbara Green-Ajufo (Vice-Chair), Alaric Degrafinried, Alex Paul, Ai Mori, Richard Unger, Vacancy (Mayoral)

Staff Members: Commission Staff:
Daniel Purnell, Executive Director
Tamika Thomas, Executive Assistant
City Attorney Representative:
Alix Rosenthal, Deputy City Attorney

MEETING AGENDA

- A. Roll Call And Determination Of Quorum
- B. Approval Of Draft Minutes Of The Regular Meeting Of September 8, 2010
- C. Executive Director And Commission Announcements
- D. Open Forum
- E. Complaints
 - 1. A Staff Report And Action To Be Taken On Complaint No. 09-12 (Sacks) **(SECOND SUPPLEMENTAL)**
 - 2. A Staff Report And Action To Be Taken On Complaint No. 10-04 (Mix)
 - 3. A Staff Report And Action To Be Taken On Complaint No. 10-05 (Mix)
 - 4. A Staff Report And Action To Be Taken On Complaint No. 10-07 (Handa)

The meeting will adjourn upon the completion of the Commission's business.

You may speak on any item appearing on the agenda; however, you must fill out a Speaker's Card and give it to a representative of the Public Ethics Commission. All speakers will be allotted three minutes or less unless the Chairperson allots additional time.

In compliance with the Americans with Disabilities Act, if you need special assistance to participate in the meetings of the Public Ethics Commission or its Committees, please contact the Office of the City Clerk (510) 238-7370. Notification two full business days prior to the

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meeting will enable the City of Oakland to make reasonable arrangements to ensure accessibility.

Should you have questions or concerns regarding this agenda, or wish to review any agenda-related materials, please contact the Public Ethics Commission at (510) 238-3593 or visit our webpage at www.oaklandnet.com.

Approved for Distribution

Date



PUBLIC ETHICS COMMISSION TIMELINE FOR FUTURE AGENDA ITEMS (TENTATIVE)

ITEM	NOV	DEC
Complaint No. 09-15 (Supplemental)		X
Complaint No. 09-16 (Supplemental)	X	
Complaint No. 10-09	X	
Complaint No. 10-10	X	
Complaint No. 10-11		X
Complaint No. 10-12		X
Complaint No. 10-13		X
Complaint No. 10-14	X	
Complaint No. 10-15	X	
Complaint No. 10-16		X
Complaint No. 10-17	X	
Review Of Form 700 Procedures And Compliance		X
Review Of Commission's General Complaint Procedures (Committee)	X	X
Presentation RE: Electronic Public Records Search; Email Retention	X	
Review Of Proposed Amendments To The Sunshine Ordinance		X

Public Ethics Commission Pending Complaints

Date Received	Complaint Number	Name of Complainant	Respondents	Date of Occurrence	Issues	Status
9/14/10	10-21	Jean Quan	Don Perata, Paul Kinney; California Correctional Peace Officers Association; Ronald T. Dreisback; T. Gary Rogers; Ed DeSilva; Richard Lee	Ongoing	OCRA violations	Staff is investigating
8/2/10	10-20	Sanjiv Handa	Various Business Improvement Districts & Community Benefit Districts	Various between June 3 and August 2, 2010	Sunshine Ordinance; public meetings	Staff is investigating
7/30/10	10-19	Sanjiv Handa	Civil Service Board; City-Port Liaison Committee	Various between May 31 and July 30, 2010	Sunshine Ordinance; public meetings	Staff is investigating
7/26/10	10-18	Sanjiv Handa	Port of Oakland	May 22, 2010 June 22, 2010 June 29, 2010	Sunshine Ordinance; public meetings	Staff is investigating
7/15/10	10-17	Jon Stanley, PEC	Nancy Nadel Sele Nadel-Hayes	Various times during June 2008 election	OCRA; Limited Public Financing Act	Staff is investigating
7/2/10	10-16	Gwilym Martin	Joseph Yew, Finance	June 18, 2010	Sunshine Ordinance; production of records	Staff is investigating
6/29/10	10-15	Michelle Cassens	James Bondi, et al (Derania, Renwick, Hunter)	November 19, 2009 and ongoing	Sunshine Ordinance, production of records	Staff is investigating

6/25/10	10-14	Michelle Cassens	James Bondi, et al (Derania, Hecathorn, Fielding, Vose)	August 2009 and ongoing	Sunshine Ordinance; production of records	Staff is investigating
6/24/10	10-13	Michelle Cassens	John Stewart, CEDA	Ongoing	Conflict of Interest, Form 700 filing	Staff is investigating
6/21/10	10-12	Michelle Cassens	Walter Cohen, CEDA	Ongoing	Conflict of Interest, Form 700 filing	Staff is investigating
6/21/10	10-11	Michelle Cassens	Antoinette Renwick, CEDA	Ongoing	Conflict of Interest, Form 700 filing	Staff is investigating
4/19/10	10-10	Sanjiv Handa	Office of the Mayor; Kitty Kelly Epstein	Ongoing since 1/1/08.	Oakland Sunshine Ordinance	Staff is investigating
3/29/10	10-09	Sanjiv Handa	Port of Oakland Board Of Commissioners	1/26/10	Oakland Sunshine Ordinance	Staff is investigating
3/26/10	10-08	John Klein	Dan Schulman; Mark Morodomi	3/8/10 and ongoing	Oakland Sunshine Ordinance	Staff is investigating
3/23/10	10-07	Sanjiv Handa	Victor Uno, Joseph Haraburda, Scott Peterson, Sharon Cornu, Barry Luboviski, Phil Tagami	January 1, 2007 to present	Lobbyist Registration Act	Staff is investigating

3/3/10	10-05	David Mix	Oakland City Council	3/2/10	Oakland Sunshine Ordinance	Staff is directed to explore settlement in lieu of hearing.
3/3/10	10-04	David Mix	Oakland City Council	3/2/10	Oakland Sunshine Ordinance	Staff is directed to explore settlement in lieu of hearing.
11/18/09	09-16	Marleen Sacks	Measure Y Committee; Jeff Baker, CAO Office	Ongoing	Whether Measure Y Committee members were required to file a Form 700.	Staff is investigating.
11/17/09	09-15	Anthony Moglia	Jean Quan	Ongoing	Alleged misuse of City resources	Staff is investigating.
09/16/09	09-12	Marleen Sacks	Office of the City Attorney (Mark Morodomi)	ongoing	Sunshine Ordinance; Public Records Act	Staff is directed to explore settlement in lieu of hearing.
2/7/09	09-03	John Klein	City Council President Jane Brunner	February 3, 2009	Sunshine Ordinance -- Allocation of speaker time.	Awaiting report from City Attorney.

11/6/08	08-18	David Mix	Raul Godinez	August 2008	Allegations involving Sunshine Ordinance -- Public Records Request	Commission jurisdiction reserved
11/6/08	08-13	David Mix	Leroy Griffin	August 2008	Allegations involving Sunshine Ordinance -- Public Records Request	Commission jurisdiction reserved
3/28/08	08-04	Daniel Vanderprieem	Bill Noland, Deborah Edgerly	Ongoing since 12/07	Allegations involving production of City records	Commission jurisdiction reserved.
2/26/08	08-02	Sanjiv Handa	Various members of the Oakland City Council	February 26, 2008	Allegations involving the Oakland Sunshine Ordinance and Brown Act	Commission jurisdiction reserved.
2/20/07	07-03	Sanjiv Handa	Ignacio De La Fuente, Larry Reid, Jane Brunner and Jean Quan	December 19, 2006	Speaker cards not accepted because they were submitted after the 8 p.m. deadline for turning in cards.	Commission jurisdiction reserved.
3/18/03	03-02	David Mix	Oakland Museum Dept.	3/11/03	Allegation of Sunshine Ordinance and Public Records Act violation.	Commission jurisdiction reserved.

MINUTES OF MEETING -- DRAFT
PUBLIC ETHICS COMMISSION
REGULAR MEETING
One Frank Ogawa Plaza (City Hall)
Wednesday, September 8, 2010
City Council Chambers
6:30 p.m.



Commission Membership: Jonathan Stanley (Chair), Barbara Green-Ajufo (Vice-Chair), Alaric Degrafinried, Alex Paul, Ai Mori, Richard Unger, Vacancy (Mayoral)

Staff Members: Commission Staff:
Daniel Purnell, Executive Director
Tamika Thomas, Executive Assistant
City Attorney Representative:
Alix Rosenthal, Deputy City Attorney

MINUTES OF MEETING

A. Roll Call And Determination Of Quorum

The meeting was called to order at 6:58 p.m.

Members present: Green-Ajufo, Paul, Mori, Unger

Members excused: Stanley, Degrafinried

B. Approval Of Draft Minutes Of The Regular Meeting Of July 7, 2010, And The Special Meetings Of August 2 and August 17, 2010

The Commission approved by unanimous consent the draft minutes of July 7, August 2 and August 17, 2010. (Note abstention by Commissioner Green-Ajufo in the approval of the August 17 minutes.)

C. Executive Director And Commission Announcements

The Executive Director announced that the Commission would convene a special meeting on Wednesday September 22, 2010, in order to consider proposed amendments to the Lobbyist Registration Act and an item relating to the interpretation of the Oakland Campaign Reform Act.

The Commission may also need to convene a special meeting in mid-to-late October in order to consider a number of pending complaints. The Executive Director noted that the Commission has received 20 formal complaints by September 1 while the annual average is between 12 and 15.

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Last week the Office of the City Administrator announced a mandatory program of ethics training for the more than 600 City employees required to file an annual Statement of Economic Interests (FPPC Form 700). Commission staff, in cooperation with the Office of the City Attorney and City Auditor, developed the curriculum and materials for the training and will assist in the bi-weekly presentations.

D. Open Forum

There was one speaker: Sanjiv Handa

E. Complaints

1. A Staff Report And Action To Be Taken On Complaint No. 09-12 (Sacks)
(SUPPLEMENTAL)

The Commission moved, seconded and adopted a motion to direct the Executive Director to prepare a supplemental report reviewing the Commission's options regarding further action on Complaint No. 09-12 including applicable remedies, types and scope of hearing process, and possibility of entering into a stipulated judgment with respondents. (Ayes: All)

There were three speakers: Marleen Sacks, Sanjiv Handa, Ralph Kanz

2. A Staff Report And Action To Be Taken On Complaint No. 10-07 (Handa)

The Commission granted the request of Messrs. Wasserman and Sokol for a postponement to the October 4 meeting due to the observance of Rosh Hashanah. The Commission requested staff to analyze Mr. Handa's assertion that Mr. Tagami may qualify as a lobbyist pursuant to O.M.C. Section 3.20.030(D)(1).

There was one speaker: Sanjiv Handa

3. A Staff Report And Action To Be Taken On Complaint No. 10-10 (Handa)

The Commission granted Mr. Handa's request for additional time to provide supporting documentation for his allegations.

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There were seven speakers: Sanjiv Handa, Steve Lowe, Charles Turner, Sisley Day, Ralph Kanz, Isaac Turner, Rashidah Grinage

- F. A Staff Report And Action To Be Taken Regarding Commission Allocation Of The Election Campaign Fund For Candidates Potentially Eligible To Receive Public Financing In The November 2010 Municipal Election -- Need For Revisions Since August 17, 2010

The Commission moved, seconded and adopted a motion to approve proposed Resolution No. 10-03, which authorizes a maximum amount of \$22,579 for each of the five district City Council candidates who have chosen to participate in the public financing program during the November 2010 election. (Aye: All)

There was one public speaker: Sanjiv Handa

- G. A Staff Report And Action To Be Taken Regarding A Proposal From The Public Ethics Commission For The City Council To Appoint A Task Force To Review City Charter Section 202 Pertaining To City Council Salaries

The Commission moved, seconded and adopted a motion to direct staff to develop a specific set of policy options for modifying the Commission's authority to set and adjust City Council salaries pursuant to City Charter Section 202. (Ayes: All)

There was one speaker: Sanjiv Handa

- H. A Staff Report And Action To Be Taken Regarding New Commissioner Recruitment And Selection; Appointment Of Temporary Ad Hoc Nominating Committee

The Commission approved by consensus the proposed materials for recruitment and selection of two Commission-appointed members. The chair appointed Commissioners Stanley, Green-Ajufo and Paul to serve on the temporary ad hoc nominating committee.

There was one speaker: Sanjiv Handa

The meeting adjourned at 9:52 p.m.

Dan, my email to Lindheim related solely to public records issues. He did not respond.

I don't really know anything about the California League of Cities, but if it is anything like the statewide coalitions for schools and community colleges, then they would develop model policies and procedures for cities to adopt and modify to suit their own needs, without reinventing the wheel. I can't believe such model policies and procedures don't exist for cities. But in any event, specific policies and procedures for how to request records (from the public's perspective) and how to produce them (from the City's perspective) is exactly what is needed. There should also be a complaint procedure in the event that the policies and procedures aren't followed.

The CPRA is a start, but it needs to be translated into plain English. The additional provisions of the Oakland Sunshine Ordinance also need to be incorporated. Most importantly, the policy needs to outline WHO is responsible for responding to requests. In my mind, this is the biggest problem. Nobody wants to do it, so they just dump it on somebody else, and it never gets done. The procedures need to spell out who is responsible if the request encompasses documents from multiple departments. The procedures need to spell out how to handle sensitive information (e.g. personnel, attorney-client, police etc.) and when attorney involvement is appropriate. They need to spell out how to handle situations where there are no documents. They need to spell out how to do redactions. They need to spell out the consequences for violating the timelines. They need to spell out the duty to actively search for all responsive documents. All of these suggestions are based on problems I have encountered.

But the bottom line is that it is NOT YOUR JOB to fix this problem. If the City is not interested, well, that's the end of the story. There is a lawsuit on this issue. The City Attorney has informed a City Council member she's on her own for refusing to comply with the law. The City Administrator ignores my olive branches. I recognize a hopeless case when I see one. This is hopeless and I truly believe the only chance for improvement is a full hearing, either before the PEC and/or the superior court, where the offending parties are put on the stand and forced to explain their ongoing and open disregard of the law. I have given the City six months to put together a meaningful settlement proposal and have received NADA. Their time is up. I want a hearing now. Please forward this email to the PEC as well. Thanks.

Marleen

From: "Purnell, Daniel" <DPurnell@oaklandnet.com>

To: Marleen Sacks <t>

Sent: Thu, September 23, 2010 10:29:37 AM

Subject: RE: Fwd: Public Records Request/District 6/Calendars/OLS No. 1923

Sorry, I've been unable to focus on your most recent prr's. I'll try to make time tomorrow and will call or write you regarding them.

I'm presuming your email to Mr. Lindheim was about your current litigation pertaining to the substance of Measure Y. I am

also interested in resolving the public records issues pending before the Commission. However I still want to better understand what it is you want the City to do -- At a very minimum there's no question that the City needs to follow the procedures set forth in the CPRA and that there is ample room for improvement. Part of meeting this minimal standard surely includes better training and education, which the City has begun to implement and, based on its initial offer, is willing to pursue further. But what else are you looking for? You have so far only mentioned the development of "specific protocols" and "greater accountability." How do those concepts translate into a specific proposal the City can respond to?

I have reviewed the materials from San Jose you sent and like a lot of what I saw. One of the thoughts I had would be to incorporate the procedures set forth in the CPRA (as San Jose has basically done) into the form of a proposed Administrative Instruction (AI) that could also include additional procedures, components of "accountability" etc. Would that approach get closer to what you envision? If so, I think that such an approach could provide a vehicle for further settlement negotiations and I would be willing to help develop something specific along these lines. Please let me know what you think.

From: Marleen Sacks [mailto:]
Sent: Wednesday, September 22, 2010 9:32 PM
To: Purnell, Daniel
Subject: Fw: Fwd: Public Records Request/District 6/Calendars/OLS No. 1923

Dan:

Since the last meeting, I haven't heard anything from you, regarding mediating my most recent complaints or otherwise trying to resolve the outstanding issues. In addition, I sent a detailed email over a week ago to Dan Lindheim informing him of my desire to resolve the matter without

litigation, and asking him what the obstacles to settlement were. Surprise surprise, I have heard nothing back from him. This is additional evidence of the City's refusal and/or lack of interest in truly resolving the issue of timely public access to records.

Below you will find an email written by Assistant City Attorney Mark Morodomi advising Jeffrey Cash, who has requested documents from Desley Brooks, that it will not represent her in the matter. Apparently, Ms. Brooks is outright refusing to produce records, and the legal grounds for doing so are so utterly non-existent that the City Attorney's office is telling her she's on her own. I can't think of any other way to interpret the email.

I am asking that you forward this email to all members of the PEC, in advance of our next meeting, as evidence that the problem is far greater than just the dozen or two situations I have complained about. As I noted in my previous email, the City Council President, Jane Brunner, simply ignored one of my most recent requests. When the Council President ignores requests from litigators with pending lawsuits, and when Ms. Brooks' refusal to produce records is found to be indefensible by the City Attorney - well, I think there's a serious problem that cannot be ignored any longer.

As the infamous matter of the City of Bell illustrates, transparency in government is essential to protecting public funds and rooting out corruption. I sincerely hope the Commission recognizes the importance in conducting a full hearing on this matter, in whatever manner is most appropriate to resolve the larger issue, and that justice will be served.

Marleen L. Sacks

----- Forwarded Message -----

From: Jeffrey Cash <t>

To: Marleen Sacks <>

Sent: Wed, September 22, 2010 6:51:28 PM

Subject: Fwd: Public Records Request/District 6/Calendars/OLS No. 1923

Begin forwarded message:

From: "Morodomi, Mark" <MMorodomi@oaklandcityattorney.org>

Date: September 22, 2010 2:40:09 PM PDT

To: "Jeffrey Cash" <>

Cc: "Abney, Michelle" <MAbney@oaklandcityattorney.org>

Subject: RE: Public Records Request/District 6/Calendars/OLS No. 1923

Sent via email only

September 22, 2010

Mr. Jeffery Cash:

Subject: Public Records Request/District 6/Ms. Brooks' Calendar

This office has been in communication with Ms. Brooks regarding producing copies of her calendar pursuant to your request. At this point, however, we have advised Ms. Brooks that this office cannot represent her in this matter, and she will need to inform you herself her reasons for not producing the calendars.

Mark Moradomi

**Supervising Deputy City Attorney
1 Ogawa Plaza, 6th Fl.
Oakland, CA 94612
510 238-6101**

1 of violence prevention, they are not targeted at youth or children, nor do they fall within the four
2 very specific categories specified above. Therefore, the following violence prevention programs
3 funded in 2009/10 by Measure Y for these purposes were not authorized: (a) Mayor's Street
4 Outreach - \$375,000; (b) California Youth Outreach, Healthy Oakland, and Youth Uprising-
5 \$643,800; Crisis Response Support Network - \$310,800; (c) City/County Neighborhood Initiative
6 (CCNI) - \$133,200; Public Safety Districts - \$30,000 ; Violence Prevention Network Coordinator
7 - \$133,2000. These expenses are merely an example of the types of violence expenditures under
8 Measure Y that do not fall within the restrictions of Measure Y, and which therefore should never
9 have been authorized.

10 44. Throughout 2009 and in 2010 as well, Petitioner submitted requests for documents
11 pursuant to the California Public Records Act and Oakland's own Sunshine Ordinance. To date,
12 Petitioner has submitted well over a dozen public records requests. With respect to the vast
13 majority of requests, including the most recent request, the City has failed to provide a response as
14 required under the CPRA and Sunshine Ordinance within the required 10 day period. As a result,
15 Petitioner filed a complaint with Oakland's Public Ethics Commission on or about September 9,
16 2009.

17 45. Following the filing of her complaint with the PEC, Petitioner attempted to mediate
18 the dispute with the City. A mediation was held on November 6, 2009. Petitioner was then able
19 to obtain most of the documents she sought. However, she also sought a change to the City's
20 practices and procedures to ensure that it complied with the California Public Records Act in the
21 future. The City refused to mediate this request, and has since continued to violate the CPRA on a
22 regular basis.

23 46. As a result of the City's continued open refusal to comply with the clear provisions
24 of the CPRA and its own Sunshine Ordinance, and the City's refusal to mediate the matter,
25 Petitioner requested that the matter go to hearing before Oakland's Public Ethics Commission.

26 47. The PEC rules specifically provide that complaints must be reviewed and a
27 recommended resolution by the Executive Director be provided to the Chair of the PEC within 30
28 business days of receipt, unless additional time not to exceed fifteen business days is provided by

SIXTH CAUSE OF ACTION

(Petition for Writ of Mandate, Request for Injunctive and Declaratory Relief - Violation of the California Public Records Act and Article I, California Constitution)

72. Petitioner hereby realleges and incorporates Paragraph 1 through 71, inclusive.

73. Government Code Section 6253 provides in relevant part that "each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available...." Subsection provides that the public agency must respond within 10 days. "In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available."

74. Subsection (d) provides: "Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial."

75. Subsection (e) provides: "Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter." The City of Oakland has adopted additional requirements, contained in Municipal Code Section 2.20.010 et seq.

76. Government Code section 6258 specifically authorizes any person to institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter.

77. Throughout 2009 and extending into the current year, Petitioner has submitted over a dozen public records requests, and the City has practically never complied with the requirements outlined above. Most recently, on February 8, 2010 Petitioner submitted a Public

1 Records Act request for documents. City officials provided a partial response, but with respect to
2 the main document being sought, Petitioner simply received one or two emails indicating that the
3 document had not been located. Petitioner has made phone calls and written to City officials, who
4 have not responded to her request for a legally sufficient response.

5 78. The City had a clear and ministerial duty to comply with the provisions of the
6 California Public Records Act, Article I of the California Constitution, and its own Sunshine
7 Ordinance, and has repeatedly and knowingly failed to comply with those requirements.
8 Petitioner has no adequate remedy at law for the injuries she and other Oakland residents will
9 suffer if the Court does not take action to require the City to comply with its clear ministerial duty
10 to comply with those requirements. Petitioner therefore seeks writ and injunctive relief, whereby
11 this Court would order the City to produce any outstanding records, and for declaratory relief,
12 whereby this Court would make a finding that the City violated the CPRA and related provisions
13 in the past,

14 79. Petitioner also seeks injunctive and other remedial relief, whereby this Court would
15 order the City to comply with the CPRA and related provisions in the future, and for court
16 monitoring to ensure compliance.

17 **SEVENTH CAUSE OF ACTION**

18 **(Petition for Writ of Mandate, Request for Injunctive and Declaratory Relief - Violation of
19 the Municipal Code and Internal Rules of the City's Public Ethics Commission)**

20 80. Petitioner hereby realleges and incorporates Paragraph 1 through 79, inclusive.

21 81. Oakland has established a "Public Ethics Commission" to assist in resolving
22 disputes related to local ethics and open government issues, including compliance with the Brown
23 Act, the California Public Records Act and Sunshine Ordinance, and other matters. The PEC is
24 governed by City Charter Section 202 and Oakland Municipal Code Chapter 2.24, as well as its
25 own bylaws and internal rules.

26 82. The PEC's rules provide: "A reporting log shall be maintained by the
27 Commission's staff that chronologically records each complaint..." Another rule provides: "The
28 Executive Director shall process, review and make recommendations on all complaints
expeditiously, and in any event no more than thirty (30) business days of receipt, unless additional

1 time not to exceed fifteen (15) business days is provided by the Chairperson of the Commission
2 ("Chair"). No further extensions shall be permitted except upon approval of the Commission as a
3 whole."

4 83. On or about September 9, 2009, Petitioner filed a complaint with the PEC
5 regarding the City's ongoing violations of the CPRA and related provisions. The City's PEC has
6 failed to comply with its own provisions for having Petitioner's complaint heard in a timely
7 manner, and has failed to provide any valid excuse for failing to adhere to its own timelines. To
8 date, Petitioner's complaint has still not been heard or otherwise resolved.

9 84. The City had a clear and ministerial duty to comply with the provisions of its own
10 City Charter, municipal ordinance and internal rules governing the PEC, and has failed to do so.
11 Petitioner has no adequate remedy at law for the injuries she and other Oakland residents will
12 suffer if the Court does not take action to require the City to comply with its clear ministerial duty
13 to comply with those requirements. Petitioner therefore seeks writ and declaratory relief, whereby
14 this Court would make a finding that the City violated its own rules regarding governance of the
15 PEC.

16 85. Petitioner also seeks injunctive and other remedial relief, whereby this Court would
17 order the City to comply with its own provisions related to the PEC in the future, and for court
18 monitoring to ensure compliance.

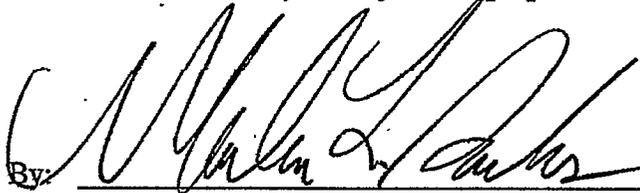
19 WHEREFORE, Petitioner prays the following relief:

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PRAYER FOR RELIEF

1. For the Court to issue a peremptory writ of mandate as specified above;
2. For the court to issue temporary and permanent injunctive relief as specified above;
3. For the Court to issue declaratory relief as specified above;
4. For attorneys' fees and costs of this suit pursuant to Government Code § 800 and Code of Civil Procedure § 1021.5; and
5. For such other and further relief as the Court may deem just and proper.

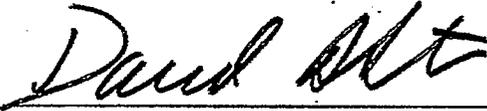
Dated: March 18, 2010

By: 

Marleen L. Sacks, Esq.
In Pro Per

Dated: March 18, 2010

DONAHUE GALLAGHER WOODS LLP

By: 

David A. Stein
Attorney for Marleen L. Sacks

690586

1 Marleen L. Sacks (State Bar No. 161388)



3 In Pro Per

4 David A. Stein (State Bar No. 102556)
5 DONAHUE GALLAGHER WOODS LLP
6 Attorney at Law
7 1999 Harrison Street, 25th Floor
8 Oakland, California 94612-3570
9 P.O. Box 12979
10 Oakland, California 94604-2979
11 Telephone: (510) 451-0544
12 Facsimile: (510) 832-1486

9 Attorneys for Petitioner
10 Marleen L. Sacks

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF ALAMEDA

14 MARLEEN L. SACKS,
15
16 Petitioner,
17
18 vs.
19 CITY OF OAKLAND,
20
21 Respondent.

Case No.: RG10504741

**PETITIONER'S REQUEST FOR
PRODUCTION OF DOCUMENTS, SET
ONE**

20 PROPOUNDING PARTY: Petitioner MARLEEN L. SACKS

21 RESPONDING PARTY: Respondent CITY OF OAKLAND

22 SET NO.: ONE (1)

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1 PLEASE TAKE NOTICE that on September 22, 2010, at the office of Donahue,
2 Gallagher, Woods, located at 1999 Harrison Street, 25th floor, Petitioner hereby demands that
3 Respondent produce for inspection, copying, testing or sampling, if appropriate, all originals
4 (copies or depictions if the originals do not exist) of the documents or other tangible things
5 described below, pursuant to Code of Civil Procedure section 2031. In responding to this
6 Demand for Inspection, you should furnish any document or other tangible thing specified in this
7 Demand which is available to you, not merely those which you now have in your own personal
8 possession. This means that you are to furnish such documents and things which are in the
9 possession of any of your agents, employees, attorneys, investigators for your attorneys, or which
10 are otherwise subject to your custody or control. Additionally, you are demanded to fully comply
11 with the requirements of Code of Civil Procedure section 2031.210 et seq. with regard to each
12 specifically-identified item and every separately-numbered category. Therefore, if you are unable
13 to produce documents or other tangible things responsive to such categories or specific
14 descriptions, you are hereby demanded to provide all such information as required by Code of
15 Civil Procedure section 2031.210 et seq. affirmed under oath.

16 All documents shall be produced in the form in which they were found in their normal
17 filing places, including the file folders or other bindings in which such documents or things were
18 so found.

19 PLEASE TAKE FURTHER NOTICE that in the event there be objection made to this
20 Demand or failure to respond to the Demand or any part thereof, or failure to permit inspection as
21 requested, Petitioner will move the court for an order pursuant to Code of Civil Procedure
22 sections 2031.300 et seq., including a request for reimbursement of reasonable expenses incurred
23 in obtaining an order for inspection and copying, including reasonable attorneys' fees, as to all or
24 any portion of the records or objects described below not produced pursuant to this Demand or to
25 which there is no response made.

26 The term "documents(s)" as used herein refers to all written, recorded or graphic matter,
27 whether produced or reproduced by handwriting, magnetic recording, photographs, photostats,
28 printing, tape, transcription of spoken language, typewriting, writing or any other means,

1 agreements, appointment books, analyses, bills, books, cablegrams, calendars, cards, charts,
2 computer hard copy, computer printouts, contracts, correspondence, credit memoranda, diaries,
3 documents, expense accounts, file cards, films, financial statements and reports, invoices,
4 journals, ledgers, letters, logs, memoranda, memorials in any form of telephone conversations,
5 minutes, notes, notices, papers, purchase orders, note cards, receipts, recording by any medium,
6 records, reports, slides, statements, telegrams, telephone slips, telexes, time sheets transcripts of
7 any type of recording, and any other pertinent representation thereof; including, but not limited to
8 any notation to any document or any copy of any document. The term "document" shall further
9 include all copies of documents on which there appears any marking which does not appear on
10 the originals thereof.

11 DOCUMENTS TO BE PRODUCED

- 12 1. All DOCUMENTS that refer or relate to the City's decision to cancel and/or postpone the
13 166th police academy in the fall of 2008.
- 14 2. All DOCUMENTS that refer or relate to any police academies scheduled or conducted
15 since November, 2008, including all documentation related to the number of applicants, attendees
16 graduates, and hire by Oakland Police.
- 17 3. All DOCUMENTS that refer, relate to or reflect the average attrition rate of Oakland
18 Police Department for any portion of the time frame of January, 2008 through the present.
- 19 4. All DOCUMENTS that refer, relate to or reflect the size of Oakland's sworn police force
20 at anytime from January, 2008 through the present.
- 21 5. All DOCUMENTS that refer or relate to the staffing of Beat 24Y's Measure Y "problem
22 solving officers," since January, 2005, including, but not limited to, when the positions were first
23 filled, the identity of the persons filling those positions, and whether the persons filling those
24 positions were ever removed, either temporarily or permanently, from their regular "problem
25 solving officer" duties.
- 26 6. All DOCUMENTS that refer or relate to the staffing of Beat 13Y's Measure Y "problem
27 solving officers," since January, 2005, including, but not limited to, when the positions were first
28 filled, the identity of the persons filling those positions, and whether the persons filling those

1 positions were ever removed, either temporarily or permanently, from their regular "problem
2 solving officer" duties.

3 7. All DOCUMENTS that refer or relate to the staffing of the six "crime reduction team"
4 officer positions referenced in Measure Y, including, but not limited to, when the positions were
5 first filled, the identity of the officers filling those positions, the duties performed by those
6 officers, whether and when the officers filling those positions were transferred to other positions,
7 and the time periods during which those positions were actually filled.

8 8. All DOCUMENTS that refer or relate to the City's efforts to address concerns raised in
9 the Oakland City Auditor's September, 2009 audit regarding Measure Y compliance.

10 9. All DOCUMENTS that refer, relate to or support the City's contention that it was
11 permitted to award contracts to non-City organizations to perform violence prevention services
12 without complying with competitive bidding or "request for proposal" requirements outlined in
13 City Municipal Code Sections 2.04.040, 2.04.051, 2.04.015, and 2.04.020.

14 10. All DOCUMENTS that refer, relate to or support the City's contention that any of the
15 following City awards were in compliance with Part I, Section 3(2) of Measure Y: \$225,000 to
16 the Safe House for Sexually Exploited Minors (2006), \$222,000 to the Volunteers of America
17 (2009), \$111,000 to the Mentoring Center (2009), \$375,000 for Mayor's Street Outreach (09/10),
18 \$643,800 to California Youth Outreach, Healthy Oakland, and Youth Uprising (09/10); \$310,800
19 to the Crisis Response Support Network (09/10); \$133,200 to the City/County Neighborhood
20 Initiative (09/10) \$30,000 to Public Safety Districts (09/10); \$133,200 to the Violence Prevention
21 Network Coordinator (09/10).

22 11. All DOCUMENTS that refer, relate to or constitute communications between City
23 officers and/or employees and representatives of the Public Ethics Commission, related to
24 Petitioner Marleen L. Sacks' requests for public records and associated public ethics complaints.

25 12. All DOCUMENTS that refer, relate to or constitute City of Oakland policies, procedures
26 and protocols for complying with the California Public Records Act and the City of Oakland's
27 Sunshine Ordinance for 2009 and 2010.

28 ///

- 1 13. All DOCUMENTS that refer, relate to or support the City's contention that it has
2 complied with the California Public Records Act and Sunshine Ordinance with respect to requests
3 for public records submitted by Marleen L. Sacks in 2009 and 2010.
- 4 14. All DOCUMENTS that refer, relate to or constitute complaints submitted by individuals
5 and organizations other than Petitioner Marleen L. Sacks regarding compliance with the Public
6 Records Act and Sunshine Ordinance from January, 2000 to the present.
- 7 15. All DOCUMENTS that refer, relate to or support the City's contention that it appropriated
8 non-Measure Y funds for staffing of sworn uniformed police officers at a level necessary to
9 maintain the number of uniformed officers at 739 for 2009/10 and 10/11.
- 10 16. All DOCUMENTS that refer or relate to the funding appropriated by the City for police
11 academies for years 08/09, 09/10 and 10/11.
- 12 17. All DOCUMENTS that refer or relate to any Measure Y "problem solving officer" that
13 was transferred to a gang intervention task force or any other duties not associated with specific
14 beat problem solving since January, 2008.
- 15 18. All DOCUMENTS that refer, relate to or support the City's contention that it maintained
16 six "crime reduction team" officers funded by Measure Y from January, 2005 to the present.
- 17 19. All DOCUMENTS that refer, relate to or support the City's contention that it complied
18 with state law and Municipal Code requirements related to its award of contracts for violence
19 prevention programs funded by Measure Y, without requiring competitive bidding or requests for
20 proposals.
- 21 20. Any DOCUMENT that refers to or reflects the actual email addresses of members of the
22 Measure Y oversight committee as of August 28, 2009.
- 23 21. All DOCUMENTS that refer, relate to or reflect the establishment of "mentorship
24 programs" at every fire stations since January, 2005, as required by Measure Y.
- 25 22. All DOCUMENTS that refer, relate to or reflect the expansion of paramedic services
26 since January, 2005, as required by Measure Y.
- 27 23. Any DOCUMENTS that indicate that Measure Y officers assigned to non-Measure Y
28 duties (e.g. desk duty) were paid out of non-Measure Y funds for the period of time they were not

1 performing Measure Y duties, since January, 2007.

2 24. All DOCUMENTS referring or relating to the City's decision in May, 2010 to lay off
3 police officers, including, but not limited to emails and other correspondence, memos, documents
4 reflecting how the initial proposed number of officers (192) was calculated.

5 25. All DOCUMENTS that refer, relate to or support the City's contention that it complied
6 with Public Ethics Commission rules requiring that public complaints within 30 business days, as
7 those rules apply to Petitioner Marleen L. Sacks' September 9, 2009 complaint.

8 26. All documents that refer, relate to or support the City's contention that it appropriated
9 sufficient funds in fiscal year 2009/10 necessary to maintain sworn officer staffing at the levels
10 required by Measure Y, i.e. 739 non-Measure Y officers.

11 Dated: August 17, 2010

DONAHUE GALLAGHER WOODS LLP

12
13 By: 

14 David A. Stein
15 Attorneys for Petitioner
16 Marleen L. Sacks

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PROOF OF SERVICE

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen years at the time of service and not a party to the within cause. My employment address is 1999 Harrison Street, 25th Floor, Oakland, California 94612-3520.

On August 18, 2010, I served copies of the attached document(s) entitled:

PETITIONER'S REQUEST FOR PRODUCTION OF DOCUMENTS, SET ONE

on the interested parties in this action, by placing a true and correct copy thereof enclosed in a sealed envelope, addressed as follows:

John A. Russo, Esq.
Barbara J. Parker, Esq.
Mark T. Morodomi, Esq.
Kevin D. Siegel, Esq.
Office of the City Attorney
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612
Tel: (510) 238-4982
Fax: (510) 238-6500
E-mail: ksiegel@oaklandcityattorney.org

Marleen L. Sacks, Esq.



BY U.S. MAIL. I placed such envelope, addressed as above by first-class mail, postage prepaid, for collection and mailing at my business address following our ordinary business practices. I am readily familiar with our ordinary business course of collection and processing of correspondence for mailing with the U.S. Postal Service. In the ordinary course of business on the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service for delivery to the addressee.

STATE. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 18, 2010, at Oakland, California.

[Redacted Signature]

Name of Case: *Sacks v. City of Oakland*

Name of Court and Case Number: *Alameda County Superior Court Case No.: RG10504741*

City Attorney

City of Oakland
Public Ethics Commission
October 4, 2010

In the Matter of

)
) Complaint No. 09-12
) **2d SUPPLEMENTAL**

Marleen Sacks filed Complaint No. 09-12 on September 16, 2009.

I. SUMMARY OF COMPLAINT

Ms. Sacks filed Complaint No. 09-12 alleging that various City staff including Mark Morodomi, Michelle Abney and Kevin Siegel of the City Attorney's Office, Jeff Baker of the Office of the City Administrator, and Renee Sykes of the Oakland Police Department violated the Oakland Sunshine Ordinance and the California Public Records Act ("CPRA") by failing to produce or failing to timely produce copies of public records. She amended her complaint several times as fully described in the staff reports of April 7 and September 8, 2010.

Copies of both staff reports have been previously distributed and are available upon request from the Commission or from the Commission's website at www.oaklandnet.com.

In its April 7 report, Commission staff identified thirteen separate allegations whereby Ms. Sacks claims that City representatives violated provisions of the Sunshine Ordinance and the CPRA. Commission staff concluded that issues of law and fact existed with respect to Allegation Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13. Both the Office of the City Attorney and Ms. Sacks submitted letters to the Commission disputing portions of the staff's report. The Commission ultimately directed staff to attempt a settlement or stipulated judgment and report back to the Commission by its meeting of September 8, 2010.

In its September 8 report, Commission staff described a proposal developed among the Offices of the City Clerk, City Attorney and City Administrator to settle Ms. Sacks' complaint. Commission staff reported that Ms. Sacks rejected the proposal on grounds that it lacked sufficient detail and provided no "accountability" if its provisions were not met. Ms. Sacks declined to provide a counter-proposal and instead insisted that her complaint be set for hearing.

During Commission staff's email exchange with Ms. Sacks on the settlement proposal, she indicated that she made four additional record requests (dated May 21, June 22, June 24 and July 27, 2010) in which she alleges that the City did not comply or did not timely

comply. She requested that these additional complaints be combined with her previous allegations and made a part of her requested formal hearing. Commission staff responded that these additional allegations would have to be mediated and made subject to a preliminary staff report before they could be considered for hearing. Ms. Sacks stated in an August 29 letter to the Commission that she requested these additional allegations be included in the current complaint "for the sake of expediency" and did not wish to delay a full hearing on her initial amended complaint. She indicated she would file a second formal complaint on these additional allegations if necessary.

At the September 8 meeting, the Commission requested a further briefing on its options regarding the disposition of Complaint No. 09-12.

II. FURTHER ACTION BY THE COMMISSION

Section VI. of the Commission's General Complaint Procedures ("Procedures") provides:

A. For any complaint recommended for hearing by the Executive Director or pulled from the consent calendar pursuant to Section III.D., the Commission may:

(1) Dismiss the complaint;

(2) Schedule the complaint for hearing; or

(3) Refer the complaint back to the Executive Director for further investigation.

B. If the Commission decides to dismiss the complaint, no further action shall be taken [other than the possible referral of the matter to another body as stated in Section III.B.(1)(e) and the Executive Director shall notify the parties in writing of the Commission's determination]. The Commission's decision is final and represents closure of the administrative process.

C. If the Commission decides to schedule a hearing, then a hearing shall be scheduled and conducted pursuant to Section IX. If in a particular case it appears the complainant is not capable of prosecuting the case before the Commission, the Chair may request that the Executive Director and/or the City Attorney assist the complainant in bringing the matter before the Commission for final adjudication.

Commission staff discusses these options in the order they are presented.

A. Dismiss The Complaint

In its staff report of April 7, 2010, Commission staff found potential issues on 11 of Ms. Sacks' 13 specific allegations. The following summarizes her alleged violations and the status of the record production.

REQUEST DATE	SPECIFIC ALLEGATION	STATUS OF REQUEST
3/31/09	Alleges failure to: send "ten day" letter; produce records promptly; provide proper justification for City Attorney redactions (ie, "by footnote or other clear reference")	Records ultimately provided.
5/26/09	Allegations withdrawn.	
5/6/09	Alleges failure to: send "ten day" letter; produce records promptly; provide proper justification for City Attorney redactions (ie, "by footnote or other clear reference")	Records ultimately provided.
7/29/09	Alleges failure to: provide records promptly; provide proper justification for City Attorney redactions (ie, "by footnote or other clear reference")	Records ultimately provided.
8/10/09	Alleges failure to: send "ten day" letter; provide records promptly; assist in identifying responsive records.	Records ultimately provided.
8/18/09	Alleges failure to: send "ten day" letter; provide records promptly.	Records ultimately provided.
8/28/09	Alleges failure to: send "ten day" letter; provide records promptly; is withholding without legal justification an "original" email address for a member of the Measure Y Committee.	Email addresses ultimately provided except one.
11/25/08	Alleges failure to: send "ten day" letter; provide records promptly.	Records ultimately provided.
9/22/09	Alleges failure to: send a "ten day" letter; provide records promptly.	Records ultimately provided.
10/1/09	Alleges failure to: send a sufficient "ten day" letter; provide records promptly.	Records ultimately provided.

10/18/09	Alleges failure to: assist in identifying public records; adequately explain why it cannot provide payroll information without assessing a charge of more than \$1,000.	City ultimately provided information that obviated need for the requested records.
12/4/09	Alleges failure to: provide records promptly.	Records ultimately provided.
2/5/10	Alleges failure to: send "ten day" letter; provide records promptly.	Some records ultimately provided; City claims copy of the actual salary survey report is not within City's possession.

The primary allegations in Ms. Sacks' complaint is the alleged failure by the City to produce records "promptly" as required by the CPRA and, in many cases, the alleged failure to send a timely "ten day" letter advising whether or when the records would ultimately be produced. Under the Procedures, the Commission could decide to dismiss all the above allegations, set all the allegations for hearing, or dismiss some and set the rest for hearing.

B. Set the Complaint For Hearing

Should the Commission decide to set all or some of the allegations for hearing, Section IX requires the Commission to decide "at that time" whether to sit as a hearing panel or to delegate its authority to gather or hear evidence to one or more of its members or to an independent hearing examiner.

During the past ten years, the Commission has chosen either to sit as a panel or to delegate the task of conducting a hearing to one or more of its members. The advantage to conducting a hearing as a panel is that the Commission can consider evidence directly, possibly over the course of several publicly conducted meetings, without having to rely upon another person's findings and determinations. The advantage of delegating authority to one or two Commissioners is that the process can be conducted more efficiently, at least in terms of scheduling, making preliminary determinations and deliberating. The person(s) conducting the hearing is required to prepare a proposed "Findings of Fact and Conclusions" which is ultimately submitted for adoption by the full Commission.

The other option would be to delegate the hearing duties to an independent hearing examiner. Section IX.A requires the Executive Director to select the hearing examiner "at random from a pre-approved list." The prospective hearing examiner must disclose any conflicts and, if the prospective hearing examiner is conflicted or unavailable, then another shall be randomly selected from the list. Over the years Commission staff has not maintained an active "hearing examiner list" and one would have to be assembled and "pre-approved" by the Commission before a prospective examiner could be selected. There are several attorneys whom Commission staff has approached recently who might

be interested in serving in this capacity but there is currently no budget for compensating anyone for his or her time.

C. Other Commission Options

1. Stipulated Order

Section XII of the Procedures authorizes the Chair or his or her designee to "enter into negotiations with a respondent for the purpose of resolving the factual and legal allegations in a complaint by way of a stipulation, decision and order. " The Procedures require that:

- 1) the Commission approve the stipulated order;
- 2) the respondent waive its procedural rights under the law and these Procedures;
- 3) the Commission retain its right to refer the matter to another governmental agency;
- 4) the agreement becomes null and void if the Commission refuses to approve the stipulated order; and
- 5) no member of the Commission shall be disqualified from hearing the merits of the complaint if the proposed stipulation is not approved.

Once approved, a stipulated order "shall have the full force of an order of the Commission."

One of the advantages of resolving a complaint by a stipulated order is that the Commission may be able to secure commitments from a respondent that the underlying law does not authorize the Commission to impose if a violation is found. Here, and unlike other ordinances that the Commission is authorized to enforce, the Sunshine Ordinance provides no express remedy for violations of the provisions pertaining to public records (see further discussion below). By entering into a stipulated order with the Commission, the City may be willing to perform tasks that the Commission would otherwise be powerless to order.

If the Commission is interested in seeking a stipulated order directly with the City, Commission staff could contact City representatives to determine whether they would be willing to agree to a set of specific proposals, perhaps along the lines of the settlement proposal previously submitted to Ms. Sacks. The Commission would not be limited to the terms of the previous settlement offer and could add additional provisions as a condition of approval.

2. Pursue Broader Inquiry Into Records Management And Records Production

Section 2.24.030 of the Commission's "enabling" ordinance authorizes the Commission to "conduct investigations, audits and public hearings" and to "[i]ssue subpoenas to compel the production of books papers and documents and take testimony on any matter pending before the Commission." As staff stated at the September 8 meeting, any testimony received at a formal hearing would be limited by relevance to the violations alleged. If a respondent is willing to either admit to the facts or to the ultimate issue to be decided (for example, that a "ten day" letter did not issue timely), there may be little need or reason to accept any further testimony on that issue. Parties also have "no right" to cross-examination at a Commission hearing. [Procedures Section IX(F)]

Another option available to the Commission would be to conduct a broader inquiry into the City's records management and records production practices. The Commission could invite (and, if necessary, subpoena) City officials to comment publicly on a broad range of issues not limited to the specific allegations contained in Ms. Sacks' complaint. The Commission could use this type of hearing to conduct a broader inquiry into the City's records management and records production practices and potentially use any information gathered to develop future recommendations to the City Council and the administration.¹

In a September 23 email to Commission staff, Ms. Sacks argues that the problem regarding Oakland's public records practices is "far greater" than the allegations contained in her complaint. She expresses hope that "the Commission recognizes the importance in conducting a full hearing on this matter, in whatever manner is most appropriate to resolve the larger issue . . ." **Attachment 1.**

III. ADDITIONAL CONSIDERATIONS

In its April 7 staff report, Commission staff proposed a set of factors the Commission may wish to consider in determining whether to conduct a formal hearing in this complaint:

"In deciding whether to conduct a formal hearing, the Commission may wish to consider the magnitude of harm or prejudice to the public, the chance that the alleged conduct is likely to continue, the amount of time and resources the Commission wishes to devote to conducting a formal hearing on this subject, and/or the availability or suitability of other remedies."

While arguments can be made over the application of any of these factors to this complaint, of primary concern to Commission staff is the commitment of Commission resources to conducting a hearing on alleged violations for which no remedy exists under the Sunshine Ordinance. Even if Ms. Sacks were to prevail on each of her complaint allegations, the Sunshine Ordinance provides no remedy or penalty that the Commission can impose.

¹ Pursuant to Resolution No. 82908, the Commission will be required to conduct at least one public hearing on a proposed Citywide records management plan in early 2011.

The Commission should also be aware that Ms. Sacks is currently proceeding with a second lawsuit against the City for, among other things, the City's alleged failure to comply with the CPRA in connection with the same requests for records currently pending before the Commission. In her lawsuit, Ms. Sacks alleges:

"44. Throughout 2009 and 2010 as well, Petitioner [Ms. Sacks] submitted requests for documents pursuant to the California Public Records Act and Oakland's own Sunshine Ordinance. To date, Petitioner has submitted well over a dozen public records requests. With respect to the vast majority of requests, including the most recent request, the City has failed to provide a response as required under the CPRA and Sunshine Ordinance within the required 10 day period. As a result, Petitioner filed a complaint with Oakland's Public Ethics Commission on or about September 9, 2010.

*"45. Following the filing of her complaint with the PEC, Petitioner attempted to mediate the dispute with the City. A mediation was held on November 6, 2009. **Petitioner was then able to obtain most of the documents she sought.** However, she also sought a change to the City's practices and procedures to ensure that it complied with the California Records Act in the future. The City refused to mediate this request, and has since continued to violate the CPRA on a regular basis."* [Emphasis added.]²

Ms. Sacks is requesting the court to order the City to "produce any outstanding records" and seeks from the court "a finding that the City violated the CPRA and related provisions in the past." She is also requesting the court to order the City to "comply with the CPRA and related provisions in the future, and for court monitoring to ensure compliance." **Attachment 2.**

On August 17, 2010, Ms. Sacks issued multiple demands for discovery in connection with her pending lawsuit. Her request for production of documents includes most if not all of the records she already requested under the CPRA and over which she admittedly filed this complaint with the Commission. **Attachment 3.** Her pleadings and discovery requests indicate that she is preparing to litigate in court the very issues she is requesting the Commission to conduct a hearing on. Unlike the Commission however, the court has the power to order the production of any withheld record, even records that the City claims to be exempt from disclosure. [CPRA Section 6259] The court may also impose sanctions for the failure to comply

² Ms. Sacks has also named the Ethics Commission in her lawsuit for failing to timely hear this complaint. She is asking the court to determine that the Commission violated its procedural rule that the Executive Director review and make recommendations on complaints no later than 30 business days from the receipt of any complaint absent an extension by the Commission Chair or by the Commission as a whole.

with any court order and award attorney fees to a "prevailing plaintiff" in the litigation. [CPRA Section 6259(d)]

IV. STAFF RECOMMENDATION

In light of the fact that Ms. Sacks has elected a judicial forum to adjudicate the very issues contained in her complaint, it is difficult for Commission staff to recommend that the Commission proceed with a formal hearing on the same allegations. Thus Commission staff recommends that the Commission either 1) dismiss Complaint No. 09-12; 2) suspend further proceedings on Complaint No. 09-12 until resolution of the lawsuit; 3) direct staff to continue to pursue settlement with the parties or a stipulated order from the City. The Commission may also wish to consider holding a hearing in the future to identify and better understand the problems associated with responding to public record requests and to develop a plan to address them. Such hearing(s) could be coordinated with the hearing the Commission will be required to hold in 2011 on the City's proposed records management program.

Should the Commission decide to proceed with a formal hearing on the specific allegations of the Complaint, the Commission must decide whether to sit as a hearing panel or to delegate its authority to hear evidence to one or more Commission members or to an independent hearing examiner. If the Commission wishes to use an independent hearing examiner, staff will return at the November meeting with a list of persons who may be willing to serve as a hearing examiner which the Commission can approve and from which the examiner will be randomly selected.

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.*

City Attorney

City of Oakland
Public Ethics Commission
May 3, 2010

In the Matter of)
) Complaint No. 10-04
)

David Mix filed Complaint No. 10-04 on March 3, 2010.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 10-04 alleging that the Oakland City Council conducted an extended discussion of an item at its March 2, 2010, regular meeting without first providing public notice. **Attachment 1.**

II. FACTUAL SUMMARY

At its regular meeting of March 2, 2010, the Oakland City Council considered Agenda Item 3 -- Open Forum/Citizens' Comments. The meeting minutes indicate that 11 people were recognized to speak under this item. After the speakers had finished, City Councilmember Desley Brooks asked Council President Jane Brunner if the City Administrator could address the "parking situation" raised by one of the speakers. Ms. Brunner explained to City Administrator Dan Lindheim that one of the speakers had objected to a parking ticket. She asked Mr. Lindheim if he could address two questions: First, whether there were people who had parking tickets rescinded; and, Second, whether the City's parking director ever communicated to his staff that some areas of the City could be ticketed and not others.

Mr. Lindheim then began a verbal response to the questions that lasted for approximately eight-and-a-half minutes. Mr. Lindheim yielded to questions and comments from Ms. Brooks that lasted approximately two-and-a-half minutes. Mr. Lindheim then spoke for another three-and-a-half minutes. Ms. Brunner then recognized comments from Councilmembers Brooks, herself, Ignacio De La Fuente and Rebecca Kaplan. These Councilmember comments continued for another four minutes before Chief Deputy City Attorney Barbara Parker interjected by stating that the topic of discussion had not been placed on the agenda, there had not been adequate public notice for such a discussion, and that the law permitted only "brief remarks" for an item not appearing on a meeting agenda.

Ms. Brunner then recognized Councilmembers Jean Quan and Mr. De La Fuente, who stated that the subject should be agendized for further discussion. Ms. Brunner then recognized Councilmembers Pat Kernighan and Ms. Kaplan before turning to the next item on the agenda. The total amount of time the City Council spent discussing and receiving

information on this subject totaled 26 minutes. At the time of this writing, the subject of parking ticket enforcement has not been agendaized for a subsequent City Council meeting.

Mr. Mix alleges that the City Council violated both the Brown Act and Sunshine Ordinance for considering an item that was not on the agenda.

III. ANALYSIS

The Ralph M. Brown Act requires local agencies to post a copy of an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting at least 72 hours before the meeting. [Government Code Section 54954.2] The Brown Act further provides in relevant part:

"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. 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 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." [Government Code Section 54954.2(a)(2)]

Sunshine Ordinance Section 2.20.150(b) provides:

*"Every agenda for every regular or special meeting shall provide an opportunity for members of the public to directly address a local body on item of interest to the public that are within the local body's subject matter jurisdiction, **provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by Government Code Section 54954.2(b).**"*¹ [Emphasis added.]

Sunshine Ordinance Section 2.20.050 provides:

"All meetings of local bodies specified in Sections 2.20.030(E) and Section 2.20.040(A) shall be open and public to the same extent as if that body were governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et seq.) unless greater public access is required by this ordinance, in which case this ordinance shall be applicable."

¹ Government Code Section 54954.2(b) pertains to "emergency" items and other items requiring a two-thirds vote not applicable here.

At the City Council meeting of March 2, 2010, members of the City Council received public testimony from a speaker under Open Forum. At the request of Councilmember Desley Brooks, City Administrator Dan Lindheim responded to the issue raised by the speaker and began a series of comments that, taken together, continued for approximately 12 minutes. City Councilmember comments ran from one-to-two minutes per councilmember for an additional 14 minutes. After approximately 20 minutes of City Council and staff comment, Ms. Parker cited the relevant law that the matter under discussion was not itemized on the agenda and therefore the public did not have sufficient notice. Ms. Brunner then recognized several additional councilmembers who wished to complete their comments on the subject.

The issue Mr. Mix presents is whether the approximately 26 minutes of staff and councilmember comment falls within the exemption for "brief responses" to statements made or questions posed by persons exercising their public testimony rights. Commission staff could find no legal authority defining or discussing what constitutes a "brief response" for purposes of the Brown Act. However, even if each councilmember and the City Administrator were provided a full minute to make a "brief response", the total would not constitute even half of the time the City Council expended on this item. Thus Commission staff concludes there is an issue in law and fact whether the City Council 1) violated Section 54954.2(a)(2) as it applies to Oakland's "local bodies" pursuant to O.M.C. Section 2.20.050; and/or 2) violated O.M.C. 2.20.150(b) by discussing the issue of parking ticket enforcement when that issue did not appear on the March 2, 2010, agenda.

IV. STAFF RECOMMENDATION

The Commission has the discretion whether to schedule and conduct an evidentiary hearing on the issue of whether the City Council violated Government Code Section 54954.2(a)(2) as it applies to Oakland's "local bodies" pursuant to O.M.C. Section 2.20.050 and/or Sunshine Ordinance Section 2.20.150(b).

If the Commission determines a violation occurred, the Sunshine Ordinance would require the City Council to agendaize whether to cure and correct the violation. If the City Council chose to cure and correct the item, it would then decide whether to affirm or supersede its previous action after taking any new public testimony on the item. [O.M.C. §2.20.270(D)]

In deciding whether to conduct a formal hearing, the Commission may wish to consider the magnitude of harm or prejudice to the public, the chance that the alleged conduct is likely to continue, the amount of time and resources the Commission wishes to devote to conducting a formal hearing on this subject, and/or the availability or suitability of other remedies.

Should the Commission decide to schedule a formal hearing in this matter, the Commission's General Complaint Procedures require the Commission to decide whether to sit as a hearing panel or to delegate its authority to hear evidence to one or more Commission members or to an independent hearing examiner. Commission staff recommends that the Commission direct staff to discuss a mediated settlement or stipulated judgment with the

City Council before a hearing, if any, is scheduled.

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.*

City Attorney

City of Oakland
Public Ethics Commission
October 4, 2010

In the Matter of

)
) Complaint No. 10-04
) **SUPPLEMENTAL**

David Mix filed Complaint No. 10-04 on March 3, 2010.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 10-04 alleging that the Oakland City Council conducted an extended discussion of City parking enforcement policy at its March 2, 2010, regular meeting without first providing public notice. Commission staff prepared a preliminary staff report for consideration at the Commission's May 3, 2010, meeting. **Attachment 1.** At its May 3 meeting, the Commission directed the Executive Director to schedule a hearing to determine whether the City Council 1) violated Government Code Section 54954.2(a)(2) as it applies to Oakland's "local bodies" pursuant to O.M.C. Section 2.20.050 and 2) violated O.M.C. Section 2.20 150(b). The Commission also directed the Executive Director to discuss a settlement or stipulated judgment with City Council representatives before setting the complaint for hearing.

II. STATUS OF SETTLEMENT

Commission staff contacted Chief Deputy City Attorney Barbara Parker and City Clerk LaTonda Simmons on May 5, 2010, advising them of the Commission's action and of its direction that staff explore the possibility of settling the allegation. Ms. Parker told Commission staff that the City Council had not given her authority to negotiate such a settlement before it began its extended summer recess in July. Commission staff and Ms. Parker agreed to re-visit the issue when the City Council and Ethics Commission re-convened in September, 2010.

According Ms. Parker, the City Council will consider Complaint No. 10-04 in closed session on October 5, 2010. Because of the elapsed time, Commission staff recommends that the Commission decide tonight whether to sit as a hearing panel or to delegate its authority to hear evidence to one or more Commission members or to an independent hearing examiner. Given the relatively narrow issue and the fact that the relevant evidence is contained on the City Council agenda and DVD recording of the March 2 City Council meeting, Commission staff believes that a hearing can be scheduled relatively quickly and be conducted by one or more

members of the Commission pursuant to Section IX of the General Complaint Procedures. If the City Council decides on October 5 to voluntarily "cure and correct" the alleged violation, Commission staff will refrain from setting a hearing date and apprise the Commission at the November 1, 2010, meeting.

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.*

City Attorney

City of Oakland
Public Ethics Commission
June 7, 2010

In the Matter of)
) Complaint No. 10-05
)

David Mix filed Complaint No. 10-05 on March 3, 2010.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 10-05 alleging that the Oakland City Council agendized an item on its March 2, 2010, regular meeting without providing ten days of public notice or making a requisite "urgency" finding. **Attachment 1.**

II. FACTUAL SUMMARY

On February 16, 2010, the City Council conducted a special meeting to consider a "Mid Year Review of FY 2009-2010" budget. City staff proposed several budget-balancing resolutions for the current fiscal year in the general fund, Measure B (transportation) fund, and in the Development Services fund. **Attachment 2.** At the special meeting, the City Council adopted a motion to make various adjustments to the City's general fund. The meeting ran well beyond the scheduled time and no action was taken regarding the Measure B and Development Services funds. City Council President Jane Brunner announced at the end of the meeting that these two items would have to return to the City Council for future consideration.

On Thursday, February 25, 2010, the City Council Rules Committee considered a request from Ms. Brunner to schedule another special meeting on City budget matters for Tuesday, March 16, 2010. During the Rules Committee's discussion, several members cited scheduling problems with the proposed date. Several alternative dates were discussed until a suggestion was made to schedule the item on the City Council's next regular meeting agenda on Tuesday, March 2, just five days away. City Clerk LaTonda Simmons advised the Rules Committee that in order to consider the matter at the March 2 meeting, the item would either have to be the subject of a special meeting (requiring only 48 hours' notice, excluding the intervening weekend) or the Committee would have to adopt an "urgency" finding in order to add the item as a "supplemental" agenda item to the ten-day agenda already posted for the March 2 meeting. She suggested that the Rules Committee seek advice from the City Attorney's Office representative on the urgency finding.

Councilmember Jean Quan noted that the agenda material for the two items remaining from the February 16 special meeting (Measure B transportation fund and Developmental Services fund) had already been filed and distributed. She then asked Deputy City Attorney Mark Morodomi what he thought of the idea to place the item on the March 2 agenda as an "urgency" item. Mr. Morodomi's response is not audible to Commission staff on the recording, but Ms. Brunner then states that the Committee needs an opinion from the City Attorney on making an urgency finding. She states that the City "needs to save money" and "the sooner the better". She noted that the City Council had previously given direction to have the matter returned to the City Council and that staff can simply place the "old [budget] materials" from the February 16 meeting into the supplemental agenda package for the March 2 meeting. While barely discernable from the audio recording, Mr. Morodomi recalls and believes he said "That's fine" in response to the reasons Ms. Brunner provided to justify the urgency.

As soon as Ms. Brunner finished speaking, Councilmember Ignacio De La Fuente or Councilmember Larry Reid stated "Second, Madam chair", apparently inferring that Ms. Brunner had supplied the factual basis for an urgency finding in the form of a motion. At that point, Ms. Simmons sought clarification whether the item was to be agendized as a special meeting or as a supplemental item on the March 2 regular meeting agenda. Ms. Brunner stated, "That's a good question." Ms. Brunner then said she thought the item would be supplemented to the March 2 agenda. Ms. Simmons immediately said such an action "would require the urgency finding made by Councilmember De La Fuente and seconded by Councilmember Reid." Ms. Brunner said "if that's okay with the City Attorney's Office. . ." There being no audible response, Ms. Simmons then states, "Okay then that is confirmed."

On Friday, February 26, 2010, the City Clerk posted and distributed the City Council's March 2 supplemental agenda. The budget item appears as Item S [Supplemental] -15.1. **Attachment 3.** The following language appears just beneath the published item:

Pursuant to Section 2.20.080(E)2 of the Sunshine Ordinance an urgency finding was made at the February 25, 2010 Rules and Legislation Committee to place this item on the agenda for the following reasons: That there is a need to take immediate action which came to the attention of the local body after the agenda was posted, and that the need to take immediate action is required to avoid a substantial adverse impact that would occur if the action were deferred to a subsequent special or regular meeting.

This item requires an Urgency Finding (2/3 majority vote) pursuant to Section 2.20.080E(2) of the Sunshine Ordinance, prior to discussion.
[Emphasis in original.]

Twenty-five people spoke to the budget item at the March 2 meeting. Following public comment and City Council debate, the City Council adopted the proposed resolutions pertaining to the Measure B and Development Services funds. There is no record in the minutes or on the audio recording that the City Council adopted an "urgency finding" before or during its consideration of the item. **Attachment 4.**

Mr. Mix contends that 1) the City Council failed to establish the requisite "urgency finding" at the City Council's March 2, 2010, regular meeting, and 2) the Rules Committee's "urgency finding" made at its February 25, 2010, meeting was an abuse of discretion.

III. ANALYSIS

A. Limitation Of Action

Sunshine Ordinance Section 2.20.270 provides in relevant part:

"No person may file a complaint with the Public Ethics Commission alleging violation of the notice provisions of Section 2.20.080 if he or she attended the meeting or had actual notice of the item of business at least 72 hours prior to the meeting at which the action was taken."

Mr. Mix alleges that the City Council failed to make an "urgency finding" that would justify including Item S-15.1 on its March 2, 2010, regular meeting agenda. The minutes of the March 2 meeting as well as the online recording demonstrates that Mr. Mix attended the March 2 meeting as well as spoke on the item. Thus under Section 2.20.270, he is prohibited from "filing" that portion of his complaint that alleges violations of Section 2.20.080 as to the March 2 meeting. Mr. Mix denies that he attended the February 25 Rules Committee meeting. There is also no indication from the online recording or from the minutes that he attended either. Thus this report shall only address those issues raised in connection with the February 25 Rules Committee meeting.

B. "Urgency Findings" And Supplemental Agendas

Agendas for the regular meetings of the City Council, Board of Port Commissioners, Ethics Commission and their respective standing committees must be filed, posted and distributed to agenda subscribers no later than ten days before the date of the meeting. [O.M.C. Section 2.20.080(A)] These local bodies may "supplement" their respective ten-day agendas no later than 72 hours before a regular meeting and *"only for the following reasons or under the following conditions:*

"(1) to add an item due to an emergency or urgency, provided the local body makes the same findings as required by Section 2.20.080(E) before taking action. . ." [O.M.C. Section 2.20.080(B)(1)]

The findings required to justify an "urgent" matter under Section 2.20.080(E) are as follows:

"Upon a determination by a two-thirds vote by the members of the local body present at the meeting, or, if less than two-thirds of the members are present, a unanimous vote of those present, that there is a need to take immediate action which came to the attention of the local body after the agenda was posted, and that the need to take immediate action:

- (a) *is required to avoid a substantial adverse impact that would occur if the action were deferred to a subsequent special or regular meeting;*
 - (b) *relates to federal or state legislation; or,*
 - (c) *relates to a purely ceremonial or commendatory action.*
- [O.M.C. Section 2.20.080(E)]

The original scheduling request at the February 25 Rules Committee meeting was to convene a "special budget meeting" of the City Council on March 16, 2010. As the discussion progressed, the Rules Committee indicated that it wanted to continue its consideration of the proposed budget resolutions pertaining to the Measure B and Development Services funds that the City Council was unable to consider at its February 16 special meeting. A proposal was made to add this item to the regular meeting agenda of March 2, but the City Clerk advised that the only way to "supplement" this item to the March 2 agenda was to make an "urgency finding" [pursuant to Section 2.20.080(B) and (E)]. Chief Deputy City Attorney Barbara Parker told Commission staff that it is the "custom and past practice" of the Rules Committee to make the urgency finding when supplementing a City Council agenda pursuant to Section 2.20.080(B).

In order to make an "urgency finding," several relevant elements must be present: 1) a need to take immediate action; 2) an item that "came to the attention of the local body after the [ten-day] agenda was posted"; and 3) a "substantial adverse impact" that would occur if the contemplated action were deferred to a special or regular meeting. Here it is at least arguable and probably not disputable that "immediate action" on the proposed budgetary adjustments was necessary in light of Oakland's current and projected budget deficits.

What is more subject to question is whether the need to take this proposed action came to the attention of the Rules Committee only after the ten-day agenda for the March 2 meeting was posted. All City Council members knew as early as February 16 that they would still have to take action on the remaining proposals to adjust the Measure B and Development Services funds. Ms. Brunner made an announcement to that effect at the end of the February 16 meeting. Commission staff thus concludes that there is an issue of fact and law whether the item came to the attention of the Rules Committee after the ten-day agenda was posted.¹

¹ *Commission staff notes there are no specific facts in the written or recorded record indicating how a delay beyond the March 2 meeting would have resulted in a "substantial adverse impact." The scheduling request which initiated the Rules Committee's action to supplement the March 2 agenda was a proposal to schedule the item for a special meeting on March 16. The only information Commission staff observed supporting a finding of "substantial adverse impact" was Ms. Brunner's comment that the sooner the City Council consider the proposed adjustments the better it would be. While hardly a clarion call of urgency, Commission staff believes that it can be reasonably inferred that a "substantial adverse impact" could have resulted by delaying action on the two budget items beyond the March 2 meeting.*

IV. STAFF RECOMMENDATION

The Commission has discretion whether to schedule and conduct an evidentiary hearing on the issue of whether the Rules Committee violated Sunshine Ordinance Section 2.20.080(B) and (E) in making an "urgency" finding to agendize Item S-15.1 to the March 2, 2010, regular meeting of the City Council.

If the Commission determines a violation occurred, the Sunshine Ordinance would require the Rules Committee to agendize whether to cure and correct the violation. If the Rules Committee chose to cure and correct the item, it would then decide whether to affirm or supersede its previous action after taking any new public testimony on the item. [O.M.C. §2.20.270(D)]

In deciding whether to conduct a formal hearing, the Commission may wish to consider the magnitude of harm or prejudice to the public, the chance that the alleged conduct is likely to continue, the amount of time and resources the Commission wishes to devote to conducting a formal hearing on this subject, and/or the availability or suitability of other remedies.

Should the Commission decide to schedule a formal hearing in this matter, the Commission's General Complaint Procedures require the Commission to decide whether to sit as a hearing panel or to delegate its authority to hear evidence to one or more Commission members or to an independent hearing examiner. Commission staff recommends that the Commission direct staff to discuss a mediated settlement or stipulated judgment with the Rules Committee before a hearing, if any, is scheduled.

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.*

City Attorney

City of Oakland
Public Ethics Commission
October 4, 2010

In the Matter of

)
) Complaint No. 10-05
) **SUPPLEMENTAL**

David Mix filed Complaint No. 10-05 on March 3, 2010.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 10-05 alleging that the Oakland City Council agendized an item on its March 2, 2010, regular meeting without providing ten days of public notice or making a proper "urgency" finding. Commission staff prepared a preliminary staff report for consideration at the Commission's June 7, 2010, meeting. **Attachment 1.** At its June 7 meeting, the Commission voted to conduct an evidentiary hearing to determine whether the City Council's Rules and Legislation Committee violated Section 2.20.080(B) and (E) of the Oakland Sunshine Ordinance by supplementing the City Council's March 2, 2010 regular meeting without making a proper "urgency" finding. The Commission directed staff to attempt reaching a settlement of the allegations by means of a voluntary "cure and correction" before scheduling any hearing.

II. STATUS OF SETTLEMENT

Commission staff contacted Chief Deputy City Attorney Barbara Parker and City Clerk LaTonda Simmons on June 8, 2010, advising them of the Commission's action and of its direction that staff explore the possibility of settling the allegation. Ms. Parker told Commission staff that the City Council had not given her authority to negotiate such a settlement before it began its extended summer recess in July. Commission staff and Ms. Parker agreed to re-visit the issue when the City Council and Ethics Commission re-convened in September, 2010.

According Ms. Parker, the City Council will consider Complaint No. 10-05 in closed session on October 5, 2010. Because of the elapsed time, Commission staff recommends that the Commission decide tonight whether to sit as a hearing panel or to delegate its authority to hear evidence to one or more Commission members or to an independent hearing examiner. Given the relatively narrow issues involved and the fact that the relevant evidence is contained on the City Council agenda and DVD recordings of the relevant meetings, Commission staff believes that a hearing can be scheduled relatively quickly and be conducted by one or more members of the Commission pursuant to Section IX of the General Complaint Procedures. If the City Council decides on October 5 to voluntarily

"cure and correct" the alleged violation, Commission staff will refrain from setting a hearing date and apprise the Commission at the November 1, 2010, meeting.

Respectfully submitted,

Daniel D. Purnell
Executive Director

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City Attorney

City of Oakland
Public Ethics Commission
October 4, 2010

In the Matter of

)
) Complaint No. 10-07
) **2d SUPPLEMENTAL**

Sanjiv Handa filed Complaint No. 10-07 on March 23, 2010, alleging that six individuals violated provisions of the Oakland Lobbyist Registration Act ("LRA") by failing to register as lobbyists and/or by failing to file quarterly disclosures regarding their respective efforts to influence local governmental decisions.¹

The Commission considered a preliminary staff report on Complaint 10-07 at its regular meeting of July 7, 2010. The Commission postponed consideration of allegations pertaining to respondents Joseph Haraburda, Scott Peterson, Sharon Cornu, Barry Luboviski and Victor Uno. The Commission did consider allegations regarding Phil Tagami in connection with his alleged advocacy on behalf of California Capital Group (CCG) during the selection process for a developer at the Oakland Army Base (OAB). The Commission directed staff to obtain additional information before further consideration, specifically: 1) the relationship between Mr. Tagami and an entity known as "CCI", 2) the identities of any persons who may have represented AMB in connection with the developer selection process; and 3) the status of Mr. Handa's various public records requests pertaining to the OAB.

At its meeting of September 8, 2010, the Commission received its requested information and granted requests from respondents Haraburda, Peterson, Cornu, Luboviski and Uno to postpone further consideration due to the Rosh Hashanah holiday. Complainant Sanjiv Handa nevertheless spoke under the scheduled agenda item and alleged, among other things, that Commission staff's previous analysis did not consider whether respondent Phil Tagami met the definition of "local governmental lobbyist" under LRA Section 3.20.030(D)(1) as well as Section 3.20.030(D)(2).

The Commission requested staff to review whether Mr. Tagami might qualify as a local governmental lobbyist under Section 3.20.030(D)(1).

¹ A copy of the complaint, staff report and exhibits were provided with the agenda package for the Commission meeting of July 7, 2010, and September 8, 2010. Copies of these materials are available from the Commission's website or from the Commission office.

I. LRA Section 3.20.030(D)

Under the provisions of LRA Section 3.20.030(D), a "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."

Commission staff has historically identified lobbyists who qualify under subsection D.1 as so-called "contract" lobbyists and those qualifying under subsection D.2 as so-called "in-house" lobbyists. A "contract" lobbyist is typically an individual who is paid to represent the interests of one or more clients but is not otherwise associated with the client. While acknowledging the imprecision of Section 3.20.030(D), Commission staff has also interpreted the phrase ". . .for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency" as applying both to subsection D.1 and D.2. The failure to apply this phrase to subsection D.1 as well as D.2 would make any individual who receives \$1,000 or more in economic consideration in a calendar month a lobbyist, which cannot possibly be the intent of the ordinance. Thus to qualify as a local governmental lobbyist under subsection D.1, Commission staff concludes that an individual must receive in economic consideration \$1,000 or more in a calendar month for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency.

In its July 7 staff report, Commission staff reported that Mr. Tagami is one of two general partners of the entity California Capital Group (aka CCG), which successfully sought the rights to negotiate a "master developer" agreement with the City for the OAB property. Mr. Tagami disclosed that he and his partner do not receive a "salary" from CCG and do not, because of the partnership's structure, hold the positions of "employee, officer or director." With respect to his compensation from CCG, Mr. Tagami stated he and his partner receive periodic distributions ("draws") from CCG's income. Upon further follow-up, Mr. Tagami told Commission staff through his attorney that neither he nor his partner allocate or apportion their "draws" to any specific activity or function, and that the amount of their draws can vary. Under such an arrangement it would be very difficult for the Commission to determine whether Mr. Tagami received any specific amount for any alleged lobbying activity made on behalf of CCG.

Mr. Handa argued that since Mr. Tagami acknowledges receiving a "draw" from CCG, and given the amount of effort he alleges Mr. Tagami to have expended in securing the OAB contract, at least \$1,000 of his draw can be attributed to lobbying activity. The problem with accepting this argument is that unlike a "contract" lobbyist for whom subsection D.1 was intended, there is no way to ascertain a rate or amount of compensation for the lobbying activities Mr. Tagami is alleged to have performed. That is the primary reason why subsection D.2 arguably exists in the first place -- it is very difficult to identify a particular amount that some individuals receive for "lobbying" on behalf of a client, especially when that individual performs other services for the client as part of his or her duties (such as writing reports, serving on a board, selling products, acquiring new business, etc.) In such cases, an individual's "status" as a lobbyist alternatively depends on whether they meet the descriptive criteria as a "salaried employee, officer or director" whose duties include influencing local governmental actions.

In this instance, Commission staff concludes that because Mr. Tagami reportedly does not allocate any particular amount from his periodic draws to any particular activity, and because his position with CCG is not a "salaried employee, officer or director", the current provisions of the LRA do not apply to his alleged communications on behalf of CCG.

Respectfully submitted,

Daniel D. Purnell
Executive Director

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