

Item 7 - Staff Memorandum



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TO: Public Ethics Commission
FROM: Kellie F. Johnson, Enforcement Chief
DATE: May 18, 2021
RE: Case No. 18-48 and 16-22M ; In the matter of Oakland Planning and Building Department prepared for the June 7, 2021, Public Ethics Commission Meeting

BACKGROUND:

On September 7, 2016, the Commission received a complaint alleging that the Oakland Planning and Building Department (Department) failed to disclose records in response to a public records request made by the complainant (Complainant) on August 8, 2016. On October 31, 2016, Commission Staff initiated its mediation program pursuant to the Oakland Sunshine Ordinance. In response, the Department provided additional records responsive to Complainant's public records request. Commission Staff has completed mediation and made a recommendation to close the mediation because the department reported that they had no other documents in their possession regarding the public records request related to Case No DS 15-0313. The Commission closed the Mediation and referred the matter to the Enforcement Unit for further investigation on whether the Planning and Building Department violated the Public Ethics Act. That investigation has concluded.

SUMMARY OF LAW:

All statutory references and discussions of law pertain to the referenced statutes and laws as they existed at the time of the violations.

OMC 2.20.190 Release of Documentary Public Information; Release of public records by a local body or by any agency or department, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in any particulars not addressed by this Article. The provisions of Government Code Section 6253.9 are incorporated herein by reference. (Ord. 12483 (part), 2003; Ord. 11957 § 00.19, 1997) added by Stats. 2008, Ch. 63, Sec. 2. Effective January 1, 2009.)

California Public Records Act § 6253:

(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, 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 to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or their 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.

FACTUAL SUMMARY:

In 2015, the complainant made two public records requests to the City of Oakland Planning and Building Department. The first was in-person at the Zoning counter, where the complainant requested e-mails pertaining to the 5150 Redwood matter. On that day, the Department employee on duty recalled going back to his computer and printing out a “big stack” of records and then giving that stack, directly to the complainant. The Complainant later that month, submitted an electronic records request [the one at issue in this case]. The following reflects the substance of the public records request that the complainant made on electronically.

On August 8, 2016, the City received, via RecordTrac, the following public records request: “All records in any way related to Case File no. DS15-0313 regarding the development at 5150 Redwood Road.”

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At the time, RecordTrac was the City's online portal for sharing public records. It allowed members of the public to make requests, receive responses from the City, and search past requests and responses.

On August 18, 2016, the Department stated the following on RecordTrac: "Request extended: Additional time is required to answer your public records request. We need to consult with another agency before we are able to deliver your record (Government Code Section 6253(c)(3))."

Also on August 18, 2016, Complainant stated the following on RecordTrac: "This response does not appear to fulfill the requirements of Government Code section 6253(c)(3) in that you have not stated "the estimated date and time when the records will be made available." Given that the entire project has taken place in Planning and Building what outside agency has records concerning this project?"

Also on August 18, 2016, the Department stated the following on RecordTrac: "Dear Requester, this was not a response, but a request for additional time as the Planning and Building Department does need to consult with another department in the production of the records. Documents will be uploaded on or before September 1st."

On August 26, 2016, the Department provided the following statement, 420 pages of documents, and closed the request: "Dear Records Requester, I have just scanned and uploaded 410 pages of documents which staff from the City of Oakland's Department of Planning and Building believe to be responsive to your request. Having made all responsive materials available to you, the City of Oakland will consider your request closed. Thank you,"

On September 7, 2016, the Commission received a complaint alleging that the Department failed to disclose records in response to public records request (PRR) No. 16745 made by Complainant.

On October 31, 2016, Commission Staff started its mediation process by reaching out to the Department and giving them the opportunity to review the complaint and submit a response. On November 18, 2016, the Department provided Commission Staff with a detailed memorandum outlining communications the Department had with Complainant preceding the filing of the complaint, the Department's response to PRR No. 16745, as well as one page of additional records that were not provided in the Department's response to the public records request on Recordtrac.

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On December 14, 2016, Commission Staff shared the Department's memorandum with Complainant, including the one page of additional records. Complainant responded to Commission Staff on the same day, asserting that Complainant found the response inadequate because it did not contain a copy of the Conditions of Approval for Case File No. DS15-0313 signed by both the City and the applicant.

Commission Staff continued to communicate with Complainant in January 2017, during which Complainant alleged that the Department continued to purposefully withhold records. On January 10, 2017, Commission Staff asked what evidence Complainant had supporting this allegation. Complainant replied that the fact the Department did not provide "the signed [Conditions of Approval] is evidence that they are withholding records." Complainant alleged that the lack of a signed Conditions of Approval was in violation of Department policy.

In response, Commission Staff requested confirmation from the Department that it did not have a copy of the signed Conditions of Approval. On February 2, 2017, the Department confirmed that it did not have a signed Conditions of Approval, or any additional records in response to PRR No. 16745. The Department explained to Commission Staff that it approved the application and moved forward with the project without receiving a Conditions of Approval signed by the applicant. The Department had verbally informed the applicant of the Conditions of Approval and had confirmed that the applicant was adhering to the Conditions of Approval by visual inspection approximately two weeks later. Commission Staff relayed this information to Complainant, but Complainant continued his allegation that the Department was withholding a signed Conditions of Approval and/or communications between the Department and the applicant.

In response, Commission Staff informed Complainant that further mediation was unlikely to resolve his concerns, and that the violation of Department Policy that he alleged was outside the scope of the mediation process and the Oakland Sunshine Ordinance as it relates to public records.

When the Commission referred this matter back to the Enforcement unit for evaluation in May 2020, the Commission investigator conducted a related document search through the City IT department and recovered additional documents, specifically email communications between the developer and the City Planning and Building Department, including emails between the developer and the City regarding the Conditions of Approval. The Complainant had requested a copy of these emails in 2015 but was told they did not exist. The PEC forwarded those documents, described above, to the complainant.

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The Complainant also had requested a copy of the signed agreement between the developer and the city regarding compliance with safety and preservation standards for small project design approval. It is a Planning and Building Department policy that a signed copy of the Conditions of Approval be submitted to the Department before a project could begin. The Department eventually provided a copy of an unsigned agreement to the Complainant, but not a signed copy. The Department did not produce a copy of the Conditions of Approval that was signed by both the City and the developer, and no such signed document was found in the PEC staff's investigation and IT search. It is very likely that the developer did not provide a signed copy of the form to the City.

When asked why the City did not disclose the emails between the developer and the City, City Planner Aubrey Rose said he did not know why the emails were not turned over when the Complainant made the request.

ANALYSIS:

The City of Oakland's Sunshine Act incorporates the requirements of the California Public Records Requests Act. Both Acts give the public the right to inspect and copy most records retained by governmental agencies in the course of business, subject to certain privileged information or statutory exemptions.

The PRA expressly provides that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The purpose is to give the public access to information that enables them to monitor the functioning of their government. See, Gov. Code, § 6250.

Neither the Oakland Sunshine Act nor the California Public Records Act provide the Public Ethics Commission the authority to impose penalties against a City department or agency that fails to comply with the provisions of either Act. The Commission or a Complainant has the option of filing a civil action in the Superior Court of California for violations to the CPRA. The burden is on the requester to go to court to fight for the documents. While the agency may have to pick up the requester's legal bills, there is no penalty for agencies that willfully, knowingly, and without any good reason violate the law.

Here, the Complainant made a request for documents from the City Planning and Building Department. The documents were records retained by the Planning and Building Department in its regular course of business. The Department provided some documents to the

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Complainant but failed to provide others. The Commission Staff were able to recover additional responsive documents that the Department failed to provide to the Complainant. It is not clear whether the Department, willfully, knowingly or negligently withheld documents from the Complainant. The Department representative Aubrey Rose was without any good reason to explain why all responsive documents were not provided to the Complainant.

VIOLATIONS:

For the reasons stated above, the Department failed to provide responsive documents to the Complainant, however, the Commission is without state statutory or municipal authority to impose a penalty on the Department.

RECOMMENDATION:

Pursuant to the Public Ethics Commission Complaint Procedures, the Commission could write an advisory letter to the Department with recommendations, invite the Department to make a presentation to the Commission on its public records request policies and practices, and make further inquiries. Again, the Commission has no authority to impose penalties for Sunshine Ordinance violations.