

Item #9 - Enforcement Report



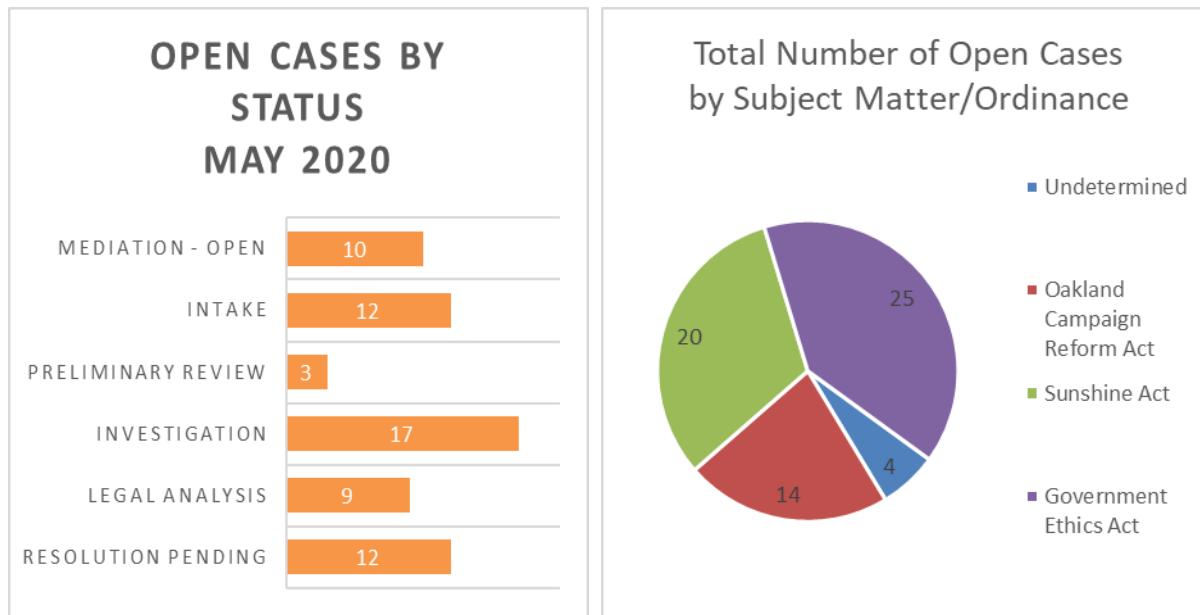
James E.T. Jackson, Chair
Nayeli Maxson Velázquez, Vice-Chair
Jill M. Butler
Michael B. MacDonald
Janani Ramachandran
Joe Tuman
Jerett Yan

Whitney Barazoto, Executive Director

TO: Public Ethics Commission (PEC)
FROM: Kellie Johnson, Enforcement Chief
DATE: May 21, 2020
RE: Enforcement Program Update for the June 1, 2020 PEC Meeting

Current Enforcement Activities:

Since the last Enforcement Program Update on May 4, 2020, Commission staff received 3 complaints. This brings the total Enforcement caseload to 63 enforcement and mediation cases: 15 matters in the intake or preliminary review stage, 17 matters under active investigation, 9 matters under post-investigation analysis, 12 matters in settlement negotiations or awaiting an administrative hearing, and 10 ongoing public records request mediations.



Summary of Cases:

Since the last Enforcement Program Update in May 2020, the following status changes occurred:

1. In the Matter of the City Attorney Barbara Parker and the City Council President Rebecca Kaplan (Complaint No. 20-09) On April 15, 2020, the City of Oakland Public Ethics Commission (PEC) received a complaint (#20-09) that alleged on April 9, 2020, the City Council held a Special

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Closed Session Council meeting by teleconference to appoint a new City Administrator. The complaint alleged that the City Council did not supply an appropriate description of the item to be discussed in the closed session on the Council Agenda and that the Council discussed executive salary and benefits during the closed session in violation of the law. After a thorough review of the complaint, the facts and the law, Staff concluded that the allegations raised in the complaint do not provide sufficient facts to establish a violation of the California Public Records Act, the Brown Act, the Oakland Sunshine Act or any other law within the PEC's jurisdiction; the complaint was dismissed. (See attachments)

2. *In the Matter of City of the Department of Building and Planning [Mediation Summary]* (Case No. M2019-17). On October 8, 2019, the Commission received a request for mediation from the Requestor alleging that Building and Planning Department failed to provide responsive documents to two separate public records requests. The Requester initiated their respective public records request on May 11, 2019 and August 25, 2019, seeking copies of Radio Frequency Reports that they believed were provided to the City of Oakland between January 1996 and August 2019, the department did not provide a response. Staff initiated the Mediation process on October 16, 2019. The Deputy Director of the Building department confirmed that the documents that the Requester was seeking were not documents collected or maintained by his department. This matter was set over from the May PEC meeting for follow-up. Staff has completed the follow-up request and recommends that the Commission close the mediation. Enforcement Staff will open an investigation into the violation of the California Public Records Act and the Oakland Sunshine Ordinance. (See Action Items)

3. *In the Matter of The City of Oakland Police Department; (Case No. 16-15) [Mediation Summary]*. On August 24, 2016, the Commission received a complaint alleging that the Oakland Police Department (OPD) failed to disclose records in response to multiple public records requests made by the Requestor. On November 10, 2016, Commission Staff initiated its mediation program pursuant to the Oakland Sunshine Ordinance. Once Staff initiated mediation, the Requestor received several responsive documents from OPD. However, upon conclusion of the mediation program on July 16, 2018, the requester had not received responsive documents to PRR No. 14437. This request remains open in NextRequest with relevant records still unproduced by OPD, even though this public records request was made on March 10, 2016. Commission Staff attempted to resolve this matter through mediation for two years with little success. However, OPD has not released responsive documents to PRR No. 14437 and the Staff has exhausted all avenues in attempting to facilitate production of the documents. This matter was removed from the PEC Agenda in March 2020 to gather follow-up information. After the conclusion of the follow-up investigation, Commission Staff recommends that the Commission close this matter. (See Action Items)

May 18, 2020

Gene Hazzard

[REDACTED]

[REDACTED]

Re: PEC Complaint No. 20-09; Dismissal Letter

Dear Mr. Hazzard:

On April 15, 2020, the City of Oakland Public Ethics Commission (PEC) received your complaint (#20-09) that alleged on April 9, 2020, the City Council held a Special Closed Council meeting by teleconference at which one of the “Special Closed Agenda Items” was the appointment of a new City Administrator. The complaint alleged that the City Council did not supply an appropriate label/description of the item to be discussed in the closed session on the Agenda and that the Council discussed executive salary and benefits during the closed session in violation of the law.

We have reviewed the complaint, the facts and the law. The allegations raised in the complaint do not provide sufficient facts to establish a violation of The California Public Records Act, the Brown Act, Oakland Sunshine Act or a violation within the PEC’s jurisdiction. Therefore, we are dismissing this complaint.

Your complaint asserts that when the City Council held a Special Closed Session meeting on April 9, 2020, that the City Attorney and the President of City Council violated California Government Code(s)§ 54953.3(a); 54954.3; 54956(a); and 54956 (b). The California Government Code does provide specific requirements for legislative bodies seeking to hold Special Closed Session meetings as discussed below.

City Council Special Closed Session Agenda

Meetings called by the presiding officer or majority of the City Council to discuss only discrete items on the agenda under the Brown Act’s notice requirements for special meetings and are subject to 24-hour posting requirements, are called “Special Meetings.”¹

¹ California Government Code (CGC) §54956

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A “Closed Session meeting” is a meeting of the City Council conducted in private without the attendance of the public or press. A City Council is authorized to meet in closed session only to the extent expressly authorized by the Brown Act.²

Generally, the purpose of the closed session provisions in the Brown Act are to avoid revealing confidential information.³ Generally, closed session items must be briefly described on the posted agenda and the description must state the specific statutory exemption that applies.⁴ Most often, agenda descriptions cover license and permit determinations, real property negotiations, existing or anticipated litigation, liability claims, threats to security, public employee appointments, evaluations and discipline. The City Council is required to include the section of the Brown Act authorizing the closed session in advance on the agenda and it must make a public announcement prior to the closed session discussion. In most cases, the announcement may simply be a reference to the agenda item.⁵

The complaint alleged that the City Attorney did not supply enough or the correct label of the agenda item. And that the Agenda item cited the incorrect statutory exemption.

The Special Closed Session Agenda Item appeared on the April 9, 2020 Revised Final Agenda in the following format:

3. Pursuant to California Government Code Section 54597:

PUBLIC EMPLOYEE APPOINTMENT

b) Title: Appointment of City Administrator

The Agenda item from the April 9, 2020 Closed Session City Council Meeting, in fact, referenced California Government Code section §54957 that applied to the Closed Session topic of appointment of a public employee and included the descriptor “public employee appointment.” The information on the face of the Agenda included the required information referenced in the body of the Agenda item.

Discussions in Closed Session

The Brown Act provides that the City Council, in a closed session, can “ consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee.” The purpose of this exception — commonly referred to as the “personnel exception” — is to avoid undue publicity or embarrassment for an employee or applicant for employment and to allow full and candid discussion by the legislative body; thus, it is restricted to discussing individuals, not general personnel policies.⁶

² CGC §54962

³ 61 OPS. Cal. Atty Gen 220 (1978).

⁴ CGC 54954.5

⁵ Id. 54954.5

⁶ CGC 54957.(b)

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The known, “ personnel exception” specifically prohibits discussion or action on proposed compensation in closed session, except for a disciplinary reduction in pay. As such, there can be no personnel closed sessions on a salary change (other than a disciplinary reduction) between any unrepresented individual and the legislative body. However, a legislative body may address the compensation of an unrepresented individual, such as a city manager, in a closed session as part of a labor negotiation.⁷

Although the City Council is required to report non-confidential items discussed in the Closed session, the Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired in a closed session by any person present, and offers various remedies to address breaches of confidentiality.⁸ An exception would be disclosure of any improper subject that was discussed in closed session.⁹

The complaint contends that the City Council discussed “executive salary and associated salary benefit package.” Aside from that assertion, you provide no information or name of a witness, corroborated or otherwise, that the City Council, in fact, discussed salary or benefits for the City Administrator in its closed session.

In the absence of any information, evidence or witness to show that salary of an unrepresented individual or any other improper subject was discussed during the Special Closed Session meeting, there is insufficient evidence to prove that the City Council violated a provision of the Brown Act.

Even if, however, the allegations in the complaint constituted a violation to the Brown Act or California Public Records Act, neither the Act nor the Oakland City Charter provide penalty authority to the Public Ethics Commission to assert jurisdiction over such a violation.

We are required to inform the Public Ethics Commission of the resolution of this matter at its next public meeting, as part of our regular monthly update on Enforcement actions. That meeting will take place on June 1, 2020, at 6:30 p.m. by teleconference as will be posted on the Commission’s website in advance of the meeting. The report will be purely informational, and no action will be taken by the Commission regarding this matter, which is now closed. However, you are welcome to call-in to that meeting to listen and/or give public comment if you wish. You may also submit written comments to us before that meeting, and we will add them to the meeting materials. Thank you for bringing this matter to our attention.

Sincerely,



Kellie Johnson, Enforcement Chief
City of Oakland, Public Ethics Commission
KJohnson3@oaklandca.gov

⁷ CGC § 54957.(b)

⁸ CGC §54963

⁹ See, 76 OPS. Cal. Atty Gen. 289 (1993).

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May 18, 2020

Barbara Parker
Oakland City Attorney

Re: PEC Complaint No. 20-09; Dismissal of Complaint

Dear Ms. Parker:

On April 15, 2020, the City of Oakland Public Ethics Commission (PEC) received the attached complaint(s) against you (#20-09) that alleged on April 9, 2020, the City Council held a Special Closed Session Council meeting by teleconference at which one of the “Special Closed Agenda Items” was the appointment of a new City Administrator. The complaint further alleged that you and the City Council President did not supply an appropriate label/description of the item to be discussed in the closed session on the Agenda and that the Council discussed executive salary and benefits during the closed session in violation of the law.

We have reviewed the complaint, the facts and the law. The allegations raised by the complainant do not provide sufficient facts to establish a violation of The California Public Records Act, the Brown Act, Oakland Sunshine Act or other law within the PEC’s jurisdiction. Therefore, we are dismissing this complaint. No action is necessary on your part; this is just a courtesy notice.

A copy of the dismissal letter to the complainant is attached. If you have any questions regarding this matter, please feel free to contact me at (510) 238-4976 or Kjohnson3@oaklandca.gov.

Sincerely,



Kellie F. Johnson
Enforcement Chief
City of Oakland Public Ethics Commission

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May 18, 2020

Rebecca Kaplan
Councilmember

Re: PEC Complaint No. 20-09; Dismissal of Complaint

Dear Councilmember Kaplan:

On April 15, 2020, the City of Oakland Public Ethics Commission (PEC) received the attached complaint(s) against you (#20-09) that alleged on April 9, 2020, the City Council held a Special Closed Session Council meeting by teleconference at which one of the “Special Closed Agenda Items” was the appointment of a new City Administrator. The complaint further alleged that you and the City Council President did not supply an appropriate label/description of the item to be discussed in the closed session on the Agenda and that the Council discussed executive salary and benefits during the closed session in violation of the law.

We have reviewed the complaint, the facts and the law. The allegations raised by the complainant do not provide sufficient facts to establish a violation of The California Public Records Act, the Brown Act, Oakland Sunshine Act or other law within the PEC’s jurisdiction. Therefore, we are dismissing this complaint. No action is necessary on your part; this is just a courtesy notice.

A copy of the dismissal letter to the complainant is attached. If you have any questions regarding this matter, please feel free to contact me at (510) 238-4976 or Kjohnson3@oaklandca.gov.

Sincerely,



Kellie F. Johnson
Enforcement Chief
City of Oakland Public Ethics Commission

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