
City Attorney

City of Oakland
Public Ethics Commission
August 30, 2004

In the Matter of)
) Complaint No. 03-02
)

Complaint No. 03-02 was filed by David Mix on March 18, 2003.

I. SUMMARY OF COMPLAINT AND ALLEGATIONS

Mr. Mix filed the above complaint alleging that the East Bay Zoological Society, Oakland Museum Department, and the Chabot Space and Science Center failed to provide records he requested under the California Public Records Act and the Oakland Sunshine Ordinance. ***Attachment 1.***

II. BACKGROUND

During the Oakland Municipal election held in March, 2002, voters considered ballot Measure G, a \$59 million public bond proposal whose funds will be used to renovate and construct facilities at the following three sites: The Oakland Museum, the Oakland Zoo, and the Chabot Space and Science Center. Voters approved Measure G by approximately 75 percent of the votes cast.

Each of the three facilities is supported, in varying ways, by non-profit corporations: The Oakland Museum receives support from the Oakland Museum of California Foundation ("Museum Foundation"), the Oakland Zoo by the East Bay Zoological Society ("Zoo Society"), and the Chabot Space and Science Center by the Chabot Space and Science Center Foundation ("Chabot Foundation").

All three non-profit entities made significant financial contributions to the campaign committee formed to support voter adoption of Measure G. Among the most controversial aspects of the "Yes on Measure G" campaign was a mass mailing that included a free pass to either the zoo, museum or science center.

In July, 2002, the Commission considered a previous complaint by Mr. Mix who challenged the use of such free passes to induce voters to support the ballot measure. (See PEC Complaint No. 02-03). The Commission referred a part of Mr. Mix's complaint to the Alameda District Attorney for further investigation of whether the free passes violated a state election law that forbids offering anything of value to induce voters to support or oppose a ballot measure or candidate. After investigation, the

District Attorney declined to prosecute those involved with the "Yes on Measure G" campaign.

III. ANALYSIS

On February 6, 2003, Mr. Mix submitted separate written requests to the Zoo Society, Oakland Museum Department, and the Chabot Space and Science Center. **Attachments 2, 3 and 4, respectively.** The requests generally direct specific questions to the three entities about their activities during the Measure G campaign, and demand a series of "accountings" of various expenditures.

Mr. Mix eventually contacted Michelle Abney of the City Attorney's Office to request her assistance in obtaining the documents. On March 11, 2003, Deputy City Attorney Mark Morodomi responded in writing to Mr. Mix stating that there was no legal requirement under the Sunshine Ordinance or Public Records Act for any of the three entities to perform specific "accountings" on those issues Mr. Mix requested, or to answer the specific questions he posed in his request. **Attachment 5.** Mr. Mix sent a written protest to Mr. Morodomi in which he stated that his specific questions and requests for various accountings were intended to embrace any documents that contained the information he was seeking. **Attachment 6.**

A. Commission Jurisdiction Over The Chabot Space and Science Center, Zoo Society and Museum Department

The California Public Records Act states that a local agency must provide exact copies of any public record upon request. [Gov't Code §6253]. The Oakland Sunshine Ordinance states that any local body, agency or department of the City, shall be governed by the Public Records Act unless the Sunshine Ordinance imposes additional requirements. [O.M.C. §2.20.190]. The Commission has jurisdiction to enforce the public records provisions of the Sunshine Ordinance as to any local body, agency or department of the City. [O.M.C. §2.20.190; §2.24.270].

Mr. Mix made his request for public records to the Chabot Space And Science Center, Zoo Society and the Museum Department. An important preliminary question is whether any of these three entities is a "local body" or an "agency or department" of the City. If not, then the Commission may not enforce the provisions of the Sunshine Ordinance as to these entities. The following is a brief recitation of the applicable law:

Section 2.20.020(E) of the Sunshine Ordinance defines "local body" as:

- (1) the Oakland City Council, the Oakland Redevelopment Agency, and the Board of Port Commissioners;
- (2) any board, commission, task force or committee which is established by City Charter, ordinance, or by motion or

resolution of the City Council, the Oakland Redevelopment Agency or the Board of Port Commissioners;

- (3) any advisory board, commission or task force created and appointed by the Mayor and which exists for longer than a 12-month period; and,
- (4) any standing committee of any body specified in subsections (E)(1)(2) or (3).

The Sunshine Ordinance defines "agency" as "an agency of the City of Oakland." It defines "department" as a "department of the City of Oakland or a department of the Port of the Port of Oakland." [O.M.C. §2.20.180]. City Charter Section 600 permits the City Council to create City agencies and departments by ordinance.

1. Is The Museum Department A Local Body, Agency Or Department Of The City?

The City Council has adopted ordinances creating a number of City agencies and departments. The Museum Department has been expressly identified as an administrative department within the City's Life Enrichment Agency. [O.M.C. §2.29.060]. Thus it appears that the Museum Department is a local department subject to the public records provisions of the Sunshine Ordinance.

2. Is The Chabot Space And Science Center A Local Body, Agency Or Department Of The City?

The Chabot Space and Science Center is a joint powers agency ("JPA") formed in 1989 by the City of Oakland, the Oakland Unified School District, and the East Bay Regional Parks District. Under the state law and the multi-agency agreement governing its formation, the Chabot JPA is a legal entity separate from the agencies that created it. [See Government Code §6507; **Attachment 7.**]

As a separate governmental entity, Commission staff does not believe the Chabot JPA possesses the elements necessary to constitute a "local body" under the Sunshine Ordinance: It is obviously not the City Council, Redevelopment Agency or the Port of Oakland. It is not a board, commission, task force or committee as those terms are commonly understood, or an advisory board, commission or task force created and appointed by the Mayor. The Chabot JPA was in fact "established" by a multi-agency agreement expressly authorized under state law. That agreement created a legal entity separate from the City of Oakland as well as from the other parties to the agreement. Finally, the Chabot JPA has never been established by ordinance as an "agency or department" of the City. Thus it appears that the Chabot JPA is not a local body, agency or department subject to the public records provisions of the Sunshine Ordinance or to the Commission's authority to enforce those provisions.

3. Is The Zoo Society A Local Body, Agency Or Department Of The City?

As mentioned above, the Zoo Society is a private, non-profit public benefit corporation. It was formed in 1936 to "acquire, establish, operate and control zoological gardens" for the benefit of the public. In 1994, the Zoo Society entered into an operating agreement with the City that basically authorizes the Zoo Society to collect and keep revenues collected at the zoo in exchange for operating and maintaining the facility. The City owns the zoo property, fixtures and all the animals.

The Office of the City Attorney has previously analyzed whether the Zoo Society constitutes a local body, agency or department of the City. In a written opinion dated February 17, 2004, the City Attorney concluded that the Zoo Society does not constitute a "local body" under the Sunshine Ordinance because it is not "a board, commission, task force or committee established by City Charter, ordinance, motion or resolution" and it is not an "advisory board, commission or task force created and appointed by the Mayor." **Attachment 8.**

In reviewing the Commission's deliberations of the City Attorney's opinion at the March 1, 2004, meeting, there was a question of whether the Mayor's power of appointment to a non-profit corporation could qualify the non-profit entity as an "advisory board, commission or task force created and appointed by the Mayor."

Commission staff notes that it is not uncommon for a California public benefit corporation to have some or all of its board members appointed by a local governmental agency or officer. However the mere power to appoint members to a corporation's board of directors does not mean that the appointing authority "creates" the corporation. A corporation is "created" (i.e., "formed") when persons organizing the corporation meet specific legal and administrative requirements and file articles of incorporation with the state. Furthermore, it would appear to stretch unreasonably the common meanings of the terms "advisory board, commission or task force" to include a private non-profit corporation. Finally, and perhaps most dispositively, none of the Zoo Society's board members are appointed by the Mayor or by the City Council. **Attachment 9.**

For the reasons given above, it does not appear that the Zoo Society is a local body, agency or department subject to the provisions of the Sunshine Ordinance or the Commission's authority to enforce it.

B. Record Request To The Museum Department.

Attachment 2 details the records Mr. Mix requested from the Museum Department. In summary, he requested a number of specific "accountings" of money and resources expended in support of the Measure G campaign. He also directed a number of specific questions to Museum Director Dennis Power. Mr. Mix then

requested additional information from the Museum Department in his letters dated March 9 and March 13, 2003. **Attachments 10A, 10B and 10C.**

Since Mr. Mix made his initial request, there have been a number of communications between Mr. Mix and City staff, in particular Dennis Power and the Office of the City Attorney. In November, 2003, Mr. Power sent Mr. Mix a six-page letter attempting to address Mr. Mix's requests for documents as well as for specific information. The letter also references that Mr. Mix spent a total of seven hours on October 7 and October 27, 2003, personally inspecting boxes of administrative records. **Attachment 11.**

Clearly the Museum Department is a department of the City and subject to the requirements of the Sunshine Ordinance. If there are any further documents which Mr. Mix can reasonably identify and which the Museum has not already provided, the Commission can direct the Museum Department to make them available for inspection and copying if, for some reason, the Museum Department fails or refuses to do so.

As to Mr. Mix's requests to the Chabot Space And Science Center and Zoo Society, it does not appear that the Commission can direct those entities to comply with the Sunshine Ordinance since they do not appear to constitute local bodies, agencies or departments of the City. To the extent that the Public Records Act applies to either the Science Center or Zoo Society, the Public Records Act permits members of the public to seek judicial enforcement of their right to inspect or copy public records. There is no governmental or law enforcement agency to which the commission can refer this matter that is authorized to administratively or criminally enforce Mr. Mix's asserted rights under the Public Records Act.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 03-02 as it applies to the Chabot Space and Science Center and the Zoo Society. Commission staff further recommends that Complaint No. 03-02 be dismissed against the Museum Department however this dismissal shall be without prejudice as to any future complaints over records that Mr. Mix may seek from the Museum Department.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality elates 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.*