
City Attorney

City of Oakland
Public Ethics Commission
November 7, 2005

In the Matter of)
) Complaint No. 05-09
)

Gene Hazzard filed Complaint No. 05-09 on August 31, 2005.

I. SUMMARY OF COMPLAINT AND ALLEGATIONS

Mr. Hazzard filed Complaint No. 04-09 alleging that 1) the Oakland City Council took action on a motion that did not meet the required notice provisions of the Sunshine Ordinance; 2) a number of City Councilmembers took part in a "serial meeting" without providing proper public notice under the Brown Act and Sunshine Ordinance; and 3) the Oakland City Council improperly considered a report from the City Auditor that did not meet the required notice provisions of the Sunshine Ordinance. **Attachment 1.**

II. BACKGROUND

At its July 19, 2005, meeting, the City Council considered a proposed resolution authorizing the City Administrator to implement the actions of the Oakland Workforce Investment Board ("WIB") to award two contracts to the Oakland Private Industry Council, Inc. ("PIC"). The WIB is an oversight and policy-making body appointed by the Mayor and established to oversee federally funded employment and training programs within the City of Oakland. The PIC was previously selected as the contracting entity by the WIB following a public request for proposals (RFP). Under the federal Workforce Investment Act and the Oakland City Charter, the WIB, the Mayor and the City Council must concur with the award of any funding.

The proposed resolution would have authorized the City Administrator to (1) negotiate and enter into agreements with the PIC to serve as the "workforce development system administrator" with an operating budget not to exceed \$1.3 million for FY 2005-2006 and to serve as a "one-stop career center operator" for an amount not to exceed \$1.9 million; and (2) to authorize disbursement of additional funds to the PIC for subcontracts, services and implementation of certain grant agreements and programs.

During the meeting the City Clerk distributed an amendment to the proposed resolution prepared by City Council President Ignacio De La Fuente. The amendment provided for the PIC to receive \$1.325 million as the one-stop career center operator instead of the \$1.9 million allocated by the WIB, and for the \$575,000 difference to be

allocated between two local church-affiliated programs, Allen Temple Housing and Economic Development Corporation, and the Acts Full Gospel Church's Men of Valor Academy. The proposed amendments contained two separate Memoranda of Understanding to effect the proposed redistribution of money. **Attachment 2.**

During consideration of the item, Chief Deputy City Attorney Barbara Parker advised that the City Council could not reallocate the money pursuant to Mr. De La Fuente's proposed amendment because it constituted a significant change in the agenda item and therefore required a new notice under the Sunshine Ordinance. She advised that the City Council could request staff to prepare a new resolution to effect the proposed amendment for consideration at a later meeting.

According to the City Clerk's posted minutes of the July 19 meeting, City Councilmember Henry Chang moved that the City Council not adopt the proposed resolution and instead 1) approve funding consistent with Mr. De La Fuente's proposed amendments; 2) execute the proposed Memoranda of Understanding to reallocate the funding; and 3) "direct staff to return with a resolution consistent with this motion and consistent with the City Attorney's opinion on the City Council's authority to change the WIB recommendations." The motion was seconded and carried by a vote of 6-2. **Attachment 3.**

At its meeting of September 20, 2005, the City Council considered a written opinion from the Office of the City Attorney that cited limitations on the City's ability to allocate funds outside of the federally prescribed process. After extensive debate and public comment, the City Council approved an alternative resolution to have the Oakland WIB serve as the system administrator and the one-stop career center operator, with \$575,000 of the originally proposed amount set aside for job training service providers who submit a successful response to a future RFP. **Attachment 4.**

III. ANALYSIS

A. Public Notice Of Mr. De La Fuente's Floor Motion

The Brown Act requires all public bodies to post an agenda at least 72 hours before the start of a regular meeting. The agenda must contain a "brief general description of each item of business to be transacted or discussed at the meeting." [Government Code Section 54954.2(a)] Such descriptions need not exceed 20 words. With few exceptions not applicable here, a public body may not take action on any item that has not been placed on the agenda.

Oakland's Sunshine Ordinance expands the public notice requirements for meetings of the City Council. Sunshine Ordinance Section 2.20.080 requires the City Council to post and file with the City Clerk its agendas and agenda-related materials at least ten days before a regular meeting. A June 7, 2005, amendment to the Sunshine Ordinance expressly excludes from the definition of agenda-related materials "written

amendments or recommendations from a member of a local body pertaining to an item contained in agenda-related materials previously filed pursuant to Section 2.20.070 (special meetings) or Section 2.20.080 (regular meetings)." [O.M.C. Section 2.20.030(B)] Thus a member of a local body is not required to post or file with the City Clerk any proposed amendments to an item that already appears on an agenda.

Mr. Hazzard contends that the City Council "improperly noticed" and took action on Mr. De La Fuente's amendment. Mr. De La Fuente's amendment was unquestionably related to the previously agendized item pertaining to the WIB proposal. As a "written amendment" from a member of the City Council, there was no requirement for the amendment to be previously posted or filed in order to be considered in connection with the previously agendized WIB proposal.

B. Serial Meeting Of The City Council

1. Applicable Law

The Brown Act expressly prohibits "any use of direct communication, personal intermediaries, or technological devices that is employed by a *majority* of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body..." [Government Code Section 52952.2(b)] (Emphasis added.) This prohibition is generally cited as the prohibition against "serial meetings." The Sunshine Ordinance employs similar language in its definition of what constitutes a "meeting" of a local body. [O.M.C. Section 2.20.030(F)]

According to the California Attorney General's Office, a serial meeting is "a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the body's members." [See "The Brown Act -- Open Meetings for Local Legislative Bodies"; pg.11; 2003 ed.] For example, a serial meeting can occur on a five-member panel when panelist A and B discuss an item together and then panelist B contacts panelist C about the item. Or a serial meeting can occur if a person acts as the "hub" of communication by speaking individually with panelists A, B and C about an item.

The Brown Act prohibits such above-described serial communications if they are used to develop a "collective concurrence" as to actions to be taken. Based on cited California court decisions, the Office of the Attorney General advises that "[c]onversations which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications which contribute to the development of a concurrence as to action to be taken by the legislative body." [ibid; pg. 12.]

The rule prohibiting "serial meetings" is subject to an important exception for "individual contacts or conversations between a member of a legislative

body and any other person." [Government Code Section 54952.2(c)(1); O.M.C. Section 2.20.030(F)(4)(a)] According to the Office of the Attorney General, the purpose of this exception is to protect the rights of the public to contact their government representatives regarding issues that concern them. Thus the Attorney General advises that communications between members of the public and members of a legislative body do not constitute a meeting while conversations between boardmembers, or boardmembers and staff, do constitute a meeting. The communications between a member of the public and boardmembers may not be "orchestrated" by members of the public body to evade the serial meeting prohibition. [See "The Brown Act -- Open Meetings for Local Legislative Bodies"; pg.13; 2003 ed.]

2. Specific Allegations And Known Facts

Mr. Hazzard contends that a majority of the City Council conducted a serial meeting on the WIB item prior to the regular meeting of July 19, 2005. He contends that on the afternoon of July 18, 2005, Councilmembers De La Fuente and Brunner met with Mayor Jerry Brown and Oakland's Workforce Development Manager Al Auletta to discuss Mr. De La Fuente's floor amendment. He contends that Mr. De La Fuente then met with Councilmembers Quan and Kernighan to discuss his amendment.

Mr. Hazzard submits copies of two documents he says supports his allegation of a serial meeting. The first is a document entitled "Henry's motion - 7/19/05" which purports to show that Councilmember Chang was apprised in advance of Mr. De La Fuente's amendment and was briefed on how to introduce the motion to adopt the amendment at the meeting. **Attachment 5**. The second is an unidentified staff "briefing memo" that states "[t]he plan is to accept the City Attorney's report and put the \$575,000 out to competitive bid." Mr. Hazzard contends that the phrasing "the plan" indicates the existence of a collective decision to decide the issue outside of a formal meeting. **Attachment 6**.

(Mr. Hazzard refused to tell Commission staff how he learned about the alleged meetings between Mr. De La Fuente and Ms. Brunner, Ms. Kernighan and Ms. Quan. He stated that he inferred the subject matter of these alleged meetings from the fact that all four voted to support Mr. De La Fuente's amendment at the July 19, 2005, meeting and the nature of the debate surrounding the issue. Mr. Hazzard also refused to reveal the source of Attachments 6 and 7, although Gay Plair Cobb, chief executive officer of the PIC, told Commission staff that she received a copy of Attachment 6 (Henry's motion) from a City Councilmember the day after the July 18 meeting. Ms. Cobb denied that she provided a copy of Attachment 6 to Mr. Hazzard.)

Commission staff contacted Councilmembers De La Fuente and Brunner who confirmed that they did have a meeting on July 18, 2005. Ms. Brunner stated that she heard for the first time of Mr. De La Fuente's proposed amendment at that meeting. Mr. De La Fuente also acknowledged that he had spoken to Ms. Kernighan before the July 19 City Council meeting to advise her of his proposed amendment. Both Mr. De La Fuente and Ms. Quan both deny that he had spoken to

her about his proposal before the July 19 City Council meeting, although Ms Quan said that she was familiar with the issues surrounding the WIB's procurement process and was therefore "sensitive" to what Mr. De La Fuente ultimately proposed.

Mr. De La Fuente told Commission staff that he does not believe he spoke personally to Mr. Chang about his proposed amendment. Nevertheless, Willie Yee, council aide to Mr. Chang, states that he (Mr. Yee) was the author of Attachment 6 (Henry's motion) and that he believes he received the information about the amendment from Alex Pedersen, an aide to Mr. De La Fuente. Mr. Yee said his written reference to the City Auditor's report merely meant that he assumed the City Auditor's staff would appear at the meeting to explain the findings in their report. As it turned out, Mr. Chang did in fact make the motion to adopt Mr. De La Fuente's proposed amendment, consistent with the information provided from Mr. De La Fuente's office.

Based on the above, it appears that there were either direct or indirect communications among Mr. De La Fuente and Councilmembers Brunner, Kernighan and Chang regarding Mr. De La Fuente's motion. No other councilmember reports that he or she had been contacted by Mr. De La Fuente or his staff regarding the proposed amendment. (Councilmember Desley Brooks did not respond to Commission staff's voice message requesting comment on Mr. Hazzard's complaint.) Since a quorum of the City Council is defined by City Charter Section 209 as five councilmembers, it does not appear, based on the information provided to Commission staff, that a serial meeting occurred. And while Commission staff understands there may have been individual contacts between various councilmembers and members of the public regarding the WIB agreement prior to the July 19 meeting, such communications would appear to fall within the exception to public meetings as provided under Government Code Section 54952.2(c)(1) and O.M.C. Section 2.20.030(F)(4)(a).

C. Consideration Of The City Auditor's Report

At the July 19 meeting, the Office of the City Auditor presented a report reviewing and commenting on the WIB procurement process. The report is dated July 15, 2005, and was not included in the City Council's ten-day or supplemental agenda package. A representative from the City Auditor's Office gave an oral presentation of the report's findings at the meeting. Mr. Hazzard contends that the City Council improperly considered this report at the meeting because it was not posted or filed with the City Clerk as part of either the ten-day or supplemental agenda package.

The previously referenced June 7, 2005, amendments to the Sunshine Ordinance expressly exempt reports from the City Auditor from advance filing requirements. Subsection 2.20.080(H) requires the Mayor, City Administrator and the City Attorney to submit their agenda materials in compliance with Sunshine filing deadlines. However, "[t]his subsection shall not apply to the City Auditor, and the City Council may consider reports from the City Auditor that are presented to the Council after the deadlines specified in this Ordinance." The purpose of the amendment was

based on a recognition that the City Auditor often provides important financial information to the City Council that cannot always be acquired in time to meet local filing deadlines.

Based on the express language permitting the City Auditor to submit reports after Sunshine filing deadlines, it does not appear that the City Auditor or the City Council violated the Sunshine Ordinance by receiving and considering the City Auditor's July 15, 2005, report at the July 19, 2005, meeting.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 05-09 on grounds that there is no information to support a finding that 1) the Oakland City Council improperly considered a motion that did not meet required notice provisions of the Sunshine Ordinance; 2) a quorum of City Councilmembers took part in a "serial meeting" without providing proper public notice under the Brown Act and Sunshine Ordinance; and 3) the Oakland City Council improperly considered a report from the City Auditor that did not meet the required notice provisions of the Sunshine Ordinance.

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.*