
City Attorney

City of Oakland
Public Ethics Commission
July 11, 2005

In the Matter of)
) Complaint No. 05-06
) **(Supplemental)**

I. BACKGROUND

The Public Ethics Commission initiated Complaint No. 05-06 based on news reports in the Oakland Tribune that the Oakland Board of Port Commissioners ("Port Board") conducted a closed session meeting on February 18, 2005, for which no public notice was given. The Commission also directed staff to investigate whether the topics discussed at the meeting were proper subjects for a closed session meeting.

At its regular meeting of June 6, 2005, the Commission considered a preliminary report from its executive director on the allegations contained in the complaint. The executive director concluded that there were issues of law and fact on whether the Port Board violated the following provisions of the Brown Act and Oakland Sunshine Ordinance:

- 1) The requirement to timely provide notice of a special meeting [Gov't Code §54956; O.M.C. §2.20.070];
- 2) The requirement to convene in open session prior to the closed session hearing [O.M.C. §2.20.110];
- 3) The requirement to only consider those matters specified in the open session statement made before the closed session begins [O.M.C. §2.20.120]; and
- 4) If the Port violated O.M.C. §2.20.120 by discussing issues beyond those permitted by the personnel exception, the requirement that a local body reconvene in open session prior to adjournment and publicly disclose all portions of its discussions which are not confidential. [O.M.C. §2.20.130]

Before reaching a decision whether to proceed to a formal hearing on the above-stated issues, the Commission directed staff to obtain additional information from the Port on several issues. The information requested, and the Port's responses to those requests, are contained in a letter dated June 24, 2005, from Port attorney David Alexander. **Attachment 1.**

II. DISCUSSION

In addition to the information provided in his June 24 letter, Mr. Alexander advised Commission staff that the consultants who attended the February 18 meeting did not make or produce any record of the closed session hearing. He also stated that he contacted Port boardmembers to determine that there were no responses to Ms. Ayers-Johnson's email of February 19, 2005. The Office of the Attorney General advises that it is only when a **majority** of boardmembers of a local agency email each other to develop a collective concurrence as to a pending action that a potential violation of the Brown Act arises. [84 Ops.Cal.Atty.Gen. 30 (2001)] Under this opinion, Ms. Ayers-Johnson's email alone would not appear to violate either the Brown Act or the Sunshine Ordinance.

III. STAFF RECOMMENDATION

As stated previously, the Commission has discretion whether to schedule a formal hearing on this issue to determine whether a violation of the Brown Act and Sunshine Ordinance occurred. If the Commission were to determine that a violation occurred, the Sunshine Ordinance would require the Port Board to agendize "for immediate determination" whether to cure and correct the violation after first taking any new public testimony. If the Port Board chooses to cure and correct, it would then decide whether to affirm or supersede any previous actions taken in closed session. [O.M.C. §2.20.270(D)]

In determining whether to schedule a formal hearing in this matter, the Commission may wish to consider the following factors: 1) the absence of any dispute over whether the meeting was timely noticed or that the Port Board properly convened a noticed open session before convening into closed session; 2) the likelihood of obtaining testimony on the nature of the closed session discussions or communications between Port staff and its legal counsel; and 3) whether the remedy provided in Section 2.20.270(D) is adequate based on representations that the Port Board took no actions at the February 12 meeting and subsequently "re-noticed" the meeting for March 18, 2005.

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.*