



# PORT OF OAKLAND

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June 24, 2005

City of Oakland  
Public Ethics Commission  
One Frank Ogawa Plaza, 4<sup>th</sup> Fl.  
Oakland, California 94612-2031

Attention: Daniel D. Purnell

**Re: Complaint No. 05-06**

Dear Mr. Purnell:

This is in reply to the questions you have sent by e-mail on June 20, 2005, concerning the above complaint.

**Question 1:** Was there an audio/video tape or transcript made of the February 18 meeting? If not, were there any reports, notes or other writings made summarizing the discussions and/or actions taken at the February 18 meeting? Such reports, notes and writings include those generated from the consultants present at the meeting. If there are any such documents, please identify and describe them and indicate whether you are claiming a privilege over their disclosure.

**Answer 1:** There was no audio or video tape or transcript of the February 18, 2005, closed session of the Board. We do not record or video tape closed sessions. I would note, however, that even if there were recorded minutes or a transcript the Brown Act expressly makes such record confidential and not subject to disclosure. (Govt. Code §54957.2) The appellate courts have stated that the Brown Act provides for disclosure of the proceedings which took place in closed session only in specified situations involving *in camera* review by a court. Kleitman v. Superior Court, 74 Cal.App.4<sup>th</sup> 324 (1999).

**Question 2:** With respect to the email initiated by Ms. Ayers-Johnson on February 19, the Ethics Commission was concerned whether the Port Board conducted another "meeting" by engaging in an email dialogue in response to Ms. Ayers-Johnson involving a majority of the Port Board membership. Can you please indicate whether a majority of the Port Board responded to Ms. Ayers-Johnson's email? If so, can you please provide copies of any existing email correspondence?

**Answer 2:** There were no responses to the e-mail sent by Commissioner Ayers-Johnson on February 19, 2005.

ATTACHMENT 1

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530 Water Street ■ Jack London Square ■ P.O. Box 2064 ■ Oakland, California 94624-2064  
Telephone: (510) 627-1100 ■ Facsimile: (510) 627-1826 ■ Web Page: [www.portofoakland.com](http://www.portofoakland.com)

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Date 7-11-05

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**Question 3:** I will be faxing to your office a copy of what Sanjiv Handa purports to be an October 23, 2000, memorandum from the Port's legal office. This document concludes that the Port Board may hold a meeting without public notice to discuss such items as "team development, how to listen and negotiate, general public relations." With respect to this document, can you please verify whether this document was in fact produced by your office? Also, can you advise me the extent to which, (if any) this document was used or relied upon by anyone (including yourself, Jerry Bridges, John Betterton or Ms. Scates) to schedule or proceed with the February 18 meeting.

**Answer 3:** With respect to this item I want to acknowledge and thank the Ethics Commission's counsel, Mark Morodomi, who attempted to contact me about it prior to the meeting. But regrettably by the time I got his message the meeting was already in progress.

I have received your fax of a memorandum dated October 23, 2000, which you state Sanjiv Handa represented to be a memorandum from my office. The top of the document is cut off where the author is identified and where it is indicated to be attorney client communication or work product privileged and exempt from disclosure. This is what I understand Mr. Handa stated to the Ethics Commission.

On its face this memorandum is an internal communication conveying legal research and opinions. Attorney client communications and attorney work product have long-established protection from disclosure as a matter of state law and public policy. I am shocked that the content of this document was revealed and allowed to become part of the record before the Ethics Commission. I must insist that it be stricken from the record and disregarded in your investigation.

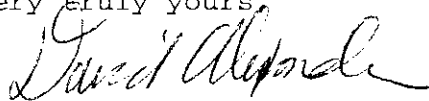
The courts have imposed ethical responsibilities on unintended recipients of privileged documents who should refrain from examining them any more than necessary to determine that they are privileged and then immediately notify the appropriate persons. State Compensation Insurance Fund v. WPS, Inc., 70 Cal.App.4<sup>th</sup> 644 (1999). In this instance the document was read publicly before the Ethics Commission and became part of the record. Use of the memorandum as an instrument of investigation as suggested by the questions in item 3 of your e-mail, is highly inappropriate. Under current review by the State Supreme Court is an appellate decision imposing attorney disqualification where, rather than informing the source of attorney work product of its inadvertent disclosure, the attorney copied it, disseminated it, and fully utilized it to his advantage in violation of the ethical standards established in the State Fund case cited above. While the appellate case cannot be cited in legal proceedings until the Supreme Court rules, it can be read in Lexis or Westlaw as Zerlene Rico v. Mitsubishi Motors Corporation, 116 Cal.App.4<sup>th</sup> 51 (2004).

Notwithstanding our concerns regarding utilization of privileged attorney communications and work product, I can provide you with some facts of which you should be aware. The Board did hold a retreat subsequent to the October 23, 2000, memorandum. This was held as a public meeting, duly noticed and attended by members of the public. The Port has not varied from this practice.

The position of the Port Attorney's Office, the Executive Director, and the Port as a whole is that the closed session of February 18, 2005, should have been noticed as a meeting. The Secretary to the Board was advised prior to the meeting, albeit it was imperfectly communicated. When it was ultimately communicated and understood, he concluded it was too late to post notice. The reason for faulty communications was that this meeting did not follow the normal calendaring procedures because Port personnel who are normally involved in such matters were not involved in the meeting. This omission was inadvertent. A Calendar Committee meeting normally precedes Board meetings in order to coordinate the agenda planning, closed session items, and related agenda requirements. This meeting did not occur in this instance. Port personnel will be present to further explain at your next meeting, if necessary.

I have attempted to respond to your additional questions fully and candidly as I did previously. This is the third occasion that we have been asked to respond to questions and the third time this matter will appear on the Ethics Commission agenda. The Port has acknowledged the mistake, attempted to cure and correct the mistake, and has cooperated in your investigation to the extent attorney-client relationships would allow. I trust you have sufficient facts before you to bring this matter to a close.

Very truly yours,



DAVID L. ALEXANDER  
Port Attorney

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