
City Attorney

City of Oakland
Public Ethics Commission
April 5, 2004

In the Matter of)
) Complaint No. 04-01
)

Gary Sirbu filed Complaint No. 04-01 on January 22, 2004.

I. SUMMARY OF COMPLAINT AND ALLEGATIONS

Mr. Sirbu filed Complaint No. 04-01 alleging that an unknown City official or employee may have violated Section 7 of the City Council's Code of Ethics (and other provisions of state law) by disclosing a confidential attorney-client communication to the news media. **Attachment 1.**

II. BACKGROUND

On January 12, 2004, San Francisco Chronicle columnist Chip Johnson reported that during the previous week he received a copy of a memorandum written by City Attorney John Russo to Mayor Jerry Brown. Mr. Johnson wrote that the memorandum "scolded" the Mayor and Oakland Police Chief Richard Word for promoting a police officer who reportedly had been disciplined for making discriminatory comments while on duty. **Attachment 2.**

Mr. Johnson also reported that the memorandum omitted facts about subsequent discipline the officer received that would have undercut the City Attorney's criticism of the decision to promote the officer. He quoted Mayor Brown as stating that the memorandum was "written to be leaked to the press" in order to discredit the Mayor politically. Finally, Mr. Johnson criticized the unidentified person who leaked the memorandum for "us[ing] employees as props to settle a personal or professional beef."

On January 13, 2004, the Oakland Tribune ran a story by Heather MacDonald stating it also received a copy of the memorandum during the previous week. The story recounted much of the same information contained in Chip Johnson's story. **Attachment 3.** Ms. MacDonald also did not reveal the source of the memorandum in her story.

Mr. Sirbu alleges that the act of distributing the memorandum to members of the news media constitutes a breach of the attorney-client privilege and could possibly violate state law pertaining to the confidentiality of police employment records. He also alleges that the City Attorney distributed the memorandum to members of the Oakland

City Council whom, if they were the source of the leak, would have violated Section 7 of the City Council Code of Ethics.

Oakland Municipal Code Section 2.24.020 sets forth the Commission's jurisdiction. The Commission has jurisdiction over the allegations concerning the Code of Ethics and their application to members of the City Council. The Commission does not have jurisdiction to determine allegations concerning Government Code §3060 or Penal Code §832.7.

III. ANALYSIS

Mr. Russo told Commission staff that the memorandum was initially drafted by Vicki Laden, a deputy City Attorney familiar with police matters. He said he made a few revisions to the document before signing or initialing it for distribution. He said he gave the memorandum to his personal secretary, Cheryl Moore, with instructions for her to deliver the original to Mayor Brown. Copies of the memorandum were also "cc'ed" to members of the City Council and to the City Administrator, Deborah Edgerly.

Ms. Moore told Commission staff that she delivered copies of the memorandum to the respective addressees in sealed envelopes marked "confidential." She told Commission staff she hand-delivered the original and all other copies to the respective city offices. She did not deliver them directly or personally to the intended recipients. She left them with the receptionists or secretaries, who in turn placed the envelopes on the official's desk or in the respective mailbox for city Councilmembers.

Commission staff interviewed Mayor Brown, Mr. Russo, Ms. Edgerly, all members of the City Council and most of their legislative staffs. Each person denied that they were the source of the leaked memorandum or that they had instructed anyone to send it to the press. Commission staff also asked Mr. Johnson and Ms. MacDonald if they would disclose the identity of the person who sent them the memorandum. Both refused, citing professional and legal privileges that protect the confidentiality of news sources.

Section 7 of the City Council Code of Ethics states:

"Each member of the City Council has a duty to. . .(7) [r]efrain from disclosing any information received confidentially concerning the business of the City, or received during any closed session of the Council held pursuant to state law."

The penalty for violating the Code of Ethics is the "censure" by other members of the City Council. The Code of Ethics does not apply to other City officers or employees.

In addition to the Code of Ethics, California law provides for the removal from office any city officer for "willful or corrupt misconduct in office." [Government Code §3060.] There is no statutory definition of "misconduct", however court decisions

indicate that such misconduct involves criminal behavior or a purposeful failure to carry out the "mandatory duties of office." [Steiner v. Superior Court (1996) 50 Cal.App. 1771,1782.] Commission staff has not found any cases applying §3060 to the unauthorized distribution of confidential communications. It remains an open and interesting question whether §3060 would apply to the situation here.

Finally, Penal Code §832.7(a) states that peace officer personnel records or information obtained from these records are confidential and can only be disclosed pursuant to a court order based on a showing of good cause. (Commission staff takes no position whether the distribution of the memo to the news media constitutes an actionable violation of §832.7.)

Commission staff has been unable to determine the identity of the person who sent the memorandum to members of the local news media. Staff is also extremely doubtful that further investigation into this matter will lead to his or her discovery. All the recipients of the memorandum, as well as the City Attorney and key members of his staff, have expressly denied distributing, or instructing anyone else to distribute, the memorandum to the press. Their statements are not likely to change in the absence of additional evidence or future cooperation from the news media.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 04-01 on grounds that there are insufficient facts on which to base a finding that a particular person violated Section 7 of the Code of Ethics or any other applicable law.

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.*