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City Attorney

City of Oakland  
Public Ethics Commission  
January 5, 2004

In the Matter of )  
 ) Complaint No. 03-15  
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Complaint No. 03-15 was filed by Rashidah Grinage on November 3, 2003.

**I. SUMMARY OF COMPLAINT AND ALLEGATIONS**

Ms. Grinage filed the above complaint alleging that Oakland Mayor Jerry Brown and City Councilmember Danny Wan violated the Brown Act, Sunshine Ordinance and the City Council's Code of Ethics by considering a proposal before the City Council's Finance and Management Committee without timely filing agenda-related materials with the City Clerk. **Attachment 1.**

**II. BACKGROUND**

On October 14, 2003, the City Council's Finance and Management Committee considered an item relating to Oakland's Risk Management Incentive Program ("Incentive Program.") The Incentive Program was a policy adopted by the City Council in 1997 to monitor and control liability claims incurred by certain City agencies and departments. The Incentive Program was applied to the Oakland Police Department, Fire Department, Public Works Agency and Department of Parks and Recreation. One of its components permits these entities to keep a portion of their projected budget for liability claims if such claims do not exceed a targeted amount. Conversely, these entities would be required to forfeit other budgeted funds if liability claims exceeded the targeted amount.

In July, 2003, the City Council considered a staff report that demonstrated the results of the Incentive Program for FY 2001/2002. The report indicated that all but the Parks and Recreation Department would have incurred significant "disincentives" under the Program. Most significantly affected would be the Police Department, which would be assessed approximately \$426,000 from other budgeted funds if the Incentive Program were implemented.

The City Council referred the July, 2003, report back to staff with instructions to develop alternatives to the original Incentive Program. These alternatives were presented in another staff report and recommendations at the Finance and Management Committee on October 14, 2003. The staff report presented three options for the Committee to consider. Option A was to continue with the implementation of the

original Incentive Program. Options B and C presented other alternatives for creating agency and department incentives to reduce liability claims. The staff report recommended that the Committee adopt, for final City Council consideration, one of the three options.

During the presentation of the item, Mayor Brown appeared and presented what was labeled as "Alternative D" for claims involving the Oakland Police Department. Alternative D contained no financial incentives or disincentives, but proposed several administrative actions designed to make police officers more aware of, and their commanders more accountable for, police behavior that results in liability claims and payouts against the City. Alternative D was submitted to committee members and those in attendance on a one-page handout. **Attachment 2.** Mayor Brown and risk management staff orally presented the rationale supporting Alternative D.

Several speakers objected to Alternative D on policy grounds. None raised objections under the Sunshine Ordinance. The committee voted 3 to 1 to accept the staff report, adopt Alternative D for recommendation to the full City Council, and direct staff to develop a detailed process for the progressive discipline of police officers. **Attachment 3.**

On October 15, 2003, Ms. Grinage sent a fax to City Attorney John Russo and Deputy City Attorney Mark Morodomi objecting to the Committee's consideration of Alternative D and requesting that the City Attorney invalidate the Committee's vote on grounds that Alternative D was not included in the ten-day agenda package for that meeting.

Mr. Morodomi responded the following day with a three-page letter stating that a "technical violation [of the Sunshine Ordinance] may have occurred" because a copy of Alternative D was not submitted into the ten-day agenda package for the Committee meeting. **Attachment 4.** He also concluded that the "harm to public awareness" of the matter was mitigated by the fact that the Committee had full authority to recommend whether to continue the Incentive Program or not, and that the Committee's recommendation in support of Alternative D would be available to the public more than 10 days before the City Council would take final action on the item.

On October 16, 2003, the City Council Rules Committee scheduled the Finance and Management Committee's recommendation for hearing at the November 4, 2004, City Council meeting. Ms. Grinage states that the Office of the City Attorney sent a communication to the Rules Committee over the propriety of scheduling this item for City Council consideration in light of her alleged violations. The Office of the City Attorney acknowledged that it provided privileged advice to the Rules Committee on this subject.

At its regular meeting of November 4, 2003, the City Council considered the Committee's recommendation and adopted a motion to direct staff to review a risk

management program currently in effect in Phoenix, AZ., and return with additional recommendations for the City Council meeting of January 6, 2004. **Attachment 5.**

Ms. Grinage alleges that Mayor Brown violated the Sunshine Ordinance by submitting an alternative recommendation without previously filing the one-page handout in the 10-day City Council agenda package. She alleges that Committee chairperson Danny Wan violated Sections 4 and 12 of the City Council Code of Ethics for failing to object to the Mayor's conduct and for allowing a vote on the Mayor's recommendation.

### **III. ANALYSIS**

#### **A. Ten-Day Filing Requirement Under Sunshine Ordinance**

Under the Sunshine Ordinance, all "agenda-related materials" for a regular City Council committee meeting must be filed with the Office of the City Clerk and Oakland Main Library no later than ten days before the date of the meeting. [O.M.C. §2.20.080(A)(2)] Under certain circumstances, the 10-day package can be "supplemented" with additional material no later than 72 hours before the meeting. [O.M.C. §2.20.080(B)]

Agenda related materials include "all reports, correspondence and any other document prepared and forwarded by staff to any local body, and other documents forwarded to the local body, which provide background information or recommendations concerning the subject matter of any agenda item." [O.M.C. §2.20.030(B)] The Brown Act does not require that agenda-related material be filed with the City Clerk within a specified period of time before a meeting.

The hand-out which Mayor Brown had distributed at the October 14 committee meeting probably constitutes "agenda related material" because it was a document forwarded to the committee that contained a recommendation concerning an agenda item. According to the Mayor and his staff, Alternative D was not finally developed until after the 10-day agenda was filed. Thus the question presented is whether the committee should have considered an alternative recommendation to an otherwise properly noticed agenda item.

Commission staff notes that it is not uncommon for a local body to take action on an item that varies from a staff recommendation. Such situations often occur after receiving public comment and/or debate among the members of the local body. On one hand, such flexibility is an essential part of the decision-making process and necessary for the timely administration of a local body's business. On the other, the Sunshine Ordinance is predicated upon giving the public as much advance information about City decisions as reasonably possible.

In this case, there is no indication that time was essential to a decision on this item. The Mayor's proposal, while germane to the item, presented an option not

addressed or contemplated in the staff report -- that the original Incentive Program be dropped altogether in favor of tighter administrative procedures in police conduct cases. There is no apparent reason why this proposal could not have been incorporated into the staff report and made a part of the 10-day agenda package, or made part of a 72-hour "supplemental" package before the meeting.<sup>1</sup>

In the absence of any time sensitivity, there is a legal and factual issue that the written recommendation should have been included in the agenda package pursuant to Section 2.20.080(A)(2) or 2.20.080(B).

## **B. City Council Ethics Code**

In July, 2001, the City Council adopted by resolution a "Code of Conduct" that provides in relevant part: "Each member of the City Council has a duty to. . .(4) Provide fair and equal treatment for all persons and matters coming before the Council [and]. . . (12) Maintain the highest standard of public conduct by refusing to condone breaches of public trust or improper attempts to influence legislation, and by willing to censure any member who willfully violates the rules of conduct contained in this Code of Ethics."

The Commission has the authority to oversee compliance with the Code of Ethics. [O.M.C. §2.24.020(B)] However, as noted in previous complaints involving the Code of Ethics, it is extremely difficult to enforce "codes of ethics" in an adjudicatory complaint proceeding. The standards of conduct contained in the Code of Ethics (as well as in most other similar codes) are "aspirational." That is, they set idealized goals of behavior that do not provide the requisite clarity or detail necessary for administrative enforcement.

The Commission has previously dealt with allegations involving the City Council Code of Ethics as presenting a question of whether to make a recommendation to the City Council to censure one of its members. In this case, there is nothing in the committee's taped deliberations to suggest that the chairperson or committee "willfully" sought to violate the City Council Code of Ethics by considering the item. Since the actions at issue are already regulated under the Sunshine Ordinance, Commission staff does not believe there are grounds to invoke the highly generalized provisions of the Code of Ethics in this matter.

## **IV. STAFF RECOMMENDATION**

Commission staff believes there is a legal and factual issue that the written recommendation (Alternative D) should have been included in the 10-day or 72-hour

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<sup>1</sup> The Sunshine Ordinance additionally permits a local body to "excuse" the agenda material filing requirement provided that 1) the item properly appears on the agenda, 2) the minimum requirements of the Brown Act have been met, and 3) the local body, by two-thirds vote, determines it was not reasonably possible to meet the filing requirement and there is a need to take immediate action or the item is purely ceremonial. [See O.M.C. §2.20.080(D)].

“supplemental” agenda package. The Commission has discretion whether to schedule a formal hearing on this issue to determine whether a violation of the Sunshine Ordinance occurred.

If the Commission were to determine that a violation of the ordinance occurred, the Sunshine Ordinance would require the Finance and Management Committee to re-agendize the item and determine whether to cure and correct the violation. If the Committee chooses to cure and correct the item, it would then decide whether to affirm or supersede its previous action to recommend Alternative D to the City Council after taking any new public testimony on the item. [O.M.C. §2.20.270(D)]

In deciding whether to conduct a formal hearing on this matter, Commission staff believes the Commission should consider the fact that the City Council has agendized for its meeting of January 6, 2004, further discussion and another staff report on the subject of liability management. City policy in this area is developing at the City Council level in a direction above and beyond the Finance and Management Committee’s recommendation of Alternative D. Thus a formal Commission hearing in this matter may produce a remedy that is neither timely, relevant nor practical.

An alternative recommendation would be to dismiss the complaint and issue a letter to the Mayor’s Office and Chairperson Wan expressing the Commission’s concern over the Committee’s consideration of Alternative D in the absence of any demonstrated urgency, as well as the Commission’s desire to see that all staff-produced agenda material is timely submitted into the 10-day or 72-hour supplemental agenda package. Commission staff is advised that this policy is consistent with the advice now being provided by the Office of the City Attorney to all local bodies.

Commission staff further recommends that the Commission dismiss the complaint with respect to alleged violation of the City Council Code of Ethics.

Respectfully submitted,

Daniel D. Purnell  
Executive Director

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*\*\* 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.*