
City Attorney

City of Oakland
Public Ethics Commission
June 6, 2005

In the Matter of)
) Complaint No. 05-06
)

This complaint was initiated by the Public Ethics Commission at its regular meeting of April 6, 2005. A copy of the staff report requested by the Commission for the April 6 meeting is included as **Attachment 1**.

I. SUMMARY OF COMPLAINT AND ALLEGATIONS

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.

II. BACKGROUND

According to Port Board Executive Director Jerry Bridges, he first raised the idea of a special Port Board meeting sometime in early January, 2005. His intended purpose for the meeting was to review his performance, discuss and develop personal goals and objectives, and to work on a strategic communications plan for him, the Port Board and its senior managers.

In September, 2004, the Port had contracted with an entity known as Red Oak Consulting of Carlsbad, California, for the purpose of examining Port governance, leadership and teamwork of senior management, and "strategic initiatives of the organization." **Attachment 2**. Mr. Bridges stated he had been meeting with his senior staff approximately every two weeks as part of that process. He said he wanted to schedule a meeting with the Port Board to bring them into the plan's development. He said he recalls telling Port Attorney David Alexander and Port Board Secretary Jon Betterton that he wanted to call such a special meeting at some point in the future.

Sometime in January, 2005, Mr. Bridges said he selected the date of February 18, 2005, for the meeting. He said he could not recall whether he communicated that date directly to the Port Board. Another Port Boardmember, Darlene Ayres-Johnson, thought she recalled receiving an email from Port Board President Patricia Scates informing her of the date, place and time. Ms. Scates thought the meeting date may

have been determined at a previous meeting. In any event, Mr. Bridges said he also told David Alexander and Jon Betterton that a meeting was being planned. He said he assumed they would take care of any meeting notice requirements.

Mr. Betterton told Commission staff that he first learned that a meeting was to be scheduled approximately 3 to 4 weeks before it occurred. He recalls telling Mr. Bridges early on that the meeting had to be publicly noticed. He said that Mr. Bridges told him that he was going to discuss the noticing issue with the legal department.

Port Attorney David Alexander told Commission staff that he did not provide any written advice to Mr. Bridges or to Mr. Betterton on whether the proposed meeting required public notice. He stated that a member of his staff produced a report to him on the subject and said that this staff member may have consulted with Mr. Betterton. Mr. Betterton said he received a copy of a legal memorandum from James Allen, a Port staff attorney, dated January 28, 2005. He stated that the memorandum discussed noticing issues for the proposed special meeting. Mr. Betterton did not reveal the contents or conclusions contained in the memorandum after being advised by Commission staff that Mr. Alexander had claimed a privilege over communications between the legal office and Port staff.

Mr. Betterton said that he ultimately learned that the meeting had been scheduled for Friday, February 18, on the preceding Tuesday, February 15, 2005. He said that several days before the meeting he overheard a conversation between David Alexander and Port Board President Patricia Scates in which she asked Mr. Alexander whether the meeting had been noticed. Mr. Betterton recalls Mr. Alexander telling her, "We've handled that." Mr. Betterton said he assumed that Mr. Alexander had concluded the meeting did not require public notice otherwise he (Mr. Betterton) would have received instructions to publish notice for the meeting.

Mr. Betterton also says he recalls having a conversation with Mr. Alexander several days before the meeting in which he and Mr. Alexander discussed the fact that the meeting had not been publicly noticed. Mr. Betterton said he reluctantly conceded to Mr. Alexander that the meeting should just go forward despite Mr. Betterton's belief that the meeting required public notice. Mr. Bridges told Commission staff that he too believed the meeting should go forward even after Mr. Betterton advised him of his belief that the Friday meeting required public notice. Mr. Bridges said he made his decision to go forward with the meeting on grounds that 1) preparations had already been made (i.e. the hotel room reservation, flight and accommodations for the consultants, and Port Boardmember schedules) and 2) his belief that the purpose of the meeting was unrelated to any Port-related business decisions.

Both Mr. Bridges and Mr. Betterton believe that none of the Port Boardmembers knew in advance that the meeting had not been noticed. They stated that such matters are typically handled by staff.

Mr. Bridges told Commission staff that the overwhelming portion of the meeting was devoted to his performance as Executive Director and the development of goals for future performance. He stated, however, that because his future performance goals also involved issues pertaining to relations between him, his staff and the Port Board, that the Port Board's own goals, expectations and objectives became part of the discussion. This account was corroborated by Ms. Scates, who said that whenever any discussion ventured away from Mr. Bridges' evaluation that she would move the discussion back to that topic. Two representatives from Red Oak Consulting reportedly attended the meeting. Mr. Bridges states that the Port Board did not take any action or make any decisions during the meeting.

Another partial account of the meeting was contained in an email sent by Port Director Darlene Ayers-Johnson to members of the Port Board and Port staff the day after the meeting. The email states in part: "Our gathering was led by a non-Port group leader/facilitator on matters that **did not involve substantive issues that pertained to Port policy or Port business decisions.** Instead, the meeting dealt with **"organizational dynamics," "team work," "strategic thinking," "communications," "critical thinking" and building a framework to enable our body to operate more efficiently.**" (Emphasis in the original.) She stated that the off-site meeting "pertained to general educational matter, and issues (that is the evaluation of the Port Executive Director)." She expressed her belief that these topics did not require the meeting to be publicly noticed. **Attachment 3.**

On Tuesday, February 22, 2005, Mr. Bridges sent a letter to Oakland City Attorney John Russo in which he characterized the meeting as an "administrative oversight" and a "serious mistake" that he did not wish to happen again. **Attachment 4.** He requested assistance from the City Attorney in arranging a staff training session to review elements of the Brown Act and Sunshine Ordinance. Such a meeting was conducted by Mark Morodomi and Michelle Abney of the City Attorney's Office in late March, 2005. Mr. Bridges said he attended the session along with members of the Port's senior staff.

On February 25, 2005, the Port posted and distributed a "special meeting agenda" for the meeting of February 18, 2005. The agenda stated in pertinent part:

"The purpose of the Special Meeting was to provide for a Closed Session for public employee performance evaluation. No action was intended or taken, nor was public participation intended or permissible in Closed Session. No other business was calendared or intended.

"This notice of Special Meeting, which occurred on Friday, February 18, 2005, is intended to cure and correct inadvertent failure to post timely notice of Special Meeting and to provide public notice that the closed session occurred at such time and place." **Attachment 5.**

On March 1, 2005, Ms. Scates reportedly made a public statement at a Port Board meeting. A written version of that statement acknowledged that the Port Board held a closed session meeting on February 18 "consisting of one closed session item." The statement says that the meeting was "inadvertently omitted from the Port Calendar and subsequently proper meeting notice was not made." **Attachment 6.** Ms. Scates, like Mr. Bridges, told Commission staff that the Port Board would never intentionally hold an illegal meeting.

On March 18, 2005, the Port Board called a second special meeting to conduct a personnel evaluation of Mr. Bridges and to discuss "Port-wide Goals and Objectives." The personnel evaluation of Mr. Bridges was scheduled as a closed session item using the Brown Act's approved description for such an item. The Port-wide goals were noticed as an open session item following the personnel evaluation. **Attachment 7.** Mr. Alexander and Ms. Scates told Commission staff that the March 18 meeting was intended to repeat the meeting of February 18 after first providing public notice.

III. ANALYSIS

A. Alleged Failure To Notice A Special Meeting

The Brown Act requires local bodies such as the Port Board to provide public notice of all special meetings by posting and distributing a copy of the agenda to each member of the local body and to the news media no less than 24 hours before the meeting. (Gov't Code §54956) The Oakland Sunshine Ordinance extends this posting and distribution requirement to at least 48 hours before the meeting, not counting weekends and holidays. In addition, the Sunshine Ordinance requires that a copy of each special meeting agenda as well as all agenda-related materials be filed in the Office of the City Clerk at the time of posting. The Port Board, along with the City Council and Redevelopment Agency, is required to post a copy of its special meeting agendas on-line. Special meetings held at a location other than the regular meeting place must be noticed at least ten days before the meeting. [O.M.C. §2.20.070]

The Brown Act recognizes several situations in which a public body may not be required to provide advance notice of its gatherings. The Brown Act exempts from its definition of a governmental "meeting" a gathering at a conference. In order for this exception to apply, the gathering must be open to the public and the members must refrain from discussing among themselves, other than as a part of the scheduled program, "business of a specific nature that is within the subject matter jurisdiction of the local agency." [Gov't Code §54952.2(c)(2)] The Brown Act also exempts from its definition of "meeting" an open and publicized community meeting called or hosted by another person or entity so long as the meeting concerns issues of local interest and is open to the public and publicized in advance. As in the case of conferences, the local agencies are prohibited from discussing "business of a specific nature" that is not a part of the scheduled program. [Gov't Code §54952.2(c)(3)]

It is undisputed that the Port Board did not provide public notice for the February 18, 2005, special meeting at the Waterfront Plaza Hotel. It does not appear from the information provided that the February 18 meeting constituted a conference or a publicized community meeting that would arguably grant relief from public notice requirements. No member of the Port staff has claimed that either exception applied. What the Port Board has claimed publicly is that the failure to notice the gathering was "inadvertent." This contention is controverted however by information that senior Port staff knew or believed, at least three days before the meeting, that the meeting required public notice but chose instead to proceed without it.

B. Proper Subjects Of A Closed Session Hearing

The Brown Act permits legislative bodies to consider certain types of matters in closed session. Among the permitted subjects of closed session meetings are certain personnel matters. Under Government Code Section 54957(b)(1), local legislative bodies are permitted to consider the "appointment, employment, evaluation of performance, discipline, or dismissal of a public employee." This section is commonly known as the "personnel exception" to open meeting laws.

The Brown Act offers specific language to describe the types of items a local agency will consider in closed session. The Oakland Sunshine Ordinance requires that all local agendas contain the Brown Act's descriptions, including the one for personnel matters. Any "action taken" in closed session without this agenda disclosure is subject to invalidation under the provisions set forth in the Brown Act. [O.M.C. §2.20.100] Prior to any closed session, the Sunshine Ordinance requires local bodies to announce in open session the reasons for convening a closed session and must "cite and explain" the legal authority for the closed session. Members of the public have the right to comment on any item of closed session before the closed session convenes. [O.M.C. §2.20.110] Once the closed session convenes, a local body may only consider those matters specified in the open session statement made before the closed session begins. [O.M.C. §2.20.120] After every closed session, a local body must 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]

It appears that an evaluation of Mr. Bridges' job performance was a proper subject for the Port Board's closed session hearing. However, a governmental agency may not avoid its public notice requirements simply because the subject of the meeting is appropriate for closed session. The Brown Act and Sunshine Ordinance still require advance public notice and proper agenda descriptions of all closed session items.

Information also exists that the Port Board may not have exclusively confined itself to a narrow discussion of Mr. Bridges' job performance. Based on Mr. Bridges' statements and Ms. Ayers-Johnson's email, other topics included organizational dynamics, team work, strategic thinking, communications, critical thinking and working efficiently. The question is at what point, if any, did the Port Board's

evaluation of Mr. Bridges' job performance leave the permissible boundary of a personnel evaluation and enter the domain of public business?

A 2001 California court decision concluded that a permissible closed session employment evaluation included "consideration of the criteria for such evaluation, consideration of the process for conducting the evaluation, and other preliminary matters, to the extent those matters constitute an exercise of. . . [the agency's] discretion in evaluating a particular employee." The court also provided the dictum that "'feedback' to the employee is a traditional part of a formal performance evaluation. (See Armstrong, A Handbook of Human Resource Management (1988) p. 167.) A determination of whether an employee's performance is satisfactory and establishment of goals for future improvement are the primary objectives of a formal performance evaluation. (Id. at p. 166.)" Duval v. Board of Trustees (2001) 93 Cal.App.4th 902, 909-910.

In the absence of a detailed account of the deliberations conducted in closed session, Commission staff cannot determine whether and to what extent the Port's evaluation of Mr. Bridges adhered to the above parameters. According to Mr. Bridges, the consultants produced no writings or reports summarizing the discussions at the February 12, 2005, meeting. Mr. Bridges, Ms. Scates and Ms. Ayers-Johnson all told Commission staff that any discussion of Port goals and objectives were related to Mr. Bridges' job evaluation and plans for improving his performance. On the other hand, the statements and email, as well as the presence of outside consultants whose contracted services arguably went beyond mere performance appraisal, raise an issue whether the Port discussed a broader set of issues than permissible under the personnel exception.

III. STAFF RECOMMENDATION

Commission staff concludes there are 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]

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 agendaize "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.

If the Commission decides to schedule a formal hearing, Commission staff recommends that staff first be directed to attempt a settlement of the issues raised in this complaint subject to Commission approval under Section XII(F) of the Commission's General Complaint Procedures.

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.*