



Item 10b - Dismissal Letter 23-13

ENFORCEMENT UNIT
1 FRANK H. OGAWA PLAZA, #104
OAKLAND, CA 94612
(510) 238-3593
TDD (510) 238-3254

April 27, 2023

Office of Councilmember Nikki Fortunato Bas
[REDACTED]
[REDACTED]

Via email: [REDACTED] o/b/o Councilmember Bas and staff

Re: Public Ethics Commission Complaint no. 23-13; Notice of Dismissal and Advisory Letter

To Council President Fortunato Bas and District 2 staff:

On March 22, 2023, the City of Oakland Public Ethics Commission (PEC) received a complaint alleging that your office violated the Government Ethics Act by failing to return phone calls and/or e-mails from a member of the public. In a previous letter to you, we provided a copy of that complaint.

I am writing to inform you that the PEC has completed its preliminary review of the complaint and has dismissed it with no further action. We did this because there is no duty under the Government Ethics Act to respond to phone calls or emails from a member of the public. For more detail, you can consult the dismissal letter that we sent to the complainant, a copy of which is attached here pursuant to our Complaint Procedures.

No further action is necessary on your part; this letter is just a courtesy notice.

However, please be advised that the City's Sunshine Act (which is separate from the Government Ethics Act) requires each City agency (including the City Council) to respond to written and oral requests for public information¹ on a "timely and responsive" basis.² "Public information" means "the content of 'public records' as defined in the California Public Records Act . . . whether contained in public records or in oral communications."³ In turn, "public records" contain "information relating to the conduct of the public's business prepared, owned, used, or retained by any . . . local agency regardless of physical form or

¹ OMC § 2.20.200(A).

² OMC § 2.20.200(B).

³ OMC § 2.20.180(C).

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characteristics.”⁴ Agency liaisons have a duty to provide oral public information about agency “operations, plans, policies, and positions.”⁵

Here, the complainant provided us with copies of the emails that he claimed to have sent to your office and to which he allegedly did not receive any response. Most of them were not seeking information about public business conducted by your office. Rather, they were seeking assistance from, or to influence, you and/or your staff. Neither you nor your staff were under any legal obligation under the Government Ethics or Sunshine Acts to respond to those emails.

However, there was one email dated October 26, 2022, in which the complainant asked for the “status” of the Athol/East 18th St. tennis courts encampment. This email appeared to be requesting information about public business conducted by the City of Oakland, and may therefore have been a request for public records or oral public information.⁶ It is unclear whether your office would actually have the responsive records or information, but the law does not require that public records requests be made to the correct department of the City to receive a response.⁷ The person designated by your agency to respond to public records requests has an affirmative duty under the Sunshine Act to:

- facilitate the inspection and copying of public records;
- provide oral public information about agency or department operations, plans, policies, and positions;
- provide information on a timely and responsive basis to those members of the public who are not requesting information from a specific person; and/or
- assist members of the public in identifying those public records they wish to obtain.⁸

Please keep this advice in mind in the event that your office receives records or information requests from the public in the future.

Although I am dismissing Mr. Collins’ complaint against you, I advised him that he may want to pursue mediation of his public records/information request if he so chooses. Mediation of a Sunshine Act (public records) dispute is a separate process from the investigation of an ethics complaint, and your participation in it would be voluntary. If your office participates in that mediation and does not have the records or information he is seeking, then the person designated by your agency to respond to public records requests should direct Mr. Collins’

⁴ Cal. Gov. Code § 7920.530(A).

⁵ OMC § 2.20.200(A).

⁶ I would note that the complainant sent this email to [REDACTED] and it is unclear whether this is an email address on which you conduct City business (and therefore would be an appropriate place to send a public records/information request). That is an issue that would have to be resolved in mediation, if the complainant chooses to pursue it.

⁷ *Kumeta v. City of San Diego*, D037521, 2002 Cal. App. Unpub. LEXIS 6494, at *16 (July 16, 2002).

⁸ OMC § 2.20.200(A)-(B).

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request to the appropriate agency. We will let you know if Mr. Collins chooses to pursue mediation of his records/information request.

We are required to inform the Public Ethics Commission of the dismissal of this complaint at an upcoming public meeting, as part of our regular monthly update on Enforcement actions. The date/time and agenda of that meeting will be posted on the Commission's website in advance of the meeting. The report will be purely informational, and no action will be taken by the Commission regarding this matter, which is now closed. However, you are welcome to call-in to that meeting to listen and/or give public comment if you wish. You may also submit written comments to us before that meeting, and we will add them to the meeting materials.

If you have any questions regarding this matter, please feel free to contact me at (510) 424-3200 or srussell@oaklandca.gov.

Respectfully,

Simon Russell

SIMON RUSSELL | Enforcement Chief
CITY OF OAKLAND | Public Ethics Commission
City Hall, 1 Frank Ogawa Plaza, Room 104 |
Oakland, CA 94612
Phone: 510.238.2213 | Cell 510.424.3200 | Fax: 510.238.3315
Email: srussell@oaklandca.gov | he/him/his
www.oaklandca.gov/pec

Enclosure: Copy of Dismissal Letter to Complainant

April 27, 2023

David Collins
[REDACTED]
[REDACTED]

Via email: [REDACTED]

Re: Public Ethics Commission Complaint No. 23-13; Notice of Dismissal; Recommendation for Mediation

To David Collins:

On March 22, 2023, the City of Oakland Public Ethics Commission (PEC) received your complaint (#23-13) alleging that District 2 City Councilmember Nikki Fortunato Bas and her staff violated the Government Ethics Act by failing to return your phone calls and/or e-mails.

The PEC has completed its preliminary review of the complaint and determined that it does not allege a violation of the Government Ethics Act. No provision of the Government Ethics Act imposes a legal requirement on a City Councilmember or their staff to respond to phone calls and/or emails from a member of the public.

However, we also reviewed your complaint under the City's Sunshine Act, which requires each City agency (including the City Council) to respond to written and oral requests for public information¹ on a "timely and responsive" basis.² "Public information" means "the content of 'public records' as defined in the California Public Records Act . . . whether contained in public records or in oral communications."³ In turn, "public records" contain "information relating to the conduct of the public's business prepared, owned, used, or retained by any . . . local agency regardless of physical form or characteristics."⁴ Agency liaisons have a duty to provide oral public information about agency "operations, plans, policies, and positions."⁵

¹ OMC § 2.20.200(A).

² OMC § 2.20.200(B).

³ OMC § 2.20.180(C).

⁴ Cal. Gov. Code § 7920.530(A).

⁵ OMC § 2.20.200(A).

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We reviewed the emails you provided to the PEC, showing your communications with Councilmember Bas' office. Most of them were not seeking information about public business conducted by Councilmember Bas' office. Rather, they were seeking assistance from, or to influence, Councilmember Bas. Neither Councilmember Bas nor her staff were under any legal obligation to respond to those emails.

However, your email to Councilmember Bas on October 26, 2022, asking for the "status" of the Athol/East 18th St. tennis courts encampment is requesting information about public business conducted by the City of Oakland, and may therefore be a request for public records or oral public information.⁶ It is unclear whether Councilmember Bas' office would actually have the responsive records or information, but the law does not require that public records requests be made to the correct department of the City to receive a response.⁷ The person designated by Councilmember Bas' office to respond to public records requests has an affirmative duty under the Sunshine Act to:

- facilitate the inspection and copying of public records;
- provide oral public information about agency or department operations, plans, policies, and positions;
- provide information on a timely and responsive basis to those members of the public who are not requesting information from a specific person; and/or
- assist members of the public in identifying those public records they wish to obtain.⁸

Mediation of a Sunshine Act (public records) dispute is a separate process from the investigation of an ethics complaint. If you wish to pursue mediation of your request for information concerning the encampment, you can complete and return the attached Mediation Request to our office. Meanwhile, I am dismissing your ethics complaint because it does not allege a violation of any laws over which the PEC has jurisdiction other than the Sunshine Act.

We are required to inform the Public Ethics Commission of the resolution of this complaint at an upcoming public meeting, as part of our regular monthly update on Enforcement actions. That meeting date/time and agenda will be posted on the Commission's website in advance of the meeting. The report will be purely informational, and no action will be taken by the Commission regarding this complaint, which is now closed. However, you are welcome to call-

⁶ I would note that you sent your email to [REDACTED] and it is unclear whether this is an email address used by the Councilmember to conduct City business (and therefore an appropriate place to which to send a public records/information request). That is an issue that would have to be resolved in mediation, if you choose to pursue it.

⁷ *Kumeta v. City of San Diego*, D037521, 2002 Cal. App. Unpub. LEXIS 6494, at *16 (July 16, 2002).

⁸ OMC § 2.20.200(A)-(B).

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in to that meeting to listen and/or give public comment if you wish. You may also submit written comments to us before that meeting, and we will add them to the meeting materials.

Thank you for bringing this matter to our attention. If you have other questions regarding this matter or our mediation program, please feel free to contact me.

Respectfully,

Simon Russell

Simon Russell, Enforcement Chief
City of Oakland, Public Ethics Commission
(510) 424-3200
srussell@oaklandca.gov

Enclosure: Mediation Request Form



Public Records Request Mediation Guide

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Questions? Contact the PEC:

(510) 238-3593

Oakland City Hall, Room 104

EthicsCommission@oaklandca.gov

Keep this page for your records

What is a public record? A public record is any writing or recording that contains information about the conduct of the public's business, including those stored in electronic form (such as emails). State and local law provide the right for the people to inspect and obtain copies of public records, unless those records, or information in the records, are confidential. Examples of confidential records include those containing personal information like a social security number, those relating to an ongoing investigation, or attorney-client communications. Confidential records might be partially redacted or withheld entirely.

Who may request mediation? Any person whose request to inspect or copy public records has been denied, delayed, or not completely fulfilled, may request mediation of their request through the Public Ethics Commission (PEC).

What does the mediation process look like? The PEC is responsible for conducting mediation. PEC staff will try to begin mediation within 10 days of receiving your request; however, due to high demand for PEC staff resources, many mediations begin later than 10 days after the request is made. The mediator (a PEC Commissioner or staff member) will conduct most communication between the parties by phone or email, and will aim to resolve the dispute to the mutual satisfaction of both parties. The mediator's recommendations are not binding on any party.

What is the difference between filing a mediation request and filing a complaint? The purpose of filing a mediation request is to have the PEC assist you in obtaining any records to which you are legally entitled. The purpose of filing a complaint is to have the PEC's Enforcement Unit investigate any potential violations of our local public records law; it is not necessarily meant to obtain any records you are requesting.

Do I have to participate in mediation before I can file a complaint or take legal action? Yes. A requestor who alleges an incomplete or untimely response to their public records request, must first participate in mediation before filing a complaint with the PEC or seeking a court order.

How long does mediation take? There is no legal deadline for when a mediation must end. Because the mediator cannot force an agency to release records, the length of the mediation depends upon the amount of cooperation received. Some mediations are completed within a few weeks, while others can go on longer than that.

Can I end the mediation myself? Yes, you may withdraw from the mediation process at any time. At that point, you may file a complaint with the PEC or seek a court order – but if you end the mediation, the PEC will no longer work to produce the records you are seeking. To withdraw your mediation request, please notify PEC staff in writing.

What if the mediation is unsuccessful? If the mediator is unable to resolve the dispute and determines that future mediation is unlikely to produce additional records, the mediator will notify both parties that they are closing the mediation and explain why. A final report regarding the mediation will be provided to the Public Ethics Commission at its next public meeting. You will be informed of that report in advance of the Commission's meeting and will have the opportunity to make a public comment at the meeting. You may then file a complaint with the PEC to investigate alleged violations of our local public records law, or seek a court order. Note: the PEC has no authority to impose fines for Sunshine violations.

How do I request mediation? Please complete both sides of the attached Request for Mediation form, and submit the form and any attachments to the Public Ethics Commission by email, mail, or fax via the contact information below.



Request for Mediation of Public Records Request Form

Staff Initials: _____

Request #: _____

If you would like to submit a request for mediation to help you obtain public records that you requested from a City employee or official, please complete this form. This form becomes a public record available for inspection and copying by the public, along with any documents submitted with this form. A copy of this request also will be provided to the persons identified in the allegations below. For more information about the Public Ethics Commission’s mediation process, see the [Oakland Sunshine Ordinance \(Oakland Municipal Code Chapter 2.20\)](#). Please contact the PEC with any questions you may have about mediation. The PEC’s contact information can be found at the end of this form.

Contact Information of Person Making Request:

Name: _____

Street Address: _____

City: _____ State: _____ Zip: _____

Phone: _____

Email: _____

Description of Request. Please complete the lines below and/or provide an attachment with the following details:

- **What records are you seeking?** Please include your Next Request number, if known. You can find your request number at <https://oaklandca.nextrequest.com/>

- **From whom are you seeking the records?** Please include the employee’s name, and any known title, department, phone number, email address, etc.

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- **Why are you seeking mediation?** Please describe the problem(s) you have encountered, and the outcome you are seeking.

- Additional information or documentation that might aid in the mediation. Please include copies of such documentation and list them here.

Verification. I certify under penalty of perjury under the laws of the State of California that my above and attached statements are true and correct.

(Signature)

Executed on _____ at _____
(Date) (City, State)

Request Submission. Please complete and submit this form and any attachments by email, mail or fax:

Email: EthicsCommission@oaklandca.gov
Mail: Public Ethics Commission
1 Frank H. Ogawa Plaza, Rm. 104 Oakland, CA 94612
Phone: (510) 238-3593
Fax: (510) 238-3315