

Item 12a - Enforcement Report



Arvon Perteet, Chair
Ryan Micik, Vice Chair
Charlotte Hill
Joseph Tuman
Francis Upton IV

Suzanne Doran, Acting Executive Director

TO: Public Ethics Commission
FROM: Simon Russell, Enforcement Chief
DATE: December 21, 2022
RE: Enforcement Program Monthly and Year-End Report for the January 11, 2023, PEC Meeting

End of the Year Summary for Enforcement Matters

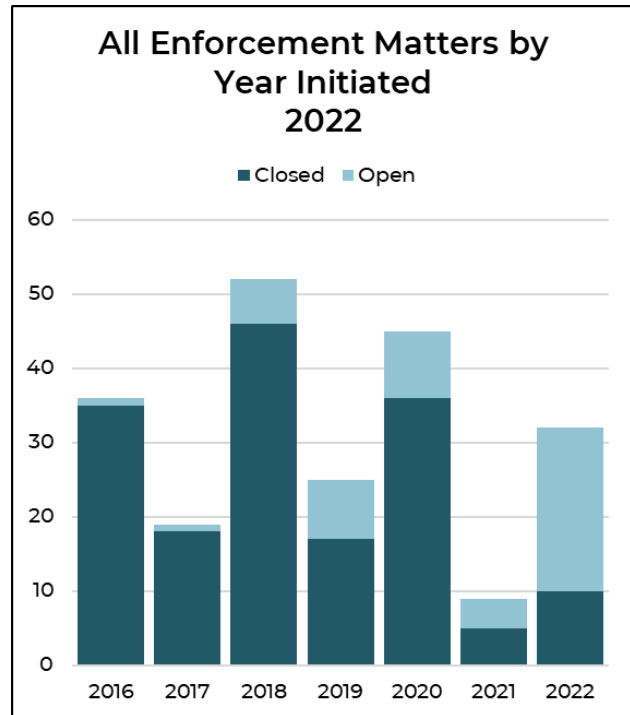
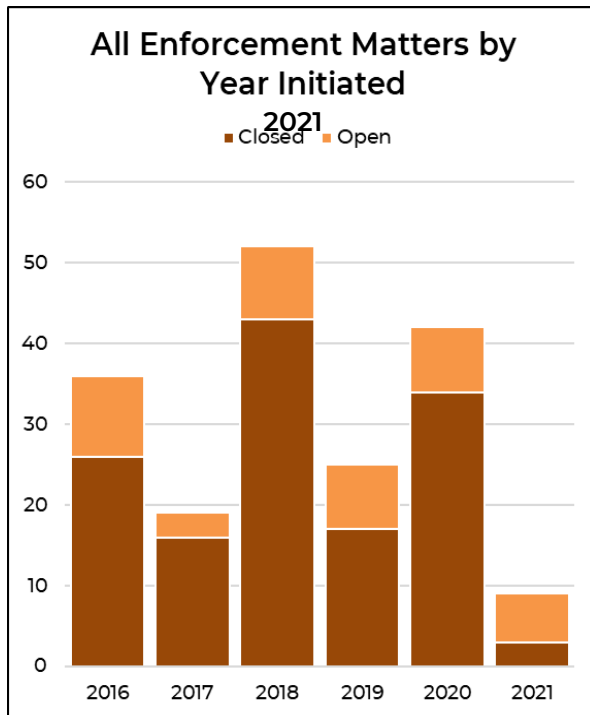
The Enforcement Unit ensures compliance with the laws under the PEC's jurisdiction by investigating alleged wrongdoing and, where appropriate, recommending penalties. The full Commission may take a public vote on whether to accept any such recommendation and impose penalties. This end-of-year report presents a summary of the Enforcement Unit's work in 2022.

Training Hearing Officers

One of the Enforcement Unit's goals in 2022 was to train more people to be available as hearing officers in cases that Enforcement staff has been unable to settle. PEC staff put together a Hearing Officer training in the fall of 2022 that will continue to be available to all former and current Commissioners interested in serving as hearing officers. This enables the Enforcement Unit to move forward with bringing cases to a hearing that may have been delayed. Enforcement also anticipates an increased need for hearing officers in the short- and medium-term as it completes current investigations and legal analyses; the new training program will ensure that hearings on those matters will not be delayed due to a lack of available hearing officers.

Caseload Trends in 2022

In 2022, a priority for the Enforcement Unit was to resolve outstanding cases or complaints from 2016-2017. As shown in the charts below, significant progress was made towards this goal. Enforcement also resolved a number of cases from 2018-2021, while maintaining a steady resolution rate on new cases in 2022:



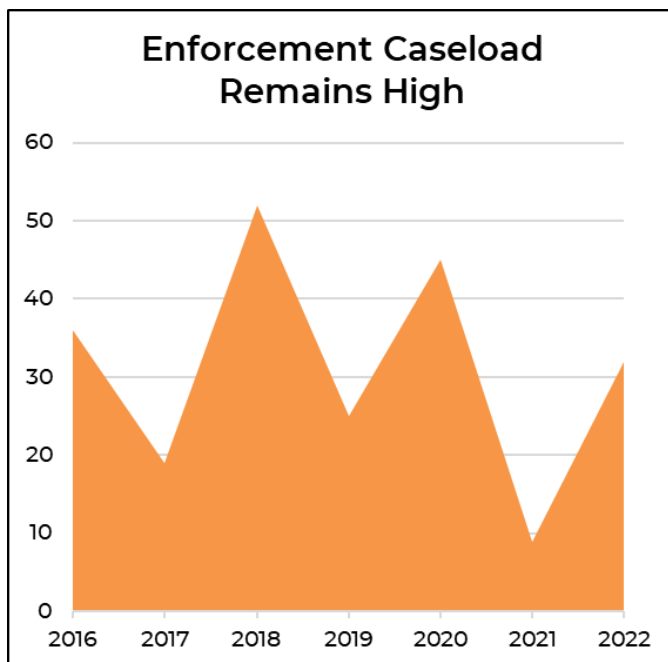
The Enforcement Unit receives complaints from the public, or referrals from other enforcement agencies. It also has the authority to initiate its own pro-active investigations without a public complaint or referral.

Complaints from the public come in two forms, “formal” and “informal.” Formal complaints are submitted on the PEC’s official complaint form under penalty of perjury. Informal complaints are submitted in any other manner (e.g., on an unsigned complaint form, by telephone, email message, or in-person) and are generally not made under penalty of perjury. Enforcement staff is required under our Complaint Procedures to review formal complaints and decide whether to open an investigation or dismiss the complaint. There is no such obligation for informal complaints, though Enforcement staff endeavors to review them with the same care as formal complaints.

All formal complaints undergo “preliminary review,” in which Enforcement staff determines (1) whether the allegations, if assumed to be true, would fall within the PEC’s jurisdiction; and (2) whether to open a full investigation or dismiss the complaint. Before making the latter determination, Enforcement staff usually does some preliminary fact-finding. This may be done because the complaint, while providing some evidence to support its allegations, did not provide sufficient evidence for Enforcement staff to make a fully-informed decision as to whether to open a case or dismiss the complaint. It may also be necessary to independently verify some of the evidence provided in the complaint.

So far in 2022, Enforcement staff has received eighteen (18) formal complaints. Of these, nine (9) have been reviewed and dismissed without requiring a full investigation, while nine (9) are still in the preliminary review stage. Enforcement staff has not yet opened an investigation based on a formal complaint in 2022.

Enforcement staff also received a number of informal complaints in 2022 and initiated a number of its own complaints (referred to as “pro-active” complaints). Enforcement staff opened four (4) investigations in 2022 based upon informal complaints, and eight (8) investigations based upon pro-active complaints. Note that pro-active complaints are often generated from information gathered during other investigations, and do not always concern completely new matters.



Enforcement currently has twenty-four (24) matters classified as being in the “Investigation” stage. Of these, nine (9) were initiated this year. Note that some of these new investigations were generated out of information gathered during other investigations. This is usually done when Enforcement has determined that it has enough evidence to begin charging or closing part of a case against one respondent, while continuing to investigate another part of the case concerning some other respondent(s). For administrative purposes, investigations that are bifurcated in this way are usually assigned new case numbers.

Over the course of 2022, Enforcement staff determined that it had gathered enough evidence in seven (7) cases to re-classify them from “Investigation” to “Legal Analysis,” which is a preliminary step towards formally charging or closing a case. Enforcement may continue to gather evidence at this stage, but the primary focus is now on preparing these cases for the full Commission’s consideration in the near future (either as settlement agreements, probable cause reports and hearing requests, or as recommended closures).

Over the course of 2022, the full Commission voted to resolve the following cases with a monetary penalty upon recommendation of the Enforcement staff:

- **In the Matter of Jason Overman, Case no. 18-14.** The Commission found that Respondent, Jason Overman, a private lobbyist, violated the Oakland Campaign Reform Act's contractor contribution ban by making campaign contributions to City of Oakland elected officials, candidates, or their controlled committees. The Commission approved a financial penalty in the amount of \$2,600.
- **In the Matter of Justin Berton (Case No. 18-45).** The Commission found that the Respondent, Justin Berton, the Director of Communications for Oakland Mayor Libby Schaaf, violated the Government Ethics Act's misuse of city resources provision by posting four links to newspaper editorials that endorsed the Mayor re-election in 2018 to the mayor's official Nextdoor public agencies/elected officials' account. The Commission approved a financial penalty in the amount of \$1,000.
- **In the Matter of Rebecca Kaplan, Case no. 20-40.** The Commission found that the Respondent, Rebecca Kaplan, the City Council At-Large member, violated the Government Ethics Act section Form 700 reporting and conflict of interest provisions by failing to disclose her ownership interest in an Oakland condo and voting on matters affecting a park development project next door to her property. The Commission approved a financial penalty in the amount of \$19,000.

Over the course of 2022, Enforcement presented one (1) matter to the full Commission for a finding of probable cause and a recommendation to schedule an administrative hearing. This is done when the Enforcement staff and the respondent(s) have been unable to reach a settlement agreement, though it does not preclude the possibility of reaching a settlement before the hearing.

Overall, the Enforcement Unit has a total of 51 open Enforcement complaints or cases, at all stages. This does not include informal and pro-active complaints that are still under preliminary review, meaning that Enforcement's actual caseload is in excess of 51 matters.

Enforcement's processing rate for incoming, formal complaints in 2022 (meaning that preliminary review was completed, resulting either in a dismissal or the opening of an investigation) stands at 50%. Some special circumstances account for this. First, most of the formal complaints received in 2022 that are still under "preliminary review" were received close in time to one another around the November election. This sudden influx of complaints made it difficult to resolve all of them in a timely manner.

It should also be borne in mind that the length of a preliminary review does not depend solely upon Enforcement staff; delays in obtaining documents or interviews from third parties are a common reason for preliminary reviews to take an extended amount of time. Generally, we

do not issue subpoenas before opening an investigation, therefore we are largely reliant on third parties' cooperation to complete a preliminary review in a timely manner. Although Enforcement is reluctant to open an investigation before obtaining all of the evidence we have requested during a preliminary review, our recent practice has been to open an investigation and issue subpoenas if a third party has not produced necessary documents or interviews after several requests.

In sum, the numbers above provide a mixed picture. Enforcement staff has steadily worked to meet its goal of clearing its backlog of older cases, while continuing to respond to new complaints as they come in. At the same time, the stark reality is that the Enforcement Unit has insufficient staffing to address all of the matters on its caseload in a timely manner. When fully staffed, the Enforcement Unit consists of only two people: the Enforcement Chief, who typically handles preliminary review, legal analysis, settlement negotiations, and hearings; and an Investigator, who typically handles investigations while providing as-needed support on preliminary reviews. Experience has shown that two full-time staffers is insufficient to handle Enforcement's caseload as it has grown over the years. However, since August this year the Enforcement staff has been reduced to one individual, an Enforcement Chief, handling the entire Enforcement caseload at all stages, from preliminary review of complaints to investigations, legal analyses, settlement talks and public hearings.

Enforcement anticipates hiring a limited-term, part-time investigator early in 2023, and a permanent, full-time investigator around midyear 2023, bringing the total Enforcement staffing to two individuals (the level it has been at, with limited variations, since 2016 until August of this year). These new staffers will assist with preliminary review of incoming complaints, as well as with open investigations. While this should help to reduce the short-term backlog of preliminary reviews and investigations, an expanded Enforcement staff is essential to addressing the Enforcement caseload as it has developed over the years. This is particularly urgent in the very likely event that Enforcement's caseload will only continue to grow as the public becomes more aware of our work and sends in more complaints, and as the PEC's overall mission expands with the inclusion of the Democracy Dollars program and possible filing officer duty for Form 700s. At minimum, the Enforcement Unit should have two full-time investigators and one full-time attorney, in addition to the Enforcement Chief. Any staffing below that level may result in long processing times for cases.

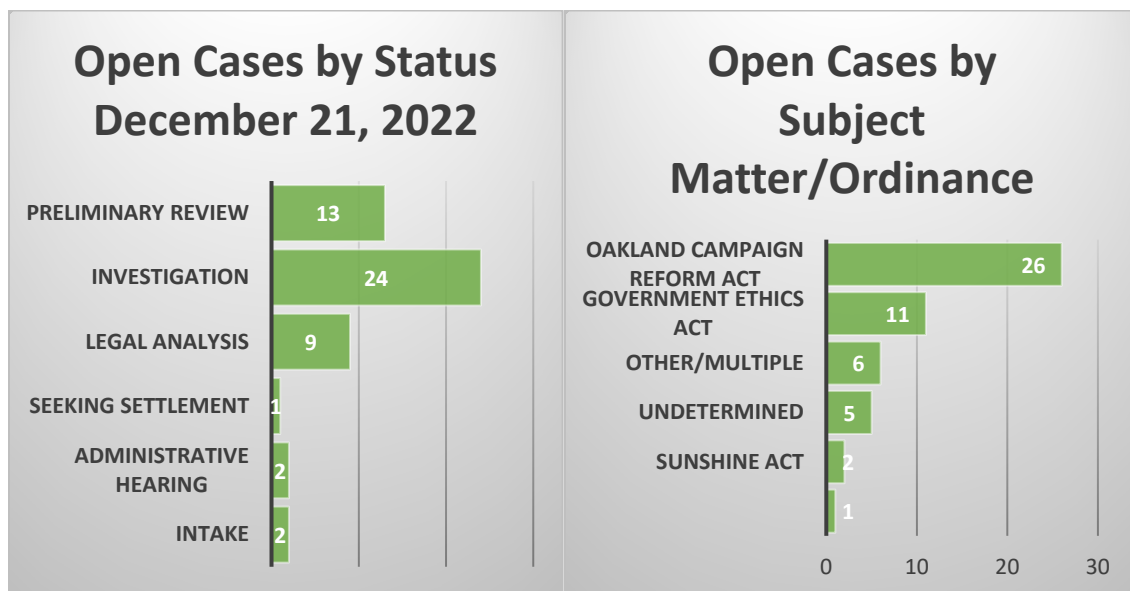
In light of its staffing problem, Enforcement has been prioritizing among its entire caseload (not just incoming complaints) to determine where best to use its limited resources. We continued to prioritize enforcement activities based on the following considerations to determine priority level: 1) the extent of Commission authority to issue penalties; 2) the impact

of a Commission decision; 3) public interest, timing, and relevancy, and 4) Commission resources.

Current Enforcement Activities

As the chart below illustrates, most of the open Enforcement matters involved alleged violations of the Oakland Campaign Reform Act (OCRA), e.g., allegations of exceeding the campaign contribution limit, receiving contributions from City contractors, failing to report campaign contributions or expenditures, etc. The second-largest type of complaint or case involves alleged violations of the Government Ethics Act (GEA), e.g., allegations of a conflict of interest, misuse of City resources, bribery, etc. Sunshine Act cases involve alleged violations of the City’s public records or open meetings laws, only the latter of which are handled by Enforcement (public records disputes are currently handled by the PEC’s education unit as mediations).

Since the last Enforcement Unit Program Update submitted to the Commission on November 30, 2022, Commission staff received two (2) formal complaints, dismissed two (2) formal complaints, opened one (1) new investigation, closed nine (9) cases with no further action upon the full Commission’s public vote, and closed one (1) case with a \$19,000 penalty upon the full Commission’s public vote. This brings the total Enforcement caseload to fifty-one (51) open complaints or cases: 15 matters in the intake or preliminary review stage, 24 matters under active investigation, 9 matters under post-investigation legal analysis, 1 matter in settlement negotiations, and 2 matters awaiting an administrative hearing.



Case Resolutions or Submissions

Since the last Enforcement Unit Program report on November 30, 2022, the following cases have been resolved or submitted to the Commission:

- 1. In the Matters of Dan Kalb (PEC Case No. 16-08a); Abel Guillen (PEC Case No. 16-08b); Lynette Gibson McElhaney (PEC Case No. 16-08c); Annie Campbell Washington (PEC Case No. 16-08d); Noel Gallo (PEC Case No. 16-08e); Desley Brooks (PEC Case No. 16-08f); Larry Reid (PEC Case No. 16-08g); Rebecca Kaplan (PEC Case No. 16-08h); Libby Schaaf (PEC Case No. 16-08i).** On December 14, 2022, the Public Ethics Commission voted to close these cases with no further action. Their current status is now “Closed.”
- 2. In the Matter of Rebecca Kaplan (PEC Case No. 20-37).** On September 24, 2020, the PEC received a formal complaint alleging that incumbent City Council candidate Rebecca Kaplan had sent campaign emails without the required “paid for by” disclosure. The state FPPC also investigated substantially similar allegations and issued a warning letter to Kaplan. In light of the FPPC resolution of the matter, the PEC decided to dismiss its complaint rather than pursue its own investigation. This decision was taken by the Enforcement Chief in February 2021, but due to a clerical error the complaint was never formally dismissed. Enforcement staff is dismissing the complaint now (see Attachments).
- 3. In the Matter of Rebecca Kaplan (PEC Case No. 20-40).** On December 14, 2022, the Public Ethics Commission voted to approve a settlement agreement in this matter, finding the Respondent liable for violating the Government Ethics Act section 2.25.040(B) (Failure To Timely Disclose A Property Interest On A Statement Of Economic Interest Form; three separate counts) and Government Ethics Act section 2.25.040(A) (Conflict of Interest; two separate counts), and imposing a total penalty of \$19,000. The current status of this case is now “Closed.”
- 4. In the Matter of John Doe(s) and Sheng Thao For Oakland Mayor 2022 (Complaint No. 22-24).** On November 22, 2022, the PEC received a formal complaint alleging that unnamed persons were campaigning on behalf of the Sheng Thao mayoral campaign in close proximity to a polling station located in a City park. After conducting a preliminary review, Enforcement staff determined that the PEC lacks jurisdiction over allegations that someone campaigned too close to a polling station (complainant has been referred to other authorities with appropriate jurisdiction), and that there was no misuse of City resources given the lack of any monetary loss to the City and the incidental and minimal nature of the alleged activity. No connection between the

Thao campaign and the unnamed respondent(s) was investigated or determined, due to the mootness of the issue. The status of this case is now “Closed.” (See Attachments)

Legal Actions/Litigation

Since the last Enforcement Unit Program report on November 30, 2022, the following public court actions have been submitted or scheduled by or on behalf of the Enforcement Unit:

1. **In the Matter of Mike Hutchinson for School Board 2016, Mike Hutchinson, Harriet Hutchinson (Case No. 17-09).** A hearing on a Petition To Enforce Investigative Subpoena in Alameda County Superior Court case no. 22CV019951, *City of Oakland Public Ethics Commission v. Harriet Hutchinson*, is scheduled for February 7, 2023, at 10:00 AM in Department 14.
2. **In the Matter of Andy Duong (Case No. 19-14).** A hearing in the related matter of Alameda County Superior Court case no. RG20070117, *City of Oakland Public Ethics Commission v. Charlie Ngo*, is scheduled for January 25, 2023, at 1:30 PM in Department 511.

Except where otherwise noted, no allegations have yet been proved or admitted in any of the above matters, and the existence of these cases and associated litigation should not be taken as an indication that the potential respondent(s) necessarily violated any laws. This information is being provided for the PEC’s informational purposes only.