Memorandum

TO: Oakland Public Ethics Commission

FROM: Ralph Kanz, Complainant

DATE: July 21, 2021

RE: Complaints 18-48 and 16-22; Oakland Planning Department Violations of California Public Records Act and Oakland Sunshine Ordinance

BACKGROUND:

This complaint concerns the Oakland Planning Department (Planning) intentionally withholding records subject to disclosure under the California Public Records Act (CPRA) and the Oakland Sunshine Ordinance (Sunshine), and lying to Public Ethics Commission (PEC) investigators about the existence of the records. As a former member of the Oakland PEC, and one time chair, I am disappointed that after nearly five years a public records request I made to the City has still not been fulfilled. Despite my identifying documents subject to disclosure under both the CPRA and Sunshine, the requested records have not been produced. The PEC has the authority to compel production of the identified records, but to date has not utilized all the means provided by the Charter and Municipal Code .

Planning continues to knowingly withhold records that are responsive to a records request made five years ago. Planning hid records for four years and created two versions of a document in order to cover-up violations of the law. Available records suggest other records were destroyed or have been withheld. This case involves more than violations of the CPRA and Sunshine. Underlying this matter is the City of Oakland's continuing violations of the California Environmental Quality Act (CEQA) and the California Endangered Species Act (CESA).

Planning has a history of destroying, hiding, and withholding records that are responsive to public records requests. My personal experiences with Planning go back over 20 years; years that have included seeing documents appear and disappear in planning files; files that were re-organized and sanitized, including the removal items that would make the approval of a project more difficult.

Planning has a history of short-cutting the CEQA process, thereby limiting and/ or preventing public involvement in the review and approval of proposed projects. In this matter documents were backdated and never circulated for public comment. In 2020 there was a proposal for a project on the property at 5200 Old Redwood Road.[1]

[1] The project that is the subject of the complaint took place at 5150 Redwood Road, adjacent to 5200 Old Redwood Road.

Planning committed to noticing the project, and approved it without the promised noticing. In both cases CEQA and CESA have been violated because proper noticing and opportunity for public comment did not occur; the California Department of Fish and Wildlife was not consulted as the trustee agency for threatened and endangered species; and take of an endangered species was a result. In the case of the adjacent property at 5200 Old Redwood Road, Planning told me I could appeal the matter, which if successful, would have resulted in the project to be properly noticed, but the appeal fee in the matter was $1622.57, money the appellant may not recover.

City and Planning staff misled the PEC investigators both in writing and orally by claiming there were no further records subject to disclosure. Four years after making these statements records were disclosed proving the statements false.

This is a case where the PEC must fully investigate and use all the tools available to compel production of the records. Also this matter involves possible criminal acts which can be referred for prosecution.

FACTS OF CASE:

On September 2, 2015 while driving past 5150 Redwood Road I noticed a Planning Department notification posted on the site. I stopped and took a photo of the sign and the next day emailed the case planner Aubrey Rose expressing my concern that the site contains habitat for, and a population of, Presidio clarkia (*Clarkia franciscana*). Presidio clarkia is listed as endangered under both the federal and state endangered species acts. The population of Presidio clarkia at 5150 Redwood Road is well documented and the City has been informed many times of presence on the site. On September 4, 2015 Rose responded in part, "however, the building permit has not been issued; therefore, a HOLD has been placed on it while we investigate this matter further - talk to you soon."

The presence of any special status species on a site triggers review under the California Environmental Quality Act (CEQA). In this case there needed to be either a Mitigated Negative Declaration (MND) or an Environmental Impact Report (EIR) prepared for the project.

I heard nothing back from Aubrey Rose after September 4, 2015 and I assumed it was because the CEQA review was in process. On April 20, 2016 while driving past the site I noticed construction was taking place. I again wrote Aubrey Rose asking why construction had commenced without CEQA review. His response "Good to hear from you, thanks for checking in – the zoning approval is attached – condition of approval #23 on pages 9-10 relates to the issue you raise; please take a look and advise, do you feel there is non-compliance with that condition?" The Zoning Approval contained 23 Conditions of Approval (COA).

Over the next few days we exchanged emails regarding the requirement of Condition #23 that the applicant hire a biologist to survey for Presidio clarkia "prior to any construction related activity." I was told that Planning staff determined there was no

need for a biologist to inspect the site even though Condition #23 made this a requirement.

After more communications with Planning, including the May 19, 2016 letter from Scott Miller attempting to justify the violations of CEQA, I went to the Planning offices in August and asked to inspect the file for the case. I specifically asked Aubrey Rose for emails related to the case because none were in the case file. In my experience, emails are the most often used method of communication between planners and project applicants. Rose went into the back offices and after quite a while came out with a stack of records. All of the records were emails involving me. Not a single email was with the applicant for the project. As the staff report states, it was over 400 pages of documents, but in reality it represented no more than 20 pages of actual responsive documents that had been printed repeatedly in varying and bizarre formats.[2]

After inspecting the files at Planning I went to the Building Department and asked to inspect the plans for the project. COA Condition #6 requires a copy of the signed COA and approval letter be "attached to each set of permit plans submitted to the appropriate City agency for the project..." Attached to the plans I was provided by Building was a copy of the COA for the project. The COA attached to the plans contained 22 Conditions and they were signed by Scott Miller for the City, but not by the applicant. This raises the issue of which set of COA were legally enforceable, the one with 22 Conditions or the one with 23.[3]

The two versions of the COA are dated the same day, August 11, 2015. The version with 23 Conditions could not have been dated earlier than October 9, 2015 when they were first communicated to the project applicant, and should have triggered public notification of the project to allow for comment.[4] Plus the time to appeal the decision should have started on the new date.

I filed the complaint with the PEC in September 2016, and as a result the City responded with the memo dated November 18, 2016. The memo, signed by Claudia Cappio and Darin Ranalletti declares in part, "all existing emails have been provided..." [5]

I continued communicating with Milad Dalju who was handling the matter for the PEC. In a January 9, 2018 email Mr. Dalju stated:

> *Based on your previous statements, the outstanding issues are the following:*
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> *1. The Planning Department did not provide a copy of a COA that both includes Condition No. 23 and is signed by the applicant, and;*

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[2] Exhibit A contains the over 400 pages of reformatted emails.
[3] COA Condition #8 in all approvals by the City requires the applicant to indemnify the City, therefore without an applicant's signature the COA are not enforceable.
[4] Exhibit B has the email string confirming communications with the project applicant.
[5] Exhibit A includes the memo.

2. The Planning Department did not provide a copy of any documentation that indicates that Condition No. 23 was communicated to the applicant either in writing or orally.

I communicated both of these issues to the Planning Department, and their response is the following:

1. The Planning Department does not have a COA that includes Condition No. 23 that is signed by the applicant, and there is no evidence that the applicant ever signed a COA that includes Condition No. 23.
2. The Planning Department does not have any documentation, including call logs or emails, that show that a COA with Condition No. 23 was communicated to the applicant.
3. The Planning Department believes that they did communicate Condition No. 23 to the applicant, based on a site visit that confirmed that the applicant was adhering to Condition No. 23. They have provided the attached photos as documentation that the Planning Department verified in-person that the applicant was adhering to Condition No. 23.

In a follow-up email on January 10, 2018 Mr. Dalju wrote:

According to the Planning Department, the hold was placed by entering it into Acella, and Condition No. 23 was communicated to the applicant by telephone. Documentation of the hold in Acella, dated September 4, 2015, has been provided to you. According to the Planning Department, there is no written record of the phone call they made to the applicant to communicate Condition No. 23. Additionally, they do not have a copy of the COA that is signed by the applicant.

I understand that you allege that they have a copy of a the COA signed by the applicant and a record of communication the hold and/or Condition No. 23 with the applicant. But they have confirmed that they have neither. So at this point, unless you have any other outstanding issues, I will conclude the mediation process. Please let me know by January 15, 2018, if there are any outstanding issues other than aforementioned ones.

On January 10, 2018 I suggested to Mr. Dalju that the PEC subpoena the records from the project applicant, but the PEC took no action. Oakland Charter section 603(f)(iv) gives the PEC the authority to issue subpoenas. In this case the applicant's records would provide the truth.

At the November 5, 2018 meeting of the PEC staff presented a memorandum of the mediation summary where Planning continued to assert no further documents existed.

Nothing of further significance occurred in this matter until July 17, 2020 when the City provided additional records that had not been provided previously. Most notable among them was the series of emails between Aubrey Rose and the project applicant that took

place in October 2015, emails the City had previously stated did not exist. The emails show that on October 9, 2015 Rose sent an email attached with the COA with 23 Conditions to the applicant with the request that they be signed and returned to him. The records suggest the applicant was getting a signature on the COA, but the transmittal of the signed document was not part of the record. Based on the email chain, there is every reason to believe the signed COA was returned to the City.[6]

On January 4, 2021 I sent the following email to the PEC regarding this complaint:

> *Tomorrow will be 4 years and 5 months since the filing of the above complaint. The original Public Records request #RT-16745 was made to the Planning Department on August 8, 2016. The records concerned illegal approvals for a project that impacts special status species and therefore protections under the California Environmental Quality Act were not included. Within a short time it was clear the Planning Department was withholding responsive records. On September 2016 I filed a complaint with the Public Ethics Commission (PEC) because it was clear, based on this matter and my previous requests to the Planning Department that records were being withheld. Among the records being withheld is the signed Conditions of Approval (COA) for the project. There are two sets of COA's in the record, neither one is signed by the applicant as the COA's require. One set of COA's has 22 conditions listed and the other has 23. At one point I saw a set of COA's with 22 conditions signed by Scott Miller of the Planning Department, but not by the applicant.*
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> *In a memo to PEC staff dated November 18, 2016, Claudia Cappio and Darin Ranelletti stated in part, "all existing emails have been provided." On August 3, 2020 more records were released. Included in the new disclosure were responsive emails that had not been provided in 2016.*
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> *At this point I know there has to be a set of signed COA's. The emails released in August 2020 suggest there are other emails that have not been produced. There are currently two problems related to records laws in Oakland that need to be addressed. First the law needs to be clarified that mediation is not a requirement for filing a complaint. OMC section 2.20.270.C. states a person "may demand immediate mediation" of a request. PEC staff has made this mandatory, which only slows down the process. I knew when I filed the complaint in this matter that mediation would not result in production of the records. Staff then demanded mediation take place. That was a two year process. Still no records. At one point I asked staff to subpoena the records of the project applicant because they had no reason to withhold records. Now over four years later and five years after approval of the project the applicant has no legal duty to maintain those records. In 2019 SB615 was introduced in the California Legislature proposing a requirement for mediation of Public Records Act (PRA)requests. The reaction to to proposal by those who understand the law was swift and strong. The bill never made it to a committee hearing before the author withdrew the*

[6] Exhibit B contains the email string between Aubrey Rose and project applicant.

proposal. Because mediation is a bad idea that has been strongly rejected at the state level, it should also be rejected in Oakland. Second there is no penalty for anyone intentionally withholding records that must be produced. The only penalty currently in the Public Records Act makes an agency responsible for the legal fees of a requester who goes to court. But only the agency is held responsible. The City of Vallejo does have an ordinance that addresses the problem. Under Vallejo Municipal Code section 2.08.140 willful and deliberate violations of the Brown Act or the Public Records Act "shall be deemed official misconduct." The law further allows for penalties as strong as termination or removal from office for anyone found guilty.

The PEC needs to make city officials and departments responsible for timely producing records requests under the PRA and the Sunshine Ordinance. Without such a change residents will continue to be denied rightful access to public information.

01/19/2021 PEC Enforcement Chief Kellie Johnson emailed me:

Unfortunately, I do not have an estimate to give to you. We contacted the department regarding the disclosure of the outstanding documents. As late as December 3, 2020, the department released additional documents to you. You responded that the documents were still not responsive. We re-contacted the department to address the concern of the outstanding documents. I will contact you when this matter is scheduled and on the PEC Agenda for consideration. Thank you for bringing this matter to our attention.

The only notice I received for the matter being scheduled was the regular agenda notice sent to agenda subscribers. Nothing was sent to me personally notifying me that the item would be heard, and there was no effort to get my input on the results of the investigation.

MISSING RECORDS:

When reviewing the records it is clear there are documents that have not been disclosed along with others that might exist. The following records have not been produced:

- The COA with 22 conditions signed by Scott Miller, which I have seen a copy of attached to plans in Building.

- A copy of the COA's signed by the applicant, whether it be with 22 or 23 conditions. There is reason to believe there are two versions signed by both the City and the applicant. The emails provided in July 2020 show that on October 9, 2015 Aubrey Rose told Vicki Gunther at Powell and Associates that the COA with

23 conditions needed to be signed and returned. The entire string of emails suggest the project would not go forward without the City receiving the signed COA.

- Emails of Aubrey Rose communicating with other Planning staff regarding the wording of Condition# 23 for the COA. Some were produced, but those suggest there were others. Possibly this was done by phone, but the emails show Rose was wanting documents to take language from for the COA Condition #23.

- The email records produced in July 2020 suggest there are other email communications between Planning and the applicant.

- There are no phone logs or notes of phone calls. Notably, if a hold is placed on a project, as occurred here, the City would want a record of that communication for legal reasons.

ANALYSIS:

The Planning Department continues to withhold documents for which the CPRA and Sunshine compel production. The Charter states is shall be the duty of the PEC to enforce compliance with Sunshine and the CPRA. The PEC has the authority under the Charter to subpoena records and bring contempt charges for refusal to produce the records. Further the PEC can forward to the District Attorney criminal matters that can be charged under the Government Code

The CPRA and Sunshine were violated by not disclosing the records in 2016. Besides the CPRA and Sunshine, other laws are applicable to this case. Government Code section 6200 *et seq*. makes it a crime to "steal, remove, or secrete" a record as it does to "alter or falsify." In this case records were secreted for four years, and the COA was altered when Condition #23 was added but the date was not changed to the date of amendment. Further the law makes a guilty party punishable by a fine or imprisonment. The PEC must investigate further to determine what actually occurred in this matter and if the matter should be referred for prosecution.

RECOMMENDATIONS:

- The PEC should subpoena the records from the applicant and the City. The PEC is authorized to" seek remedial relief for violations and injunctive relief." As the staff memorandum acknowledges the "Commission or a Complainant has the option of filing a civil action in the Superior Court of California for violations to the CPRA." There is nothing prohibiting the PEC from going to court to obtain the records which are known to exist. The Charter and Oakland Municipal Code (OMC) gives the Commission the power and authority to bring such an action, and specifically declares it shall be the duty of the Commission to enforce the CPRA and Sunshine.

- City staff lied to PEC investigators, in both written and verbal statements. The OMC should be amended to make it a punishable offense to lie to PEC investigators. If the PEC investigator had been an FBI agent people would be in jail.

- As this case proves, the mediation process laid out in the OMC has no teeth. A mediation requirement is not contained in the CPRA and as this case has shown it is a complete failure in Oakland. Mediation delays production of documents. The legislature wasted no time in refusing to consider adding a mediation requirement to the CPRA. Amend Sunshine to eliminate mediation so the law in Oakland is consistent with the CPRA.

- Amend City law to make individuals responsible for violating Sunshine, the CPRA, and the Brown Act liable for their conduct.

- Staff must improve communication with complainants to ensure all the issues and concerns in a case are addressed.