

Item 9a - M2020-09 Mediation Summary



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TO: Public Ethics Commission
FROM: Chris Nardi, Law Clerk
Jelani Killings, Ethics Analyst
DATE: April 21, 2023
RE: *In the Matter of the Mayor's Office (Case No. M2020-09); Mediation Summary*

I. INTRODUCTION

On May 6, 2020, the Commission received a request for mediation alleging the Mayor's Office failed to provide all responsive documents to a public records request made by the Requester on February 26, 2020. On May 21, 2020, Staff initiated its mediation program pursuant to the Oakland Sunshine Ordinance.

Because the Requester received all responsive documents that could be attained through the mediation process, this mediation request was closed with no further action. During the March 1, 2021, Commission meeting, Staff notified the Commission that this mediation request was closed. However, a mediation summary for a different mediation request was inadvertently included in the meeting packet instead of the summary for this request. Staff is therefore providing the Commission with a revised copy of the original mediation summary prepared by Carly Johnson, Mediation Coordinator Intern, and Kellie Johnson, Enforcement Chief.

II. SUMMARY OF LAW

One of the primary purposes of the Oakland Sunshine Ordinance is to clarify and supplement the California Public Records Act (CPRA), which requires that all government records be open to inspection by the public unless there is a specific reason not to allow inspection.¹ The CPRA requires each agency to make public records promptly available to any person upon request.²

Any person whose request to inspect or copy public records has been denied by any City of Oakland body, agency, or department, may demand mediation of their request by Commission Staff.³ A person may not file a complaint with the Commission alleging the failure to permit the timely inspection or copying of a public record unless they have requested and participated in the Commission's mediation program.⁴

¹ Oakland Municipal Code § 2.20.010(C); Government Code § 7920.000 et seq.

² Government Code § 7922.530(a).

³ O.M.C. § 2.20.270(C)(1).

⁴ O.M.C. § 2.20.270(F).

Item 9a - M2020-09 Mediation Summary

Once the Commission's mediation program has concluded, Commission Staff is required to report the matter to the Commission by submitting a written summary of the issues presented, what efforts were made towards resolution, and how the dispute was resolved or what further efforts Commission Staff would recommend to resolve the dispute.⁵

III. SUMMARY OF FACTS

On February 26, 2020, the City received, via NextRequest, the following records request (#20-1106):

“All text message and email communications to and from Oakland Mayor Libby Schaaf spokesperson Justin Berton and KCBS reporter Doug Sovern since Jan. 1, 2018.”

On March 9, 2020, Sun Kwong Sze (Public Records Alternative Liaison for the Office of the Mayor) stated the following via NextRequest:

“Request extended: additional time is required to answer your records request. We need to search for, collect, or examine a large number of records (Government Code section 6253(c)(2)).”

On March 9, 2020, Requester stated the following via NextRequest:

“Please provide an estimated date for a determination when records will be available that is no more than two weeks from today, as required under the CPRA.”

On March 10, 2020, Requester stated the following via NextRequest:

“Hi -- following up because I still have not been provided with a date for your next response.”

On March 9, 2020, Sze stated the following via NextRequest:

“We are aiming for March 20. Thank you for your patience. Best regards,” and updated the due date to 3/20/2020.

On March 23, 2020, Sze stated the following via NextRequest:

Dear Requester,
Due to the Shelter in Place order and staff are telecommuting, our ability to review and post records is greatly impacted. We will try to post any records as soon as we can. Thank you for your patience. Stay healthy.

On March 23, 2020, Requester stated the following via NextRequest:

Hi, Thank you for the update. While I am sympathetic to the challenges posed by the current public health crisis, I'm not quite sure I understand the reasoning here. All records I have requested are by nature electronic records -- emails and text messages. It would seem to me that this is not an appropriate time to limit government transparency given the enormous

⁵ Complaint Procedures § IV (C)(5).

Item 9a - M2020-09 Mediation Summary

restrictions on citizen's lives ordered by local, state and federal government. If you are unable to provide records today, please provide an estimated date for their release. This should not have to wait until an indefinite shelter-in-place order is lifted.

On April 6, 2020, Requester stated the following via NextRequest:

Hi,
It has now been two weeks since you wrote that "we will try to post any records as soon as we can" with no further response.
While some reasonable allowances under the circumstances are appropriate, I do not think this should be delayed indefinitely because of a public health crisis. At the very least, please provide a date for your expected response. The public records act is clear that you must provide an expected date for records release.

On April 7, 2020, Requester emailed Mr. Sze with the following message:

Thank you for the response but I asked two weeks ago what date you think you can respond to this request by and still have received no response. I point out once again that the records I am seeking are electronic records so telecommuting should not be a burden on retrieving them, that if the mayor's office had responded to this request in a timely manner in the first place this request would not be impacted by the shelter in place order and there is no legal basis for indefinitely delaying the release of public records under these circumstances. Please provide a specific date that the records will be released.

On April 10, 2020, Sze stated the following via NextRequest:

Hi Scott,
Thank you for your patience. Please see the released records.
Best,
Sun Kwong

Accompanying this message were four documents. The NextRequest case was consequently closed.

On April 10, 2020, Requester emailed Sze:

Hi,
Thank you for releasing records, but these records are incomplete. My request included text messages. Please reopen this request and provide all documents

On April 16, 2020, Requester emailed Sze:

Hi,
Why is this request still closed? I am aware of the existence of responsive text messages. If these are not going to be released please explain why.

On April 21, 2020, Requester emailed Sze:

Hi,

Item 9a - M2020-09 Mediation Summary

It has been 10 days since I received an incomplete response to this request, yet it is still closed and I have received no further correspondence. Please reopen the request and provide the rest of the responsive records.

On April 22, 2020, Sze responded to Requester via email:

“Dear Mr. Morris,
We have received your inquiries. There are no more responsive records to this request.”

On April 22, 2020, Requester responded to Sze via email:

The mayor's office is clearly withholding responsive records. Mr. Berton has indeed used text message communications as part of official business as spokesperson for the mayor's office, and these are disclosable records under the California Public Records Act. If you are withholding these records under an exemption in the statute, you must state the statute. If the records were destroyed, it would be in violation of record retention laws. Your responses that there are no records are insufficient as I have specific information of text messages by Mr. Berton to Mr. Sovern. The statement that you have no further records is false, and if Mr. Berton is not disclosing the existence of these records, he should be reminded that as a city employee his communications are in fact disclosable records.

On April 27, 2020, Sze responded to Requester via email:

“Dear Mr. Morris,
In response to your further inquiry, the Mayor's Office does not have any additional records pertaining to your request.”

On April 27, 2020, Requester responded to Sze via email:

This still requires further explanation.

On Feb. 26, 2020, Mr. Berton had a text message conversation with Mr. Sovern that specifically pertained to me. On Feb. 27, 2020, Mr. Berton alerted Mr. Sovern to my public records request, but Mr. Sovern indicated that I would not be able to obtain those records because Mr. Berton was using a personal cellphone to communicate.

If the mayor's office's position is indeed that personal text messages conducting official business are not subject to the California Public Records Act, I would direct you to review the California Supreme Court's 2017 decision in *City of San Jose vs. Superior Court* which held that city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account.

As an official spokesperson for the mayor's office, Mr. Berton's interactions with reporters are official business, particularly in this case when he was interacting about a news story in the context of Mr. Sovern's professional duties. From the sparse email exchanges released, which strain credulity that it is all the official communications between Mr. Berton and Mr. Sovern, a full time political reporter, it would appear that Mr. Berton believes that he can hide his professional communications by using a personal account. The state Supreme Court disagrees.

Item 9a - M2020-09 Mediation Summary

Please release all records without further unlawful delay.

On May 4, 2020, Requester emailed Sze:

“Hi, Can you please clarify whether it is the position of the mayor's office that employees can avoid disclosing official communications by using personal accounts and devices?”

On May 5, 2020, Sze responded to Requester via email:

“Dear Mr. Morris,
Employees are to provide all City related business including those conducted on personal devices. Mr. Berton has indicated that all responsive documents have been provided.”

On May 5, 2020, Requester responded to Sze:

Frankly, Mr. Berton is lying. As I said, it is absurd to think that this is all the communications that Mr. Berton has had with a local political reporter and I have specific information that Mr. Berton indicated he would prevent disclosure by using a personal account. I don't know if the mayor's office is complicit in this deception or being deceived itself, but there are more communications that are being undisclosed.

On May 6, 2020, Requester filed the mediation request, alleging that records were withheld.

On October 10, 2020, Sze confirmed to Staff that all responsive records had been provided to the requester.

On October 21, 2020, Staff made an IT request to search Mr. Berton's Oakland.gov email for any communications between Mr. Berton and Mr. Sovern.

On October 23, 2020, Sze confirmed that the search for responsive records included those from personal devices and that, again, all responsive records had been provided.

On October 30, 2020, Staff received results from the IT search and found additional emails between Mr. Berton and Mr. Sovern that were responsive to the requester's original records request.

On November 5, 2020, Staff contacted Requester and provided all responsive documents.

On November 5, 2020, Requester responded with additional questions and, once answered, expressed satisfaction with the mediation and the hope that the department's delay in responding and possible failure to provide all responsive documents would be investigated further.

IV. RECOMMENDATION

Since all responsive documents available at this time have been provided to the requester, the mediation has been closed with no further action.

While the Requester was frustrated with the Mayor's Office failure to provide responsive documents in a timely manner and the requester believed the department was deliberately withholding

Item 9a - M2020-09 Mediation Summary

information, further inquiry with the department staff did not establish that the department liaison had deliberately withheld the requested records from the requester. There was no indication that further investigation would recover additional records.