

# Item 9b - M2020-11 Mediation Summary



Ryan Micik, Chair  
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TO: Public Ethics Commission  
FROM: Chris Nardi, Law Clerk  
Jelani Killings, Ethics Analyst  
DATE: April 24, 2023  
RE: *In the Matter of the Planning & Building Department (Case No. M2020-11); Mediation Summary*

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## I. INTRODUCTION

On June 22, 2020, the Commission received a request for mediation alleging the Planning & Building Department was unlawfully delaying its response to a public records request made by the Requester on June 11, 2020. Staff initiated its mediation program on July 1, 2020, pursuant to the Oakland Sunshine Ordinance.

Because the Planning & Building Department and City Attorney's office represent that all non-exempt responsive records were provided to the Requester, and the City Attorney's office represents that all redactions were proper, this mediation was closed with no further action.

## 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.<sup>1</sup> The CPRA requires each agency to make public records promptly available to any person upon request.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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<sup>1</sup> Oakland Municipal Code § 2.20.010(C); Government Code § 7920.000 et seq.

<sup>2</sup> Government Code § 7922.530(a).

<sup>3</sup> O.M.C. § 2.20.270(C)(1).

<sup>4</sup> O.M.C. § 2.20.270(F).

<sup>5</sup> Complaint Procedures § IV (C)(5).

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### III. SUMMARY OF FACTS

On June 11, 2020, the City received the following records request via NextRequest (20-3255):

All records of communication between the Planning Department and the applicant, or any representative of the applicant, for the project at 5200 Old Redwood Road. This would include communications with the owners, the applicant, and any representative including legal representation.

On June 14, 2020, the City received the following records request via NextRequest (20-2300):

All records of communication to or from Neil Gray in any way related to Case File No. PLN18512; 5200 Old Redwood Road; APN: 37A-3138-004-06.

On June 22, 2020, the Planning & Building Department closed request 20-3255, stating:

Similar/duplicate request.  
Response to request will be under your other request, #20-3300.  
Thank you

On June 22, 2020, the Planning & Building Department requested an extension for request 20-2300, stating:

Additional time is required to answer your public records request. We need to search for, collect, or examine a large number of records (Government Code Section 6253(c)(2)).

On June 22, 2020, the Requester filed a mediation request with the Commission, alleging that the Planning & Building Department was unlawfully delaying release of records.

On July 1, 2020, Staff initiated its mediation program and notified the Planning & Building Department of the mediation request.

On July 15, 2020, the City Attorney's office released to the Requester PDF copies of emails related to the development. It subsequently closed the request, stating that all requested documents had been released.

On July 18, 2020, the Requester stated via NextRequest:

This response is incomplete. None of the attachments to emails were included. Examples include the 02/28/2020 letter from Corrina Could, the June 18, 2020 email from Neil Gray attaches the Fish and Wildlife Debrief that is not included. None of the Zoom meeting videos are included. No notes of phone calls or meetings are part of the records. The January 21, 2020 email from Sarah Fonseca had attachments not included. June 17, 2020 email from Neil Gray to Ed Manasse had the Final IS attached but was not included. December 9, 2019 email from Hightail to Neil Gray had and attachment that was not produced. March 2, 2020 email from Neil Gray to Theresa Wallace did no include the attachment. May 28, 2020 email from Neil Gray to Sanjeev Jain had attachments not included. No records for the June 22, 2020 Zoom call involving Neil Gray and others. April 16, 2020 email from Theresa Wallace to Neil

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Gray had attachments. January 27, 2020 emails from Theresa Wallace to Neil Gray. December 3, 2019 email from Neil Gray to Theresa Wallace had no attachments included. March 2, 2020 email from Neil Gray to Theresa Wallace attached letter. October 25, 2019 letter from Michael Branson. October 18, 2019 letter from Todd Williams to the City. I could go on but you get the point. The records are incomplete.

On July 22, 2020, the City Attorney's office released copies of attachments to the previously disclosed emails. The City Attorney's office stated that it redacted some of the attachments under several exemptions: attorney-client privilege pursuant to Section 6254(k), the draft exception pursuant to Section 6254(a) because "[d]rafts that do not represent staff's full analysis of a topic may lead to inaccurate conclusions as to the City's position," and the unwarranted invasion of personal privacy exception under Section 6254(c).

On January 24, 2022, and January 27, 2022, Staff followed up with the Requester via email to confirm if they had received all the requested documents and that, if so, staff would be closing the mediation request. On January 28, 2022, the Requester responded, stating:

The Planning Department regularly withholds records that the public requests. Given the history with the Planning Department I assume some records have been withheld, but I have no way of knowing what those records might be. Unless Commission staff uses its ability to inspect the records there is no way of knowing if the records have been produced. And even then the records might not be found. I assume some records have been withheld. Mediation was designed to be a quick process, not to go on for years. This request is almost two years old and I have not thoroughly reviewed the history, but given the misrepresentations made by Planning Department staff I will assume they have withheld records unless proven otherwise.

On March 30, 2023, and April 5, 2023, Staff reached out to the City Attorney's office to confirm that all requested records were disclosed to the Requester. On April 5, 2023, the City Attorney's office asked the Planning & Building Department to confirm that all relevant communications were disclosed.

On April 6, 2023, Neil Gray of the Planning & Building Department confirmed to Staff that all responsive records they held should have been disclosed, stating: "The only correspondence I had was through email, so what you showed should be responsive." The City Attorney's office confirmed to Staff that they were not aware of any additional non-exempt responsive records on April 7, 2023.

On April 10, 2023, the Planning & Building Department confirmed to Staff that they provided all responsive records to the Requester.

On April 7, 2023, the City Attorney's office confirmed to Staff that it reviewed all claimed exemptions before the records were disclosed, stating in part:

Essentially all correspondence between me and Neil would be attorney-client privileged since my role on this was to advise Planning on legal issues pertaining to the development.

On April 19, 2023, the City Attorney's office confirmed to Staff that it reviewed the applicability of the draft provision of the Sunshine Ordinance to this request, stating:

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Yes, that provision of the OMC is consistent with and clarifying of the California Public Records Act requirement that preliminary drafts not kept in the ordinary course of business need not be disclosed. Drafts that are kept in the ordinary course of business are thus not exempt from disclosure. The drafts at issue here are preliminary drafts of CEQA documents. Our office does not retain preliminary drafts of various CEQA documents. Practice is to hold onto a draft so that when we receive the next version, we can ensure our comments were addressed. But after that point they are not retained in the ordinary course of business.

On April 24, 2023, Staff followed up with the Requester regarding their public records request and informed them that the mediation would be closed.

#### **IV. RECOMMENDATION**

Because both the Planning & Building Department and the City Attorney's office represent that all non-exempt responsive records were provided to the requester, and the City Attorney's office represents that the claimed exemptions were legally applicable, the mediation has been closed with no further action.