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CITY OF SAN JOSE
SAN JOSE ELECTIONS COMMISSION
COMPLAINT FORM

2012 FEB -9 A 11:39

File this form with the Office of the City Clerk
200 East Santa Clara Street
San José, CA 95113
Telephone: 408-535-1260; Fax: 408-292-6207

Your Name* Christopher E. Platten

Address 2125 Canoas Garden Avenue, #120, San Jose, CA 95125

Telephone (Home) Area Code(408) 482-7613 (Work) Area Code (408) 979-2920

Your name, address and phone number are required. If you wish to remain anonymous, you may call the Elections Commission Anonymous Complaint Hotline at 408-975-ANON (2666) Certain Restrictions apply.

1. Nature of Complaint

Campaign

Gift Ordinance

Lobbyist

Revolving Door

Ethics

2. Who is the person or persons you are complaining about? (Please provide name(s) and address(es); business and residence, if known.)

See attached narrative complaint

3. Describe complaint. State all facts as specifically as possible. (Attach additional pages as necessary.)

See attached narrative complaint

4. Names and Addresses of potential witnesses, if known:

2012 FEB -9 A 11: 39

See attached narrative complaint

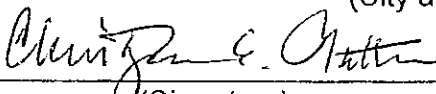
5. Additional Information:

6. Documentation: Please attach copies of any available documentation regarding the violation.

VERIFICATION

I certify under penalty of perjury under the law of the State of California that the above statements are true and correct.

Executed 2/9/2012 at San Jose, CA
(Date) (City and State)


(Signature)

1

2 INTRODUCTION

3 The elected officials and employees of the City of San Jose are required to tell the
4 truth and are prohibited from lying, misleading or deceiving in fulfilling their public
5 responsibilities.

6 Under California Government Code, Section 6203, the City Charter, City Council
7 policy and the City Code of Ethics, elected officials and employees are prohibited from
8 promulgating or filing misleading documents on material issues relevant to matters under
9 Council consideration. In addition, these provisions impose a duty upon officials and
10 employees to disclose true material facts. An NBC Bay Area News (KNTV) investigative
11 report broadcast February 8, 2012 disclosed that Mayor Chuck Reed, City employee
12 Russell Crosby and former City employee Michael Moehle knowingly mislead and
13 misrepresented to the Council and the public the true and accurate 5-year projections for
14 City contributions to retirement plans. Such misrepresentations were contained in the
15 Mayor's June Budget Message for Fiscal Year 2011-2012 and in multiple public messages
16 and memoranda promulgated by or known to these individuals. The Commission must
17 investigate not only these deceptive actions, but also whether other officials and
18 employees participated in the deliberate nondisclosure of true material facts.

18 FACTUAL BACKGROUND

19 At the February 14, 2011 City Budget Priority Session (at 2:09 of the meeting), San
20 Jose Retirement Department Director Russell Crosby off-handedly estimated that the City's
21 projected pension contribution costs for FY 15-16 could rise an additional \$250 million
22 above the then-current figure of \$400 million to \$650 million. Former City employee and
23 professional actuary Michael Moehle was present when Crosby made this statement and
24 did not correct him or take issue with the accuracy of Crosby's representation. According to
25 the NBC Bay Area News broadcast interview of Crosby, this figure "came off the top of my
26 head," and was made without any independent actuarial analysis or support. Further,
27 according to Crosby, he specifically informed the Mayor and members of the Mayor's staff
28 not to repeat or use the \$650 million figure with the public or the Council because it was not
actuarially accurate or true. In Mayor Reed's interview with the NBC Bay Area News

1 investigative reporter, when confronted with Crosby's statement, he first denied, then did
2 not "recall," and then did not "remember" Crosby's admonition not to use the \$650 million
3 figure.

4 On April 13, 2011, Mayor Reed and Vice Mayor Nguyen issued a press release
5 stating that San Jose's Retirement Director Russell Crosby has projected that pension
6 contribution costs could rise to \$650 million per year by FY 15-16. A true and correct copy
7 of the April 13, 2011 press release is attached.

8 On May 13, 2011, Mayor Reed and Vice Mayor Nguyen, and Councilmembers
9 Herrera and Liccardo recommended that the Council adopt a declaration of a fiscal and
10 public safety emergency. That recommendation is premised, in part, on the projection that
11 pension costs could jump to \$650 million if actuarial assumptions were adjusted to reflect
12 modern conditions. This recommendation was made without the existence of any actuarial
13 report or supporting data validating the \$650 million projection and in spite of Crosby's
14 express admonition. In the memorandum recommending the adoption of a declaration of
15 fiscal emergency, the signatories expressly rely on Crosby's \$650 million projection made
16 at the February 14, 2011 City Council Budget Priority Session, which he admitted in the
17 NBC Bay Area News broadcast came "off the top of my head."

18 On June 3, 2011, Mayor Reed exercised his discretion under Charter Section
19 502(d), and issued his "June Budget Message for Fiscal Year 2011-2012." A true and
20 correct copy of pages 1-3 of the June 3, 2011 Budget Message is attached. This written
21 Budget Message is required by the Charter if the Mayor wishes to exercise his discretion to
22 recommend alterations to the City Manager's proposed budget. In his Budget Message,
23 the Mayor writes: "That could cause retirement costs to jump to \$650 million per year by
24 2016 [sic]." In addition, a chart on p. 3 of the Mayor's Budget Message depicts "The City's
25 Skyrocketing Retirement Contributions" to reach \$650 million for FY 2015-2016. These
26 statements were based solely on Russell Crosby's later-disavowed exaggeration at the
27 February 14, 2011 Council Budget Priority Session. It had no basis in fact. Moreover,
28 Crosby, by his own testimony, had warned the Mayor and Councilmembers not to repeat or
rely on the \$650 million figure because it was not actuarially accurate or true.

The Mayor's Budget Message was adopted by the City Council on June 14, 2011.

1 The NBC Bay Area News' website posted an email dated June 15, 2011 from
2 Russell Crosby to Michael Moehle, (the day following adoption of the Mayor's Budget
3 Message), stating the following:

4 3:45 just got done w Alex [Gurza]. Pls send Alex and me a
5 copy of the spreadsheet that calculated the \$400 million
6 contrib rate in 3 yrs. It also shows that with fixing
7 demographics and other issues the rate is \$575 million.

8 FYI – it seems an off hand comment to Scott's people
9 regarding no back up for the \$650 number has caused them
10 to challenge even \$400MM. These are not good players.
11 You have to assume everything said will be twisted into
12 something else.

13 Anyway, let's get that old spreadsheet out and do some
14 damage control. Thx

15
16 This email confirms that the Mayor's use of the \$650 million figure was without
17 actuarial or factual support and solely the product of Crosby's "off the top of my head"
18 comment on February 14, 2011. We believe the reference to "Scott's people" in the email
19 describes employees under the direct supervision of former City Finance Director Scott
20 Johnson, now an employee of the City of Oakland. In his position as City Finance Director,
21 Scott Johnson was responsible for producing accurate financial disclosures to bond rating
22 agencies, bondholders and prospective bondholders. The undersigned fear that an
23 attempt was made to include the misleading and unfounded \$650 million retirement cost
24 projection in Johnson's required financial disclosures to bond rating agencies (e.g.,
25 Moody's, Fitch and S & P). Any attempt to have included the misleading \$650 million
26 retirement cost projection in the City's required financial disclosures could have triggered a
27 lowering of the creditworthiness of the City of San Jose by the bond rating agencies. This
28 would have dramatically increased borrowing costs for the City. If so, it would have been
improperly used to support the declaration of a fiscal and public safety emergency by the
Council.

1 As posted on the NBC Bay Area News website, on June 30, 2011, six days after
2 adoption of the FY 2011-2012 Budget by the Council, which included 10% pay cuts to City
3 employees, and layoffs, Michael Moehle emailed Gene Kalwarski, Bill Hallmark and Anne
4 Harper of the Cheiron firm, actuaries to the San Jose Retirement Plans regarding "5-Year
5 budget projections." This email instructed Cheiron as to the "Rules to follow in preparing
6 the [actuarial] projections" to determine the City's contributions to their respective
7 retirement plans. Among these were instructions that Cheiron was not to exercise
8 independent expertise in making actuarial projections. Rather, Cheiron was expressly
9 directed to disregard known historical events which include, but are not limited to, the 10%
10 pay cuts to all City employees, the high double-digit market asset gains in each retirement
11 plan and the impact of layoffs, retirements and employee position eliminations. But,
12 Cheiron was directed to use the known incorrect assumption that employee compensation
13 since July 1, 2010 had grown by 4.25%.

14 On July 20, 2011, per Crosby's instructions, Cheiron released to Crosby a letter
15 containing its "independent" 5-year projection of City retirement contributions. This revised
16 actuarial projection showed City contributions in FY 2015-2016 would *decrease* from \$650
17 million used by Mayor Reed and others to \$431.5 million. This is \$218.5 million less than
18 the misleading \$650 million figure wrongly used by the Mayor in his June 3, 2011 Budget
19 Message and other public and media documents. The undersigned complainants request
20 the Commission determine the source of Crosby's instructions to Cheiron, and whether
21 Crosby, Cheiron or other City officials or employees knew as of July 20, 2011 the Cheiron
22 projections were incorrect because of the limiting instructions provided to Cheiron by
23 Crosby and Moehle.

24 In November and December 2011, Cheiron delivered revised actuarial City contribution
25 cost projections to the respective retirement plans, using the complete and accurate known
26 historical events. These reports concluded that City contribution costs would be
27 approximately \$295.4 million for FY 2015-2016 or \$354.5 million less than the
28 misleading \$650 million projection contained in the Mayor's June 3, 2011 Budget
Message.

1 We Believe Mayor Reed, Russell Crosby and Michael Moehle Violated the Public
2 Trust, the Law, the Charter, and City Policies By Knowingly Distributing False
3 Material Facts and By Knowingly Failing to Disclose True Material Facts.

4 San Jose Municipal Code 12.02 et seq. contains the ethics provisions applicable to
5 elected officials and employees. Elected officials may not engage in "misconduct," defined
6 as "an egregious and serious wrongful act, lawful act performed in a wrongful manner, or a
7 failure to act when a duty to act existed, that is taken in his or her official capacity or in
8 relation to the duties of office . . . members of council have a duty to abide by . . . state
9 law, city charter, city ordinances, and city policies, including . . . governmental ethics laws."
(SJMC Section 12.18.220.)

10 Council Policy 0-32 requires members of the City Council to publicly disclose
11 material facts that are relevant "for a member of the City Council to make an informed and
12 knowledgeable decision and which would likely influence the decision of a member of the
13 City Council on an item of business on the City agenda."

14 The City's Code of Ethics for officials and employees, Policy No. 0-15 requires "the
15 elected and appointed officials and employees of the City . . . act individually and
16 collectively to create a City government that is responsible, fair, honest and open. City
17 employees and officials are expected to demonstrate the highest standards of personal
18 integrity, honesty and conduct in all activities in order to inspire public confidence and trust
19 in City employees."

20 As stated in the City Charter, "The citizens of San Jose expect and must receive the
21 highest standard of ethics from all those in the public service. City officers and employees
22 must be independent, impartial and responsible in the performance of their duties and
23 accountable to the members of the public."

24 Moreover, California Government Code, section 6203, subdivision (a) provides, in
25 pertinent part: "[e]very officer authorized by law to make or give any certificate or other
26 writing is guilty of a misdemeanor if he or she makes and delivers as true any certificate or
27 writing containing statements which he or she knows to be false." A violation of this code
28 section is a misdemeanor.

1 By deliberately publishing before the Council and the public the knowingly false,
2 misleading and deceptive FY 15-16 City pension contribution cost of \$650 million and by
3 limiting the Cheiron firm from using known historical events to produce a complete true and
4 accurate 5-year actuarial projection of City pension contribution costs, Mayor Reed,
5 Russell Crosby and Michael Moehle violated the legal and ethical duties imposed upon
6 them by law, Charter and policy. This warrants a full, complete and independent
7 investigation by this Commission to determine who knew of these actions and when did
8 they know of them.

8 CONCLUSION

9 Based on the foregoing described conduct, it is clear that:

- 10 1. By his June Budget Message, and numerous public statements and publicly
11 distributed documents, Mayor Reed and potentially other Councilmembers
12 deliberately misrepresented material facts to the Council and public by claiming that
13 5-year actuarial projections of City contributions to retirement plans could reach
14 \$650 million by fiscal year 2015-2016 in violation of Government Code, section
15 6203, the requirements of the Charter, San Jose Municipal Code, Section
16 12.18.220, Council Policy No. 0-32 and the City's Ethics Policy No. 0-15. Mayor
17 Reed and potentially other Councilmembers failed to disclose true and accurate
18 material facts regarding the projected cost of City contributions to the retirement
19 plans in fiscal year 2015-2016 in violation of the duties imposed under law.
- 20 2. By their failure to inform the Council and public that the Mayor's representation of
21 \$650 million in projected City contributions to retirement plans by fiscal year 2015-
22 2016 was unsupported by actuarial analysis and merely a figure "off the top of
23 [Crosby's] head," and by his limiting instructions to Cheiron in June, 2011 regarding
24 what rules it was to "follow" in reaching its July 20, 2011 5-year pension contribution
25 cost projection, Russell Crosby and Michael Moehle failed to act in accordance with
26 the requirements of the Charter and City Ethics Policy No. 0-15.

26 Complainants request the Commission conduct a thorough and independent
27 investigation into the actions of Mayor Chuck Reed, Russell Crosby, Michael Moehle and
28 potentially other officials and employees to determine whether the conduct described

1 herein, or later discovered substantiates violations of law and City policies from which
2 appropriate action should be taken.

3 **POTENTIAL WITNESSES**

4	Chuck Reed	Pier Luigi Oliverio
5	Madison Nguyen	Rose Herrera
6	Pete Constant	Donald Rocha
7	Ash Kalra	Nancy Pyle
8	Sam Liccardo	Debra Figone
9	Kansen Chu	Scott Johnson
10	Xavier Campos	Jennifer McGuire
11	Russell Crosby	Bill Hallmark
12	Michael Moehle	Gene Kalwarski
13	Anne Harper	Alex Gurza
14	Sharon Erickson	Richard Doyle
15	Julia Cooper	Ed Shikada
16	Arn Andrews	Deanna Santana

17 **DESIGNATION OF REPRESENTATIVES**

18 Complainants designate the firm of Wylie, McBride, Platten & Renner, Christopher
19 E. Platten, 2125 Canoas Garden Avenue, Suite 120, San Jose, CA 95125. (408) 979-2920
20 as their representative for purposes of prosecuting this complaint.

21 Respectfully submitted:

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Name	Address	Phone Number
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Name	Address	Phone Number
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27
28

-----Original Message-----

From: Moehle, Michael
Sent: Wednesday, June 15, 2011 5:05 PM
To: Crosby, Russell
Subject: Re: Spreadsheet

Which remark are you referring to

----- Original Message -----

From: Crosby, Russell
To: Moehle, Michael
Sent: Wed Jun 15 15:50:04 2011
Subject: Spreadsheet

3:45 just got done w Alex. Pls send Alex and me a copy of the spreadsheet that calculated the \$400 million contrib rate in 3 yrs. It also shows that with fixing demographics and other issues the rate is \$575 million.

FYI - it seems an off hand comment to Scott's people regarding no back up for the \$650 number has caused them to challenge even \$400MM. These are not good players. You have to assume everything said will be twisted into something else.

Anyway, let's get that old spreadsheet out and do some damage control.
Thx

From: Moehle, Michael
Sent: Thursday, June 30, 2011 11:44 AM
To: Gene Kalwarski; Bill Hallmark; Anne Harper
Subject: 5-Year budget projections

Gene

Russell has requested that Cheiron prepare a 5-year projections (ending with City contributions for the 2015-2016 fiscal year) of City contributions for all 4 plans:

1. Federated Pension
2. Federated OPEB
3. P&F Pension
4. P&F OPEB
5. Totals for all 4 plans

Rules to follow in preparing the projections:

1. All projections should be based on the June 30, 2010 valuations/data/assumptions/methods, including payroll growth assumptions
2. The Federated pension projection should include the Option 2 discount rate phase in the Board adopted in November 2010
3. The P&F pension projection should assume that the discount rate is changed to 7.50% effective with the June 30, 2011 valuation
4. OPEB contributions should be assumed to continue to be subject to the 5-year phase in restrictions in the MOU's. Assume that if the maximum contributions are reached, that those maximums remain in effect.

In addition, we also need a 20-year projection of pension only City contributions for Federated and P&F.

Ideally you would prepare your own estimates for P&F, but in the interest of time you can rely on Segal's valuations (including their estimate of the cost impact of going to 7.5% for pensions which we can provide).

My understanding is that you have already prepared similar estimates for Federated in your presentations to the Board and that you may already have a working model for P&F that you presented to the Board as part of the RFP process for that plan. You can use your own judgement as to whether you want to refine any previous work you have prepared.

After you discuss internally, can you let me know when you expect to finish the projections?

Thanks

Mike

Michael Moehle
Retirement Investment Officer
City of San Jose
Department of Retirement Services