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December 6, 2004

Greg Nelson, General Manager
Department of Neighborhood Empowerment
305 East 1st Street
Los Angeles, California 90012

Re: The Public Records Act and Neighborhood Councils'
Electronic Databases/Address Lists

Dear Mr. Nelson:

This letter responds to your request that our Office provide an overview of the California Public Records Act (the "Act") and analyze whether electronic database/address lists maintained by neighborhood councils ("NC Database" or "Database") that contain the names, home addresses, electronic mail ("e-mail") addresses, and/or telephone numbers of stakeholders, whether private individuals or entities (collectively, "contact information") are protected from public disclosure under the Act.

Generally, the Act requires the disclosure of public records. However, if a NC Database was generated in a manner that led its participants to believe that their contact information would be used only for neighborhood council purposes, this creates an expectation of privacy that would justify and probably require that the Database be protected from disclosure. If a neighborhood council desires to disclose a Database where the participants have an expectation of privacy, before releasing the Database, participants should be given an opportunity to remove their contact information from the Database. We also have previously advised that neighborhood councils may want to advise new stakeholders that placing their information in the Database may subject it to public disclosure. Such an admonition arguably eliminates an expectation of privacy.

Other limited requests under the Act for certain e-mail communications, which identify the sender and recipient, may not be protected from disclosure, depending upon the underlying facts. Accordingly, we strongly advise that the Department of Neighborhood Empowerment ("DONE"), upon receiving requests for advice on the Act from neighborhood councils, consult with our Office so that we may ensure compliance.

I. Background

A system of neighborhood councils was established under the Charter of the City of Los Angeles ("Charter") to promote community participation in City government and to make government more responsive to local needs. Charter, Article IX, § 900. Neighborhood councils serve an advisory role in City government. *Ibid.* Pursuant to the Charter, neighborhood councils must have a diverse membership that is open to "everyone who lives, works, or owns property in the area (stakeholders)" (*id.* at § 906(a)(2)); establish a "system through which [they] will communicate with stakeholders on a regular basis" (*id.* at § 906(a)(4)); and "adopt fair and open procedures for the conduct of their business" (*id.* at §§ 904(g) and 906(a)(6)). These Charter-imposed obligations are repeated throughout the Plan for a Citywide System of Neighborhood Councils ("Plan") and Ordinance Number 174006 (as amended by Ordinance Number 174975) which implements the Plan.

Neighborhood councils use Databases to facilitate their operations, such as communicating with and conducting outreach to stakeholders. The ability to communicate by using the contact information in the NC Database, particularly through e-mail, has been recognized as one of the single most valuable tools underlying the successful operation of neighborhood councils. The Databases provide neighborhood councils with a rapid and cost-effective means of notifying and providing their stakeholders with important information such as election materials and meeting notifications.

Neighborhood councils compile their Databases through a variety of methods, including self-directed outreach by individual stakeholders, use of sign-up sheets at organized events, or by garnering information from stakeholder or voter registration materials. NC Databases are typically located at the home of a board member(s) on a personal computer and this person acts as the custodian of the record for the benefit of the neighborhood council. The genesis of NC Databases typically dates to the organizing period, before the forming body was a certified neighborhood council and subject to the Act. While some stakeholders were notified that their contact information might be subject to disclosure, other stakeholders state they were never informed that their contact information might be divulged to other parties and only consented to their inclusion in the Database with the understanding that their contact information would *not* be used or shared outside the neighborhood council.

Recently, certain neighborhood councils have received requests under the Act from third parties for their Databases. Neighborhood council leaders were concerned with these requests because disclosure would subject the stakeholders in the Database to unwanted telephone and e-mail solicitations, invasions of privacy, and, ultimately, cause a "chilling

effect” on the willingness of stakeholders to be included in the Database. As a result of these requests, neighborhood council leaders have sought advice on their obligation to produce NC Databases pursuant to the Act. In providing this advice, for purposes of our analysis, we will assume that DONE’s inquiry relates to NC Databases that were compiled *without* informing those included that their contact information may be made publicly available.

II. Discussion

A. The Public Records Act

Enacted in 1968, the Act’s purpose is to allow the public to be informed of their government’s activities by making its records accessible. Gov’t Code § 6250. The Act is modeled after the federal government’s Freedom of Information Act (“FOIA”). While the Act grants access to the records of California state and local government agencies, FOIA grants similar rights of inspection to the records maintained by federal agencies. 5 U.S.C. § 552 *et seq.* Because FOIA served as the statutory model for the Act, the courts have held that federal legislative history and judicial construction of FOIA may be used in construing the Act. *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338; *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016; *California State University, Fresno v. Superior Court* (2001) 90 Cal.App.4th 810, 823; *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 825 (holding that the Act and FOIA have similar policy objectives and should receive parallel construction).

While the Act’s core policy objective is to promote accountability and transparency in government, “a narrower but no less important interest is the privacy of individuals whose personal affairs are recorded in government files.” *CBS, Inc. v. Sherman Block* (1986) 42 Cal.3d 646, 651. Indeed, the Act begins, “[i]n enacting this chapter, the Legislature, [is] mindful of the right of individuals to privacy....” Gov’t Code § 6250. In recognizing the preservation of privacy as a distinct and important statutory goal of the Act, the court in *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 651, observed that “[s]tatutory and decisional law on public record disclosure reveals two fundamental if somewhat competing societal concerns --- prevention of secrecy in government and protection of individual privacy.” “The objectives of the [Act] thus include preservation of islands of privacy upon the broad seas of enforced disclosure.” *Id.* at 653.

There are numerous statutory exemptions in the Act. In Section 6254 alone there are approximately 28 categories of records that may be withheld from disclosure. The exemptions in Section 6254 are permissive and not mandatory, which means that the

government agency may disclose the records instead of asserting the statutory exemption by identifying a dominating public interest that favors nondisclosure. *CBS, Inc. v. Sherman Block*, 42 Cal.3d at 652. In addition, the Act provides a catchall exemption that allows non-disclosure of a record if the government agency finds that, given the particular facts of a case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure. Gov't Code § 6255. Hence, the responding agency must balance the public interest in disclosure against interests in non-disclosure, such as privacy interests, in order to determine if an exemption should be asserted under Section 6255 to protect the record from disclosure. In conducting this evaluation, while the Act and FOIA prohibit the agency from considering a requesting party's particular purpose in seeking the record, both California and federal courts have looked to "human experience" to evaluate "both the public benefit and the potential invasion of privacy by looking at the nature of the information requested and to which use the information *could* be put if released to *any* member of the public. [Citation omitted.]" (Emphasis in original.) *Painting Industry of Hawaii v. U.S. Dep't of the Air Force* (9th Cir. 1994) 26 F.3d 1479, 1482; see also, *City of San Jose v. Superior Court*, 74 Cal.App.4th at 1024 and *Black Panther Party v. Kehoe*, 42 Cal.App.3d at 653.

When a request for government records is made under the Act, an agency must respond to the requesting party in writing within 10 days and notify the requesting party in writing which records will be made available and which records are protected from disclosure by an exemption in the Act. Gov't Code § 6253(c). If certain records will be withheld pursuant to an exemption, then the response must identify the specific statutory exemption that protects the record from disclosure. *Id.* If the agency requires additional time to evaluate whether a record is exempt by citing the statutory basis for the extension, the agency may extend the time to respond to the requesting party up to an additional 14 days. Gov't Code §§ 6253(c) and 6255(b). If the agency withholds any records, the burden is on the agency to demonstrate the need for non-disclosure. *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 345.

B. Are Neighborhood Council Databases a Public Record within the Meaning of the Act?

The Act broadly defines a "public record" to include information "relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." Gov't Code § 6252(e). Public records may exist in written or electronic form, including e-mail, and there is no requirement that a public record be in writing. Gov't Code § 6252(f). "The definition [of a public record] is broad and 'intended to cover every conceivable kind of record that is involved in the

government process[.]’ [Citation omitted.]” *Coronado Police Officer’s Assoc. v. Carroll* (2003) 106 Cal.App.4th 1001, 1006 (“*Coronado*”). However, that does not mean that every record in an agency’s possession is a public record. *Id.* Only those records that safeguard the accountability of the government to the public are intended to be subject to the Act. *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 475. “FOIA’s central purpose is to ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.” (Emphasis in original.) *United States Dep’t of Justice v. Reporters Comm. for Freedom of Press* (1989) 489 U.S. 749, 797.

In *Coronado, supra*, 106 Cal.App.4th at 1009-11, the court found that a database maintained by the public defender containing client files and public information was not a public record under the Act as “it did not relate to the public’s business” but rather, existed to serve the interests of the public defender’s individual clients. The court reasoned that although the public defender’s office is organized under the County of San Diego’s Charter, its core function of representing indigent criminal defendants is a private function. *Id.* at 1007. In *Coronado*, 106 Cal.App.4th at 1007, the court stated that a public defender does not perform under “color of state law” but serves “‘an essentially private function, adversarial to and independent of the state.’ [Citing the Supreme Court case of *Polk County v. Dodson* (1981) 454 U.S. 312, 318-325¹].” However, the *Coronado* court also noted that not all records pertaining to the public defender’s database were private. *Id.* at 1009. “Records containing information concerning the administrative decision to compile the database, the cost of maintaining the database or rules applying to its access and use are policy decisions made by the public defender in its capacity as the administrator of a public office” and, therefore, were public records. *Id.*

We note that neighborhood councils receive their impetus from the Charter but are also legislatively proclaimed as “independent entities” of City government. Neighborhood councils are to operate in a manner that is as “independent, self-governing, and self-directed as possible.” Plan, Article II, § 4. We also note that in informal advice rendered to this Office, the State Fair Political Practices Commission (the “FPPC”) opined that the neighborhood councils’ role of advising the government on matters of local concern “is not considered a service or obligation which public agencies are legally authorized to perform or traditionally have performed.” *FPPC Advice Letter* dated July 2, 2004, File no. I-04-101,

¹ In making a determination as to liability under 42 U.S.C. § 1983, the Supreme Court held in *Polk*, 454 U.S. 312, 318, that the public defender does not act under the “color of law” when performing his or her traditional lawyering functions because the public defender acts on behalf of his client and not the state.

pg. 4.² The FPPC's view that neighborhood councils appear to act outside the traditional role of governmental activities supports the view that neighborhood councils have more similarities with private entities than governmental agencies. Neighborhood councils may, at times, form views and opinions that are contrary to positions ultimately adopted by the City. The NC Database is used to disseminate information to stakeholders in their personal capacities and, at times, convey information that is adversarial to City government. The use of the NC Database in this manner is not in fulfillment of a governmental obligation or purpose but, instead, is serving an essentially private function, similar to constituents who may petition their government. This function falls outside the sphere of governmental activity and is similar to the non-governmental uses of the public defender's database that warranted protection from disclosure in *Coronado, supra*, 106 Cal.App.4th at 1009. Accordingly, an argument can be made that NC Databases, being tools employed to serve their membership, not City government, are not public records within the meaning of the Act.

On the other hand, the advisory role neighborhood councils play is not always an adversarial one.³ Neighborhood councils also partner with city elected offices and agencies to meet common goals and objectives for the community. NC Databases serve as a vital means of performing outreach and communicating with stakeholders. Accordingly, neighborhood councils rely on NC Databases to perform one of their core functions - community outreach. NC Databases are virtually indispensable in the neighborhood council's execution of this important function. Neighborhood councils' primary role is to advise government, something that can be performed in furtherance of mutual goals shared by the City entities they advise. Therefore, given the unique and central role NC Databases serve in neighborhood council operations and the fact that, despite their independence, neighborhood councils often work in concert with city agencies to accomplish common goals, a court may very well conclude that a NC Database is a public record.

C. Assuming that NC Council Databases are Public Records, are they Protected From Disclosure Under Any Statutory Exemption?

Assuming that NC Databases are public records, they need not be disclosed if protected by a statutory exemption. While the Act and FOIA clearly favor the disclosure of

² In this letter, the FPPC declined to conclusively state whether neighborhood councils were in fact local governmental agencies, leaving that determination to the City Council.

³ Even an adversarial role may be construed as part of the overall debate by City officials and agencies, as well as part of the advice function of the neighborhood councils.

public records and information, these laws also contain numerous exemptions, two of which are relevant in the instant analysis. These include exemptions for: (1) "personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Gov't Code § 6254(c); and (2) the protection of records from disclosure where "on the facts of the particular case the public interest served by not making the record public clearly outweighs the interest served by disclosure of the record." Gov't Code § 6255.

1. **Does the "Personnel, Medical or Similar Files" Exemption Protect NC Databases from Disclosure?**

a. **Are NC Databases "similar files?"**

The exemption for "personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" provided under Section 6254(c) may protect NC Databases from disclosure. While California courts have not expressly stated that the "similar files" exemption under Government Code § 6254(c) is applicable to databases comprised of personal contact information, the United States Supreme Court has broadly interpreted the FOIA exemption for "similar files" to include " 'detailed Government records on an individual which can be identified as applying to that individual.' [Citation omitted.]" *United States Department of State v. Washington Post Co.* (1982) 456 U.S. 595, 602. As a result, the courts have applied the "similar files" exemption to protect databases comprised of personal information from disclosure. See, *United States Dep't of Defense v. FLRA* (1994) 510 U.S. 487, 502 (address lists for government employees were protected from disclosure to labor unions requesting the information).

b. **Would disclosure of NC Databases constitute an unwarranted invasion of personal privacy?**

Under the "similar files" exemption in Section 6254(c), establishing that the record falls within the "similar files" exemption is only half the equation. Section 6254(c) also requires that the disclosure of information must "constitute an unwarranted invasion of personal privacy," which is measured by weighing the privacy interest against the governmental purpose served by disclosure. We believe a court could find that disclosure of a NC Database constitutes an unwarranted invasion of privacy.

First, the courts have for the most part dismissed the argument that there is a public interest in disclosure that sheds light on the government's operations when the request for information only seeks the disclosure of a list of names and addresses in the government's

possession. *National Ass'n of Retired Fed. Employees v. Horner* (1989) 879 F.2d 873, 876 (“*Horner*”). The “disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind.” *United States Dep’t of Justice v. Reporter’s Committee*, 489 U.S. at 765. In withholding a list containing the home addresses of government employees, the Supreme Court in *U.S. Dept of Defense v. FLRA, supra*, 510 U.S. at 497, stated:

“The relevant public interest supporting disclosure in this case is negligible, at best. Disclosure of the addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further ‘the citizens’ right to be informed about what their government is up to.’ [Citation omitted].”

Even when the privacy interest in the contact information is considered modest, the courts have balanced the interests in favor of withholding lists of names and contact information. As bluntly put by the court in *Horner, supra*, 879 F.2d at 879:

“We have been shown no public interest in, and a modest personal privacy interest against, disclosure of names and addresses of individuals receiving federal employee retirement benefits. We need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time.”

California courts also recognize the importance of privacy interests and this concern with privacy is an important consideration when determining the protections that should be afforded to information in the government’s possession. Specifically, the court in *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 357, opined:

“The California Constitution expressly provides that all people have the ‘inalienable’ right to privacy. [Citations omitted.] [Footnote omitted.] As our Supreme Court has recently explained, ‘in many contexts the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the [implied] federal constitutional right of privacy as interpreted by the federal courts.’ [Citations omitted.]”

"The California courts have equated the right of privacy with the right 'to be let alone,' which must be balanced against public interest in the dissemination of information.... [Citation omitted.]" *Black Panther Party v. Kehoe*, 42 Cal.App.3d at 651-52.

Highlighting the importance of privacy in the home and the right to be left alone, the Supreme Court in *Rowan v. United States Post Office Dep't* (1970) 397 U.S. 728, 738, recognized a right of privacy interest in avoiding unwanted intrusions through the mail. "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality.... [Citation omitted.]" *Id.* "[I]ndividuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail. [Citation omitted.]" *City of San Jose v. Superior Court*, 74 Cal.App.4th at 1019. In our age of electronic communications, the issue of privacy has become a greater concern with the advent of spam and endless solicitations and thus the distribution of personal contact information could be extremely harmful due to the spread of identity theft. *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1512.

The courts have held that these privacy interests become even more substantial when the record being sought consists of contact information that is commercially valuable, such as for marketing purposes. *Horner*, 879 F.2d at 877. In *Horner*, the court concluded that the address list for retired persons was exempt from disclosure because the annuitants formed a target group for marketing products to the elderly. *Id.* at 876. Similarly, in *Minnis v. United States Dep't of Agric.* (9th Cir.1984) 737 F.2d 784, 787, the address list for persons applying for park permits was deemed protected from disclosure. The disclosure of information on persons who sought recreational permits would provide solicitors with a commercially valuable list of persons who had recreational interests and subject those recipients to an "unwanted barrage of mailings and personal solicitations." *Id.* Commercial exploitation was also of foremost concern to the court in *Painting Industry of Hawaii v. U. S. Dep't of Housing and Urban Development*, *supra*, 26 F.3d at 1483, which allowed the government to withhold a list of people engaged in the construction trade because, "[u]ndoubtedly, such a list would be of interest to people interested in marketing goods and services to people working in the construction trades."

A NC Database would be considered by many to be commercially valuable. It identifies a target group of active community volunteers who live in a specific and compact geographic region. We have been informed by DONE that individuals have already inquired as to the availability of NC Databases for telemarketing and/or commercial purposes. Accordingly, we believe a court could find that there are significant privacy interests at stake resulting from the disclosure of NC Databases.

2. **Does the Exemption in Section 6255 Protect NC Databases from Disclosure after Weighing the Interest in Non-Disclosure Against the Public Interest in Disclosure?**

Government Code § 6255, the catchall exemption, allows government agencies to withhold a record from disclosure upon balancing any interest in non-disclosure against the reasons for disclosure. Under this test, as with Section 6254 (c), privacy interests again may be balanced against the interest in disclosure, and shares virtually the same analysis. "The weighing process under section 6254, subdivision (c) to determine whether the disclosure would constitute an unwarranted invasion of privacy requires a consideration of almost exactly the same elements that should be considered under section 6255." *Braun v. City of Taft*, 154 Cal.App.3d at 345. Accordingly, the analysis of privacy interests provided above can be applied to the § 6255 catchall exemption.

In performing the balancing test under Section 6255, the courts have reached varying results, depending upon the particular circumstances of a case. For instance, in *CBS, Inc. v. Sherman Block*, *supra*, 42 Cal.3d at 654, the court ordered the disclosure of applications for permits to carry concealed weapons even though they contained personal contact information. The court opined that the applications would allow the public to judge whether the county sheriff had exercised proper discretion in issuing the permits. *Id.* at 655. Similarly, in *New York Times Company v. Superior Court of Santa Barbara County* (1990) 218 Cal. App. 3d 1579, 1586-87, the names and home addresses of excessive water users were also ordered disclosed. In *California State University Fresno v. Superior Court* (2001) 90 Cal.App.4th 810, 833-34, the university was ordered to disclose the names of donors (who requested anonymity) to a university-affiliated foundation in order to allow the public to determine whether the donors had received favoritism in obtaining licenses for luxury box suites at the university's new arena.

Conversely, courts have upheld the government's decision to withhold public records containing personal contact information when the public interest in nondisclosure clearly outweighed the public interest in disclosure. In *City of San Jose v. Superior Court*, 74 Cal.App.4th at 1012, the city had an ongoing duty to record, investigate and report airport noise complaints. The court allowed the city to withhold the names, addresses and telephone numbers on the complainants, finding that "airport noise complainants have a significant privacy interest in their names, addresses, and telephone numbers as well as in the fact that they have made a complaint to their government, and the disclosure of this information would have a chilling effect on future complaints." *Id.* at 1023-24; *see also*, *United States Dep't of State v. Ray* (1991) 502 U.S. 164, 178 (holding that the identity of Haitian refugees contained in reports that memorialized government conducted interviews

could be protected from disclosure because the refugees provided the interviews on promises of confidentiality and may not have been otherwise willing to be interviewed or provide the requested information in the absence of promises of confidentiality.)

The courts are reluctant to abridge privacy interests when a less intrusive means is available to obtain similar data. As articulated by the court in *City of San Jose v. Superior Court*, 74 Cal.App.4th at 1020, the “public interest in disclosure is minimal, even when the requester asserts that personal contact is necessary to confirm government compliance with mandatory duties, where the requester has alternative, less intrusive means of obtaining the information sought.” In denying disclosure of the names and addresses of governments annuitants, the court in *Horner*, 879 F.2d at 879, explained that a database may not provide direct evidence of the government’s conduct because that database alone does not show how the information was used by the government for governmental purposes.

Neighborhood councils are intended to foster community participation and disseminate information about City government. If contact information were required to be disclosed, people may choose not to provide their contact information, thus, significantly hampering the core purpose and potential success of neighborhood councils. Neighborhood councils have an ongoing obligation to conduct outreach and engage in regular communications with stakeholders that is contingent upon the willingness of stakeholders to provide their contact information. The disclosure of stakeholder contact information from the Database is highly likely to hamper neighborhood councils’ ongoing obligations because the disclosure of the Database would have a “chilling effect” on the future willingness of stakeholders to participate in the Database. In fact, we have been informed by DONE that virtually all stakeholders of one particular neighborhood council chose to opt out of a Database when the neighborhood council considered making the database public. This “chilling effect” parallels that which compelled the court in *City of San Jose, supra*, 74 Cal.App.4th at 1023, to withhold the personal contact information of the persons filing noise complaints.

On the other hand, a person or entity that wants to ascertain the extent of the neighborhood councils’ outreach and/or participate in any e-mail dialogue or debate by directly contacting stakeholders may be able to argue that the balance tips in favor of disclosure. However, neighborhood councils may establish, and already possess, alternative records that demonstrate their compliance with outreach, diversity, open and inclusive operations, and engaging in regular communications, such as meeting minutes, newsletters, websites, community flyers and the like. These records may serve as an alternative to providing the contact information in their Database. Additionally, DONE,

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which is vested with the authority to investigate and resolve complaints regarding neighborhood council operations, (Plan, Sec. 5(A)) provides a less intrusive avenue for confirming neighborhood council compliance with the Plan and other applicable requirements, as disclosure of information of any information to DONE would remain within the City family. Accordingly, it is debatable whether a court would sacrifice the privacy interests of neighborhood council stakeholders to evaluate a neighborhood council's compliance with its governmental purposes.

III. CONCLUSION

With the passage of state Proposition 59, we believe the trend favors greater disclosure for a more open government, rather than non-disclosure. However, while we are unable to guarantee the results that a court would reach in any given situation, we believe the courts could still find that a significant privacy interest is at stake in the disclosure of NC Databases. Accordingly, at this time, given the current state of the law, we conclude that neighborhood councils may decline to disclose their NC Databases to parties requesting them under the Act when they have compiled and maintained their Database in a way that created an expectation of privacy among the participants. However, a neighborhood council may, if it so desires, maintain a Database that may be made available to the public provided that the stakeholders are informed that their personal contact information may be made public and consent to its public dissemination.

Very truly yours,



TERREE A. BOWERS
Chief Deputy City Attorney

TAB:TS:lee

cc: Janice Hahn
Councilmember, 15th District
Ronald Stone, President
Board of Neighborhood Commissioners