

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
MONDAY - - - FEBRUARY 1, 2016 - - - 7:00 P.M.

Acting Chair Foreman convened the meeting at 7:06 p.m.

ROLL CALL - Present: Commissioners Dieter, Tuazon, and Acting Chair Foreman – 3.

Absent: Commissioner Bonta and Chair Aguilar – 2.

ORAL COMMUNICATIONS, NON-AGENDA

None.

AGENDA ITEMS

3-A. Minutes of the October 14, 2015 Meeting

Commissioner Dieter moved approval of the minutes.

Commissioner Tuazon seconded the motion, which carried by unanimous voice vote – 3. [Absent: Commissioner Bonta and Chair Aguilar – 2.]

3-B. Consider Further Revisions to the Sunshine Ordinance Amendments

Acting Chair Foreman outlined the packet documents; inquired how the Commission should review the items.

The Assistant City Attorney responded the City Council concurred with the changes that the Commission made with the exception of the items identified in the staff report.

Acting Chair Foreman stated there are four items: 1) use of electronic communication devices; 2) submitting comments when a policy body member is not present at a meeting; City staff disagreed with the Commission's recommendations on said two items; 3) requiring all City Council meetings to be live streamed; and 4) responding to public records requests.

The Assistant City Attorney stated there is also an item about public comments by members of policy bodies and opinions of public concern; with respect to the use of electronic communication devices, staff recommended a rule that the Council thought would prevent use of any type of device except iPads or laptops when accessing agenda materials; the Commission felt the provision was too restrictive and thought that there should be a little more leeway; the City Council agreed; staff has divided the item into three parts: 1) when a policy body is considering a general legislative matter, the use of devices would be strongly discouraged, but not prohibited; 2) when the policy body is considering a quasi-judicial matter, electronic communication devices would be

prohibited except for accessing agenda materials; and 3) not withstanding those admonitions, devices could be used for innocuous purposes, such as a calculator, looking up a date or contacting a family member; the provision would be largely self-policing.

Acting Chair Foreman provided a handout; stated after he reviewed the October Council staff report, which rejected the Commission's more liberal approach, he took it upon himself to attend the Council meeting and defend the Commission's language; he also presented his personal view that the language should be even broader, should not tie into devices, and should address what is prohibited; suggested the language at the bottom of his handout; stated the language does not say what can be done, rather it says what cannot be done with devices; the only thing that should be prohibited is receiving or sending private communications about the meeting; outlined the City Council discussion from the minutes; stated the majority of the Council provided direction to staff; however, staff has come up with something that is almost directly contradictorily to what at least three Councilmembers want; he has drafted a paragraph in line with what a majority of Council requested; he talked with the Assistant City Attorney who raised the issue of quasi-judicial matters; provided the example of the Commissions' quasi-judicial complaint hearing; stated the complainant and public have a right to see everything Commissioners consider in making a decision; suggested a two tier system: one for general legislative matters and one for quasi-judicial matters; stated his recommendation is much shorter and does not provide the rationale.

Commissioner Dieter provided a handout; stated that she listened to the City Council discussion; everyone agrees the purpose of the provision is to prohibit communicating electronically with others during meetings because of the appearance it gives; rather than spelling out all of the different allowable scenarios, the provision should be kept general and say what members should do; the language could be even shorter than Acting Chair Foreman's suggestion; the first original sentence could be retained and rather than staff's proposed language, one sentence could cover everything; the sentence would be: "therefore communicating electronically with others during meetings is prohibited;" it is not necessary to tell anybody using a device is allowed if there is an emergency; the language can be streamlined a little bit more to achieve the purpose.

In response to Acting Chair Foreman's inquiry, Commissioner Dieter stated her understanding is the provision's purpose is to have members not communicate with each other; members should be paying attention to what's being done; using an electronic device to look up a word is fine; communicating gives a bad appearance.

The City Clerk stated the Sunshine Task Force included the provision because they did not want somebody to not go on record publicly and try to influence the decision makers during the meeting; communication is what the Task Force honed in on.

Commissioner Dieter stated the Sunshine Ordinance just states do not communicate on electronic devices while at the dais, which covers everything and is very simple.

Commissioner Tuazon stated the matter is common sense; the public wants 100% attention; questioned why members would be communicating with someone else.

Commissioner Dieter stated that is the whole point.

Acting Chair Foreman stated everyone agrees on said matter.

The Assistant City Attorney stated the language suggested by Acting Chair Foreman or Commissioner Dieter certainly works; the Mayor has asked on a couple occasions whether or not she can use an electronic device calendar or calculator and is wondering whether language should be added to indicate that there is an exception for innocuous use, such as a calendar, calculator, or communicating with a family member; not allowing innocuous use would prohibit calling a spouse; language does not have to be added; he could indicate to Council that it is understood and implicit, but he questions whether it should be expressed.

Commissioner Dieter stated it is expressed in the first part.

Acting Chair Foreman stated he has a problem with the first sentence.

Commissioner Dieter stated the first is not her language, which was already there.

In response to Acting Chair Foreman's inquiry, Commissioner Dieter stated that she is suggesting a sentence in place of the language provided by staff.

Acting Chair Foreman stated he does not want the first sentence included.

Commissioner Dieter inquired whether Acting Chair Foreman would like to eliminate the whole provision and start from scratch.

Acting Chair Foreman responded the reason he is opposed is that he does not agree with it at all; stated he made that point to Council and convinced three of them that in this day and age, the use of electronic communication devices does not lead to the public perception that a member is receiving information, everybody uses devices all the time; Commissioner Dieter's language regarding prohibiting electronically communication with others during meetings creates the exact problem that the Assistant City Attorney and the Mayor have referenced; his language includes that members are prohibited from sending or receiving business related emails, texts and instant messages during the meeting; members would be allowed to email a spouse or family member and could use electronic devices for anything other than communicating with others regarding business related matters; said language is what is missing.

Commissioner Dieter stated the language is not missing.

Acting Chair Foreman stated he does not like the first part.

Commissioner Dieter stated that she is open to scratching the entire thing and starting over; she tried to rewrite the provision; the language already addresses receiving information relative to the subject matter at hand.

The Assistant City Attorney inquired whether the two suggestions could be combined; stated language could state: in order to ensure that all communications to policy board members presented in a public meeting are shared with the public, communicating electronically with others during public meetings is prohibited when pertaining to the business thereof.

Commissioner Dieter and Acting Chair Foreman stated said language is fine.

Acting Chair Foreman stated the Commission agrees on the language except he still thinks separate language is needed for quasi-judicial proceedings.

Commissioner Dieter stated that she does not think that the general public will know what quasi-judicial means.

Acting Chair Foreman stated that he is not concerned about the general public not knowing; the term can be explained; the important thing is the City has to let Councilmembers know that they cannot refer to anything that is not in public view at a quasi-judicial hearing.

Commissioner Dieter stated she has no problem if someone wants to look up a word.

The Assistant City Attorney stated a conditional use permit would be a good example; if somebody applies to sell liquor at a gas station, a conditional use permit would be needed and would come before the Planning Board; if the use is denied, the applicant would have to appeal the matter to the City Council.

Acting Chair Foreman stated the applicant has no idea what the Councilmember is checking; the applicant has the right to know everything being considered in a quasi-judicial proceeding.

Commissioner Dieter stated the problem lies with communicating to outside people which is the intent behind the provision; anyone can be at home and look up anything so nothing would be hidden from the public; the main issue is not having people communicate with others.

Commissioner Tuazon stated that he feels strongly about it; members need to give 100% of their attention; outside communication should be prohibited; noted that he does not have a cell phone or laptop.

Commissioner Dieter inquired whether Commissioner Tuazon would have a problem with a Councilmember looking something up on the Internet while at the dais to help in making a decision or become more informed.

Acting Chair Foreman stated a Councilmember might want to look at a Google map regarding rezoning a piece of land.

Commissioner Dieter inquired whether Commission Tuazon would be offended by said Councilmember.

Commissioner Tuazon responded in the affirmative; stated homework should be done in advance.

Acting Chair Foreman inquired about the Assistant City Attorney's view on the quasi-judicial issue; further inquired whether he is being too legalistic.

The Assistant City Attorney responded that he thinks the way the first sentence has been redrafted is probably broad enough to cover the quasi-judicial issue; in an abundance of caution, language could be added; however, in the staff report to Council, he could indicate that implicit in the language is honoring the notion that quasi-judicial matters have to be observed.

The Commissioners expressed consensus.

The Assistant City Attorney stated that he understands the introductory non-substantive sentence would be deleted.

Acting Chair Foreman inquired what section the Assistant City Attorney is referring to.

The Assistant City Attorney responded Section 2-91.4H; stated the sentence would state: in order to ensure that all communications to policy board members presented in a public meeting are shared with the public, members are prohibited from communicating electronically with others during public meetings that pertain to the business thereof.

Acting Chair Foreman inquired whether staff would go to the Commission or Council, to which the Assistant City Attorney responded based on the outcome tonight, he will prepare an agenda report that will go to Council that would reflect the Commission direction.

Acting Chair Foreman stated the next item is regarding submitting comments when a policy body member is not present at a meeting.

The Assistant City Attorney stated the Commission discussed the matter before and felt comfortable that if a member was not present at a meeting, the member should not be able to submit comments on the item; the City Council did not agree and directed that the prohibition be deleted; it has been deleted, but the Commission has the discretion to add the item back.

Commissioner Dieter stated that she is fine with the City Council's recommendation; she listened to their deliberation and it made sense to her.

The Commissioners expressed consensus.

Acting Chair Foreman stated the next item is requiring all City Council meetings to be live streamed.

The Assistant City Attorney stated live streaming is a new issue that came up as a result of a rent control meeting; the matter became an issue regarding not being able to move the meeting location because of the inability to live stream; the public safety issue needed to be addressed; the idea was to bring some amendments to the Commission to allow for relocating a meeting even though the proceedings could not be live streamed; hopefully, these situations will be few and far between; public safety has to be paramount to live streaming; the audio and video would be recorded and available, but the meeting would not be live streamed.

Commissioner Dieter stated that she read the matter over and had a question at the very beginning; the ordinance states meetings shall be audio or video recorded; she does not know whether it should actually say live streamed recorded; it is fine the way it is; her recommendation to make it a little shorter has been provided to the Assistant City Attorney; rather than spelling out due to the nature of the item or items under discussion, one sentence should read: meetings held outside City Hall may not be available via live streaming; instead of spelling out audio and video every time, it should just say all recordings will be archived; that she looked back at the minutes from a year ago and understands why archiving for 10 years was used; when storage becomes an issue, the matter might come back to the Commission; right now, the matter is not an issue; 10 years should be changed to indefinitely.

Acting Chair Foreman inquired how the City Clerk feels about the recommended changes, to which the City Clerk responded the way that technology and storage capacity is going, videos will probably be kept indefinitely; stated the City is under contract; all data is kept on a server; the City pays a fee; there are backups if anything happens to the data; suggested adding: a minimum of 10 years and potentially indefinitely based on storage capacity.

Commissioner Dieter stated that including both is confusing to the public; if the City is trying to communicate that things would not be deleted, just say indefinitely, so the public knows that they can check with the City Clerk to find something; if it becomes a problem, it can be addressed at that time; this is the City's history; it is important that the public be able to view the archives in the future; that she feels very strongly about the matter; no one knows how a historical reference could impact something down the road or whether someone might want to understand the history of something; it is important to strive for indefinitely until it becomes a problem.

Acting Chair Foreman stated the only problem he has with the issue is that the matter was brought up because of the problem of moving the meeting; nobody has asked the Commission to change the archive section; when the Commission went over the entire Code, the decision was to leave in 10 years; that he is not saying the issue should not be reviewed; however, he questions whether this is the time to do so; a separate section addresses keeping records; the Commission reviewed the matter and voted on 10 years; some Commissioners might have voted against it but it was kept at 10 years; the matter was sent back to the Commission because of the live streaming issue.

The City Clerk noted Section 2-91.4C reads for a period of at least 10 years.

Acting Chair Foreman inquired about the written record, to which the Assistant City Attorney responded the Commission talked about Section 2-92-4, which requires documents to be posted on the website for at least four years; stated some modifications have been made.

Acting Chair Foreman inquired where the 10 years is coming from, to which the City Clerk responded the original ordinance.

Acting Chair Foreman stated 10 years is underlined like it is new language, inquired whether the current section says 10 years.

The City Clerk responded in the affirmative; stated the section states: the City shall make such audio or video recordings available via live streaming, as well as archived in a digital form, in a centralized location on the City's website within 72 hours from the date of the hearing and for a period of at least 10 years after the date of the meeting.

Acting Chair Foreman stated the language is not new.

The Assistant City Attorney stated the idea is that 10 years would be referenced in the following sentence.

Acting Chair Foreman inquired why the matter is being raised.

The Assistant City Attorney responded the issue of allowing meetings to be held at places where live streaming is not available arose because of the hiccup when trying to locate a meeting outside of City Hall.

Acting Chair Foreman stated the Commission reviewed the whole statute last year and did not change the language; now the Commission is being asked to deal with one issue, which is being used as a device to change other language, which he does not necessarily disagree with.

The Assistant City Attorney stated it is incumbent on staff to bring proposed amendments to the ordinance to the Commission's attention when issues are found;

staff felt that it was timely to bring the matter to the Commission's attention; the Commission can either revise the language to leave it.

Commissioner Dieter stated the Open Government Commission is here to make revisions; nothing is ever set in stone; the Commission can always make changes; things can always be made better; public records should be saved forever since they contain historical information about how and why certain laws were enacted; money has been spent on holding meetings; money should be spent to preserve meetings; history matters; the past is a valuable primary source for future generations, which the public will be able to see historic events as they unfolded; no one knows which decisions will be the most valuable; being able to see the Council and those who spoke connects future generations; that she feels very strongly that 10 years should not be used unless storage becomes a problem for the City.

Acting Chair Foreman inquired whether Commissioner Dieter is making a motion to change the language, to which Commissioner Dieter responded the language should be to what she provided.

Acting Chair Foreman called for a vote on keeping the records indefinitely, which did not receive three affirmative votes by the following voice vote: Ayes: Commissioners Dieter and Tazon – 2. Abstentions: Acting Chair Foreman – 1. [Absent: Commissioner Bonta and Chair Aguilar – 2.]

The Assistant City Attorney stated the language would be brought to the Council with the note that there was not a majority vote.

Acting Chair Foreman stated he would change his vote to aye, which caused the motion to carry by unanimous voice vote – 3. [Absent: Commissioner Bonta and Chair Aguilar – 2.]

Acting Chair Foreman stated the next item is public comments by members of policy bodies and opinions of public concern.

The Assistant City Attorney stated the Commission did not feel that there is a particular reason to include the two sections in the ordinance, but reluctantly went along with the language recommended by staff; Council felt that neither section is really important or critical to the Sunshine Ordinance; the Commission and Council recommendation is that the sections be deleted; deletion is proposed unless the Commission feels differently.

Commissioner Dieter moved approval of the City Council recommendation to delete the sections.

Commissioner Tazon seconded the motion, which carried by unanimous voice vote – 3. [Absent: Commissioners Bonta and Chair Aguilar – 2.]

Acting Chair Foreman stated the next item is responding to public records requests.

The Assistant City Attorney stated the issue arose from Mr. Klein's complaint concerning the time to respond to requests and the Sunshine Ordinance not mirroring the timeframes under the Public Records Act (PRA) when a local agency needs longer than 10 days; staff drafted language to delete the need to respond within three days and added a provision to allow a reasonable extension not to exceed 14 days if the material cannot be readily accessed or made available to the requester.

Commissioner Dieter stated she has no problem with the suggested edit.

Acting Chair Foreman stated that he thought the response period is 10 days.

The Assistant City Attorney stated 10 days is for a typical situation, but staff added language; when there are unusual circumstances, the time to respond can be extended which, is consistent with the PRA.

Acting Chair Foreman inquired whether it is under Section 2-92.2, to which the Assistant City Attorney responded in the affirmative; stated it is Subsection C.

Commissioner Dieter stated that she has a slight aversion to citing the Government Code because the reader has to look up the Government Code to see the provision; she is flexible; suggested adding a qualifier, such as the need to compile data from a voluminous record; she is open if other commissioners want to have people read the Government Code.

Acting Chair Foreman inquired whether a lot of extra language would need to be added, to which the Assistant City Attorney responded that he was simply trying to not be wordy; stated the language could be added.

Acting Chair Foreman stated Commissioner Dieter has made him more conscience of the issue; that he originally thought that the Sunshine Ordinance should be cut down and not include parts that are redundant; however, Commissioner Dieter has convinced him this section pertains directly to members of the public and needs to be understood; that he does not want the public to have to refer to the Government Code.

The City Clerk stated if the Government Code changes, the Sunshine Ordinance would be out of sync which could cause a problem and is often why only the citation is given.

Commissioner Dieter suggested including a qualifier, such as the need to compile data from a voluminous record.

The Assistant City Attorney stated doing so is easy enough.

Acting Chair Foreman inquired if everyone is in favor.

Commissioner Tauzon stated he is in favor of the Council recommendation.

Commissioner Dieter inquired about an issue on the last page of the Sunshine Ordinance, which is not on the agenda, regarding providing training for City employees and officials.

The City Clerk responded training is recorded and available.

Commissioner Tauzon inquired whether every employee has to go through the training, to which the Assistant City Attorney responded in the affirmative.

3-C. Adopt the Annual Public Report

Acting Chair Foreman stated the Annual Public Report is posted on the City's website; the report addresses alleged violations brought to the Commission's attention during the previous calendar year; inquired what Commissioners think about the wording.

Commissioner Dieter responded the wording is fine; suggested adding reference to Sunshine Ordinance Section 2-93.6.

Acting Chair Foreman inquired whether the Commission concurred.

Commissioner Tauzon inquired whether a report would need to be filed if there is nothing to report, to which Commissioner Dieter responded in the affirmative.

Acting Chair Foreman stated the public wants to know whether or not complaints have been filed.

The Assistant City Attorney stated that he wanted to ensure the item is responsive to what Commissioner Dieter is looking for.

3-D. Informational Report Concerning Disclosure of Documents that have been Determined to be Public After Previously Determined as Unavailable to the Public

Commissioner Dieter stated two relevant sections deal with City Attorney reports: Sections 2-91.8 and 2-91.12E; inquired whether a report would be presented to Council on the Consent Calendar as a public report.

The Assistant City Attorney responded the report, which makes reference to a list of various litigation, claims etc., goes to Council twice a year.

Commissioner Dieter stated Section 2-91.8 addresses making a determination about whether documents can be disclosed; inquired whether the matter would also go to Council on the Consent Calendar.

The Assistant City Attorney responded that he does not know; stated he would bring the matter to the City Attorney's attention.

Commissioner Dieter stated the public would realize nothing has been declassified even though it is required semiannually.

The Assistant City Attorney stated said matter can easily be included with the report.

Commissioner Dieter stated at least once annually, the Commission also needs to report to the Council, in writing, any practical or policy problems encountered in the administration of the Sunshine Ordinance; that she is wondering if the issue of declassifying documents should be reported to the City Council; it is difficult for the Open Government Commission to weigh in on documents being declassified because the provision is not clear; things need to be spelled out and perhaps included in the Sunshine Ordinance, which the Council can discuss; clarification is needed on the criteria for disclosure, the process to determine the risk of disclosing documents, who decides to take the risk--the Council or City Attorney, and who decides when something can be disclosed; a mechanism needs to be put in place for community members to request classified documents to be declassified; a Commissioner or Councilmember might want something to be declassified; a mechanism needs to be in place for the public to ask for something and get a response about why something may or may not be able to be disclosed.

The City Clerk stated in the past on several occasions, the Council has voted to allow closed session information to be disclosed; when a request is made from a member of the public, staff will provide the legal reasoning why the information is not being disclosed; provided an example of the recent hiring of the City Manager; stated an explanation is given to the requestor.

Commissioner Dieter stated the Commission does not know the criteria used to judge the matter; something should be added to the Sunshine Ordinance to make things more transparent so that the Commission can handle complaints.

The Assistant City Attorney stated the sentence in question says: the Commission shall report, in writing, to the City Council at least once annually about any practical or policy problems encountered in the administration of this chapter; if the Commission wants to identify what it sees as practical or policy problems, it is within the Commission's jurisdiction; that he is not sure whether staff can do so; the Commission might want to appoint an ad hoc committee to address the matter and return back to the Commission.

Acting Chair Foreman stated Commissioner Dieter has already laid out the issue; requested that the matter be put in writing and considered at the next meeting; questioned if spelled out in State law; stated real property transactions, contracts, and labor agreements that take place in closed session typically end up in open session; outlined an example of closed session information being requested on the subcommittees set up to help Council select the new City Manager; questioned whether there is a way to challenge the issue.

Commissioner Dieter added another example of when the Del Monte project was addressed, the Council indicated the City would open itself up to litigation if the ordinance was repealed; the ordinance was not repealed; seeing the legal reasoning behind the matter would be interesting; it is important that the City Attorney include the matter regarding closed session minutes in the report on the Council's Consent Calendar.

Acting Chair Foreman inquired whether Commissioner Dieter would draw something up to review in October.

Commissioner Dieter responded the first thing is to have the Assistant City Attorney talk to the City Attorney to ensure that the report on documents that are determined to be undisclosed will be added to the Consent Calendar.

The Assistant City Attorney stated Section 2-91.8A refers to any closed session minutes being exempt from disclosure based on whether the disclosure would be detrimental to the City and a report should be provided to Council.

Commissioner Dieter stated the report should be on the Consent Calendar for the public; that she would provide ideas to incorporate in a staff report for the Commission to figure out 1) criteria for disclosure, 2) the process to determine risk, 3) who decides the risk, and 4) a mechanism for the public.

Acting Chair Foreman inquired whether Commissioner Dieter had a chance to talk to the Assistant City Attorney about the fact that the Sunshine Ordinance requires that there be a new Chair every year; stated the matter is not on the agenda; inquired how to handle the matter.

The Assistant City Attorney responded it would probably be best to place the item on the October agenda.

Commissioner Dieter inquired whether it would be okay to wait until October to work on the other part [disclosing documents].

The Assistant City Attorney responded in the affirmative; stated a special meeting could be held assuming there is Commission interest and space availability.

Commissioner Dieter stated City staff has to prepare a report; disclosing documents is a big deal in the community right now; the matter can be put on the shelf until October or could be discussed at an earlier date.

The City Clerk stated a meeting has to be held if a complaint is filed and the item could be added.

Commissioner Dieter stated that she hopes that a complaint is not filed.

The Commission agreed to wait until October.

The Assistant City Attorney stated if the report is prepared earlier and ready to go, a meeting could take place after being noticing.

Acting Chair Foreman stated the Chair could be addressed then too.

COMMISSIONER COMMUNICATIONS

Commissioner Dieter stated part of the Commission's responsibility is to review public notices to confirm that they conform to the requirements of the Sunshine Ordinance and to work to improve public accessible information.

The Assistant City Attorney stated the gist is to ensure that public notices adequately communicate what is being considered; a person off the street who may not otherwise be interested should be able to understand the agenda.

Acting Chair Foreman inquired what should be done if something on an agenda is ambiguous.

The City Clerk responded a Commissioner can let her know; stated summary titles have been added as a result of people pointing out ambiguity at a past Open Government Commission meeting; a summary title is used when a title seems legalistic and lengthy, including multiple resolutions or actions; the summary title is in plain English; staff has been very careful and diligent with titles.

Acting Chair Foreman stated people can get detail of by clicking on the number to the left online; perhaps stock language should be added to the agenda item providing instruction on how to locate details.

The City Clerk stated instructions are available in a separate document online.

ADJOURNMENT

There being no further business, Acting Chair Foreman adjourned the meeting at 8:26 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

The agenda for this meeting was posted in accordance with the Sunshine Ordinance.