

Report on Proposed Open Government Commission Complaint Procedure Revisions

September 20, 2021 Open Government Commission Meeting

Prepared by Commissioner LoPilato

I. Background / Relevant History

- In August 2021, the Commission voted to move forward with preparing revisions to the Public Complaint Procedures posted on the City's website. The existing Public Complaint Procedures document was adopted in the first meeting of the Open Government Commission in May 2012.
- In July and August 2021, three Review Areas were identified for Commission consideration:
 - Review Area 1: Potential Shifting of Outside Counsel's Role During Complaint Hearings / Request for Adjustments to Staffing Support for Adjudicatory Matters
 - Review Area 2: Potential Revisions to the Complaint Form
 - Review Area 3: Potential Revisions to the Public Complaint Procedure
- For Review Area 1, the Chief Assistant City Attorney committed at the August 2021 meeting to outlining the support that would be provided to the OGC under the City Attorney's Office (CAO)'s new plan for staffing complaint hearings, as well as a more detailed description of the ethical wall and guardrails that would be in place to ensure no appearance of bias in staffing the OGC.
- For Review Area 2, the City Clerk committed in August 2021 to collecting information on possible changes to the Sunshine Ordinance Complaint Form, including a review of other jurisdictions, and returning suggested revisions to the OGC.
- For Review Area 3, Commissioner LoPilato committed to preparing the first draft of a revised Complaint Procedure as outlined in the Memorandum re: Potential Revisions to Sunshine Ordinance Complaint Procedures submitted by Commissioner LoPilato for the July and August 2021 meetings.

II. Relevant Documents

- Exhibit A: Draft Complaint Procedure Revisions with tracked changes (prepared by Commissioner LoPilato)
 - Please note that this is a very rough draft for initial consideration and may need to go through several further iterations before finalization and posting.
- Exhibit B: Potential Sample Legal "Instructional Memo" or "Neutral Statement of the Case" to OGC for CAO Consideration in Support Commitments
- Exhibit C: Original Complaint Procedure (for reference)

III. Status Update on Review Areas Prior to September 2021 Meeting

- **REVIEW AREA 1: Awaiting Confirmation of Support To Be Provided By Chief Assistant City Attorney**
 - As noted above, the Chief Assistant City Attorney committed in August 2021 to outlining the support that would be provided to the OGC under the CAO's new plan for staffing complaint hearings, as well as a more detailed description of the ethical wall and guardrails that would be in place to ensure no appearance of bias in staffing the OGC.
 - Commissioners may then review that outline and determine whether it is (a) acceptable, (b) needs minor changes to be informally requested of the Chief Asst City Attorney during the September 2021 meeting, or (c) does not resolve Commission concerns such that a formal request for a shift in support should be presented to Council and/or the City Attorney.
 - For efficiency, based on representations made at the August 2021 meeting that the Chief Asst City Attorney anticipates being able to provide a "neutral statement of the case" to assist the OGC prior to complaint hearings, the attached proposed revisions to the Complaint Procedure (for Review Area 3) anticipate those changes to the current practice.
 - Upon confirmation from the CAO regarding these and other outstanding issues, the proposed Complaint Procedure revisions will need to be reviewed to ensure alignment with CAO's intended plan.
 - For the ease of reference, the sample templates from the August 2021 meeting presentation slides modelling what an "Instructional Memo" or "Neutral Statement of the Case" might look like are attached hereto as Exhibit B. ("Instructional Memo" and "Neutral Statement of the Case" can be used interchangeably at this point. The former is language from the original Complaint Procedure; the latter is language suggested by the Chief Asst City Atty at the August meeting.)
- **REVIEW AREA 2: Awaiting Suggestions for Revised Complaint Form From City Clerk**
 - As noted above, the City Clerk kindly offered to synthesize Commissioner suggestions and issues discussed in August regarding the Complaint Form, look at examples from other cities, evaluate what types of updates might be appropriate and report back to the Commission with suggestions.
 - Once a revised Complaint Form is prepared, Staff or the Commission should undertake a careful review to ensure alignment between language on the Form and in the Revised Complaint Procedures.
- **REVIEW AREA 3: Initial Rough Draft of Revised Complaint Procedures Attached As Exhibit A.**

- This version is a significant overhaul of the prior document, as the original Complaint Procedure was filled with procedural descriptions that did not align with past or current OGC practices (or anticipated practices).
- Most of the substantive changes and the rationales for those changes were flagged in the Memorandum re: Potential Revisions to Sunshine Ordinance Complaint Hearing Procedure submitted for the July and August 2021 meetings.
- This draft could benefit greatly from Commissioner feedback on what aspects of the procedure are unclear, as well as any ways the proposed procedural changes can be improved to better serve the Commission's goals.

IV. Noteworthy Points for Discussion in Draft Complaint Procedure Revisions

○ Intro Statement in Original Complaint Procedure: Evidentiary Inference Language

- **Issue:** The original language in the intro to the Complaint Procedure (first sentence) states:

“Consistent with the language and spirit of the City of Alameda Sunshine Ordinance (Ordinance) to provide the most open government possible (see Alameda Municipal Code Chapter II, Article VIII, Sections 2-90 through 2-93), **all inferences and evidence shall be viewed in the light most favorable to the petitioner.**”
(emphasis added)

This is significant language - it's a guiding principle for how Commissioners, as decision-makers, must interpret *any* ambiguities in the evidence we receive during the complaint process.

- **Commissioner LoPilato Recommendation:** We should seek guidance from the Chief Assistant City Attorney on the origin and impact of this language and decide if it needs modification. If keeping, we need to change the language to “complainant” instead of the “petitioner” (a term not used anywhere else in the document, indicating this “inference” instruction in the original may have been pasted in from an outside source). If keeping, we should move this sentence down to the Commission Findings section where it has more context.

○ Filing A Complaint - When should OGC see a Complaint?

- **Issue:** I've attempted to lay out the sequence of events that is triggered by the filing of a formal Complaint, including who sees the complaint and when.
- **Decision Point:** Should the full OGC receive a copy of the complaint (1) as soon as it's filed or (2) not until the full hearing packet (including the “statement of the case” from the Chief Asst City Attorney) is ready for distribution? In the latter scenario, the OGC would be notified that a Complaint was filed and of the upcoming hearing date, but would not review the Complaint's substance until the full hearing packet is complete.

- PROs of seeing the Complaint immediately:
 - (1) Better OGC awareness of full scope of issues leading to Complaint filings, even when complaints are withdrawn (which may inform other OGC tasks like advising on issues arising in the implementation of the S.O. and confirming the accuracy of the Annual Report prepared by Staff)
 - (2) Opportunity for Commissioners to do independent individual analysis with more time before the hearing
- Cons of seeing the Complaint immediately:
 - (1) Decreases the benefit of an organized hearing packet presenting the Complaint in context with the “statement of the case,” the Respondent’s statement, and evidence submitted by both sides.
 - (2) Commissioners may put in time and analysis on complaints that are ultimately resolved or withdrawn before hearing.
 - (3) Higher risk of Commissioners engaging in communications that could require recusal from the hearing.

- **Commissioner LoPilato Recommendation:** Based on my assessment that the “cons” slightly outweigh the “pros,” I have tentatively drafted the revisions to include only an immediate “notification” to the OGC, while the Complaint itself would be distributed to the City Attorney (to determine staffing for representation of the Respondent) and to the Chief Assistant City Attorney (to begin her work on preparing the “statement of the case”). As the hearing nears and the hearing packet is finalized, the OGC would then see the full universe of information surrounding the Complaint. We could potentially set up a practice where any withdrawn complaints are still forwarded to the OGC for awareness.

○ **Pre-Hearing Submissions and Deadlines**

- **Issue:** The original complaint procedure had several references to requiring all documentation from Complainants at least 5 working days before the hearing and then a strange procedure for continuing the hearing to allow for new evidence (which then referenced a 45-day window that doesn’t seem to have any other basis for being in the procedures and may run afoul of the Sunshine Ordinance).
- **Commissioner LoPilato Recommendation:** Instead, in this revised draft, I have set forth a timeline and sequence for documents to be submitted by both parties prior to the hearing with a notation that the Complainant is “encouraged to provide information as early as possible in the process to ensure a thorough evaluation.” While we want to avoid scenarios where lots of new written material comes in on the day of the hearing and thereby isn’t included in the “neutral statement of the case,” I think we also want to allow flexibility as community members navigate what may be an unfamiliar process.

- Also note: We should wait to finalize anything regarding the actual timeline until there is confirmation that a period of time does, in fact, need to be built in for the Chief Assistant City Attorney's preparation of a Neutral Statement of the Case.
- **Public Hearing Procedure Section - Modifications to Hearing Procedures**
 - **Issue:** A lack of uniform expectations about the sequence of events in a complaint hearing can lead to confusion and mistrust in the process. These proposed revisions attempt to set forth a sequence and time limits, but this should definitely be something the Commission reaches consensus around because a lot of options are possible. Similarly, the Commission should consider what situations might warrant waiving the typical procedural sequence or time limits and how that should be determined (e.g. discretion of the Chair? majority vote? supermajority vote? A combination?)
 - **Commissioner LoPilato Recommendation:** Before finalizing this section, we should engage in deliberations among the Commission, with attention to experiences of prior Complainants, and consider feedback from Staff supporting the Commission on how other adjudicatory bodies operate and observations of the prior OGC hearings.
- **Findings of the OGC and "Remedies" Section**
 - NOTE: This section will need to be updated (and continually monitored) to reflect any changes to remedies / penalties section of the Sunshine Ordinance.

V. **Potential Additional Considerations**

- Should these procedures include a glossary? Or maybe add a "Definitions" section at the beginning?
 - Commission or staff suggestions on additional terms to define / clarify?
- FAQ Section: This seems like a useful addition to the Complaint Procedure, but generally will require Staff's hand to update properly.

VI. **Recommendation on Action To Be Taken**

- **Review Area 1:** Evaluate any proposal offered by the Chief Assistant City Attorney regarding staffing support for adjudicatory matters and boundaries around OGC support role within the City Attorney's Office. Vote on whether a formal request of any kind is necessary.
- **Review Area 2:** Evaluate any proposals offered by City Clerk regarding revisions to the Sunshine Ordinance Complaint Form.
- **Review Area 3:** Provide feedback for either Commissioner LoPilato or the City Clerk to synthesize into a second set of revisions to the Complaint Procedure for full Commission review at the next meeting (ideally after further progress is made on Review Areas 1 and 2 to avoid circling back).