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OPEN GOVERNMENT COMMISSION

CITY OF ALAMEDA, CALIFORNIA

ERIN FRASER,

Complainant,

vs.

CITY OF ALAMEDA, ET AL,

Respondent

MEETING OF MAY 2, 2022
AGENDA ITEM 3-A

REPLY TO THE
RESPONDENT'S POSITION STATEMENT

This Reply is in response to Respondent's Position Statement dated April 19, 2022 ("Respondent's Position Statement"), in response to Complainant's Complaint dated April 13, 2022 ("Complaint"), and in anticipation of a hearing before the Open Government Commission on May 2, 2022.

Respondent's Position Statement includes false factual statements. Respondent's Position statement includes broad interpretations of law, largely without citing cases to back up such interpretations. Respondent's Position Statement, if followed, would lead to an overburdening of City government through excessive information requests and a narrowing of jurisdiction of the Open Government Commission to an unreasonably narrow set of circumstances. Respondent's Position Statement, like Respondent's inordinate delay in producing records related to the death of Mario Gonzalez, demonstrates that Respondent does not take seriously its obligation to comply with the CPRA, the Constitution of the State of California (*see* Cal. Const., art. I, § 3, subd. (b)), the Supreme Court of California (*see, e.g.,* City of San Jose v. Superior Court of Santa Clara Cnty., 214 Cal. Rptr. 3d 274, 389 P.3d 848, 2 Cal. 5th 608 (2017)), or prior rulings of this body. Complainant repeats his prayer for the strongest relief possible.

I. ARGUMENTS RAISED BY RESPONDENT

Respondent's Position Statement is difficult to parse. Complainant responds herein on information and belief as to what Respondent's legal arguments are intended to be. It appears Respondent raises four primary arguments in defense of Complainant's Complaint. These arguments are as follows:

1. Complainant's Complaint relates to a request from over a year ago so any dispute should have been resolved within 15 days of the initial request on April 19, 2021 (the "Initial Request");

2. Respondent has provided all records Complainant requested;

3. Respondent is not required to produce records in their original form; and

4. Respondent has not violated the Sunshine Ordinance or California Public Records Act ("CPRA").

Complainant disagrees the factual and legal assertions in Respondent's Position Statement, as more fully described below.

II. COMPLAINANT'S COMPLAINT WAS TIMELY UNDER THE PLAIN LANGUAGE OF THE SUNSHINE ORDINANCE

Much of Respondent's Position Statement is devoted to the argument that the Complaint was untimely. As the Sunshine Ordinance makes clear, the "trigger" for a complaint before the Open Government Commission is a violation of the Sunshine Ordinance, or through incorporation into the Sunshine Ordinance a violation of the CPRA. Respondent instead argues that the date of a request for information is the "trigger" date. Thankfully, Section 2-93.2.a. of the Sunshine Ordinance is clear and unambiguous in this respect. That provision provides, in part:

Any person may file a complaint against any violation of the Sunshine Ordinance no more than fifteen (15) days after the alleged violation.

The Complaint is based on a continuing violation by Respondent from March 30, 2022 until April 7, 2022, and also continuing to this day (see pages 7-8 of the Complaint). The Complaint was filed by email to the City Clerk on April 13, 2022. Hence, Complainant filed within 6 days of the alleged violation, and thus well within the 15 day time limit.

It is possible that Respondent was confused by the Complaint because the Complaint notes that Respondent has committed several violations of the Sunshine Ordinance and CPRA, and acknowledges that some of those violations were beyond the 15 day time frame for hearing by the OGC (but not a court of competent jurisdiction under the CPRA). Nevertheless, the acknowledgement that some violations were time-barred before the OGC (but not a court of competent jurisdiction under the CPRA) has no impact on the violations from March 30 until April 7. Put in to the simplest terms possible so Respondent can understand: Respondent broke the law a lot, this Complaint is only about some of those violations.

Respondent also is in continuing violation of the Sunshine Ordinance. Hence, additional complaints could be filed today because the violation is ongoing and such complaints would be timely. The Sunshine Ordinance does not address continuing or ongoing violations, but a reasonable interpretation of its provisions would be that the

1 15 day time limit begins upon the termination of the violation, not the commencement of the violation. In any case,
2 the Complaint was filed timely.

3 Furthermore, Respondent's interpretation of the Sunshine Ordinance that a Complaint must be filed
4 within 15 days of a records request would lead to additional onslaught of CPRA requests and other unfavorable public
5 policy outcomes. If Respondent prevails on the timing issue, Complainant would be forced to file another request
6 with the City's custodian of records, and then immediately re-file another OGC complaint. Each request takes City
7 staff away from their important duties, so Respondent's interpretation of the law could easily lead to a result where
8 City staff are further overburdened with CPRA requests and less able to complete their typical assigned duties.
9 Furthermore, the Sunshine Ordinance is clearly intended to provide access to public records and the ongoing work of
10 government; Respondent's reading of the law would limit all accountability of this law because of the short time frame,
11 which would make it essentially unenforceable.

12 In sum, Respondent's interpretation of the Sunshine Ordinance is contrary to the plain language of
13 the ordinance. The trigger date is the day of an alleged violation, not the day of a request.

14 **III. RESPONDENT HAS KNOWINGLY FAILED TO PRODUCE ALL REQUESTED RECORDS**

15 Respondent also argues that the Complaint is moot because Respondent has produced all responsive
16 records. Respondent's attorney, Mr. Cohen, personally knows this to be false. In a telephone conversation on April
17 19, 2022, Respondent's attorney and Complainant spoke at Respondent's request to discuss a possible settlement in
18 lieu of a hearing before the OGC. During the April 19, 2022 conversation, Complainant informed Respondent that
19 Complainant was still very interested in receiving records in the form of text messages (or other mobile messages,
20 such as WhatsApp messages) between Charles Clemmens (an employee of Respondent) and various Alameda Police
21 Department ("APD") officers. Such messages, even if on the personal devices of Respondent's employees, are records
22 as defined by the CPRA, and thus by extension the Sunshine Ordinance. *See City of San Jose v. Superior Court of*
23 *Santa Clara County*, 2 Cal.5th 608 (Cal. 2017). Mr. Cohen orally acknowledged to Complainant that such messages
24 were responsive to the Complaint and purported to express dismay that they had not previously been provided.
25 Nevertheless, such messages still have not been provided or possibly even collected by the Respondent.

26 Complainant anticipated at the time of the initial request on April 19, 2021 (the "Initial Request")
27 that Respondent would not complete the request immediately, hence Complainant intentionally mentioned text
28 messages and other messages so that Respondent was on notice to collect and preserve such records, so that they could

1 be produced at the appropriate time. Nevertheless, it appears Respondent failed to collect such messages initially or
2 has at least failed to produce them.

3 Furthermore, the Initial Request was extremely broad given the definition of “record” under the
4 CPRA. This was intentional. Respondent has not conducted a good faith effort to collect all records and it appears
5 Respondent remains willfully ignorant of the scope of the definition of record, even though the Initial Request
6 specifically referenced the broad definition. As an alternative, Complainant suggested in his Initial Request that he
7 would be willing to narrow the request in consultation with Respondent. Respondent has never sought to consult with
8 Complainant to reduce the scope of the request, hence, it remains very broad.

9 Respondent’s failure to produce all records demonstrates a systemic failure on the part of
10 Respondent to learn and implement its duties under the CPRA and Sunshine Ordinance.

11 **IV. RESPONDENT MISCHARACTERIZES STATE AND LOCAL LAW**

12 *Documents in Original Form*

13 On page six of Respondent’s Position Statement, Respondent writes, “There is similarly no merit in
14 the Complainant’s contention that either under the Sunshine Ordinance or the Public Records Act, he is entitled to the
15 release of data in its raw, original form.” This claim is repeated elsewhere in Respondent’s Position Statement.
16 Complainant strongly disagrees with its assertion. The Complaint cites applicable law, namely Government Code
17 § 6253.9, which provides in part:

18 (a) . . . [A]ny agency that has information that constitutes an identifiable public record . . .
19 that is in an electronic format shall make that information available in an electronic format
20 when requested by any person and, when applicable, shall comply with the following:

21 (1) The agency shall make the information available **in any electronic format in which it**
22 **holds the information.**

23 The plain language of the statute makes clear that if the state agency (here, Respondent) has the record in an electronic
24 format that is requested, that format should be produced. If an agency created a record in a specific electronic format,
25 presumably it retains that record in the same format. This may not always be the case, of course. For example, APD
26 may have some records which are handwritten notes on a notepad. For preservation purposes, these notes may be
27 scanned and converted to an electronic format such as an image file or a PDF. However, here, Respondent has not
28 said that it does not maintain the records in the original format. Instead, it suggests that because it has maintained the

1 records in multiple formats, it can provide the record in the format of its (Respondent's) choosing. This is contrary to
2 the plain language of the statute. Respondent provided no legitimate reason for its refusal to produce electronic records
3 in their original format.

4 Further, Respondent misinterprets or exaggerates the Initial Request and the Complaint's insistence
5 on original format as instead original storage media. Respondent includes a reference to original hard drives, for
6 example. Complainant never requested the original *media* on which the records were stored (such as a hard drive).
7 Complainant has always requested duplicate copies of the records in the original *format*. If the original format of
8 video was an MPEG, Complainant wants an MPEG video, not a link to YouTube. If the original format of an email
9 was an EML or OST or PST, Complainant wants the same file format. As Complainant explained in the Complaint,
10 original format matters because it will include metadata which would allow the public to scrutinize whether
11 Respondent has made changes to the records prior to production.

12 Providing records in their original format requires no conversion or reformatting and is thus *less*
13 burdensome than producing re-formatted records. Copy and pasting electronic records is simple and straightforward.
14 Respondent's refusal to do so is troublesome and a violation of California law.

15 16 *Redaction*

17 Respondent cites Penal Code 867.9(b)(6)(B), *et seq.* as proof that Respondent was authorized in
18 redacting records. The applicable provisions of Penal Code 867.9(b) provide:

19 (6) An agency shall redact a record disclosed pursuant to this section **only** for any of the
20 following purposes:

21 (A) To remove personal data or information, such as a home address, telephone number,
22 or identities of family members, other than the names and work-related information of
23 peace and custodial officers.

24 (B) To preserve the anonymity of whistleblowers, complainants, victims, and witnesses.

25 (C) To protect confidential medical, financial, or other information of which disclosure is
26 specifically prohibited by federal law or would cause an unwarranted invasion of personal
27 privacy that clearly outweighs the strong public interest in records about possible
28 misconduct and use of force by peace officers and custodial officers.

1 (D) Where there is a specific, articulable, and particularized reason to believe that
2 disclosure of the record would pose a significant danger to the physical safety of the peace
3 officer, custodial officer, or another person.

4 (7) Notwithstanding paragraph (6), an agency may redact a record disclosed pursuant to
5 this section, including personal identifying information, where, on the facts of the particular
6 case, the public interest served by not disclosing the information clearly outweighs the
7 public interest served by disclosure of the information.

8 Complainant acknowledges that the above provisions allow for some redaction. However, Respondent's self-interest
9 has clouded its interpretation of the statute and led Respondent to misapply its provisions.

10 For example, it is undisputed that Charles Clemmens participated in the death of Mario Gonzalez.
11 It is also undisputed that the death of Mario Gonzalez was ruled a homicide by the Alameda County Coroner. In a
12 world which valued the lives of people of color, Mr. Clemmens would be investigated for homicide charges and Mr.
13 Gonzalez would be honored as a victim. Nevertheless, it appears that Respondent has not initiated any criminal
14 investigation in to Mr. Clemmens and the Alameda County District Attorney clearly states that its report covers only
15 police officers, which excludes Mr. Clemmens. Hence, Respondent's implicit bias and derogation of Mr. Gonzalez's
16 rights as a victim (and thus entitled to redaction under (6)(B)) are largely ignored; his personal details are publicly
17 provided and unredacted in the materials published publicly by Respondent on its website. However, Mr. Clemmens,
18 a person involved in a homicide, is referred to as a "witness" and thus the APD case file redacts out many of his details.
19 If Mr. Gonzalez's life matters, he is a victim and entitled to redaction. If Mr. Gonzalez's life matters, Mr. Clemmens
20 should be a defendant in a criminal case and not entitled to redaction. Respondent's redactions are those misapplied:
21 under broad for Mr. Gonzalez, over broad for Mr. Clemmens. And this is just one example.

22 **V. OTHER FALSE STATEMENTS BY RESPONDENT**

23 Finally, to ensure that the OGC understands the lengths to which Respondent has demonstrated bad
24 faith in this matter, Complainant provides additional examples of falsehoods within Respondent's Position Statement.

25 On page 3, Respondent writes, "On April 12, 2022, following the public release of the final report
26 by the Alameda County District Attorney, the City released all responsive documents to Mr. Fraser and the public by
27 sending a link to the audio, video and written documents connected with Case Number 21-01762." This statement is
28 demonstrably false and Respondent's production of the purported April 12, 2022 email is evidence (*see* page 18 of

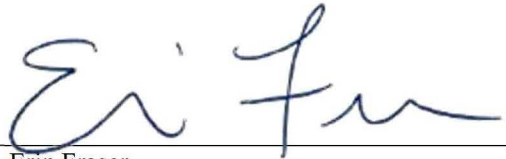
Respondent's materials, which omits the "To" line from the record). Respondent did not write to Complainant on April 12, 2022. (Complainant has searched his email account and spam folder and is confident no such April 12, 2022 email was sent to Complainant.) Rather, Respondent wrote to Complainant on April 7, 2022, as evidenced by the attached Exhibit K. However, Respondent did not send a link to materials on April 7, but instead simply advised Complainant that the District Attorney had completed its report. Respondent's invented email correspondence is a clear fabrication and violation of good faith and professional ethics.

On page 2, Respondent writes, "The Sunshine Ordinance complaint currently before the Open Government Commission ("OGC") presented by Eric Fraser." This is demonstrably false. Respondent's name is Erin Fraser.

On page 1, Respondent writes, "[Complainant's] April 19, 2021 CRPA did not contain anything of the sort [a factual showing] **nor did it seek disclosable public records.**" (Emphasis added.) This is demonstrably false. Respondent has in fact produced some records in response to the Initial Request, proving Respondent's claim false. These records may have been delayed but they were always disclosable public records.

This is not an exhaustive list of the falsehoods contained in Respondent's Position Statement and Complainant reserves the right to raise these as violations of State and local law in the future.

Complainant respectfully submits this Reply this 26th of April, 2022.


Erin Fraser

Mario Gonzalez

EXHIBIT K

From: Lisa Cooper <lcooper@alamedacityattorney.org>

To: Undisclosed Recipients

Date: Thursday, April 7th, 2022 at 6:00 PM

The City of Alameda writes to advise you that on the evening of April 7, 2022, it was advised that the Alameda County District Attorney had completed its investigation into the April 19, 2021 incident involving Mario Gonzalez and publicly released its findings. Accordingly, the Alameda Police Department has again reassessed its earlier decision to withhold certain documents, video records, and other information arising from the April 19, 2021 incident. In light of the conclusion of the District Attorney's investigation, the City will be releasing all responsive and publicly disclosable information to the public early next week. Please be advised that some of the materials have been redacted to protect the personal information of third parties and Mr. Gonzalez's right to medical privacy. See, Penal Code Section 832.7(b)(6) and Penal Code 832.7(b)(7).

Regards,

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