

Presentation of Revised Report to City Council on Issues Arising from Implementation of the Sunshine Ordinance for Discussion

Date: Jan. 11, 2022

Prepared by the Open Government Commission (OGC) Sub-Committee on Practical and Problems Encountered on Administration of the Sunshine Ordinance (Commissioners Serena Chen and Rasheed Shabazz¹)

I. Purpose of Report

The purpose of the Report is to fulfill the OGC duty to report least annually to the City Council on the practical and policy problems encountered in the administration of the Sunshine Ordinance.

II. Background/History

The Open Government Commission (OGC) was established in 2012 whose **purpose** is to “advise the City Council on administration of the Sunshine Ordinance and hear and decide complaints of violations of the Sunshine Ordinance. ([A.M.C 2-22.1](#))

The **duties** of the OGC include developing goals to ensure the practical and timely implementation of ordinance, and report in writing to City Council at least once annually on any practical or policy problems encountered in the administration of the Sunshine Ordinance. ([A.M.C. 2-22.4](#))

The OGC voted to establish a sub-committee at the May 3, 2021 meeting, to address their duty to prepare in writing a listing of practical/policy problems encountered in the administration of the Sunshine Ordinance. Commissioners Serena Chen and Rasheed Shabazz were appointed to meet and report back at the next OGC meeting. The Subcommittee members met three times via telephone in May, July, and September 2021. The Subcommittee identified issues in four areas: Sunshine Ordinance (Municipal Code); Hearings and Complaints; Public Records; and Public Meetings. These issues have been identified through discussions of the Commission and hearings of Sunshine Ordinance complaints, but the specific issues may have been outside the scope of the specific complaint.

After discussing the preliminary report at the July 20 and September 20 OGC meetings, the Sub-committee agreed to prepare a report to the City Council for OGC approval at the October 4 meeting. Due to time constraints, feedback from the OGC was not discussed until the November 2 OGC meeting and a recommendation was made to bring back the report with revisions to the January 2022 OGC meeting.

¹ Mr. Rasheed resigned from the OGC in November 2021

III. **Practical/procedural problems encountered in the administration of the Sunshine Ordinance that the OGC and staff have been able to address**

For the most part, the operational and procedural issues that were raised during the OGC meetings in 2021, have been addressed by staff and commissioners.

- a. Lack of clarity over rules of order and governing procedures resulting in extended meeting times.
Solutions: The original 2012 OGC bylaws were updated and adopted on October 4.² The revisions addressed procedural problems that had emerged as the OGC adjudicated three complaints in March and April. The revisions included standardizing the agenda, rules of order and governing procedures including adoption of Rosenberg's Rules of Order.
- b. Structural conflict inherent in the dual role of the CAO in both defending the City in the complaint process and at the same time providing legal advice to the OGC on the Sunshine Ordinance (SO)/Brown Act and Public Records Act (PRA)
Solution: Staff established a new procedure to have Chief Assistant City Attorney Elizabeth Mackenzie provide a confidential neutral statement on each complaint for commissioners and to sequester herself from the city attorneys/outside legal counsel assigned to respond to SO complaints.
- c. Binary options in deciding complaints
Solution: Given the complex nature on deciding complaints, staff have delineated five distinct findings that Commissioners can make:
 1. Complaint Sustained with Cure and Correct Recommendation
 2. Complaint Sustained without Cure and Correct Recommendation
 3. Complaint Denied
 4. Complaint Denied as Unfounded³
 5. Complaint Dismissed (on jurisdictional or procedural grounds, not a finding on the merits)
- d. Complaint form amendments have been proposed to provide complainants with a checklist identifying specific sections of the SO most commonly (alleged) to have been violated and to create an on-line complaint filing process.

² Commissioner LoPilato was appointed to a Bylaws Revision subcommittee at the May 3, 2021 OGC meeting. The draft revisions were reviewed for input and changes at OGC meetings prior to October 4.

³ A.M.C. ARTICLE VIII. 2-93.8 (d). A person who makes more than two (2) complaints in one (1) 12-month period that are determined by the Commission to be unfounded shall be prohibited from making a complaint for the next five (5) years.

IV. Practical and Policy problems encountered in the administration of the Sunshine Ordinance that still need clarification and/or action by Council

- a. Need for clarification as to what the OGC can ask city staff to do. For example, is it within the OGC's authority to request that staff prepare an orientation handbook? The three OGC members who joined the OGC in 2021 would have benefited from an orientation and handbook which delineated how the OGC administers their duties. Only a copy of the Sunshine Ordinance was provided.

Recommendation: That an Orientation packet be provided to all commissioners which includes not just the Sunshine Ordinance, but also: 1) the section in the Alameda Municipal Code establishing the Open Government Commission and its duties (Chapter II, Article II, 2-22); 2) the OGC bylaws; 3) copies of the Brown Act and Public Records Act; and 4) Rosenberg's Rules of Order.

- b. Continuity and institutional memory of the OGC. The Open Government commissioners are appointed by each city council members and may only serve a total of four years at the discretion of the council member who appointed them. The commission is only required to meet twice a year unless complaints are filed. The 2021 commissioners decided to meet 10 times in order to produce bylaws revisions and the first annual commissioner report to Council on problems encountered. Given the 4 year maximum term limit of commissioners, it is important that the City and future commissioners can know and learn from the history and development of the commission.

Recommendation: To allocate resources in the development of a 10-Year Report that will provide an overview of the creation of the Sunshine Ordinance and Open Government Commission ordinance and the accomplishments of the OGC and most importantly recommendations, based on the data and interviews with past Commissioners, staff, and complainants, as to how the Sunshine Ordinance and the Open Government Commission can be improved.

In addition, the annual report produced by staff on PRAs, could be modeled after City of Oakland's Public Ethics Commission May 2021 "Spotlight on Oakland's Public Records System: A Data-Driven Review of City Agency Performance and Opportunities for Improvement." Follow link: <https://www.oaklandca.gov/news/2021/spotlight-on-oaklands-public-records-system>

- c. A complaint filed by Paul Foreman and heard on Mar. 1, 2021, alleged that an ad hoc committee created by the Recreation and Parks Department was in fact a "legislative body" and should have followed

Brown Act requirements. While the complaint was not sustained on procedural/jurisdictional grounds, the merits of the complaint bore some validity. The SO contains an exemption for “ad hoc committee⁴” as a legislative body but its definition was vague and upon research into the Brown Act, it was discovered that the Brown Act does not use the term “ad hoc committee,” and instead defines a “temporary advisory committee,” and describes when such a committee would and would not be considered a “legislative body” under the Act⁵.

Recommendation: The OGC recommends that the SO be amended to clarify and define what type of committee would NOT be considered a “legislative body” to avoid future confusion in the future. The Brown Act does exempt advisory committees, composed solely of the legislative body that are less than a quorum of the legislative body - unless it is a standing committee. . . Groups advisory to a single decision-maker or appointed by staff are not covered as long as they are not created by formal action of the legislative body, based on a 193 opinion by the California Attorney General. 56 Ops.Cal.Atty.Gen. 14, 16-17 (1973)

- d. The complaint filed by Scott Morris, heard on Apr. 5, 2021, regarding a PRA request for police arrest records highlighted the difficulty and delays experienced by requestors in the past. Mr. Morris had been clearly frustrated by the city’s slow and repeatedly incomplete responses and it was not until he filed a SO complaint that a complete set of the records which he had requested were provided to him. (See page 8.)

Recommendation: An annual review/audit of police department responses to PRA requests for timeliness and thoroughness to be included in the report would help in determining what factors are delaying compliance and how the department and the CAO can better expedite complete responses.

- e. The complaint filed by Jay Garfinkle, heard on Apr. 5, 2021, regarding insufficient notice of council support for a specific bill within a consent calendar item pointed to a need for more transparency in what is included in the Legislative Agenda.

Recommendation: While the OGC did not sustain the complaint, 3-2, the Commissioners nonetheless believe that the City could practice greater transparency and, in the future, publish its legislative Agenda and following the state legislative session, note the specific bills lobbied for and their disposition.

⁴ Included in an amendment to the SO passed in the Feb. 18, 2020 city council meeting was the term “ad hoc committee” and its exemption as a legislative body. A.M.C. Article VIII, 2-91.1(c), and 2.91.1(d) 6

⁵ CA Gov Code section 54952(b)

- f. The complaint filed by Rasheed Shabazz, heard on Dec. 6, 2021, regarding a PRA request for social media postings by a council member exposed a need for the City to have a policy clearly delineating the responsibilities of the public official responsible for providing the requested records, i.e. the responsibility of the “custodian of records” to comply with PRA requests. The failure of public officials to produce social media or other communication records requested under a PRA request undermines the goals of transparency and open government.

Recommendation: Given the expansion of the use of social media, a policy or regulation regarding its use and the need to require public officials to produce them in response to public records requests would be helpful in providing guidance to officials.

APPENDIX

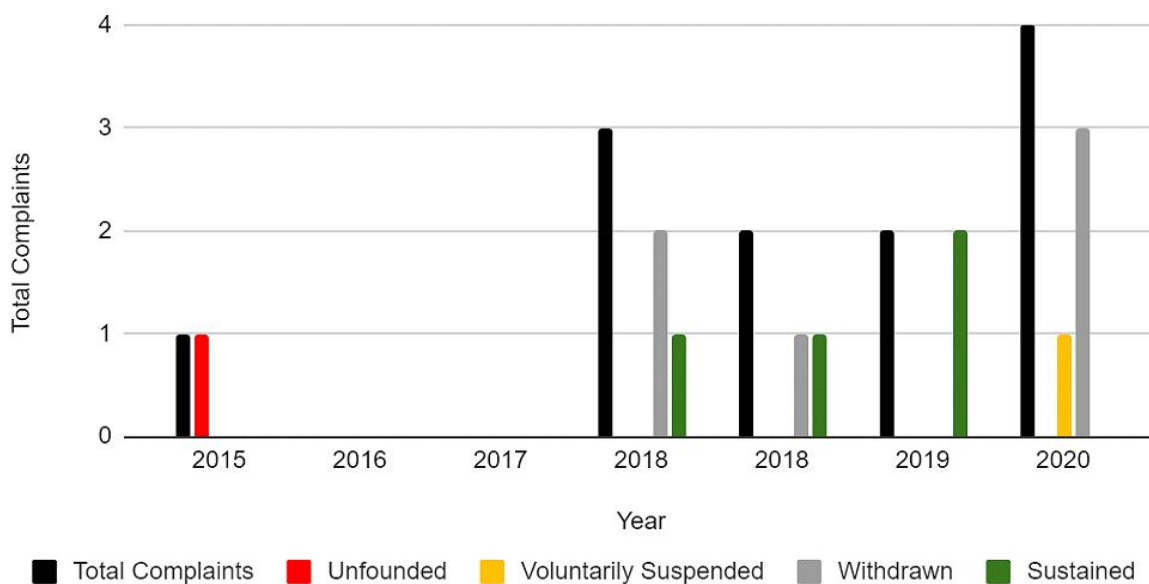
Charts of Sunshine Ordinance complaints, PRA requests, and detailed examples of problematic Public Records Act responses

EXHIBIT 1

Altogether, there were approximately 12 or 13 complaints between 2015 and 2021 [Exhibit 1].

Disposition of Sunshine Ordinance Complaints, 2015-2020

Source: Open Government Commission Annual Reports, (Rasheed Shabazz)

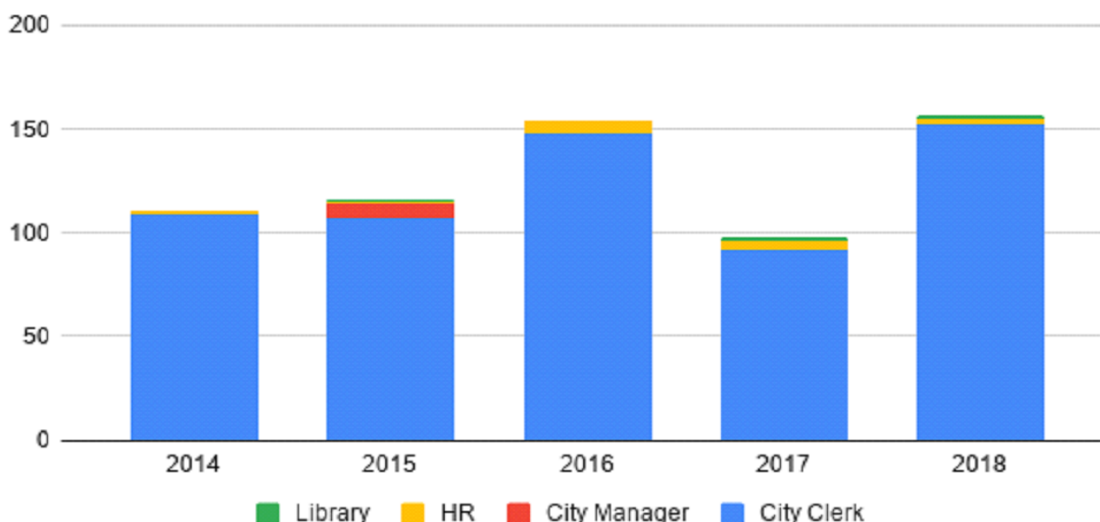


During 2021, the Commission decided 6 complaints. One was sustained and one complaint had two issues of which one was sustained. The remaining four were either denied or dismissed.

EXHIBIT 2 - Public Records Act (PRA)

City of Alameda Public Records Act Requests, 2013-2018

Does not include City Attorney's Office



Complaints - Problematic Responses

Shabazz vs. City of Alameda

On January 22, 2019, freelance journalist and OGC Commissioner Rasheed Shabazz filed a PRA requesting records related to the Alameda Police Department and the implementation of a new law SB1421. City did not respond in a timely manner. On May 29, 2019, Shabazz filed a Sunshine Ordinance Complaint for a lack of a timely response. City then responded and informed Shabazz that there were no responsive records and attempted to dissuade pursuit of a hearing. At the July 2019 hearing of Shabazz' complaint, City claimed they received "hundreds of requests" per year. Staff recommended finding of a "technical violation." Staff also claimed no pattern existed of members of the public not receiving information requested.

At the July 23 and December 18, 2019, meetings, the OGC found the City violated the Sunshine Ordinance by not providing a timely response and sustained the complaint as a violation. The suggested remedy was including an annual report on Public Records Act requests.

Subsequently, City released info related to the in-custody death of Shelby Gattenby to Shabazz on December 19, 2019. The release of this information contradicts city's claim that there were no responsive records, instead, the City stated the information was being released in response to the conclusion of the Alameda County District Attorney's investigation.

In a subsequent PRA, on Feb. 18, 2020, Shabazz requested PRA logs from the City dated 2013-2018. On March 11, 2020, City responded with logs for the following departments:

HR, Clerk, Library, and City Manager's Office. The City Attorney's office requests were not included.

After follow-up emails, on February 8, 2021, the CAO released logs for its office for three of the five years requested: 2014, 2017, and 2018.

Morris v. Alameda

On April 15, 2020, freelance journalist Scott Morris filed PRA for an arrest report. The CAO denied his request. Morris needed to follow-up multiple times to obtain records. Morris filed a complaint. Staff stated they would work with Morris to develop a policy on release of records. Staff did not follow through. Instead, staff inaccurately described Morris' complaint as "involuntarily suspended" in draft 2020 Annual Report.

Following the February meeting and a PRA seeking correspondence between the City and Morris, Shabazz contacted Morris on February 24, 2021 who stated he had not heard back from the City and expected a hearing. He also shared that in his 2020 conversation with the City, Asst. City Attorney Cohen referenced a tweet from Shabazz recommended Morris file a complaint if he did not receive the records he requested.

At the April 2021 hearing, Morris raised concerns about the CAO obstructing PRAs. At the hearing, although Olson Remcho was hired as an independent party, the attorney referenced Shabazz' tweet to Morris. This could be coincidental, or it may suggest coordination between the CAO and the independent Council.

Olson Remcho Request

On April 6, Shabazz filed a PRA requesting invoices and contracts for Olson Remcho. City responded on April 14, the City responded claiming exemptions for agreement and invoices. However, in its report to the City Council in June 2021, staff included the costs for Olson Remcho's services in its proposal to remove the complaint adjudication responsibilities from the OGC. On June 1, 2021, Shabazz pointed out this contradiction to the CAO. On June 10 the information was subsequently provided to Shabazz.

These three incidents illustrate the persistence required by requesters to receive documents requested from the City, specifically those that involve the CAO's office.

ENDNOTES:

¹ Sunshine Ordinance, 2-22.4 [b-d], Alameda Municipal Code.

² Sunshine Ordinance, 2.90 - Introduction "This sunshine ordinance has been developed to codify the City of Alameda's public policy concerning participation in the deliberations of the City's legislative bodies and to clarify and supplement the Ralph M. Brown Act and the California Public Records Act and expanding its application and effectiveness to local governments."

³ Sunshine Ordinance, 2.90.1 - Goal.

⁴ Alan Cohen, Asst. City Attorney email to Rasheed Shabazz, December 19, 2019.

⁵ Rasheed Shabazz email to Elizabeth Mackenzie, City Clerk, February 24, 2021.