City of Alameda

Staff Report

File Number:2015-2034

City Council

Agenda Date: 10/6/2015

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Introduction of Ordinance Amending the Alameda Municipal Code by Amending Various Sections of Article VIII (Sunshine Ordinance) in Chapter II (Administration) and Adding New Sections 2-90.3, 2-90.4 and 2-91.18 Concerning Local Standards to Ensure Public Access to Public Meetings and Public Records. (City Attorney 2310)
To: Honorable Mayor and Members of the City Council

From: Janet C. Kern, City Attorney

Re: Introduction of Ordinance Amending the Alameda Municipal Code by Amending Various Sections of Article VIII (Sunshine Ordinance) in Chapter II (Administration) and Adding New Sections 2-90.3, 2 -90.4 and 2-91.18 Concerning Local Standards to Ensure Public Access to Public Meetings and Public Records

BACKGROUND

In 2012, after nearly a year's study and the involvement of numerous residents, the City Council adopted what is called the City's "Sunshine Ordinance", codified in Chapters 2-91 and 2-92 of the Municipal Code. As set forth in the Ordinance, it was developed to codify the City's public policy concerning public participation in the deliberation of the City's elected and advisory bodies; supplement the state law (the Ralph M. Brown Act and Public Records Act (the Brown Act)) concerning open government; and demonstrate the Council's commitment to an open, democratic and transparent City government. Its goal is to ensure that residents have timely access to information, opportunities to address elected and advisory bodies prior to decisions being made and provide easy and timely access to public records. The Ordinance also established an Open Government Commission (Commission) to oversee and enforce the Ordinance, including the authority to impose fines for violations. The Ordinance requires that employees and officials who are required to file statements of economic interests affirm annually that they have read the Ordinance and that they receive training on the Ordinance, to be provided by the City Attorney's Office.

As the Sunshine Ordinance requires, in June 2014 the City Attorney's Office conducted two training sessions on the Ordinance. Both sessions were taped and the City Clerk's Office retained the earlier one for those elected and appointed officials, and City employees, who were unable to attend the training sessions or who were elected/appointed/hired after the training sessions were conducted. Having spent considerable time reviewing the substance of the Ordinance in preparation for the

training, the City Attorney's Office saw some room for clarification of and improvement to the Ordinance. Accordingly, the City Attorney's Office prepared draft amendments to the Ordinance and presented those amendments to the Open Government Commission in October 2014, February 2015 and March 2015.

For the most part, the Commission agreed with the revisions to the Ordinance and recommended that the City Council consider and adopt the revisions. The proposed Ordinance revisions are attached for Council's consideration and include the redlined changes to the existing Ordinance. To assist the Council, where sections have been moved, where material has been added to or deleted from the Ordinance, or where staff is recommending Council adopt language somewhat different than what the Commission has recommended, staff has presented in [brackets] a brief explanation as to the move, addition or deletion, or changes from the Commission's recommendations. Moreover, the more substantive changes to the Ordinance are discussed below.

DISCUSSION

1. Use of Electronic Communication Devices. Currently, there is a subsection in the Ordinance's "Findings" (section 2-90.2 (f)) that provides that it is not in the public's interest to have private communications occur between decisions makers and a limited number of individuals and therefore at public meetings, cell phones and other electronic communications including email, text and instant messaging shall be turned off during public meetings.

   Staff had two concerns with this. First, this provision is in the "Findings" section in the Ordinance and hence easy to overlook; staff believes it should be in a "substantive" section of the Ordinance rather than in the Findings. Second, because the City is trying to go paperless, most elected and appointed officials use City issued or personal iPads to access agenda materials. IPads, of course, can be used to send email, texts, instant messaging and the like. It seemed to staff that this provision, in addition to being moved, should attempt to address this apparent conflict. Accordingly, staff moved the provision to a new Section 2-91.4 (h) and added "The use of electronic communication devices, other than for the purpose of a member's accessing agenda materials that are on a member's iPad or laptop computer shall be prohibited during meetings."

   The Commission, however, felt that this subsection as drafted was too narrow and did not reflect today's technological reality that elected and appointed officials should be able to use their personal smart phones or iPads during a meeting to access information relevant to the subject matter then under discussion but should not be allowed to use such devices to send or receive information to/from inappropriate sources, such as third parties. For example, an official may want to access electronically a portion of the City's Municipal Code, even though such portion is not part of the agenda materials. The Ordinance, both in its current form and as staff had revised it, would not allow that.

Staff continues to recommend the language as originally proposed. If the additional language recommended by the Commission were adopted, there would no longer be a bright line rule as to what is/is not permitted and members of the public may question what information elected and appointed officials are in fact receiving and/or sending when it comes to their use of electronic communication devices at public meetings.

2. The Definition of Meeting and Policy Body. The Commission expressed concern that the definition of "meeting" under the Sunshine Ordinance was different than that under the Brown Act. The Commission was also concerned that the Sunshine Ordinance uses the term "Policy Body" to mean elected and advisory bodies but the Brown Act uses the term "legislative bodies" to embrace both elected and appointed officials. In both instances, the Commission was concerned that the differences could lead to confusion. For example, the Ordinance in Section 2-91.1 (b)(1), defines meeting, in part, to mean "a congregation of a majority of the members of a policy body at the same time and place." The Brown Act, on the other hand, in Gov. Code, section 54952.2 (a), defines meeting to mean "any congregation of a majority of the members of the legislative body at the same time and location, including teleconference locations as permitted under Section 54953, to hear, discuss, deliberate or take action on any item that is within the subject matter jurisdiction of the legislative body. Moreover, the definition of "Policy Body" under the Ordinance (Section 2-91.1 (d)) is essentially the same as "Legislative Body" under the Brown Act. Gov. Code, Section 54952.

   After discussion, the Commission was satisfied there was no compelling reason to revise the definition of "meeting" or "policy body" under the Ordinance to track the definitions in the Brown Act. The Commission, however, recommended language be added to the Ordinance to reflect that the definitions were the same except where the definition, in the case of a "meeting" (more restrictive) or, in the case of "policy body" (broader definition), the more restrictive (as related to meetings) or the more broad (as related to policy bodies) would apply. For example, under the Ordinance, Section 2-91.1 (b)(4)(C), a majority of the policy body may not attend a social, recreational or ceremonial meeting conducted in a venue, such as a restaurant, where public access is permitted, only if consideration is provided. The Brown Act has no such prohibition. Staff has added the clarifying language to the definitions of meeting and policy body.

3. Policy Body Members Submitting Comments When Not Present at the Meeting. The Sunshine Ordinance, in Section 2-91.6, provides that persons who are unable to attend the public meeting or hearing may submit written comments and those comments will be brought to the attention of those conducting the meeting. An issue came up at an advisory board meeting as to whether a member of such body who was unable to attend a meeting may nevertheless submit written comments about matters that the board would consider at that meeting. Staff's sense is that should not be permitted but could point to no ordinance or policy to prohibit it.

Staff analogizes the situation to a board member who has disqualifying financial conflict of interest. In that case, the member must not only remove him/herself from the dais when the item is under discussion but also must not attempt in any way to influence the other decision makers, e.g., by addressing the board at the meeting (unless the member's own business or property is affected.) Moreover, since a board member should make a decision only after considering all of the comments of the public, the staff and other board members, for the absent board member to express his/her views in written comments to the board before considering all of the comments of the public, staff and other board members, could call into question the fairness of the process.

Staff therefore revised Section 2-91.6 to prohibit an absent policy body member from submitting written comments to the policy body regarding the subject of the meeting or hearing except when the absent member's own business or property is affected.

4. Public Comments by Members of Policy Bodies. The Ordinance, in Section 2-91.17, states that every member of a policy body retains the full constitutional rights of a citizen to comment publicly on governmental actions, including those of the policy body on which the member sits and that policy bodies shall not sanction or deprive members from expressing their views. Staff was concerned that this might lead to advisory bodies, as a whole, taking formal action, such as writing letters to an outside organization, that contradicts a policy or position that the City Council had adopted. Staff also wanted to clarify that while advisory policy body members retain First Amendment rights, since the City's Charter provides a City Council majority may remove any member from that policy body (Charter Section 10-9), Section 2-91.17 was not intended to create any new private cause of action should a member be removed.

   The Commission questioned why this section was even in the Ordinance but ultimately agreed it should remain, along with the staff added language stating that the section should not be construed to create a cause of action by a member of an advisory board removed by the City Council. The Commission did recommend that the sentence prohibiting advisory bodies from taking formal action that would contradict adopted Council policy, be deleted. Because it seems to staff to be incongruous for a subordinate body to draft a letter to an outside organization that contradicts a position or policy that the elected representatives have adopted, staff recommends the sentence remain.

5. Opinions of Public Concern. Somewhat akin to Section 2-91.17 discussed above, Section 2-92.6 provides that City employees and advisory board members shall not be disciplined or discouraged from expressing personal opinions on matters of public concern so long as the opinion does not purport to represent the opinion of "the City", the employee's department or the member's board. As staff understands it, the purpose of this section is to not penalize public employees and appointed officials from expressing personal opinions when those matters are of "public concern" so long as it is clear such opinion does not represent that of

the City, the employee's department or the appointed official's appointed body. The problem with the section as written is that, in part, it merges the employees and advisory board members, although different standards apply to each. Another problem is that the line is not always bright under what circumstances a public employee may exercise his or her opinion about a matter of "public concern" and still have First Amendment protection from being disciplined. While leaving the section largely intact, staff has separated the employees from the advisory board members and has in very general terms tried to provide guidance as to when First Amendment protection applies to statements made by public employees.

The Commission was of the opinion that this entire section should be deleted from the Ordinance in that, as to advisory board members, the issue was sufficiently addressed in Section 2-91.17 and, as to public employees, the issue should be addressed in personnel rules rather than in the Sunshine Ordinance. If, however, the section were to remain in the Ordinance, the Commission recommended it be moved from Chapter 2-92 (which concerns access to public records) to Chapter 2-91 (public access to meetings) and follow Section 2-91.17.

Staff does not disagree that there is conceptual overlap between Section 2-91.17 and this section but this section is more specific in its efforts not to discourage public employees or advisory body members from expressing themselves on matters of public concern with the express caveat that the section is not intended to provide rights to public employees or to advisory body members beyond those recognized by law or agreement. Accordingly, staff recommends that the section, as revised, remain in the Ordinance but be moved to Section 2-91.18.

6. Declaration by and Training Requirements for Form 700 Filers. The Ordinance currently requires those public officials and employees who are required to file FPPC Form 700 not only to declare under penalty of perjury that they have read the Sunshine Ordinance but also to attend an annual training on the Ordinance. Given that typically there will be few, if any, substantive changes to the Ordinance on an annual basis, and given that officials and employees must declare annually that they have read the Ordinance, it seems that annual training on the Ordinance is not necessary. This is supported by the fact that since the adoption of the Ordinance, there have been no formal complaints filed concerning violations of the Ordinance. Staff therefore recommends that the training be provided every third year with the caveat that new employees and newly elected or appointed officials be required to review the tape of the training (the most recent of which was in May 2014) within six months of their appointment or election. The Commission agreed with that recommendation.

FINANCIAL IMPACT

Adoption of this Ordinance should have no impact on the City's General Fund.

City Council

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MUNICIPAL CODE/POLICY DOCUMENT CROSS REFERENCE

This draft ordinance amends the Municipal Code. Its intent is to strengthen and clarify the City's goal to have its government be transparent and to ensure public access to meetings and public records.

ENVIRONMENTAL REVIEW

Adopting this ordinance is not subject to environmental review in that it is not a "project" for purposes of the California Environmental Quality Act (CEQA). The ordinance is an organizational or administrative activity of the City that will not result in direct or indirect physical changes in the environment. CEQA Guidelines, section 15378 subd. (b)(5).

RECOMMENDATION

Introduce an ordinance amending the Alameda Municipal Code by amending various Sections of Article VIII (Sunshine Ordinance) in Chapter II (Administration) and adding new Sections 2-90.3, 2-90.4 and 2-91.18 concerning local standards to ensure public access to public meetings and public records.

Respectfully submitted,
Janet Kern, City Attorney

Financial Impact section reviewed,
Elena Adair, Finance Director

Exhibits:
1. Redline Changes to the Sunshine Ordinance
2. Current Sunshine Ordinance
3. Open Government Commission Minutes from October 6, 2014, February 2, 2015 and March 30, 2015