

**From:** Heather Little [<mailto:heatherlittle9691@gmail.com>]  
**Sent:** Monday, February 04, 2019 4:05 PM  
**To:** LARA WEISIGER <[LWEISIGER@alamedaca.gov](mailto:LWEISIGER@alamedaca.gov)>  
**Subject:** Document for inclusion in tonight's OGC meeting

Good afternoon Lara,  
Please include the following correspondence for tonight's meeting of the OGC:

The recent complaints brought forward by Serena Chen have raised underlying process issues that has put the validity of the Open Government Commission and its ability to make decisions into question. In order to best remedy this situation, I would like to propose that City Council, at its earliest convenience have a conversation to address the following:

- 1) hear the OGC December finding and make a determination to decide if OGCs "null and void" decision stands or not.
- 2) review Sunshine Ordinance with new city attorney to review the null and void clause of the Sunshine Ordinance. And if it is determined that it is unconstitutional, what other method of oversight process can be provided. Ie, if OGC makes a determination that should impact a decision by the CC, the CC should take the next opportunity to review and make their decision about next steps.
- 3) authorize separate legal council for OGC so that there is no future conflict of interest.

I believe that until these three actions are addressed, the recent and future decisions of the OGC will be able to be questioned. Thank you for your consideration.

Thanks,  
Heather

## LARA WEISIGER

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**From:** Paul Foreman <ps4man@comcast.net>  
**Sent:** Sunday, February 03, 2019 8:10 PM  
**To:** Ruben Tilos; heatherlittle9691@gmail.com; Rasheed Shabazz; 'Bryan Schwartz'; michaelhenneberry5@gmail.com  
**Cc:** LARA WEISIGER; id94501@gmail.com; Michael Roush; Ashley Zieba; Serena Chen; Jim Oddie; John Knox White; Marilyn Ezzy Ashcraft; Malia Vella; Tony Daysog  
**Subject:** Item 3D, Feb. 4 Meeting of Open Government Commission

Dear Commissioners:

I am writing in support of the Complaint of Serena Chen filed with you on Jan. 25, 2019.

For the benefit of new Commissioners Tilos and Shabazz and because of the confusing nature of the Mr. Roush's staff report to this body it is necessary to review the history of this matter from the inception of the problem.

### The History:

On October 16, 2018, the City Council introduced two ordinances (Ordinance Nos. 3227 and 3228) to amend the Cannabis Regulatory Ordinance and the Land Use Ordinance (Ordinance Nos. 3201 and 3206). The Agenda description of the proposed action spoke only of authorizing "delivery only" dispensaries. However, at the Oct. 16 meeting the proposed Ordinances were amended to authorize full service retail dispensaries, which, unlike "delivery only" dispensaries would allow the public to visit and purchase product on site. Before voting on the proposed Ordinances, Council inquired of Assistant City Attorney Cohen as to whether this was a material change which prevented a vote on the same at this meeting. He assured them that it was not a material change. The Ordinances received an affirmative vote on first reading.

On Oct. 30, 2018 Serena Chen filed a Sunshine Ordinance Complaint alleging that the change of language was material and that, therefore, the Oct. 16 vote was unlawful and required the matter to be re-agendized for first reading at a subsequent Council meeting. Notwithstanding this pending Complaint and before it was heard by the OGC, City Council proceeded to a second reading and passed the Ordinances on Nov. 7, 2018. The OGC heard the matter on Nov. 14, 2018. Notwithstanding the advice of Assistant City Attorney Roush, acting as counsel for the OGC, that the Complaint should be dismissed, the OGC unanimously determined that the change of language in the Ordinances from what was proposed in the Oct. 16 Agenda notice was material, and, pursuant to the authority of AMC Sec. 2-93.8, ordered that the Ordinances were null and void and should be reintroduced at a subsequent meeting. Mr. Roush was directed to write a formal opinion and order reflecting this decision within 14 days, as required by law. He indicated that he would do so.

However, no Order was published, and on Dec. 3, 2018 the OGC received notice that Mr. Roush had scheduled the matter for rehearing, asserting that he had determined that his previous advice to the OGC that a "null and void" order was authorized by law was in error. He concluded that, notwithstanding the clear language of the Sunshine Ordinance, it was in conflict with the City Charter and California law because it constituted a legislative function that could only be exercised by Council. Mr. Roush presented the OGC with two alternative orders, one that dismissed the Complaint and one that simply "advised" Council to repeal the Ordinances and re-introduce them.

The OGC met on Dec. 16. In the interim, the OGC received an extensive legal brief from Cross Creason, an Alameda resident attorney, that defended the legality of Sec. 2-93.8 and the OGC's decision pursuant thereto. The Commission refused to reconsider the matter and directed Mr. Roush to immediately draft an Order confirming the Commission's Nov. 14 decision, with one change. At the suggestion of myself, the decision did not require the re-introduction of the null and void ordinances. That was left to the proper discretion of Council. The immediacy was required by the fact that

my term of office and that of Commissioner Dieter would expire the very next day, Dec. 18. Accordingly the decision was written and signed the evening of Dec. 17. At that point, I assumed the matter was ended. However, my conclusion proved to be wrong.

### **The Current Complaint:**

The City did not implement the OGC Order, but apparently purports to treat it as advisory only. The Jan. 15, 2019 City Council Agenda Item 6B devoted a paragraph to each of the two ordinances which provided for consideration of both repeal of each ordinance and passage of replacement ordinances. However, 6B omits the critical factor included in the draft ordinances attached to the Agenda. Both draft ordinances provide that Ordinances No. 3227 and 3228 are repealed in their entirety," if and when this Ordinance becomes effective and operative." (Boldface mine)

The omission of this critical language from 6B causes the Agenda item to be understood by a person of average intelligence and education that this is a reconsideration of these ordinances which gives the Council the discretion to both repeal Ordinances 3227 and 3228 and decline to enact the replacement ordinances. Thus it appears as a true re-do of the issue in which opponents of Ordinances 3227 and 3228 can attempt to convince Council to repeal and not replace the ordinances. **In actuality the entire procedure was a sham. The provisions of Ordinances 3227 and 3228 were going to remain on the books no matter what the vote, the only issue would be whether they would carry their old or new numbers and enactment dates.** Thus, 6B clearly violates the mandate of AMC Sec. 2-91.5.

In addition, the failure to attach the Commission's Dec. 17 Order also violated Sec. 2-91.5 by failing to attach, "any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted with the agenda". Mr. Roush's statement in his report appended to your Feb. 4 agenda asserts that the attachment was not necessary because the Commission did not order him to do so. This is a specious argument. The Order was clearly material and necessary for the public to be aware of why 6B was on the Agenda.

Mr. Roush's assertion in the same report that 6B was intended to respect the advisory role of the OGC, while still preserving his position that the "null and void" OGC order is unlawful, is disingenuous. This sham procedure completely ignores and disrespects the proper role of the OGC and the Sunshine Ordinance itself.

The remedy for this improper notice is to again assert the Commissions' authority under AMC Sec. 2.93.8 a and order the City to "cure and correct" by redoing Item 6B of the Jan. 15 Agenda by listing the matter as two separate agenda items. The first item would provide for consideration by Council of the repeal of Ordinances 3227 and 3228. The second item would provide Council with another opportunity to re-enact these Ordinances under a new number and new enactment date.

This would allow for the City Attorney to preserve his position that the "null and void" provision of our Sunshine Ordinance is unlawful, while at the same time respecting the underlying intent of the Commission Order of Dec. 17, 2018. More importantly, it would finally give those Alameda citizens who oppose full service cannabis dispensaries the opportunity to meaningfully oppose them. If the repeal vote fails, it will be a rejection of the Commission's advice, but it will at least be a recognition by Council that it must consider and vote on the same.

With regard to Complainant's prayer for a \$250 fine to be levied against the city, she accidentally cites the wrong subsection of AMC 2.93.8. Subsection b pertains to violations of the public records provisions of the Ordinance. It is subsection a that pertains to the matter at hand and only permits a fine on a second violation.

Sincerely,

Paul S Foreman



January 31, 2018

TO: The Honorable Mayor Ezzy Ashcraft, Vice Mayor Knox White, and Council Members Daysog, Oddie and Vella

CC: Open Government Commissioners, Acting City Attorney Roush, Acting City Manager Rudat

The League of Women Voters of Alameda was a strong advocate for the formation of the Sunshine Task Force in 2010 and participated in many of its meetings to develop the Sunshine Ordinance. In 2012, The Ordinance was approved by the City Council and reviewed by City Staff and the City Attorney's office. The Council entrusted the Open Government Commission as the body to hear violations of the Ordinance.

The League of Women Voters of Alameda has followed closely the recent complaint filed with the Open Government Commission concerning the agenda description for Ordinance 3227 and 3228. At its November 14 meeting, the Commission deemed the ordinance null and void and as a remedy held that the Council should consider re-hearing the items. At the December meeting of the Commission the City Attorney's office held that the Sunshine Ordinance had not been violated and the Commission did not have the authority to render the ordinance null and void. The Commission disagreed and upheld its November 14 decision.

On January 15, 2019 the City Council agendized the ordinances without including the written decision of the Sunshine Commission.

There were several issues with the process followed in this complaint and the advice the Commission received from the City Attorney's Office. At issue is that the City Attorney's Office is serving both the Council and the OGC. In our view, this is a clear conflict of interest. To allow the OGC to continue its commitment to open and democratic procedures and ensure citizen participation and trust we strongly urge the Council to support an independent counsel for the OGC, in the few instances where it is necessary. The City Attorney's Office is not able to properly provide this advice to the Open Government Commission because representation is directly adverse to City Council in the same matter.

We strongly support independent counsel for the Open Government Commission and ask for a timely response from the Acting City Attorney, Michael Roush.

s/Georgia Gates Derr, LWV Alameda President  
s/Susan Hauser, LWV Alameda V.P. Administration  
s/Karen Butter, LWV Alameda Action Co-chair  
s/Felice Zensius, LWV Alameda Action Co-chair