

Draft Presentation re Complaint filed by Jay Garfinkle re a violation of the Brown Act that took place during the City Council meeting of February 16, 2021.

Members of the Open Government Commission:

We understand that you are aware that we submitted our Complaint on February 25, 2021 specifically to address what we perceived to be a violation of the Brown Act that took place during the City Council meeting of February 16, 2021. We will discuss this violation and also plan to expand the discussion to include what we perceive to be a general disregard for the desirability of maintaining openness and transparency on the part of certain members of our Council and City Staff.

The Complaint itself challenges the appropriateness of the process that led to the Council's decision to support State Senate Bill 271, a currently little known but nonetheless controversial and contentious bill which addresses the eligibility requirements for candidates for the office of Sheriff. The motion was made by Councilmembers Knox-White and/or Vella during a discussion of the revision of the Council's Legislative Agenda List of Goals which was identified on the Consent Agenda as Item 5-E which had been pulled from the Consent Calendar, aka Consent Agenda, by both of them, presumably for the purpose of initiating discussion of this Bill which had not appeared on the Regular Agenda, and was, therefore, by definition not eligible for consideration during the February 16th meeting.

The issue we raise in our complaint is not related to the language or merits of SB-271, but rather to the fact that the topic of the motion had not appeared on the Regular Agenda as required by the Brown Act. And while the violation in question, in our opinion, not only demonstrates another example of what we have perceived to be an ongoing disregard for the letter of the Brown Act, it more importantly demonstrates a disregard for the spirit of the Act. This obvious disrespect for the Brown Act permitted the Council to not only entertain, discuss, and approve the acceptance of a non-agendized item, which was a violation by definition, it more importantly resulted in giving the Mayor and City Manager permission to instruct the City's paid lobbyist(s) to support and lobby for a specific item of legislation without first determining the will and preference of the public whose interests they were put into office to represent. They denied their constituents the opportunity to discuss with, and instruct, their own elected representatives, of their opinions regarding a significant policy decision which would require the City's lobbyist(s) in Sacramento to support and lobby in favor of a very significant and controversial item of legislation that had not yet been discussed by the public and had not received even a modicum of support from the residents of Alameda. In fact, the only public support came from the Oakland lobbyist who initiated the entire process by submitting an email request to the Council asking that they support the resolution calling for enactment of SB-271, a resolution which he had personally drafted. The Council heard neither an expression of support nor of opposition from the residents of Alameda as we had not been informed of the requested consideration and support from the resolution's author.

The residents of Alameda had not been properly alerted to the planned discussion and likely subsequent decision by the Council to support this controversial piece of legislation. We, the residents of Alameda, were, in effect, put in the position by the Council of lending our support to a bill that most of us were

not even aware existed. This quite clearly is not representing the will of the people which representation is exactly what the Brown Act is intended to facilitate by requiring proper notice of planned discussions.

To make matters worse, when asked for an opinion regarding the discussion and acceptance of this non-agendized item vis-à-vis the Brown Act, the City Attorney gave an answer that may or may not have been legally correct but was certainly viewed by many members of the public who witnessed his response as being, at the very least, questionable, and certainly not consistent with the spirit of the Brown Act. What we heard was, in essence, that since the Council was discussing the Legislative Agenda (List of Goals) which includes an overly broad range of goals, they are allowed to discuss any item related to those broadly and vaguely worded goals, several of which had been added by previous Councils over the years and may, therefore, no longer be relevant to the current aspirations of the residents of the City despite having been subjected to cursory periodic review by members of the Council. And because of this, the City Attorney expressed his opinion that consideration of issues even remotely related to any of those goals need not be specifically agendized. We, however, fail to understand how this opinion could possibly be consistent with either the letter or the spirit of the Brown Act. And what we believe renders the consequence of accepting and acting on this opinion to be even more worrisome is that it was authorizing the Council to support a piece of contentious legislation that holds major political significance. And this, without any input from the residents of Alameda who are now being cast as supporters of what promises to remain controversial and hotly debated.

The Council, continuing to act under the umbrella of the City Attorney's questionably correct opinion, went on to support SB-314 which is related to the elimination of the cash bail process and to make an editorial, and arguably substantial change to the wording of a "goal" related to a proposed bicycle/pedestrian bridge. There was no allowance for public discussion of these additional items nor was there any urgency for adding the City's support for them. Discussion of these latter issues might conceivably be permitted under the City Attorney's rationale as the issues of Cash Bail and a Bicycle/Pedestrian Bridge can be found in the Legislative Agenda. Even so, they failed to make editorial changes to clarify the confusingly worded goal related to Cash Bail and took liberties in designating the nature of the undefined bridge.

We stress that the City Attorney's opinion notwithstanding, we believe that reasonable people would find the wording of the List's goals and the goals themselves so broad and, in many cases, so vague, that basing a decision as to the applicability of the Brown Act on the content of the List would be totally inappropriate and without merit.

The Draft Decision prepared and presented in advance of the Commission's receipt and deliberation of the merits of the complaint under consideration here argues, *with emphasis added and with comments in italics*, that:

1. **The Staff Report** related to Item 5-E of February 16, 2021 explained the use of the Legislative Agenda List, to wit: "The City of Alameda (City) adopts an annual Legislative Agenda to guide the City's legislative advocacy efforts. By adopting a Legislative Agenda, staff, the Mayor, and the City Council are able to react quickly to most legislative issues

as they arise, ensuring there is a formal City position on a variety of legislative matters. Having a Legislative Agenda in place also allows the City to continue to engage in legislative efforts that impact the City, should they be placed on the ballot for voters to consider.”

*(Note that the issues under consideration here are **not**, and were **not**, under consideration by the Legislature for placement on the ballot for voter approval nor were they matters of such urgency that would justify the precipitous approval granted absent public discussion.) Unfortunately, Staff did not acknowledge, let alone emphasize the fact that relying on the List permits the Mayor, and other “executives” to interpret the items on the list as they deem appropriate and take action **without first verifying** the correctness of their interpretation or taking account of the public’s current preferences through a properly agendized deliberation. **Staff also failed to explain** that many, if not most, of the of the issues under consideration by the Legislature that might have been even remotely related to the List’s goals had not been initiated recently but had evolved over many months, and frequently, over several years, in which case, **precipitous unagendized action would rarely be warranted, let alone appropriate.***

Staff went on to say that:

2. **“Issues that are of significant or urgent nature that are not defined in the Legislative Agenda,** as well as issues that develop over the year and legislation that may conflict with one another, **will be brought to the City Council for consideration.**”

*We would note that the issue of the **election of Sheriffs is not only significant but also is not specifically addressed in the Legislative Agenda,** and we see clearly that this procedure delineated in the Staff report was not adhered to in the present case. And if only because of this obvious failure to follow the established appropriate procedures requiring presentation to, and discussion by, the Council, one must conclude that the Council’s **unagendized** discussion and decision to support the motion under consideration is not protected under the City Attorney’s umbrella opinion as it related to the Legislative Agenda List of Goals vis-à-vis the requirements of the Brown Act. The process employed here is not consistent with what we are told in the Staff Report, to wit: such issues would be brought to the Council, presumably to be agendized for discussion as a Regular Agenda item.*

This presents us with a quandry. If, as the Staff argues, the City’s executives are permitted to take action on items they believe to be included on the List without public discussion, a permission we must certainly challenge, and if the City Attorney is arguing that the Council can consider SB-271 since it is addressed on the List, then why is the Council now voting to place support for SB-271 on the List? Why didn’t one of the City’s executives simply send a letter of support to the Legislature as requested by the Oakland lobbyist? We believe the answer to this apparent quandry is that SB-271 is, in fact, not adequately related to any item on the List that would “permit” unagendized action. And in this case, the Brown Act

would have certainly applied and thus the unagendized action constituted a violation of the Act.

We believe that the above discussion quite clearly validates the foundations of the Complaint as filed on February 25th of this year. And in view of this inescapable conclusion, we repeat our request that the City instruct its lobbyist(s) to cease any and all lobbying activities related to SB-271.

In addition, we would observe that while the Complaint addresses a specific failure to comply with the Brown Act vis-à-vis Council discussions and actions, this discussion shines light on additional related problematic issues which include: 1. The method of assignment of items to the consent Calendar; 2. The existence and use of the Legislative Agenda List, and 3. And possibly more importantly, the procedures followed by this Commission as delineated in Exhibit-4 Draft Commission Decision.

With regard to these three points, **we are requesting** that the Open Government Commission request of the City's executives that they **optimize the use of the Consent Agenda** to include only items which are clearly routine procedural decisions, and/or decisions that are likely to be noncontroversial and, in addition, to refrain from including items which a reasonable lay person might consider to be controversial and warranting public discussion whether or not such discussion is specifically required based on various relevant policies and practices. The Consent Agenda should specifically exclude questions of support or opposition to any and all State and/or Federal legislation regardless of any nexus to the Legislative Agenda List.

As to the use of the **Legislative Agenda (List of Goals)** itself, we believe that this, in essence, serves, primarily and perhaps inadvertently, as a form of wish list that permits the City's executives to engage in any action they may personally interpret to be furthering any goal found on the List, and proceed at their own discretion without contemporaneous public discussion. The Staff report alluded to above indicated that during 2020 the City had sent more than 100 such letters to the Governor and the Legislature. Granted, some may have been appropriate, however there is no way for the public to know since these are not shared with the public absent specific Public Records Act requests.

We are requesting that the Open Government Commission suggest to the City's executives that reference to the goals delineated on the list serve only to justify initiation of public discussion of a specific item that clearly and specifically relates to that goal. And in this regard, inclusion of a goal on the List must not serve as a nexus for justifying the taking of decisions to support or oppose specific items of legislation without first allowing for agendized public discussion. It would also seem appropriate to suggest that all communications on legislative issues and letters submitted under the rubric of the Legislative Agenda Goals List should be publicized by the City Clerk by way of an email notification list and should be compiled for reference on the City's webpage.

And finally, as to the **procedures delineated in the Draft Commission Decision**, we take exception to the currently employed process of propounding a decision of the Commission in advance of their consideration of the details of the Complaint and its supporting arguments. And while we understand the administrative and secretarial rationale for this practice, we believe there is room for improvement

to make it more logical and reasonable. It is also worrisome that the propounded decision in this particular case appears to have been based, at least in part, on misrepresentation of significant facts related to the events that are the basis for the Complaint. In this regard, the argument presented in the Draft Decision includes the following, *with emphasis added*:

“In response to a written request **from a community member** to support SB 271,...” . The Decision goes on to state that: “Thereafter, the City Council heard public comments on Agenda item 5E. **A community member** speaking on behalf of Secure Justice, a large organization comprising over 41 member organizations **representing thousands of Alameda residents**, urged the Council to add support of SB 271 to the 2021-22 Legislative Agenda and stated that **he had submitted a resolution** in support of SB271 for the Council’s consideration.”

We would draw the Commission’s attention to the above acknowledgement that initiation of the consideration of SB-271, the non-agendized subject of the Complaint, had been drafted, submitted, and had then been discussed as a public comment by a lobbyist who was not a resident of Alameda and who then unbelievably claimed to “represent **thousands** of Alameda residents”. And while this may be allowable under the rules of order, in our opinion, this would argue even more strongly for the desirability of first agendizing and allowing for public discussion of this **non-urgent** resolution rather than precipitously proceeding to take a decision on it.

In view of the concerning events described above, in addition to the questionable appropriateness of drafting a decision before the Commission has heard the complaint and relevant testimony, **we are, therefore, requesting** that the Commission staff refrain from its current practice of propounding the Commission’s decisions prior to conclusion of the discussion for which the hearing has been called.

We thank the Commission for your time and your attention you are allowing for consideration of the merits of the Complaint as filed and the details we have presented in support of it.

Jay Garfinkle

PS: One further item of note regarding the Council’s inconsistent enforcement of the rules, though not exactly the subject of the Complaint is that we believe that since Councilmember Knox-White has

reportedly been an active member and served in a leadership position in Bike Walk Alameda, the organization that has been lobbying for a Bicycle/Pedestrian Bridge, it is likely that he should have recused himself from discussing and making the motion that included the item related to the bridge. And going back two years for another, and possibly more significant, example of inconsistent enforcement of the rules, we believe this same member of the Council should have been required to recuse himself from the 2019 discussions and decision related to the McKay Avenue question in that he had reportedly been on the Board of the Alameda Point Collaborative, the major beneficiary of the action he was advocating.

Admittedly, these examples are not related specifically to our present Complaint, but we believe they are relevant to how the Council not infrequently is inconsistent in how they apply their own rules. And this, we would argue is an unacceptable practice that should be also be addressed by the Commission if there is interest in working to improve the transparency and openness of the City's governmental processes.

JG