

September 7, 2021

RE: Continued Item 6E regarding amendment of the Sunshine Ordinance

Honorable Mayor and Members of the Alameda City Council,

In 1953 the California Legislature enacted what has become known and referred to as the Brown Act. This was done in response to the longstanding but, unfortunately, too long tolerated and too frequent failure to adequately notify the Public of anticipated official discussions to be held for determining resolutions, regulations and laws that would subsequently be set by relevant legislative bodies throughout the State. These would include, but would certainly not be limited to, bodies such as City Councils in addition to commissions and committees appointed by City Councils

And while it was the responsibility of each jurisdiction to determine how the Act was to be enforced, it is my understanding, possibly incorrect, that the City of Alameda did not undertake this task until a Citizens Committee was established in 2012 or 2013 to accomplish this. This eventually resulted in the enactment of the Sunshine Ordinance and the creation of the Open Government Commission which was tasked with overseeing and enforcing the City's adherence to the mandates of the Act.

Apparently, everything was copacetic here until the City Council committed a procedural error for which it was called to task by the OGC in 2018.

Not wanting to risk getting caught again, the Council began taking steps to limit the purview and effectiveness of the OGC. First, with the cooperation of the newly hired City Attorney, they declared that if the OGC was able to hold up actions of the Council that they would be exercising a legislative function. And we certainly couldn't allow that. The question then would be "Is the US Supreme Court exercising a legislative function when they find a specific law or action to be in conflict with the US Constitution and then go on to instruct Congress and the President to think again?"

Following this limitation on effective oversight, the Council then, on advice of the City Attorney, applied what can only be interpreted as highly questionable logic, to declare that Ad Hoc committees would not fall under the purview of the OGC. And true to form, this took place only after one or two or more of their Ad Hoc committees failed to open their decision-making activities to the Public consistent with the mandates of the Brown Act.

Since then, the OGC, under the watchful eye of the City Attorney's office, has been going through the motion, for the past two years, of attempting to make recommendations for amending the Sunshine Ordinance. The stumbling block has been that it must be done in such a way as to limit public scrutiny of the City's elected officials while providing the public with optimal oversight of the City Council's and City Staff's activities. The ongoing problem is that while the Sunshine Ordinance was created to ensure

enforcement of the Brown Act, as it is currently being interpreted by the City Attorney and City Council, it does very little to ensure optimal transparency of the operations of our government here in Alameda.

The name "Open Government Commission" suggests that its mandate is to ensure openness of our government's activities. Few people are aware that the Commission is limited in its ability to provide optimal openness and is actually prohibited from attempting to ensure transparency beyond what the City Council is willing to permit.

The Act was a significant step forward in giving the public a better view of the legislative activities of their government. Unfortunately, it was merely a baby step.

The Sunshine Ordinance was adequate for its time. But it appears to many observers that the City Council and City Attorney have been acting to limit its effectiveness. I submit that it's time for the citizens of Alameda to take charge of the process of ensuring transparency as limiting transparency to the mandates of the Brown Act is no longer sufficient to provide optimal transparency. In this regard we note that there are a number of issues that would benefit from open discussion leading to more effective oversight and transparency. The current amendment(s) under consideration are akin to rearranging the deck chairs on the Titanic. What is actually needed, however, is an optimally functioning iceberg detector.

As a citizen of Alameda, I would be very appreciative if the Commission would find a way to go beyond its initial mandate of posting agendas timely and endeavor instead to enhance the transparency of local government activity. To this end, I would suggest that a working group comprised of one or two members of the Commission in addition to a number of members of the public who have been demonstrating an interest in promoting transparency in Alameda's governmental functions be formed to develop policies and procedures which would effectively enhance public oversight beyond the mandates of the Brown Act. This, of course, would require amendment of that section(s) of the Municipal Code that currently restricts the effectiveness of the Sunshine Ordinance and Open Government Commission. Perhaps the Commission could make a recommendation for establishing such a working group to the City Council. And if the City Attorney's office would not allow the OGC forward such recommendations to the Council, perhaps the Council could initiate the process as it did with the police reform committee. It could be enabled in the same manner, though this working group would be specifically required to conduct its business openly and in full view of the public.

Thank you for considering this recommendation for creating policies and procedures to allow greater public oversight and transparency for the benefit of the Public.

Jay Garfinkle

From: [Alameda Citizens Task Force](#)
To: [Marilyn Ezzy Ashcraft](#); [Malia Vella](#); [John Knox White](#); [Trish Spencer](#); tdaysog@alamedaca.com
Cc: [Eric Levitt](#); [Yibin Shen](#); [Lara Weisiger](#)
Subject: [EXTERNAL] Item 6-E on Sept. 7 Continued July 20 Council Meeting (Item 6-G on July 20 Agenda) Sunshine Ordinance
Date: Monday, September 6, 2021 11:34:04 AM

ACT

Alameda Citizens Task Force

Vigilance, Truth, Civility

Dear Mayor Ashcraft, Vice-Mayor Vella and Council Members Knox-White, Herrera Spencer & Daysog:

ACT strongly supports Paul Foreman's letter to you of July 17 pertaining to the above captioned matter. He maintains that the City Attorney's June 1 determination that an OGC complaint hearing is a quasi-judicial process requires that it be given the same status as quasi-judicial hearings conducted by other City Boards and Commissions pursuant to Sec. 30-25 of our Municipal code. (Planning Board, Public Art Commission, Historical Advisory Board). Thus, an OGC ruling would be final unless overruled or modified after the filing of an appeal and a re-hearing before City Council.

We also support Mr. Foreman's rejection of the proposal of the City Attorney to simply "encourage" maintenance of the status quo during the pendency of a complaint proceeding. We urge the adoption of the much stronger language of the LoPilato/Newly Installed Commission proposal which requires maintaining the status quo, unless doing so significantly prejudices the City.

Finally, we urge you to create a citizen task force to completely review the Ordinance and suggest modifications. The initial Sunshine Ordinance was a product of a citizen task force a decade ago. Since that time several modifications of the Ordinance have been adopted by Council with the assistance of the OGC and the Office of the City Attorney, but we must not lose sight of the fact that the Ordinance was adopted to directly serve the citizens of Alameda. We believe it is time for a new citizen review of the Ordinance.

Sincerely,

Gretchen Lipow
President, Alameda Citizens Task Force

From: [Krystal LoPilato](#)
To: [Marilyn Ezzy Ashcraft](#); [Malia Vella](#); [John Knox White](#); [Tony Daysog](#); [Trish Spencer](#)
Cc: [Lara Weisiger](#); [Elizabeth Mackenzie](#); [City Clerk](#)
Subject: [EXTERNAL] Re: Item 6-G re Sunshine Ordinance Revisions - 7/20/21 Council Meeting
Date: Monday, August 30, 2021 10:31:48 AM

Good morning Mayor, Vice Mayor, and Councilmembers,

As this agenda item has been carried over from July, I wanted to share a brief update on my correspondence below pertaining to the item now labelled 6-E on the Continued Items section of the agenda for the 9/7/21 Council Meeting. These comments are submitted in my individual capacity only.

The technical issues mentioned in my July email (the incorrect exhibits to the agenda item and the wording of the Ordinance revisions) appear to all have been corrected for this September meeting. I want to thank City Staff for their responsiveness on those issues and express my support of the ordinance revisions presented by the City Attorney's Office in this agenda item.

Additionally, I'm pleased to report that our August 2021 Open Government Commission meeting included a notification from the Chief Assistant City Attorney that this item would be coming before City Council and had been carried over to the agenda for the first Council meeting in September. I believe this type of professional courtesy is a positive step and bodes well for improving dynamics between the Commission and the City Attorney's Office.

Thank you,
Krystal LoPilato
Open Government Commissioner

On Tue, Jul 20, 2021 at 10:14 AM Krystal LoPilato <krystal.lopilato@gmail.com> wrote:
Good morning Mayor, Vice Mayor, and Councilmembers,

Thank you for encouraging Staff to return with proposals for the remedy replacement in the Sunshine Ordinance. I know many of us are eager to move forward with clarity on these statutory revisions, and I appreciate Staff's efforts to bring a new Ordinance proposal back so quickly.

This latest recommendation from Staff was not agendized for the full Open Government Commission and, accordingly, was not discussed by the Commission in our meeting last night. I share that context to explain why I am writing in my individual capacity. I am generally supportive of Staff's recommendations in Item 6-G and grateful for their work, but wanted to (1) flag a few technical issues to clarify the record, (2) offer minor corrections to Staff's proposed Ordinance for your consideration, and (3) identify a concern with the "Subcommittee Proposal" which is not flagged in the Staff Report. (Had Staff brought this back to the OGC for comment last night, I would have raised the latter two issues there instead of troubling Council with these granular details.)

(1) Exhibits / Historical Context

Upon inquiring, I was advised that there was a clerical error in the original attachment of Exhibits to this agenda item. A revised exhibit was then included. I'd like to offer some

clarifications that might be helpful to maintain a clear record:

- **Exhibit 1 is a memorandum prepared by a subcommittee of 2020 OGC members.** Staff expressed objections to its contents on legal grounds, but the full 2020 OGC adopted that subcommittee's proposal.
 - Subsequently, three new members joined the Commission in 2021, including myself. Staff sought further input on the remedy replacement from the new 2021 OGC.
- **The original Exhibit 2 is not the "Newly-Installed Commission's Proposal." It is a standalone copy of the old 2020 OGC's recommendation for statutory language.**
 - As noted in various Staff Reports, the City Attorneys' Office advised the 2021 OGC that the recommendation adopted by the 2020 OGC was violative of the City Charter and encouraged further consideration of an alternate remedy replacement. Specifically, the City Attorneys' Office recommended that the Commission support the "Knox White Proposal," and reiterated that Staff would not be supportive of either the 2020 "Subcommittee Proposal" or a related "Foreman Proposal" considered in 2020.
- **What is currently Exhibit 3, titled "Exhibit 2 - REVISED Newly Installed Commission Proposal," is the actual 2021 OGC proposal, adopted by the current slate of Commissioners.**
 - Based on the City Attorneys' advice to the Commission, and in the hopes of expediting an OGC recommendation returning to Council, I drafted ordinance revisions that were primarily grounded in the "Knox White Proposal" and submitted them to the full Commission for consideration. Those proposed revisions included a separate mechanism for increasing transparency around "cure and correct" recommendations via public website posting. This is intended as an avenue for adding "teeth" to the Sunshine Ordinance without running afoul of Staff's stated legal concerns regarding the Charter.
 - Those draft revisions were adopted for recommendation by the full 2021 Commission, including the minor italicized adjustment to Section 2-93.8(a) which was discussed on the dais, as noted on Staff's explanatory intro page to the revised exhibit. As a further clarification for anyone tracing the history, the 2021 OGC proposal was discussed and adopted on May 3, 2021 (not April 5, 2021 as stated in Staff's explanatory intro page accompanying the corrected exhibit). The proposal was submitted for an April meeting, but the item was postponed and discussed at a later meeting date.
 - The current Exhibit 3 ("REVISED Newly Installed Commission Proposal") is the same document that I submitted for your review in the 6/1/21 Council Meeting, upon learning that Staff had not submitted the 2021 OGC Proposal to Council or accounted for the changes adopted by motion on the dais in the 6/1/21 Staff Report description of the 2021 OGC's final proposal.

(2) Minor Corrections to Staff's Proposed Ordinance Language

I believe the new Ordinance revisions recommended by Staff accurately reflect the bulk of the 2021 OGC's recommendation and appreciate Staff's recent efforts to incorporate the Commission's work into their draft Ordinance. However, if Council wants to move forward with the draft Ordinance, there may be two technical corrections needed due to an alteration Staff made to the placement of language drafted by the Commission.

Specifically, Staff has opted to plug the transparent cure and correct "posting requirement" from the Commission's revision to Section 2-92.4 (Notices and Postings) into Section 2-93.2 (Complaint Procedures). That's certainly a reasonable approach if there is a desire to touch as few portions of the Ordinance as possible. If Council prefers Staff's placement of that language into Section 2-93.2, the verbiage that was pulled from the Commission's proposal for Section 2-92.4 would need to be updated to reflect the new placement into the Complaint Procedures section, as follows:

- The Commission's language referred to the OGC's website being maintained "*in accordance with subsection b herein*" because it was contained in Section 2-92.4 (Notices and Postings). This would need to be changed to "*in accordance with Section 2-92.4(b)*" to reflect the new placement.
- The Commission's language refers to "*complaints brought pursuant to Section 2-93.2 of this Ordinance*" (again, because it was intended for a different section). This would need to be changed to "*complaints brought pursuant to this section.*"

(3) The 2020 Subcommittee Proposal

In the event Council considers the 2020 "Subcommittee's Proposal" (Exhibit 1) instead of the more recent proposal, I'd like to flag a concern which was not identified in the Staff Report: The 2020 Subcommittee's proposed revision to Section 2-93.2(a) requires complaints alleging a violation of Section 2-91 to "be filed a (*sic*) no more than ten (10) calendar days after the initial appearance of the item on a meeting agenda." In the case of City Council meetings, in which items must appear on the agenda twelve days prior to the meeting, the proposed change would functionally remove the public's ability to lodge a complaint about actions in a Council meeting which stray beyond the boundaries of a properly noticed and agendized item. I don't believe this was an intended consequence of the drafters, but it signals a need to carefully evaluate the timing implications and language in this proposal if there's a desire to move forward with any portion of it.

Thank you for your consideration and dedication to this issue.

Best regards,
Krystal LoPilato
Open Government Commissioner (2021)

From: [Krystal LoPilato](#)
To: [Marilyn Ezzy Ashcraft](#); [Malia Vella](#); [John Knox White](#); [Tony Daysog](#); [Trish Spencer](#)
Cc: [Lara Weisiger](#); [Elizabeth Mackenzie](#)
Subject: [EXTERNAL] Item 6-G re Sunshine Ordinance Revisions - 7/20/21 Council Meeting
Date: Tuesday, July 20, 2021 10:15:04 AM

Good morning Mayor, Vice Mayor, and Councilmembers,

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meeting which stray beyond the boundaries of a properly noticed and agendized item. I don't believe this was an intended consequence of the drafters, but it signals a need to carefully evaluate the timing implications and language in this proposal if there's a desire to move forward with any portion of it.

Thank you for your consideration and dedication to this issue.

Best regards,
Krystal LoPilato
Open Government Commissioner (2021)

From: ps4man@comcast.net
To: [Marilyn Ezzy Ashcraft](#); [Malia Vella](#); [John Knox White](#); [Tony Daysog](#); [Trish Spencer](#)
Cc: [Eric Levitt](#); [Yibin Shen](#); [Lara Weisiger](#)
Subject: [EXTERNAL] Item 6-G on July 20 Regular Council Agenda-Amendments to Sunshine Ordinance Enforcement Provisions
Date: Saturday, July 17, 2021 4:10:50 PM

Dear Mayor Ashcraft, Vice-Mayor Vella & Council Members Knox-White, Herrera Spencer and Daysog:

The City Attorney's June 1 statement that an OGC enforcement proceeding is a quasi-judicial process renders all three of the enforcement alternatives presented as inappropriate and unlawful. I believe a fresh look at the issue from this new quasi-judicial perspective is required. The basis for this conclusion follows.

Late in 2018 the City Attorney determined that a OGC "null and void" order was a usurpation of the legislative authority of Council, thus rendering it advisory only. On Feb. 4, 2020, Council amended Section 2-93.8 of the ordinance to provide that in response to complaints, the OGC "may recommend to the originating body steps necessary to cure or correct the violation."

At the same Feb. 4, 2020, meeting, Council directed the OGC and the City Attorney to collaborate in drafting additional language in section 2-93.8 to give the OGC recommendations some "teeth". In the course of that process a good faith proposal was made by Council Member Knox-White and refined by OGC Commissioner LoPilato which the OGC approved on May 3, 2021, and is now submitted to Council.

On June 1, 2021, when the City Attorney adopted a view that I had urged since 2018, that the enforcement function of the OGC is quasi-judicial, not legislative, it entirely changed the legal topography, so to speak.

Council can choose to accept or reject advice from City agencies recommending policies. However, a quasi-judicial decision is not a policy decision. It is an application of City law as expressed in our Municipal Code to a particular fact situation. Thus, it is a legal determination that Council cannot accept or reject by a simple majority vote. The City is required to implement the decision or amend Sec. 2-93.8 to provide an appeal to Council, that requires a de novo hearing that performs the same legal analysis required of the OGC. The city already has ordinances to guide this process in the quasi-judicial functions of other named city agencies. AMC Sec. 30-25 et. sec. That section also needs to be amended to add the OGC to the list of city agencies to whom it applies. I suggest that in the case of an OGC appeal no fee should be required from any party.

This still leaves the thorny issue of the status of any City action while the Complaint against it is pending. I believe that the language contained in the Exhibit 2-REVISED Newly Installed Commission's Proposal adequately deals with the issue. The suggestion of the City Attorney that the ordinance should simply "encourage" maintaining the status quo puts the OGC right back in the toothless position it has been in since late in 2018 and wastes the good efforts of Council Member Knox-White and Commissioner LoPilato.

I suggest that the issue be referred back to the OGC and the City Attorney for the development of alternatives that are consistent with the quasi-judicial nature of the complaint process.

Sincerely,

Paul Foreman