

**From:** [ps4man@comcast.net](mailto:ps4man@comcast.net)  
**To:** [Lara Weisiger](#)  
**Subject:** [EXTERNAL] FW: Item 6-G on July 20 Regular Council Agenda-Amendments to Sunshine Ordinance Enforcement Provisions  
**Date:** Monday, October 4, 2021 2:54:55 PM

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Lara,

Below is the letter I sent to city council on July 17 which is now pertinent to tonight's OGC meeting. Please forward this to the OGC members and include in the correspondence file for Items 3-A and 3-C.

Paul

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**From:** ps4man@comcast.net <ps4man@comcast.net>  
**Sent:** Saturday, July 17, 2021 4:11 PM  
**To:** Marilyn Ashcraft <mezzyashcraft@alamedaca.gov>; Malia Vella <mvella@alamedaca.gov>; John Knox White <jknoxwhite@alamedaca.gov>; Tony Daysog <tdaysog@alamedaca.gov>; 'tspencer@alamedaca.gov' <tspencer@alamedaca.gov>  
**Cc:** 'Eric Levitt' <elevitt@alamedaca.gov>; 'yshen@alamedacityattorney.org' <yshen@alamedacityattorney.org>; 'Lara Weisiger' <lweisiger@alamedaca.gov>  
**Subject:** Item 6-G on July 20 Regular Council Agenda-Amendments to Sunshine Ordinance Enforcement Provisions

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

October 4, 2021

ATTN: Open Government Commission of the City of Alameda, California

RE: Items 3B and 3C - Agenda of the October 4, 2021 meeting of the Open Government Commission

Dear Members of the Open Government Commission,

After reviewing the proposed changes to the OGC Bylaws and Complaint Procedure, and having had many years of leadership experience in organizations that adhered strongly to the practices mandated by Robert's Rules of order which are nearly identical to those of Rosenberg's Rules which are the rules official adopted for governance by the City of Alameda, it is my considered opinion that since the mandates of the State's Brown Act and Alameda's Sunshine Ordinance are to optimize transparency related to the operations of our government, and since oversight of this function has been assigned to the Open Government Commission, I believe that the Commission's governing documents and procedures should be crafted in such a manner as to optimize the effectiveness of the Commission which depends in large part on the participation of the Citizens of Alameda.

To this end, I am suggesting changes to the documents currently under consideration for revision which, in my opinion, will better facilitate optimal participation of the Public in carrying out the mandates of the Brown Act and Sunshine Ordinance.

Some of the changes I am offering are fairly minor. But others incorporate enhancements that I believe deserve careful and thoughtful consideration by the members of the OGC and members of the Public. I am, therefore, suggesting that deliberation and decisions related to Items 3B as related to the OGC Bylaws, and Item 3C as related to the Complaint Procedure, be tabled until a future meeting of the OGC so as to allow sufficient time for a careful review of these suggested modifications to the revisions of these documents currently under consideration by this body and members of the public

Thank you for considering the attached modifications I am submitting and for my proposal to defer deliberation and action for the purpose of allowing time for their proper evaluation.

Jay Garfinkle

**City of Alameda Open Government Commission**  
**PUBLIC SUNSHINE ORDINANCE COMPLAINT PROCEDURE**

Consistent with the language and, **more importantly, with the spirit** of the City of Alameda Sunshine Ordinance (Ordinance) to provide the most open government possible (see Alameda Municipal Code Chapter II, Article VIII, Sections 2-90 through 2-93), **all inferences and evidence shall be viewed in the light most favorable to the petitioner.**

**A. Initial Communications About Sunshine Ordinance Concerns**

It is the goal of the Open Government Commission (“OGC” or “Commission”) to help the public gain access to public records and meetings. The Staff supporting the OGC will therefore work with members of the public to help achieve such access in order to avoid the need for filing complaints with the OGC. **(Who, name(s) and/or title(s), comprises “the Staff supporting the OGC”?)**

Members of the public are encouraged to contact the City Clerk to express any requests or concerns they have regarding the City’s compliance with the Sunshine Ordinance so that Staff may work with them to resolve the issue, where possible.

1. The City Clerk may be reached at **[email]** or **[phone]** or **[address + business hours]**.
2. The City Clerk shall discuss the request or concern with the member of the public and may attempt to resolve the request or concern. Staff from the City Attorney’s Office may also assist in this process. **A record of the discussion shall be kept and provided to the member of the public within two business days and shall be included in the agenda for the next meeting of the OGC. The member of the public shall be offered the opportunity to discuss the matter further at the relevant meeting of the OGC. (For purposes of the operation of the OGC, Friday is to be counted as a “business day”.)**
3. **Any member(s) of the OGC may elect to discuss the report during the meeting and the OGC may move to promote the report to the status of a complaint which will be developed into the proper format of a complaint and placed on the agenda of the next meeting of the OGC.**
4. **If unable to immediately facilitate access to a desired record or otherwise satisfactorily resolve the member of the public’s concerns to their satisfaction, the Staff shall advise the member(s) of the public of the right to file a complaint with the OGC and to pursue the complaint process and shall send the complainant a packet of information regarding the complaint process, including this complaint Procedure. If the initial contact by the member of the public has been made timely with regard to the filing of a complaint, an additional allowance shall be granted for the filing of a subsequent complaint consistent with the intervals allowed for such filing.**
5. **If, during the course of a subsequent public meeting of any Council, Commission, Committee, or Board, the public is first made aware of any action that might reasonably be expected to have generated a complaint following such action, time limits found in the Sunshine Ordinance notwithstanding, members of the public shall be allowed an appropriate interval following such meeting for the timely filing of a relevant complaint.**

**Please note that under the Sunshine Ordinance, a formal complaint must be filed no more than fifteen (15) days after an alleged violation of the Sunshine Ordinance.**

Members of the public should stay aware of this deadline during initial discussions with City

Staff. ~~In order to preserve all rights under the Sunshine Ordinance, it may be necessary for a member of the public to file a Complaint Form while they are continuing to work with Staff on possible resolution.~~ As noted below, complaints may be withdrawn any time prior to the Complaint Hearing.

**B. Filing a Complaint**

1. A complaint is “filed” by submitting the Sunshine Ordinance Complaint Form to the City Clerk via mail, fax, electronic mail (e-mail), in person, or via electronic submission through [REDACTED]. If a free-standing letter asserting a Sunshine Ordinance violation or concern is received, the City Clerk shall provide the Complainant with a Complaint Form for completion and submission, or with information on how to submit a complaint digitally via [REDACTED]. ~~The free-standing letter may be attached to the Complaint form if so desired by the complainant.~~
2. Upon receiving the Complaint Form, the City Clerk will notify the full Open Government Commission and the City Attorney’s Office within **forty-eight hours** that a complaint has been filed. A copy of the Complaint Form **along with relevant attachments** shall be forwarded to the **OGC and the** City Attorney’s Office, as described below. City Staff, will determine staffing, if any, for the representation of

the City Department or policy body alleged to have violated the Sunshine Ordinance (the “Respondent” or “City”).

3. ~~Separately, the City Clerk shall also send the Complaint Form to the Attorney supporting the OGC (“Commission Attorney”) to begin the process of preparing any appropriate instructional documents for the OGC. The City Clerk may also advise the Commission Attorney whether resolution discussions with the Complainant are ongoing and the date of the anticipated hearing.~~
4. The City Clerk will consult with ~~all relevant parties, including the Complainant and~~ the Open Government Commissioners, to schedule a Complaint Hearing as soon as practicable and no later than thirty (30) business days from the date the Complaint Form is filed, unless all relevant parties agree to a later date.
5. In accordance with the Sunshine Ordinance, no complaint will be ~~accepted~~ **heard** by the Commission against a member of the City Council or an officially declared candidate within forty-five (45) days of a City election.
6. Complaints may be withdrawn any time prior to the Complaint Hearing.

### **C. Pre-Hearing Submissions and Analysis**

Once a Complaint is filed, several additional steps may occur:

1. The City Clerk shall promptly provide the Complaint Form and any additional information submitted by Complainant to the City Attorney (counsel for Respondent) and to the ~~Commission Attorney OGC~~, no later than two (2) business days after receipt of the Complaint.
2. City/Respondent may submit a Position Statement to the City Clerk and the ~~Commission Attorney OGC~~. The Position Statement, if any, should be submitted within a reasonable time to allow it to be reviewed by the Complainant and ~~Commission Attorney OGC~~. Upon receiving the Position Statement from City/Respondent, the City Clerk will promptly provide the Position Statement to the Complainant ~~and the OGC~~ for their review and consideration.
3. Complainant may, but is not expected or required to, provide additional arguments, evidence, or responses to the City’s Position Statement at any time before or during the Complaint Hearing. Complainants are encouraged to provide any such additional arguments, evidence, or responses to the City Clerk at least ~~thirteen (13)~~ **ten (10)** calendar days prior to the Complaint Hearing if Complainant wishes to have such information included in the initial agenda packet and considered in the Neutral Statement of the Case provided to the OGC (see below).

Information submitted within ~~13~~ **10** calendar days of the hearing may still be considered by Commissioners, but Complainants should try to provide information relevant to their Complaint as early as possible in the process.

~~The Commission Attorney responsible for supporting the OGC shall conduct a prehearing analysis of the materials submitted by both parties, and may further provide a public or confidential written “Neutral Statement of the Case” to the Commission, which may be supplemented from time to time. This document, if provided, is intended to be neutral supportive guidance for Commissioners in their analysis of the Complaint file and is not binding on Commissioners in any fashion.~~

#### **D. The Complaint Hearing File**

In accordance with the Sunshine Ordinance, the written agenda for all Open Government Commission meetings, including Complaint Hearings, must be posted seven (7) **business** days before a regular meeting or twelve (12) **business** days before a special meeting. Whenever a Complaint Hearing is on an Open Government Commission meeting agenda, all documents necessary for the adjudication of the Complaint will be included with the agenda and available to the public.

The agenda will contain a Staff Report prepared by the City Clerk setting forth the dates on which items were submitted and any other significant and undisputed dates relevant to the topic of the Complaint (e.g. date of a City Council meeting in which an alleged violation occurred). The Staff Report shall include a statement alerting the public that additional arguments, information, and evidence may be presented by both sides up to and during the Complaint Hearing. The Staff Report will attach the following exhibits (the "Hearing File") with a notation indicating the source of the materials, as set forth below:

- Complaint and Accompanying Evidence (Complainant)
- City's Position Statement and Accompanying Evidence (City) (*if any*)
- Complainant's Reply to Respondent's Position Statement (Complainant) (*if any*)
- Non-Confidential Neutral Statement of the Case for Commissioner Consideration (Commission Attorney) (*if any*)
- Public Correspondence (*if any*)
- **Record of pre-complaint filing of discussions, including recommendations made to the complainant.**

Any additional materials or correspondence submitted by either party or the public will be added to the Hearing File with the date of submission and source of material clearly identified. Notice of such additions will be noticed and included in an updated agenda upon their receipt. Such notice shall be provided directly to all recipients of the initial agenda publication.

All members of the OGC are responsible for being familiar with the complaint issues prior to the hearing.

**(Isn't this a "given"? Is it necessary to state this in this policy and procedure statement?)**

#### **E. Public Hearing Procedure**

The Complainant and Respondent shall receive a written notice from the City Clerk of the date and time they are scheduled to appear before the OGC for a hearing and will be advised of the timeline for written submissions outlined above. During the public Complaint Hearing, the Commission will provide the parties with the chance to present evidence and make arguments.

The Complaint Hearing shall proceed as follows:

- Complainant's Opening Statement and Presentation of Facts: 10 minutes
- Respondent's Opening Statement and Presentation of Facts: 10 minutes
- Complainant's Reply to Respondent's Presentation of Facts (if needed): 5 minutes
- **Questions and/or comments from the public 2 minutes per speaker for the first five speakers and one minute per speaker number six and beyond.**

- Commissioner Questioning of Parties and Witnesses (if needed): 5 minutes per Commissioner. An additional 2 minutes will be allowed for response to each question.
- Complainant's Closing Statement: 2 5 minutes
- Respondent's Closing Statement: 2 minutes
- Commissioner Deliberations ~~and Decision~~
- Complaint clarification and/or correction of misstatements and/or misunderstandings voiced during the deliberations 2 minutes
- Further deliberation, if necessary, and decision

These procedures and maximum time limits are intended to create predictability and consistency for all parties, but the Commission is also committed to ensuring that members of the public feel comfortable navigating the process. Any questions about the Complaint Hearing procedure may be directed to the City Clerk before or during the hearing. Additionally, in special



circumstances, the time limits or order of presentation above may be modified at the OGC Chair's discretion or upon a supermajority vote.

The Commission may render an oral tentative decision on the matter at the conclusion of the hearing, and will render a formal written decision within thirty (30) business days of the conclusion of the hearing. ~~The formal decision shall be drafted by the City Clerk in consultation with the Chair of the OGC. Neither the City Attorney nor the complainant shall be permitted to participate in the drafting of the final formal written decision. The formal decision shall be included in the agenda and reviewed by the OGC during a public meeting prior to its being published and forwarded to the City Council and the appropriate official body(s), if any other than the City Council has been the subject of the complaint addressed in the report. The decision to accept or reject the report, or any portion of it, shall require a motion and second subject to amendment of a majority vote of those members present.~~

#### **F. Commission Findings**

After hearing all testimony, the OGC shall deliberate and render a decision on the Complaint by a majority vote.

The Commission may issue any of the following findings:

- Complaint Sustained with Cure and Correct Recommendation
- Complaint Sustained without Cure and Correct Recommendation
- Complaint Denied Not Sustained
- ~~Complaint Denied as Unfounded~~
- Complaint Dismissed on jurisdictional ~~or procedural~~ grounds if so determined by the OGC, not a finding on the "merits".

The OGC's ~~the formal report of the decision shall include as much detail related to the oral deliberations and decision as possible regarding the basis for the Commission's findings.~~ The OGC's decision shall be memorialized in a formal written decision after the meeting and both the Complainant and Respondent shall be notified in writing of the final decision.

~~Separate from the decision on the Complaint, upon a majority vote, the OGC may also direct any OGC subcommittees preparing reports or advisory letters to City Council on behalf of the OGC to consider including information about the circumstances giving rise to the Complaint at issue in their report or letter.~~

~~After review and approval of the final draft of the formal report by the OGC at the next meeting of the OGC the complaint and final formal report shall be forwarded to the City Council for inclusion in the Council's next published meeting agenda as a regular item of business.~~

~~(This last point is added to optimize the accuracy and completeness of the report and ensure that it will not be hidden in the Consent Agenda.)~~

~~In accordance with the Sunshine Ordinance, a person who makes more than two complaints in one 12-month period that are determined by the OGC to be "unfounded" shall be prohibited from making a complaint for the next five years.~~

~~((The above paragraph has been struck as, IMO, it is counter to the provision of transparency that is the mandate of the OGC. If this would require a revision of the Sunshine Ordinance, the OGC should so recommend to the City Council. Similar~~

recommendations should be made if necessary to facilitate the Complaint process now being reviewed and appropriately modified.)

The Remedies defined below, IMO, remain too vague and of minimal benefit to the constructive nature of the concept of transparency. If the OGC finds that an action taken by the Council or other formal body or office was in violation of the spirit of the Sunshine Ordinance, the offending body must be required to take appropriate action to mitigate any damage that may have resulted from their inappropriate action(s).

## **G. Remedies**

The remedies available for a Sunshine Ordinance complaint are set forth in Sunshine Ordinance section 2-93.8:

1. "If the OGC finds a violation of Section 2-91 (Public Access to Meetings), the Commission may recommend to the originating body steps necessary to cure or correct the violation. The originating body shall consider the Commission's recommendation and render a final decision on whether to accept or reject the Commission's recommendation, in whole or in part, as soon as practicable. Such a final decision is not subject to further administrative appeal except for judicial review. The City is encouraged to consider taking all necessary actions to maintain the status quo pending the originating body's review of the Commission's recommendation, to the extent doing so would not be prejudicial to the City." Sunshine Ordinance Section 2-93.8(a).

2. "If the OGC finds a violation of Section 2-92 (Public Information), the Commission may recommend to the City steps necessary to cure or correct the violation. The City Clerk, City Manager and/or City Attorney, as appropriate, shall promptly consider the Commission's recommendation and inform the Council of their final decision **which shall be included as an item in the Regular Agenda as noted in Paragraph "F" above.** Sunshine Ordinance Section 2-93.8(b).

"If a "cure and correct" recommendation is issued by the Commission, Staff will provide an update in the next meeting's Staff Update section about whether the Commission's recommendation was accepted or rejected.

#### **H. Documentation and Information Regarding Individual Complaints**

The City Clerk shall keep a file of all documents and a log of all Complaints filed with the OGC, including the date of each Complaint, the department/policy body against which it was made, the nature of the complaint, and its status. This file shall be maintained in compliance with its records and retention schedule.

Copies of all correspondence relating to a complaint shall be sent to all parties.

#### **GLOSSARY**

#### **FAQs**