

Report to City Council on Issues Arising from Implementation of the Sunshine Ordinance
Open Government Commission
Prepared by the OGC Sub-Committee on Practical and Problems Encountered on Administration
of the Sunshine Ordinance (Commissioners Rasheed Shabazz and Serena Chen)

Summary

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Background

The duties of the Open Government Commission (“OGC”) include advising the City Council on the implementation of the City of Alameda’s Sunshine Ordinance, developing goals to ensure the practical and timely implementation of ordinance, and report in writing to City Council at least once annually on any practical or policy problems encountered in the administration of the Sunshine Ordinance.¹

At the May 3, 2021, ~~OGC Commission~~ meeting, Commissioners agreed to form a subcommittee to address practical and policy problems encountered and appointed Commissioners Chen and Shabazz to meet and report back at the next OGC meeting. The Subcommittee members met three times via telephone in May, July, and September 2021. The Subcommittee identified issues in four areas: Sunshine Ordinance (Municipal Code); Hearings and Complaints; Public Records; and Public Meetings. These issues have been identified through discussions of the Commission and hearings of Sunshine Ordinance complaints, but the specific issues may have been outside the scope of the specific complaint.

After discussing the preliminary report at the ~~July 20/20/21~~ and ~~September 9/20/21~~ OGC meetings, the Sub-committee agreed to prepare a report to the City Council after a final approval ~~the~~ at the ~~October 4/4/21~~ OGC meeting.

¹ Sunshine Ordinance, 2-22.4 [b-d], Alameda Municipal Code.

Some of the issues initially covered by the Sub-Committee at the July 20 OGC 7/20-OGC meeting ~~are~~have since being ~~en~~ addressed: -staff plan on conducting an orientation for new OGC members later this year (2021); ~~proposed~~made amendments to the OGC By-Laws have been ~~proposed~~made and have been agendaized for the October 4~~will be agendaized on the 10/4/21~~ ~~OGC meeting for approval~~; and amendments to the complaint process have been presented and will be further discussed and (possibly adopted) at the October 4~~11/1/21~~ meeting.

Through the latter two processes outlined above, the roles and responsibilities of the OGC members and the CAO's office have been clarified, providing an operational framework through which new issues can be addressed. This report begins to address practical and policy problems focused on public records and public meetings. Besides the Annual Report authored by staff, this is the OGC's first report.

Key Findings

- New Commissioners had not received an orientation or copies of the bylaws prior to serving on the Commission or chairing meetings
- The Commission has experienced ongoing communication and relationship challenges with the City Attorney's Office (CAO)
- Community members have experienced challenges obtaining public records from the City, specifically relating to the Alameda Police Department via the CAO
- Ambiguous of non-existent definitions of "ad hoc committee" or "conflict of interest" has contributed to confusion

Issues

Public Records

The Sunshine Ordinance supplements the California Public Records Act (CPRA)² and seeks to ensure "easy and timely access to all public records."³ Three incidents of Public Records Act requests documented in this report suggest a pattern of obstructing the public's access to records.

Shabazz vs. City of Alameda

On January 22, 2019, freelance journalist and OGC Commissioner Rasheed Shabazz filed a PRA requesting records related to the Alameda Police Department and the implementation of a new

² Sunshine Ordinance, 2.90 - Introduction "This sunshine ordinance has been developed to codify the City of Alameda's public policy concerning participation in the deliberations of the City's legislative bodies and to clarify and supplement the Ralph M. Brown Act and the California Public Records Act and expanding its application and effectiveness to local governments."

³ Sunshine Ordinance, 2.90.1 - Goal.

law SB1421. City did not respond in a timely manner. On May 29, 2019, Shabazz filed a Sunshine Ordinance Complaint for a lack of a timely response. City then responded and informed Shabazz that there were no responsive records and attempted to dissuade pursuit of a hearing. At the July 2019 hearing of Shabazz' complaint, City claimed they received "hundreds of requests" per year. Staff recommended finding of a "technical violation." Staff also claimed no pattern existed of members of the public not receiving information requested.

At the July 23 and December 18, 2019 meetings, the OGC found the City violated the Sunshine Ordinance by not providing a timely response and sustained the complaint as a violation. The suggested remedy was including an annual report on Public Records Act requests.

Subsequently, City released info related to the in-custody death of Shelby Gattenby to Shabazz on December 19, 2019. The release of this information contradicts city's claim that there were no responsive records, instead, the City stated the information was being released in response to the conclusion of the Alameda County District Attorney's investigation.⁴

In a subsequent PRA, on Feb. 18, 2020, Shabazz requested PRA logs from the City dated 2013-2018. On March 11, 2020, City responded with logs for the following departments: HR, Clerk, Library, and City Manager's Office. The City Attorney's office requests were not included. After follow-up emails, on February 8, 2021, the CAO released logs for its office for three of the five years requested: 2014, 2017, and 2018.

Recommendation:

- Amend Sunshine Ordinance to require annual supplemental Public Records Act (PRA) report as part of the Annual Report
- The OGC recommend City Council direct staff to conduct report on PRAs, modeled after City of Oakland's Public Ethics Commission May 2021 "Spotlight on Oakland's Public Records System: A Data-Driven Review of City Agency Performance and Opportunities for Improvement."⁵
- In accordance with SO 2-22.4(d), the development of a 10-Year Report that will provide an overview of the creation of the Sunshine Ordinance and Open Government Commission ordinance and the accomplishments of the OGC and most importantly recommendations, based on the data and interviews with past Commissioners, staff, and complainants, as to how the Sunshine Ordinance and the Open Government.

Morris v. Alameda

⁴ Alan Cohen, Asst. City Attorney email to Rasheed Shabazz, December 19, 2019.

⁵ "Spotlight on Oakland's Public Records System: A Data-Driven Review of City Agency Performance and Opportunities for Improvement," Public Ethics Commission, City of Oakland, May 2021, <*****.oaklandca.gov/news/2021/spotlight-on-oaklands- public-records-system>.

On April 15, 2020, freelance journalist Scott Morris filed PRA for an arrest report. The CAO denied his request. Morris needed to follow-up multiple times to obtain records. Morris filed a complaint. Staff stated they would work with Morris to develop a policy on release of records. Staff did not follow through. Instead, staff inaccurately described Morris' complaint as "involuntarily suspended" in draft 2020 Annual Report. Following the February meeting and a PRA seeking correspondence between the City and Morris, Shabazz contacted Morris on February 24, 2021 who stated he had not heard back from the City and expected a hearing. He also shared that in his 2020 conversation with the City, Asst. City Attorney Cohen referenced a tweet from Shabazz recommended Morris file a complaint if he did not receive the records he requested.⁶ At the April 2021 hearing, Morris raised concerns about the CAO obstructing PRAs. At the hearing, although Olson Remcho was hired as an independent party, the attorney referenced Shabazz' tweet to Morris. This could be coincidental, or it may suggest coordination between the CAO and the independent Council.

Recommendations:

- CAO staff should clarify and publish its PRA policy on the City website.
- CAO staff should attend/participate in a Public Records Act training.

Olson Remcho Request

On April 6, Shabazz filed a PRA requesting invoices and contracts for Olson Remcho. City responded on April 14, the City responded claiming exemptions for agreement and invoices. However, in its report to the City Council in June 2021, staff included the costs for Olson Remcho's services in its proposal to remove the complaint adjudication responsibilities from the OGC. On June 1, 2021, Shabazz pointed out this contradiction to the CAO. On June 10 the information was subsequently provided to Shabazz.

These three incidents illustrate the persistence required by requesters to receive documents requested from the City, specifically those that involve the CAO's office.

Recommendation:

- The OGC encourages the City Council to include a similar evaluation metric for CAO as the Clerk currently has related to job performance.

Altogether, there were approximately 12 or 13 complaints between 2015 and 2021 [Exhibit 1].

EXHIBIT 1

⁶ Rasheed Shabazz email to Elizabeth Mackenzie, City Clerk, February 24, 2021.

Disposition of Sunshine Ordinance Complaints, 2015-2020

Source: Open Government Commission Annual Reports, (Rasheed Shabazz)

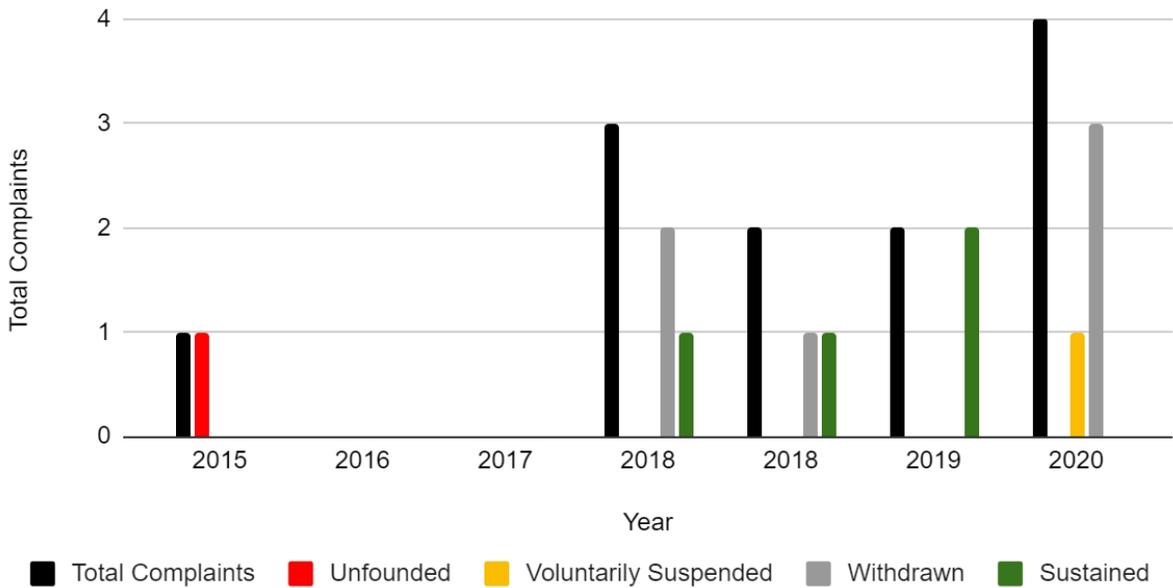
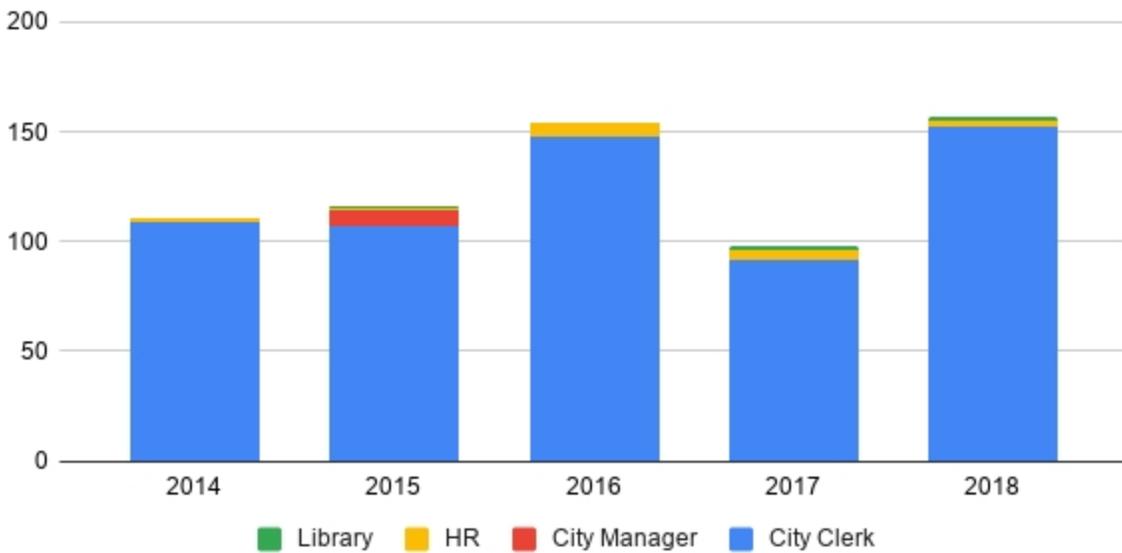


EXHIBIT 2

City of Alameda Public Records Act Requests, 2013-2018

Does not include City Attorney's Office



Public Meetings

The City of Alameda's exemption of **ad hoc committee(s)** to be exempt from Brown Act public noticing and access requirements has caused confusion because there is no definition of "ad hoc committee" in the definition section. By contrast, the Brown Act considers all commissions, commissions, boards or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body [to be] considered a "legislative body." The Brown Act does exempt advisory committees, composed solely of the legislative body that are less than a quorum of the legislative body - unless it is a standing committee. . . Groups advisory to a single decision-maker or appointed by staff are not covered as long as they are not created by formal action of the legislative body, based on a 193 opinion by the California Attorney General. 56 Ops.Cal.Atty.Gen. 14, 16-17 (1973)

Recommendation:

- CAO define ad hoc committees

Conflict of Interest

CAO provide clear definition of what circumstances constitute a "conflict of interest" and when recusal is required for the OGC and all "legislative bodies."

Garfinkle v. City of Alameda

In March 2021, Alameda resident Jay Garfinkle filed a complaint related to the City of Alameda's Legislative Agenda, specifically specific legislation not being included in the agenda prior to the meeting. The OGC found the complaint unfounded, 3-2.

Recommendation:

- The OGC recommends the City publish its legislative Agenda and following the state legislative session, note the specific bills lobbied for and their disposition.

Summary of Recommendations

- Develop goals and establish a timeline to address short-term and long-term "fixes" to ensure practical and timely implementation of the Sunshine Ordinance.
- The OGC recommends the City publish its legislative Agenda and following the state legislative session, note the specific bills lobbied for and their disposition.
- CAO define ad hoc committees
- CAO staff should clarify and publish its PRA policy on the City website.
- CAO staff should attend/participate in a Public Records Act training.
- Amend Sunshine Ordinance to require annual supplemental Public Records Act (PRA) report as part of the Annual Report

- The OGC recommend City Council direct staff to conduct report on PRAs, modeled after City of Oakland’s Public Ethics Commission May 2021 “Spotlight on Oakland’s Public Records System: A Data-Driven Review of City Agency Performance and Opportunities for Improvement.”
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- The OGC encourages the City Council to include a similar evaluation metric for CAO as the Clerk currently has related to job performance.