

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
TUESDAY - - - JULY 23, 2019 - - - 7:00 P.M.

Chair Henneberry convened the meeting at 7:00 p.m.

ROLL CALL - Present: Commissioners Little, Shabazz, Tilos and Chair Henneberry – 4.

Absent: Commissioner Schwartz – 1.

ORAL COMMUNICATIONS, NON-AGENDA

None.

AGENDA ITEMS

3-A. Minutes of the February 4, 2019 Meeting

Commissioner Shabazz requested that the minutes include that prior to the meeting, he had informed staff he would be late.

Commissioner Shabazz moved approval of the minutes.

Commissioner Little seconded the motion, which carried by unanimous voice vote – 4.
[Absent: Commissioner Schwartz – 1.]

3-B. Hearing on Sunshine Ordinance Complaint Concerning Alleged Failure to Respond Timely to Public Records Act Request

Chair Henneberry noted that Commissioner Shabazz would have to recuse himself since he filed the complaint.

The Assistant City Attorney gave a brief presentation.

In response to Commissioner Tilos' inquiry regarding the hundreds of requests per year, the Assistant City Attorney stated approximately 30 to 40 come through the City Attorney's office to determine if records could be disclosed; the other vast number of requests are handled routinely without the involvement of the City Attorney's office.

Commissioner Tilos inquired how requests are tracked, to which the Assistant City Attorney responded there is a designated paralegal who tracks the requests manually and assigns the matter to the respective attorney; stated he did not know why the request from the complainant was not tracked appropriately.

In response to Commissioner Tilos' inquiry, the City Clerk stated all requests are tracked manually, with exception of the City's SeeClickFix online system which is used primarily for Public Works maintenance requests, i.e. request to fix potholes, etc.

Chair Henneberry inquired whether the same system is used in the City Attorney's office, to which the Assistant City Attorney responded the City Attorney's office does not receive the requests initially, only the ones that need further evaluation regarding whether certain documents can be disclosed.

Chair Henneberry inquired whether a request is automatically acknowledged.

The Assistant City Attorney responded in the affirmative for most cases; stated sometimes the acknowledgement includes a time extension to provide a response depending on the request.

Commissioner Henneberry stated the complaint before the Commission tonight was skipped over in terms of all the deadlines and acknowledgements.

The Assistant City Attorney concurred with Commissioner Henneberry, stated the complainant's request was not handled timely or appropriately, unfortunately.

Commissioner Little inquired whether there is a standardized set of regulations that determine what can be disclosed and what cannot.

The Assistant City Attorney responded there are several exemptions under the Public Records Act that are not subject to disclosure based on the category; there are always gray areas in interpreting the categories; there is a catch-all provision as well about privacy interest that would be impacted by disclosure substantially outweighing the obligation to disclose, which is also a grounds not to provide the information; the requestor needs to be informed why information is not being disclosed.

Commissioner Little inquired whether there were no records to even review for this request, to which the Assistant City Attorney responded in the affirmative; stated the Police Department found no records responsive to the request.

Commissioner Little inquired whether there is now a process for making sure the Police are maintaining records post January 1, 2019 so that there would be something to review should another request come up.

The Assistant City Attorney responded in the affirmative; stated there are records pre-and post-January 1, 2019; if there is an incident that falls within the categories and a public records request is made, documents would be produced unless there was some other exception.

Commissioner Little inquired what processes have been put into place since this incident happened to make sure no more records requests are lost and whether the process is consistent or needs tightening up.

The Assistant City Attorney responded there is always room for improvement; stated the City Attorney's office is not aware that the situation happens routinely; Commissioner Shabazz's email from today indicates otherwise, but he is not aware of other incidents; the City Attorney's office will look into the incidents even though there was not a complaint filed at the time and to review why there was not a timely response on a couple of matters.

Commissioner Tilos inquired whether it was fair to say the City Attorney's office's response to public records request is to wait for a complaint to be filed before providing information.

The Assistant City Attorney responded in the negative; stated that he would not categorize the process in that way; the person designated to track the requests is usually very diligent and makes sure the requests are handled in a timely manner; this particular request seems to be an anomaly.

Commissioner Tilos inquired whether follow-up on the other records requests have been done to ensure they were answered timely, to which the Assistant City Attorney responded he cannot answer definitively.

Chair Henneberry stated it can be assumed that the other requests have been fulfilled because there have not been any complaints filed; the City would certainly be hearing from KQED and the East Bay Times if requests were not fulfilled.

The Assistant City Attorney concurred with Chair Henneberry, stated most people submitting a records request that is not fulfilled would not just ignore it; he is not certain whether or not the other requests have been followed-up but a review of the other requests can be done.

In response to Chair Henneberry's inquiry regarding when an email was sent by the City Attorney's office to the complainant, the Assistant City Attorney stated the email was sent on May 29, 2019 after the complaint was filed.

In response to Commissioner Little's inquiry regarding a response sent to the complainant on June 10, 2019, the Assistant City Attorney stated every attempt is made to resolve the complaint before having the matter come before the Commission.

Commissioner Little inquired whether perhaps the City Attorney's Office fulfilling several requests regarding the same issue was the reason the complainant's request was overlooked.

The Assistant City Attorney responded in the negative, stated the voluminous requests he mentioned were not a specific incident, requests were for any incident which fell into the new categories.

In response to Commissioner Little's inquiry, the Assistant City Attorney stated the complainant made a request for a broad variety of incidents.

In response to Commissioner Little's inquiry, Rasheed Shabazz, Complainant, stated there were multiple experiences where he did not received responses in a timely manner.

Mr. Shabazz gave a brief presentation providing background information on Senate Bill, facts related to his complaint, relevant State law related to Police records; commented on the importance of transparency and perception; and provided recommendations to make local government accessible to the public.

Commissioner Tilos stated he would like to see the statistical reporting regarding the public records requests; he would like to see some sort of penalty imposed on the agencies or departments that do not provide responses in a timely manner.

Chair Henneberry stated the Commission's decision does not go far enough and does not establish the framework for avoiding the situation from repeating itself; he is not comfortable signing it as is; it is not comprehensive enough; there should be guarantees from the City departments that when a citizen makes a request, it will be acted on in a timely manner; 39 out of 40 requests may have been fulfilled, but dropping the ball on one request in this egregious manner is not acceptable.

Commissioner Tilos stated the number of requests not been confirmed; the actual number could be lower.

Commissioner Little concurred with Chair Henneberry; stated that she is not comfortable signing off on the decision as it does not outline the expectation for making sure there are procedures put into place so that the situation does not end up back before the Commission.

In response to Chair Henneberry's inquiry, the Assistant City Attorney stated the staff report and decision points out that the matter was inadvertent rather than intentionally overlooking the complainant's requests; based on what he has heard from the Commission, he could draft a revised decision for the Commission to consider at the next meeting on October 7, 2019.

Chair Henneberry stated the perception from the City Attorney's office is the issue was inadvertent and unintentional, which are non-legal terms.

The Assistant City Attorney concurred with Chair Henneberry; stated a violation is a violation.

Commissioner Little stated she thinks it is important to bring up the topic of conflict of interest again; she is curious how legal counsel, which is the same counsel defending the incident, can advise the Commission.

The Assistant City Attorney stated part of the responsibilities of the City Attorney's office is to advise all boards and commissions, as well as the City Council; typically, the kinds of issues that may come up before the Open Government Commission are ones the City Attorney's office can advise on; conflict of interest has been discussed with the new City Attorney and he feels there is no conflict of interest; the City Attorney's role is to give legal advice; the Commission may accept the advice or not, but it does not mean there is a conflict of interest; it may just mean the City Attorneys has a different opinion than the majority of the Commission; unless the City Council indicates that it wishes the Open Government Commission to have outside Counsel, the intent is to continue to provide legal advice to the Commission.

Commissioner Little whether Commissioner Shabazz's circumstances as the complainant create a conflict of interest, yet the City Attorney's office involvement does not.

The Assistant City Attorney responded in the affirmative; stated a complainant, by definition, is not in a position to decide his or her own complaint; the City Attorney's office recognized in this particular case that the request did not get fulfilled and that there was a violation; the City Attorney's office has been up front about it and does not see a conflict of interest.

Commissioner Tilos concurred with Commissioner Little; stated it could be safe to say the conflict of interest is perceived but not real; he believes the Commission is powerful enough to consider the legal advice given by the City Attorney's office without conflict and be able to form its own opinions regarding the advice.

The Assistant City Attorney concurred with Commissioner Tilos; stated his office provides legal advice; the City Council and other Boards and Commissions do not always follow the advice, but it is within their prerogative; he hopes the advice being given tonight is consistent with what the Commission would follow, including adding language to the decision that indicates what should happen on a going-forward basis; he is ready to draft something for the Commission's consideration.

Chair Henneberry stated he would like the Commission to make concrete recommendations in the decision.

Commissioner Tilos stated he would like to see monthly or quarterly metrics about the number of requests made and fulfilled, not only for the City Attorney's office, but overall; until 100% can be seen, there is no progress toward fixing the problem or the inadvertent technical violations that could happen.

Chair Henneberry concurred with Commissioner Tilos; stated the request is reasonable considering the volume of record requests made annually; he would like to emphasize the need for an immediate acknowledgement of requests made.

Commissioner Little inquired whether an excel spreadsheet is used for the tracking, to which the Assistant City Attorney responded that he is not certain of the tracking method but will provide information at the next meeting.

Commissioner Little stated that she would like the City Attorney's office to review its processes and come up with internal suggestions.

The Assistant City Attorney stated that he has notes of the well-founded suggestions and will draft the changes to the decision.

The City Clerk added that her office usually always double-checks when copied on requests and has already included the new practice going forward.

In response to Commissioner Little's inquiry, the City Clerk stated often times the requests which come through the SeeClickFix system to the Clerk's office are not public records requests and are Code Enforcement or other requests, which the office has to reassign; the actual public records requests that come through to the Clerk's office are typically fulfilled within the 10 days because most of the information is not confidential and does not require extra review.

Chair Henneberry stated the direction is for staff to go back to the drawing board to restructure the decision so that the situation does not repeat itself.

The City Clerk clarified that the hearing will be continued to a date certain, October 7, 2019 for the decision to be reviewed.

Chair Little inquired whether the Commission would receive the revised draft decision prior to the agenda packet, to which the Assistant City Attorney responded in the affirmative; stated that he will provide the draft soon so that the Commission will have an opportunity to provide comments and it can be close to final form ahead of the October 7th meeting.

In response to Commissioner Tilos' inquiry, the Assistant City Attorney stated Commissioner's comments should be directed to him alone, not fellow Commissioners, to be compliant with the Sunshine Ordinance.

Commissioner Little stated Commissioners can reach out to one other Commissioner if there are any questions or to clarify anything.

COMMISSION COMMUNICATIONS

Commissioner Shabazz stated he will not be able to attend the upcoming Sunshine Ordinance training, but will watch the video.

Commissioner Little stated that she, too, will not be able to attend the Sunshine Ordinance training.

The City Clerk stated the Sunshine Ordinance Training will be on August 13th at 10:30 a.m. in Council Chambers; the training will be recorded so those who are unable to attend will be able to watch the recording online.

Chair Henneberry stated that he may not be able to attend the training as well, but will watch the video.

ADJOURNMENT

There being no further business, Chair Henneberry adjourned the meeting at 8:01 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

The agenda for this meeting was posted in accordance with the Sunshine Ordinance.