

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING  
MONDAY - - - NOVEMBER 1, 2021 - - - 7:00 P.M.

Chair Tilos convened the meeting at 7:06 p.m.

ROLL CALL - Present: Commissioners Chen, LoPilato, Montgomery, Reid, Shabazz and Chair Tilos – 5. [Note: The meeting was conducted via Zoom.]

Absent: None.

[Staff present: Chief Assistant City Attorney Elizabeth Mackenzie;  
City Clerk Lara Weisiger]

NON-AGENDA PUBLIC COMMENT

None.

COMPLAINT HEARINGS

3-A. Hearing on Sunshine Ordinance Complaint Filed on September 21, 2021

Dorothy Freeman, Complainant, and Paul Foreman gave an Opening Statement and Presentation of Facts.

Bradford Kuhn, Nossaman, City/Respondent, gave an Opening Statement and Presentation of Facts.

Mr. Foreman gave a Reply to the City/Respondent Opening Statement and Presentation of Facts.

Commissioner LoPilato inquired whether correspondence was submitted for the September 7, 2021 Closed Session; stated a written submission encouraged purchase of the entire 2.8 acres.

Ms. Freeman responded in the affirmative; stated that she probably made a statement; she has made so many that she cannot remember.

Commissioner LoPilato inquired whether the term “pre-development agreement” is a technical term.

Mr. Foreman responded in the negative; stated legally, there is no such thing as a pre-development agreement; a City ordinance states what has to go in to a Development Agreement (DA); two or three of the terms in the Settlement Agreement (SA) would also be in a DA.

Commissioner LoPilato inquired how an eminent domain proceeding can be resolved via settlement if certain segments have to be discussed in open session.

Mr. Foreman responded the actual negotiation has to be done in Closed Session; stated once negotiations are completed, the City Attorney could simply ask to present the SA at an open meeting of the City Council for consideration and public input; if it is not accepted, it would start over again; compared the matter to labor negotiations.

Commissioner LoPilato inquired how the matter would be agendized, to which Mr. Foreman responded it would have to be agendized for the next meeting; stated in February, the City indicated an agreement was reached in principle; he would not be worried about a two-week delay between a Closed Session and the final presentation.

In response to Commissioner Reid's inquiry regarding appraisals, Mr. Foreman stated the question is not germane to the issue, but he could answer if there is no objection from the Commission; he attended a neighborhood meeting at Jean Sweeney Park where Mayor Ezzy Ashcraft explained the original appraisal was approximately \$1 million and that the railroad came back with \$8 million; the Mayor further explained that due to the large disparity, the Council got a second appraisal, which was significantly higher and led Council to believe the City could not afford to purchase the entire property; he asked the Mayor about the second appraisal; the Mayor said the City Attorney instructed it cannot be revealed.

In response to Commissioner Reid's inquiry, Mr. Kuhn stated there was a confidential exchange of appraisals between the City and Union Pacific in the middle of litigation; pursuant to an agreement signed by the parties, the City is not allowed to disclose the valuation information presented by Union Pacific; he is able to say that the second appraisal was significantly higher; the Closed Session was necessary to discuss the risks of litigation on the potential exposure; he does not see any way to have candid dialogue in open session; he does not think it is fair to reach a decision in Closed Session and then ask for public input, but not be able to discuss the risks of the litigation and potential exposure; it puts the City Council in an unfair position; the ultimate outcome was the same because the SA was disclosed and reported out in open session; the details were fully laid out to the public.

Mr. Foreman stated the Council was not obligated to keep the appraisals a secret, but agreed to do so; the Council could have come to an open meeting to make the same disclosure that the Mayor and Mr. Kuhn just made and the public would at least have something to discuss; the Complaint is not about a bad decision, it is about a secret conclusion that was made without public input.

Commissioner Reid stated that she is trying to understand how the appraisal fits into the context of the current zoning; inquired about the current zoning of the property.

Mr. Foreman responded the current zoning on a small piece of the property is industrial and Union Pacific (UP) wants to raise to R2 and is also talking about density beyond R2

limits, which is why there is a provision about R2 in the SA; if the zoning is changed, the land will be a whole lot more valuable than it is today.

Ms. Freeman stated approximately 1.7 acres are zoned R2 already, leaving approximately 2.3 acres still zoned for industrial.

Mr. Kuhn stated no one is disputing that the SA in no way changes the zoning of the property and somehow eliminates the requirement for Union Pacific to come back to the City Council; Union Pacific has to go through an entire development application process, get public input, and get City approval to develop the property, which is not taken off the table or changed whatsoever by the SA.

Mr. Foreman stated that he agrees Union Pacific has to do everything, but the agreement greases the rails; requested the Commission to read it and come to its own conclusion about whether it is germane.

Commissioner Reid requested Ms. Freeman to elaborate on the background of the land acquisition and how much community involvement there was up until the Closed Session.

Ms. Freeman responded in 2013 when the City started out to develop the Park, she worked with the Recreation and Parks Department on community meetings which had over 300 people attended, as well as 700 to 800 people who participated in an online survey; the survey included options for what people wanted to have in the Park, which was very close to what Jean Sweeney envisioned; as the Park was being developed, it was always understood that the Union Pacific land would become part of the Park; the map portrays that the Union Pacific land is part of the Park, including the bike path; in 2018, the City filed the eminent domain case in public; the case explained that the 1.7 acres zoned R2 was too expensive for the City to purchase; the rest of the 2.8 acres was addressed in public; people believed the Union Pacific land would be added to the Jean Sweeney Park; all the community outreach indicated the land would eventually become part of the Park.

Mr. Kuhn clarified a portion of the Union Pacific corridor was never going to be part of the Park; every public project always has public involvement and input; candidly, any piece of litigation involving the City has some sort of public dialogue because taxpayer dollars are at stake, but does not bring the matter outside of the exemption which allows the City Council to meet in Closed Session to discuss and resolve pending litigation; otherwise, every matter the City decides regarding litigation would be open to the public, which cannot be the case.

Mr. Foreman stated Complainants are not alleging that is the case; they are alleging when there is an obligation to do something in public, it has to be done in public; it does not have to disrupt the negotiation process or the closed nature of it; with ordinary litigation that had nothing to do with public hearings or a claim against the City, there is no obligation to allow public input; it is a private matter; this is a public matter that involves a public park, housing and zoning; every time the City has litigation, it does not mean it has

to be done in secret from start to finish; this is an exception.

In response to Chair Tilos's inquiry, Mr. Kuhn stated the public does not get to control the litigation; the details were disclosed and made available to the public; if the public wants to provide participation, they still have the ability to do so; they can voice their concerns and tell the Council to acquire more land; the open session resolution to acquire the property to begin with was done in accordance with the City Charter.

Mr. Foreman stated he and Ms. Freeman are here because they think the citizens had a right to have the proposal presented to the public once the negotiations were completed; whether or not the Council made a good economic decision is not being challenged.

Commissioner LoPilato stated the Commission needs to be cautious about too much party to party debate, which is outside of the procedures.

In response to Commissioner LoPilato's inquiry, Mr. Kuhn stated the City was quickly approaching a trial date; typical when that happens, the parties want to continue the trial later or take it off calendar if they are engaging in negotiations; that happened in this case; there were preliminary discussions with Union Pacific in February; it took the City until September to get somewhere; the litigation was still active and pending at the time of the Closed Session; the dismissal of the case did not happen until after Closed Session was completed and the SA was signed.

Mr. Foreman stated he just wanted the Commission to read the stipulation.

Commissioner LoPilato stated that she has read and is familiar with the stipulation; it is beneficial to understand that when a SA is signed by one party, the offer can still be revoked; if an offer is made and an agreement laid out, then the other party listens to an open session and learns all the weaknesses of the City's case, the whole deal can be ended with a simple email to the City Attorney saying the deal is off.

Mr. Kuhn concurred with Commissioner LoPilato; stated anyone can revoke a signature at any time.

Commissioner LoPilato stated Mr. Foreman outlined what a compliant process under the Complainant's interpretation would look like; inquired what that timeline and process could entail.

Mr. Kuhn responded City Council could have gone into closed session, discussed the matter, stated no decision was reached, put it on a future Council agenda in open session, get public input and reach a decision; he thinks it is form over substance because the public did have a chance to weigh in on the matter; Ms. Freeman even submitted a letter before the City Council hearing; the Recreation and Parks Department held public meetings about potential revisions to the Park layout and design; ultimately, the City Council gets to make decisions on pending litigation, weighing the risks and the budget; laying the cards out on the table for Union Pacific to see would completely change their

negotiating position.

Commissioner LoPilato inquired whether the settlement is typically considered to be under proceedings or if there is a definition for the term.

Mr. Kuhn responded in the affirmative, stated it is all one and the same; he would either settle an eminent domain action via SA, which calls for the exact terms and dismissal after the fact pursuant to a stipulated judgment where the Court transfers the property.

Commissioner Reid inquired whether the final Master Plan approved by Council in 2016 includes the parcel in question.

Ms. Freeman responded in the affirmative; stated the design includes the 4.52 acres along the southern border.

Commissioner Reid inquired why the public would not have the right to know about the reduction in property if it was part of the Master Plan.

Mr. Kuhn responded that the public did know about it; the terms were reported out in open session; there were Recreation and Parks meetings well before which discussed potential reductions and changes in size; Ms. Freeman was aware of it before the meeting and submitted a comment letter on it; nothing was hidden from the public; the City decided to resolve pending litigation in Closed Session so they could talk about risks and potential ramifications of moving forward with acquiring the entire corridor and whether or not there was funding.

Ms. Freeman stated from copies she obtained of Court case documents and the Recreation and Parks Director's meeting with the public to explain that the west end of the park had to be redesigned, she deduced the change; why it had to be redesigned was not explained; one chart said: "not City-owned property" which was subsequently removed; a blank space showed it would no longer be considered as part of the Park; what was going on was never discussed in public; she was assuming that this was the issue due to the Court records and the meeting about the redesign of the park, but it was never stated by the City.

Commissioner Reid inquired whether Mr. Kuhn was involved in the litigation with Union Pacific, to which Mr. Kuhn responded in the affirmative.

Commissioner Montgomery inquired whether there would have been any effect on the negotiation or settlement if the matter been placed on a later agenda date.

Mr. Kuhn responded that he does not want to speculate, but would assume that if there was an open session and the City disclosed valuation, potential exposure and the risks of acquiring the entire corridor, it would significantly impact the negotiating position with Union Pacific.

Mr. Foreman stated that he thinks Mr. Kuhn's explanation is contrived; the City negotiated with Union Pacific over a long period of time; the City knew the strengths and weaknesses of the railroad and vice versa; Council came to a consensus as to what would be a good deal; the railroad agreed to it; all the City Attorney had to do was ask whether it could be presented to the public in an open meeting; at the public meeting, nothing has to be disclosed if it would be harmful; the City could have simply stated, like the Mayor did, that the appraisal cannot be disclosed; it still gives the public a chance to speak out and feel they have real input and someone is listening to them; let the public feel they are participating in open government.

Commissioner Reid inquired why the City would agree to pay a previously agreed upon price for the full parcel and now decide to pay less than half for a lot less land; further inquired whether the zoning was different in the appraisal process.

Mr. Kuhn responded in the affirmative; stated the zoning was different; the original appraisal was done incorrectly; the trail appraisal prepared for the City was massively more expensive than the original \$1.1 million deposit.

Commissioner Reid inquired whether the appraisal for housing would add much higher valuation than for park land, to which Mr. Kuhn responded in the affirmative.

Commissioner Reid inquired how long Mr. Kuhn has been contracted with the City on the project, to which Mr. Kuhn responded he became involved a little over a year ago.

Ms. Freeman gave a Closing Statement.

Mr. Kuhn gave a Closing Statement.

#### Speakers:

Jay Garfinkle, Alameda, stated that he does not find the City Attorney's argument compelling; the City Council and City Attorney's office have a tendency to disregard the people's constitutional right to know what the City government is doing; he is disappointed the Council chose to disregard the will of the people.

Jenice Anderson, Alameda, stated that she knew the reasons for the changes to the park project, including Union Pacific changing the land price; she does not follow Ms. Freeman and did not get the information from her, nor is she part of the group bringing forward the Complaint; the public knew about the changes to the plan before the September 7<sup>th</sup> meeting, so it was not out of the blue; the person who did the bulk of the Complaint was banned from bringing Complaints to the OGC for several years; she feels if anyone else did a by-proxy Complaint, it would be called out; she thinks the whole Complaint is ridiculous.

Commissioner Reid stated the closed session discussions placed a veil on the appraisal procedure; whether or not the valuation was based on housing or parkland would have a

huge variation.

In response to Chair Tilos's inquiry regarding timing Commissioners, the City Clerk stated the Complaint Procedure does not list a specific time.

Chair Tilos stated he would like to start with five minutes; if more time is needed, Commissioners can request more, up to nine minutes.

Commissioner Reid stated that she was surprised Mr. Kuhn was involved; it seems there is considerable bias; the public was involved from the very beginning; then, suddenly, the Council decided not to include the public in the litigation section of the process; the Sunshine Ordinance provides for more transparency; the public has the right to know the reasons regarding the appraisals and has the right to participate; the neighbors should be included in the process.

Commissioner Chen stated she has been following the Jean Sweeney Park story since the beginning; everyone who participated in the process feels like part-owners; to have this suddenly happen is terrible; it is a threading the needle issue; under litigation, questions and decisions from the City Council cannot be disclosed; she would rule in favor of the City, but the way it came down does not pass the smell test; the OGC has the opportunity to recommend how to make it better; the neighbors and community still have many future opportunities to speak up on how the land is or is not developed; the iron gates have not shut; she used to follow eminent domain and condemnation of properties, so she realizes a lot of regular folks might not fully grasp how a City can condemn properties for City use, but cannot pay less than the land's value; the OGC's role is to try to figure out a way to bring the community back into the process without jeopardizing the agreement; an open hearing should be held, but in a manner so that Union Pacific does not pull out; there are all kinds of dangers when the flood gates are open in the middle of litigation.

Chair Tilos stated if the Commission votes in a certain manner on the issue, it could be sent back and open up the gates.

Commissioner LoPilato stated that she does not think putting the item back on another agenda would open up the gates; the agreement has been signed; the Complainants acknowledged that the possible remedy of having it brought into open session, with the only goal to have a discussion, would not change the outcome; there is a flawed assumption by the Complainants that the public could ask the City Council questions whether in open or closed session; public comment can happen and Councilmembers can share their reasoning, but the forum for asking questions is to directly contact the Councilmember and ballot box power; there is not going to be an open session questions and answers on a SA; remedy-wise, there is not a lot to do; she thinks the OGC has the jurisdiction to look at the matter and make a decision; substantively, it falls within the pending litigation exception; she cannot imagine having attorney-client discussion in a public session; it would not serve the City's interests; when she thinks about how tax dollars are spent, she would like to be able to trust that the City can have effective

representation in the litigation, which requires being able to have private discussion about the pros and cons; eminent domain proceedings, including a SA, could probably be a subject of debate, but the proceedings seem proper; she is inclined to dismiss the Complaint, but would not find it unfounded; she was troubled by the concept of pre-development agreement; arguments could be made that the pre-development agreement functionally paves the way, but she does not think it legally does anything that takes it out of the pending litigation exception.

Chair Tilos stated that he concurs with Commissioner LoPilato's comments; there is definitely substance and he would not say the Complaint is unfounded.

Commissioner Montgomery stated that she concurs with Commissioner LoPilato's statements, as well as Commissioner Chen's comments; she is leaning toward denied at this point, but not unfounded; she believes there are things to look at; perhaps a recommendation could be made for the future.

Commissioner Reid stated that she agrees with Commissioner Chen that the matter does not pass the smell test in terms of transparency for the community; she is not suggesting the agreement be withdrawn or substantial changes made, but she wonders what harm there is in suggesting to the City Council reagendize the item to make the whole process more transparent; the Commission is here for the public; she is leaning towards transparency and providing the public with as much information as possible and an opportunity to participate.

In response to Chair Tilos's inquiry, the Chief Assistant City Attorney stated that when Mr. Kuhn was discussing the ability to exit the agreement, he was talking about the point when the matter came to closed session in September; if there had been a delay at that point or some question on whether or not the City was going to agree to certain terms, Union Pacific or the City could have exited the agreement; at this point, there is a signed SA; she is not prepared to opine on the ramifications of the City trying to get out of the SA, but will say it is definitely beyond the scope and jurisdiction of the OGC; to clarify the point, Mr. Kuhn's statement had to do with the status at the beginning of September, not now.

Chair Tilos stated since the matter did not pass the smell test, he would consider kicking it back but it would not change the outcome; it is a done deal; he would not say the Complaint is unfounded because there is definitely something going on; Complaint denied seems to be more appropriate.

Commissioner Reid stated that she agrees with Chair Tilos; bringing it back would give the public an opportunity to be aware and weigh in; this has been going on since 2013; leave the doors open to allow the public to be aware; she does not see the harm in it since the outcome will not change; the OGC would be doing its job to create transparency.

Chair Tilos stated the public is definitely aware now; it is after the fact, but there are quite a few attendees at the meeting.



Commissioner Chen stated none of the possible changes are a done deal; decisions will require hearings; the hearings will give the entire community, especially the neighbors, an opportunity to weigh in as the Council deliberates on whether or not to change the zoning or allow a development; it is obvious the Union Pacific attorneys just wanted to get more out of the deal; they are doing their jobs; it is all part of a legal game; there are many more times to get a bite of the apple; the process is not closed; the community has opportunities; everyone will be on alert to practice their democratic rights.

Commissioner Montgomery stated the public could address the matter by speaking at a Council meeting on a non-agenda item or could write a letter to Council; inquired what would be the value of reagendizing the item.

Chair Tilos stated Commissioner Montgomery's understanding is correct; reagendizing the item would just be reopening the discussion; the Complainants just want the Council to be more on record about why they made their decisions; it is not an effective use of the Council's time and taxpayers' dollars.

The Chief Assistant City Attorney directed the Commissioner's attention to the issue at hand, which is precisely if they have concluded whether there is a violation of the Sunshine Ordinance or the Brown Act; stated there is a litigation exception for conferring with legal counsel regarding pending litigation when discussion in an open session would likely and unavoidably prejudice the position of the City; anyone making a motion should frame it with this specific provision in mind; if there were to be a vote to sustain, there should be a finding of how this falls outside of the litigation exception.

Commissioner Reid stated Sunshine Ordinance Section 2-91.10, Council is not required to hold a Closed Session; she is leaning toward sustained to open up the process, let the public weigh in and not close the gates.

In response to Chair Tilos's inquiry, the City Clerk stated the way the Complaint Procedure is written, the Chair can waive the time limit or a supermajority vote is required to amend the times.

Chair Tilos stated he will extend the time one minute for each Commissioner.

Commissioner LoPilato moved approval of denying the Complaint on the basis that there was no violation of the Brown Act or Sunshine Ordinance as the matter fell within pending litigation exception.

Commissioner Chen seconded the motion, which carried by the following roll call vote: Commissioners Chen: Aye; LoPilato: Aye; Montgomery: Aye; Reid: No; Chair Tilos: Aye. Ayes: 4, Noes: 1.

In response to Chair Tilos's inquiry, the Chief Assistant City Attorney stated that she has enough information to draft a short written decision.

In response to Chair Tilos's inquiry, the City Clerk stated that she would send the final written decision to Commissioners via Docusign.

### 3-B. Hearing on Sunshine Ordinance Complaint Filed on October 4, 2021

Jay Garfinkle, Complainant, gave an Opening Statement and Presentation of Facts.

Bradford Kuhn, Nossaman, City/Respondent, gave an Opening Statement and Presentation of Facts.

Mr. Garfinkle replied to the City/Respondent Opening Statement and Presentation of Facts.

Commissioner LoPilato inquired whether Mr. Garfinkle's Exhibit 3 attached to his Complaint is the full set of documents he received that produced by the City.

Mr. Garfinkle responded in the negative; stated much of what was produced was repetitious threads.

Commissioner LoPilato clarified that she was asking about the larger exhibit which was 1,052 pages.

Mr. Garfinkle responded he thought he had pulled out the larger exhibit.

Commissioner LoPilato stated that she is trying to gauge whether the Commission has visibility into the full scope of the production, which sounds uncertain; inquired whether Mr. Garfinkle inquired about any of the specific redactions with the City Attorney's office representative that was communicating with him about the production before filing the Complaint.

Mr. Garfinkle responded that he does not know if he did; stated it took him a long time, at least a couple of weeks, to go through all the documents; while his Complaint was about the lack of explanation, he was also looking at what was being expressed between the lobbyists and City staff, much of what he thought was inappropriate; it was not just a matter of the redactions; he could not file a Complaint about what they were talking about, his Complaint was about the quality of the redactions; among all of the communications, he felt a number were inappropriate.

Commissioner LoPilato clarified that her question is whether Mr. Garfinkle inquired about why there was a redaction, to which Mr. Garfinkle responded in the negative; stated the City Attorney's office is required to provide it, he should not have to ask for it.

Commissioner Reid thanked Mr. Garfinkle for bringing his Complaint forward; inquired what type of information would be exempt related to draft position statements and why the documents were redacted if they are just conversations regarding the legislative

agenda between the City lobbyists and staff.

Mr. Kuhn responded the Public Records Act makes a specific exception for documents governed by the deliberative process privilege; City staff need the ability to comment on, exchange dialogue and share information that goes into the City's decision-making process candidly and confidentially without having all of the draft documents or decisions made available to the public; the Court has said exposing the agency's decision-making process would discourage candid discussions within the agency and undermine the agency's ability to perform its functions; some documents not subject to attorney-client privilege are still not subject to disclosure under the Public Records Act (PRA); draft documents and iterative process are not typically turned over to the public because it would discourage and prevent the City from engaging in a candid and open dialogue, sharing ideas, understanding the basis for certain positions and making revisions without having it be completely open, disclosed, and nitpicked when just trying to gather information.

Commissioner Reid inquired whether the deliberative process goes beyond City staff, to which Mr. Kuhn responded it would include consultants and lobbyists as well.

Commissioner Reid inquired whether the reason is because it would cause harm to the City.

Mr. Kuhn responded in the affirmative; stated if every document was made available to the public, it would discourage candid conversations; everyone would be too worried about putting a draft together or commenting on drafts and exchanging ideas without being able to fully vet and understand different positions.

Commissioner Reid inquired how that reconciles with open government and the fact that the public has a right to know the City's process.

Mr. Kuhn responded the law makes a specific finding that disclosure of certain deliberative process discussions would inhibit the free and candid communication between staff; it is a finding of the law that allows the iterative process to take place before things are completely opened and shared.

In response to Commissioner Reid's inquiry, Mr. Kuhn stated the City produced documents on a rolling basis; six batches of documents were produced; some batches had no redactions, some had a few; in the case where there were redactions, there was an explanation provided about the basis or reasoning why certain records were redacted when the documents were produced.

Commissioner Reid stated her understanding is the PRA requires the City to explain precisely why there was a redaction in whole or in part; she does not see it in the examples.

Mr. Kuhn stated the City's Position Statement includes cover emails explaining the basis

and reasons why certain documents were withheld; for example, when a document redacted based on the deliberative process privilege, staff indicated information was withheld based on the grounds that disclosure would inhibit the free and candid communication between staff and their agents on matters within their purview; that is what was provided and required under the law; the City is not required to go through every single email and provide an exact, precise explanation on every single redaction, especially with thousands of pages of documents.

Commissioner LoPilato stated it appears the Complainant is making an argument that the passage of Proposition 59 in 2004 essentially weakened the deliberative process privilege; requested Mr. Kuhn talk a little bit about the legal landscape related to the deliberative process and whether that has shifted post 2004 or if the current state of affairs has changed anything.

Mr. Kuhn stated that he does not think anything has changed with respect to what is before the Commission tonight; Proposition 59 is meant to be a Sunshine Ordinance provision and placed a statute of limitations restricting access to certain meetings and records, but it does not suddenly place additional burdens or obligations, or make additional records available to the public.

Mr. Garfinkle gave a Closing Statement.

Mr. Kuhn gave a Closing Statement.

Speaker:

Ryan LaLonde, Alameda, thanked the Commission for former Commissioner Shabazz's webinar on the Public Records Act and how to submit requests; stated that he received PRA documents from the County District Attorney's office; the documents Mr. Garfinkle received from the City are the same type as the ones he received from the County, including cover letters stating why there are redactions; there is opportunity to ask for clarification, which he did and the County sent additional information; follow-up is important; Mr. Garfinkle decided not to submit the cover letters that came with the email production; in his case, he worked with the County to get the specific documents he needed, it was not a fishing expedition; Mr. Garfinkle's Complaint is unfounded in the fact that there was no due diligence on his part to actually get to the bottom of what he really wanted.

Commissioner Reid stated the PRA provides protections for the disclosure of documents; she questions whether or not the exemptions were justified; she does not see that the deliberative process privilege outweighs the importance of the public receiving the information; she does not see specific information on the disclosures provided in the documents themselves.

Commissioner Chen stated that she has the same question as the speaker; the documents did not include the emailed explanation of the redactions.

In response to Commissioner Chen's inquiry, Commissioner LoPilato stated the cover emails stating the reasons for the redactions are exhibits to the City's Position Statement; Exhibit 8 includes the deliberative process privilege, which Mr. Garfinkle did not include.

In response to Chair Tilos's inquiry, Commissioner LoPilato stated Exhibit 2, the City's Position Statement, includes exhibits that are clearly outlined and contain the cover letters.

Commissioner Reid stated the question is whether or not the PRA provides transparency in the redactions; questioned why some documents are more redacted than others.

Commissioner LoPilato stated sometimes a redaction is a portion of a document; sometimes it is a larger portion of a document; the proper process should be that if someone receives six batches of a rolling production over 1,100 pages and has questions about specific redactions, reach back out to the City for clarification; she did not see any attempt to do so; if there was evidence that the City was not responsive to follow-up questions, she would want to flag that as a possible recommendation for better transparency; unfortunately, the Complainant made no attempt to gain clarification about any of the documents; there is no obligation under the law to provide an explanation of redactions document by document; she is inclined to deny the Complaint and really wishes there had been some attempt for clarification or follow-up on the part of the Complainant.

In response to Chair Tilos's inquiry, the Chief Assistant City Attorney stated the language she advises the Commission to look at is Government Code Section 6255, Subsection A which is a provision of the PRA; it states that: "the agency shall justify withholding any record by demonstrating that the record in question is exempt under expressed provisions of this chapter, or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record;" the provision itself does not provide any specificity for going item by item; further interpretation is found in Case law; in this instance, Case law speaks to how the California Supreme Court has spoken to what Code Section 6255 actually requires; the Supreme Court found in Section 6255, Subsection A that a requestor was not entitled to a specific log; the reasoning is that in the PRA, the legislature went to great lengths to impose very specific requirements in certain cases; the Supreme Court opined that if a public agency was required to enumerate each time and each record and what the various exception was for each record, it could have done so and chose not to; it was extrapolated that a blanket explanation is sufficient; the Case cited is Haney vs. Superior Court; the PRA does not require an itemized list of every single redaction in a document request; a blanket email with an explanation, such as the one the City provided, would be acceptable under the PRA.

Commissioner Reid moved approval of sustaining the Complaint and to cure and correct, so that Mr. Garfinkle receives a thorough explanation of why the documents were redacted.

The motion failed due to a lack of second.

Commissioner Reid moved approval of dismissing the Complaint on procedural grounds asking that Mr. Garfinkle work with the City Attorney and City Clerk's offices to understand a little more of why the redactions occurred.

The Chief Assistant City Attorney stated the dismissal is for procedural or jurisdictional defects; jurisdictional would be if the Commission did not have the authority to make a decision on the Complaint or it is something totally out of the Commission's purview; procedural grounds would be that some sort of procedure was not followed in the actual making of the Complaint; the most classic example would be if a Complainant filed their Complaint after the deadline; stated that she is not sure whether dismissal is really what Commissioner Reid intends.

The motion failed due to a lack of second.

In response to Commissioner Reid's inquiry, Chair Tilos stated the five options are: 1) Complaint sustained with cure and correct recommendation, 2) Complaint sustained without cure and correct recommendation, 3) Complaint denied, 4) Complaint denied as unfounded, and 5) Complaint dismissed on jurisdictional or procedural grounds.

Commissioner Montgomery moved approval of denying the Complaint as unfounded.

Commissioner Reid suggested a friendly amendment to deny the Complaint, but not determine it unfounded, as it would be a harsh penalty to the Complainant.

Commissioner LoPilato stated that she is inclined to second the motion; she wrestles with the unfounded distinction solely on the basis of what a layperson may interpret; it comes down to what a reasonable community member making a PRA would think.

Chair Tilos stated as a non-lawyer person, he is leaning toward unfounded; the City did its due diligence; the Chief Assistant City Attorney also explained the California Supreme Court's position regarding redactions on PRAs.

In response to Commissioner Chen's inquiry, Chair Tilos added a minute to everyone's clock.

Commissioner Montgomery stated that she did not accept the friendly amendment to the motion.

Commissioner Chen stated that she has been frustrated with the Complaint because it kept changing every few hours and there was no time limit; there was opportunity for the Complainant to do more due diligence; this is not the first Complaint he has filed; on one hand, she does not want to find it unfounded because it seems severe; on the other hand, the Complainant had the opportunity to prepare a more solid Complaint; the speaker's

experience and back-and-forth communication with the County on a similar PRA seems like a more reasonable and collaborative process; she supports the unfounded finding.

Commissioner Reid stated that punishing members of the public for bringing forth a PRA Complaint goes against the values of open government; she is very disappointed in the unfounded finding because of the harsh punishment.

Commissioner LoPilato seconded the motion, which carried by the following roll call vote: Commissioners Chen: Aye; LoPilato: Aye; Montgomery: Aye; Reid: No; Chair Tilos: Aye. Ayes: 4. Noes: 1.

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Chair Tilos called a recess at 10:04 p.m. and reconvened the meeting at 10:12 p.m.

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### REGULAR AGENDA ITEMS

#### 4-A. Selection of Vice Chair

Commissioner Chen moved approval of Commissioner LoPilato being Vice Chair.

Commissioner Montgomery seconded the motion.

Under discussion, Commissioner LoPilato stated that she does not think the Vice Chair should automatically advance to the Chair role in January and could be anyone interested.

Chair Tilos concurred with Commissioner LoPilato; stated that he would likely step down; the Vice Chair is the logical choice; he was reluctant when he was voted as Chair, but allowing all members an opportunity and experience to Chair is important.

Commissioner LoPilato stated that she is happy to take on the role of Vice Chair until the election in January based on the Commission's constitution at that point.

On the call for the question, the motion carried by the following roll call vote: Commissioners Chen: Aye; LoPilato: Abstain; Montgomery: Aye; Reid: Aye; Chair Tilos: Aye. Ayes: 4. Abstention: 1.

#### 4-B. Minutes of the September 20, 2021 and October 4, 2021 Meetings

Commissioner Chen moved approval of the minutes.

Commissioner LoPilato seconded the motion, which carried by the following roll call vote: Commissioners Chen: Aye; LoPilato: Aye; Montgomery: Aye; Reid: Aye; Chair Tilos: Aye. Ayes: 5.

#### 4-C. Report to City Council on Issues Arising from Implementation of the Sunshine Ordinance

Commissioner Chen gave a brief presentation.

Commissioner LoPilato stated that she does not think the report is quite in shape to send to the City Council; it was a huge undertaking; she is refining her thoughts on it; the Commission is required to do the reports at least once annually; Complaints are still coming in for 2021; suggested moving the plan to finalize the report closer to January; she is mindful that certain things already feel outdated; specifically Recommendation #3, the City already is publishing the legislative agenda.

Commissioner Chen stated work on the Complaint Procedure and form took out half of the recommendations; she feels the relationship with the City Attorney's office is much improved; the report can be updated on an ongoing basis; she concurs with Commissioner LoPilato regarding the timing.

Chair Tilos stated the Commission could hold off until January.

Commissioner Chen stated things can be lost during the turnover of members; the report is a living document like the Bylaws.

Commissioner LoPilato stated the report should be grounded in the statute; some of the recommendations read like directives; leading with an explanation and background of what the Sunshine Ordinance actually says may be a better approach; the recommendations could be reviewed item-by-item; it is important to look at the accuracy and weight that is given to some of the language; the Commission's role should be neutral; the report seems more like an advocacy piece; it might be better received and more effective if it is more neutral and has a gatekeeper tone; the City Council needs to give direction to the Commission and staff on what work the Commission should do in addition to hearing Complaints; the expectations of what the Commission does is a bit limited.

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In response to Chair Tilos's inquiry, the City Clerk stated a vote was needed to consider new items at 10:30 p.m. but since it was missed, the next item could be bumped; a vote is needed to continue past 11:00 p.m.

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Commissioner Chen stated she would like to have the report come back on the January agenda.

4-D. Consider Amending the Sunshine Ordinance Complaint Form. Not heard.

#### STAFF UPDATE



The City Clerk stated that when the last Sunshine Ordinance amendments were adopted, prior Complaints and decisions were to be posted on the OGC website, which has been done; she welcomes any feedback.

The City Clerk further stated that she worked on the Complaint Procedure glossary and Frequently Asked Questions (FAQ) section and will send it out to the Commissioners for feedback.

The Chief Assistant City Attorney announced a Citywide Sunshine Ordinance training for all Board and Commission members would be in mid-December; she will be doing a training for the OGC at a public meeting in January.

#### COMMISSION AGENDA REQUESTS

None.

#### COMMISSION COMMUNICATIONS

None.

#### NON-AGENDA PUBLIC COMMENT

None.

#### ADJOURNMENT

Chair Tilos adjourned the meeting at 10:56 p.m.

Respectfully submitted,

Lara Weisiger  
City Clerk

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