

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING  
MONDAY - - - DECEMBER 6, 2021 - - - 7:00 P.M.

Chair Tilos convened the meeting at 7:02 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: Assistant City Attorney John Le; Chief Assistant City Attorney Elizabeth Mackenzie; City Clerk Lara Weisiger]

NON-AGENDA PUBLIC COMMENT

Anonymous [not able to speak; spoke under second section of Non-Agenda Public Comment]

COMPLAINT HEARINGS

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

Rasheed Shabazz, Complainant, gave an Opening Statement and Presentation of Facts.

The Assistant City Attorney, City/Respondent, gave an Opening Statement and Presentation of Facts.

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

Vice Chair LoPilato inquired whether the Commission should be considering the documents produced at the time the complaint was made or documents produced at the time the complaint reaches the Commission on the hearing date.

The Chief Assistant City Attorney inquired whether the question is about the two alleged violations being considered separately in terms of the statute of limitations argument.

Vice Chair LoPilato responded in the negative; stated that she is curious about whether a violation would be moot if it is cured before the hearing.

The Chief Assistant City Attorney stated it is up to the Commission's discretion; whether or not there was a technical violation that has now been cured versus no violation is a factor to weigh; it is at the Commission's discretion to make either finding.

Vice Chair LoPilato stated screenshots provided today have been referenced; she has

not seen anything come through and the agenda has not been updated; the Commission is totally in the dark about the documents; inquired whether the Complainant can provide insight about what he received and where it came from.

Mr. Shabazz responded that he cannot describe that much because he received it this afternoon; screenshots that have an October date from Alamedanonymouse were sent to the City on Friday.

In response to Vice Chair LoPilato's inquiry regarding the screenshots, the Assistant City Attorney stated he was not aware of the document until this afternoon since City Hall is closed on Fridays; he did not review it when he received it, so he is not able to summarize it; he immediately asked that it be provided to the Complainant.

Commissioner Chen inquired what the expectations and requirements are of the custodian of records when such a request is received.

The Assistant City Attorney stated within about an hour of receipt, the request was provided to a number of individuals inside the City to process the request; according to the California Supreme Court, the nature of the request can be summarized to the custodian of records; since the request was related to social media, it is expected that it would be given to the custodian of records, who is the best person to look at those type of requests; the law says that search can be reasonably relied upon and that is precisely what the City Attorney's office did; the idea that the City Attorney's office did not produce records is inaccurate.

Commissioner Chen inquired what date the City Attorney's office received the request, to which the Assistant City Attorney responded the request was received on April 21st and provided to the custodian of records.

Commissioner Chen inquired about the custodian of records being required to reply.

The Assistant City Attorney responded the custodian of records is required to do a search to produce records; in this case, it was social media; the standard practice is when the custodian of records is copied on the request, they are aware of what they need to do; once it is turned over to the City, it is treated like any other records request; the City Attorney's office reviews the request for possible exemptions and \produces the records.

In response to Commissioner Chen's inquiry, the Assistant City Attorney stated he recalls only receiving one related record and was not sure if it was from the custodian of records or staff.

Commissioner Chen inquired whether the custodian of records would then be in violation of responding timely.

The Assistant City Attorney responded the City can only act through its agents, the individuals who do the City's work; stated it can be viewed as anyone who is involved in

the processing of the request.

Following a summary of the City's responses, Chair Tilos inquired about Nextdoor.

The Assistant City Attorney responded there are two separate Nextdoor accounts; stated one is the Agency account, which is managed by the City's Public Information Officer and is intended for one-way communication, although comments are allowed; records were produced from said account since it is under the City's custody and control; these records were in addition to providing the custodian of records of the personal Nextdoor account.

Chair Tilos inquired whether Councilmember Herrera Spencer's comments were on the City's Nextdoor account, to which the Assistant City Attorney responded in the affirmative.

In response to Chair Tilos's inquiry, the Assistant City Attorney stated the City provided records from the City's Nextdoor account to the Complainant; the Complainant then stated he was not interested in the records from the City's account, but was interested in records from the personal account.

Chair Tilos clarified the reason records were not produced from the personal account was because the City did not have access to them.

The Assistant City Attorney concurred; stated the City produced the records from the personal account after receiving them today.

In response to Chair Tilos's inquiry, Mr. Shabazz stated that he did not have any expectations about the particular technology, medium or method in which the records were maintained or retained; he asked for the correspondence and was aware of one instance which included his name put on a crime thread; he did not know the particulars of how the information would be obtained.

In response to Commissioner Montgomery, the Assistant City Attorney stated when referring to the agency account, it is possible for a member of the public to comment on it, but it is not possible for them to initiate a new post; new posts can only originate from their own personal Nextdoor account.

Commissioner Montgomery inquired whether Mr. Shabazz requested communication from Councilmember Herrera Spencer's own Nextdoor account as well as comments she made under City posts.

Mr. Shabazz responded in the affirmative; stated that he requested correspondence to and from Councilmember Herrera Spencer and comments by her on the Nextdoor platform; he was not aware of any particular distinction between the City's account and Councilmember Herrera Spencer's personal account.

Commissioner Montgomery stated the Commission could not access the complete comments as only screenshots were provided; inquired whether Mr. Shabazz received

and was able to read the complete comments.

Mr. Shabazz responded in the negative; stated that he received two links to policies related to elected officials usage of the Nextdoor platform, as well as a number of different comments; he does not use Nextdoor; initially he was using a laptop and was unable to access the application in order to read the complete comments.

In response to Commissioner Montgomery's inquiry, the Assistant City Attorney stated there were not any more to the comments than the screenshots provided to the Commission; only excerpts were provided; this was done because the City Attorney's office was not clear whether or not the Complainant was requesting records from the City's agency account; an email stating the documents were excerpts was sent asking if the information was what was being requested before sending full documents; the Complainant sent a response stating his request was not about the City's Nextdoor account, but the writings of a City official discussing City business through a specific social media platform; the City Attorney's office interpreted the statement to mean there was no interest in additional records and why the documents remained as excerpts.

Mr. Shabazz shared his screen verifying the email correspondence with the Assistant City Attorney.

In response to Vice Chair LoPilato's inquiry, the Assistant City Attorney stated that he provided the excerpted documents because he was unclear at the time whether or not the Complainant was interested in them.

Vice Chair LoPilato inquired what the City's position is on whether a social media communication could constitute a public record.

The Assistant City Attorney responded the City's position is that there is not clear legal authority on the issue; a number of other arguments have been raised that the Commission should consider; the City Attorney's office believes the Commission does not need to decide the weighty Constitutional issue, which should be dealt with by the Legislature; there is no clear guidance; one of the practical considerations raised in dealing with social media being a public record is a retention schedule; gave an example of a Snapchat post which disappears immediately and cannot be saved or retained like an email message which is retained for three years; the Commission should not be the body to make a decision on such a difficult and weighty Constitutional issue.

In response to Chair Tilos's inquiry, the Assistant City Attorney stated for the Nextdoor account owned, retained and maintained by the City, there is very little issue with producing information to any requestor; what is being discussed tonight is a personal social media account; clarified that the City is not taking the position that the post on the City's account is not a public record.

Vice Chair LoPilato stated that she is aware an agency may rely on an employee to search their own personal files, accounts and devices for responsive materials; inquired whether

the City received any confirmation that the individual custodian of records conducted such a search when the City forwarded the request.

The Assistant City Attorney responded that he did not personally forward the request and is not aware of a response.

Vice Chair LoPilato inquired whether any specific guidance was given to the individual whose personal account communications were sought in terms of what would constitute a public record in this context or was the request just forwarded.

The Assistant City Attorney responded when requests are forwarded to a custodian of records, training is not provided on the spot; the City provides general Public Records Act (PRA) and open government training and relies on the fact that the custodian of records have been trained in some manner or another.

Commissioner Chen stated five years ago people would tweet without issue; then, policy started coming through Twitter, a social media tool; she is still taken aback and questions when tweets became policy statements; Nextdoor allows every owner of an account to make a request of every posting they have made; she followed the instructions to do so and was able to get all the postings she has ever made within three minutes; Nextdoor makes it very easy for an individual to recover all their documents by a simple request.

In response to Vice Chair LoPilato's inquiry, the Assistant City Attorney stated the City's position was that it did not have actual custody of responsive documents until recently; the City turned over the documents once they were received; the membership agreement states the City does not have constructive possession; the cases the City cited look to the contract and have to do with the subcontractor as a determining factor of whether or not the City had constructive possession; the analogy here is that since the membership agreement states the City does not have that ability, the City cannot make the request from Nextdoor; the City followed the California Supreme Court rulings.

Vice Chair LoPilato inquired the City's position on whether some of the comments by the individual Councilmember, specifically a comment made on January 6, 2021 on the City's Nextdoor account, would have constituted a public record.

The Assistant City Attorney responded as was stated one of the factors determining whether the comment was a public record boils down to whether or not it relates to the conduct of the people's business; the records were produced because the City felt they were relevant; he falls back on the position already made that there is no clear guidance until decided by a Court of competent jurisdiction that has a binding effect on the City.

Vice Chair LoPilato inquired whether there is written policy related to the use of social media for Councilmembers and Commissioners, to which the Assistant City Attorney responded in the negative; stated he is not aware of a social media policy.

In response to Vice Chair LoPilato's inquiry, the Assistant City Attorney stated the

Commission should stand by a position that they had taken in the past to the extent that the doctrine of stare decisis applies; decision 19-02 would not be a precedent because the issue about timeliness was not decided; it was never raised and, therefore, never decided; the notion that the City is bound because timeliness was not previously raised is not something the City would ever support.

Vice Chair LoPilato inquired whether the records produced were from the individual custodian of records or from a third party, to which the Assistant City Attorney responded they were from a third party.

Mr. Shabazz stated the email he received was from Alamedanonymous; Anonymous Anonymous, is present at this meeting, along with Councilmember Herrera Spencer, so it is not likely they are the same person, would suggest the records were not from the custodian of records.

Mr. Shabazz gave a Closing Statement.

The Assistant City Attorney, City/Respondent, gave a Closing Statement.

Speakers:

Jenice Anderson, Alameda, stated the City needs a new social media policy for Councilmembers; she does not have access and was blocked from using Nextdoor without an appeals process; she does not know what Councilmembers are doing or the business being conducted; other Councilmembers use Twitter, which any members of the public can see; City officials should not be able to use the Nextdoor platform and should be required to produce records of communications, especially if talking about constituents.

Anonymous stated that he has no relationship to AlamedaAnonymous; he is from San Francisco; quoted State law regarding PRAs; according to State law, the Councilmember is a local agency and is required to produce the requested records; urged the Commission to resolve the ambiguity in favor of public access.

Michael Devine, Alameda, stated the term doxing, a criminal act of revealing private information through hacking or other illegal means, should not be used, as it is inflammatory and misleading; the content posted to Nextdoor is not doxing any more than the City releasing the same documents in a prior public records request; because the requestor is anonymous, the source, intent or how information was acquired cannot be questioned; the City should not have produced any documents from the anonymously provided screenshots.

Monica Price stated the Sunshine Ordinance requires timely access to public records; pointed out key considerations of the City of San Jose case; urged the Commission to broadly construe that City employees using personal accounts to conduct City business are public records.

Jay Garfinkle, Alameda, stated it is dismaying that the City would accept an email from Anonymous and egregious to allow Anonymous to address the Commission; the distinction between public record and public domain needs to be clarified; the process is dysfunctional; the Commission should provide specific direction to City staff.

Matt Reid, Alameda, stated there are some interesting parallels with the Morris case heard earlier this year; made comparisons between the Garfinkle and Morris cases; stated there needs to be a better policy for training elected officials in terms of how they behave in social media while at the same time, respecting the right to privacy; Nextdoor is used to amplify information that is also available elsewhere; he does not think it constitutes being disclosed under the PRA.

Alexia Arocha, Alameda, stated that she supports the Complainant; a request was made; a timely response was not provided; response was only provided when a complaint was made; trying to use legalese and Constitutional ambiguity is not quite accurate; a City official discussing City issues on Nextdoor is not considered a private person; she does not agree with the comments made about doxing or about being able to face an accuser; this is not criminal court.

Chair Tilos summarized the complaint and suggested bifurcating the issues.

Vice Chair LoPilato stated it is abundantly clear that there was a violation in that the City failed to respond timely; enforcing the Sunshine Ordinance statute of limitations would only generate more complaints and disincentivise back and forth discussion between City staff and the requestor; if the Commission has to dismiss the first claim as potentially time-barred, a written decision should probably include a recommendation to the City about how to deal with the issue.

Chair Tilos stated he concurs with Vice Chair LoPilato about encouraging more follow up between City staff and requestors; he wishes that the City Attorney's office and the Complainant could have come to a resolution before five months went by to avoid a complaint being filed.

Commissioner Montgomery stated the case is difficult because of the time constraints for both parties; the City did not respond timely and the Complaint was not filed within the required time period; there should be comments regarding how it should be done in the future.

Chair Tilos stated one of the decision options is Complaint dismissed due to jurisdictional or procedural grounds.

In response to Commissioner Montgomery's inquiry, the Chief Assistant City Attorney stated one option the Commission has under the newest revision of the Sunshine Ordinance, specifically Subsection D of 2-93.2 states: "...the Commission may also consider options for informal resolutions of complaint...to avoid similar violations;" options

could include changing the Sunshine Ordinance to provide for additional time or pull the statute of limitations to encourage discussion instead of filing a Complaint; the options would fall in the category of informal resolution; the Commission would have the ability to make informal, non-binding recommendations, even if a portion of the complaint is found to be time-barred.

The City Clerk stated the issue occurred before the new system, NextRequest, was in place; the human error of miscommunication cannot happen with NextRequest because everything is documented in the system and nothing can fall through the cracks.

Chair Tilos stated it is nice to see improvements happening since there have been a lot of issues with PRAs.

Commissioner Chen stated if the City did not respond in the 10 days, it is a de facto violation whether or not anyone complains.

Commissioner Montgomery stated according to the rules and regulations, it is not on the Complainant to keep nudging for a response.

Vice Chair LoPilato stated, as a point of order, time limits were not written into the procedure for deliberation on Complaints; there is room for flexibility.

Chair Tilos concurred with Commissioner Montgomery's comments; stated seeing even one friendly reminder or follow-up with the City may have avoided the complaint and hearing.

Commissioner Chen moved approval of sustaining the Complaint without a Cure and Correct since the City has a cure with the new software.

In response to Commissioner Chen's motion, Vice Chair LoPilato stated that she is struggling with the fact that there is a statute of limitations in the Sunshine Ordinance; she does not like it, especially with regard to PRAs; the Commission should frame whatever decision is made with some acknowledgement of the statute of limitations.

The Chief Assistant City Attorney stated the Sunshine Ordinance is complaint driven and violations are found after being raised by a complaint; the Commissioners should be aware and guided by the statute in this case; because the City has forcefully raised the statute of limitations argument, she highly urges the Commission to figure out a way to address the statute of limitations and to marry it with the facts for the decision; years from now, people may wonder how a complaint that was brought up five plus months after it ripened into a complaint was able to be heard by the Commission; if the Commission is inclined to find a violation, the statute of limitations should be addressed.

Commissioner Chen withdrew her motion.

In response to Chair Tilos's inquiry, the Chief Assistant City Attorney stated the



mechanics and administration of complaints starts with the City Clerk's office; the Clerk's office is the recipient of the initial complaint and informs the City Attorney's office immediately about it.

The City Clerk stated upon receipt of the complaint, she reached out to the Complainant to see if the matter could be resolved outside of bringing it before the Commission; she was not aware of any jurisdictional issues and was not told not to put it on the agenda; apologized if it was an error on her part.

Chair Tilos inquired who would make the determination as to whether or not there are jurisdictional issues and what is the process.

The City Clerk responded if it were 15 days after a meeting occurred, she would be very clear on the date; she was not looking for a date since the Complainant had not received a response.

Commissioner Montgomery moved approval of dismissing the complaint based on jurisdictional grounds because of the timing.

Chair Tilos stated he would like to make a friendly amendment to the motion to include that the Commission informally address that a violation did occur with regard to timing; no response within 10 days.

Vice Chair LoPilato made another friendly amendment to Chair Tilos's amendment to include a factual finding that a violation did occur based on the undisputed statements of the parties and also include a recommendation for informal resolution of complaints regarding PRA requests to which no response was given; the City should consider automatically tolling the statute of limitations for PRA related complaints until the time in which an eventual response to the request is actually provided to the requestor to allow sufficient time for informal resolution.

In response to Commissioner Montgomery's requests for a summary of the amendments, Chair Tilos stated that he concurs with Vice Chair LoPilato's amendments minus the recommendation.

Vice Chair LoPilato accepted Chair Tilos's reasoning; stated the recommendation could be included in an implementation report if the Commission is more comfortable with doing so.

Commissioner Montgomery accepted the friendly amendments.

Chair Tilos 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.

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Chair Tilos called a recess at 9:06 p.m. and reconvened the meeting at 9:12 p.m.

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Chair Tilos summarized part two of the complaint regarding the City's response to the Nextdoor issue.

Commissioner Montgomery stated she needs more clarification on what constitutes City work as opposed to a personal statement made by a Councilmember on any social platform.

In response to Vice Chair LoPilato's inquiry regarding whether the City of San Jose case could be used as guidance, the Chief Assistant City Attorney stated the case law statutes have not caught up yet with reality and social media; the City of San Jose case is instructive, but it is not precedent in the sense that it does not address the situation here; the Commission is trying to grapple with the issue of whether or not the private social media of a public official is a public record; the law does not give a lot of guidance; cases from an Appellate Court or Supreme Court in California do not exist yet; the factors provided in the City of San Jose case evaluate whether or not certain communications constitute public records.

Chair Tilos stated as a non-lawyer, his thought process is what could the City have provided; he is not comfortable making a decision based on what the Chief Assistant City Attorney's statement regarding uncharted territory; the City Attorney's office and City Council should give the Commission guidance; the City's account is open; information should have been provided.

Commissioner LoPilato stated the issue is an emerging legal area; the Commission making precedent decisions regarding social media disclosures would probably be improper; the language in the San Jose case which she cited is a bit more permissive as to what analysis the Commission could undertake tonight; however, she thinks Chair Tilos's comments are well taken into consideration and the Commission may not need to go in that direction; stated there is a reference in the Assistant City Attorney's October 28<sup>th</sup> email about a record being apparent on the City's official agency account; a question could be whether that implicit admission is a record and should have been produced before the complaint was filed.

Chair Tilos stated that he takes timing into consideration as well; he does not want to see complaints brought forth from three years ago; the complaint could have been triggered sooner than five months; he understands there are a lot of moving pieces.

Vice Chair LoPilato stated that she would argue the complaint was timely; the statute of limitations was not triggered until the requestor is informed of whether a response was provided.

Commissioner Montgomery stated the clock does not start ticking until there is an actual response; the Complainant did not know he could not get what he wanted until a response

was provided.

In response to Chair Tilos, Commissioner LoPilato stated the question is when could the Complainant have known when they actually had a claim to bring; with Claim 1, the City did not respond in ten days, which he knew on day 11; with Claim 2, he could not have known that there were no responsive documents until the City told him.

Chair Tilos concurred with Vice Chair LoPilato and Commissioner Montgomery that timeliness is not a factor and can be struck to address the social media piece.

Commissioner Chen stated the Complainant did not know until October 19<sup>th</sup> when he received an email from the City informing him that there were no records.

Commissioner Reid stated she agrees with all Commissioners; something to discuss is what would constitute the conduct of public business.

Chair Tilos stated if the City has its own account for blasting information to members of the public and a public official comments, it would be considered a public record; if the public official makes comments on a personal account, outside of the City's lane, he does not want to make a determination about that and needs guidance.

Commissioner Montgomery stated that she is leaning towards whatever happens on social media should be considered public record; if one Commissioner posted on a City matter and two other Commissioners responded, the three members responding would constitute a City meeting and be conducting City business.

In response to Chair Tilos's inquiry, Commissioner Montgomery stated discussing issues on social media that are coming on an agenda is City business.

Chair Tilos stated that he does not want to go down the rabbit hole and make a statement or determination about what is considered City business and what is not.

The Chief Assistant City Attorney stated that she cautions the Commission to address what is actually in the complaint; in the communication between the Complainant and the Assistant City Attorney, the Complainant stated he was interested in statements made in the private social media account of Councilmember Herrera Spencer; the Commission is being asked to decide whether or not the City, in telling the Complainant to deal directly with Nextdoor for the information he requested, is a violation of the PRA; the question is whether there is a requirement by the City to go to Nextdoor or do something else to get the information for the Complainant.

Vice Chair LoPilato stated that she respects the delineation made by the Chief Assistant City Attorney if the Commission goes in that direction; any Commission decision should state it was upon guidance from the City Attorney's office; the Complainant believes the communications by Councilmember Herrera Spencer on Nextdoor are subject to the PRA; while she understands there was back and forth after the complaint was filed, she

is uncomfortable narrowing the scope of what is being addressed.

Chair Tilos stated the Complainant was open about wanting everything with no delineation.

The Chief Assistant City Attorney stated she appreciates Vice Chair LoPilato's comments; in Attachment 2 of the City's position, there is communication that the City Clerk attempted to resolve the issue before a complaint was filed; Mr. Shabazz stated the City did not take the next step in contacting either Nextdoor or the City official in order to get the records he requested; his complaint stems from what he views as an insufficient effort by the City to obtain the records.

Commissioner Chen stated that she asked the Assistant City Attorney if he asked the custodian of records to produce any responsive records; the Assistant City Attorney said that he asked Councilmember Herrera Spencer a day after he received the request in April; inquired whether the City vets documents before release.

The Chief Assistant City Attorney stated in the process of evaluating and obtaining records, the City does vet documents to make sure there is no personal information or anything not related to City business, which would be redacted; the balance would be disclosed.

Commissioner Chen inquired what happens if the City official does not produce records.

The Chief Assistant City Attorney responded the general rule is that the City takes the public official at their word; if they state they do not have any responsive records, it is permissible for the City to rely on that statement; the rule is used to address requests for private emails and texts and does not yet apply to social media.

Commissioner Chen stated her assumption, based on the Assistant City Attorney's response, is that there were no records to produce; if the screenshots were accurate and could be proven, it seems the official did not present the documents.

Chair Tilos stated the accuracy of the screenshots is not in the Commission's purview.

Commissioner Chen stated if the City can obtain personal emails and texts of City employees and officials, anything posted on social media seems to be even more broad; with reference to the January 6, 2021 Capitol incident, a lot of social media is being used in cases; law is formulating and social media could be considered public record in the future.

Vice Chair LoPilato concurred with Commissioner Chen that laws relating to social media are definitely moving in that direction; giving guidance and training to officials with a lens on open government is valuable; comments on the City's Nextdoor account on January 6<sup>th</sup> in which Councilmember Herrera Spencer urges the public to vote on a specific agenda item is concrete example as a record responsive to the complaint; the City had

access on its account and it was public record.

The Chief Assistant City Attorney inquired whether Vice Chair LoPilato's rationale for finding a violation was that the record was not produced at the time Mr. Shabazz filed his complaint, to which Vice Chair LoPilato responded in the affirmative, stated it does seem like a viable basis to say there was a violation.

In response to Chair Tilos's inquiry, Commissioner Montgomery stated that she is leaning toward sustaining the complaint; she does not feel like the Complainant received the available documents.

Chair Tilos stated that he is leaning towards a cure and correct that the Commission needs more guidance to interpret between public and personal accounts.

In response to Chair Tilos's inquiry, the Chief Assistant City Attorney stated there are two different potential violations: 1) whether or not the agency posts were timely produced, and 2) whether the City did all it could do to track down and produce the information requested; there are potentially two separate cure and corrects; requesting guidance would be helpful and valuable, but harder to manufacture since there are no laws yet; a cure and correct to get agency postings is easier to fashion.

Vice Chair LoPilato stated that she likes the delineation of whether there was a violation of the agency account versus the private account; she is prepared to make a motion; inquired whether the reference to the City encompasses the individual official as an agent of the City and is there a way to parse that.

The Chief Assistant City Attorney stated the question is difficult; neither party briefed the question and she does not have either party's perspective; the complaint did not address the violation on behalf of the individual; the violation was addressed against the City and argues that the City did not do what it was supposed to do vis a vis the PRA and Sunshine Ordinance; if the question is whether there could be a separate complaint against an individual, that is not what is before the Commission now and she is reluctant to say that could happen.

Vice Chair LoPilato stated that she is not going in that direction so much as she is hoping to delineate that City staff did all they could do with respect to producing records given that no records were provided to them by the individual; the clarification would be important in order not to endorse the act of not responding to the City's request to provide personal account information.

Chair Tilos stated the City Attorney asked the official to produce it, but the Commission does not have teeth to enforce it.

Vice Chair LoPilato moved approval of sustaining the complaint on the basis that there was a violation in that the City was the custodian of an agency Nextdoor account which contained comments by a Councilmember using the Nextdoor social media platform,

which were responsive to the PRA request that were not produced prior to the complaint; she would add that the Commission makes no findings whether there was a violation of the PRA with respect to producing records from a Councilmember's personal account on the basis that, with the evidence presented, the City took steps to obtain the records but ultimately no analysis was able to be conducted as to whether there were any public records.

In response to Chair Tilos's inquiry, Vice Chair LoPilato stated the reason the motion is not concise is that the Commission needs to write the reason of decision statement, which should include all the basis for the findings; it can be a tighter motion, but the Chief Assistant City Attorney needs sufficient basis for the decision.

Vice Chair LoPilato moved approval of sustaining the complaint on the basis of the violation that the City failed to produce records from the Agency Nextdoor account.

In response to Chair Tilos's inquiry regarding the cure and correct, Vice Chair LoPilato stated the Commission could address recommendations on both issues; suggested seeing if there is consensus on the sustained part first.

Chair Tilos stated he would be agreeable without a cure and correct.

Vice Chair LoPilato stated that she thinks there is a very specific cure and correct the Commission could issue with respect to the finding; the cure and correct can be discussed after everyone is aligned with the finding.

Commissioner Montgomery 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.

Vice Chair LoPilato stated to ensure the scope is narrow and case law is not being manufactured, a reference should be made that the City Attorney's office referred to a record produced on October 28<sup>th</sup>; the Commission relying on that as opposed to the Commission making an independent finding of law as to whether or not it was a record is significant; further recommended that the City consider maintaining an index that is accessible to the City Clerk and City Attorney's offices of all social media accounts maintained as an official communications channel of the City; stated the City should evaluate whether comments should be disabled on the City account, as comments could increase the likelihood of a Brown Act violation on a platform which appears not to be carefully monitored by the City.

Chair Tilos concurred with Vice Chair LoPilato's statements and recommendations.

Vice Chair LoPilato stated the Commission could offer up Recommendation 1 to be included with the decision; separately, the Commission should consider practical training that might be useful for Board members and Councilmembers, which could be done through the implementation report and is an action the Commission should take to

address the issues in the complaint.

Commissioner Montgomery inquired whether the Complainant included a recommendation for cure and correct in his complaint, to which Chair Tilos responded in the affirmative; stated the Complainant included several cure and correct recommendations.

Vice Chair LoPilato stated the Complainant's recommendations are on Page 14 of Exhibit 2, Respondent's Statement.

Commissioner Montgomery inquired whether the Commission addressed any of the specific items in the statement.

Chair Tilos responded that he likes the way it is and does not want to open it up.

Vice Chair LoPilato suggested the recommendations regarding training and policies be in a follow up report, which would be a good place to revisit and think about the Complainant's suggestions.

Chair Tilos concurred; stated issues come back after getting feedback from the Complainant as well as an agenda item and have public comments.

Commissioner Chen stated that she is going to fix up the report on how to improve operations and what is needed from the City Council to help navigate new territory for either January or February; maybe the ideas can be included.

Commissioner Montgomery stated that works for her.

Vice Chair LoPilato suggested the finding for Claim 1 include a positive statement that the likelihood of communication errors would be resolved by the implementation of the Next Request system.

The Chief Assistant City Attorney inquired whether there was consensus on the recommendations or if a vote is required.

In response to Commissioner Montgomery's inquiry, the Chief Assistant City Attorney stated there were no recommendations as part of the first finding.

Vice Chair LoPilato stated the Commission discussed the prospect of recommendations, but agreed to table them.

The City Clerk inquired whether the direction to add a positive statement about the Next Request system was a direction by consensus, to which Chair Tilos responded in the affirmative.

The City Clerk stated the main recommendation for Claim 2 is the list of social media

accounts.

Commissioner Reid suggested pulling Item 4-B.

#### REGULAR AGENDA ITEMS

##### 4-A. Minutes of the November 1, 2021 Meeting

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-B. Consider Amending the Sunshine Ordinance Complaint Form. Not heard.

#### STAFF UPDATE

None.

#### COMMISSION AGENDA REQUESTS

None.

#### COMMISSION COMMUNICATIONS

None.

#### NON-AGENDA PUBLIC COMMENT

Michael Devine, Alameda, discussed cyber bullying and Tweeting pictures of Art Garfinkle being anti-Semitic behavior; suggested the Commission consider reversing any rulings and dismissing Mr. Shabazz's complaint.

Anonymous stated he worked with Commissioner Reid on the complaint form and hopes the Commission takes it on; expressed support for protecting the public's rights to access.

#### ADJOURNMENT

Chair Tilos adjourned the meeting at 10:30 p.m.

Respectfully submitted,

Lara Weisiger  
City Clerk



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