

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING  
TUESDAY - - - JANUARY 11, 2022 - - - 7:00 P.M.

Chair Tilos convened the meeting at 7:11 p.m.

ROLL CALL - Present: Commissioners Cambra, Chen, Montgomery, LoPilato 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

None.

REGULAR AGENDA ITEMS

4-A. Selection of Chair and Vice Chair

In response to Commissioner Montgomery's inquiry, Chair Tilos summarized the selection process.

Commissioner Montgomery moved approval of electing Vice Chair LoPilato as Chair and Commissioner Chen as Vice Chair.

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

4-B. Minutes of the December 6, 2021 Meeting

Vice Chair LoPilato outlined minor corrections.

Commissioner Chen moved approval of the minutes with the corrections.

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

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

Commissioner Chen gave a presentation.

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Commissioner Montgomery moved approval of allowing five more minutes for the presentation.

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

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Commissioner Chen completed her presentation.

Commissioner Montgomery stated the orientation packet should be moved to the success portion of the report since she received one when she became a Commissioner.

Vice Chair LoPilato thanked Commissioner Chen for her huge undertaking in providing a well-structured and comprehensive report; stated that she would like to add a link to the Brown Act and Public Records Act in the Bylaw; she would like clarification about what the Commission/staff partnership should look like.

The City Clerk stated she will add the links to the bylaws.

In response to Commissioner Chen's inquiry regarding posting the bylaws online, the City Clerk stated the bylaws for Boards and Commissions are not typically posted, but she would be happy to post in on the Commission's webpage.

Commissioner Chen stated she would like the bylaws to be posted online.

In response to Chair Tilos's inquiry regarding the four-year maximum term limit, Vice Chair LoPilato stated the section regarding the term limits is from the original bylaws; it is a piece that the Commission does not have the ability to revise since it requires City Council action; quoted the language, "...a term that is concurrently linked with the service of the appointing City Council member but in no event shall exceed four years..."

The City Clerk stated the key language is that a single term cannot exceed four years.

Vice Chair LoPilato stated that she was wondering about development of a ten-year plan; questioned whether problems, such as lack of continuity in institutional memory, might be solved in a less labor-intensive way; she thinks it is a great aspirational request, but fears it will be bumped to the bottom of the priority list given everything else staff has to do.

Commissioner Chen stated for her personally and as a resident of Alameda, it would be

good to have a historical document that talks about open government and democracy, especially now; it does not have to be as detailed as an encyclopedia; people forget the importance of open government and we are seeing the destruction of voting rights in this Country; people do not really appreciate what it entails to have a legitimate democracy and what should be expected from elected officials; she would like to see the City allocate resources to the development of a document that allows people to see the background behind the whole series of open government and Sunshine Ordinances that were passed 10 to 15 years ago and why local communities may be the last place where democracy is still practiced; it is really important that people have a healthy respect for open government, what it means and how they can practice it themselves.

Vice Chair LoPilato stated it is a great goal, but she is concerned that it is too big of an ask to include in this inaugural report in terms of staff allocation and financial resources; an alternative could be a staff/Commission partnership could prepare the report which can then be publicized on City channels; the alternative could soften the ask if the Commission is willing to take on some of the labor.

Commissioner Cambra stated that he would like a little more clarification regarding the document; questioned if the intent would be that the memory of the decisions made by the Open Government Commission (OGC) would create precedent; he understands that it does not address the over-arching issue of democracy, but also wonders if creating a report every year would add to the continuity of the OGC.

Commissioner Chen stated Commissioner Cambra just took her down a different path on how the Commission adjudicates all the different cases; the Commission has no idea of how previous cases were adjudicated, which seems like a case law issue.

Chair Tilos inquired whether the Commission should have knowledge of previous cases or come in with a fresh set of eyes.

Commissioner Cambra responded that he thinks continuity in the decision-making process is important so the public understands when they come before the OGC with a complaint factually similar to a previous one, the Commission will not come to a completely different decision; he does not want to use the word “precedent” as it is a legal term; the term “guided by” may be more appropriate.

In response to Chair Tilos’s inquiry, the City Clerk part of the recent Sunshine Ordinance changes require all of the decisions made by the Commission be posted online; the information is posted on the City’s OGC website.

Commissioner Montgomery stated her thoughts are as the times and days change, the Commission’s ideas will change as well; she is uncertain about using past decisions as a precedent to base decisions on; she is not totally against the suggestion as worded in the report.

Vice Chair LoPilato stated past decisions of the OGC are also accessible to anyone in

the Legistar archives; she is fine with the language that the PRA report could be modeled after this report; the bigger question is whether to make an ask about the development of a 10-year plan or report related to the history of the Sunshine Ordinance; she does not know if the City Council is aware that an annual report on PRAs is prepared.

In response to Vice Chair LoPilato's inquiry, the City Clerk stated the PRA report evolved from the Commission; basically the OGC asked questions about the PRAs, wanted data, and the information was added to the annual report; now that the City has NextRequest which tracks the data, it will evolve again.

Commissioner Chen stated that she recalls it was former Commissioner Shabazz who requested the PRA report; the rest of the Commission joined in the second year of the report and it became more detailed as a result; she will include the history.

Vice Chair LoPilato stated that she is in favor of bringing a version back in February to incorporate the Complaint Form amendments; she offered suggestions for consideration, not so as much as line-by-line recommendations; inquired what the subcommittee sees as the best path to ensure an efficient vote on a final report in February.

Commissioner Chen stated the report was started six months ago and keeps changing; she would like to present a final version next month for the Commission's approval; she appreciates all the input provided; it is aspirational to see if the City is interested in helping to produce a more robust document.

In response to Chair Tilos's inquiry, Commissioner Chen stated that she would like to put the report to bed to start on the next one.

The City Clerk stated any Commission suggestions should be emailed to her to forward to Commissioner Chen.

Vice Chair LoPilato stated the Commission is doing great and is slowly learning how to produce work product as a group on the fly; she would like to receive feedback from the Commission on the complaint hearing in December; a lot of different issues came up; there was discussion regarding the possibility of making a recommendation to encourage the City consider the 15-day statute of limitations as it applies to PRA requests; inquired whether the Commission would consider it a worthy recommendation before Commissioner Chen puts time into it.

Commissioner Cambra stated that he supports Vice Chair LoPilato's comments regarding the recommendation; as long as there are fruitful and productive conversations between City staff and the requestor, it would be fine; the statute could be refined so there is a clear point where the parties are done; requiring a meet and confer would be helpful in the event a complainant did not want to engage with the City.

Commissioner Chen stated that she would appreciate language for the report.

Commissioner Cambra stated he would be happy to help prepare the language.

Vice Chair LoPilato stated as long as the Commission is framing it as encouragement for Council and the City Attorney's office to consider; her guess as to the origin of the 15-day statute of limitations was from the need to look forward with open meetings violations, making sure the complaint process happens quickly and perhaps the implications on a PRA request did not come into play; she wants to give some deference to the drafters of the statute in case there was some brilliant reason behind it that the Commission is missing; Commissioner Cambra's points are well taken, but it strikes her as that it incentivizes complaints; the more ways to find informal resolutions, the better.

The City Clerk stated as part of the complaint form revision, the Commission gave direction to include that members of the public could attend OGC meetings and raise an issue without filing a complaint; the language is included at the top of the revised form; it could also be placed in other places throughout so that the public knows the Commission also exists to hear them.

Chair Tilos stated the report should be wrapped up; new comments and ideas could go into next year's report.

Commissioner Chen stated that she will bring the best of everything back at the meeting in February; unless there is something highly egregious, she is hoping the Commissioners will adopt it and a new subcommittee could be set up for the next report.

Commissioner Cambra stated there was a situation at the December 6<sup>th</sup> hearing regarding a recusal; inquired whether the Commission should address the issue or make the Council aware; stated it has the impact of potentially having the Commission's decision come under judicial review.

Commissioner Chen responded in an earlier iteration of the report, she included the recusal issue asking for clarification on when it is appropriate for a Commissioner to recuse themselves from a vote; she could put it back into the report.

Commissioner Cambra stated it would be helpful to put it back into the report so the Council is aware; the issue is a refusal of recusal puts the entire Commission decision potentially into question; it would be nice to have the ability to do something about it and have an answer.

Chair Tilos concurred with Commissioner Cambra but recalls there was a reason why it was taken out.

Vice Chair LoPilato stated her loose recollection is that there was going to be specific training given to the Commission with respect to their roles in the adjudicatory process; she assumes recusals would fall under the training; the City Council would most likely defer to the City Attorney's office; perhaps the Commission could ask the Chief Assistant City Attorney to include the issue in the upcoming training.

The Chief Assistant City Attorney stated training has been discussed, but was bumped due to the number of complaints the OGC received; the City Attorney's Office and City Clerk will discuss holding a training session to be conducted during a meeting; the checklist of topics that are intended to be presented would include conflicts of interest, both statutory and those defined by case law, in order to advise Commissioners of any conflicts.

Commissioner Cambra inquired whether the Chief Assistant City Attorney is aware of any enforcement actions for a non-recusing member of a legislative body.

The Chief Assistant City Attorney responded that she is not aware of any as she is sitting here today; stated it is always a risk; an action taken could be invalidated because someone who had a clear conflict of interest failed to heed the advice to recuse; if she finds any examples, she could include it in the training.

Chair Tilos stated it is a difficult issue because the Commission does not have teeth; the only recourse would be not to hear an item if Commissioners fear their vote could be overturned; discussed a similar situation when he sat on the Recreation and Parks Commission; stated Commissioners are crossing their fingers and hoping, but hope is not a strategy; a precedent needs to be set.

Commissioner Chen stated that she has her marching orders and invited any comments be sent to her via the City Clerk.

#### 4-D. Consider Amending the Sunshine Ordinance Complaint Form.

The City Clerk gave a brief presentation.

Commissioner Montgomery stated that she does not quite understand the section in the form which requires to name the person or department the complainant contacted; inquired clarification.

The City Clerk responded the section is intended for instances when the complainant did contact someone; proposed making the field not required to eliminate any confusion.

Vice Chair LoPilato stated a possible two-word fix would be add a parenthetical "(if any)" in addition to it not being required; inquired whether the last Date field on the form could be made to auto-populate with the date it is being submitted.

The City Clerk responded in the affirmative, stated when the form comes through the system it is time-stamped; the form can be made to auto-populate the date submitted and the language could be changed to Filing Date for clarification.

Commissioner Chen stated that she compared the new form with the old written form; she can see how a written form is less scary than an online form because if the

complainant did not contact anyone, they could just skip a section; the recommended solutions would work.

In response to Vice Chair LoPilato's inquiry, the City Clerk stated a paper form will still be available; the paper form would match the revised online form; everything would be exactly the same whether it was obtained online or hard copy; based on the trends, she highly doubts there will be many paper form submissions.

Vice Chair LoPilato inquired whether there is a word or character limit in the Describe Alleged Violation field, to which the City Clerk responded in the negative.

Vice Chair LoPilato inquired whether the language regarding submitting "all evidence supporting the complaint at the time of filing" could be revised to be more flexible to allow complainants to provide information up to, and during, the hearing.

The Chief Assistant City Attorney responded confusion arises from the actual text of the statute; the language is not entirely clear, but very suggestive that all evidence the complainant will be relying upon will be included as part of the complaint; however, further on in Section 2-93.2, the language states that during the hearing, the Commission will provide the parties with a chance to present evidence and make arguments; in practice and in the new complaint procedure, the Commissioners have made it clear that they would want to hear and consider any evidence the complainant may bring up at the hearing and do not want to put up any barriers for complainants to put their best foot forward; one option is the entire sentence could be simplified to say: "Please attach relevant documents" or "you are not required to submit evidence, but any evidence would be helpful" and provide a link to the complaint procedures; she recommends a very basic revision with the language: "attach relevant documents" and end it there.

The City Clerk suggested the language "evidence supporting your complaint should be submitted at the time of filing; during the hearing, the Commission will provide the parties with an opportunity to present evidence and make arguments."

Chair Tilos stated that he is leaning more toward the simple path of "please attach relevant documents/evidence;" staff could inform the complainant about the other opportunities to present documents; it does not need to be on the form.

Commissioner Chen stated that since used the paper form when filing her complaint, she had the impression that she could present more evidence at the hearing; she does not want the form to dissuade a complainant from being able to add to their arguments.

The City Clerk noted the old form included the language: "Please attach all relevant documentation supporting your complaint. Documentation is required."

Commissioner Montgomery stated there definitely needs to be some language about submitting any evidence that the complainant now has; she fears that on the day of the hearing, the Commission gets swamped with pages of late material; a statement on the

form that guides complainants to submit what they now have would be helpful.

Chair Tilos agreed with Commissioner Montgomery's comments; stated that he has not yet experienced being swamped with documents on the day of the hearings.

Commissioner Cambra stated that he has the same concern on both sides of the coin; the Commission could potentially be swamped at the end, which could prejudice the other side; civilians are looking at this; suggested language along the lines of: "additional information may be submitted later;" stated City staff could encourage the complainant to get the information in sometime before, and not on, the hearing date; the way her would handle Commissioner Montgomery's point is that he would not be able to evaluate any evidence submitted on the day of the hearing, which he is concerned the City would not have the ability to defend; it is a tough call.

The Chief Assistant City Attorney stated when the City directs complainants to the new procedure, the revised information might address the issues of providing related documents and evidence, as well as encourage complainants to present it a certain number of days before the hearing.

The City Clerk responded the procedure is currently posted on the website; she also includes: "contact the City Clerk's office with any questions," as she does not want anyone to feel overwhelmed or discouraged when filing a complaint.

Vice Chair LoPilato inquired whether it is possible to embed the link to the procedures in the complaint form; suggested adding language to encourage submitting evidence at the time of filing along with a link to the procedures so it is clear; stated the form needs to be road tested over time; the Commission may hear from people that the form is too legalistic or formal; as it is now, the form include an entire section on pre-hearing submissions that also ties the timing for submissions to the agenda timing.

Chair Tilos stated since complainants will be working with City staff, the language could be left very basic; he likes Commissioner Cambra's language suggestion: "additional evidence could be submitted later."

Commissioner Montgomery moved approval of the form with the changes suggested by Vice Chair LoPilato.

In response to Commissioner Cambra's inquiry, the City Clerk stated the suggested language is: "you are encouraged to submit evidence supporting your complaint at the time of filing" and "additional information for of submitting evidence..." with a link to the procedure.

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



Commissioner Chen moved approval of the paper form matching the online form.

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

#### STAFF UPDATE

The City Clerk made an announcement regarding the Sunshine Ordinance training held on December 15, 2021.

#### COMMISSION AGENDA REQUESTS

None.

#### COMMISSION COMMUNICATIONS

7-A. Communication from Commissioner Cambra

Commissioner Cambra stated that he wanted to provide his background information as the new Commissioner and he is honored to be back on the OGC.

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#### NON-AGENDA PUBLIC COMMENT

None.

#### ADJOURNMENT

Chair Tilos adjourned the meeting at 8:54 p.m.

Respectfully submitted,

Lara Weisiger  
City Clerk

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