

MINUTES OF THE CONTINUED MAY 2, 2022
OPEN GOVERNMENT COMMISSION MEETING
WEDNESDAY - - - MAY 18, 2022 - - - 7:00 P.M.

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

ROLL CALL - Present: Commissioners Cambra, Chen, Montgomery and Chair LoPilato – 4. [Note: The meeting was conducted via Zoom.]

Absent: Commissioner Tilos – 1.

[Staff present: Chief Assistant City Attorney Elizabeth Mackenzie; City Clerk Lara Weisiger; Special Counsel Michael Roush; Police Chief Nishant Joshi]

CONTINUED COMPLAINT HEARING

3-A Hearing on Sunshine Ordinance Complaint Filed on April 13, 2022

Chair LoPilato provided a recap; suggested a time limit of 20 minutes for each Commissioner.

Commissioner Montgomery moved approval of the recommendation.

Vice Chair Chen seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4. [Absent: Commissioner Tilos – 1.]

Chair LoPilato suggested reopening Commissioners' questions to address whether all responsive documents have been provided.

Vice Chair Chen moved approval of the recommendation.

Commissioner Cambra seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4. [Absent: Commissioner Tilos – 1.]

In response to the question about whether the City still needs to disclose records, Special Counsel stated the administrative investigation has been disclosed and is available on the website; there are approximately 800 pages of exhibits; outside counsel who prepared the report is in the process of doing redactions; when the redaction is completed, the 800 pages will be produced; hopefully, within the next 7 to 10 days; the production would conclude production of all the documents in response to the PRA request; because of the volume of documents, outside counsel was not able to complete the work by today, but the work is ongoing and will be forthcoming very soon.

Chair LoPilato inquired whether the 800-page exhibit have been in the City's possession and given to the administrative investigator or if they are stand-alone, new documents given to the City for the first time now.

Special Counsel responded that his understanding is some of the documents came from the City; some documents have already been released, but there may also be some documents included that were created as a result of the administrative investigation; it is a combination, so there may be some redundancy with the exhibits and what has already been produced.

Chair LoPilato provided a statement of the issue of Claim 2.

Commissioner Cambra stated that he assumes any new documents released would fall under Mr. Fraser's ongoing complaint, since they are all part of the same production; the Commission may not actually have a final decision this evening and may visit this again in another month or two.

Chair LoPilato stated said issue is part of what she wanted to get to the bottom of at the beginning of the hearing; the Commission could probably move through findings, reach a conclusion and include disclaimer language about any finding being based on the information available to the Commission as of May 18th; she anticipates an issue that these further disclosures may come out between the Commission concluding the hearing and the written decision being finalized; in order to actually wrap up the process at some point, given that Complainant did not withdraw the complaint, the Commission has to move forward the best it can.

The Chief Assistant City Attorney concurred with Chair LoPilato's general premise that whatever decision is rendered tonight by the Commission, she will make the proposed decision clear that it is limited to the scope of facts before the Commission now; further stated that if Mr. Fraser or any other Complainant submit a complaint on the additional production, either due to the sufficiency of the production or various redactions made in it, or any other issue that any Complainant may feel is appropriate, then there could be the basis for another complaint; a cut off is needed at a certain point or else there could be a continuing wrong, so to speak, which the Sunshine Ordinance does not provide for; the way it could be addressed is that the statement of the decision would make clear that, based on the information in front of the Commission, the decision would be frozen in time as of May 18th.

The City Clerk noted that she received an email from Mr. Fraser that he would like the hearing to proceed.

Commissioner Cambra stated the substance of the Commission's deliberations at the last meeting centered primarily on whether a claim was time barred versus the substance of each of the five claims; he is concerned that the Commission may not have all the information necessary and that the parties may need to come back and supplement.

Chair LoPilato stated that she is inclined to make findings with the state of the facts as they are right now, including the recommendation that production of further records be expedited; the substance can be address with respect to the facts that the Commission already has; the written decision can acknowledge that this was the landscape before the Commission as of May 18th; if the Complainant takes issue with items in any additional production, a further complaint could be brought and that would be the scenario in which the parties come back before the Commission again; the Commission may also want to consider a statement around equitable tolling of the Sunshine Ordinance statute of limitations, such that the fact that the issue is proceeding does not create some kind of 15-day Catch 22 for the Complainant.

Commissioner Cambra stated that he is willing to proceed, but is not sure he has enough facts to make findings for each of the causes of action; if a question comes up, the Commission can decide whether or not more information is needed to make a determination.

Chair LoPilato framed the issue and encouraged staying grounded in the statutes involved.

Commissioner Cambra stated in one of the documents, the Complainant referred to Government Code Section 6253(b) which has a reference to “exact copy;” the response from the City states the City has a number of systems in which data was entered into third party applications; if the City needs a copy of a record that was created, it comes from the third party software as a PDF versus the City having a Word document; if the PDF version from the third party is what was actually provided, that is the original format; if it is something else, it may not be original.

Commissioner Montgomery stated she reads the provisions as more than just about the one format; it can be many different things; she does not think the document uploaded into a holding database software would be the original format; the handwritten note, screenshot of a text message or email would be the original format.

Commissioner Cambra concurred with Commissioner Montgomery; stated it has to do with the variety of media; if the record is an email and was generated through the City, then it would not come from a third party; some of the raw data went into a third party software.

Chair LoPilato stated that she ended up focusing on two subsections in the statute, which seem to be what the parties were arguing between in their briefing; the section does state that if a record exists in electronic format, the agency shall make that information available in an electronic format when requested; it does not look like there is necessarily a separate and distinct original format requirement when the requester is seeking copies; subsection (a)(1) says the agency shall make the information available in any electronic format in which it holds the information, which she interprets as when somebody asks to review records, such as a three dimensional model or schematic, the requestor could go to City property for that; the only way to make a copy would be governed by subsection

(a)(2) which says each agency shall provide a copy of an electronic record in the format requested if that requested format is one that it otherwise uses to make copies, which really goes into the realm of metadata and case law; she wonders if it is a statutory interpretation question on how to weigh subsection (a)(1) versus (a)(2) and which applies here; perhaps there is a difference and Mr. Fraser was seeking copies and did not ever ask to review emails on a computer screen at City Hall or the Police Department; even if the question is resolved, she is in favor of applying (a)(2), which focuses on how an agency makes copies; the Commission still has to decide if there was compliance.

Commissioner Cambra stated Mr. Fraser was interested in metadata with the thought that alteration of the document, video or records would be detectable through the non-visible aspects.

Chair LoPilato inquired whether there is an obligation to produce metadata as a public record; stated from a common sense perspective, it seems like it would be a really large process for government agencies to do in response to public records requests; she does not know if the obligation goes that far.

Commissioner Cambra stated if a document is created, he believes there would be metadata; if 3000 documents with metadata is overly burdensome, the City has a response of “overly burdensome” as another defense; if metadata is part of the document and it was generated internally, he believes it is part of the document; but if raw data goes into one of the third party system and comes out as a PDF, then the PFD produced is the way the record is stored in the normal course of business; he does not have the knowledge about how that applies.

Vice Chair Chen stated her reading of Mr. Fraser’s response was that he did not get any data at all; he did say he did not get it in the correct format, but he did not get anything before April 12th; the question about the format if he did not receive anything cannot be answered.

Commissioner Cambra clarified that the Commission is only dealing with the disclosures that were made on April 12th, which Mr. Fraser received; that is what the discussion is about, not any data prior to April 12th, which the format is unknown.

Vice Chair Chen stated Mr. Fraser did not receive anything on April 12th because he claims he was not on that email list and the City cannot provide the documents that show him as a recipient.

Chair LoPilato stated the Commission’s finding could address multiple aspects of the issue; one finding could be limited to records that were disclosed; an alternate finding could be how can the Commission discuss what the Complainant received when the Complainant did not actually receive anything.

Commissioner Cambra stated the Commission should make a factual determination.

In response to Commissioner Cambra's inquiry, Vice Chair Chen stated the Assistant City Attorney was not able to pull up whether or not Mr. Fraser's name was listed under the bcc of the email released on April 12th.

Commissioner Cambra stated in essence, the City has not presented any factual evidence that disclosure was made specifically to Mr. Fraser.

Chair LoPilato stated that Mr. Fraser contends he did not receive the email and even checked his spam folder; the City was aware of his contention and did not refute it.

Commissioner Montgomery stated that Mr. Fraser found out that there was a web posting through other sources; he did not receive an email from the City with the link; he literally was not given anything and had to find it through other sources; the City did not do what it was supposed to do.

Chair LoPilato stated the Commission could make an overarching factual finding of a violation that perhaps applies to all of the individual claims.

Commissioner Cambra inquired whether Special Counsel could confirm that the City did not include Mr. Fraser in the April 12th email; stated he would like to have a more factual basis before making a finding of a violation which would impact virtually everything; he concurred with Chair LoPilato that it would not be the sole reason for finding a violation.

Chair LoPilato stated that she remembers asking specifically and expected the City should have engaged in the fairly straightforward act of going to the paralegal's computer to check if Mr. Fraser was on the bcc; the fact that that was not confirmed is a strong indication that the Commission should weigh the evidence of one party's statement that something definitively happening and the other party not being able to confirm or deny it; it may be the case that the Commission just has to do the weighing to make a finding; she is open if other Commissioners want to potentially ask another follow up question.

Commissioner Montgomery stated the question was asked at the last meeting; it is a fact that the City did not produce the document showing the bcc.

Vice Chair Chen concurred with Commissioner Montgomery, stated it is very easy to find a bcc; City staff save all of their emails; after asking repeatedly and there being no evidence, she feels like it does not exist; this is her opinion on the trust issues regarding these cases.

The Chief Assistant City Attorney stated it seems the Commission is grappling with trying to prove a negative, which she does not think it needs to do; all it needs to determine is whether or not there was evidence of a certain fact; no evidence has been presented; the Commission does not have to engage in the guessing game about whether or not it exists.

Commissioner Cambra stated all Commissioners could agree there was not any evidence to show the email was sent to Mr. Fraser.

Chair LoPilato stated that was her conclusion as well.

Commissioner Montgomery inquired whether there is a second piece that the Commission needs to evaluate.

Chair LoPilato stated the Commission may want to consider making the overarching factual finding that under the facts presented, the Complainant did not actually receive records at any point or could continue with the questions claim-by-claim and make the finding if it is relevant to each claim.

Commissioner Cambra stated in this case, the violation is that it was not in the form requested; questioned if nothing was presented at all, could there be a violation of something that was not presented in the correct form.

Chair LoPilato stated the Commission may need to make no finding on certain claims.

In response to Commissioner Cambra's inquiry on the five possible outcomes, the City Clerk provided the options: 1) complaint sustained with cure and correct recommendation, 2) complaint sustained without a cure and correct recommendation, 3) complaint denied, 4) complaint denied as unfounded, and 5) complaint dismissed.

Commissioner Cambra moved approval of denying Claim 2 in order to move on with making a finding that there was not any disclosures so there could not be a format violation.

Commissioner Montgomery seconded the motion.

The City Clerk noted the motion from the last meeting was everything prior to March 29 date was time barred; this motion specifically addresses everything post March 29th.

Chair LoPilato inquired whether Commissioner Cambra would entertain a friendly amendment to the motion along the lines of the Commission is unable to make a finding on the format of produced records on the basis that no records had yet been produced to Complainant.

Commissioners Cambra and Montgomery accepted the friendly amendment to the motion.

In response to Chair LoPilato's inquiry, the City Clerk re-stated the motion: the Commission is unable to make findings on the format of the produced records, as no records were produced to the Complainant.

On the call for the question, the motion carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4.

Chair LoPilato provided a statement of the issue of Claim 4.

In response to Commissioner Montgomery's inquiry about making the same finding as Claim 2, Chair LoPilato stated the finding could potentially be one of several findings that could be made to some or all of the remaining claims; there may be other findings as well.

In response to Vice Chair Chen's inquiry, Chair LoPilato stated Claim 8 is about timeliness; she is inclined to address the questions of prompt production and timeliness under Claim 8; for this claim, the Commission could stay more tethered to Alameda Municipal Code (AMC) Section 2-92.8, which the Complainant cited.

In response to Commissioner Montgomery's inquiry, Chair LoPilato stated if there is general agreement, the Commission could make a finding that Claim 5 would actually be a violation based on the lack of producing records; then, the Commission could discuss any other bases for a violation or non-violation.

Chair LoPilato further stated the introductory language of AMC Section 2-92.8.d.1 requires cooperation with all members of the public making requests for law enforcement records to advise individual requesters when responsive records are available; in this case, there is testimony and written evidence from the Complainant saying he never received the April 12th email, which contained the link to responsive records released; the responder did not refute it; it can be inferred that there was no notice to the Complainant based on the evidence presented; it can be noted that it was possibly an inadvertent or a technical violation, but a meaningful one because the failure to respond to this request or individual functionally closed the door of communication about whether the requestor had questions about the records, needed help accessing files, or even an opportunity for him to say his request was much broader than what was available on the link; she would tether the finding to the introductory language of the requirement of cooperation with all members of the public.

In response to Commissioner Cambra's inquiry, Chair LoPilato stated it is appropriate to be considered here because this was the disclosure of records on April 12th and any communications thereafter; she did not see anything in the record or evidence presented of actual conferring back and forth prior to the complaint being filed; the Complainant is asserting that he believed his request was broader; the respondent is asserting that they have disclosed the records, which is all there is except for the administrative investigation; inquired whether any Commissioners feel like the claim is a space to discuss the scope or have concerns about the scope of what was produced relative to what was requested.

Commissioner Montgomery stated she still has a lot of reading to do but her feeling is that the City did not disclose the law enforcement records to the Complainant consistent with the Sunshine Ordinance; he had to go looking for them.

Chair LoPilato stated there is alignment on the applicability of the lack of a direct response to the Complainant as a basis for a violation of the claim.

Commissioner Cambra stated the City did disclose the information through a link in an email to a whole bunch of people, unfortunately, Mr. Fraser was not one of the people; it is clear that he did not receive the records because of negligence, as opposed to any intent to not get him the records; it has to go with cooperation, as opposed to the reason why the City did not give him the record sooner; there was not any room for cooperation; the window of time from March 30th to April 12th was short and the Complainant had to file his complaint because of the 15 day requirement; suggested having a discussion about the possibility of extending the statute, which cannot be done in this particular case.

In response to Commissioner Cambra's inquiry, Chair LoPilato stated part of the Commission's finding might need to address that while it may have been an inadvertent or technical violation, there is an opportunity to move things forward in a productive way with respect to the request; the Commission could essentially recommend that the respondent confer with Mr. Fraser about the types of records he has articulated a request for and recommend that any further responsive records that are not required by law to be withheld or redacted be produced; now that the ongoing investigation exemption is no longer in play, the City may want to consult Government Code Section 6253.1 which outlines ways in which an agency must assist a member of the public requesting records; the Commission could also make a recommendation that there be direct communication with this requestor and that he be directly included in any notifications about the availability of any further records.

Commissioner Montgomery stated that she likes Chair LoPilato's cure and correct ideas.

Vice Chair Chen stated there has been an ongoing disagreement about when items are redacted; the reason for each redaction should be explained; previous redactions were vague; according to the Code, the redactions reasons should be specified.

Chair LoPilato stated that would be under Claim 6, which specifically refers to the Sunshine Ordinance section regarding withholding entire records and also requires an explanation of withheld information in writing.

Commissioner Cambra stated that he recalls the Assistant City Attorney mentioning case law that says the City is not required to do a specific log for individual redactions; maybe the Commission needs to get a little more information on the case law before going down said path.

Chair LoPilato stated the Commission has made a prior finding that no privilege log is required; she is inclined to address the depths of the explanation under Claim 6.

Commissioner Montgomery and Vice Chair Chen non-verbally expressed agreement with Chair LoPilato.

Commissioner Montgomery moved approval of the Commission sustaining Claim 4, with the cure and correct recommendations previously noted by Chair LoPilato.

Chair LoPilato stated the motion should elaborate that the finding is there was a failure to cooperate with a member of the public.

Commissioner Montgomery proposed: a failure to cooperate with the release of records.

Commissioner Cambra proposed: the City failed to cooperate with Mr. Fraser in the disclosures requested; therefore, the Commission sustains the complaint with a way to cure and correct.

Chair LoPilato inquired whether Commissioner Montgomery wants to make a reference to the likelihood that it was an inadvertent violation or an inadvertent admission, to which Commissioner Montgomery responded in the negative; stated that she does not want to guess whether it was negligent or purposeful, only whether or not it was done.

Chair LoPilato offered a friendly amendment to the motion that Commission sustains the complaint on the basis that Sunshine Ordinance Section 2-92.8.d.1's requirement for cooperation with all members of the public making requests for law enforcement records includes advising individual requesters when responsive records are available; the City failed to do so.

Commissioner Montgomery accepted Chair LoPilato's friendly amendment to the motion.

Vice Chair Chen seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4.

Commissioner Montgomery stated that she has a hard time believing all records were produced; there was no email, text, phone calls, nothing; this a large and important case involving a death; she is hoping more records will be released; she has read the City's response and it just seems like a big hole; there is no proof that there are missing records, it is just her feeling.

Chair LoPilato stated the original request sought all records created relating to the incident described in Case 21-01762, not just the file; the Complainant emphasized interest in digital communications, calendar appointments, or other items that would be beyond the scope of what is in a typical Police file; what was ultimately disclosed was limited to evidence collected for the Police and investigatory files; there were no efforts to confer with the Complainant directly prior to the complaint being filed about what other types of records pertaining to other law enforcement activity might need to be disclosed under the Sunshine Ordinance; the cure and correct recommendation essentially recommends that the City look at the Complainant's response to follow up Question A1 and engage with that request.

Commissioner Cambra stated that it may be possible there is other information out there, but anything that is not before the Commission is speculation; the Commission has to make a finding based on facts; he is satisfied with the motion.

Commissioner Montgomery stated she would like to put a pin in the matter to talk about further things, but she is okay right now.

Chair LoPilato called a recess at 8:43 p.m. and reconvened the meeting at 8:53 p.m.

Chair LoPilato provided a statement of the issue of Claim 5.

Chair LoPilato stated that she did not see anything in the complaint indicating a lack of production; the argument in the complaint focused more on the timing of the production.

Commissioner Cambra stated that page 2 of the complaint has a pretty specific list all of the information that needs to be disclosed, some of which was disclosed as part of the body cam footage and dispatch records released several months after the incident; from a substantive standpoint, his question is did these records exist and were they released at that time.

Chair LoPilato stated there is a lack of specificity in the complaint regarding what aspects of the long list of statutory information Mr. Fraser is claiming was not produced; it seems the concern and thrust of the allegation is more that the information was not produced the minute the District Attorney's (DA) letter went out and wanting the information on March 30th or earlier.

Commissioner Cambra inquired whether an arrest record was actually made.

Chair LoPilato stated everyone had the same accessibility to the records that were produced and the same lack of information about what else might exist; she sees the thrust of the complaint as taking issue with whether there was a proper exemption for not providing all information; she does not see the Complainant taking issue with specific items he seems to believe were missing from the April 12th disclosures; there is not much to see; otherwise, the Commission would be analyzing a specific question; on said basis, she is inclined to find no violation here rather than to keep going in search of one or make no finding.

Vice Chair Chen stated that there is no finding because the Commission does not have enough evidence either way to know whether the evidence and information even existed.

Chair LoPilato stated the term prompt is potentially part of the analysis, but is being segregated to Claim 8.

The Chief Assistant City Attorney stated that the reason the term prompt is being discussed is because she provided some guidance to the Commissioners that the Complainant cited a statute that he asserts was violated and went into a discussion about the timing of the DA's release of her report; he then asserts that from March 30, 2022 to present, the respondent had no legal basis for withholding information required to be

disclosed under the Government Code; the analysis of whether or not there was an unreasonable or unlawful delay is where the term prompt comes up.

Chair LoPilato stated that from reading the complaint, the thrust of the claim is more about the timing; Mr. Fraser is not identifying any specific thing that was not disclosed; there is no reason to infer that the Police records that were disclosed did not include this information.

Commissioner Montgomery stated that she would like to go back to the actual question, which is: did the City comply with requirements for disclosing arrest logs and records concerning calls for service; the City did not respond directly to the Complainant, communicate with him or email the link to him.

Chair LoPilato stated that she is hearing a hybrid claim that the City did not comply with the Government Code sections, because it did not produce information to the Complainant by virtue of not having contacted the Complainant with the link, but it sounds like it is leaning towards no finding with respect to the specific aspect of arrest information and calls for service.

Commissioner Cambra stated that there was some disclosure that calls for service were a part of the recordings that the City released, along with the video, so at least there was some disclosure; he does not know that the Commission can make a finding that there was a violation; there is not enough information.

Chair LoPilato stated there may be a finding with respect to this individual Complainant along the lines of Commissioner Montgomery's statement and a secondary finding with respect to the records disclosed to the public.

Commissioner Cambra stated if he is not mistaken, the Complainant got the video footage and the calls for service audios from the City prior to April 12th.

Chair LoPilato stated the Respondent's Exhibit 5 is an email from the Paralegal to the Complainant dated April 27 2021 with a link that contains all of the materials the City has publicly released, along with a link to the release of the body worn camera footage; the statutory language deals with arrest records, which she is not sure actually applies here; it sounds like the Commission is attempting to determine if the calls for service were released directly to the Complainant.

Vice Chair Chen stated that she never got the sense that the City ever released information to the Complainant directly; all along, he asked for a lot of information and every time the City wrote a press release or posted something, the Complainant was sent an email telling him to look at the press release or post.

Chair LoPilato stated that Government Code 6253(f) envisions posting any public record on the agency's website and directing a member of the public to the location on the website where the public record is posted as an acceptable method of disclosing

information; the distinction here is with respect to April 12th since the City never emailed the Complainant the link as far as the evidence indicates; however, it appears that with respect to whatever was released April 27, 2021, there is an email on the record indicating that the Complainant received the link; since the Commission does not have the materials contained in the link, the Commission is at a loss about whether it contained the information about the calls for service; if the Complainant was alleging that calls for service were never produced, it would have been stated in the complaint somewhere and does not seem to be; the argument seemed to be more about timeliness.

Commissioner Montgomery moved approval of giving Chair LoPilato an additional 15 minutes.

Commissioner Cambra seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4.

In response to Commission Montgomery's inquiry, Commissioner Cambra stated some of the information from the list was disclosed; there is a question about whether or not the remainder of the information exists; the Commission could find that the City did not do the disclosure and there are not enough facts to be able to sustain the complaint.

The City Clerk stated some of the other options include potentially no violation or no finding; another one was potentially finding a hybrid between Claim 2 and Claim 4.

Chair LoPilato stated to the extent that materials covered by Government Code Section 6254(f)(1) and (f)(2)(a) were produced as part of the April 12, 2022 disclosure, the Commission makes a finding that disclosure was not properly made to the specific complainant since the evidence reflects he did not receive the email in which the records were disclosed; to the extent that records covered by Section 6254(f)(1) and (f)(2)(a) were included in prior disclosures that were directly sent to the complainant, the Commission would find no violation.

Commissioner Cambra stated that he concurs with Chair LoPilato; he is frustrated that the Commission does not have enough facts and the structure of the hearing does not allow for hearing back from the Complainant or the Respondent to try and get more information to be able to make a more solid determination.

Chair LoPilato stated a future solve for that could be some changes to the Commission's complaint procedure; as the procedure stands, when complaints are complex, Commissioner clarifying questions is where questions need to come in; there was so much in this case, which go through the analysis could have taken 2 hours.

In response to Chair LoPilato's inquiry, the Chief Assistant City Attorney stated the Commission could reopen clarifying questions; the parties have had an opportunity to

present evidence in support of the claim; if evidence is insufficient, it is acceptable to conclude that no finding is possible due to the lack of evidence.

Commissioner Cambra stated he appreciates the Chief Assistant City Attorney's views, but is opposed to simply stating there is not enough information, which gives the Commission an out to not make a finding; he is leaning more towards the parties being able to supplement the record; a number of assumptions were made that he still feels uncomfortable with; he does not want to see a rigid hearing procedure adopted that may not fit a real hearing with due process concerns.

Chair LoPilato stated that she wants to provide all opportunities for parties to be heard and wants to believe findings can be made without relying heavily on assumptions.

Vice Chair Chen stated if the Commission reopens the claim, the first two decisions will have to be reopened as well; it seems endless; perhaps it should have been structured differently from the get go, but now it is trying to be fixed midstream.

Chair LoPilato stated that she is also mindful of the fact that the Commission had the opportunity to ask questions during clarifying questions; she wants the Commission to hold itself accountable as well.

The Chief Assistant City Attorney stated the issue of due process imagines that a party has not had the opportunity to make an argument; in this case, both sides have been offered the opportunities to make arguments and submit evidence, not just once but twice; she appreciates the desire to give everyone a fair shake; if the Commission is holding back on making a decision because of the concern that the parties have not been offered due process, she does not feel that either party has been denied due process; they have had the opportunity to bring forth evidence to either support or refute claims; if they have not done so, that is their decision.

Commissioner Montgomery stated that she agrees with the Chief Assistant City Attorney; no matter what questions the Commission would ask in the future, the answers will not be any different; questions have been asked and responded to; she would not like the issue opened up again.

Commissioner Cambra reminded the Commission that there are two parties; one is the City and has the full force of the City Attorney's office; the other party is a resident in the community who should not be expected to know the law; even if all the facts have not yet been presented, the Commission should not be a barrier to getting more information to give the Complainant the benefit of due process.

Chair LoPilato stated that she asked for a delineation of what records the Complainant asked for, but did not receive to inform the discussion; the Complainant provided a list in response to Commissioner Chen's question and listed that his request was meant to encompass text messages, personal cell phones, internal emails, messages, phone records, notes, interviews of Officers, and records with Renee Law Group of

correspondence with all three bodies investigating the death of Mr. Gonzalez; that addresses the gap between what was produced and what was requested.

In response to Chair LoPilato's inquiry, Commissioner Cambra stated his concern is more with Claim 5; he does not anticipate any more concerns with Claim 6 and Claim 8; he would like to move forward, but reserve, and hear the other two claims.

Chair LoPilato stated where the Commission left off on Claim 5 was: to the extent that the records were contained in the April 12th disclosure, there was at least a technical violation with respect to the fact that records were not disclosed directly to the Complainant and, to the extent the records identified in subsections were disclosed directly to Complainant, the Commission finds no violation.

In response to Chair LoPilato's inquiry, Commissioner Cambra stated to go ahead and move forward with a finding on the claim because there was no disclosure.

Chair LoPilato restated Commissioner Montgomery's original motion: to the extent that records specified in Government Code Section 6254(f)(1) and (f)(2)(a) were produced via disclosures on April 12, 2022, the Commission finds a technical violation in that the City did not directly disclose the records to Complainant; to the extent that the records specified in the same two subsections were disclosed directly to the Complainant, the Commission finds no violation.

Commissioner Cambra stated on the earlier disclosure, the City released all the information it had when releasing the video and audio; if there was no arrest record to release, there was no violation

Chair LoPilato proposed the addition of the phrase: if the items in the subsections do not exist or were released there was no violation; if the items in the subsections were released via the April 12th disclosure, the finding would be a technical violation on the same basis as the other claims.

In response to Commissioner Cambra's inquiry, Chair LoPilato stated the motion could be clarified with one word: if the only instance in which these records identified in this subsection were disclosed was on April 12th, then there is a technical violation.

Commissioner Cambra stated that he is concerned with saying there is a technical violation because there was a previous disclosure; he does not feel like the Commission can have it both ways; it is appropriate to make a motion at this time.

Chair LoPilato stated as information for the public and any future parties, it is very helpful if the Commission is actually provided with the full scope of the records request and the records produced so that comparisons can be made to help the Commission avoid the challenging aspects of this complaint.

In response to Commissioner Montgomery's request, Chair LoPilato restated the motion: if the records specified in Subsection 6254(f)(1) and (f)(2)(a) were produced in a disclosure for which the City directly corresponded with the Complainant, then the Commission finds no violation; if the only instance in which the records identified in Subsection 6254(f)(1) or (f)(2)(a) was in the April 12, 2022 disclosure of which the Commission finds the Complainant did not receive notice, then the Commission finds a technical violation.

Vice Chair Chen seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4.

Chair LoPilato provided a statement of the issue of Claim 6.

In response to Chair LoPilato's inquiry, the Chief Assistant City Attorney cited AMC Section 2-92.11: no record shall be withheld from disclosure in its entirety, unless all information contained in it is exempt from disclosure by law; any redacted or withheld information or document shall be explained in writing.

Chair LoPilato stated this addresses the decision point to withhold records after the records have been determined to be responsive; the question is not about determining scope, but withholding things that have been determined to be responsive.

Commissioner Cambra inquired whether the City's reliance on Penal Code Section 832.7 and other provisions, which said the City could not disclose information because there was an active investigation going on, does not apply in this case to the April 12th disclosure because the investigation had been concluded.

The Chief Assistant City Attorney responded in the affirmative; stated that is her understanding of the City's position.

Vice Chair Chen stated that she does not have enough legal expertise to determine whether or not the option was overly applied to redact the information; the 60 days seems to provide an out.

Chair LoPilato stated everybody should be mindful of the time restrictions; the Commission is looking at actions from March 29, 2022 forward.

Commissioner Cambra stated that the City gave justification for why it was not going to disclose certain information: Penal Code Section 832(7)(b)(7): confidential medical, financial or other information which disclosure is specifically prohibited by federal law or because it is an unwarranted invasion of personal privacy; personal identifying information of witnesses, including juveniles.

Chair LoPilato stated the question is whether legal exemptions existed to justify the full withholding of any records and whether explanations were given in writing.

Commissioner Cambra stated that he does not want to interpret any of the statutes without some guidance; the statutes seem relatively broad in the description of what can be withheld.

Chair LoPilato stated the Commission can be looking at records produced on April 12th that were withheld in full prior to the DA's decision not to prosecute; the Sunshine Ordinance requires there to be some legal exemption for withholding records in full; reviewing what was released on April 12 and staying mindful of the timeframe, she is comfortable finding no violation in the City's decision to withhold the records in full until after the DA's decision not to prosecute under the exemption outlined in Penal Code Section 832.7; the Commission has learned there were potentially records in the City's possession that had been withheld pending the administrative investigation; to the extent the records were in the City's possession prior to the administrative investigator preparing new documents that are still being withheld, she would likely find a violation on the basis that Penal Code Section 832.7 only creates an exemption to withhold records to do a pending administrative investigation for 180 days after the discovery of use of force; this is a spot where it is difficult to make a finding because the information given was ambiguous as to whether there are any records that were in the City's possession previously that have not been disclosed; nonetheless, the explanation of any records being withheld was never given in writing and that whole concept about documents being withheld with the administrative investigation still remains ambiguous; there may be room to explore a finding of a possible violation; with the redactions, there are two separate issues; she personally would find no violation with respect to the level of description given in explaining the redactions in the City's April 12, 2022 email or the fact that redaction explanations were given in an overarching list, rather than record by record; she agrees there is no requirement for a privilege log; as just a member of the Community, and that's how Commissioners sit, she would hope that if Mr. Fraser or any other requester went back to the City with questions about a specific record redaction, the respondent would explain which of those listed redactions applies to that record; here, the evidence presented reflects that the City omitted Mr. Fraser from the April 12th email disclosing the records; even if that admission was inadvertent, it would constitute at least a technical violation because he never received an explanation of redacted material in writing, as required by the Sunshine Ordinance.

Commissioner Montgomery stated that it is hard to make decisions on things that you cannot see, but it looks like the City did what it was supposed to do based on the ordinances.

Commissioner Cambra stated Mr. Fraser should have been included in the April 12th email disclosure, but was not and did not get the link; therefore, Mr. Fraser did not see any of the justifications for the redaction; essentially, instead of some of the information being withheld, all of the information was negligently withheld; the question becomes about whether the information was intentionally withheld versus just not getting the information.

The Chief Assistant City Attorney stated the statute is silent as to intent; there has been discussion about technical violation, negligent violation and intentional violation, but that is reading a distinction into the law that is not there; if the Commission would like to include a characterization of how it believes the violation was made, it would not be part of the violation; the Commission can conclude that the violation was a negligent violation or that the omission of the Complainant on the bcc line was done negligently and not with intent; the Commission can go either way; there is no relevance; if the majority of the Commission wishes to provide some additional context that would be included in the statement of decision, that can be done as well.

Vice Chair Chen stated that she does not know what the intent was in the omission, so all she can say is the City failed to send the Complainant the information that he requested within the time limit; he did not get it and the City did not send it, so that is a violation.

Commissioner Montgomery moved approval of giving Commissioner Cambra an additional 10 minutes.

Vice Chair Chen seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4.

Commissioner Montgomery moved approval of sustaining Claim 6 on the basis that Mr. Fraser never received the April 12th email; he did not receive it and it was withheld.

Vice Chair Chen seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4.

Chair LoPilato inquired whether it seems reasonable to have the cure and correct either repeated under each claim or as a whole, to which the Chief Assistant City Attorney responded it could be done either way; it seems that there is a certain pattern so she would prefer, for specificity, to have the cure and correct listed as applicable to each claim.

Commissioner Montgomery moved approval of incorporating the cure and correct recommendation from Claim 2 and applying it to this finding as well.

Vice Chair Chen seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4.

Chair LoPilato provided a statement of the issue of Claim 8.

Vice Chair Chen stated this is just a repeat of everything the Commission has been doing all night; it was not timely because the City did not send it to Mr. Fraser; she cannot think of anything more to say about it; she has sat through multiple Public Records Act (PRA) complaints regarding the Police Department; it is a variation on the same theme which needs to be applied to the next annual report about how the Commission can help the Police Department and the community better understand each other's challenges in responding to PRAs and how to increase transparency; the same things are being discussed over and over again; it seems that PRA requests that get logged jammed only get unlogged jammed when people file a complaint, which is another problem.

Commissioner Cambra stated he concurs with Vice Chair Chen.

Vice Chair Chen moved approval of sustaining Claim 8 based on the fact that the complainant did not receive the link to the documents.

Commissioner Cambra seconded the motion.

Commissioner Montgomery made a friendly amendment to the motion to incorporate the cure and correct recommendation from Claim 2 and apply it to this finding.

Vice Chair Chen and Commissioner Cambra accepted the friendly amendment.

On the call for the question, the motion carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; and Chair LoPilato: Aye. Ayes: 4.

In response to Chair LoPilato inquiry, the Chief Assistant City Attorney stated that between her notes and the video, she should be fine drafting a written document that will be shared and signed by each Commissioner.

Chair LoPilato made comments regarding the finding as to whether the omission of Mr. Fraser from the email was inadvertent or not.

Commissioner Cambra expressed that it has little relevance to the decision, which are technical, statutory and fact based.

Commissioner Montgomery stated that she is not sure the Commission should judge intent or speak towards intent on either side; the Commission needs to be careful about making statements about purposefulness.

The Chief Assistant City Attorney stated the general description could include that the Commissioners discussed the issues of intentionality and negligence and ultimately opted not to include it in the decision; the conversation will be noted, but will not be part of the decision.

Vice Chair Chen stated she would like to see two items on the next agenda, including the table of contents for the next annual report and a report from staff about PRA requests and the outcomes of complaints.

The Chief Assistant City Attorney cautioned the Commission to stick within the bounds of the agenda.

ADJOURNMENT

Chair LoPilato adjourned the meeting at 10:46 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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