

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
MONDAY - - - SEPTEMBER 19, 2022 - - - 7:00 P.M.

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

ROLL CALL - Present: Commissioners Cambra, Chen, Montgomery, Tilos and Chair LoPilato – 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 Minutes of the May 2, 2022 Meeting and the May 18, 2022 Continued May 2, 2022 Meeting

Commissioner Tilos stated he would prefer to bifurcate the vote on the minutes since he was not present at the May 18th continued meeting.

Chair LoPilato provided some minor corrections to the minutes.

Commissioner Cambra moved approval of the May 2, 2022 minutes.

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

Commissioner Cambra moved approval of the May 18, 2022 minutes.

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

4-B. Discussion of the Unfounded Determination

Commissioner Cambra gave a brief presentation.

Vice Chair Chen stated that she wants to try to parse out unfounded; Commissioners feel like unfounded is a pretty serious decision, which is why there are now five different choices.

In response to Chair LoPilato, Vice Chair Chen stated that she does not know the difference

between something staff might peel off versus what would make it through the gate.

In response to Chair LoPilato's inquiry, the City Clerk stated staff has only found two complaints as not timely; it is very clear that, following a body's action, the complaint has to be filed within fifteen days of that action; anything sixteen days or more is what would not be scheduled for a hearing.

In response to Chair LoPilato's inquiry, the Chief Assistant City Attorney stated that she would distinguish the two as procedural and substance; if there is a procedural defect in the way that the complaint was filed, such as timing, the complaint may not come to the Commission for a hearing; the substance of the complaint would be a consideration that the Commission would evaluate to determine whether or not the Complainant's argument lacks sufficient teeth to be unfounded or not.

Vice Chair Chen stated if the Commission ruled something as unfounded, given what the choices are right now, it seems like an egregious thing; it needs to be defined much better.

In response to Commissioner Montgomery's inquiry, Commissioner Cambra stated his questions include: 1) did the Complainant actually reach out to the City to try and resolve the issue or at least engage in some dialogue, so there would be the possibility that the matter would never come to the Commission; and 2) something filed with the Open Government commission is a quasi-judicial proceeding that has to follow all of the law; if a Complainant clearly ignores precedent, the City Attorney's office could look at the case and state it is not a violation of the Brown Act or Public Records Act (PRA) and the Complainant could chose to proceed anyway; it is not a matter of checking three out of five boxes, rather, there should be a reason when the Commission considers something unfounded.

In response to Commissioner Montgomery's inquiry, the City Clerk stated when the complaint procedures were adopted, the Commission wanted to have more than just two options and set the following five options: 1) complaint sustained with cure and correct recommendation, 2) complaint sustained without cure and correct recommendation, 3) complaint denied, 4) complaint denied as unfounded, and 5) complaint dismissed on jurisdictional or procedure grounds, not a finding on the merits; denied as unfounded is defined as a complaint rejected with the Commission additionally finding the complaint lacks a reasonable or rational basis; if more than two complaints are determined to be unfounded within a twelve month period, the Complainant is prohibited from filing a complaint for five years.

Chair LoPilato inquired whether the first sentence of the definition would be fair game for the Commission to potentially massage and refine, to which the Chief Assistant City Attorney responded in the affirmative; stated what the Commission cannot change on its own would be the penalty for having two unfounded complaints within the time period; said language is in the Sunshine Ordinance and the Commission would need Council to make that kind of change.

In response to Chair LoPilato's inquiry, the City Clerk stated more than two complaints prohibit filing for five years.

Commissioner Cambra stated that he and the Chief Assistant City Attorney were both really clear about not wanting to tie the Commission's hands to a clear list before actually making an unfounded decision; at the same time, a person's reasonableness is relative; the idea that the Commission would be able to articulate some factors as part of the procedure in determining an unfounded complaint is important; it gives notice to anybody who wants to file that there is a

penalty and how it will actually play out.

Vice Chair Chen stated there are three ways to deny a complaint: deny, deny as unfounded, and deny on procedural basis; ever since this was clarified, the Commission has not had a ruling denied as unfounded and recognized it is a huge slap in the face of someone who honestly came forward and felt that a violation of Sunshine Ordinance occurred; historically, her complaint was the first one sustained; the issue had not come up before; no one has been banished from filing complaints; it makes more sense that Commissioners have three choices to deny a complaint; unfounded is one that has not been chosen ever since choices were provided.

Commissioner Tilos stated that he remembers the Commission concluded a complaint was unfounded prior to the five choices available now.

Commissioner Cambra stated he recall that case was brought by Paul Foreman.

Commissioner Tilos stated that he wonders whether the case would still be unfounded if the Commission had the five choices back then; all along he thought the magic number was two unfounded complaints before being banned, when actually it is three; perhaps Mr. Foreman thought the same as he made a statement to the effect that he would be banned after one more unfounded ruling.

Chair LoPilato stated factual circumstances that gave rise to the unfounded determination feel like fair game for the discussion; inquired whether there are boundaries to keep in mind in terms of re-litigating things outside of the agenda item.

The Chief Assistant City Attorney responded in the affirmative; stated Chair LoPilato's concern is well founded; it is fair game to have discussions about what was considered unfounded in past complaints; the Commission should not retry Mr. Foreman's complaint from early 2021 because it would step outside of what is agendized tonight.

Vice Chair Chen stated that she recalls that the Commission decided not to sustain Mr. Foreman's complaint and the choice was binary: either sustain or deny it as unfounded; if her complaint was unfounded, her feelings would have been hurt; if other options were available, perhaps the Commission would not have made the unfounded ruling.

Commissioner Montgomery stated without the minutes in front of her, she does not want to discuss the specific complaint; she would rather stay on the issue and not second guess what was done in the past; inquired what issue is truly bothering the Commission and what the aim is now.

Chair LoPilato stated one possible path of action could be to put a little bit of a finer point on what unfounded means; maybe there is room to add in some examples of a type of circumstance that could lead to a finding of unfounded.

Commissioner Cambra concurred, stated it could be described in broad language so Commissioners all have the same criteria.

Chair LoPilato stated the language should be in the complaint procedure which is given to anyone filing a complaint so that Complainants are on notice immediately of the exact same framework that the Commission will be thinking through.

Commissioner Cambra stated occasionally the Commission is going to get a complaint that is very sensitive; being able to have the confidence and foundation to make a determination by going through the factors is important.

Commissioner Montgomery stated it is important to remember that the Commission is fluid and members will turn over with every election; Commissioners will not always know about the past or unfounded rulings; she wants to make sure the Commission is just talking about the issue and not trying to foresee what a citizen or some future Commissioner should or should not know.

Chair LoPilato inquired whether there is sufficient interest in taking some course of action to refine or explain the definition of unfounded.

Commissioner Cambra stated that he wants to address Commissioner Montgomery's concerns; he concurs that the Commission does not want to establish precedent in any way by making decisions for future Commissions; there are going to be many future Commissioners; there still needs to be consistency in the decision making process; present and future Commissioners should look at the factors which are the same unless a Commission changes the procedures; regardless of who the Commissioners are, the discussion and factors going forward would be the same; suggested continuing the item to the next meeting in order to give Commissioners the opportunity to think a little bit about what reasonable might be and what might be consider beyond the his suggestion.

Commissioner Tilos stated everyone seems to be in agreement that a five year ban is a steep penalty; other choices were not available before; he is good with the language the Chief Assistant City Attorney provided being married with Commissioner Cambra's check boxes.

Chair LoPilato concurred with Commissioner Tilos; stated his suggestion is almost identical to what she was going to suggest as a possible path forward; the Commission cannot do anything but make a suggestion to the City Council if there is interest in addressing the penalty; what the Commission can do is address the definition of unfounded in the Complaint Procedures which is the guiding document for individuals who are bringing a complaint forward; it also lays out the five options that Commissioners use to make decisions; the current language in the procedure is: "finding the complaint lacks a reasonable or rational basis...;" concurred with Commissioner Cambra's suggestion to carry the item forward so that Commissioners can add language; she agrees with the desire not to make a very rigid box, but mostly just provide a framework of things that could lead to the determination.

In response to Commissioner Cambra's inquiry, the City Clerk stated the issue would be a new agenda item because the Commission would be addressing and modifying the complaint procedures.

In response to Chair LoPilato's inquiry, Commissioner Cambra stated Commissioners should mill around what factors would be reasonable, irrational, or whichever way it is approached, which could be shared at the next meeting for the Commission to wordsmith.

Chair LoPilato stated it would be helpful for Commissioners to submit written correspondence before the meeting; suggested Commissioner Cambra reduce the factors he is proposing into a written suggestion.

The City Clerk noted if anybody submits language directly to her, she can synthesize it ahead of time.

4-C. Discuss Statutory Regulations Controlling the Hearing Process and Opportunities to Encourage Parties to Confer and Attempt to Resolve Issues Prior to the Hearing

The Chief Assistant City Attorney gave a brief presentation.

Vice Chair Chen stated when the original Sunshine Ordinance was written, the PRA issue was not anticipated; it was more about the other half of the violations, which is a failure to adequately notice items on an agenda; the ordinance was written just to address the fact of whether the City Council, Boards or Commissions failed to properly notice a meeting because that is not a moving target; the PRA is a moving target; if the Commission wants to, it could ask that the City Council look at amending the Sunshine Ordinance to address what constitutes a PRA violation.

Chair LoPilato stated the question could be narrowed down even further to adjusting the statute of the window of the time to file in the context of a PRA complaint; it is difficult to discern what some of the motivations were in the original drafting of the Sunshine Ordinance or where there was conscious thought put into things versus stock language; to the extent that the 15 day window is geared towards ensuring that complaints about agendized matters are handled promptly, it seems like more thought could be put into whether that timeline makes sense for PRA violations.

Vice Chair Chen stated most of the PRA complaints are about police records requests, which has been a big issue nationwide; inquired whether the Chief Assistant City Attorney chanced upon any research about individuals making a PRA request from law enforcement.

The Chief Assistant City Attorney responded that she was looking at the very specific issue of whether or not there was case law interpreting when a PRA request had not been complied with; stated the short answer is no; she is aware of the phenomenon Vice Chair Chen mentioned about disputes relating to police records; unfortunately, the fact that there are a lot of conflicts in that area did not produce reported cases that would have helped the Commission find whether there is any sort of definition about when a PRA request has not been complied with.

STAFF UPDATE

The City Clerk and Chief Assistant City Attorney gave a brief update on a complaint that was received, but not scheduled for a hearing.

COMMISSION AGENDA REQUESTS

6-A. Consider Agendizing the Formation of Subcommittee for Drafting Annual Implementation Report to City Council and Discussion of Potential Topics and Form of Report (Chair LoPilato)

Chair LoPilato gave a brief presentation.

Commissioner Cambra stated that he is ready move forward with the item.

Chair LoPilato stated at the beginning of this year, former Vice Chair Shabazz and current Vice Chair Chen put significant work trying to catch up for ten years that the report had not been prepared; the Commission process to move forward should be simpler; concurred with Commissioner Cambra in that the Commission is obligated to move forward; stated it is an excellent vehicle to communicate concerns and issues that come up.

Vice Chair Chen stated that she would like to suggest the inclusion of aggregated data about PRA requests in the report; requested the assistance of the City Clerk to compile the data; stated it is important for people to know about things happening in the City government and that the City is trying to be as transparent as possible.

The City Clerk stated the NextRequest PRA system started in August 2021; it is easy to pull data from the program, she would just need a timeframe.

Chair LoPilato stated that she would love to see the annual implementation report refer to things that happened in the calendar year; in carrying the item forward, the Commission could include a motion that one of the topics to be discussed at the future meeting would be the inclusion of the 2022 data from NextRequest; it could encompass January 1 to the end of the year; the report would be published in January or February 2023.

In response to Chair LoPilato's inquiry, the Chief Assistant City Attorney stated that her understanding was that the discussion is only to deal with whether or not a majority of the Commission is in favor of bringing the matter back to a future meeting, during which time there would be discussion about forming a subcommittee and talking about what type of topics would be in the report; she would advise that the discussion tonight really focus narrowly on whether there is interest in bringing it back for a more robust discussion.

Commissioner Montgomery moved approval that the item be brought forward and agendized for the next meeting.

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

6-B. Consider Agendizing Revision of the Sunshine Ordinance Complaint Procedures to Clarify the Pre-Hearing Process (Chair LoPilato)

Chair LoPilato gave a brief presentation.

Commissioner Tilos moved approval that the item be agendized for the next OGC meeting.

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

COMMISSIONER COMMUNICATIONS

Vice Chair Chen expressed appreciation for Chair LoPilato.

Commissioner Tilos concurred with Vice Chair Chen sentiments and expressed appreciation for Chair LoPilato.

Chair LoPilato expressed appreciation to the Commission for working as a team and improving processes; thanked staff for their hard work.

The City Clerk stated she is happy to poll to Commissioners for an available date for the next meeting.

ADJOURNMENT

Chair LoPilato adjourned the meeting at 8:31 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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