

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING  
MONDAY - - - AUGUST 2, 2021 - - - 7:00 P.M.

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

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

Absent: Vice Chair Shabazz – 1.

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

Oral Communications

None.

Regular Agenda Items

3-A. Review of the Sunshine Ordinance Complaint Form and Procedure

Commissioner LoPilato gave a Power Point presentation.

Commissioner Reid thanked Commissioner LoPilato for the excellent presentation; suggested the Commission consider an online complaint form process as well; stated the most streamlined approach is something as simple as possible for the average member of the community to be able to reach out to file a complaint; another important issue is what independent outside counsel would look like and who would decide; suggested considering a provisional approach such as having outside counsel for the next six months or for specific number of complaints; noted that she has questions regarding what a prehearing process and an informal complaint process would look like.

Chair Tilos summarized Commissioner Reid's questions and comments.

Commissioner Chen stated reading Commissioner LoPilato's report and seeing the visual presentation was very helpful; she compared it to having jury instructions, receiving a neutral presentation of the parameters and being able to decide whether or not a complaint matches up with the Commission's duties under the Sunshine Ordinance; she would really value having "jury" instructions as the Commission is the jury and not the judge.

Chair Tilos thanked Commissioner LoPilato for the hard work; stated he is leaning towards having an impartial and neutral outside attorney guide the Open Government Commission (OGC), rather than someone from the City Attorney's office.

Commissioner Chen stated she would like to test out having a neutral memo to see if it

works; she is not convinced either way whether outside legal counsel is needed or whether it could be done in-house with City Attorney staff; if the Commission is not satisfied with the product, then the alternative could be tried; all attorneys are trained to argue multiple sides of any issue; she would like to see a neutral memo first.

Commissioner Reid stated the Commission's task is to ask what is the best way for the OGC to serve the public; the OGC needs to ensure that someone who is bringing forward a complaint receives the best chance of being heard and understood; suggested having outside, independent counsel for the next few meetings to see what that would look like; stated the complaints heard this year already took the other approach with the City Attorney's office drafting resolutions, which had a lot of confusion; she would like to try the outside counsel approach, but would like to know a cost estimate first.

Commissioner LoPilato stated that she does see the two paths as the most desirable; she is leaning towards the option of what the City Attorney's office proposed because it is an incremental step; there has actually never been a neutral memo come from the City Attorney's office; everything has always been viewed by everyone writing it as an advocacy piece; the City Attorney's office prefers to structure it with the Chief Assistant City Attorney providing advice to the Commission and having outside counsel when necessary; suggested leaning into trust and seeing what that looks like; the memos would be put forth publicly; the Commission would be very aware if they are not neutral; she would also like more guardrails in place and a commitment that the OGC would be receiving an instructional memo.

Chair Tilos stated that he would be supportive of trying out a restructured process of having a walled-off Chief Assistant City Attorney, along with providing a neutral memo; it would be a marginal step towards building trust between the OGC and City Attorney's office.

Commissioner LoPilato stated it is also possible to do both options, which would be a good trust exercise and be improvement to the support of the Commission.

The Chief Assistant City Attorney stated that she appreciates all the comments; she echoes Commissioner LoPilato's comment that the City Attorney's office has never provided a neutral statement, summary, memo or jury instructions; she understands the Commission's point about wanting some explanation of the case; concurred with Commission Chen's comments that attorneys are trained to both write advocacy pieces and to frame issues neutrally; she can definitely do both and it is something her office would entertain in the context of supporting the Commission in its adjudicatory capacity; she envisions that there would be support in terms of a neutral statement of the cases; generally speaking, the City Attorney's office is in charge of handling legal advice and representation in house; from time to time, outside counsel is hired for a variety of reasons; she does not know what the cost would be to use outside counsel.

In response to Chair Tilos' inquiry, Commissioner LoPilato stated it sounds like everyone, including the Chief Assistant City Attorney, is in alignment for the first piece regarding the

possible vision of what a statement of the case would look like; inquired whether the plan to represent City departments in complaints before the OGC extends to any policy body.

The Chief Assistant City Attorney responded that she does not see any difference between policy bodies versus City departments in terms of how the City Attorney's office would represent them.

Commissioner LoPilato inquired whether the Chief Assistant City Attorney, as the advisor to the OGC, would be staffing any policy bodies in terms of advising them on Brown Act issues or stepping back from those duties.

The Chief Assistant City Attorney responded the City Attorney's office has not determined exactly what her role would be other than she would be stepping back from handling Public Records Act (PRA) requests, which is due to recognition of the fact that at some point one of the productions could be the subject of a Sunshine Ordinance complaint.

Commissioner Reid stated that she has concerns about the ethical wall; she is not convinced that the City Attorney's office would be able to truly be a fair and neutral advisor; she wonders if there are other options to explore; suggested considering both outside counsel and a neutral advisor to have a comparison.

The Chief Assistant City Attorney stated the idea of an ethical wall is not a new one; case law has been reviewed to support past practices and anticipated future practices in terms of maintaining an ethical wall so that decisions that come out of the Commission would be legally solid; the concept of an ethical wall is used currently in Civil Service Board matters and in adjudicatory appeals to the City Council; the City Attorney's office is comfortable with the process and suggests the format going forward.

Commissioner Chen moved approval of accepting Option 2 [Chief Assistant City Attorney with formalized parameters for ethical wall guardrails and commitment to providing transparent, written instructional memo as resource for the OGC] on a provisional basis.

Commissioner LoPilato seconded the motion.

In response to Commissioner LoPilato's inquiry regarding the appropriate procedural process, the Chief Assistant City Attorney stated Option 2 is relatively consistent with the City Attorney's office proposal for staffing, except for the part about formalizing parameters for ethical wall guardrails and commitment to providing a transparent, written instructional memo.

In response to Commissioner LoPilato's inquiry, the Chief Assistant City Attorney stated her initial reaction would be that any sort of request dealing with allocation of resources needs to go through the Council; however, given that the Commission is deciding on Option 2, a formal request to the City Attorney's office would be the most logical since the City Council would not need to take any action.

The City Clerk concurred with the Chief Assistant City Attorney; stated the matter is going to come back anyway; staff could flesh out any additional details which could be brought back at the same time; selecting the option tonight gives staff the understanding direction that can be looked at further.

On the call for the question, the motion carried by the following roll call vote: Commissioners Chen: Aye; LoPilato: Aye; Reid: No; Chair Tilos: Aye. Ayes: 3. Noes: 1. [Absent: Vice Chair Shabazz – 1]

Under discussion, Commissioner LoPilato stated the next item would be to decide whether the Commission wants to draft a request letter with bullet points to be voted on by the entire Commission; the City Attorney's office could come with any concerns about the requests; the Commission could then submit something formally.

Chair Tilos stated the City Attorney's office already knows what the OGC wants and he would rather have them draft the letter to present to the OGC.

The Chief Assistant City Attorney stated that she would be happy to commit to doing what Chair Tilos outlined; she could flesh out with her colleagues to make the commitments that Option 2 outlines to the extent they are able to with their resources; her office is also very mindful of the City Council's desire for both parties to work collaboratively so that is a priority for her as well; she will have something for the September meeting that is more fleshed out from her July 19<sup>th</sup> email.

Commissioner LoPilato continued her presentation with Review Area 2 and modifications to the complaint form; suggested revisions return at the next meeting.

Chair Tilos stated he is satisfied with the simplicity of the current complaint form and can live with how it is.

Commissioner Reid stated that she thinks the complaint form needs some revision; it would be a great idea to include members of the public; suggested proposing a subcommittee, which includes the public, to work on revisions for just the form or also include the complaint procedure; since it is going out to the public, they would be the best people to test it.

Commissioner Chen stated since Alameda's complaint form was written many years ago, she would be interested to see what other cities' complaint form looks like; the most logical people to have input are people who file complaints; they are the ones who have to struggle with the form; it would be helpful to know whether they were satisfied with the form part of the process; Commissioner LoPilato has already done all of the heavy lifting for the process part and included a lot of detail in her memo to the Commission; another question for the Commissioners who had to review the forms is whether it provided the information needed; if the form is going to be revised, the Commission needs to talk to the people who created and touched it.

Chair Tilos inquired whether Commissioner Chen thought the complaint form was complex when she filed her complaint prior to being on the Commission.

Commissioner Chen responded in the negative; stated she thought the form was very simple and even hand-wrote hers.

Chair Tilos stated that he does not want to over-complicate the form; the form is really just the first step; subsequent steps in the process get more complex.

Commissioner LoPilato concurred with Chair Tilos, stated the form should continue to be simple; the only concern she had was the physical address requirement; complainants should be made aware that the complaint form is made public.

Commissioner Reid inquired whether a member of the public could make an anonymous complaint, if it had been done in the past and if it could be included in the process.

Chair Tilos stated he would not want to accept anonymous complaints; if someone is filing a complaint, they should step up; it also opens up the door for more complaints.

Commissioner Reid stated the City of San Francisco's Sunshine Task Force hears anonymous complaints; she would like the process to be more open and comfortable for people; there are some details on the form that seem inconsistent, including how to file the complaint; the consideration of an online form would be beneficial and bring Alameda into the 21<sup>st</sup> century.

Commissioner Chen stated she finds it difficult to see how the Commission could take an anonymous complaint and yet have the person present their complaint to the OGC.

The City Clerk noted the Sunshine Ordinance requires that the complainant attend the hearing.

Commissioner Chen stated unless the City Council changes the Sunshine Ordinance, anonymous complaints are not accepted; concurred with Commissioner Reid regarding the inconsistencies in the documents; stated that she will rely on Commissioner Reid's eagle eyes to point out what needs to be fixed.

In response to Commissioner LoPilato's inquiry, the City Clerk stated there are digital options at the City's disposal that are easy to use; many forms have been converted to an online submission; the form has not been changed since 2012 and not everyone was emailing back then; all the comments on revising the submission options are possible.

In response to Chair Tilos' inquiry, the City Clerk stated that she has heard all the comments from tonight and offered to synthesize the form; if Commission members think of additional things, they can be given to her without violating the Brown Act; she could present the revised form back to the Commission; she would also research what other cities' forms look like and include some options.

Commissioner Reid stated she would be happy to work with the City Clerk if it is appropriate; she would also gather suggestions from the public.

In response to Commissioner Reid's inquiry, Commissioner LoPilato stated that she was envisioning revisions to just the form, rather than the complaint procedure which would be a heavier lift.

Commissioner LoPilato continued her presentation with Review Area 3; stated it is the meatier section of the complaint procedure; she took a stab at identifying quite a few areas for revision that could be significant improvements and having more clarity around what the process will entail; inquired whether there is interest in revising the procedures, what should be included and who should do it.

In response to Commissioner Reid's inquiry regarding a pre-hearing conference, Commissioner LoPilato stated her term pre-hearing meant written submissions; stated there are various procedural aspects of the complaint procedure, including the complaint committee hearing, that just has not occurred or been implemented.

In response to Commissioner Reid's inquiry, the City Clerk stated some complaints have been withdrawn because staff has worked with the complainant; they have not necessarily been called pre-hearing conferences, but it is an example of how complaints are withdrawn.

Commissioner Reid stated it would be helpful to include the specific language in the document regarding the willingness of staff to work with the complainant; the timing is also important to clarify on the form.

In response to Commissioner Reid's inquiry, the City Clerk stated the 15 day deadline to file a complaint is in the Sunshine Ordinance and is 15 calendar days.

In response to Commissioner Chen's inquiry, the City Clerk stated the number of days is a confusing issue; the 15 calendar days is the timeline required to submit a complaint; the Public Records Act timeline differs regarding falling on holidays.

Commissioner Reid requested clarification about the PRA timeline, to which the City Clerk responded the issue is not on the agenda, but the deadline for PRAs is 10 days.

Commissioner LoPilato stated as long as there are no concerns about a subcommittee of one, moved approval of appointing herself as a subcommittee to revise the complaint procedures.

Chair Tilos stated he has no objections to a single person subcommittee.

Commissioner Reid stated she would be happy to work with Commissioner LoPilato on the subcommittee if it would be helpful.

Commissioner Chen seconded the motion, which carried by the following roll call vote: Commissioners Chen: Aye; LoPilato: Aye; Reid: No; Chair Tilos: Aye. Ayes: 3. Noes: 1. [Absent: Vice Chair Shabazz – 1]

Under discussion, Commissioner LoPilato stated any feedback from Commissioner Reid would be welcome.

Commissioner Reid stated if the Commission is taking a collaborative approach, members should work together; if Commissioners are willing to work on a certain topic, the Commission should welcome it.

Chair Tilos stated Commissioners are welcome to share their thoughts.

### 3-B. Staff Update

The Chief Assistant City Attorney stated the OGC proposals for the Sunshine Ordinance revisions submitted to the City Council for the July 20<sup>th</sup> meeting has been continued to the September 7<sup>th</sup> meeting.

The City Clerk announced that Next Request, the City's new PRA system, went live today; staff will be given a little bit of adjustment time before going out with a full press release.

### 3-C. Determine Next Meeting Date (Due to September Holiday)

The City Clerk stated the first Monday in September is the Labor Day holiday; inquired whether Commissioners wanted to select a date tonight, or have her do offline individual polling; the proposed dates are: 9/1, 9/8, 9/15, 9/20, or 9/28.

Commissioner LoPilato stated that she would like a date as far away from the holiday as possible.

Chair Tilos stated his concern is if the OGC meets on September 28<sup>th</sup>, they would have to come back in a few days for the October 4<sup>th</sup> meeting.

The City Clerk stated the September and October meetings could be combined as one meeting.

The Chief Assistant City Attorney noted she is not available on September 28<sup>th</sup>, although another attorney in her office could fill in.

Chair Tilos stated it seems like people would like more time to think about the date.

The City Clerk stated she will conduct offline polling; she just wanted to make it publicly known that there will be no meeting on September 6<sup>th</sup> since it is a holiday.

## COMMISSION COMMUNICATIONS

Commissioner LoPilato suggested receiving updates from Commissioners at subsequent meetings of correspondence any member has sent to Council; she would like to be aware of what is going out under the Commission's name.

The City Clerk stated she forwarded correspondence to the Council and can also forward it to the Commission offline; there is no need to wait until the next meeting.

Commissioner Chen stated the Commission should think ahead about what the table of contents should be on the Annual Report; she would like both Commissioners and staff to begin thinking about it; she feels some members would like to see a more robust annual report; she would like to agendize brainstorming the table of contents.

In response to Chair Tilos' inquiry, the City Clerk stated the Commission should not express any consensus under this issue because it is not agendized.

### Adjournment

Chair Tilos adjourned the meeting at 8:32 p.m.

Respectfully submitted,

Lara Weisiger  
City Clerk

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