

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
WEDNESDAY - - - OCTOBER 14, 2015 - - - 7:00 P.M.

Chair Aguilar convened the meeting at 7:02 p.m.

ROLL CALL - Present: Commissioners Bonta, Dieter, Foreman, Tuazon, and
Chair Aguilar – 5.

Absent: None.

ORAL COMMUNICATIONS, NON-AGENDA

None.

AGENDA ITEMS

3-A. Minutes of the March 30, 2015 Meeting

Commissioner Bonta stated she would pass on a few typos to the City Clerk.

Commissioner Dieter moved approval of the minutes as corrected.

Vice Chair Foreman seconded the motion, which carried by unanimous voice vote – 5.

3-B. Hearing of Sunshine Ordinance Complaints filed September 15, 2015

The Assistant City Attorney gave a brief presentation.

John Klein stated he is embarrassed about needing to be present and thought about withdrawing the complaint because it seems trivial; however, it is not trivial; through the whole process, which has been skeletal, the response has not been as it should be; he submitted five individual records requests directly to the Mayor and each Councilmember because that is the way he wanted to do it; if the City Attorney wanted to consolidate the response, it would have been fine; however, the City Attorney's response on the 11th does not even say who he is responding for; the City Clerk is the custodian of records; that he did not know why he was getting an email from the City Attorney; he thought maybe it is on behalf of the Mayor, but did not know; while the response was timely, it did not include the information the rule requires, which is: when the documents will be ready, how the documents will be delivered and by whom; said information is not in the City Attorney's September 11th response; he did not know who the Attorney was responding for and the required information was not included in the three day response; the Attorney said he needed clarification; the City Attorney inquired if they could talk Wednesday; when they did talk Wednesday, the clarification the Assistant City Attorney needed was the timeframe of the requested documents; questioned why the City Attorney did not simply ask in the original email; by that time, the response was getting really late and he was feeling that the City's response was

disingenuous; he did not need to deal with a particular Attorney; if an Attorney is out of the office for three days, the City should assign someone else to be responsible for a response; eight days into the ten day period after the conversation with the Attorney, a 14 day extension was requested because the request was voluminous; the conversation was at 2:30 p.m. in the afternoon, by 5:30 p.m., the Attorney knew that the response was voluminous; questioned how he learned so much so quickly; following the emails provided, the Attorney was asked about the definition of voluminous and never replied; the September 11th response was inadequate because it did not include when, how and by whom; if the City's position is that the complaint is frivolous, he suggests timelines mean something under the rule; provided an example of timeliness involved with receiving a parking ticket; timeliness should mean something in this instance and should be more meaningful for the City Attorney; the responsibility to timelines does not decrease as it goes up, but rather includes all of the responsibilities and assumes a much higher standard; that he is a consumer of public records; he has done a number of public record requests with the City Clerk; it is never an issue; rather than getting an email in three days telling him when he will receive the documents, he gets the documents; he is never told the documents will be provided next week; by the end of three days, he has the documents; he submitted a records request this week; 12 minutes later, he received an email from the City Clerk telling when, by whom and how; timelines matter; the complaint is not trivial given all the other incidentals of the interaction and the disingenuous nature of how the request was handled by the Attorney.

Vice Chair Foreman inquired if Mr. Klein has received the documents, to which Mr. Klein responded in the affirmative.

Vice Chair Foreman inquired if he received the documents on October 2nd, to which Mr. Klein responded that he received them on October 1st.

Vice Chair Foreman inquired how voluminous were the documents, to which Mr. Klein responded 475 pages, which is not voluminous.

Vice Chair Foreman inquired how many emails [were provided in response to the request], to which Mr. Klein responded that he has not been through or counted the emails; stated there are a lot of repetitive emails.

Vice Chair Foreman stated that he apologizes he does not have the documentation; however, he has read it all; inquired whether there was a statement by the City Attorney in one of his emails to Mr. Klein that the documents had to be reviewed before they could be released because there might be privileged material.

Mr. Klein responded that he does not have his copy; it was voluminous; eight days into the request, it seems disingenuous to suddenly ask for an extension because the documents are voluminous.

Vice Chair Foreman stated that he is looking at an email sent by Attorney Alan Cohen.

Mr. Klein stated the issue is not Mr. Cohen's response; it is that eight days into the request, Mr. Cohen finally responded with the "when, how and whom" requirement.

Vice Chair Foreman inquired whether Mr. Klein received the documents within the 14 day timeframe, to which Mr. Klein responded that he does not see how that relates; his complaint is that he did not get the documents.

Vice Chair Foreman stated Mr. Klein is addressing the procedure and waiting the eight days.

Mr. Klein stated that he filed his complaint before the City Attorney even responded.

Vice Chair Foreman inquired whether the initial complaint was based on the issue of not getting responses from the Mayor and Councilmembers.

Mr. Klein responded the response was not pursuant to the rule; stated that he will be happy to stipulate a generated response would have been fine; however, going back to the Attorney's initial email on the 11th, he did not say who he was representing; the email from the 16th delineates who the Attorney is responding for because he asked the Attorney to do so during the phone call.

Vice Chair Foreman stated to understand the complaint, what Mr. Klein is saying now is that he is not objecting to an Attorney responding as opposed to a Councilmember; inquired whether Mr. Klein is objecting to the Attorney not disclosing who he was representing.

Mr. Klein responded in the negative; stated when, how and who within three days; the Attorney gave no information and left the office for three days; his request was on ice for eight days; the issue is the response was not adequate with regard to the rule of three days of giving who, when and how, which may seem trivial; however, it is the behavior around it; the Attorney could have said sorry he was late and that he would do his best to get the documents but might need a few more days; it was not like that; the Attorney's response was defensive; he has had a lot of success of rapid turnaround customer service with the City Clerk's office.

Vice Chair Foreman inquired if Mr. Klein had ever requested emails before, to which Mr. Klein responded not specifically.

The Assistant City Attorney stated that he does not think anyone from his office or the City has indicated that the complaint is trivial or frivolous; looking at Mr. Cohen's response, it says he would like to obtain some clarification on the request and it would be helpful to discuss it; Mr. Cohen stated he would be out of the office until Wednesday morning; that he does not read the email as defensive; it seems reasonable for a person trying to respond to a public record act request to want to better understand what is being requested; when something comes to the Council, there is a responsibility

for the City Attorney's office to check with the Councilmembers about their individual emails; more time is involved when making a records request of a public official as opposed to walking into the City Clerk's office where documents can be obtained immediately; there were reasons why it took longer than what otherwise would be allowed; the email speaks for itself; that he does not find it to be offensive; Mr. Cohen was trying to get some clarification; it is true the email does not say it is on behalf of the five Councilmembers; however, since all of the requests came in on September 7th, if he were the recipient, he would think it would be reasonable to assume it is in response to the requests from that date.

Vice Chair Foreman stated that he does not see a problem; the Attorney should have indicated who he was representing; however, he thinks it is obvious; when he read all of the emails, he assumed that the Attorney was responding for everybody; Mr. Klein does have a point that the Attorney said he wanted clarification and what he wanted to know was the timeframe; he understands how Mr. Klein could assume there was something ambiguous in his request; the very simple clarification could have been stated in the Attorney's email.

The Assistant City Attorney stated the point of clarification was about the beginning timeframe; correspondence relative to rent control issues have been before the City Council since September, 2014; Mr. Cohen was simply asking how far back in time to go; after a telephone conversation, the email Mr. Cohen sent to Mr. Klein on September 16th indicates that the time frame is June 1st through September 1st; that [timeline] seems to be the point of clarification; there were emails and other material relative to rent control that predated September 2015; that he does not disagree the email could have been more artfully written; however, eventually Mr. Klein received the documents within a reasonable time and within the 14 day extension.

Commissioner Bonta stated there is one way to look at the email from Mr. Cohen; "by whom" is Attorney Cohen; "how" is by having a conversation to seek clarification; "when" was Wednesday morning to schedule a time; it is very clear that Mr. Klein was frustrated by the engagement; she agrees there could have been more clarity in the initial email response; however, it does seem like there was intention to be responsive in the areas that Mr. Klein is primarily concerned with: when, how and whom, within the three day timeframe.

Commissioner Dieter thanked Mr. Klein for bringing the matter before the Commission; even if there was not a violation of the Sunshine Ordinance, the Commission strives to make government more transparent and more accessible to individuals; Mr. Klein's feedback may actually improve a couple of things.

Mr. Klein stated the Attorney's response sounds a lot like someone trying to talk their way out of a parking ticket.

Commissioner Dieter inquired whether the City did respond within three business days; and whether then, within ten days, the City stated that the request was voluminous so it

would take a little bit more time; stated the criteria in Sunshine Ordinance Section 2-92.9 was met.

Mr. Klein responded the language specifies the response has to address by whom, when and how the request will be fulfilled.

Commissioner Dieter stated that she is reading Section 2-92.9, which states a request to inspect or obtain copies of public records that is submitted to any department or anybody shall be satisfied no later than 10 business days unless the requester is advised in writing within three business days that additional time is needed to determine whether the request for records is likely to comprise a voluminous amount of separate and distinct writings.

Commissioner Bonta inquired if Section 2-92.5 is being referenced, which indicates a request for information to any agent of the City requires the agent to respond to said request within three business days by providing or explaining how, when and by whom.

Mr. Klein responded in the affirmation; stated said Section is the one in his complaint.

Vice Chair Foreman stated that he thought the issue was frivolous when he first looked at it; however, the more he reviews it, the more he is a little bit concerned; he understand Mr. Klein received the documents in time; Mr. Klein is not complaining about that; he is putting himself in Mr. Klein's shoes; a response was due in three days; the response came in on the third day, which is perfectly okay; the response is clarification is needed; Mr. Klein wrote back less than two hours later asking the Attorney to tell him what is unclear; in hindsight from the 16th, Attorney Cohen could have very easily met the three day requirement and still could have asked for the extension; that he does not have a problem with staff asking for the extension; these are emails and over 400 pages, which might include privileged material; he has no problem whatsoever with the extension; if he were in Mr. Klein's shoes, he would say the Attorney is dragging his feet; he does not know why the Attorney was dragging his feet; it may be totally innocent; maybe he was just going away for the weekend, but he is dragging his feet; that he does not want the public or anyone asking for documents to feel like they have to drag the documents out of the City; he is concerned because clearly the three day timeline could have been met.

The Assistant City Attorney stated when a complaint has been filed under the ordinance, the Commission hears the evidence and arguments and has to render a formal written decision on the matter; staff needs the Commissions direction.

Commissioner Tuazon stated the way everyone communicates now with text and email is so easy to just write something that causes more questions; if he asks somebody a question through email, the response comes back with more questions or creates more problems instead of addressing the issue; people need to be very careful when answering an email; he is not saying that Mr. Cohen was reckless here; however, he did not address the whom, when and how.

Commissioner Bonta stated Mr. Cohen did respond via email within the three day time period and followed up with a phone call to get clarifying information; the height of customer service is to actually speak to someone directly and try to get the information.

Mr. Klein stated it is difficult to understand said reasoning when the rule clearly states within three days the requester will get a response with regarding to when, how and by whom the request will be fulfilled.

Vice Chairman Foreman stated that is the issue; Mr. Klein is not complaining about not getting the documents; his formal complaint is limited to the three day rule; that he leans toward the three day rule was violated; what bothers him is that Attorney Cohen may have a perfectly good explanation, but is not here; Attorney Cohen is the one who wrote the email and the Commission is supposed to be having a hearing about the email.

Mr. Klein inquired whether the other party is supposed to present, to which the Assistant Attorney responded he is present on Mr. Cohen's behalf because the documents speak for themselves; the Commission has enough information to determine whether or not there was or was not a violation of the ordinance; that he does not think intent, except as read through the email, is relevant.

Vice Chair Foreman stated that is a good point; it is not a question of intent.

Vice Chair Foreman moved approval of finding that there was a violation of the three day rule and [staff] did not comply with the requirements thereof; the needed clarification could have easily been satisfied in three days.

Chair Aguilar stated the City met "by whom:" the City Attorney would be responding on behalf of the Councilmembers; "when" was going to be discussed; the Attorney could not answer "when" because he needed information on the timeframe; he needed to know where to start and stop gathering information; maybe the Attorney could have put the timeframe of the documents in the email or maybe he could not have; maybe he thought it was going to take a lot more back and forth discussion; the Attorney needing clarification on "when" then it is "how;" as far as she is concerned "how" is the only outstanding thing.

Vice Chair Foreman stated the Attorney could not really answer "how" until "when" was answered.

Chair Aguilar stated the Attorney needed information; maybe in his judgement a phone call was the best way to get to the bottom of what Mr. Klein wanted without having 16 emails go back and forth; the Attorney was out of the office and said he was not going to be available; she is having a hard time saying that the Attorney violated the Sunshine Ordinance because the email has whom and when; how was the problem because the Attorney needed clarification and could not address how without when.

The Assistant City Attorney stated the original motion failed and there needs to be another motion or some decision made.

Chair Aguilar moved approval that the Sunshine Ordinance was not violated.

Commissioner Dieter seconded the motion, which carried by the following voice vote: Ayes: Commissioners Bonta, Dieter, Tazon and Chair Aguilar – 4. Noes: Vice Chair Foreman – 1.

The Assistant City Attorney stated that he draft the decision and provide it to the Commission.

COMMISSIONER COMMUNICATIONS

The Assistant City Attorney stated the [Sunshine Ordinance] amendments were heard by the City Council in October; the Council has a very lively hour and a half discussion; Council agreed with most of the non-substantive issues that the Commission agreed with; the Council did not accept or wanted further clarification on the more difficult issues that the Commission struggled with; the Council also raised some other issues; he intends to bring a report back to the Commission in January or February for further consideration of the items that the Council had concerns about, plus some new items that have risen in the interim.

Vice Chair Foreman inquired if Commissioners could comment on the matter now, to which the Assistant City Attorney responded the matter is not on the agenda; he was providing information about what transpired.

Vice Chair Foreman stated that he took it upon himself to defend the Commission's views; he very carefully limited himself defending the Commission's statements; he also very carefully stated his personal opinion but did comment on other issues; the Council had a problem with whether a Commission can write a letter.

The Assistant City Attorney stated the matter will be brought back.

Commissioner Dieter stated she does not mind meeting in January.

The City Clerk stated the next regular meeting is February 1st.

Chair Aguilar stated maybe the matter should be addressed February 1st.

Commissioner Dieter inquired if the Commission would be discussing the other two pending issues from the last Commissioner Communication: the Commission is supposed to issue an annual report and needs to figure out how to do so, and the City Attorney's office is supposed to issue a report about whether or not any documents have been declassified.

The Assistant City Attorney responded both matters will be placed on the agenda.

The City Clerk noted Vice Mayor Matarrese requested clarification on the annual report as part of the Sunshine Ordinance discussion.

ADJOURNMENT

There being no further business, Chair Aguilar adjourned the meeting at 7:41 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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