

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
MONDAY - - - OCTOBER 17, 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 September 19, 2022 Meeting

Commissioner Tilos made a minor typographical correction and moved approval of minutes with the correction.

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.

4-B. Amend the Sunshine Ordinance Complaint Procedures, including Clarification of Unfounded and the Pre-Hearing Process

The City Clerk briefly introduced the item and Chair LoPilato made brief comments.

Commissioner Cambra stated the Commission has more opportunities to make refined decisions as opposed to either sustaining or denying as unfounded, which has resolved so much of the issue that he does not see it as significant at this time; it is important to discuss for a couple of reasons; first, it goes to the credibility of the Commission in that decisions are impartial and objective, even when hearing a complaint that involves a sensitive underlying issue; the Commission should be creating predictability and consistency with all of the parties to understand how the Commission arrives at an

unfounded decision; one of the reasons that would be appropriate for an unfounded decision is if very clear legal citations are shared with a Complainant and they decide to proceed anyway; another relates to a person's mental capacity; a couple of people mentioned that the Commission might be used as a political tool, but why a person files a complaint can be very challenging to decide; the Commission should have a really good standard for finding a complaint unfounded; one suggestion is that the unfounded determination could be changed to require a super majority vote to safeguard against the chilling effect for people that may be subjected to it.

Vice Chair Chen stated two unfounded cases were presented by the same individual, even though he presented the second case on behalf of another individual; since they represent a certain point of view, it might have been construed that the Commission was being political; without dissecting what happened with the two cases, she cannot reflect on whether or not the Commission would have determined the complaints were unfounded today.

Chair LoPilato stated written edits were not suggested tonight; she would like to hear if anybody is proposing any specific edits to the definition in the complaint procedures.

Commissioner Cambra stated it might be premature without hearing from everybody first; he would be happy to take a stab at it; it would be a reflection of the entire Commission as he would not want to do it alone.

Vice Chair Chen stated her only comment is that, based on the new screening process, it would seem that any complaint the Commission might find unfounded today would be unusual if it slipped through the first staff screening; if it was not within the Commission's jurisdiction, if it was not within the 15 days, all these things, the Chief Assistant City Attorney and/or the City Clerk would have been in a position to tell the Complainant that their complaint would not be eligible to be heard by the Commission.

Chair LoPilato stated there are instances where complaints have been partially time barred; it makes sense for those to come forward; in an instance where the complaint does not fall within the window of time, her understanding is that staff has acted to connect with that Complainant about the jurisdictional issue.

In response to Chair LoPilato's inquiry, the Chief Assistant City Attorney stated the City Clerk's and City Attorney Office's role is very limited just to ensure what is written on the complaint actually makes an allegation that the Commission has jurisdiction to decide and that the complaint has followed the procedure outlined in the Sunshine Ordinance, nothing more, nothing less.

In response to Commissioner Montgomery's inquiry, the City Clerk stated staff has probably communicated to complainants in both methods of email and phone call the two times the 15 days had passed; the matter can be clarified in the procedure.

The Chief Assistant City Attorney clarified that pursuant to the Sunshine Ordinance, the Commission is the only body that gets to make the unfounded determination; if somebody

files a complaint that is unambiguously too late or alleges a violation of the zoning code or something not under the Commission's jurisdiction, the complaint would simply not be heard; the Sunshine Ordinance indicates unfounded is determined by the Commission; staff's determination of the complaint not complying with the procedure to be heard by the Commission does not make it unfounded.

Chair LoPilato stated previous Commissions did not have the complaint procedures to adhere to or review on a regular basis; procedures existed, but were not at this level of detail, did not include the variety of options, and did not have any definition of unfounded; if there is a need, the Commission should consider what, if any, changes can be made to the definition.

In response to Commissioner Montgomery's inquiry, Commissioner Cambra stated if somebody files a complaint and is not willing to engage with the City Attorney's office to try and resolve it informally and just wants to plough through, it might indicate another motive than simply trying to resolve the issue, which is what the Commission is here for; he does not have specific language but is willing to work with someone else to bolster reasonable and rational basis.

Chair LoPilato stated any changes to the procedures come back before the entire Commission to vote on.

Commissioner Montgomery stated that she does not want to discuss or touch on the issue of mental capacity; she does not want to look at it as something the Commission is going to decide; she would rather stick to something specific about the complaint or the complaint procedure.

Chair LoPilato concurred with Commissioner Montgomery; stated the mental capacity is not an appropriate topic for the Commission to be adjudicating as a component of review of complaints; she is intrigued by the possibility of a super majority needing to find in favor of a complaint being unfounded; it is a very specific procedural thing that might address some of the concerns.

The Chief Assistant City Attorney stated that she has some concerns the Commission is wading into territory that is statutory; she views requiring a super majority for a particular finding as something that would need to come through the City Council; she could look into that more fully if it is something the Commission would like to weave into the procedures; it is not called out in the Sunshine Ordinance.

Commissioner Cambra inquired whether the Open Government Commission has broad discretion on the complaint procedures, to which the Chief Assistant City Attorney responded in the affirmative; stated that she is not ruling out entirely; the City Council has very precise conditions and types of matters that require a super majority vote, which is set forth in statutes in the Municipal Code; she is wary of the Commission imposing a super majority requirement when it is not in the Sunshine Ordinance.

Commissioner Tilos questioned whether Commissioners want to update reasonable and rational basis; stated that he likes leaving it open for interpretation because it gives each appointed Commissioner flexibility, which is the whole point of having Commissioners from different backgrounds; he can live with the reasonable/rational basis, but could be swayed into something more concrete; he would like to work together through it, but is not against how it is currently written.

Commissioner Montgomery concurred with Commissioner Tilos; stated that she wonders if there is reason to add more words or language that she is not finding.

Commissioner Tilos stated the Commission only had two choices before, now there are five, which he would like leave for future Commissioners.

Chair LoPilato stated her position is similar to Commissioners Tilos and Montgomery with a slight variation; she is hearing the reason to potentially add details or language to the definition would be to create predictability within the system; at the same time, she is not hearing specific examples of how to do so; she is not 100% convinced there is a problem to solve; if the Commission is only laying out one or two very specific examples, it could have the unintended effect of people feeling bound by them; all of the things that have been described could fall under lacking a reasonable or rational basis; there is potentially a lot of merit to leaving flexibility for unpredictable situations that could come up; what should be added would be hard to outline; now that there are options, she is not fully convinced that action needs to be taken.

Commissioner Cambra suggested moving on as there does not seem to be enough interest in it at this time.

Chair LoPilato noted if it comes to pass, there will be a nice history of the discussion; inquired whether any Commissioners want to propose broader revisions to the complaint procedures.

Commissioner Cambra stated the Fraser case had four causes of action; it was very clear that the complaint was filed late; several items were split because there was a lot going on over a large period of time; the Commission still heard the items even though the Commission ultimately determined some items were not filed on time; questioned the distinction between the Fraser case and the last one filed that was not heard.

The Chief Assistant City Attorney stated that after evaluation, and in consultation with the City Clerk's office, staff determined that many of the allegations in Mr. Fraser's complaint were wrapped around each other; some of the complaint were over a series of many months; staff felt having the complaint in front of the Commission to make the determination on whether particular allegations were brought within the time period; it was not quite as clear cut as the most recent complaint.

Commissioner Cambra stated that he did not have any objection to what the City Attorney's office did because it was clear cut in concept; his concern is the public does

not know, which is important from a transparency standpoint; the report presented at the last meeting was probably sufficient; his only concern is a Complainant may not understand if the City Attorney's office makes a determination that the complaint was not filed on time, the Commission would never be able to have any discussion regarding the possibility of a continuing violation.

The City Clerk stated if a complaint is only partially time barred, the whole complaint will still be presented, it will not be diced up and given to the Commission in pieces; also, the annual report is always going to capture every single complaint that is filed; if it is withdrawn, not heard, or anything else, it will always be made public and reported out publicly.

In response to Commissioner Tilos's inquiry regarding ceding his time to Commissioner Cambra, the City Clerk responded that she has not seen the practice done before.

Vice Chair Chen moved approval of giving Commissioner Cambra three more minutes.

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 Cambra stated a memo received prior to a hearing that provides the Commission with some information and guidance; in the past, the memo has not been disclosed to the public; he would like to have the Commission discuss the possibility of having it become a public document.

The City Clerk stated the memo is from the Commissions Council and is called the Neutral Statement of the Case and can be public or confidential.

The Chief Assistant City Attorney stated that for the most part, the Neutral Statements are intended as attorney client privileged guidance to Commissioners; she would have some hesitations about the Commission determining it is not privileged because privilege is held by the City Council; if the desire is for the memo to be unilaterally disclosed to the public, it is something that will need to be discussed and looked into further.

Chair LoPilato stated without speaking to the choice between confidential or public, the addition of the Neutral Statement is helpful and she is grateful it is in the complaint procedure now.

Vice Chair Chen stated previous Commissioners asked for a separate independent attorney to advise the Commission because it was felt that the attorney assigned to the Commission was always on the City side so to speak; Commissioners wanted some kind of Neutral Statement so Commissioners could look at both sides fairly; the memo was the compromise; the Chief Assistant City Attorney is now siloed away from the other attorneys assigned to any department that has had a complaint file against it; she wonders if making the Neutral Statement open to the public would cause yet another point of contention

around the issue when it was actually something the Commissioners asked for to have neutral ground to look at both sides of the case.

Commissioner Montgomery stated that she feels the Neutral Statement is highly confidential and likes it that way; the process of being able to ask the Chief Assistant City Attorney questions is part of the process; she concurs with Vice Chair Chen that the Commissioners make the decisions, not the public; the information, conversation, and communication belongs to the Commissioners.

Commissioner Cambra stated his concern is that a person bringing a complaint does not have an opportunity to see that argument and it puts those folks at a disadvantage; the Commission has information that the Complainant does not have any opportunity to refute.

Chair LoPilato stated the Neutral Statement is not an argument; the goal is not to argue one side or the other; it is put forth to educate the Commission on the statute and how it is interpreted; if Commissioners find that something in the statement of the case feels problematic or weighted too much on one side, then maybe that is the type of thing to be revisited; she cautions against even encouraging the public to assume that it is an argument when it is intended to be more of an educational piece of non-binding information.

Commissioner Tilos concurred with Vice Chair Chen; stated making the statement public could open up another can of worms because someone could view it as not being neutral; the past Commission asked for something more neutral since it seemed the City was biased; he likes that Commissioners have the opportunity to read a Neutral Statement and ask themselves if it is really neutral; if they do not believe it is, it could be brought up at the meeting; sharing the statement with the public could derail the whole conversation from the get-go if they believe it is not neutral.

Chair LoPilato stated that she would encourage all Commissioners to always use critical thinking skills with anything presented, regardless of whether it comes from a party or the Neutral Statement of the case.

Vice Chair Chen stated that prior to having the neutral statement, Commissioners were quasi judges with one side saying the other side violated the Sunshine Ordinance; it seemed pretty weighted in favor of the City because it has a whole staff versus the Complainant being only person in the room; the Neutral Statement felt like a breath of fresh air; over time, she has agreed and disagreed with some parts of the Neutral Statement, but it has given her a better basis to decide how to vote.

Commissioner Cambra stated since the Neutral Statement is confidential, Commissioners do not have any opportunity to discuss it; inquired how the neutral aspect can be resolved when, for some Commissioners, it may not seem neutral.

Chair LoPilato stated Commissioners are able to discuss all aspects of the complaint as has been done during hearing deliberations; if there is an issue that could come up in the Neutral Statement that informs someone's thinking one way or another, even if they disagree with it, they are probably going to bring it up during deliberations; there is always space to talk publicly during the hearings.

The Chief Assistant City Attorney stated that she understands what the Commissioners are struggling with; she does not see any problem with Commissioners drawing upon points in the Neutral Statement; the Neutral Statement is most definitely designed not to be an argument; it is meant to set up the law and relevant facts that should be considered in the Commission's evaluation; Commissioners are not beholden to follow anything in the Neutral Statement; she does caution against screen sharing it on Zoom, for example, as it would destroy the attorney client privilege, which is a privilege held by the Council.

Commissioner Cambra stated if the Neutral Statement has a citation to a case to support a particular position and there was some disagreement as to whether the case actually supports the statement being made, the Commission does not have any opportunity to say the case does not stand.

The Chief Assistant City Attorney stated in that hypothetical scenario, it would be completely well within the bounds of reasonableness for Commissioners to state that they are aware of case law and perhaps one of the parties can speak to it; she does not expect Commissioners to forget or pretend that they have forgotten points brought up in the Neutral Statement.

In response to Commissioner Cambra's inquiry, the Chief Assistant City Attorney stated the analysis that she provides is covered by attorney client privilege; the guidance is meant to be very neutral; she certainly would expect and anticipate that Commissioners are free to take or leave her advice and draw upon or not draw upon certain things she has highlighted.

Chair LoPilato stated if there are any concerns regarding attorney-client privilege, the Chief Assistant City Attorney is an excellent resource; encourages Commissioners to reach out to the Chief Assistant City Attorney with any questions about how to address a topic during a hearing as a best practice.

The Chief Assistant City Attorney stated Commissioners are free to bring up a case during deliberations and put her on the spot; she will be prepared to have the citation ready so the public is aware of exactly what the Commissioner is talking about.

Commissioner Cambra stated he is fine with said approach and would like to try it; if it does not feel comfortable, the issue could be agendized again.

In response to Chair LoPilato's inquiry, Commissioner Cambra stated his only addition is to make sure it is reported out to the public at the next meeting as an agenda item in the Staff Update section.

The City Clerk stated that she always notifies the Commission whenever a hearing has been filed; it is no problem to provide information as a staff update.

Commissioner Tilos moved approval of granting Commissioner Cambra two more 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 accepting the blue lined edits and exhibit with the modification to report the fact of the complaint filing under Staff Updates at the next regularly scheduled 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.

4-C. Form a Subcommittee to Draft the Annual Report and Approve the Topics and Form of the Report

Commissioner Montgomery stated that she is concerned about the timing of setting up the subcommittee since she will be moving off the Commission when Councilmember Knox White's Council term ends.

The City Clerk stated if a subcommittee is impacted by the election, the Commission could always revisit the matter and change subcommittee members.

The City Clerk briefly introduced the item and Chair LoPilato made brief comments.

Commissioner Cambra stated that he supports the plug and play aspect of the template; it is consistent and he would like to see it go forward.

In response to Commissioner Montgomery's inquiry regarding the last subcommittee, Vice Chair Chen stated it took a lot of work and was a struggle with two people with very different schedules; it was hard for her and former Vice Chair Shabazz to communicate on an ongoing basis after he resigned from the Commission; she was left with putting together all the content; Chair LoPilato's template is very helpful; it gives guardrails to keep from going off on tangents, which happens when there are very energized, intelligent people who have a lot of thoughts; last year, the Commission did not receive any feedback on the report; she is wondering if there is a mechanism where the Commission can ask Council for feedback; the template will be very, very helpful.

Commissioner Cambra moved approval of accepting the template as drafted to be used for creating the annual report to the City Council.

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.

The Commission briefly discussed who should serve on the subcommittee.

Commissioner Montgomery moved approval of having Vice Chair Chen and Commissioner Cambra serve on the subcommittee.

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.

In response to Commissioner Montgomery's inquiry regarding examples of topics, Chair LoPilato stated the first one that comes to mind is the Commission's discussions about the 15 day window of time to file a complaint under the Sunshine Ordinance, which would require revision to the Sunshine Ordinance and the Commission would need to lift it up to the City Council; the list of topics does not need to be exactly exhaustive tonight.

Vice Chair Chen stated there is a recurring theme where many of the Public Records Act complaints involve the Police Department; there needs to be some better clarification because the Complainant may not know or understand the procedure, when they should expect records, or what type of records they should expect; the Commission needs to know which records the Police Department are allowed and not allowed to share with the public; there is a lot of confusion; it is really important for residents of the country to better understand rules around law enforcement and public records; the matter is far beyond the scope of the report, but very worthy of generating a lot of questions that people need to consider at some point.

Chair LoPilato stated the report might highlight there is a lack of clarity and a need for transparency.

Commissioner Tilos stated an example of a topic is the case regarding the City's Next Door account versus an elected official's personal Next Door account; Council needs to give the Commission some guidelines on evolving communication to inform the public on what is private versus public information for politicians.

Commissioner Montgomery concurred with Commissioner Tilos; stated the issues regarding social media accounts are valid and the Commission has gone over it multiple times.

In response to Commissioner Montgomery's inquiry, Chair LoPilato stated suggested the issue remain on the agenda if there is a December meeting.

The City Clerk stated that if there is a December meeting, the item can be on the agenda; Commissioners can also email her directly and she can compile a list that can be presented at the next meeting and passed on to the subcommittee.

In response to Commissioner Montgomery's inquiry, Chair LoPilato stated Section 4 of the template could be a space to plug in something that may continue to warrant further action; she personally would not lean towards an audit of everything, but if there is something that still continues to feel like it warrants further action, the Commission could lift it up again.

Vice Chair Chen stated the Commission discussed issues at several meetings and staff took it upon themselves to create fixes, which is where the Neutral Statement came from; it was developed after hearing the Commission talk about needing neutral information; the Commission and staff worked together; there was a good synergy; by the time the report was finally submitted, several things had already been fixed.

Chair LoPilato stated in one of the hearings, she got the sense there was confusion about whether the Sunshine Ordinance has an administrative exhaustion requirement; the Commission was presented with a very legally stylized complaint that was very ready to be filed in civil court; the Complainant indicated he had included certain types of claims in the complaint because he was unclear all of the things needed to be before the Commission or else they would be waived and unable to argue in a possible future civil claim; her read is that the Sunshine Ordinance is not intended to lay out a mandatory administrative process; since there was confusion around that, staff may want to consider a way to make it clear to Complainants; Vice Chair Chen also raised a request about aggregated data for PRA requests; updating what that looks like in Next Request could be a topic area.

Vice Chair Chen stated the May 3, 2021 staff report had data about how many complaints were filed and how many PRA requests were made; it would be good to get similar data that she and Commissioner Cambra can aggregate and create a brief narrative as to what it all means.

The City Clerk stated the Next Request system is a little different but she can work with the subcommittee.

Commissioner Cambra stated the report will not be final until January since information from December needs to be included.

Chair LoPilato concurred with Commissioner Cambra; stated if anyone rotates off the Commission before the vote occurs, it would be great to chime in with feedback during public comment at the future meeting.

Chair LoPilato stated encouraged the subcommittee to connect with the City Clerk on any and all data needs.

Vice Chair Chen inquired about the timeline, to which Chair LoPilato responded the topic should stay on the agenda from meeting to meeting to present a first draft; if that happens in January 2023, then there could be a final vote on just approving the report.

The City Clerk concurred; stated the item can be placed on any and all agendas until it gets finally approved; the Commission can take it step by step.

Chair LoPilato stated that she included a footnote on the template so that in preparing the final report for Council, the City Clerk could identify whether people have rotated off; stats will be updated before it goes to Council.

STAFF UPDATE

None.

COMMISSION AGENDA REQUESTS

None.

COMMISSIONER COMMUNICATIONS

None.

ADJOURNMENT

Chair LoPilato adjourned the meeting at 8:56 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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