

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
WEDNESDAY - - - DECEMBER 18, 2019 - - - 7:00 P.M.

Acting Chair Schwartz convened the meeting at 7:00 p.m.

ROLL CALL - Present: Commissioners Little, Shabazz, Tilos and Acting Chair Schwartz – 4.

Absent: None.

[Staff present: Chief Assistant City Attorney Michael Roush; Assistant City Attorney John Le; and City Clerk Lara Weisiger]

ORAL COMMUNICATIONS, NON-AGENDA

None.

AGENDA ITEMS

3-A. Minutes of the July 23, 2019 Meeting

Commissioner Shabazz moved approval of the minutes.

Commissioner Little seconded the motion.

Under discussion, Commissioner Shabazz stated that he submitted correspondence with corrections to the minutes; inquired the practice regarding including information on presentations in the minutes and requested changes be made.

The City Clerk stated the changes can be done to expand the minutes.

Commissioner Shabazz stated the changes include a summary; noted the minutes included a comment about speaking to other Commissioners; requested clarification of the Brown Act.

The City Clerk stated the comment was about contacting one other Commissioner; stated a quorum, or three Commissioners, cannot have a discussion about an agenda item.

Acting Chair Schwartz inquired the practice of summarizing comments.

The City Clerk responded if someone gives a presentations on something that is in writing, the minutes typically state a presentation was given; adding more detail is acceptable.

On the call for the question, the motion carried by unanimous voice votes – 4.

3-B. Action on Open Government Commission's Written Decision Following a Hearing on a Sunshine Ordinance Complaint Concerning a Failure to Respond Timely to a Public Records Act Request

Acting Chair Schwartz inquired whether Commissioner Shabazz is recusing himself.

Commissioner Shabazz responded in the affirmative; inquired at what time is he required to recuse himself, during voting or discussion.

The Chief Assistant City Attorney responded as the Complainant, Commissioner Shabazz would be required to recuse himself from the vote and discussion, but could present to the Commission as the Complainant.

In response to Acting Chair Schwartz's inquiry regarding public comment, the Chief Assistant City Attorney stated the Complainant is given an opportunity to verbalize their position; the Commission can ask questions; the City would make its presentation and have an opportunity to respond; the Commission could then have discussion and reach a decision regarding the issue.

Mr. Shabazz stated he would like to clarify that he filed his complaint as a member of the public and not as a Commissioner; he would like to address two specific issues: 1) the efforts to resolve the issue informally and any additional facts that existed, and 2) the statement that there is no evidence of subsequent violations, which is inaccurate; cited examples of potential violations included in the staff report; expressed concern about resolving violations informally discouraging folks from bringing issues before the Commission; stated that he chose to move it forward just to set a precedence; inquired how the City Attorney's office could improve its internal process for an increased sense of transparency.

Acting Chair Schwartz requested more details about Mr. Shabazz's requests from February 22 and 27, 2018.

Mr. Shabazz responded on February 27, 2018 he made a request for bodycam footage of an incident that occurred on August 21, 2017 regarding a robbery and Alameda Police drawing firearms; stated the response he was given from the Police Department was that he would not be able to access the bodycam footage.

Acting Chair Schwartz inquired whether Mr. Shabazz had issues with the response failing to address his request timely or at all and whether he had to be persistent and follow up.

Mr. Shabazz responded he cannot answer at the moment because he submitted several public records requests on separate issues, but can get the information from his computer and provide it later.

Commissioner Little stated that she recalls asking the same questions at the last meeting.

Mr. Shabazz agreed the issues discussed at the last meeting are separate.

The Chief Assistant City Attorney stated the draft decision was revised per the Commission's direction, which included removing objectionable language, adding a reminder that the City needs to do a better job with timely responses, and requiring an annual report on records requests; the changes were added to the findings sustaining the complaint; hopefully, the revised decision meets the Commission's requirements and the Commission will sign it.

Commissioner Little stated this is the first time a staff report has been provided regarding records requests; the report revealed an additional item; she is satisfied that the City Attorney's office did a nice job of capturing and cataloguing the requests; she would like to move forward by acknowledging that there are appropriate checks and balances in place; if the pattern continues, the Commission can revisit the issue.

Commissioner Tilos stated data should be provided by department to determine if there is a pattern and to allow tracking and addressing of timely responses; expressed support for the provisions added to the decision.

Acting Chair Schwartz stated it takes courage, persistence, and incredible amount of civic engagement to raise the issue to the Commission; expressed appreciation to Mr. Shabazz and the City Attorney's office for taking the matter seriously; proposed some amendments to the decision language: removing the phrase "in light of the facts...", changing the phrase to "no evidence in the record of a subsequent similar violation..." to "though limited evidence suggests similar violations, the Commission does not assess a fine...", and adding a sentence "However, the Commission will not hesitate to assess a fine in the future if similar violations are reported" to make it clear how seriously the Commission takes the matter; after the sentence, "we sustain the complaint," he would like to remove the phrase, "no other remedy is necessary."

Commissioner Little stated at the time the decision was written, the Commission did not have a staff report or evidence in hand; the staff report on record requests shows one additional violation; she appreciates the spirit of what Acting Chair Schwartz would like to do, but does not want to introduce something that was not in hand at the first hearing.

Acting Chair Schwartz stated the Commission is issuing the order tonight and should be giving a decision based on what is known today.

Commissioner Little stated she is not comfortable making an amendment or motion to the decision when the agenda item has not yet been addressed.

Commissioner Tilos stated a decision should have been approved back in October; it is a muddy water and technically the Commission should not even be discussing the item tonight; he understands both Commissioner's points, but is leaning toward the frame of mind as of October.

Mr. Shabazz stated the issues and information, including the spreadsheet, being discussed tonight were included in the October meeting; regardless of whether the Commission has reached the item on the agenda, the information was sent out to the public and the information is readily available.

Commissioner Tilos concurred with Mr. Shabazz; stated his point was the Commission was ready to make the decision coming into the meeting in October, after having the information and data from the July meeting.

Acting Chair Schwartz reiterated the amendments.

Commissioners Little and Tilos suggested amending the language to “no evidence in the record of a subsequent similar violation...” to add “since that time.”

Commissioner Little moved approval of the decision with the amendments noted.

Commissioner Tilos seconded the motion, which carried by unanimous voice vote – 3.
[Absent: Commissioner Shabazz – 1.]

3-C. Report Concerning Responses to Public Records Act (PRA) Requests Referred to the City Attorney’s Office

Commissioner Shabazz moved approval of accepting the report.

Commissioner Little seconded the motion.

Under discussion, Commissioner Little stated it is important to make sure the public understands there is an Open Government Commission, a Sunshine Ordinance and the City has a responsibility to address public records requests; inquired whether the Commission has an obligation to follow up on public records request to prevent another instance of requests falling through the cracks.

The Chief Assistant City Attorney responded the Sunshine Ordinance is prominent on the City’s website and is included on every Board, Commission, and Council agenda; the record shows that public records requests are responded to timely; the City Attorney’s office can work with the City Clerk to explore other avenues to make the information more available to the public.

Commissioner Little stated that she concurs with Mr. Shabazz regarding having an educational component about the Public Records Act; she appreciates the time and responsiveness that went into the decision; every data system can be flawed, humans are inherently flawed; she appreciates the strong response to the Commission’s request.

Commissioner Shabazz stated that he is grateful to the City Attorneys and staff for their efforts regarding the matter; concurred with Commissioner Little regarding the importance of access to information; discussed some discrepancies he found in the spreadsheet

regarding timing and responses related to his own requests; offered beneficial suggestions, including requesting the City Attorney's office assign a number to each public records request, using the year and number of the request; stated that would like to incorporate the data in an annual report; recommended a method for other departments to have consolidated and central tracking of requests.

The City Clerk stated See Click Fix has not been a great tool for records requests; the Clerk's office is working with the Public Information Officer on alternative, more efficient online way to submit public records requests.

Commissioner Little stated that she would like a column added to the spreadsheet which indicates the number of days between when the request was received and when responsive information or documents were produced.

On the call for the question, the motion carried by unanimous voice vote – 4.

3-D. Accept the Annual Report

The Chief Assistant City Attorney gave a brief presentation.

Commissioner Shabazz stated that he was not a member of the Commission at the time previous complaints were filed and wanted to confirm with the other Commissioners that the information in the report is accurate.

Acting Chair Schwartz inquired what happened with the “null and void” decision on the ordinances, to which the City Clerk responded in January 2019, the Council decided to rescind the ordinances, which were re-introduced and finally passed.

Acting Chair Schwartz requested adding a few sentences after the statement to indicate there was effective Commission action regarding the ordinances.

Acting Chair Schwartz moved approval of accepting the annual report.

Commissioner Tilos seconded the motion, which carried by unanimous voice vote – 4.

Acting Chair Schwartz proposed hearing item 3-F. before 3-E.

Commissioner Shabazz inquired whether the Commission has a set meeting cut-off time, to which the City Clerk responded in the negative.

Commissioner Shabazz inquired whether a formal motion is required to change the order of the agenda, to which the Chief Assistant City Attorney responded the Chair has the discretion to move ahead with minor agenda order changes such as the one Acting Chair Schwartz proposed.

3-F. Select Chair and Vice Chair

Acting Chair Schwartz stated the selection of Chair and Vice Chair is based on seniority; since Chair Henneberry stepped down, he is next in line for Chair; inquired whether Commissioner Tilos would then be next for Vice Chair.

Commissioner Tilos stated he was not aware of the selection precedence and suggested opening the discussion; requested staff remind the Commission of meeting logistics; expressed concerns about not having a quorum the last meeting, which wasted time and resources.

The City Clerk stated the Commission's two regular meetings are the first Monday in February and October at 7:00 p.m.; meetings are also scheduled within 30 days if a complaint is filed and as needed.

Commissioner Shabazz inquired which Commissioner would be interested in the Chair or Vice Chair roles and why.

Acting Chair Schwartz responded that he is interested in taking on the Chair role; stated he regrets not being able to attend the October meeting due to an emergency appendectomy and the last-minute July meeting was called while he was away on international travel; with those two exceptions, he has attended all the meetings and plans to going forward; he is proud of the work the Commission does; giving access to the public as well as helping the City Council function more effectively is why he would like to continue to serve on the Commission; the Commission has achieved many meaningful things; having proper disclosure is important; he would like to continue being proactive going forward.

Commissioner Tilos moved approval of appointing Commissioner Schwartz as the Chair.

Commissioner Little seconded the motion, which carried by unanimous voice vote – 4.

Acting Chair Schwartz moved approval of nominating Commissioner Tilos as the Vice Chair.

Commissioner Little stated the selection is a rotating process; she has already been Chair and Vice Chair; she feels it is a good way for appointed members to gain experience; she supports Commissioner Tilos as Vice Chair.

Commissioner Tilos stated he is humbled by the nomination and would like to fill the role as Vice Chair; he would like to continue the rotational process so that Commissioner Shabazz could also have a turn at the Vice Chair/Chair roles.

Commissioner Little seconded the motion, which carried by the following voice vote: Ayes: Commissioners Little, Tilos and Acting Chair Schwartz – 3. Abstention: Commissioner Shabazz – 1.

Commissioner Shabazz inquired whether the rotational selection process is a formal process that has been codified, to which the Chief Assistant City Attorney responded in the negative; stated the selection process is informal; selecting the Chair and Vice Chair is at the Commission's discretion.

Commissioner Little stated participation in previous meetings would be a factor for her in the nomination process; she would bypass a Commissioner who was absent for a majority of the meetings.

Commissioner Shabazz stated that he is fine with the informal process but would like to consider making it more formal in the future; discussed the example of the School Board changing its process.

Commissioner Tilos concurred with Commissioner Shabazz; stated the School Board situation had the necessary votes to change the process.

3-E. Consider Further Revisions to the Sunshine Ordinance by Amending Various Provisions of Article VIII (Sunshine Ordinance) of Chapter II (Administration), Including Provisions Related to Public Access to Public Meetings and Public Records, and Sunshine Ordinance Enforcement.

Commissioner Shabazz stated he is interested in how revising the ordinance is coming forward now.

Acting Chair Schwartz stated the City Attorney's office claims the ordinance has been around for a decade and is being cleaned up; it felt like revising the ordinance was in response to the Commission nullifying two City Council actions and the fact that the City Attorney's office seemed to dispute whether the Commission has the authority to do so; it seems that the City Attorney's office wants change to the ordinance to take the authority away from the Commission; all of the other modifications to the ordinance seemed like gravy poured over the real issue.

Section 2-93.8

The Assistant City Attorney stated the use of the Null and Void remedy was historic in a sense that it had not been used prior; when it was used, Councilmembers wanted the City Attorney's office to look into revising the Sunshine Ordinance; from said direction, the City Attorney's office drafted the ordinance amendments which are before the Commission tonight.

Acting Chair Schwartz inquired whether the Council requested the revisions because they were upset that the Commission nullified their actions.

The Assistant City Attorney responded in the negative, stated that he would not characterize it that way; it is typical for ordinances to adopt provisions that are not triggered, but it cannot be ignored that the remedy was used; his understanding is that the Council wanted a review of the entire Sunshine Ordinance.

Commissioner Little stated that she finds it timely that the one and only time the Commission used the remedy, the authority is being proposed to be removed at the very next opportunity; the change would remove any teeth the Commission has.

Commissioner Tilos stated it feels like the Commission is being undercut; the Commission did have the authority at one point, exercised that authority, then the Council requested to revise the ordinance to take away the power; the timing does not feel right.

The Assistant City Attorney stated if there is something about an ordinance that merits change, it should be addressed immediately as soon as it arises so changes are not triggered when another issue arises; he recognizes the Commission's perspective on the timing; the City Attorney's office views it differently; the situation was a little unprecedented; there was a Council request to advise the Open Government Commission on what the body could and could not do; the City Attorney's office was very frank about thinking it through deliberately; the proposed edits before the Commission tonight start the process.

Acting Chair Schwartz stated that he feels the fact that the City Council's actions were nullified by the Commission presents an incredibly strong showing of democracy in the City; it is a positive thing and the City Council respected the decision and re-agendized the issues; the Commission did not weigh in on the underlying merits of the politics involved in legislation; it was strictly about the process and whether it was as open as it needed to be under the Sunshine Ordinance; it was clear to the entire Commission that it was not an open process, so the Commission nullified the Council action; then, the City proposes to remove the Commission's authority immediately after; contrary to what the Assistant City Attorney stated about demonstrating a problem in the ordinance, it shows that the ordinance worked exactly right; the Sunshine Ordinance is the whole reason it is worth it for him to be on the Commission; he does not have issues with the other modifications, but taking away the Commission's authority is a very substantive change and there is no way for the ordinance to be re-worded that he would support taking away the Commission's teeth.

Commissioner Little stated the Commission's decision, and ultimately the Council agreeing to the decision, merely delayed the process and forced the hand of the Council to adhere to proper procedure for public noticing; the delay even went beyond an election creating new people sitting at the dais; none of that had to happen had the City responded in a timely fashion; the issue was about procedure; if the authority of the Commission to ensure proper procedure is taken away, there is no point in having an Open Government Commission or a Sunshine Ordinance.

Commissioner Tilos concurred with Commissioner Little, stated the Commission needs the authority in order to be an effective body.

Chair Schwartz moved approval of rejecting the changes to Section 2-93.8.

Commissioner Tilos seconded the motion.

Under discussion, the Chief Assistant City Attorney clarified that the Commission would like Section 2-93.8 to remain unchanged.

The Assistant City Attorney inquired whether the Commission's recommendation is that not only are the changes rejected, there are no alternative proposed changes to Section 2-93.8, to which Acting Chair Schwartz responded in the affirmative.

On the call for the question, the motion carried by unanimous voice vote – 4.

Commissioner Shabazz stated he would like the Commission to use how making changes to the Sunshine Ordinance makes government more accessible as a framework to evaluate the changes.

Section 2-91.1

Commissioner Shabazz inquired whether an ad hoc Charter Review Committee appointed by the Mayor would be considered a passive meeting body as defined in the Sunshine Ordinance.

The Assistant City Attorney responded in the negative; stated it is a typical ad hoc meeting body and not a passive meeting body; an example of a traditional ad hoc committee is similar to a ballot argument ad hoc committee where two members of the Council convene to come up with a revised ballot argument.

The Chief Assistant City Attorney stated it is defined in the ordinance that a passive meeting body shall not include an ad hoc committee appointed for a single purpose; concurred with the Assistant City Attorney that the Charter Review Committee would not be considered a passive meeting body.

In response to Commissioner Shabazz inquiry, the Assistant City Attorney stated a meeting body that includes City employees and outside agency staff would not be considered a passive meeting body and would be an exception.

There was no Commission discussion of Section 2-91.5

Section 2-91.12

Commissioner Shabazz inquired what is the impetus for the section [regarding Closed Sessions] being amended, to which the Assistant City Attorney responded a Councilmember requested the change.

Commissioner Shabazz stated it would be helpful for elected officials to clarify Closed Session votes on matters, whether it is for their own political purposes, but also for people to understand their intention; it would make sense in making government further accessible.

Section 2-91.15

In response to Commissioner Shabazz's inquiry, the City Clerk stated the Council adopted new Rules of Order eliminating the ceding of time, which was also approved by the Open Government Commission and a Council subcommittee.

Commissioner Little stated the change in policy was a result of trying to streamline the Council meetings; there were complaints that the same members of the public and Council were talking about the same issues repeatedly.

Acting Chair Schwartz stated it does not create greater public access when decisions on important issues that people come to hear about are not getting heard until late in the evening or postponed to another meeting because people are talking too long.

Section 2-92.2

Commissioner Shabazz inquired who are the designated custodian of records.

The City Clerk responded any person within the City can accept a public records request from anybody; stated the custodian of records is the staff person responsible for tracking requests within the department; each department designates one person so requests can be filtered directly to the department's custodian of records.

Section 2-92.4

Commissioner Shabazz inquired what are the benefits of posting an Environmental Impact Report (EIR) and other environmental documents on an external consultant's website as opposed to just posting it on the City's website.

The Assistant City Attorney responded the practice is not common, but sometimes the documents are very large, especially when building an administrative record, and hosting the documents on the City's website can be cumbersome.

Acting Chair Schwartz inquired whether a link is posted on the City's website in the event the consultant hosts the documents, to which the Assistant City Attorney responded he is not absolutely certain, but believes posting a link is a standard practice.

Acting Chair Schwartz requested confirmation of the accessibility to the documents be included in the changes.

There was no Commission discussion of Section 2-92.9

Section 2-93.2

In response to Acting Chair Schwartz's inquiry regarding forfeiture of a hearing date, the City Clerk stated that she reaches out to all the contact information provided by the requestor; it becomes a problem when there is a timeline to schedule a hearing and she is not getting any response from the complaintant.

Acting Chair Schwartz stated it might be helpful to add a sentence to emphasize the point, such as: “every reasonable attempt will be made to reach the individual through all available contact information and all attempts will be documented.”

In response to Commissioner Shabazz’s inquiry about re-submitting a complaint, the City Clerk responded the timelines in the Sunshine Ordinance would not allow a re-submission.

There was no Commission discussion of Section 2-93.7.

The City Clerk summarized the changes the Commission agreed to; stated there were slight revisions to 2-92.4 requiring a link be posted and 2-93.2 requiring outreach; the changes have been noted and staff will work to draft the language.

Chair Schwartz moved approval of adopting the recommendations with the two amendments.

Commissioner Little seconded the motion.

On the call for the question, the motion carried by unanimous voice vote – 4.

COMMISSION COMMUNICATIONS

Commissioner Shabazz expressed his appreciation for all the work of staff regarding his complaint as a member of the public; stated he would like to use his role as a Commissioner to make the Public Records Act more available to Alamedans and welcomes suggestions from other Commissioners and staff on ways to do that.

The Chief Assistant City Attorney stated staff could agendize the issue at the February meeting.

ADJOURNMENT

There being no further business, Chair Schwartz adjourned the meeting at 8:34 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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