

BEFORE THE OPEN GOVERNMENT COMMISSION  
OF THE CITY OF ALAMEDA

In re:  
The Complaints of John Klein

John Klein,  
Complainant

The City of Alameda,  
Respondent

DECISION OF THE  
OPEN GOVERNMENT COMMISSION  
OF THE CITY OF ALAMEDA

The above entitled matter came on for hearing and a decision by the Open Government Commission of the City of Alameda under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code (“AMC”).

Facts

On Monday, September 7, 2015 (Labor Day, a City holiday), John Klein, citing the California Public Records Act, sent an email request addressed to the Mayor and all four of the other City Council members. Although there was only one email, the email was sent to each of the elected official’s City email account, e.g., to Council member Tony Daysog at [tdaysog@alamedaca.gov](mailto:tdaysog@alamedaca.gov). In part, the email request provides, “Regarding the RRAC ordinance which was approved by the council on Sept. 1, 2015, I would like copies of all correspondence, including letters and email, any meeting notes and agenda and/or materials from any such meetings, received from the public or attended by your office prior to the

council's action on Sept. 1." The email also provided "The California Public Records Act requires a response within ten business days. If access to the records I am requesting will take longer, please contact me with information about when I might expect copies or the ability to inspect the requested records." Mr. Klein also asked that he be contacted by email or by phone if "you have any questions about the request."

Notwithstanding Mr. Klein's citation to the California Public Records Act and the time under the Act (10 business days) by which a response to a Public Records Act request is required, the City of Alameda has adopted an Ordinance, codified in the Alameda Municipal Code, commonly known as the Sunshine Ordinance. (See Article VIII, AMC.) As to requests for public records, the Sunshine Ordinance differs in some respects with the California Public Records Act. The Sunshine Ordinance provides in part that "When a member of the public submits a request for information to any paid or elected agent of the City, that agent shall respond to said request within three (3) business days by providing the information or explaining how, when and by whom the information will be provided, and who shall then have the responsibility of responding within ten (10) days of receipt of such referral." Section 2-92.2 (d), AMC. The Sunshine Ordinance also provides that "Records requests made by email must be acknowledged with an e-mail reply to the sender." Section 2-92.15, AMC.

Mr. Klein's email request was apparently provided to the City Attorney's Office in that on Friday, September 11, 2015, Assistant City Attorney Alan Cohen responded by email to Mr. Klein that "The City of Alameda is in receipt of your September 7, 2015 Public Records Act Request regarding communications leading

up to the enactment of the RRAC ordinance. I'd like to obtain some clarification on the request and it would be helpful for us to discuss it. I'm out of the office, however, until Wednesday. May I call you Wednesday morning? If so, what is a good time?"

On September 15, 2015, Mr. Klein filed five separate Sunshine Ordinance Complaints against the City Council and the individual Council members. He alleged a violation of public records access, citing sections 2-92.2d and 2-92.15 (of the AMC). The complaints elaborate, "I requested records by email on Sept. 7. I have not received an acknowledgement [sic] (2-92.15) nor have I received a 3-day response (2-92.2d)".

Mr. Klein and Mr. Cohen spoke on the phone on Wednesday, September 16, 2015 and Mr. Cohen sent to Mr. Klein a follow up email stating that his September 7 request had been received by the City on September 8, 2015. The email also stated, "In my September 11, 2015 acknowledgment e-mail, I advised that the City would be seeking some clarification on the scope of your request. In our conversation today, you agreed to clarify the request by limiting the search to the City's email server for records from June 1, 2015 to September 1, 2015 from or to the members City Council regarding the RRAC or the RRAC Ordinance. Based on the search terms you provided, we have been able to locate a voluminous amount of separate and distinct writings. These records will need to be extracted from the City's email system and reviewed to determine the applicability of any exemptions. Accordingly, the City's response to your CPRA request will be provided by no later than October 2, 2015. This fourteen-day extension of time to the ten day response period is permitted by Government Code Section 6253."

## Procedure

Under the Sunshine Ordinance, when an official complaint has been filed, the Open Government Commission, created under the Sunshine Ordinance, hears the complaint and renders a formal written decision. The complainant and the City shall appear at a hearing scheduled no later than 30 business days. During the hearing, the Open Government Commission considers the evidence and the arguments of the parties before making its decision. Section 2-93.2 (b), AMC. The hearing was scheduled for October 5, 2015 but, at Mr. Klein's request, was rescheduled to October 14, 2015. The Commission conducted the hearing on October 14 and considered the evidence and arguments of Mr. Klein and the City.

## Discussion

Section 2-92.2 (d), AMC provides that upon a request from a member of the public to a request for information, there shall be a response to that request within three business days by either providing the information requested or explaining how, when and by whom the information will be provided. Section 2-92.15, AMC requires that records requests made by email must be acknowledged with an email reply to the sender.

Here, within three business days from the date Mr. Klein's request was received, Assistant City Attorney Cohen sent Mr. Klein an email response acknowledging receipt of his email request for records, thereby satisfying the requirements of Section 2-92.15, AMC.

Mr. Cohen's email adequately explained by whom the information would be provided, i.e., by Mr. Cohen, thereby satisfying that portion of Section 2-92.2 (d), AMC. As to how and when the information would be provided, Mr. Cohen's email explained that he needed "some clarification on the request" and asking Mr. Klein if they could discuss the matter by phone the following week. Accordingly, until Mr. Cohen could have that conversation with Mr. Klein, he was not in a position to be specific as to how and when the information would be provided. But by advising Mr. Klein of the need for clarification, Mr. Cohen within the time frame set forth in the Ordinance adequately satisfied the intent and purpose of how and when the information would be provided, thereby satisfying that portion of Section 2-92.2 (d) AMC. Moreover, following Mr. Cohen's conversation with Mr. Klein on September 16, 2015 that clarified Mr. Klein's request, Mr. Cohen did explain as to how and when the information would be provided. In addition, although not relevant to disposition of this matter, the records Mr. Klein requested were delivered within the time frame that Mr. Cohen had stated.

### Decision

The intent and purposes of Sections 2-92.15 and 2-92.2 (d), AMC are, respectively, to acknowledge receipt of email requests for records and to provide a timely response to persons who request public information as to how, when and by whom the information will be provided if it cannot be provided immediately. The intent and purposes were met here and neither section of Sunshine Ordinance was violated. The complaint, therefore, is determined to be unfounded.

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Kymberli Aguilar, Chair

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Mialisa Bonta, Member

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Irene Dieter, Member

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Dan Tazon, Member

### Disagreement

I disagree with the Decision as to whether there was a violation of Section 2-92.2 (d), AMC. In my opinion, Mr. Cohen's response on September 11, 2015 did not specifically indicate to Mr. Klein by how, when and by whom the information would be provided and therefore I would find there was a technical violation of that section. I agree there was no violation of Section 2-92.15, AMC.

It is clear from the record that the only "clarification" that Mr. Cohen sought, was for Mr. Klein to inform him of the time period in which he was to search for emails. He could have easily gleaned this simple information by specifically asking for it in his Sept. 11 email to Mr. Klein. It is clear to me that Mr. Cohen, faced with the conundrum of it being the third day of the strict three day deadline of Section

2-92.2(d), being out of town, and Mr. Klein's request requiring significant research to fulfill, chose to use the "clarification" strategy to buy time.

My finding that Mr. Cohen violated Section 2-92.2(d) is not intended as a criticism of his actions. I think that he acted reasonably under the circumstances. However, in my view one of the primary purposes of the Commission's review of these Complaints is to find any defects in the law and attempt to correct them. The defect in Section 2-92.2(d) is very clear. Three days is an unreasonably short time to respond to a request for documents. The California Public Records Act cited at the beginning of this decision requires a response in ten days. Section 2-92.2(d) should be amended to be uniform with said Act.

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Paul Foreman, Member