

**BEFORE THE OPEN GOVERNMENT COMMISSION
OF THE CITY OF ALAMEDA**

In Re The Complaint of	DECISION OF THE
Erin Fraser	OPEN GOVERNMENT COMMISSSION
Complainant	OF THE CITY OF ALAMEDA
The City of Alameda,	
Respondent	

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

Facts

On April 19, 2021, the complainant, Erin Fraser, submitted a request to the City of Alameda seeking records under the California Public Records Act (“CPRA”) regarding the death of Mario Gonzalez. Mr. Gonzales died earlier that same day during an encounter with the Alameda Police Department. Mr. Fraser’s request included the following:

“[A]ccess to and a copy of all records relating to Case Number 21-01762, from and including April 19, 2021 going forward. To be clear, I request all records created relating to the incident described in Case Number 21-01762, whether they are currently in existence, or not. I will follow-up if and when I wish to cease receiving records related to Case Number 21-01762.”

Mr. Fraser added the following language to his request:

“Case Number 21-01762 relates to today’s death of a person in APD custody, and there is great public interest in this information. Time is of the

essence. I respectfully request that the City begin producing records related to this request within the next 30 days for this reason.”

Mr. Fraser also specified that he was requesting “electronic delivery of materials in their **original** form.”

On April 20, 2021, the City sent Mr. Fraser an email with an acknowledgement of his April 19, 2021 request.

On April 21, 2021, the City sent Mr. Fraser an email responding to his April 19, 2021 request. The response indicated that the City would be withholding certain responsive materials to avoid prejudicing the investigations being conducted by the Alameda County District Attorney and the Alameda County Sheriff’s Department. The response also noted that the City would be releasing certain information to the public, including footage from the police officers’ body worn cameras.

On April 22, 2021, Mr. Fraser sent an email to the City stating the following:

“To be clear, my request should include whatever records relate to the decision for officers to go door to door in the surrounding area of Oak St. and the lagoon to “inform” neighbors of the peaceful memorial last night.”

On April 24, 2021, Mr. Fraser sent an email to the City. Among other things, Mr. Fraser clarified that his original request included “raw information,” such as 911 and dispatch calls and body camera footage, etc.

On April 27, 2021, the City publicly released audio files from the police calls for service as well as footage from the officers’ body worn cameras. The City sent Mr. Fraser an email this same day with a link to the publicly-released information.

At varying intervals throughout the rest of 2021, the City sent Mr. Fraser updates stating that responsive materials would continue to be withheld due to ongoing investigations and/or enforcement proceedings.

On December 15, 2021, the City publicly released the autopsy and coroner's report regarding the death of Mr. Gonzalez. The City sent Mr. Fraser an email that same day with a link to the publicly-released information.

At monthly intervals in early 2022, the City continued to send Mr. Fraser updates stating that the Alameda Police Department would continue to withhold investigative material that has not yet been publicly released because the Alameda County District Attorney's Office had not yet decided whether to file criminal charges related to the use of force. In January, February, and March 2022, the City also cited the 65.1 gigabyte size of the investigative files as a basis for the Department "believ[ing] that the public interest in non-disclosure clearly outweighs the public interest in disclosure."

On April 7, 2022, Mr. Fraser emailed the City to ask if the City would be providing another update. Later that afternoon at 3:55pm, the City responded with an update again stating that the Alameda Police Department would continue to withhold investigative material that had not yet been publicly released because the Alameda County District Attorney's Office had not yet decided whether to file criminal charges related to the use of force. At 6:00pm that evening, the City emailed a list of undisclosed recipients stating that the City had been advised that evening that the Alameda County District Attorney had completed its investigation and had publicly released its findings, and that the City would be releasing "all responsive and publicly disclosable information" the following week.

On April 12, 2022, five days after the Alameda County District Attorney publicly released its final report on the death of Mr. Gonzalez, the City posted additional information related to the death of Mr. Gonzalez on its website. The City emailed the link to this information to an undisclosed list of various individuals who had submitted CPRA requests for this information, but the City did not send an email to Mr. Fraser with this link.

Mr. Fraser filed his complaint with the Open Government Commission (“OGC”) on April 13, 2022. His complaint included nine claims which are detailed below.

Procedure

Under the Sunshine Ordinance, when an official complaint has been filed, the OGC hears the complaint and renders a formal written decision. The Complainant and the City shall appear at a hearing, during which the OGC considers the evidence and the arguments of the parties before making its decision. AMC §2-93.2 (b), (c). The parties have the opportunity to file written materials and present evidence.

Both parties filed written materials prior to the hearing, which was held on two days: May 2, 2022 and May 18, 2022. On May 2, 2022, all five OGC commissioners were present. On May 18, 2022, four of the five OGC commissioners were present, with Commissioner Tilos being absent. The parties both appeared at the hearings, which were held via teleconference, pursuant to Section 54953 of the California Government Code. Erin Fraser spoke on his own behalf. Assistant City Attorney Alan Cohen (May 2, 2022) and Special Counsel Michael Roush (May 18, 2022) spoke on behalf of the City.

Discussion and Decision

The OGC considered each of the nine claims within Mr. Fraser’s complaint. In addition to the determinations and findings noted below, the OGC discussed the nature of the City’s

failure to send Mr. Fraser the email on April 12, 2022 with the link to the publicly disclosed information. The Commissioners ultimately decided not to make any findings as to whether the City's failure to send this email was inadvertent or intentional, as the Sunshine Ordinance did not require any such finding.

Claim No. 1 Did the City make a good faith effort to comply with Mr. Fraser's request for a shortened timeframe?

The OGC first considered whether the City had made a good faith effort to comply with Mr. Fraser's request for a shortened timeframe. This claim was based on Section 2-92.9(a) of the Sunshine Ordinance which requires the City to "make good faith efforts to comply within a shortened timeframe that has been reasonably justified by a records requester by the fact of his or her situation."

The OGC determined, on a 5-0 vote, that this claim was time-barred and therefore dismissed. Pursuant to Section 2-93.2 of the Sunshine Ordinance, a complainant must file a complaint no more than 15 days after an alleged violation of the Sunshine Ordinance. Mr. Fraser's request for a shortened timeframe was made on April 19, 2021, when he requested that the City "begin producing records relating to this request within the next 30 days." In other words, Mr. Fraser sought disclosure of records by May 19, 2021. The alleged violation therefore occurred on May 20, 2021, the day after Mr. Fraser's 30-day timeframe had passed. Given that the OGC complaint was not filed until April 2022, the claim was not timely filed.

Claim No. 2 Was the City required to disclose records in a particular electronic format?

The OGC next considered Mr. Fraser’s second claim: whether the City was required to provide information in an electronic format pursuant to Section 6253.9(a) of the Government Code.

The OGC considered the City’s disclosures separately. As to the information disclosed by the City prior to March 29, 2022¹, the OGC determined, by a 5-0 vote, that Mr. Fraser’s claim was time-barred pursuant to 2-93.2 of the Sunshine Ordinance, and therefore dismissed. The OGC found that the 15-day clock started running on the date that the information had been provided. To the extent that Mr. Fraser alleged that the format of the information disclosed in 2021 was deficient, under the current language of the Sunshine Ordinance, he needed to have filed his Sunshine Ordinance complaint within 15 days of any such disclosure.

The OGC determined, by a 4-0 vote, that it was unable to make a finding as to the format of the City’s later disclosures—i.e. those disclosures made after March 29, 2022. The OGC found that because Mr. Fraser did not receive an email on April 12, 2022 with a link to the City’s additional disclosure, Mr. Fraser had not received information in response to his request. The OGC concluded that absent any disclosure by the City to Mr. Fraser, the OGC could not make any findings as to the format of the information disclosed to Mr. Fraser.

Claim No. 3 Did the City comply with the requirement to acknowledge Mr. Fraser’s CPRA request?

The OGC next considered whether the City had properly acknowledged Mr. Fraser’s CPRA requests in April 2021. Mr. Fraser’s complaint confirmed that the City acknowledged his April 19, 2021 request but alleged that his emails of April 22, 2021 and April 24, 2021

¹ For various claims, the OGC distinguished between information disclosed by the City before and after March 29, 2022. This distinction is based on the date that Mr. Fraser filed his Sunshine Ordinance complaint. He filed his complaint on April 13, 2022. The time period between March 29, 2022 and April 13, 2022 is 15 days, which is the timeframe for bringing a Sunshine Ordinance complaint.

constituted "Additional Requests" which the City failed to acknowledge. Section 2-92.2(g) of the Sunshine Ordinance requires the City to "acknowledge" each CPRA request sent by email with a return email.

The OGC determined, by a 5-0 vote, that this claim was time-barred and therefore dismissed. The OGC found that any alleged violations of the City's duty to acknowledge Mr. Fraser's requests in April 2021 were required to have been filed within 15 days of the alleged failure to acknowledge his requests. Mr. Fraser's deadline to file a Sunshine Ordinance complaint therefore expired in May 2021, rendering his April 13, 2022 claim untimely.

Claim No. 4 Did the City comply with Sunshine Ordinance section 2-92.8(d)(1)'s requirements regarding disclosure of law enforcement information?

In evaluating Claim No. 4, the OGC separately considered the City's disclosures prior to March 29, 2022 and after March 29, 2022.

As to the City's disclosures made prior to March 29, 2022, the OGC determined, by a 4-0 vote, with one abstention, that this claim was time-barred and dismissed because it was not filed within 15 days of the alleged violation.

As to the City's disclosures after March 29, 2022, the OGC sustained the claim by a 4-0 vote. The Commission sustained the claim on the basis that Sunshine Ordinance Section 2-92.8(d)(1)'s requirement to "cooperate with all members of the public making requests for law enforcement records" includes advising individual requestors when responsive records are available and the City failed to do so here.

The OGC made the following recommendations to the City to cure or correct this violation pursuant to Section 2-93.8 of the Sunshine Ordinance: (1) The Commission recommends that the City confer with Mr. Fraser regarding the types of records that he has

requested, including the types of records identified in his Supplemental Reply to Vice Chair Chen's Question "1a,"² and produce any further responsive records that aren't required by law to be withheld or redacted. In doing so, the City is encouraged to consult Section 6253.1 of the Government Code which outlines ways in which an agency must assist a member of the public requesting records, now that the "ongoing investigation" exemption for the requested records is no longer applicable. (2) To the extent applicable, the Commission further recommends that the City expedite production of any remaining responsive records withheld due to the administrative investigation and ensure that Mr. Fraser is directly included in any notifications about the availability of those records.

Claim No. 5 Did the City comply with Government Code section 6254(f)(1) and 6254(f)(2)(A)'s requirements regarding production of arrest information and records concerning calls for service?

In evaluating Claim No. 5, the OGC separately considered the City's disclosures prior to March 29, 2022 and after March 29, 2022.

As to the City's disclosures made prior to March 29, 2022, the OGC determined, by a 5-0 vote, that this claim was time-barred and dismissed because it had not been filed within 15 days of the alleged violation.

As to information disclosed after March 29, 2022, the OGC determined, on a 3-1 vote, the following: (1) to the extent that the information specified in Government Code Section

² The Commission invited the parties to submit supplemental information in response to Commissioner questions between the May 2 and May 18, 2022 hearing dates. Complainant's Response to Supplemental Commission Questions can be found at Attachment 5 to Item 3-A on the May 18, 2022 Open Government Commission Agenda. For ease of reference, Mr. Fraser's response to Vice Chair Chen's question 1.a. stated: "(...) This request is intentionally broad and is meant to encompass text messages on personal cell phones of Respondent's employees, internal emails, messages, phone records, notes, interviews of officers, billing records with the Renee Law Group, correspondence with all the three bodies investigating the death of Mr. Gonzalez and every other 'record' as defined by the CPRA." The Commission did not take a position on whether each item is a disclosable public record, but did recommend the City confer with Mr. Fraser about the categories of records he identified.

6254(f)(1) and (f)(2)(A) was produced in a disclosure for which the City directly corresponded with Mr. Fraser, the OGC found no violation and denied Mr. Fraser's claim; and (2) if the only instance in which the information specified in Government Code Section 6254(f)(1) and (f)(2)(A) was disclosed was in the April 12, 2022 public disclosure for which Mr. Fraser did not receive notice, the OGC found a technical violation and sustained Mr. Fraser's claim.

Claim No. 6 Did the City violate Sunshine Ordinance section 2-92.11 by improperly withholding entire records and/or failing to explain redacted or withheld information or documents in writing?

In evaluating Claim No. 6, the OGC separately considered the City's disclosures prior to March 29, 2022 and after March 29, 2022.

As to the City's disclosures made prior to March 29, 2022, the OGC determined, by a 4-0 vote, with one abstention, that this claim was time-barred and dismissed because it was not filed within 15 days of the alleged violation.

As to the City's disclosures made after March 29, 2022, the OGC sustained the claim on a 4-0 vote. The OGC found that because the City had not emailed Mr. Fraser the link to additional information that was posted on April 12, 2022, the City had improperly withheld entire records from Mr. Fraser.

The OGC made the following recommendation to the City to cure or correct this violation pursuant to Section 2-93.8 of the Sunshine Ordinance: (1) The Commission recommends that the City confer with Mr. Fraser regarding the types of records that he has requested, including the types of records identified in his Supplemental Reply to Vice Chair Chen's Question "1a,"³ and produce any further responsive records that aren't required by law to be withheld or redacted. In doing so, the City is encouraged to consult Section 6253.1 of the Government Code which

³ See Footnote 2 above.

outlines ways in which an agency must assist a member of the public requesting records, now that the “ongoing investigation” exemption for the requested records is no longer applicable. (2) To the extent applicable, the Commission further recommends that the City expedite production of any remaining responsive records withheld due to the administrative investigation and ensure that Mr. Fraser is directly included in any notifications about the availability of those records.

Claim No. 7 Did the City comply with Section 6253(c) of the CPRA to respond to Mr. Fraser’s request?

The OGC determined, by a 5-0 vote, that the claim that the City violated Section 6253(c) of the CPRA was time-barred and dismissed because the alleged violation occurred in April 2021, well before Mr. Fraser filed his complaint on April 13, 2022.

Claim No. 8 Did the City respond in a “timely” manner?

The OGC separately considered the City’s disclosures prior to March 29, 2022 and after March 29, 2022.

As to the City’s disclosures made prior to March 29, 2022, the OGC determined, by a 5-0 vote, that Mr. Fraser’s claim as to the City’s lack of a timely response was time-barred and dismissed because it had not been filed within 15 days of the alleged violation.

As to the City’s disclosures made after March 29, 2022, the OGC sustained Mr. Fraser’s claim, finding that the City’s failure to email Mr. Fraser the link to the information disclosed on the City’s website resulted in Mr. Fraser not receiving a timely response.

The OGC made the following recommendation to the City to cure or correct this violation pursuant to Section 2-93.8 of the Sunshine Ordinance: (1) The Commission recommends that that the City confer with Mr. Fraser regarding the types of records that he has requested, including the types of records identified in his Supplemental Reply to Vice Chair Chen’s

Question “1a,”⁴ and produce any further responsive records that aren’t required by law to be withheld or redacted. In doing so, the City is encouraged to consult Government Code section 6253.1 which outlines ways in which an agency must assist a member of the public requesting records, now that the “ongoing investigation” exemption is no longer applicable. (2) To the extent applicable, the Commission further recommends that the City expedite production of any remaining responsive records withheld due to the administrative investigation and ensure that Mr. Fraser is directly included in any notifications about the availability of those records.

Claim No. 9: Does the City owe Mr. Fraser his costs and attorney’s fees?

The OGC determined by a 5-0 vote, that it lacks jurisdiction to assess fees and costs, and that this claim is dismissed.

Dated: June 27, 2022

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Krystal E. Pilato, Chair

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Serena Chen, Vice-Chair

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Jeff Cambra

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Meloye Montgomery, Commissioner

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Ruben Torres, Commissioner

⁴ See Footnote 2 above.