

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

In Re The Complaint of

Paul Foreman

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 (“OGC”) under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code (“AMC”).

Facts

During public comment on non-agenda items at the November 17, 2023 City Council meeting, several remote speakers disrupted the meeting with hate speech. In response, concerning oral communications about non-agenda items, the agenda for the next City Council meeting on November 21, 2023 provided as follows: “Oral Communications, Non-Agenda (Public Comment) - Limited to 15 minutes, in-person comments only, remote public comment not available for this section; any remaining speakers may comment under Section 9.” City Council then conducted its November 21, 2023 meeting with public comments for non-agenda items available only in-person and unavailable remotely. Both in-person and remote public comments, however, were available for all regular agenda items.

During the November 21 meeting, Councilmember Spencer asked how the decision was made to exclude remote public comments for non-agenda items. The City Clerk explained that the change was made by those persons designated under the City Council Handbook and Code of Conduct to set the agenda—in this case herself, the Mayor, City Manager, and City Attorney.

The November 21, 2023 agenda also provided that Councilmember Vella would attend the meeting via teleconference from Best Western Plus Dana Point Inn-by-the-Sea, 34744 Pacific Coast Highway, Dana Point, CA 92684. Councilmember Vella attended the meeting remotely and the other four councilmembers attended the meeting in the Alameda City Hall Council Chambers

Paul Foreman filed his complaint with the OGC on December 5, 2023 with two claims related to the November 21, 2023 City Council meeting. First, Mr. Foreman alleged the City violated the Brown Act by excluding remote public comment on non-agenda items and by not complying with requirements for meetings attended via teleconference. Second, Mr. Foreman alleged that the City's decision-making process to exclude remote public comment violated the Brown Act.

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 Section 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 in this case. The City submitted a position statement concerning the complaint, and Mr. Foreman submitted an additional

description of the alleged violations, an additional statement in response to the City's position statement, and an addendum memorandum to the original complaint. The City subsequently submitted a response to the additional documents from Mr. Foreman.

The OGC conducted the hearing at City Hall on January 29, 2024 with four of the five OGC commissioners present; Vice Chair Miley was absent. Mr. Foreman and Jason Allen, Assistant City Attorney, appeared at the hearing, Mr. Foreman appeared via teleconference and spoke on his own behalf. Mr. Allen appeared in-person and spoke on behalf of the City.

Discussion and Decision

Concerning the claim that the City violated the Brown Act section by excluding remote public comments on non-agenda items and not complying with requirements for meetings with attendance via teleconference., Mr. Foreman contended that Sections 54953(b), and 54953(f) of the Brown Act expressly authorize remote public comments for teleconferenced meetings, but that public accessibility requirements in Section 54953(b) were not satisfied. Mr. Allen responded: (a) Ms. Vella attended the meeting remotely under Section 54953 (b), not subsection (f); (b) nothing in Section 54953(b) requires remote public comments; (c) providing in-person public comments on non-agenda items satisfies the Brown Act, and (d) Section 54953(b)'s public accessibility requirements for Councilmembers attending remotely do not require the agenda to provide an "invitation" for members of the public to participate at the remote location nor are there geographic limits on a Councilmember's remote participation. Mr. Allen emphasized that the meeting was not held pursuant to Section 54953(f) and thus was not subject to its remote public comment requirements.

During its deliberations, the OGC discussed the requirements for conducting a meeting through teleconferencing and whether excluding remote comments on non-agenda items when a

Councilmember is participating through teleconferencing violated the Brown Act. Commissioner Tilos made a motion that the November 21, 2023 meeting with remote participation by Councilmember Vella did not violate the Brown Act. Chair Chen seconded the motion. The motion failed 2-2. Commissioner Sullivan later made a motion that the exclusion of remote comments for non-agenda items when a Councilmember is attending a meeting under Section 54953 violated the Brown Act; Chair Chen seconded the motion. The motion failed 1-3 and there was no follow up motion. Accordingly, the OGC made no finding as to the merits of that portion of Mr. Foreman's complaint.

Concerning that portion of Mr. Foreman's complaint that the process the City employed to decide to exclude remote public comments on non-agenda items violated the Brown Act, Mr. Foreman argued that pursuant to the Brown Act Section 54954.3(b) only City Council may adopt regulations to exclude remote public comments. Mr. Allen responded that the City Council adopted the Alameda City Council Handbook and Code of Conduct which authorizes the City Manager, City Clerk, and City Attorney to collaborate with the Mayor on setting the agenda, and therefore the Handbook and Code of Conduct authorized the City Manager, City Clerk, and City Attorney to set the agenda, including excluding remote comments on non-agenda items when not required under the Brown Act.

During deliberation, the OGC considered the standard procedures of setting the agenda and hypothetical limitations upon the agenda setters' authority to change meeting logistics. The OGC also noted the City Council declined to adopt a referral that would place on a Council agenda a discussion item whether remote comments should be excluded on non-agenda items. Commissioners discussed whether the process that the City had employed to exclude remote comments on non-agenda items violated the Brown Act but there was no motion that the City's

process either did or did not violate the Brown Act. Accordingly, the complaint was neither sustained nor determined to be unfounded. The OGC expressed a hope that the City Council would clarify the authority of City staff concerning setting the agenda.

Dated: March 6, 2024

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9FD0C8AA65A1452, Chair

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