



Open Government Commission

INFORMATION CALENDAR  
March 5, 2013

To: Honorable Mayor and Members of the City Council  
From: Open Government Commission  
Submitted by: Steve Wollmer, Chair, Open Government Commission  
Subject: Commission Recommendations Based on Review of Complaint Filed Under Open Government Ordinance

INTRODUCTION

The Open Government Ordinance (OGO) tasks the Commission, among other roles, with hearing complaints from the public regarding possible non-compliance with the OGO, the Brown Act or the Public Records Act. The OGO calls for the Commission to consider ways to informally resolve complaints, and advise the City Council of its opinion, conclusion or recommendation as to any complaint.

At its December 2012 meeting, the Commission considered a complaint related to the timing of public comment at the City Council work sessions.

For the reasons set forth in this Information Report, the Commission makes the following recommendations:

- (1) Staff reports, including PowerPoint presentations, should be available to the public in advance of work session presentations to the extent feasible; and
- (2) Council should hold public comment immediately after staff presentation at work sessions.

CURRENT SITUATION AND ITS EFFECTS

On November 16, 2012, Berkeley resident Merrilie Mitchell filed a complaint with the City Attorney's office asserting a violation of the Brown Act and the Open Government Ordinance. A supplemental/amended complaint was filed on November 28, 2012. The complaint alleged that the City Council violated the Brown Act and the Open Government Ordinance (OGO) on a number of occasions by calling for public testimony at work sessions before the staff presentation, rather than allowing the public to speak in response to the staff presentation.

City Council frequently holds special meetings for the purpose of being informed in detail about specific issues. These are known as "work sessions". Work sessions

generally consist of a presentation by staff or other experts or stakeholders, followed by discussion by and questions from the Council. The presentations and discussion are generally significantly longer than those at regular Council meetings. The Council does not take any action at work sessions. Rather, any action on a topic covered in a work session is placed on the agenda for a subsequent regular meeting, at which time any member of the public may comment on it before the Council acts. In many cases the Council calls for public testimony at the beginning of the work session, before the presentation.

The OGO does not address the issue of when the public is allowed to speak during Council meetings. The Brown Act states: "Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting *before or during consideration of that item.*" (Gov. Code § 54954.3(a), emphasis supplied.)

Additionally, the Council Rules of Procedure reference the timing of public comment for work sessions. Section VI.F provides that "*in general*, public comment at Council work sessions will be heard after the staff presentation, for a limited amount of time to be determined by the Presiding Officer." (Emphasis added.)

According to the complaint, the complainant has taken this matter up with the Council on more than one occasion, and the Council has not overruled the Presiding Officer's order as to the sequence of presentation,<sup>1</sup> Council discussion and testimony.

The City Attorney issued a report to the Commission addressing Ms. Mitchell's Complaint, stating that the complaint was without merit as the OGO does not specify at what point in a work session the Council must allow public testimony and the current practice is consistent with the Brown Act. The City Attorney's report further noted that the Commission's jurisdiction does not extend to allegations that the Council has violated its own rules of procedure.

Ms. Mitchell attended the December 13 Commission meeting and made a presentation to the Commission. The Commission received public comment, and held a discussion about the issues raised in the complaint.

The Commission did not determine that the City Council violated the OGO or the Brown Act. However, the Commissioners discussed whether it would benefit the public to have the presentation materials available for review in advance of the meeting and to have public testimony *after* presentation of those materials to the Council. The Commission considered its authority, under 2.06.190.A.2, to advise City Council "as to any other

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<sup>1</sup> Section I.A. of the Council Rules of Procedure states that the Mayor, as the Presiding Officer, "shall preside at the meetings of the Council" and may "decide all questions of order, subject, however, to an appeal to the Council, in which event a majority vote of the Council shall govern and conclusively determine such question of order."

action or policy that it deems advisable to enhance open and effective government in Berkeley.”

As a result of input and Commission discussion, the Commission passed the following motion at its December 13 meeting:

*Motion to recommend to Council:*

- (1) staff reports, including PowerPoint presentations, be available before work session presentation to the extent feasible; and*
- (2) Council allow public comment after staff presentation at work sessions as provided in Council procedure. (M/S/C: O'Donnell/Smith. Ayes: Costa, Murray, Lombardi, O'Donnell, Ritchie, Smith, and Wollmer; Noes: None; Abstain: None; Absent: None.)*

At its January 17, 2013 meeting, the Commission passed the following motion:

*Authorize submission of draft Information Report to City Council, as amended, to include the following Commission recommendations:*

- (1) Staff reports, including PowerPoint presentations, should be available to the public in advance of work session presentations to the extent feasible; and*
- (2) Council should hold public comment immediately after staff presentation at work sessions.*

(M/S/C Ritchie/Murray: Ayes: Costa, Murray, Ritchie, Smith, and Wollmer; Noes: None; Abstain: None; Absent: O'Donnell [Lombardi on approved leave of absence].)

#### BACKGROUND

See Current Situation and its Effects, above.

#### POSSIBLE FUTURE ACTION

Determine whether to amend Council Rules.

#### FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

None.

#### CONTACT PERSON

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