

# Memorandum

TO: Oakland Public Ethics Commission

FROM: Ralph Kanz, Complainant

DATE: March 7, 2022

RE: Complaint 21-08

## The Oakland Redistricting Commission Violated The Sunshine Ordinance

### Introduction

The Oakland Redistricting Commission (ORC) held a meeting on December 13, 2021 without providing notice to agenda subscribers. The ORC also failed to make all agenda related materials, specifically comments from ORC members to the consultant, available for public review before the meeting, and did not allow public comment before a vote at the end of the meeting. Despite being informed during the December 13 meeting and in follow-up communications that the meeting was not noticed in compliance with the law, the ORC has refused to hold a “cure and correct” meeting. Even with the admission that the law was violated, staff of the Public Ethics Commission (PEC) has dismissed the complaint for violation of the Oakland Sunshine Ordinance (Sunshine) and the Ralph M. Brown Act.<sup>1</sup> Delays in taking action to “cure and correct” the failure to notice agenda subscribers by the staffs of the ORC, PEC, and City Attorney’s office have made a solution more difficult. The dismissal letter from the PEC uses flawed legal reasoning to dismiss the complaint. Sunshine and the Brown Act were violated. A “cure and correct” meeting must take place.

### Law

Under Sunshine, a special meeting of a local body requires “filing a copy of the agenda and copies of all agenda-related material in the Office of the City Clerk”, and the delivery of the agenda to all agenda subscribers.<sup>2</sup> The agenda must be delivered at least 48 hours before the meeting, with certain exceptions. Sunshine requires the posting for a Monday meeting be “made no later than 12:00 p.m. (noon) on the preceding Friday.” The Brown Act, state law on which Sunshine is based, is incorporated into the ordinance and has similar requirements.

### Facts

The Oakland Redistricting Commission (ORC) scheduled a special meeting for Monday December 13, 2021. The agenda was timely posted on the City website. Some agenda-related materials were filed with the City Clerk, but written comments from ORC members to the consultant were not in the package or on the ORC website. The agenda for the December 13 meeting was not sent to agenda subscribers. Shortly after the meeting commenced on December 13 I learned that the meeting was

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1 Dismissal Letters:

[https://cao-94612.s3.amazonaws.com/documents/Item-10b-Dismissal-Letter-Complainant\\_Redacted.pdf](https://cao-94612.s3.amazonaws.com/documents/Item-10b-Dismissal-Letter-Complainant_Redacted.pdf)

<https://cao-94612.s3.amazonaws.com/documents/Item-10c-Dismissal-Letter-Case-No-21-08-Responent-redacted-address.pdf>

2 OMC § 2.20.070

taking place. I joined the meeting on Zoom and when there was opportunity to speak I raised the issue that the meeting had not been properly noticed. The response from staff indicated that the agenda had not been sent to subscribers.

On December 14, 2021 I emailed Corey Alvin, the staff for the ORC pointing out the problems with the previous night's meeting. Receiving no response, I filed a complaint with the Public Ethics Commission (PEC) on December 23, 2021 alleging "(a)genda Subscribers were not sent the agenda for the December 13, 2021 meeting. Also agenda related materials, specifically comments by commission members to the consultants were not available for review by the public." I followed up with an email to PEC Executive Director Whitney Barazoto on December 29, 2021 asking what was being done to cure and correct the problems with the notice for the December 13 meeting.

Mitesh Bhakta, the City Attorney staffing the ORC, emailed me on January 3, 2022 stating the agenda and agenda-related materials had been posted on December 9 and further stated, "(i)t is our understanding that the agenda was emailed to subscriber list. Staff has been unable to determine why you did not receive the agenda." Bhakta also asserted "The Oakland Municipal Code Section 2.20.090(D) provides that even if you did not receive the agenda as a subscriber to the distribution list, the meeting does not need to be noticed again or reconvened:

2.20.090(D) Notwithstanding any other provision of this ordinance, the failure of an agenda subscriber to timely receive the agenda or agenda-related material pursuant to this section shall not constitute grounds for invalidation of the actions of the local body taken at the meeting for which the agenda or the agenda-related material was not timely received.

I responded in an email to Bhakta on January 4 stating that I had confirmed with other agenda subscribers that the agenda had not been received. "With regard to the cited portion of the Sunshine Ordinance, this only applies if the agenda was actually sent. This section of the Sunshine Ordinance is directed to mailing of agendas, but email is no different. If the agenda is not sent to subscribers then a cure and correct meeting must occur. You need more than an 'understanding' that the agenda was sent to subscribers. There must be a record. Beyond the failure to send the agenda to agenda subscribers, on December 13 the Commission also failed to allow public comment after the creation of the two maps, which is also a violation that requires a cure and correct. Given redistricting only takes place once every ten years it would seem prudent to make sure legal procedures are followed."

Whitney Barazoto replied to my email on January 13 stating preliminary review by staff had begun. I replied to her on January 14; "at the December 13 meeting of the Redistricting Commission staff could not say the agenda was sent to agenda subscribers. The City Attorney's Writ to the court about this issue references the December 13 meeting claiming what occurred at the meeting was legitimate. The decisions made at the December 13 meeting have impacted everything that has occurred since. Any further delay in correcting the error makes it more difficult to clean up the problem. A preliminary review does not fix the problem."

On February 25, 2022 PEC staff sent letters to me and the ORC stating they were dismissing the complaint because I attended the meeting.

## Analysis

The PEC analysis complicates what is in fact a simple matter; the agenda was not sent to agenda subscribers. The failure to send the agenda to agenda subscribers is a clear violation of both Sunshine

and the Brown Act. That alone is enough to require the ORC to “cure and correct” the noticing of the meeting.

The PEC dismissal letter asserts “the failure of an agenda subscriber to timely receive the agenda or agenda-related material pursuant to this section shall not constitute grounds for invalidation of the actions of the local body taken at the meeting for which the agenda or the agenda-related material was not timely received. (O.M.C. 2.20.090 (D) Agenda related Materials as public records: Agenda subscribers).” This misses the point that for this clause to apply, the agenda had to be sent to agenda subscribers, which in this case it was not. The law must be read in its entirety.

Whether or not I attended the meeting is irrelevant to the failure to notice agenda subscribers. No agenda subscribers received notice before the meeting commenced. I appeared and told the ORC that there had been a failure to notice agenda subscribers. If the meeting had not been available online via Zoom, I would not have attended the meeting, and because I did not receive information that the meeting was taking place until after the commencement of the meeting, I did not attend the entire meeting.

ORC and the City were told repeatedly that the violation had occurred and that a “cure and correct” meeting was required, but instead of immediately taking action they have dragged their feet. I made a good faith effort to have the ORC comply with the law.

Even if you believe the failure to notice absolves the ORC of noticing requirement, the failure to post the agenda related materials for the meeting violates Sunshine as does not providing for public comment prior to voting on the last item on the agenda.

The dismissal letter seems to conflate public records with agenda-related materials. There is no need to make a public records request to view agenda related materials, and therefore mediation of a public records request is irrelevant.

The PEC letter to the ORC suggests there should be training provided to the ORC the next time the redistricting process takes place, as if no training took place this time. At the November 12, 2020 meeting of the ORC Jelani Killings of the PEC made a presentation on compliance with City laws.

On January 27, 2022 the Oakland City Council held a “cure and correct” meeting. The cause of the action was the failure to allow public comment during the discussion of an ordinance that took place at the December 21, 2021 meeting. In contrast the ORC meeting of December 13, 2021 had multiple violations that require a “cure and correct.” First no notice sent to agenda subscribers; second not all agenda related materials were available for public review; and third comment was not allowed on the final decision made at the meeting.

Courts in California have consistently ruled that laws protecting the public’s rights to participate in public meetings should be liberally construed. The PEC has done the opposite.

The dismissal sets a dangerous precedent in the City of Oakland. It allows for a local body to willfully fail to send notice to agenda subscribers and have no consequences. The dismissal is contrary to the spirit, intent, and letter of the law. As a former member of the PEC, given the ORC clearly violated the law, it is hard to believe this complaint could be dismissed. A “cure and correct” meeting of the ORC is required.