



Fair Campaign Practices Commission
Open Government Commission

CONCURRENT REGULAR MEETING OF THE FAIR CAMPAIGN PRACTICES COMMISSION AND THE OPEN GOVERNMENT COMMISSION

MEETING AGENDA

September 21, 2023

6:30 p.m.

North Berkeley Senior Center – 1901 Hearst Ave. – Aspen Room

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date. Please refrain from wearing scented products to this meeting.

Secretary: Samuel Harvey

The Commission may act on any item on this agenda

1. Call to Order 6:30 p.m.
2. Roll Call.
3. Public Comment. *Comments on subjects not on the agenda that are within the Commissions' purview are heard at the beginning of meeting. Speakers may comment on agenda items when the Commission hears those items.*
4. Approval of minutes for July 20, 2023 FCPC-OGC Regular Meeting

Fair Campaign Practices Commission (FCPC) Agenda

5. Reports.
 - a. Report from Chair.
 - b. Report from Staff.
6. Berkeley Election Reform Act (BERA) Clean-Up Amendments to Ensure Consistency with Contribution Limit Cost of Living Adjustment; discussion and possible action.
7. Report from subcommittee on contribution limits under Berkeley Municipal Code § 2.12.415; discussion and possible action.

Open Government Commission (OGC) Agenda

8. Reports.
 - a. Report from Chair.
 - b. Report from Staff.
9. Letter from Jim McGrath raising concerns regarding compliance with the Open Government Ordinance, Public Records Act and Brown Act; discussion and possible action.
10. Report from subcommittee reviewing policies and practices related to City Council meeting public commenting, access and public participation; discussion and possible action.
11. Adjournment.

Communications

None

Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the secretary of the relevant board, commission or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the secretary to the relevant board, commission or committee for further information. **SB 343 Disclaimer:** Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available for public inspection at the City Attorney's Office at 2180 Milvia St., 4th Fl., Berkeley, CA.



Fair Campaign Practices Commission
Open Government Commission

DRAFT MINUTES

July 20, 2023

CONCURRENT REGULAR MEETING OF THE FAIR CAMPAIGN PRACTICES COMMISSION AND THE OPEN GOVERNMENT COMMISSION

North Berkeley Senior Center
1901 Hearst Ave.
Aspen Room

Secretary: Samuel Harvey

Members Present: Patrick O'Donnell, Janis Ching, Kitt Saginor, Jessica Blome, Henry Isselbacher, Pedro Hernandez, James, Hynes

Also Present: Samuel Harvey, Staff Secretary

1. **Call to Order**

Chair called the meeting to order at 6:30 p.m.

2. **Roll Call**

Roll call taken

3. **Public Comment**

Six speakers

4. **Approval of Minutes:**

a. June 15, 2023 FCPC-OGC Concurrent Regular Meeting

a. Public comment: none.

b. Commission discussion and action.

Motion to approve minutes (M/S/C: Isselbacher/O'Donnell; Ayes: O'Donnell, Saginor, Blome, Isselbacher, Hernandez, Hynes; Noes: none; Abstain: none; Absent: Ching.)

FCPC Agenda

5. **Reports**

a. **Report from Chair**

b. **Report from Staff**

6. **Report from subcommittee on contribution limits under Berkeley Municipal Code § 2.12.415**

- a. Public comment: One speaker.
- b. Commission discussion. No action taken.

7. **FCPC Work Plan**

- a. Public comment: No speakers.
- b. Commission discussion and action

Motion to approve work plan (M/S/C: Blome/O'Donnell; Ayes: O'Donnell, Ching, Saginor, Blome, Isselbacher, Hernandez, Hynes; Noes: none; Abstain: none; Absent: none.)

OGC Agenda

8. **Reports**

- a. Report from Chair.
- b. Report from Staff.

9. **Letter from Jim McGrath raising concerns regarding compliance with the Open Government Ordinance, Public Records Act and Brown Act**

- a. Public comment: No speakers
- b. No action taken. Continued to future meeting.

10. **Report from subcommittee reviewing policies and practices related to City Council meeting public commenting, access and public participation**

- a. Public comment: five speakers.
- b. Commission discussion. No action taken.

11. **OGC Work Plan**

- a. Public comment: No speakers.
- b. Commission discussion and action.

Motion to approve work plan (M/S/C: Blome/O'Donnell; Ayes: O'Donnell, Ching, Saginor, Blome, Isselbacher, Hernandez, Hynes; Noes: none; Abstain: none; Absent: none.)

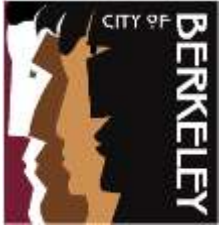
12. **Commission meeting procedures, adding agenda items, agenda item order and Brown Act considerations**

- a. Public comment: No speakers.
- b. Commission discussion. No action taken.

13. **Adjournment**

Motion to adjourn (M/S/C: O'Donnell/Blome; Ayes: O'Donnell, Ching, Saginor, Blome, Isselbacher, Hernandez, Hynes; Noes: none; Abstain: none; Absent: none.)

The meeting adjourned at 8:32 p.m.



Fair Campaign Practices Commission

Date: September 14, 2023

To: Fair Campaign Practices Commission

From: Samuel Harvey, Secretary

Subject: BERA Clean-up amendment to ensure consistency with contribution limit cost of living adjustment

City staff have drafted a set of proposed technical amendments to the Berkeley Election Reform Act (BERA) to amend sections of BERA which have been affected by the 2021 adoption of a cost of living adjustment for the candidate contribution limit and subsequent amendments. (See BMC § 2.12.415.)

First, the proposed amendments address sections of BERA which use the now-obsolete \$250 amount to set thresholds for filing and disclaimer requirements. (See Attachment 1.) The \$250 threshold was presumably adopted in these contexts to parallel the candidate contribution limit. Now that the candidate contribution limit changes with cost of living, and is currently set at \$270, staff recommends that these other thresholds be amended so that they will similarly change as cost of living adjustments are made to the candidate contribution limit.

Second, the proposed amendments provide changes to provisions related filing requirements in order to parallel the new threshold for qualification as a “committee,” which was increased from \$250 to \$1,000 following adoption of the cost of living adjustment for the candidate contribution limit.

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the “double green light” process. This process requires that the FCPC adopt the amendments by a two-thirds vote, and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

Staff believes these technical amendments ensure consistency between BERA’s interrelated provisions and therefore recommends that the Commission approve the attached amendments by a two-thirds vote for submission to the City Council.

Attachments:

1. Proposed Amendments to BERA

Clean Up Amendments to Berkeley Election Reform Act (September 2023)

With the recent adoption of technical amendments to BERA in June of 2023, other cross-referenced or related sections have been identified which staff recommend be amended for consistency. The proposed text of the amendments and a narrative description is provided below.

Amendment #1

Section 2.12.545 Cost of living adjustments

Section 2.12.271 Campaign statements--Additional filing requirements

Section 2.12.335 Disclosure on campaign communications of certain contributions and loans

Both Section 2.12.271 and Section 2.12.335 have dollar amount thresholds that are related to the now-obsolete \$250 contribution limit. As you know, the \$250 limit is now indexed every two years and is currently set at \$270.

Section 2.12.271 adds additional filing requirements for committees that make contributions for or against ballot measures. The quarterly filing requirement in this section is for committees that make expenditures in excess of \$250 in support of or in opposition to a city ballot measure. In order to keep this threshold tied to the contribution limit, this amendment sets the threshold at \$270 in Section 2.12.271 and adds it to the list of dollar amounts that are adjusted every two years per Section 2.12.545.

Section 2.12.335 requires the listing of the top-four contributors under "Major Funding Provided By" on certain campaign materials. The threshold for the top-four was established at "over \$250" so that it only captured contributions that exceeded the individual person limit of \$250. Similar to the amendment described above, in order to keep this threshold tied to the contribution limit, this amendment sets the threshold at \$270 in Section 2.12.335 and adds it to the list of dollar amounts that are adjusted every two years per Section 2.12.545.

2.12.545 Cost of living adjustments.

The Commission shall adjust the dollar amounts specified in Sections 2.12.167, [2.12.271](#), [2.12.335](#), 2.12.500.A.3, 2.12.500.A.6, 2.12.500.A.7, 2.12.500.A.8, 2.12.505.B, and 2.12.530.B.3.b for cost of living changes pursuant to Section 2.12.075 in January of every odd-numbered year following Council implementation. Such adjustments shall be rounded to the nearest ten dollars (\$10) with respect to Sections 2.12.167, 2.12.500.A.3 and 2.12.530.B.3.b and one thousand dollars (\$1,000) with respect to Section 2.12.505.B.

2.12.271 Campaign statements--Additional filing requirements.

A. Each committee that makes expenditures in excess of ~~\$250~~ \$270 in support of or in opposition to a measure must, in addition to campaign statements required by Section 2.12.270 of this Chapter, file campaign statements on the following dates: (1) no later

Clean Up Amendments to Berkeley Election Reform Act (September 2023)

than April 30 for the period January 1 through March 31; and (2) no later than October 31 for the period July 1 through September 30. If the committee has earlier pre-election statement filing deadlines, the earlier deadlines apply.

B. Any additional filing requirement under this section shall cease upon the occurrence of any of the following dates, whichever occurs first: (1) the election day on which the measure is voted upon, (2) six months after the measure fails to qualify for the ballot, (3) six months after an ordinance subject to referendum is repealed by the City Council, or (4) six months after an elected official subject to recall resigns or otherwise leaves office.

2.12.335 Disclosure on campaign communications of certain contributions and loans.

A. Campaign communications supporting or opposing any candidate or measure shall include the name of the committee and the phrase "Major Funding Provided By" immediately followed by the name of the contributor, the city of domicile, and the total cumulative sum of contributions by each of the top four contributors over ~~\$270250~~ to the committee funding the expenditure made within six months of the expenditure. For purposes of this section, the term "contributor" shall include lender, and committees shall aggregate contributions and any loan balances from the same person when determining the total cumulative sum of contributions from a contributor.

B. The disclosures required by this section shall list contributors in descending order by the cumulative total amount of their contributions and shall be presented in a clear and conspicuous manner to give the reader, observer, or listener adequate notice. For all communications, the complete name of the contributor must be listed. No acronyms may be used. For purposes of this section, "campaign communication" means any of the following items:

1. One thousand or more substantially similar pieces of campaign literature, including but not limited to mailers, flyers, pamphlets, and door hangers;
2. Paid advertisements, including but not limited to advertisements in newspapers, magazines, and on the Internet;
3. One thousand or more substantially similar e-mails or pre-recorded telephone calls made within a calendar month.

C. For purposes of this section, "campaign communication" does not include: small promotional items such as pens, pencils, clothing, mugs, potholders, or other items on which the statement required by this section cannot be reasonably printed or displayed in an easily legible typeface; posters, yard or street signs, billboards, supergraphic signs, skywriting, and similar items; television, cable, satellite, and radio broadcasts or advertisements; communications paid for by a newspaper, radio station, television

Clean Up Amendments to Berkeley Election Reform Act (September 2023)

station or other recognized news medium; and communications from an organization to its members.

D. When a new contribution changes the list of contributors required to be disclosed on campaign communications under subsection A, campaign communications must be updated on the following schedule:

1. For printed campaign communications under subsection B.1 or subsection B.2, disclosures must be updated within seven calendar days to include current disclosure information every time an order to reproduce the campaign communication is placed, or any time the campaign communication is reprinted;
2. For e-mails or pre-recorded telephone calls under subsection B.3, disclosures must be updated to include current disclosure information within seven calendar days.

Clean Up Amendments to Berkeley Election Reform Act (September 2023)

Amendment #2

The definition of a campaign committee was changed from a \$250 threshold to a \$1,000 threshold in Section 2.12.095. The related change to Section 2.12.270 reflects this update, but uses a cross-reference to Section 2.12.095 in order to keep the language relevant and current even if future amendments are adopted. Also, staff recommends deleting the use of “telegram” as a communication method to help modernize the code.

2.12.270 Campaign statement--Filing requirements.

A. Each candidate and each committee shall file no fewer than two campaign statements prior to an election, excluding run-off elections, and one campaign statement following the election, excluding run-off elections. Campaign statements shall be filed in accordance with the filing dates prescribed by state law. The semi-annual campaign statement that is filed pursuant to state law following an election shall serve as the post-campaign statement required by this section. If state law does not establish the filing dates for campaign statements, the commission shall set the necessary filing dates.

B. Each candidate and committee involved in a run-off election, and each committee supporting or opposing a candidate participating in a run-off election, shall file one campaign statement prior to the run-off election in addition to any other campaign statements required by this section and one campaign statement following the run-off election. The semi-annual statement that is filed pursuant to state law following a run-off election shall serve as the post-campaign statement required by this section. The campaign statements shall be filed in accordance with the filing dates prescribed by state law. If state law does not establish the filing dates for campaign statements in run-off elections, the commission shall set the necessary filing dates.

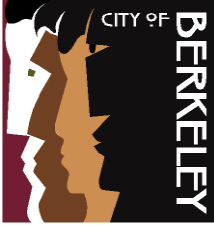
C. 1. Notwithstanding subsections A and B of this section, a candidate or officeholder who plans to receive contributions or make expenditures of less than the committee threshold in Section 2.12.095 ~~two hundred fifty dollars and who plans to make expenditures of less than two hundred fifty dollars~~ in a calendar year may file a short form campaign statement for that calendar year as prescribed by state laws and regulations. The period covered by the short form is the calendar year. ~~If No other campaign statements must be filed by a~~ candidate or officeholder who has filed a short form campaign statement for activity in the calendar year ~~unless the candidate makes receives two hundred fifty dollars or more in~~ expenditures or receives contributions that exceed the committee threshold in Section 2.12.095, they must file campaign statements as required by subsections A or B, or other applicable sections of Chapter 2.12.

2. During the six months prior to an election in which the candidate or officeholder is being voted upon, a candidate or officeholder who files a short form campaign statement and subsequently receives contributions or makes expenditures exceeding the committee threshold in Section 2.12.095 ~~totaling two hundred fifty dollars or more or makes expenditures totaling two hundred fifty dollars or more~~ during the calendar year

Clean Up Amendments to Berkeley Election Reform Act (September 2023)

shall send written notification to the City Clerk, and each candidate or officeholder contending for the same office, as follows:

- (a) The notification shall be sent within forty-eight hours of receiving contributions or making expenditures- exceeding the committee threshold in Section 2.12.095 ~~totaling two hundred fifty dollars or more or making expenditures of two hundred fifty dollars or more~~;
- (b) The notification shall include the name and address of the candidate or officeholder, the elective office for which the short form campaign statement was filed, the date of the election, and the date contributions exceeding the committee threshold in Section 2.12.095 ~~totaling two hundred fifty dollars~~ or more were received or expenditures exceeding the committee threshold in Section 2.12.095 ~~totaling two hundred fifty dollars or more~~ were made;
- (c) The notification shall be sent by ~~telegram~~, guaranteed overnight delivery, personal delivery, or facsimile transmission.



Open Government Commission

Date: July 19, 2023
To: Open Government Commission
From: Samuel Harvey, Secretary
Subject: Letter from Jim McGrath raising concerns regarding compliance with the Open Government Ordinance, Public Records Act and Brown Act

1. Summary

At its May 18, 2023 meeting, the Open Government Commission received the attached communication from a member of the public (the “Requestor”) asserting that City staff have mishandled their responses to the Requestor’s Public Records Act (“PRA”) requests, and raising various open governance concerns as a result. (See Attachment 1.)

Commission staff have reviewed the Requestor’s communication as well as the City’s handling of his numerous PRA requests. Staff have not identified any violations of the PRA, Brown Act or Open Government Ordinance. Staff recommends that the Commission take no further action on this matter.

2. Analysis

Between January 5, 2023 and April 12, 2023, the Requestor submitted 11 separate public records requests to the City. Each of these requests sought records pertaining to City action and deliberation related to the marina, waterfront and proposed ferry terminal. For a number of these requests, the Requestor also submitted subsequent communications to City staff expanding or clarifying the scope of the requests. These requests were directed to the following City departments: City Clerk, City Attorney, and Parks, Recreation and Waterfront. Each City department is responsible for responding to its own PRA requests. However, the City Attorney’s Office handles PRA requests for the City Council and City Manager’s Office, as well as requests submitted to more than one City department (“multi-departmental requests”).

As of the date of this report, each of these requests has been responded to by the City and closed. (See Attachment 2.) The City has provided several hundred pages of records to the Requestor in response to these requests. In some cases, City staff directed the requestor to responsive records published on the City’s website.

Item 9

The City has also withheld records or portions of records based upon the following exemptions:

1. Attorney-client privilege (Cal. Gov. Code § 7927.705, Cal. Evid. Code § 954)
2. Deliberative process privilege (Cal. Gov. Code § 7927.705, Cal. Evid. Code § 1040)
3. Privilege for preliminary notes, drafts and memoranda (Cal. Gov. Code § 7927.500)

Pursuant to the Open Government Ordinance (BMC Ch. 2.06.), the Commission is empowered to “consider ways to informally resolve . . . complaints and make recommendations to the Council regarding such complaints.” (BMC § 2.06.190.A.1.b.) Commission staff have reviewed the City’s handling and responses to the Requestor’s PRA requests. Commission staff have not identified any records which were improperly withheld from the Requestor or any violations of the PRA, Open Government Ordinance or Brown Act committed in City staff’s handling of these PRA requests. At this time, staff recommend the Commission take no further action on this matter.

Attachments:

1. Communication from Mr. McGrath
2. NextRequest summary of Public Records Act request responses

Received

APR 18 2023

City Attorney

2301 Russell Street
Berkeley, CA 94705
April 14, 2023

Sam Singer
City Attorney's Office
2180 Milvia Street
Berkeley, CA 94704


SUBJECT: City staff withholding documents in violation of the Brown Act and the Berkeley Open Government Ordinance

Dear Mr. Singer:

Enclosed are copies of a statement I read to the Parks, Recreation and Waterfront Commission and a letter I sent to the City Manager asking for the staff involved to be disciplined. I am filing this letter as a complaint under the Open Government Ordinance. I believe that the City attorney must reform its approach to responding to Public Records Requests. In this particular case, I have yet to see a single e-mail generated by City staff. Given what I have discovered from other agencies, city staff appears to be embarrassed by some of their e-mail records. But the city attorney's office has not provided substantive oversight over the process of responding to my PRA's; instead you have turned my PRA requests over to the very people who have hidden records that I have requested. This is simply unacceptable, and contributes to distrust for city government at a level where I believe you must act.

Beyond that, I believe that the City Attorney's office needs to lead a training exercise for all staff responsible for contacts with the public and with responding to PRA's. E-mails that would be kept in the ordinary course of city record keeping are public records, and become public records when they involve communication with outside agencies, and sometimes when policy direction has been given by council members or senior staff. No such e-mails have been provided pursuant to my requests. I believe that the Open Government Commission should be involved in this matter, and should consider making a recommendation to the Council about what modifications to the Open Government procedures might be needed to bring the city into compliance with the Brown and Public Records Acts.

Very truly yours,


Jim McGrath

Attachment

2301 Russell Street
Berkeley, CA 94705
April 13, 2023

Dee Williams-Ridley
2180 Milvia Street
Berkeley, CA 94704

SUBJECT: City staff withholding documents in violation of the Brown Act and the Berkeley Open Government Ordinance

Dear Ms. Williams-Ridley:

Enclosed is a statement I read to the Parks, Recreation and Waterfront Commission last night. It includes the factual background of an effort by city staff to withhold documents from my review. I believe that effort is a serious violation of both the Brown Act and the Berkeley Open Government Ordinance. I ask that you open an investigation into this matter, and take the appropriate disciplinary action reprimanding all of those involved. Since many city staff acquiesced in this effort, I also ask that you review the implementation of the Open Records Act to determine whether more specific guidance is necessary. I also urge you to immediately undertake a training effort for all staff that have contact with the public so that they know what their legal responsibilities for sharing information entail..

As you well know, Berkeley faces controversial proposals, most recently for re-design of the Hopkins Corridor. For that project, there is concern among stakeholders that city staff work was neither balanced nor complete in their staff work. I am sure it will not reassure those who have lost faith with city staff efforts and oversight to find another effort where the city staff have actively suppressed documents on a controversial project.

The Brown Act is clear about the public's right to documents in matters where they have concerns. Section 54950 of the Brown Act states:

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. **The people insist on remaining informed** so that they may retain control over the instruments they have created.

The City's own Open Government Act contains implementing language, with this clear policy statement in Section 2.06.010 of the Municipal Code:

Democracy in our representative form of government requires that the public have an opportunity to understand the government's activities and to communicate its concerns to its elected and appointed representatives, and that those representatives have an adequate opportunity to consider those concerns and then act effectively and in a timely manner.

It is not just the single incident of denying me access to the city response letter that raises these concerns; I have tried for over three months to obtain the documents that I need to "understand the government's proposed activities at the marina so that I may communicate with my elected and appointed representatives. But the city has turned my PRA requests over to the very people who have hidden the response letter, where they have been slow walked. This is simply unacceptable, and contributes to distrust for city government at a level where I believe you must act.

Very truly yours,

Jim McGrath

Attachment

Comments to Parks, Recreation and Waterfront Commission

As someone who lobbied for funding for this effort, I have reached the conclusion that this planning effort is corrupt. City staff have systematically bypassed this commission, and have taken steps to **prevent** stakeholders from accessing the information they need to provide you and the council with meaningful comments. I could give multiple examples of how this Commission has been bypassed, and the struggles I have had to get information, despite filing multiple Public Records requests. But I will use just the most egregious example to make my point.

On December 7, 2021, city staff presented the results of their studies of a ferry terminal in Berkeley marina. That report made these commitments as next steps:

- "...these studies ... will be published on the City's website in January 2022..."
- The staff and WETA would discuss design, and "...will come to the Council to discuss design within 60 days."
- "conduct a robust and transparent public engagement process."

In response to PRA records dating back to December of 2022, and the promise made on December 7, 2021, I finally got a copy of the Ferry Facility Feasibility Study, dated November 12, 2021. It is unchanged since that date, and there was no legitimate reason to hold that study secret. The staff did not come back to the Council to discuss design, but instead began to solicit funding for a final design of the ferry terminal, starting with the Alameda County Transportation Authority. After a series of inquiries by e-mail, on June 30, 2022, Farid Javandel submitted an application for an MTC Federal OBAG 3 Grant for design of the ferry terminal that had not yet been approved. There was no robust and transparent public engagement—there was no public engagement at all. The application materials did not include the 1986 Waterfront Master Plan, the governing document, but instead cited the West Berkeley Transportation Element of 1993, adopted at a time when a ferry terminal was under consideration for the foot of Gilman Street. ACTA informed city staff that they would have to also submit the Complete Streets checklist for the project. Rather than consult this Commission, which is charged with reviewing matters pertaining to the waterfront, the city sent the matter to the newly created Transportation Commission. On July 27, the new Commission met—with Commissioners that had just been appointed-- to discuss what was noticed as "Review the Complete Streets checklist for a One Bay Area Grant round three (OBAG3) grant application." Nothing in the meeting notice revealed that the subject grant was for the design of accessways, and environmental studies for a proposed ferry terminal.

The standard for notice under the Brown Act, described by the Attorney General, "is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body." The notice provided failed to meet this standard. The only way to find out the actual project that was under consideration was to download the whole packet, not consult the meeting notice. The city did not revise the notice, it continued and submitted the matter to ACTA. On July 31, I sent a letter to ACTA objecting to the notice and noting that the application also did not meet the requirements of the grant announcement. I didn't have a copy of the application, which had not provided ACTA with the correct land use plan policies, or I would have included that mistake in my letter. I copied city staff on that letter.

After further e-mails with ACTA staff, the city submitted a response to my letter dated August 29, 2022, signed by Scott Ferris and Liam Garland. No copy was provided to me. ACTA staff sent several e-mails to the city, asking them if they intended to send me a copy, which finally resulted in this response:

“We don’t have plans to share our City Response letter with Jim McGrath.”

That e-mail was copied to senior Berkeley staff. None of them saw the inconsistencies between this approach and the requirements of the Brown Act, or their promise to conduct a robust and transparent public engagement process. Until this e-mail was sent, perhaps the city could have argued that any shortcomings in process or content were inadvertent, or de minimus. But with this statement, and the quiescence of senior city staff, the city’s willingness to avoid the intent of the Brown Act was laid bare.

Tomorrow I will file a complaint about this dereliction of responsibility with the Open Government Commission and the City Manager. I believe that everyone involved in withholding information should be reprimanded, and that mandatory training on the requirements of the Brown Act must be instituted immediately for all city staff that are responsible for communication with the public and other agencies.

The planning activities of local government depend on process to reach a plan that is acceptable to the citizens and stakeholders of a city. But if the process cannot be trusted, the outcome cannot be trusted. If the city resorts to treating stakeholders as enemies, it will ensure that they are enemies, and that their number will grow.

To be sure, that is not the only problem with the City’s application for a grant from ACTA. The source of funds for the OBAG grants is the Federal Highway Administration, which triggers Section 4(f) of the Federal Highway Act of 1966. Now codified in 49 U.S.C 138, that section prohibits a “take” of park and open space land unless there are no practicable alternatives. Since Berkeley marina is designated as a shoreline park priority use area by BCDC that protection and the associated procedures are triggered.

The grant was turned down, and probably would have been turned down even without my letter. Among the substantive problems for applying for this grant is that there is no approved plan, final EIR, or budget for a ferry terminal. Nor was there any consideration of Section 4(f). The overall cost for the terminal is over \$110 million, and the only clearly identified funding is \$30 million of WETA funding in a 2016 business plan prepared by WETA. In the face of the plunge in ridership, WETA has delayed updating that business plan. Yet city staff sought \$7.7 million in grants and promised a 40% match. That matching funding was not identified in the adopted city budget, and would cover work that was to be funded by WETA in the existing MOU. Of course, talking about the budget for such funds in public would have let stakeholders know what the city was up to.

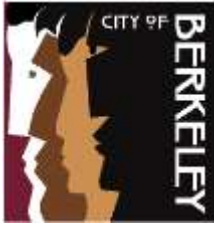
Unfortunately, this is all too common in Berkeley. Rather than face hard decisions about what to do with the marina, and the \$120 million in deferred maintenance problems, political attention shifts to the next shiny object down the road—a commuter ferry terminal. A project which the city staff now acknowledges will not generate any revenue.

Many years ago I learned never to put anything into a letter or e-mail that I was not willing to see on the front page of the Los Angeles Times. That lesson seems to have escaped Berkeley staff, who were willing to make false, even slanderous accusations about my motives, and admit that they were trying to limit my receiving information about this grant proposal. I’ve got a pretty thick skin, and I think it is

actually pretty funny. But what is not funny is the city's promising a robust and transparent public engagement process—and then violating the Brown Act to keep secrets.

Attachment 2-

Id	Created At	Request Text	Point of Contact	Request Date	Status	URL	Visibility	Closed Date	Closure Reasons	Departments	Requester Name	Requester Email
23-034	01/11/2023 11:44:46 AM	All records related to the Berkeley Marina Area Specific Plan (BMASP), and Large-Scale Ferry Feasibility study.	rmiller@berkeleyca.gov	01/05/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-34	Published	07/12/2023 08:55:46 AM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-100	01/31/2023 01:33:56 PM	Any changes or amendments to the MOU between Berkeley and the Water Emergency Transportation Authority (WETA), originally adopted as Resolution No. 68,782-N.S.	sbunting@berkeleyca.gov	01/31/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-100	Published	02/09/2023 12:43:05 PM	Fulfilled	City Clerk	James McGrath	macmcgrath@comcast.net
23-129	02/09/2023 12:45:44 PM	Contract between Berkeley and Hargreaves Jones for preparation of the Berkeley Marina Area Specific Plan and any modifications to said contract.	sbunting@berkeleyca.gov	02/09/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-129	Published	02/09/2023 12:50:26 PM	Fulfilled	City Clerk	James McGrath	macmcgrath@comcast.net
23-141	02/14/2023 12:42:54 PM	A detailed PDF of the proposed landside modifications to University Avenue and shoreline to the north presented conceptually at community workshop on the pier, October 27, 2021, and identified as "preferred conceptual alternative", slide 32. A version showing grading, vegetation removal, and scale is what I need.	rmiller@berkeleyca.gov	02/14/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-141	Published	04/25/2023 03:35:31 PM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-142	02/14/2023 12:44:15 PM	These records were identified on page 3 of the report for the Council Worksession of December 7, 2021 on "Large Scale Ferry Feasibility Study" 1. Wind and Wave Analysis to ensure safe and energy-efficient ferry berthing 2. Analysis of dredging locations and depths 3. Transportation Demand Management (TDM) review 4. Sea Level Rise Adaptation to ensure long term sustainability of the new pier 5. A ferry electrification feasibility	rmiller@berkeleyca.gov	02/14/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-142	Published	06/01/2023 05:11:58 PM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-143	02/14/2023 12:45:40 PM	These documents were discussed as work products for the Berkeley Marina Area Specific Plan in the City Council Work Session of February 11, 2021 1. Evaluation of potential new revenue opportunities and programs in the context of existing land use, zoning, and regulatory frameworks 2. A financial analysis of the operation of the Berkeley waterfront revenues and expenses, programs and services These documents were discussed as work products for the same plan in the RFP advertising for consultant services. 1. New revenue generation opportunities (element J.5) 2. Parking, existing parking, standards, project demand (element F.3)	rmiller@berkeleyca.gov	02/14/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-143	Published	03/27/2023 01:58:32 PM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-144	02/14/2023 12:46:48 PM	I. Deliverable documents from scope of services for contract No 10632 with GHD, ferry terminal feasibility study. All deliverables listed in the Scope of Services including: a. Ferry Facility Criteria Memorandum b. Wave Protection Assessment Technical memo c. Recreational concepts including meeting agendas, meeting minutes, and plans d. Transportation and Parking Demand Analysis including survey instrument and technical memo e. Memorandum of Potential Parking and TDM strategies f. Landside plans including meeting agendas and meeting minutes g. Programming level cost estimates h. Draft Ferry Facility Expanded Feasibility Study II. Deliverable documents from scope of services for BMASP, with Hargreaves Jones from the scope of services for that contract, 32000183.	rmiller@berkeleyca.gov	02/14/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-144	Published	06/01/2023 05:08:55 PM	Fulfilled	City Attorney; Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net
23-230	03/13/2023 10:01:28 AM	All reports associated with Contract 31900058 with Land Use Economics. This contract involves the economic assets at the waterfront. Contract was approved December 6, 2018.	knesbit@berkeleyca.gov	03/10/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-230	Published	04/17/2023 12:52:15 PM	Fulfilled	City Attorney	James McGrath	macmcgrath@comcast.net
23-344	04/11/2023 10:30:09 AM	MOU between Berkeley and WETA for shared parking in the Marina. Identified on page 240 of the FY 2014 and FY 2015 Adopted Budget as an accomplishment. I want a copy of the MOU and the Council resolution approving it.	sbunting@berkeleyca.gov	04/11/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-344	Published	04/19/2023 01:19:56 PM	No responsive records	City Clerk	James McGrath	macmcgrath@comcast.net
23-346	04/11/2023 04:51:05 PM	...all records of ridership and parking usage for the two small scale ferry operations carried out by PropSF and Tidelines since their inception of service....copies of all revenue received by the city, and expenses incurred by the city, for those two operations. ...surveys of parking use...	knesbit@berkeleyca.gov	04/07/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-346	Published	07/13/2023 10:15:32 AM	Fulfilled	City Attorney	James McGrath	macmcgrath@comcast.net
23-347	04/12/2023 02:59:12 PM	study of parking supply, demand, and management strategies in the Berkeley Waterfront in 2018 cited in Feasibility Study, Ferry Facility at Berkeley Municipal Pier in Nelson Nygaard appendix.	wwilliams@berkeleyca.gov	04/12/2023 12:00:00 AM	Closed	https://cityofberkeleyca.nextrequest.com/requests/23-347	Published	04/28/2023 10:12:51 AM	Fulfilled	Parks, Recreation and Waterfront	James McGrath	macmcgrath@comcast.net



Open Government Commission

PUBLIC HEARING
XXXX XX, XXXX

To: Honorable Mayor and Members of the City Council

From: Jim Hynes, Chair, Open Government Commission

Submitted by: Samuel Harvey, Secretary, Open Government Commission

Subject: Proposed Changes to Public Comment

RECOMMENDATION

City Council to review and implement suggested changes to the way public comment is given at City Council Meetings.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

At the March 14 City Council meeting, the council passed a resolution to allow two periods of public comment on Action Items and voted to “Refer the suggestions regarding improvements to the meeting process to the Agenda & Rules Committee and the Open Government Commission for consideration.” The OGC reviewed ~~both~~ the recording of this meeting, ~~and the~~ comments sent in prior to the meeting, and comments submitted by email or in person at Commission meetings and adopted the following recommendations.

Action:

Vote:

BACKGROUND

The City Council asked the Open Government Commission (OGC) to explore improvements to the way city council meetings offer opportunities for public comment. The OGC agrees with the resolution passed by City Council on March 14, 2023 that added an opportunity for public comment at the start of the Action Calendar and also maintained the opportunity to ~~as it provides the public two options to participate in~~

~~discussion of Action Items. We thank the City Council for maintaining public~~ comment at the time each Action Item is discussed as this allows the public to hear comments, questions, and proposed changes from City Councilmembers before making public comment. In addition to this change, the OGC proposes the following:

A. For immediate implementation ~~or rejection~~:

Suggested Change	Intended Result
1. Continue to allow the public to participate remotely via videoconference.	Removes barriers to participation, especially for those with disabilities.
2. Enable live transcription at all <u>committee, board, and commission</u> meetings with a videoconference component. <u>Configure zoom to permit saving of the transcription by the public.</u>	People joining remotely can better understand what is being said.
3. Limit councilmember <u>initial</u> comments <u>on action items</u> to 5 minutes/person and enforce this rule.	Bring practice more into alignment with City Council Rules of Procedure, Sec. V, Procedural Matters, Sub. G, Debate Limited, limits debate on any item to 20 minutes.
4. Start the Consent Calendar with an acknowledgement that consent items are important but should be ready to pass without prolonged discussion. Minimize discussion of items on the Consent Calendar.	Bring practice into alignment with City Council Rules of Procedure, Sec. IV, Conduct of Meeting, Sub. B, Consent Calendar, "It is the policy of the Council that the Mayor or Councilmembers wishing to ask questions concerning Consent Calendar items should ask questions of the contact person identified prior to the Council meeting so that the need for discussion of consent calendar items can be minimized."
5. <u>Amend City Council Rules of Procedure Section IV Conduct of Meeting, Sub B, Consent Calendar, last paragraph to add "If three or more Councilmembers object to a Consent item by expressing their intent to abstain or vote no, the item shall be moved from Consent to Action."</u>	<u>An item that is not going to pass does not fit the plain English definition of "consent." Such items properly belong in the Action calendar where members of the public may advocate for them and where Councilmembers may discuss their views.</u>
65. Acknowledge and verbally summarize comments received via email.	Demonstrates that the council is receptive to written correspondence and encourages more written comments that can be read ahead of time. This would require an amendment to City Council Rules of Procedure Section IV, Sub D, Written communications. (In the future, Council could consider implementing an on-line form that would

	automatically summarize how many comments are for and against a given item.)
<u>7. Use Berkeley Considers more frequently, especially for controversial issues.</u>	<u>Provides transparency in gauging public opinion.</u>
<u>8. Endeavor to inform attendees of approximate time for high interest items, e.g. “Item 32 will not be heard before 9:30.”</u>	<u>Members of the public can determine when to join, stay, or leave in person or via zoom.</u>
<u>9. Endeavor to determine early if an item will be postponed, e.g. at 9:30 move to continue an item, instead of waiting until 10:50.</u>	<u>Members of the public can determine whether to stay or leave in person or via zoom.</u>
<u>10. Require that City Manager and staff publish supporting materials for Agenda items in advance of the Agenda Committee meeting.</u>	<u>Allow time for the public and the Committee to vet for completeness, give feedback, and schedule accordingly. Diminishes the need for multiple or late supplementals.</u>
<u>11. Amend City Council Rules of Procedure Section IV Conduct of Meeting, Sub B, Consent Calendar, last paragraph as follows: “Consent Calendar items will <u>may</u> be moved to the Action Calendar <u>if requested by three councilmembers</u> by the Council. Action items may be reordered at the discretion of the Chair with the consent of Council.”</u>	<u>Reflect and formalize current practice. Allows councilmembers to respond to public requests for further consideration of an item.</u>

B. For further consideration and/or research:

Suggested Change	Intended Result
1. Schedule more meetings with fewer items on the agenda at each meeting	Members of the public would wait less long to speak on an item.
<u>2. Schedule separate meetings for items that are controversial or attract especially high public interest.</u>	<u>Avoid running overtime or having to continue long items.</u>
<u>32.</u> Have separate meetings for city department reports and/or informational items that will take longer than 20 minutes.	Agenda items at these meetings would be <u>at a prescribed</u> time certain .
<u>43.</u> Limit to 20 minutes any city department reports included within a regular meeting.	Department reports will not prolong meetings.

<p><u>54.</u> Have Special Meetings on a different day from Regular Meetings. <u>OR</u> <u>Schedule Special Meetings to have a hard stop fifteen minutes before the posted time of a Regular Meeting.</u></p>	<p>Regular Meetings can start on time and end earlier.</p>
<p><u>65. Strongly urge</u> Require that supplemental materials be submitted earlier.</p>	<p>Allows councilmembers and the public to review materials before the meeting.</p>
<p><u>7.Change the minimum amount of time for a public comment to 90 seconds, with more time if ceded by others.</u></p>	<p><u>Allows each speaker at minimum to express a well reasoned statement.</u></p>
<p><u>8. After the meeting, provide a webpage link for transcriptions created by the captioners for any Council, Committee, Board or Commission meetings for which captioners were employed.</u></p>	<p><u>Improve access for members of the public to meetings they were unable to attend. Improves access for persons with hearing disabilities and allows keyword searching of meeting content.</u></p>
<p><u>9. Provide virtual access to Board and Commission meetings which are now held in person.</u></p>	<p><u>Improves public access to these meetings.</u></p>

ALTERNATIVE ACTIONS CONSIDERED

C. Suggestions proposed at the ~~meeting~~, but NOT recommended by the OGC

Suggested Change	Reason to reject
<p>1. Limit the number of speakers at public comment</p>	<p>Public comment is an integral part of our democracy.</p>
<p>2. Make all staff presentations “pre-reads” so that Council could open with questions and then public comment</p>	<p>Not possible to require councilmembers and public to “pre-read”</p>
<p>3. Move the Consent Calendar to the end of the meeting</p>	<p>Moving an item from Consent to Action would require either a second Action section or deferring the item to a subsequent meeting</p>
<p>4. Canvass public members on which item(s) they’ve come to address and reorder agenda to place those items first.</p>	<p>Impractical, especially with many joining on zoom.</p>
<p>5. Agendize items to “time certain” (a time, not just a date).</p>	<p>Length of items - including length of public - comment, cannot be predicted accurately</p>
<p>6. Evaluate changes introduced at the March 14th meeting after they’ve been</p>	<p>Reconsideration as needed is recommended, but not a formal evaluation.</p>

in use for some time and “sunset” unless a decision is made to continue them.	Action to discontinue changes can be taken if needed.
7. Remove ceremonial matters from the agenda.	Ceremonial matters are a positive part of City Council Meetings and a way to acknowledge the positive things residents are doing for our community.
<u>8. Allow members of the public to move items from the consent calendar to the action calendar.</u>	<u>The public has an opportunity during public comment to persuade three councilmembers to move an item from the consent calendar to the action calendar. If councilmembers are not persuaded to do this, the item will fail. Especially with hybrid meetings, we have concerns that changing the current procedure could be abused. See Table A.11.</u>

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

None.

RATIONALE FOR RECOMMENDATION

The two main problems these recommendations aim to address are 1) that meetings run long, often ending late at night; and 2) long wait times make it difficult for members of the public to comment on issues being discussed, especially when substantive changes are proposed at the last minute.

The OGC plans to continue monitoring the situation to evaluate whether these changes produce the desired outcome of shorter meetings and shorter wait times for the public to speak.

CITY MANAGERCONTACT PERSON

Jim Hynes, Chair, Fair Campaign Practices Commission, (510) 981-6998

Samuel Harvey, Commission Secretary, Fair Campaign Practices Commission (510) 981-6998

Attachments: