

**CITY OF OAKLAND**  
**OFFICE OF THE CITY ATTORNEY**  
**LEGAL OPINION**

TO: PUBLIC ETHICS COMMISSION

ATTN: WHITNEY BARAZOTO  
EXECUTIVE DIRECTOR

FROM: BARBARA J. PARKER  
CITY ATTORNEY

DATE: AUGUST 21, 2015

RE: PUBLIC ETHICS COMMISSION CASE NO. 14-11

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**I. INTRODUCTION**

You asked whether a Sunshine Act violation occurred at the July 7, 2014, Public Ethics Commission ("PEC") meeting when a Commissioner read into the record a paragraph of the proposed Government Ethics Act that was not in the draft provisions of the Act that were noticed for the meeting.

**II. QUESTION AND BRIEF ANSWER**

**Question**

Did the Public Ethics Commission violate the Brown Act and/or the Sunshine Act at its July 7, 2014 meeting when it considered and discussed a written amendment introduced by a Commissioner for the proposed Government Ethics Act, Item 5 on the agenda?

**Brief Answer**

No. Oakland Municipal Code ("OMC") Sections 2.20.030(A) and 2.20.030(B)(2) allow a member of the local body to introduce 'written amendments or recommendations' that pertain to an agenda item and to agenda related materials that were filed by the Sunshine deadline, so long as the amendment/recommendation is within the scope of the noticed item. This is what occurred during the July 7 meeting. The agenda provided public notice that the Commission would review, comment, consider and approve recommendations for a proposed Ethics Act legislation, and a

Commissioner proposed that the Commission consider and discuss a written amendment and recommendation to the Act in the course of her comments.

### III. BACKGROUND

#### A. July 7, 2014, Public Ethics Commission Meeting

The PEC published its July 7 meeting agenda on June 27, in compliance with the Sunshine Ordinance's 10-day noticing requirement. The agenda stated the following title for Item No. 5: "Oakland Government Ethics Act. The Commission's *ad hoc* Ethics subcommittee will present a draft Oakland Government Ethics Act for review, comment, and consideration of approval by the Commission." There were five attachments to the agenda for Item No. 5: (1) subcommittee memorandum that described the subcommittee's recommendations for the draft Act, (2) the proposed draft Ethics Act, (3) staff analysis of the Act, (4) Oakland Ethics and Good Government Working Group Report,<sup>1</sup> and (5) the PEC's Ethics Resource Guide. The proposed draft Act codified existing state regulations and imposed new regulations on local officials and employees in the areas of conflicts, personal gain, fair process, and leaving public service. The Act further empowered the Commission to investigate and levy fines and penalties for violations of the Act, among other powers.

During the discussion of Item No. 5, PEC Commissioner Whitman informed the body that a provision regarding Charter section 218 enforcement had been inadvertently omitted from the draft legislation in the agenda packet and read the missing provision (one-paragraph, fourteen lines) on the floor and copies of the legislation with the new provision were made available to the public. The PEC discussed the proposed Charter section 218 provision and approved a motion to include it in their recommendations for the draft Act and directed staff to schedule the draft Act to come back in final draft at the next regular meeting on September 2, 2014.

Subsequently, a complaint was filed by a member of the public asserting the Commission violated the Sunshine Act when it *discussed* Commissioner Whitman's proposal to add the new section on Charter Section 218 enforcement to the draft ordinance. The complaint does not challenge the validity of the noticing requirements with respect to any other conduct by the Commission.

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<sup>1</sup> This Report was authored by the working group assembled by Councilmember Dan Kalb in order to examine strengthening the Ethics Commission and establishing a local Ethics Ordinance. Part II of this Report covers recommendations for enacting an Ethics Ordinance comparable to other local municipal ordinances throughout California, including regulations on campaigns, lobbying, conflicts, biases and leaving public service.

## **B. Brown Act And Sunshine Ordinance Requirements**

The PEC is a “legislative body” under the Brown Act<sup>2</sup> and, therefore, subject to the open meeting rules of the Brown Act and Sunshine Ordinance. (Gov’t Code §54950, et seq. and OMC Chapter 2.20, Articles I and II, respectively). The Brown Act requires 72 hours’ notice for posting the body’s agenda for regular meetings (Gov’t Code §54954.2), however, the Sunshine Act requires the PEC to post its regular meeting agendas with 10 days’ notice. (OMC §2.20.080(A)). The Brown Act and Sunshine Act prohibit local bodies from taking any action on or even discussing/debating an item that does not appear on an agenda absent an emergency or urgency finding<sup>3</sup> as prescribed by those laws, with a few exceptions, including, among other things, directing staff to schedule a matter on a future agenda. (Gov’t Code §54954.2(a)(2) and OMC §2.20.080(F)).<sup>4</sup>

“Posting” under the Brown Act means the agenda contains a brief, general description of the item to be discussed, not to exceed 20 words. (Gov’t Code §54954.2(a)(1)). Similarly, Sunshine requires the agenda to contain, “. . . a brief, general description of each item of business to be transacted or discussed during the meeting. . .” (OMC §2.20.030 (A)). The description of an item is adequate, per Sunshine, if “[ ] it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item.” (*Ibid.*)

In addition to 10-day posting and in contrast to the Brown Act, the Sunshine Ordinance further requires that the PEC, “fil[e] a copy of the agenda and all agenda-related materials with the Office of the City Clerk and the Oakland main library no later than ten (10) days before the date of the meeting [ ],” and file a copy on line. (OMC §2.20.080(A)(2-3)).

The Sunshine Ordinance defines “agenda-related materials” as “the agenda, all reports, correspondence and any other document prepared and forwarded by *staff* to any local body, and other documents forwarded to the body, which provide background information or recommendations concerning the subject matter of any agenda item”. (OMC §2.20.030(B)). The definition of “agenda related materials” expressly excludes, among other things, “written amendments or recommendations from a member of the local body pertaining to” an agenda item contained in agenda related materials

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<sup>2</sup> See, Gov’t Code §54952(b).

<sup>3</sup> See, Gov’t Code § 54954.2(b) and OMC §§ 2.20.080.D and E regarding “emergency” and “urgency” exceptions and procedures to discuss and take action on items not appearing on the agenda.

<sup>4</sup> In addition, members of the body may respond to questions posed by the public, ask a question for clarification, make a brief announcement or a brief report on his or her own activity on their own initiative or in response to a question from a member of the public. (Gov’t Code §54954.2(a)(2)). In addition, Section 54954.2(b) allows discussion of items that were posted and continued from a prior meeting that occurred no more than 5 days earlier.

previously filed pursuant to” Sunshine’s provisions for special and regular meetings. (OMC §2.20.030(B)(2).

#### IV. ANALYSIS

The PEC’s July 7 posting for Item No. 5, the subcommittee’s recommendations and draft Ethics Act, satisfies all requirements of the Brown Act, because the item was properly posted with a brief, general description. The Brown Act does not require the filing of “agenda-related materials.” Accordingly, the entire draft Act could have been handed out on the floor. However, Sunshine requires that the PEC publish all agenda-related materials at least 10 days in advance of the meeting and the PEC complied with this requirement to the extent it published the agenda related materials for Item 5 on June 27th, by the 10-day deadline for the July 7<sup>th</sup> meeting.

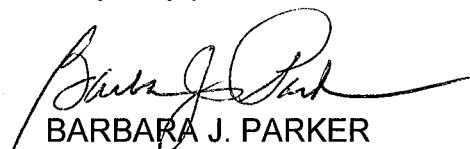
The issue is whether Commissioner Whitman’s proposed revisions for the draft Ethics ordinance – i.e., to add a new section regarding Charter section 218 enforcement - could be *discussed* at the July 7<sup>th</sup> meeting given that they were not on the agenda packet. The answer is yes. The Sunshine Act expressly excludes ‘written amendments or recommendations’ that pertain to an item contained in properly filed agenda related materials from the “agenda related materials” that must be filed by the agenda deadline. (OMC Section 2.20.030(B)(2)). This allows members of a local body, the PEC in this instance, to introduce ‘written amendments or recommendations’ on the floor provided they pertain to items noticed on the agenda and contained in related agenda materials. That is what occurred during the July 7 meeting. The draft Ethics Act, PEC subcommittee reports and other information regarding the subcommittee’s analysis and recommendations were in the agenda materials that had been timely filed on June 27, 2014. Therefore, the public was on notice that the Commission would consider a draft Ethics Act, review the language, make comments and potentially approve final language to recommend to the City Council. The Commissioner’s proposed recommendation and written amendment were “comments” on what provisions the draft Act should include that were appropriate to the item noticed.

Finally, it should be noted that the section 218 amendment was not a significant material change requiring new Brown Act/Sunshine notice because notice for the item was “sufficiently clear and specific to alert a person of average intelligence and education whose interests” were affected by the proposed Ethics Act that he/she should attend the meeting and seek more information on the item. Therefore, the PEC could have approved their final recommendations with the section 218 provisions at their July 7, 2014, meeting. However, the PEC provided another opportunity for review and public comment directing staff to schedule final recommendations for the next regularly scheduled meeting on September 2, 2014. Therefore, *even if* the amendment proposed at the July 7<sup>th</sup> meeting had been a significant material change to the noticed item, the PEC would have complied with Brown Act and Sunshine requirements when it noticed the revised recommendations for the September meeting.

## V. CONCLUSION

Cure-and-correct action is not required for the PEC's discussion of proposed amendments to the Commission's recommendations for the Ethics Act at the July 7, 2014 meeting. The draft Act and PEC's analysis and recommendations were properly noticed for the meeting, and both the Brown Act and Sunshine allow Public Ethics Commissioners to introduce "written amendments or recommendations" in connection with properly noticed agenda items agenda related materials. OMC Section 2.20.030(B)(2).

Very truly yours,



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