

Bert Robinson remarks on Administration and Accountability, 10/18

I commend the subcommittee on its efforts to design an effective enforcement mechanism, and especially on its work in devising an administrative process that will give the citizens of San Jose a meaningful opportunity to challenge city practices on records and meetings – without having to resort to a costly court procedure.

My primary concern is that the process we've designed, at this point, seems too cumbersome.

Although we have given the city very tight deadlines to respond to public records requests, we're setting few deadlines of any sort within the dispute resolution process. And this problem is compounded by the fact that the resolution process as now written consists of many steps, constructed in a completely linear fashion – there are no opportunities to short cut the process.

The way I read it, a complainant whose public records request has been denied would have to go through eight separate steps simply to get the dispute before the commission for a ruling. It would take ten steps to get the issue into court. This is particularly a problem when an issue is time sensitive: Challenging the propriety of a council vote before the challenge becomes moot, for example, or seeking a critical record in advance of a council decision on an issue.

I think we need to attack the time issue in three separate ways. The first is to eliminate unnecessary steps – there are several places in the process where we require a complaint to go to the Open Government Commission so the Commission can refer it to the next step. That means each time you will have to wait for the next commission meeting for what is, under the ordinance, an automatic referral. Depending on meeting schedules, that could cost you weeks or months in each instance.

The second way to shorten the time frame is to place strict deadlines on each step. In a letter to the subcommittee, Mercury News attorney James Chadwick has suggested some specifics; I won't go into detail, but 10 days will be appropriate for many of them.

The third way to shorten the time frame is to explicitly allow complainants to enter the process at one of several points. If a complainant wants to bypass the informal resolution track offered by the Open Government Officer and take the issue straight to the

commission, this should be allowed. If a complainant has the means to go straight to court and wants to do so, that should also be a choice. There are ways to design the process to encourage people to make particular choices – if we want most people to take issues first to the Open Government Officer, we can use deadlines and process to make that the simplest course. But it shouldn't be a required course.

One additional recommendation I'd make: Within the proposed language, there are two separate processes for disputes arising from meetings – one for most meetings complaints, and another solely for complaints that an item was improperly discussed in closed session. I would urge us to keep the administrative processes on public records, open meetings and closed meetings as similar to each other as we can – simplicity will go a long way in aiding public understanding.

I've looked at enough sunshine laws to know that enforcement is one of the most difficult issues that they confront, and few of them overcome it. I think the weaknesses in the proposal before us are easily fixed, and that we will end up with an enforcement mechanism others can look to as a model.