

Office of the City Manager

January 13, 2011

To: Honorable Mayor and  
Members of the City Council

From: Phil Kamlarz, City Manager *PK*

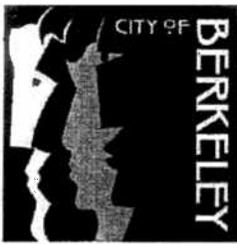
Subject: Open Government Ordinance

As indicated at the September 28, 2010 City Council Work Session, staff has drafted an "Open Government Ordinance". The proposed Ordinance is scheduled for consideration at the City Council's January 25<sup>th</sup> meeting.

In light of comments at the September 28th Work Session that the Fair Campaign Practices Commission (FCPC) may be an appropriate oversight body for the new ordinance, staff will be discussing the proposed oversight role with the FCPC at its January 20, 2011 meeting. Attached is the agenda for the FCPC meeting, including the draft ordinance (item #6), that will be sent to the Commission today. Comments from the Commission will be provided to the Council at the January 25<sup>th</sup> meeting.

Attachment

cc: Christine Daniel, Deputy City Manager  
Zach Cowan, City Attorney  
Deanna Despain, City Clerk  
Ann-Marie Hogan, City Auditor  
Mary Kay Clunies-Ross, Public Information Officer



Fair Campaign Practices Commission

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 981-6342 (V) or 981-6345 (TDD) at least three business days before the meeting date. Please refrain from wearing scented products to this meeting.

North Berkeley Senior Center  
1901 Hearst Street  
Health Room

Regular Meeting  
January 20, 2011

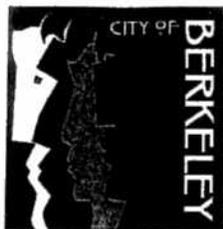
Secretary: Kristy van Herick, Deputy City Attorney

## AGENDA

**The Commission may act on any item on this agenda.**

1. Call to Order 7:30 p.m.
2. Roll Call
3. Public Comment
4. Report from Chair
5. Report from Staff
6. City Manager report regarding potential new role for Commission: oversight of Open Government Ordinance, and discussion and possible action regarding same.
7. Approval of minutes for the November 18, 2010 meeting.
8. Discussion and action regarding establishing meeting schedule for 2011.
9. Discussion and action regarding election of Chair and Vice Chair.
10. Staff report providing draft language to amend the Berkeley Election Reform Act to align filing requirements of committees making expenditures in support of a referendum and those opposing a referendum and to create a new regulation to clarify when a referendum becomes a measure and possible action regarding same.
11. Staff report providing information on 2010 newspaper publication of contributions to Berkeley elections and possible action regarding same.
12. Staff report providing revised draft language to amend the Berkeley Election Reform Act based on Benicia Ordinance to create additional pre-election filing requirements related to independent expenditures and creating new disclosure requirements on campaign materials of donors over a specified amount and discussion and possible action regarding same.
13. Adjournment.

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 located at 2180 Milvia St., 4<sup>th</sup> Floor, Berkeley, CA.



Office of the City Manager

January 20, 2011

To: Fair Campaign Practices Commission  
From: Phil Kamlarz, City Manager  
Submitted by: Christine Daniel, Deputy City Manager  
Subject: Potential New Role for Commission: Oversight of Open Government Ordinance

The purpose of this report is to inform the Commission of, and seek the Commission's input on, a proposed new role for the Commission providing advisory oversight for a new open government ordinance. This new role would be separate from, and in addition to, the Commission's existing functions under the Berkeley Election Reform Act.

By way of background, on February 18, 2010, a number of citizens began the process of circulating an initiative petition to place before the voters a "sunshine" ordinance. The initiative ordinance addresses four basic topics: the agenda process, the conduct of meetings, access to public records, and oversight. The petition was filed on August 25, 2010, certified by the Registrar of Voters as having sufficient signatures on November 22, 2010, and the Council then placed the initiative on the November 2012 ballot.

On September 28, 2010, the City Council held a work session to consider both the proposed initiative and, more generally, the elements of an open government ordinance. At that time, staff sought input from the Council on the scope of an open government ordinance, and promised to return with a draft open government ordinance based on the Council's input in January, 2011. This matter is on the agenda for the City Council meeting on January 25, 2011. A copy of the proposed Ordinance is attached.

The basic elements of an open government ordinance that were identified in the staff report for the September 28<sup>th</sup> meeting were:

#### Agenda Process

- Earlier Delivery of Agenda Packet to Council and the Public
- Development of a Policy for Late Items and Revised Items

#### Conduct of Public Meetings

- Presentation Tools for the Public
- Expanded Broadcasting of Meetings
- Reporting of Final Actions from Closed Sessions

### Public Records

- Availability of City-Produced Large Documents
- Information on Regional Body Representation
- Technology Standards that Support Access

### Oversight

- Oversight by Citizens Appointed by Council
- Advisory to the City Council
- Within the Parameters of the City Charter

One idea in which there appeared to be significant interest was to give oversight authority to an existing commission rather than creating a new one. A number of Council members, as well as members of the public and proponents of the initiative, discussed the possibility of granting oversight authority to the FCPC. This appeared to be a good fit, both because the FCPC's role already has to do with open government (in the context of elections and campaigns) and because its agenda is relatively light during extended periods of time between elections. In addition, it is the only commission staffed by the City Attorney's office, which would be a significant help in evaluating the legal issues that might arise under an open government ordinance.

Accordingly, staff recommends giving the FCPC oversight authority, and an advisory role with respect to:

- Complaints from members of the public, and informal resolution of those complaints; and
- The adequacy of the City's policies and practices with respect to open government, and recommending changes as it deems appropriate.

Specifically, the proposed ordinance provides that the Commission would:

- hear complaints by any person concerning alleged non-compliance with this Ordinance, the Brown Act or the Public Records Act, by the City or any of its legislative bodies, officers or employees;
- consider ways to informally resolve those complaints;
- seek advice from the City Attorney concerning those complaints; and
- advise the City Council of its opinion or conclusion as to any complaint.

To be considered by the Commission, complaints would be submitted in writing using a form provided by the City, and submitted to the Secretary of the Commission no less than 14 days prior to the Commission meeting at which the complaint would be considered.

In addition, each year the City Manager would prepare and submit to the Commission a report that contains at least the following information:

1. the number of Public Records Act requests received by the City;
2. the average length of time taken to respond to those requests;

3. the approximate number of pages produced in response to those requests;
4. the number and resolution of all written complaints received by the City concerning its compliance with the Public Records Act with respect to such requests;
5. the number and resolution of all complaints received by the City concerning its compliance with the Brown Act; and
6. any other information the City Manager deems appropriate that relates to the City's compliance with this Ordinance, the Brown Act, the Public Records Act, or open and effective government in Berkeley.

The Commission would be responsible for reviewing and commenting to the City Council on this report. In addition, the Commission could propose to the City Council additional legislation or procedures that it deems advisable to ensure the City's compliance with the Ordinance, the Brown Act, and the Public Records Act, and advise the City Council as to any other action or policy that the Commission deems advisable to enhance open and effective government in Berkeley.

The Commission's role and authority under the proposed open government ordinance would be advisory only; it would not have the enforcement powers granted by BERA for purposes of the open government ordinance.

The Council will be considering this ordinance on January 25<sup>th</sup>. Staff will convey the Commission's comments on its proposed role to the Council at the Council meeting.

CONTACT PERSON

Christine Daniel, Deputy City Manager, 981-7000

ORDINANCE NO. -N.S.

OPEN GOVERNMENT ORDINANCE

BE IT ORDAINED by the City Council of the City of Berkeley as follows:

Section 1. That a new Chapter 2.06 is added to the Berkeley Municipal Code to read as follows:

**Chapter 2.06  
OPEN GOVERNMENT**

**Sections:**

**Article I**

**General Provisions**

- 2.06.010 Findings and purpose.
- 2.06.020 Definitions.
- 2.06.030 Severability.
- 2.06.040 Implementation.
- 2.06.050 No private cause of action.

**Article II**

**City Council Agenda Process**

- 2.06.070 City Council agenda process.
- 2.06.070 Agenda Packet distribution.

**Article III**

**Conduct of City Council Meetings**

- 2.06.080 Number of meetings – Start time – Public hearings.
- 2.06.090 Reports regarding regional bodies.
- 2.06.100 Broadcast of meetings.
- 2.06.110 Disclosure of *ex parte* contacts
- 2.06.120 Closed sessions and litigation.
- 2.06.130 Presentation tools for the public.

**Article IV**

**Public Records**

- 2.06.140 Records available through the City's web site.
- 2.06.150 Contributions to the City.
- 2.06.160 Large document borrowing.
- 2.06.170 Technology standards.
- 2.06.180 Posting of documents.

**Article V**

**Oversight**

- 2.06.190 Additional responsibilities of Fair Campaign Practices Commission – Reporting.

**Article I**  
**General Provisions**

**2.06.010 Findings and purpose.**

A. 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.

B. To the extent these goals are sometimes in tension with each other in a given case, the government's obligation is to balance them responsibly, under the circumstances, in such a way that it is able to function and carry out its mission of ensuring the public's health, safety and general welfare in a fiscally and environmentally sustainable manner.

C. Accordingly, the purpose of this ordinance is to codify certain existing practices, as well as to adopt new practices, to ensure that the public has an adequate opportunity to be informed of the City's activities and to communicate its concerns to its elected and appointed officials.

**2.06.020 Definitions.**

The following words and phrases shall have the meanings specified below.

A. "Agenda" means a document that informs the public about a Meeting, published in advance of the Meeting which at a minimum (1) identifies the Legislative Body conducting the Meeting, (2) specifies the time and location of the Meeting, and (3) lists each item of business to be discussed or transacted and describes the proposed action for each such item.

B. "Agenda Packet" means the Agenda of a particular Meeting with all its relevant Supporting Documents.

C. "Closed Session" means a Meeting that begins with a public comment period, followed by a session that excludes the public as permitted by state law, and ends with an open session at which a public report is made as and to the extent required by state law.

D. "Legislative Body" shall have the meaning set forth in Government Code sections 54950 through 54960, as they may be amended, or any successor sections.

E. "Meeting" shall have the meaning set forth in Government Code sections 54950 through 54960, as they may be amended, or any successor sections.

F. "Supporting Documents" means all documents, regardless of form or medium or author, that are provided to members of a Legislative Body for their use in considering Agenda items for a particular Meeting.

G. "Brown Act" means Government Code sections 54950 *et seq.*, as they may be amended from time to time.

H. "Public Records Act" means Government Code sections 6250 *et seq.*, as they may be amended from time to time.

### **2.06.030 Severability.**

If any word, phrase, sentence, part, section, subsection, or other portion of this ordinance, or any application thereof in any circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The people of the City of Berkeley hereby declare that they would have passed this ordinance, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

### **2.06.040 Implementation**

The City Manager may promulgate regulations to implement this ordinance.

### **2.06.050 No private cause of action.**

This Chapter does not create, and shall not be interpreted or construed to, create a private cause of action.

## **Article II City Council Agenda Process**

### **2.06.060 City Council agenda process.**

A. The City Council Agenda Committee shall meet 15 days prior to each City Council meeting and shall determine the agenda of that City Council meeting. After the conclusion of the Agenda Committee meeting, an item may be added to the agenda only by the City Council as a whole at a duly noticed meeting that occurs after the Agenda Committee meeting.

B. The Agenda Committee packet, including a draft agenda and Councilmember and Commission reports shall be distributed by 5:00 p.m. 4 days before the Agenda Committee meeting.

C. The City Council Agenda Packet shall be distributed no later than 5:00 p.m. 11 days before the scheduled City Council meeting.

D. The powers of the Agenda Committee shall be as set forth in Rules of Procedure adopted by the City Council. The Rules of Procedure may allow for the addition of time-critical items at the Agenda Committee meeting provided they are accompanied by complete reports and statements of financial implications.

#### **2.06.070 Agenda Packet distribution.**

A. The Agenda Packet shall consist of the agenda and all supporting documents for the agenda items.

B. No later than 11 days prior to a regular Meeting, the City Clerk shall:

1. distribute the Agenda Packet to each member of the City Council;
2. post the Agenda Packet to the City's website;
3. place copies of the Agenda Packet in viewing binders in the office of the City Clerk and in the main branch of the Berkeley Public Library;
4. mail copies of the Agenda to any resident of the City of Berkeley who so requests in writing; and
5. make copies of the Agenda available free of charge in the City Clerk Department.

C. Failure to post the agenda or the Agenda Packet to the City's website shall not be a basis for cancelling a City Council meeting.

D. The City Clerk may not accept any agenda item or revised agenda item after the established deadlines, except for items carried over by the City Council from a prior City Council meeting occurring less than 11 days earlier, which may include supplemental or revised reports.

E. No item may be considered unless it is included in the Agenda Packet except that a correction or supplement to an item already included in the Agenda Packet may be considered, if the City Council, by a two-thirds vote, determines that the good of the City clearly outweighs the lack of time for citizen review or City Council member evaluation of an item. Reports carried over as Old Business need not be reproduced again.

F. Matters not included on the published agenda may be discussed and acted upon only if and to the extent authorized by the Brown Act, specifically Government Code section 54954.2(b) as it may be amended from time to time.

**Article III**  
**Conduct of City Council Meetings**

**2.06.080 Number of meetings – Start time – Public hearings.**

A. The City Council shall hold a minimum of twenty-six (26) meetings, or the amount needed to conduct City business in a timely manner, whichever is greater, each calendar year.

B. Regular City Council meetings shall begin no later than 6:00 p.m.

C. Except at meetings at which the budget is to be adopted, no public hearing may commence later than 10:00 p.m. unless there is a legal necessity to hold the hearing or make a decision at that meeting or the City Council determines by a two-thirds vote that there is a fiscal necessity to hold the hearing.

**2.06.090 Reports regarding regional bodies.**

Council members who represent the City on regional bodies and commissions shall, promptly after attending meetings of those bodies, provide to the City Council and the public a report that briefly summarizes the discussion and any action on any item that affects the City of Berkeley. Such reports shall state where additional information about the issues summarized may be obtained.

**2.06.100 Broadcast of meetings.**

A. All regular and special meetings of the City Council, Redevelopment Agency, Rent Stabilization Board, and Zoning Adjustments Board, when held in the venue regularly used, shall be recorded, televised and video-streamed live as well as archived for replay. The live broadcasts shall be captioned.

B. It is the intent of the City to broadcast the meetings of the Planning Commission, Landmarks Preservation Commission, and Housing Advisory Commission, in the same manner as specified in paragraph A, as City resources become available.

C. The broadcast requirements shall not apply if necessary equipment malfunctions or if a public meeting is changed to a location that does not have the technological capacity to accommodate the broadcasting needs.

**2.06.110 Disclosure of *ex parte* contacts**

Whenever a Legislative Body holds a public hearing on a zoning, landmarks, subdivision or other adjudicative matter, following any staff presentation, each member of the Legislative Body shall verbally disclose all *ex parte* contacts concerning the

subject of the hearing. Members shall also submit a report of such contacts in writing prior to the commencement of the hearing. Such reports shall include a brief statement describing the name, date, place, and content of the contact. Written reports shall be available for public review in the office of the secretary to the Legislative Body prior to the Meeting and placed in a file available for public viewing at the Meeting.

#### **2.06.120 Closed sessions and litigation.**

A. Before any Closed Session, a Legislative Body shall meet in open session for the purpose of taking public comment solely on the subject(s) of the Closed Session.

B. Any member of a Legislative Body attending a Closed Session by teleconferencing is required to state at the beginning and end of the Closed Session that he/she is participating with no other person present and to file a signed statement to that effect under penalty of perjury, except that if a member of a Legislative Body is disabled and needs assistance to participate in a Closed Session, the City shall provide a staff assistant who is authorized to attend the Closed Session. Any specialized attendant or assistant, whom a disabled Council Member needs to have present in order to participate fully in the Closed Session shall be allowed to attend the Closed Session.

C. Immediately following the end of the Closed Session, the Legislative Body shall make a report in open session describing any final action taken as required by state law, as well as any other matter or statement the City Council decides to make. If the Closed Session is not followed the same day by a regular meeting of the Legislative Body, the report shall also be made at the next regular meeting.

D. The location of reports to the public after a Closed Session has ended shall be in a venue that is open to the public, and where practicable, one that supports video transmission, audio, and video-streaming.

E. Any report on final approvals taken in Closed Session shall be posted no later than the end of the following business day to the City's website.

F. When litigation involving the City is finally adjudicated or otherwise settled, the text and terms of any settlement shall be subject to disclosure. No attorney representing the City shall solicit or agree to any settlement provision that would restrict disclosure of terms or communications between each party after settlement and any such provision shall be void.

G. When settlements are authorized by the City Council at a Closed Session but are not reported out immediately following the end of the Closed Session, the City Attorney shall prepare an information item for the City Council Agenda promptly upon execution of the settlement, which shall include a copy of any settlement agreement.

**2.06.130 Presentation tools for the public.**

Members of the public may use City equipment for audio/visual presentations for items on the meeting agenda of the City Council if the presentation is provided to the City Clerk no later than seven (7) days before the meeting, or five (5) days before for items carried over from a meeting that occurred the week immediately prior. Requests for presentation tools are subject to reasonable availability of any equipment that the proposed presentation would require. Presentations from the public shall comply with the time limits set forth in the City Council Rules of Procedure.

**Article IV  
Public Records**

**2.06.140 Records available through the City's website.**

A. The following shall be available through the City's website and shall be available in written form in the City Clerk Department:

- City Charter
- Berkeley Municipal Code
- General Plan and Area Plans
- Zoning Ordinance
- Landmarks Preservation Ordinance
- Citizen's Guide to Public Information
- Records Retention Schedule
- City Council Rules of Procedure
- Commissioner's Manual
- Conflict of Interest Code
- Statements of Economic Interest for filers under GC 87200
- Agendas and Minutes of the meetings of all Legislative Bodies
- Index of Regional Bodies on which the City is represented and the City Representatives who serve on them

B. All communications from the City Manager and department heads to other agencies on behalf of the City shall be available through the City's website at the same time they are provided to members of the City Council.

**2.06.150 Contributions to the City.**

Any gift of funds, goods, or services worth more than \$1000.00 in aggregate, which may be accepted or collected by the City or any of its functionaries or Legislative Bodies, for the purpose of carrying out or assisting any City function, shall be disclosed and approved on the Agenda of a regular Meeting of the City Council.

**2.06.160 Large document borrowing.**

Large published documents produced by or on behalf of the City, such as City Budgets and environmental impact reports or statements prepared pursuant to the California Environmental Quality Act (CEQA) or the National Environmental Protection Act (NEPA), shall be available through the City's website and made available at designated City offices with copies available for borrowing by the public at the Berkeley Central Public Library.

#### **2.06.170 Technology standards.**

A. To provide for the accessibility of electronic information on the City's website, the City shall:

1. Meet or exceed the guidelines for accessibility specified by the Federal General Services Administration pursuant to Section 508 of the Rehabilitation Act (29 U.S.C. 794d) as it may be amended from time to time.

2. When feasible within resource constraints, use open, non-proprietary, standards-based data formats on public facing information systems. When platform-specific formats must be used, provide an alternate format or a viewer to consume the file types.

3. Make audio and video available for both download and streaming using open, cross-platform, standards-based formats, accessible by a broad range of computer operating systems and portable devices.

4. When feasible within resource constraints, avoid web content types that are not compatible across browsers (such as Flash).

5. Make substantive website changes trackable in an open, cross-platform, standards-based journal format (such as RSS).

B. Nothing in this Section shall require programming a computer to respond to a request for information or to release information that would violate a licensing agreement or copyright law.

#### **2.06.180 Posting of documents**

All documents submitted to the City Council, including but not limited to, the agenda and Agenda Packet, communications, and any documents submitted at a meeting of that body, shall be available through the City's website no later than the close of business the following business day after the meeting for which the documents were submitted.

### **Article V Oversight**

#### **2.06.190 Additional responsibilities of Fair Campaign Practices Commission – Reporting.**

A. The Berkeley Fair Campaign Practices Commission established by Berkeley Municipal Code section 2.12.170 shall have the following authority with respect to oversight of this Chapter.

1. The Commission shall:

- a. hear complaints by any person concerning alleged non-compliance with this Ordinance, the Brown Act or the Public Records Act, by the City or any of its legislative bodies, officers or employees;
- b. consider ways to informally resolve those complaints;
- c. seek advice from the City Attorney concerning those complaints; and
- d. advise the City Council of its opinion or conclusion as to any complaint.

To be considered by the Commission, complaints shall be submitted in writing using a form provided by the City, and must be submitted to the Secretary of the Commission no less than 14 days prior to the Commission meeting at which it will be considered.

2. In addition, the Commission may advise the City Council concerning the report prepared pursuant to subdivision (C), propose additional legislation or procedures that it deems advisable to ensure the City's compliance with this Ordinance, the Brown Act and the Public Records Act, and advise the City Council as to any other action or policy that it deems advisable to enhance open and effective government in Berkeley.

B. The power and authority of the Fair Campaign Practices Commission with respect to oversight of this Chapter shall be limited to the functions set forth in this Section, and the Commission shall not have any of the additional authority or powers set forth in Chapter 2.12 with respect to oversight or enforcement of this Chapter.

C. Each year, the City Manager shall prepare and submit to the Fair Campaign Practices Commission a report that contains at least the following information:

1. the number of Public Records Act requests received by the City;
2. the average length of time taken to respond to those requests;
3. the approximate number of pages produced in response to those requests;
4. the number and resolution of all written complaints received by the City concerning its compliance with the Public Records Act with respect to such requests;
5. the number and resolution of all complaints received by the City concerning its compliance with the Brown Act; and
6. any other information the City Manager deems appropriate that relates to the City's compliance with this Ordinance, the Brown Act, the Public Records Act, or open and effective government in Berkeley.

## **Section 2. Effective date.**

Sections 2.06.060 and 2.06.070 shall be effective beginning with the regular City Council meeting on April 26, 2011. The remainder of this ordinance shall take effect as provided by the Charter.

## **Section 3. Posting.**

Copies of this Bill shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.